A DIGEST

OF

REPORTED CASES

IN THE

SUPREME COURT, COURT OF INSOLVENCY, AND THE COURTS OF MINES AND VICE-ADMIRALTY OF THE COLONY OF VICTORIA.

FROM 1861 TO 1885.

BY

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AND

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TO

SIR WILLIAM FOSTER STAWELL, KNIGHT,

CHIEF JUSTICE OF THE

SUPREME COURT OF THE COLONY OF VICTORIA,

AND

THE HON. ROBERT MOLESWORTH, ESQUIRE,

PUISNE JUDGE OF THE SAME COURT,

This Work

IS (BY PERMISSION)

RESPECTFULLY DEDICATED

BY THE COMPILERS.

TABLE OF REPORTS

COMPRISED IN THIS VOLUME.

Any case in the foregoing Reports, which went, on appeal, to the Privy Council, has been extracted from the English Report in which it appears.

ABBREVIATIONS USED

IN THIS VOLUME.

A.J.R.—Australian Jurist Reports.

A.L.T.—Australian Law Times.

App. Cas. or Ap. Ca.—Appeal Cases.

L.J.—Law Journal Reports.

L.R.—Law Reports.

L.T.—Law Times.

N.C.—Notes of Cases.

P.C.—Privy Council.

S.C.—Same Case.

S.P.—Same Point or Principle.

V.R.—Victorian Reports.

V.L.R.—Victorian Law Reports.

W.R.—Weekly Reports.

W. & W.—Wyatt and Webb's Reports.

W.W. & A'B.—Wyatt, Webb and a'Beckett's Reports.

PREFACE.

In presenting this Digest to the Profession and to the Public, the Compilers venture to hope that they have, in some measure, supplied a long-felt want.

It will be seen that the book follows very closely on the lines of "Fisher's Digest," although in some parts of the work, such as "Land Acts," "Lunatic," "Mining," "Transfer of Land," and "Justices of the Peace," the headings have been arranged according to the points decided, and to the arrangement and subdivision of the Statutes affecting such subjects. The heading, "Practice and Pleading," includes many cases which are not so useful under the *Judicature Act* of 1883, and Rules, as under the old system; but the Compilers have felt it their duty to make the book what it professes to be, viz., a Digest of *all* the cases; and they venture to hope that they have kept the cases decided under the different systems perfectly distinct, and to think that points of practice and pleading decided under the old system will still, in many instances, be found useful. As to cases decided under Statutes which have been repealed or re-enacted, small footnotes have, in most instances, been inserted, to draw attention to the present Legislation on the various subjects.

The frequent use of cross references may be considered rather cumbrous and undesirable, but the Compilers have found by actual test that different persons will look under different headings for the same information; and they must give as their reason for filling up so much of the work with cross references—a wish to accommodate, as far as possible, all who may refer to it. Great inconvenience has been occasioned by the inability of the printers to keep set up more than two or three sheets at one time. This has in nearly every instance prevented a reference to the column in the cross reference, when the abstract of the case itself has come in a later part of the work than the reference. In several instances, too, the case itself has after some consideration been put under a different sub-heading from that fixed at the time of the reference; for this reason indulgence must be asked for the large number of corrigenda which relate, as will be seen, almost exclusively to cross references. Attention is directed to the Addenda, where a few cases and cross references, inadvertently omitted from the body of the work, will be found.

The Compilers believe that the gentlemen connected with the various Reports digested will have no reason to complain of any unfair use of *head-notes*, for in every instance an endeavour has been made to obtain the abstract of the case without reference to the head-note.

Grateful acknowledgment is made of the invaluable suggestions offered to the Compilers by several members of the Profession, and by Mr. Schutte, the respected Librarian of the Supreme Court. It cannot be hoped that the arrangement of the work will be found perfect; but it is hoped that, as a reward for long and arduous labour, the work will be found generally useful.

Selborne Chambers *June* 1886

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TO THE STATUTES.

The numbers after the cases refer to the columns; where no section of a Statute is put before a case the case refers to that Statute generally.

CORRIGENDA.

READERS ARE REQUESTED TO MAKE THE FOLLOWING ALTERATIONS :—

Col. 1, line 5.—Instead of *Form and Requisites of, &c.*, read *post col.* 619.; line 2 from bottom, delete *in.*
Col. 2, line 5.—Instead of *Sec.* 16, read *Sec.* 36.
Col. 6, line 27 from bottom.—Instead of FRAUDULENT CONVEYANCE, read *post col.* 623.
Col. 8, line 2.—After Claim, read *col.* 930.
Col. 12, line 9 from bottom.—Instead of JURISDICTION, read *post col.* 659.
Col. 28, line 19.—After OFFENCES (STATUTORY,) read *col.* 1113; line 22, after JUSTICE OF THE PEACE, read *col.* 753; line 23, instead of *No.* 239, read *No.* 229.
Col. 29, par. 2, line 3.—After *column*, read 13; par. 5, line 4, instead of *Construction and Interpretation of*—(*General Rules,*) read *cols.* 1572, 1573.
Col. 39, line 27 from bottom.—Instead of BILL, read *post col.* 1198.
Col. 55, lines 5, 10, 13.—Instead of *Sec.* 21, read *Sec.* 261.
Col. 59, line 8.—After BILL OF SALE, read *col.* 107.
Col. 61, line 9.—Instead of 1864, read 1865.
Col. 70, line 22 from bottom.—Instead of *under* CROWN, read *col.* 330.
Col. 71, line 7.—Instead of *Jury*, read *cols.* 307, 308.
Col. 73, line 17 from bottom.—After LOCAL GOVERNMENT, read *col.* 853.
Col. 74, line 10 from bottom.—Instead of under TRESPASS—*To houses and lands*, read *col.* 1312.
Col. 76, line 14 from bottom.—Instead of *Instrument*, read *Instruments.*
Col. 93.—Delete last paragraph.
Col. 109, line 25.—Instead of *Conveyance*, read *Preferences.*
Col. 116, line 32.—Instead of *under* CROWN—*Privileges, &c.*, read *post col.* 330.
Col. 124, line 7.—Instead of *Sec.* 14, read *Sec.* 20.
Col. 127, line 6.—Instead of *Jurisdiction of Courts of Mines*, read *cols.* 1008, 1009; line 30, instead of *Ibid.*, read *col.* 953.
Col. 134.—After CLAIM, read *Mining* instead of *of Mining.*
Col. 143, line 34.—Instead of *cestius*, read *cestuis.*
Col. 145, line 6 from bottom.—Instead of *British*, read *Cornish*; lines 5 and 4 from bottom, instead of *under* MALICIOUS PROSECUTION, read cols. 880, 881.
Col. 152, line 19.—Instead of *Rules and Articles*, read *Increase of Capital.*
Col. 159, line 25.—Instead of *Rules, &c.*, read *cols.* 1022, 1023.
Col. 160, line 28 from bottom.—Instead of *Farrar*, read *Farran*; line 26 from bottom, instead of CALLS, read *col.* 1021.
Col. 161, line 14.—Instead of *Rules, &c.*, read *cols.* 1025, 1026.
Col. 184, line 22 from bottom.—Instead of *N.*, read *M.*
Col. 205.—Delete lines 8 and 9.
Col. 221, line 13 from bottom.—Instead of 106, read 116.
Col. 223, line 14.—After *column*, read 227.
Col. 245, line 5.—Instead of *In other Cases*, read col. 545; line 4 from bottom, instead of 294, read 274; line 2 from bottom, instead of *Sec.* 39, read *Sched.* 39.
Col. 258, line 13 from bottom.—Instead of *Sec.* 75, read *Sec.* 78.
Col. 322, line 13 from bottom.—Instead of "*Constitution Act*," 22 *Vic., No.* 68, read "*Constitution Act*"—22 Vic. No. 68.
Col. 325, line 11.—Instead of *Selectors*, read *col.* 793.
Col. 332, line 31.—Instead of *under* TRESPASS—*To lands and houses*, read *col.* 945.
Col. 334, lines 9 and 10 from bottom.—Instead of *Practice in Granting Probate and Letters of Administration*, read *col.* 1523; line 6 from bottom, instead of *Ibid.*, read *col.* 1531.
Col. 349, line 22.—Instead of *Sec.* 75, read *Sec.* 76.

Col. 383, lines 26, 27.—Instead of *Jurisdiction and Duty—In other cases*, read *col.* 763.
Col. 395, lines 12 and 13 from bottom.—Instead of *For Facts See S.C. post under* WAY, *&c*, read *See S.C. post col.* 1493.
Col. 405, lines 4 and 5.—Instead of *Rights and Powers, &c.*, read *col.* 1444; line 13, instead of *Fairnbairn*, read *Foirbairn.*
Col. 408, Par. 5.—Instead of *Effect of Forfeiture, &c.*, read *cols.* 935, 936.
Col. 411, line 4 from bottom.—Instead of *Ibid.*, read *col.* 958.
Col. 412. last 2 lines.—Instead of *Interests in Mines—Claims, &c.*, read *col.* 919.
Col. 415, line 27 from bottom.—For *Allen*, read *Allan.*
Col. 416, line 26.—Instead of *In re Peebles*, read *In the Goods of Peebles.*
Col. 420.—Delete par. 4.
Col. 431, line 14.—Instead of *Symonds*, read *Symons*; line 25 from bottom, instead of *In re Peebles*, read *In the Goods of Peebles.*
Col. 448, line 33.—Instead of *Allen*, read *Allan.*
Col. 454, line 21.—After WINDING UP, read *col.* 1035.
Col. 461, line 4.—Instead of *Practice*, read *col.* 1541.
Col. 463, last line.—After "*Judicature Act*," read *cols.* 1229, 1230.
Col. 465, line 10 from bottom.—Instead of *Petitioning Creditor's Debt*, read *col.* 1028.
Col. 484, line 5.—After *Leases*, read *cols.* 792, 793, 794.
Col. 502, line 6.—Instead of *Property, Powers, and Contracts*, read *cols.* 864, 865.
Col. 539, line 14.—Instead of DOWER, read *col.* 1470.
Col. 540, line 33.—After *Jurisdiction*, read *col.* 650.
Col. 548, line 4 from bottom.—After *To whom granted*, read *col.* 1520.
Col. 550, line 25.—Instead of *Sec.* 14, read *Sec.* 74.
Col. 566, line 29 from bottom.—After LEASE, read *col.* 809.
Col. 577, line 9 from bottom.—After *Sequestration*, read *col.* 612.
Col. 589, line 4.—Instead of *No.* 5, read 5.
Col. 591, line 25 from bottom.—Delete *Sec.* 13; line 12 from bottom, instead of *Sec.* 13, read *Part* 13.
Col. 596, line 24.—Instead of *Sec.* 46, read *Sec.* 47.
Col. 607, par. 2, last line.—Instead of *Synnott*, read *Synnot.*
Col. 616, par. 5, line 1.—Instead of 375, read 379.
Col. 618, line 8 from bottom.—Instead of 181 read 151.
Col. 636, line 12.—Delete *and Procedure.*
Col. 654, footnote to par. 4.—Instead of *Sec.* 77, read *Sec.* 79.
Col. 670, line 35.—After *Discharge*, read *col.* 690.
Col. 706, line 17.—Instead of *col.* 170, read *col.* 710.
Col. 735, line 8.—Instead of *Currie*, read *Cowie.*
Col. 748, line 17 from bottom.—After RATES AND RATING, read *col.* 1267.
Col. 749, lines 9 and 10.—Instead of 1860, read 1865.
Col. 752, line 28.—Instead of CALLS and WINDING UP—*Petition and Practice in—Calls*, read *col.* 1026.
Col. 753, par. 7, line 2.—Instead of *Sec.* 238, read *Sec.* 223.
Col. 754, line 28.—Instead of *Vict.*, read *Rich.*
Col. 758, line 21.—Instead of *Guthrie v. Gippsland Gold Mining Company*, read *Guthridge v. Gippslander Gold Mining Company.*
Col. 760, line 13.—Instead of *Act No.* 263. read *Act No.* 267.
Col. 762, line 36.—Instead of *Corden*, read *Carden.*
Col. 766, line 18 from bottom.—After LICENSING ACTS, read *col.* 833.
Col. 781, par. 3, line 3.—Instead of 572, read 571.
Col. 783, line 6 from bottom.—Instead of *Chalmers*, read *Chambers.*
Col. 784, lines 13 and 12 from bottom—Instead of *Rights, &c.*, read *col.* 1444; line 8 from bottom, after TRUSTEE, read *col.* 1444.
Col. 789, line 2.—Instead of *col.* 326, read *cols.* 328, 329.
Col. 801.—After par. 2, read 5 *Commons.* instead of 6 *Commons.*
Col. 802.—After par. 2, read 6 *Offences, &c.*, instead of 7 *Offences, &c.*
Col. 803, line 5 from bottom.—Read 7 *Other Points*, instead of 8 *Other Points.*
Col. 805.—In subject XI. of Index, read *col.* 819, instead of *col.* 818.
Col. 813, line 28.—Instead of 501, read 571.
Col. 818, line 7.—Instead of *Haimes*, read *Haines.*
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Col. 834, par. 4, line 5.—Instead of *Sec.* 14, read *Sec.* 140.
Col. 839, line 29.—After PURCHASER, read *cols* 1475, 1476.
Col. 863, last line.—After (STATUTORY,) read *cols.* 1110, 1117, 1118.
Col. 864.—In Index IV. (*b*) read *Supersedeas*, instead of *Supercedeas.*
Col. 874.—After par. 1 insert heading (*c*) *Maintenance, Allowances and Expenses.*
Col. 880, line 14 from bottom.—Instead of *Atcion* read *Action.*
Col. 922, line 6.—Instead of *Sub-sec. iv.*, read *Sub-sec. iii.*
Col. 957, line 33.—Instead of *Sec.* 313, read *Sec.* 31.
Col. 967, line 18 from bottom.—Instead of 314, read 914.
Col. 983, line 23 from bottom.—Instead of *col.* 979, read *col.* 977.
Col. 984, par. 1.—Instead of 1853, read 1883.

Col. 1025, line 28.—Instead of *Stocpoole*, read *Stacpoole*.
Col. 1047, par. 5.—Instead of *col.* 1040, read *col.* 1046.
Col. 1075, par 2, lines 2 and 3.—Instead of *Sec.* 14, read *Sec.* 20.
Col. 1185, par. 2, line 2.—Instead of *disallowed*, read *allowed*.
Col. 1207, Index (4.)—Instead of *col.* 1210, read *col.* 1209.
Col. 1211, par. 6, line 4.—Instead of *No.* 19, read *No.* 10.
Col. 1227, line 10 from bottom.—Instead of *Order* 14, read *Order* 16.
Col. 1230, last par., line 3.—Instead of *Order* 10, read *Order* 9.
Col. 1232, par. 4, line 2.—Instead of *Order* 28, read *Order* 38.
Col. 1234, line 39.—Instead of *Rules* 6 and 7, read *Rule* 6.
Col. 1284, lines 15 and 21.—Instead of 233, read 223.
Col. 1313, heading.—Instead of SETTLEMENTS, read SHERIFF.
Col. 1325, line 27.—Instead of *Sec.* 5, read *Sec.* 46; line 4 from bottom, instead of *Sec.* 4, read *Sec.* 40.
Col. 1356, line 17.—Instead of 106-108, read 806-808.
Col. 1375, line 19.—Instead of *Smith*, read *Smyth*.
Col. 1380, par. 5, line 3.—Instead of 810, read 808.
Col. 1382, par. 4, line 1.—Instead of *Foming*, read *Forming*.
Col. 1396, par. 3 from bottom, line 1.—Instead of 27, read 25.
Col. 1401, line 11 from bottom.—Instead of 1400, read 1406.
Col. 1416, line 17.—Instead of *see facts ante column for* 1060, read *see for facts ante column* 1060.
Col. 1425, line 11 from bottom.—Instead of *Hermert*, read *Hemert*.
Col. 1463, line 3.—Instead of *Webster*, read *Baker*.

Digest

OF

REPORTED CASES

IN THE

SUPREME COURT, COURT OF INSOLVENCY AND THE COURTS OF MINES, AND VICE-ADMIRALTY OF THE COLONY OF VICTORIA.

FROM 1861 TO 1885.

ABATEMENT.

OF ACTIONS.] — *See* under PRACTICE AND PLEADING.

OF INSOLVENCY PROCEEDINGS.]—*See in re* Mann, *post* under INSOLVENCY—SEQUESTRATION.]—The Petition, &c.—Form and Requisites of, &c.

OF NUISANCES.]—*See* NUISANCE.

OF LEGACIES.]—*See* LEGACY.

ABATTOIRS.

"Abattoirs Stat." No. 356, Secs. 7, 8, 27, 28, 41—Dues.] — L. was sued in the Police Court, Geelong, by T., the Town Inspector for Geelong, for dues on the slaughtered cattle in a slaughter-house owned by him, within a mile of Geelong. The Geelong Abattoirs were leased to one W. *Held*, that under Sec. 41, T. and not W. was the proper person to sue; that in Sec. 7 the words "and in every such last mentioned, &c.," should be read "but every such last mentioned, &c.;" and that L. was liable to pay the dues to the Town Council of Geelong. *Lowe v. Tweedale*, 3 V.R. (L.,) 225; 3 A.J.R. 110.

Being in possession of a Skin with Defaced Brand —"Abattoirs Statute," Ssc. 16.]—The "brand" mentioned in Sec. 36 of the "Abattoirs Statute," which section imposes a penalty upon any one having in his possession a skin from which the brand has been defaced, is a fire-brand upon the skin itself, and not a mere surface brand upon the wool. *Smith v. McGann*, 2 V.L.R. (L.,) 266.

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ABDUCTION.

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See INSOLVENCY AND FUGITIVE OFFENDERS.

ACCESSORY.

Doctrine of Accessories—When applicable.]—The doctrine of accessories applies only to an indictable offence in which there is a principal offender. *Regina v. Barry ex parte Connor*, 5 A.J.R., 124.

For facts *see* S.C. under LICENSING ACTS.

ACCIDENT.

See NEGLIGENCE.

ACCOUNT.

1. *General principles and who may be compelled to Account.*
2. *Re-opening Settled Accounts.*
3. *Directing Accounts to be taken.*
4. *Practice.*

1. GENERAL PRINCIPLES AND WHO MAY BE COMPELLED TO ACCOUNT.

E., M., and L. entered into a Government Railway Contract. In this L. acted as a trustee for R. G., N. G., and J. W. By articles of partnership L. was as such trustee to receive $\frac{1}{4}$ of the entire profits, E. and M. each $\frac{1}{10}$. By Indenture R. G., N. G., and J. W., assigned their joint and several estate to trustees upon trust for their creditors. By deed, March, 1860, executed between E., M., and L., R. G., N. G., and J. W. and their trustees, W. W. and the Bank of N. S. W, the partnership between E., M., and L., was dissolved, and a fresh partnership established between W. W. and L., in which L. represented N. G., R. G., J. W., and their trustees, and certain funds were assigned to the trustees for payment of certain scheduled debts; and it was provided that L. should give to E. and M. respectively, bonds conditioned for payment of a sum of money equal to $\frac{1}{10}$ of net profits of the contract within three months after the completion of the contract, and that the completion of the contract meant the time when certain retained percentages should become payable by Government, *i.e.*, twelve months after the Railway was opened for traffic. By deed, July, 1861, between same parties, J. W. was to take L's. place in the partnership of W. W. and L., and J. W., as a personal liability of his own, but not so as to render other parties liable or to interfere with existing liabilities, was to give the bonds mentioned in Indenture, March, 1860. The bonds given by L. were given up by E. and M. and cancelled. The Railway was opened 1st April, 1862. On 6th December, 1862, E. and M. filed bill against R. G., N. G., J. W., their trustees, and W. W., praying for an account, for a declaration that certain entries and charges in partnership books were improperly entered and charged, and certain bills of exchange wrongfully accepted, and certain moneys wrongfully applied. *Held* that bill was filed before time had arrived entitling plaintiff to an account; that the alleged improper entries and charges, acceptance of bills and misapplication of moneys, could have no effect in the only account in which the plaintiff was entitled, viz.:—an account of the entire profits of the contract, deducting outlay from receipts; that plaintiff was entitled to an account against J. W. only, and that the accounts in that case would be of such a complicated nature that it was a fit subject for an account in Equity. Reference to Master to take an account of the net profits. *Evans v. Guthridge*, 2 W. and W. (E.,) 83.

Sale of Wool—Release of Debt.]—Defendants advanced to plaintiffs a sum of £694 18s. 9d. on a shipment of wool to England. After the advance plaintiffs found it necessary to call a meeting of their creditors. A composition of 6s. 8d. in the pound was offered, but ultimately the creditors, including the defendants, consented to release their debts on payment of 10s. in the pound, the defendants being creditors for about £600, besides the £694 18s. 9d. advance, and also lending a sum to enable them to pay the composition to the other creditors. The wool shipped had been sold, and, as plaintiffs believed, had realised a large profit over their debt to the defendants. They therefore sought for an account. The defence was that the defendants obtained the wool not merely as security, but that it had been actually assigned to them. There was some evidence of such an arrangement, but not enough to prove a concluded bargain to that effect. Accounts ordered—the defendants to be charged with interest upon the balance in their hands after satisfaction of the sum of £694 18s. 9d., at the same rate as they were entitled to interest upon such sum. *Thomas v. Goldsborough*, 1 A.J.R. 113.

2. REOPENING SETTLED ACCOUNTS.

Upon what Terms granted.]—Where a defendant through poverty is unable to attend in the Master's office when accounts are taken against him, this is no ground for permitting him to reopen those accounts, and if relief be given him it will only be upon payment both of the costs of the account and of the application. *Kendell v. Thomson*, 1 W.W. and A'B. (E.,) 141.

What are, and what are not, Settled Accounts—Course of Dealing between Trustees and their Agent.]—A testator, after expressing his confidence in M., directed his trustees to employ him as their agent and solicitor. M. was so employed, and furnished accounts from time to time to the acting trustee, including charges for commission as agent, and costs as solicitor. The costs were taxed *exparte*, and allowed him

in account without investigation. In 1867, at the instance of a *cestui que trust* objecting to M.'s account, an order for re-taxation was obtained, and had been partly acted upon, when M. died. A suit was instituted in 1869, against M.'s administrator, seeking an account of his receipts. *Held*, that the course of dealing did not amount to a conclusive settlement of accounts, that the recommendatory words in the will were material in considering the effect of such dealing as to such settlement, and account directed, limited by consent to items for costs. *Phelan v. Macoboy*, 1 V.R. (E.,) 85; 1 A.J.R., 3. Confirmed on appeal: *sub nom. Macoboy v. Phelan*, 1 A.J.R. 52.

Partnership—Ship.]—Plaintiff and defendant were partners in a ship called the "T." The "T." was lost and insurance moneys recovered; the plaintiff and defendant then purchased the "R. P.," plaintiff advancing most of the money and defendant being credited with a sum of £537 due to him from former transaction and with £18 a month as wages. The "R. P." made several voyages, and accounts to December, 1869, were made up, by which it appeared that defendant was credited with £1068. The plaintiff then advanced nearly £2000 for repairs and outfit, and ship made several voyages at great profit as plaintiff alleged, until July, 1871, when she was sold for £2500. £1831 of this was remitted to the plaintiff for purchase-money and £420 for profits, defendant claiming to retain a large sum as his own. Bill by plaintiff for accounts. Defendant in answer denied that he was part owner of the "R. P.," and therefore not liable for losses, and that his wages were to be paid him irrespective of losses. and he alleged that accounts were signed by him without his understanding them, and claimed a re-opening of accounts as to the "T." *Held*, that the former accounts having been settled could not be re-opened, and account decreed of receipts and disbursements by defendant, giving him credit only for payments actually made, and account of profits. *Smith v. Knarston*, 3 A.J.R. 94.

3. Directing Accounts to be Taken.

Simple Account within Rule 19 of Cap. VI. of Supreme Court Rules]—T. and S. dissolved partnership, and referred differences to arbitration. The arbitrator employed an accountant, who struck a balance, to which the parties did not object, but no award was made. T. and S. jointly deposited with a bank an acceptance in favour of the firm for a debt owing at the dissolution. After dissolution T. renewed the acceptance without consulting S. T. then discounted the whole acceptance and left the colony. S. assigned his interest in the acceptance to a third person. The person to whom T. had discounted the acceptance sued the acceptor when the acceptance was overdue. S. filed a bill against T. and the person to whom he had discounted the acceptance, and the acceptor was restrained from paying to such person more than half the acceptance, and the acceptor accordingly paid half to him and half to S.'s assignee. T. was never served with the bill in this suit. T. on his return filed a bill against S. and his assignee, praying an account of the partnership at its dissolution, and that if S. or his assignee had received more than was due to S. of the partnership assets, he or his assignee should be directed to pay to T. what should be found due. Evidence was given of the balance struck by the accountant. *Held*, that T. was not estopped by the decree in the previous suit, and that the matter was one of "simple account" within Rule 19 of Cap vi. of the Supreme Court Rules, and decree made in favour of T. without a reference. On appeal, *Held*, that Rule 19 contemplated the case of an ordinary bill for account; that to bring a case within this Rule a special prayer in the bill is not necessary, though the proceedings may, if the plaintiff choose, be framed to meet the case, and appeal dismissed. *Taylor v. Southwood*, 1 W. & W. (E.,) 29.

Under Supreme Court Rules, Cap. vi., Rule 19, an account was taken at the hearing of a suit for redemption. *Bulling v. Bryant*, 1 W. & W. (E.,) 121.

Supreme Court Rules, Cap. VI., Rule 19.]—Where the evidence was unsatisfactory and by no means conclusive, and not unlikely to be, at all events, to a certain extent, rebutted, a decree for a specific sum under the Supreme Court Rules, in place of a decree for an account, should not be made. *Tuckett v. Alexander*, 1 W. & W. (E.,) 87, 94.

Quære, Whether Rule 19, Cap. 6, of the Supreme Court Rules, should be held to apply to the case of a Defendant who has not defended the suit; as this point was overlooked, and not argued, in *Taylor v. Southwood*, 1 W. & W. (E.,) 29.—*Ibid.*

See S.C. UNDER INSOLVENCY—FRAUDULENT CONVEYANCE.

4. Practice.

Co-defendants not interested in accounts which only affect one defendant—Parties—Costs.]—Where a plaintiff in a suit, the main object of which was accounts, has no rights as to account except against one defendant, the other parties should be kept before the Court, so that the account may determine that defendant's rights against them for any sums he may have to pay to the plaintiff and also to give him facilities for access to books and papers, but plaintiff was made to pay costs of all parties defending up to and inclusive of hearing. *Evans v. Guthridge*, 2 W. & W. (E.,) 83.

"Four-day Order" for Filing.—Where a defendant in a suit for an account, failed to bring in his accounts in the Master's office, within the time limited for that purpose by the Master, the Court, on the *ex parte* application of the Plaintiff, granted a "four-day order" for the filing by the defendant of his accounts. *Cronan v. Edwards*, 5 W. W. & A'B. (E.) 15.

In Master's Office—Right of cestuisque trust to.—In a suit by *cestuisque trusts* against trustees, the *cestuisque trusts* are entitled to have accounts

taken in the Master's Office, although they were furnished with accounts before the summons was issued, and the answer had accounts attached to it. *Snaith v. Dove*, 4 A.J.R., 140.

"Statute of Evidence" No. 197, Secs. 7, 8, 10—Affidavits—Appeal.]—Before making an order under Act No. 197, Secs. 7 and 8, which require that accounts should be filed, the Master-in-Equity should, before directing accounts to be filed, give the respondent an opportunity of answering, by way of affidavit, or *viva voce* evidence, the statements in the affidavit on which the summons was based. Since the Act does not indicate the manner of evidence in the office, affidavits are not the most fitting evidence before the Master. Affidavits in support of a summons under Sec. 7 should be explicit, referring to defects in certain accounts presented, and showing definitely a demand for proper accounts and a refusal. An appeal will lie against an order of the Master under Sec. 7, rejecting *viva voce* evidence tendered in answer to affidavits on which summons was based, and directing accounts to be filed. *In re Wharton, ex parte Smith*, 3 V.L.R. (E.,) 260.

Cost of Accounts—When Plaintiff in Error.]—On taking accounts in a suit, it was found that the defendant was right as to the amount due. *Held*, that the plaintiff should not have the costs of taking the accounts. *McPherson v. Hunter*, 2 A.J.R., 36.

Of taking Accounts—Finding in Defendant's favour—Accounts necessitated by Defendant's conduct.]—When the result of taking accounts in the Master's office in a partnership suit, was substantially in the defendant's favour, but the proceeding had been necessary on account of conflicting statements by him as to the amount due (the matter being within his knowledge.) *Held*, that the costs thereof were properly imposed upon him. *James v. Greenwood*, 2 A.J.R., 41.

Of Decree—When Defendant made no Tender of Sum Due.]—When accounts had been taken, and it was found that the defendant was right as to the sum really due, but he made no tender of that sum, he was not allowed the costs of the decree. *McPherson v. Hunter*, 2 A.J.R., 36.

In taking accounts under a decree it is entirely for the chief clerk to direct what parties shall bring in accounts; *Molesworth, J.*, refused to interfere with his discretion in this respect. *Bell v. Clarke*, 10 V.L.R. (E.,) 283, 305; 6 A.L.T., 127.

ACCOUNT STATED.

Action on.]—*See* under MONEY CLAIMS.

ACT OF GOD.

What is not.]—*See Davis v. Bull, post* under MINING.—Claim.

When a Defence.]—Where the law creates a duty or charge, and the person is unable to perform it by reason of the Act of God, he is excused from performance; but if a person contracts to do a certain thing, and it becomes impossible by reason of the Act of God, he may be liable in damages for its non-performance. *Connor v. Spence*, 4 V.L.R. (L.,) 243, 259.

If a ship owner enter into a special contract to carry goods in a particular ship, and the ship be damaged by the Act of God, but the damage done is such that she could be made capable of resuming the voyage, though, from an economical point of view it might be unwise to do so, the ship owner is liable in damages for non-performance of his contract, though *semble* that if the ship or the goods were totally destroyed by the Act of God the ship owner would not be liable for such non-performance. *Ibid.*

ACT OF PARLIAMENT.

See STATUTE.

ACTION.

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1. GENERALLY.

When maintainable.]—No action lies on an Order or Rule of Court to pay money. *Gregory v. King*, 1 W. & W. (L.,) 92.

Assumpsit—Against heir on whom lands have descended for money payable as price of goods sold and delivered to ancestor.]—Where A. was indebted to plaintiffs for money payable as price of goods sold and delivered to A., and A.'s lands descended on B. his heir. *Held* that assumpsit would lie against B. for such amount due on an account stated between plaintiffs and A. in his lifetime. *M'Ewan v. Moncur*, 2 W. & W. (L.,) 273.

Cause of Action — Action when maintainable.] M., a sharebroker, declared against B. and C., sharebrokers, to recover damages for that the defendants conspired to dissolve the Stock Exchange, of which plaintiff and defendants were members, "for the purpose of injuring the plaintiff of his just rights," and for that "in furtherance of the said conspiracy, they said to W. sharebroker, these words—'Do you know that fellow?" (meaning the plaintiff,) 'Beware of him; he has given a lot of trouble' (meaning he was not fit to be trusted.") *Held* on demurrer that the declaration disclosed no cause of action. *Moorhead v. Brown*, 4 W. W. & A'B. (L.,) 143.

Against whom maintainable.—Detention of Ship.] —H sold a ship to W. Before the sale the master had been employed by H., and after the sale by W. The sale was effected in the China Seas by an agreement entered into by the master in pursuance of an authority given by H, and by the agreement it was stipulated that after the sale the vessel was to be sailed as W.'s, though still registered in the name of H., and so to continue till the whole of the purchase money was paid. After the sale the master was employed by W., and while in such employ he brought the vessel to Sydney; but, on receiving a message from H., whom he had appointed agent of the vessel, brought the vessel to Melbourne, and in consequence W. lost the opportunity of obtaining valuable freight in China. W. sued H. for detention. *Held*, that though H. might have been guilty of improper conduct in offering the advice he did to the master, the latter was a free agent, in W.'s employ, and could have adopted or rejected the advice as he saw fit; and that no action for detention would lie against H. *Wilson v Holmes.* 1 V.R. (L.,) 53: 1 A.J.R., 117.

Money Recovered in—What is.]—Money paid between the parties in settlement of an action, is not money "recovered" in the action; and costs are part of the damages recovered. *Day v. Union G. M. Coy.*, 2 V.L.R. (L.,) 11.

When Maintainable.]—Where the cause of action is the same, the plaintiff cannot sue in a second action in a Court of Law for that which he had the opportunity of recovering, and which, but for his own fault, he might have recovered in a former action; and, *e converso*, in matters arising out of contract, the cause of action being the same, and not the subject of cross action or set-off, a defendant who has had an opportunity given him to raise and has passed over a substantial ground of defence in an action brought against him, is concluded by the judgment in that action, and cannot make the omitted ground of defence the subject of an independent action; and this principle is not affected by the fact that the two actions were brought in separate Courts, and that the plaintiff in the second action seeks to recover unliquidated damages. *Hurst v. Bank of Australasia*, 2 V.R. (L.,) 217; 2 A.J.R., 123.

Who may Maintain.]—*Semble*, that the person named by an Act of Parliament as the person to whom moneys are to be paid, is the proper person to sue in an action to recover such moneys. *Roebuck v. Mayor &c., of Geelong West*, 2 V L.R. (L.,) 189, 194.

On Covenant to Pay—Demand.]—An action may be maintained on a covenant to pay a sum certain on demand, without any previous demand. *Nicholson v. Merry*, 4 V.L.R. (L.,) 65.

Actionable Wrong—Immorality.]—The owner of a boarding house sued a boarder for damages arising from loss of boarders through defendant's committing adultery in such boarding house. Judgment for defendant, there being no appearance for plaintiff. *Hill v Power*, 5 V.L.R. (L.,) 400; 1 A.L.T., 169.

When maintainable — Building contract — Satisfaction of Employer — Question for Jury.] — Defendant, a contractor for making a tank and well, invited tenders for the brickwork and puddling of a tank, and accepted the plaintiff's tender for the brickwork only (the puddling being left for the contractor to do himself.) The contract and specification provided that "during the building of brickwork and erection of tank, the contractor shall keep the tank clear of water, and shall be responsible for tank and well being water-tight;" the work was also to be done in a substantial manner, to the satisfaction of the defendant. *Held* that to justify a verdict for the plaintiff, the jury must be satisfied on three points:—That the parties had entered into the contract alleged; that the work had been duly executed in conformity therewith; and that the defendant, as a reasonable person, ought to have been satisfied with that execution. *Smith v. Sadler*, 6 V.L.R. (L.,) 5.

When maintainable—Debt arising out of a felony—Duty to prosecute.]—*Semble*, that where money has been stolen, it is not the duty of the person from whom it is stolen to take criminal proceedings before taking civil proceedings to recover the money. *Foster v. Green*, 3 A.L.T., 97.

2. Notice of.

"Customs Act 1857" No. 13, Sec. 227.]—Notice of action under Sec. 227 of Act No. 13 must be proved in an action against a customs officer for detinue and trover of goods which he would not deliver up until duties imposed only by resolution of the Legislative Assembly had been paid, and for refusing to sign a "free entry" of such goods unless the duties were paid, where the duties were demanded by the defendant *virtute officii*, and he had a *bonâ fide* belief that he was doing his duty. The duty of deciding as to the existence and honesty o the belief devolves on the Court and not on the jury. *Stevenson v. Tyler*, 2. W.W. & A'B. (L.,) 179.

"Melbourne Harbour Trust Act 1876," No .552, Sec. 46.—Person.]—*See Union Steamship Coy. of New Zealand v. Melbourne Harbour Trust Commissioners, post* under Harbour Trust.

County Court Bailiff—Action against for not levying execution—"County Court Statute 1869," Sec. 32]—*See Solomons v. Mulcahy, post* under COUNTY COURT—Officers of the Court.

"Justices of Peace Statute 1865" No. 267, Sec. 170—Notice—When Justice entitled to.]—*See Smith v. Cogdon, post* under JUSTICE OF PEACE—Actions against.

ADMINISTRATION OF ESTATES OF DECEASED PERSONS.

1. *General Principles and Construction of the Administration Acts.*
2. *Suits and Actions for.*
   - (*a*) *Practice Generally.*
   - (*b*) *Parties.*
   - (*c*) *Costs.*
3. *Administration by Executors and Administrators.*—*See* EXECUTORS AND ADMINISTRATORS.
4. *Grant of Letters of.*—*See* WILL.

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1. GENERAL PRINCIPLES AND CONSTRUCTION OF ADMINISTRATION ACTS.

Administration Act 1872, Sec. 14—Does not Apply to Estates of Persons Dying before its Date.]—On a rule *nisi* for a *mandamus* to compel the Registrar of Titles to register as proprietors of certain land executors, who were also devisees in trust under a will made in 1861, but not proved till 1872, *Held* that Sec. 14 of the "*Administration Act* 1872," which did not come into operation till 1873, did not apply to such a case, but only to the case of persons dying after the Act came into operation, and rule *nisi* discharged. *Regina v. The Registrar of Titles ex parte Grice*, 4 A.J.R., 92.

Under Intestates' Real Estate Act, Secs. 4, 6—Effect on Conveyance made Previously to Rule to Administer.]—By the operation of Sec. 6 of the "*Intestates' Real Estate Act*" No. 230, under which section the title of the person to whom a rule to administer real estate of an intestate has been granted under Sec. 4 is referred back to the time of the death, a conveyance of the land made by the heir-at-law of the intestate previously to the obtaining the rule to administer is nullified. *Slack v. Winder*, 4 A.J.R., 188.

Intestatee' Act (No. 230,) Sec. 4—Property partly Disposed of by Will—No Next of Kin.]—A testator left a will dated August, 1874, by which he made a specific devise and bequest to his wife for life, and left the rest of his property to his trustees and executors upon trust for sale (postponing the sale of that portion in which widow had a life estate till after her death) but making no farther disposition of the residue. The trustees realised the whole of the estate, the sale of which was not postponed, and held the proceeds. The testator left a widow but no next of kin. *Held* on information that the widow was entitled to a moiety of the entire residue besides her life estate specifically devised and bequeathed, and that as to other moiety the Crown was entitled to what represented personal estate, and the trustees to what represented converted real estate and unconverted real estate subject to widow's life estate. *Attorney-General v. McPherson*, 3 V.L.R. (E.,) 270.

Act No. 427, Sec. 6.]—The Act is not retrospective, so that the administrator of an intestate who died before the Act came into force, and before a Crown grant was issued in respect of such land, cannot maintain ejectment. *Edmondson v. Macan*, 4 V.L.R. (L.,) 422.

Administration Act 1872 (No. 427.) Sec. 9—Sale after Payment of Debts.]—Where real property is distributable under Act No. 427, Sec. 9, and all the debts have been paid, if all parties interested consent to a sale, the Court will decree the executor to sell and divide the proceeds, but if one party insist on a division of the real estate *quâ* real estate the executor must divide it accordingly. *Dodgson v Clare*, 5 V.L.R. (E.,) 137.

Act No. 230, Sec. 4.]—A. died intestate in 1853, leaving W. his heir. W. died intestate in 1868, and a rule to administer A.'s estate was obtained in 1878. *Held* that A.'s real estate was distributable as to beneficial ownership under Act No. 230 between the widow and next of kin of A. *Archibald v. Archibald*, 5 V.L.R. (E.,) 180.

Mortgagees—5 Vict., No. 17.]—Where during the pendency of a creditor's suit, instituted by mortgagees against the heir and administratrix of an intestate, the administratrix sequestrated the estate, and the official assignee was substituted as a defendant instead of the administratrix. *Held* that there was nothing in the Act 5 Vict., No. 17, to take away the preference of the mortgagees as specialty creditors. *Australian Trust Company v. Webster*, 1 W. & W. (E.,) 148.

Simple and Specialty Creditors—Who are.]—*Australian Trust Company v. Webster.*—*See* under INSOLVENCY—JURISDICTION.

Estate overrun with Rabbits—Motion for leave to spend Money in exterminating them, out of Income and Annuity charged on Estate.]—P. was entitled to an annuity of £500 charged on the T. estate, which was devised by the will of the owner in fee in strict settlement subject to the annuity. The estate, a sheep-station, was infested with rabbits in such numbers that if they were not

exterminated the estate would, in a few years, become unprofitable, or £10,000 would have to be spent in clearing it. Under these circumstances the executors of the will moved for leave to spend £1300 during the course of three years, to be taken half out of P.'s annuity, and half out of the income of the estate. *Held* that the Court could not make such order. *Brown v. Abbott*, 10 V.L.R. (E.,) 129.

Semble, that if it were shown that the property would be totally destroyed if the money were not expended in exterminating the rabbits, the Court could order part of P.'s annuity to be applied in such extermination. *Ibid.*

For other cases *see* under DISTRIBUTIONS STATUTES OF.

2. SUITS AND ACTIONS FOR.

(*a*) *Practice Generally.*

By Mortgagee—Legal and Equitable.]—Plaintiff was legal and equitable mortgagee respectively of different portions of real estate of a deceased intestate, and as such instituted a creditor's suit against the intestate's personal representative and infant co-heiresses. Decree made for an account of the mortgage debts respectively, interest and costs; on non-payment within three months, for a sale of the equitably mortgaged premises; infant defendants declared trustees for the purchaser, under the decree, and plaintiff directed to convey the equitably mortgaged lands to such purchaser, for the interest of the infants therein; the plaintiff within the term assigned to sell under the power of sale in the legal mortgage; and in case proceeds of all these sales insufficient to pay plaintiff's principal, interest, and costs, then general accounts directed of the intestate's real and personal estate. *Collyer v. Corcoran*, 1 W. W. & A'B. (E.,) 16.

Plea of Sequestration of Estate by Administratrix.]—To an administration bill by a mortgage creditor on behalf of himself and all other creditors, against the administratrix and heir of an intestate, the administratrix pleaded that before suit instituted she had sequestrated the personal estate of the intestate, whereby all such personal estate became and was vested in the official assignee, and prayed to be dismissed from the suit. *Held per Chapman, J.*, that as the whole estate passed out of her, she was no longer a necessary party; *per the Full Court*, that the plea was no answer to the bill, and that it must be overruled. *Fairbairn v. Clarke*, 1 W. & W. (E.,) 333.

Sale of Realty for payment of Debts.]—A testator died in 1867, leaving realty and personalty to trustees, who were also appointed executors, for the benefit of his wife and children; the personal estate was insufficient for payment of debts. In a friendly administration suit by beneficiaries a decree was made authorising money to be raised for payment of debts by mortgage of the real estate, leaving it to the Master's discretion to insert a power of sale or not. *Stodart v. Stodart*, 6 W.W. & A'B. (E.,) 59.

Advertisements for Next of Kin.]—In an administration suit advertisements for next of kin are not necessary when the next of kin can be otherwise ascertained. Certificates of births, deaths, and marriages are not necessary for proof of kindred which may be established by other evidence. *Mulloy v. Mulloy*, 1 V.R. (E.,) 167.

Interlocutory Application—For Sale of Real Estate.]—Where a motion was made by the plaintiff in an administration suit, for sale of the business of the intestate, and the land on which it was carried on, and the administratrix defendant objected to the sale and opposed the motion; although it was admitted that the sale would be beneficial, the motion was refused with costs. *Graham v. Graham*, 2 V.R. (E.,) 145; 2 A.J.R., 104.

Injunction and Receiver granted.]—An administratrix, upon obtaining administration, formed a partnership to carry on the intestate's business, and allowed the partners to exercise control over the assets employed in it. Shortly after obtaining administration, and without any necessity for sale, she advertised real estate to the value of about £13,000 for sale for cash. On bill by persons out of the colony alleging themselves to be the sons, and only next of kin, of the intestate, and that the defendant was not the widow of the intestate as she pretended to be, injunction granted *ex parte* to restrain sale and a receiver granted on motion. *Graham v. Graham*, 2 V.R. (E.,) 145; 2 A.J.R., 100.

Excess of Expenditure over Receipts of Estate—Refusal of Power to Raise Money, but Grant of Order to wind up.]—On further directions where it appeared that executors had properly incurred debts in managing the estate, the Court would not sanction the borrowing of a sum of £2500 to pay off existing debts, but granted an order to wind up the estate. *Farrell v. Evans*, 3 A.J.R., 71.

Motion for Direction of the Court Before Decree.]—An application by administrators after the institution of a suit respecting the property in their hands but before decree, for the direction of the Court as to the manner of investing the property will be refused. *Attorney-General v. Huon*, 4 A.J.R., 107.

Motion to Dismiss Bill—Costs.]—A creditor who held a current promissory note not due at institution of suit, but which was paid at maturity brought an administration suit which was registered as a *lis pendens*. Motion to dismiss bill refused because plaintiff was entitled to carry suit to a hearing to determine question of costs, and *without costs* because the *lis pendens* had been used vexatiously. *O'Reilly v. Egan*, 1 V.L.R. (E.,) 1.

Priority of Suits—Creditor's Suit—Decree—Second Suit—Stay of Proceedings.]—It is generally a matter of course, where a decree in one administration suit has been obtained, to stay all others; and that, although the decree in the first suit

may be collusive, in the sense of the executor having facilitated it; and there is no authority to show that the impugning a plaintiff's demand in a first suit, is a reason for letting a second proceed. *Per Molesworth, J., Michaelis v. Cooney,* 2 V.L.R. (E.,) 63.

Blending of Realty and Personalty—Defendant occupying Realty a Trustee.]—The real and personal estate of a person dying in 1867, are so far blended as to liability and beneficial ownership that they should be included in one suit. On appeal affirmed, but an inquiry as to the title of certain real estate directed in the Master's office, it not being clear whether this land belonged to the deceased or to the defendant. *Dryden v. Dryden,* 2 V.L.R. (E.,) 74. On appeal, *Ibid,* 153.

Bill for Administration—Equity Pleading Rules, No. 7.]—A bill for administration, under Rule 7 of the Equity Pleading Rules, should seek it generally, and not partially. *Broomfield v. Summerfield,* 2 V.L.R. (E.,) 174.

Foreign Assets—Receiver Pending Taking of Accounts.]—A decree was made for administration against D., who was administrator in Victoria and Tasmania, and the accounts were proceeded with in the Master's office. Pending the accounts, the plaintiff moved for a receiver over the Tasmanian assets, on the grounds of inconsistencies in D.'s accounts, his incapacity to manage the property, and danger to the assets. *Held* that the Court had jurisdiction to make such an appointment; but motion refused on the ground of the difficulties that might arise therefrom, and the complexity that would be added thereby to the taking of the accounts. *Dryden v. Dryden,* 4 V.L.R. (E.,) 202.

Person Not Heard of for Many Years—Inquiries by Whom to be Made.]—In a suit for execution of trusts of a will one of the beneficiaries had not been heard of since 1855. Inquiries were directed by advertising in newspapers circulating in the part of Scotland where he was born, such inquiries to be made by the administrator *c.t.a.,* since plaintiffs in the suit were interested in preventing a discovery. *Low v. Moule,* 5 V.L.R. (E.,) 10.

Plaintiff Ceasing to have any Interest in Suit—Stay of Proceedings—Further Prosecution of Suit by Persons found Entitled as Next of Kin but not Parties to Cause.]—The Attorney-General filed a Bill against defendants creditors who had obtained administration of an intestate's estate, claiming property on behalf of Crown and administrator. The Master in his report found that certain persons were entitled as next of kin, and thereupon the Attorney-General intimated he would not proceed farther in the suit. The Master (under Order 56 of Orders in Chancery, 1828) committed prosecution of the proceedings under the decree before him to the next of kin. Motion by defendants for stay of proceedings in Master's Office. *Held* that in order to enable next of kin to prosecute suit and have carriage of decree, a supplemental suit was not necessary; but such might be obtained by order upon motion, and motion for stay of proceedings refused. Subsequently an order was made upon motion giving the next of kin the carriage of the suit, but a motion for payment into Court of moneys in defendant's hands, before such order obtained was held to be irregular. *Attorney-General v. Huon,* 5 V.L.R. (E.,) 119; 1 A.L.T., 26.

Payment out—Creditor's Suit.]—In a suit for administration by one creditor, no other creditors having proved, on motion for payment out of a sum of money in Master's report found as the balance after satisfying a secured creditor, order made, the executrix being through her contumacious conduct not entitled to her costs, upon terms of its concluding the suit. *Martin v Keane,* 5 V.L.R. (E.,) 290; 1 A.L.T., 75.

Undefended Suit—Order for payment of Balance due.]—In an undefended suit by ten *cestuisque trustent* against the administrator and other *cestuisque trustent,* the Court made a decree without reference for the payment to them by the administrator of their share of the balance appearing by the accounts filed by him to be in his hands, and of their costs of suit, without prejudice to the rights of the other *cestuisque trustent. Buggy v. Buggy,* 9 V.L.R. (E.,) 134.

Decree on further Directions—When made.]—Where in an administration suit it had been referred to the Master to inquire and report as to the estate of the deceased, and as to any outstanding debts and liabilities, and, on the suit coming on for further directions, the plaintiff asked for a decree in accordance with certain minutes of decree to which all the parties had consented, *Held, per Molesworth, J.,* that when a decree is pronounced in such a suit it becomes the property of all the creditors, and not merely of the parties to the suit, and that the decree would not be granted as asked, unless the Master advertised for creditors and none appeared. Case to stand over, to allow the Master to make the inquiry. *Orton v. Prentice,* 10 V.L.R. (E.,) 258.

(*b*) *Parties.*

Personal Representative must be a Party.]—The Court will not entertain an administration suit until there is a full personal representative before the Court, and the obtaining letters of administration without the letters being taken out does not constitute such a representative. *McLachlan v. McCallum,* 1 W.W. & A'B. (E.,) 110.

Wherever the Court has to administer an estate and the plaintiff can raise a general administrator, a mere administrator *ad litem* is not sufficient. *In the goods of Corcoran,* 2 W. & W. (I. E. & M.,) 117.

Persons claiming Adverse Title in a Chattel Real.]—In a suit against an administrator for the proceeds of a chattel real taken by him as the estate of the deceased, he cannot insist that a person, not a party, claimed that chattel real

by adverse title, except perhaps to have some indemnity provided; and such person so claiming is not a necessary party. G. and M. were partners in a station property; it was agreed that M should buy G.'s interest for £500 cash and £2000 payable in bills, further secured by a mortgage from M. to G. of the whole. Some station agents advanced the £500, and took a mortgage over M.'s interest. G. died and his brother A. G. took out administration. A. G. died, and Mrs. A. (sister to G.) took out administration *de bonis non* to G. and administration to A. G. During the partnership G. and M. applied for a Crown Grant of a pre-emptive section of 640 acres; the money for this was found by the station agents, and included in their mortgage. M. became insolvent. *Held* in an administration suit against Mrs. A., that M.'s official assignee and A. G.'s heir, though they might claim some interest in the proceeds of the pre-emptive section received by A. G., were not necessary parties. *Gordon v. Allan*, 3 A.J.R., 95.

Who must be—Next of Kin.]—An administrator of real estate and one of the next of kin, brought a suit for administration against the administrator of the personal estate. *Held* that the next of kin were necessary parties, as the greater part of relief sought could only be obtained in a suit in which they were before the Court, and the plaintiff had a complete remedy at law as to partial relief sought. *Dryden v. Dryden*, 1 V.L.R. (E.,) 4.

Mortgagee of Plaintiff.]—The plaintiff in an administration suit mortgaged his share of the estate. *Held* that the mortgagee was a necessary party. *Cleary v. Macnamara*, 4 V.L.R. (E.,) 221.

Supreme Court Rules, Cap. V., Rule 7.]—Supreme Court Rules, Cap. V., Rule 7, by which certain members of a class may sue on behalf of themselves and others, does not include the case of a suit by one of the next-of-kin of an intestate against the administrator. *Ibid.*

Next of Kin.]—One of the next of kin of an intestate filed a bill for administration on behalf of himself and all others, the next of kin, and stated in his bill the names of the others, alleging some to be within, and some without the jurisdiction. *Held* that the other next-of-kin within the jurisdiction, and the representatives within the jurisdiction of deceased next-of-kin, were necessary parties. *Ibid.*

Executor not Proving.]—The executor named in a will, to whom leave is reserved but who does not prove the will, is not a necessary party to a suit to administer the trusts of the will. *Dredge v. Matheson*, 5 V.L.R. (E.,) 266; 1 A.L.T., 73.

Residuary Legatee—Pecuniary Legatees—Supreme Court Rules, Cap. V., Rule 7.]—Suit by creditor of a residuary legatee against executors for administration and to enforce a charge on his share. *Held* pecuniary legatees under will were not necessary parties, being sufficiently represented by the executors, and that a contingent residuary legatee in remainder whose interest under will has been disposed of by a codicil is not a necessary party: Rule 7 of Cap. V., does not apply to assignees or mortgagees of legatees. *Bank of New South Wales v. Strettle*, 5 V.L.R. (E.,) 293; 1 A.L.T., 83.

(c.) *Costs.*

In a creditor's administration suit an infant defendant who is in fact represented by a solicitor nominated by the plaintiff creditor is not allowed costs otherwise than between party and party. *Colley v. Colley*, 2 W. & W. (E.,) 111.

Specific Devisees—Deficient Fund.]—In a creditor's suit against trustees, executors, and specific devisees, where there was a deficient fund *Held* that the specific devisees only were entitled to costs as between party and party, the plaintiff, executors, and trustees being only entitled to costs as between solicitor and client. *Dight v. Mackay*, 6 W. W. & A'B. (E.,) 163.

In What Cases—Exceptions to Report—Costs of Suit for Recovery of Title Deeds—Real and Personal Representatives—Costs Party and Party.]—In a suit by the real representative against the personal representative of an intestate for administration, plaintiff had excepted to Master's report on three points, the first being that the plaintiff's costs in an equity suit for the recovery of title deeds relating to intestate's property had not been allowed, this exception was overruled, the Court finding no evidence of the propriety of this suit; as to another exception it was allowed, and no order was made as to third. *Held* that plaintiff and defendant were each to abide their costs of exceptions; and as to the general costs of suit, (it appearing that each had made unfounded claims against the other as being entitled to distribution, that the defendant had made false statements of the state of the family in his affidavit to obtain administration, and had taken possession of property before obtaining administration, that the defendant had deferred the duty of realising and brought the case on to a second hearing) that each was entitled to costs out of the estate as between party and party only. *Mulloy v. Mulloy*, 3 A.J.R., 7.

Of Plaintiff going into Evidence.]—Suit by next of kin of an intestate for administration, and for accounts, the administrator having refused to account but having subsequently filed his accounts in the ecclesiastical jurisdiction and having by his answer submitted to account. The suit having gone on to evidence, *Held* at the hearing that if plaintiff had not gone into evidence the defendant would have been liable for costs up to the answer, but as plaintiff had gone into the evidence he was not entitled to his costs up to the hearing, but the whole costs must be reserved until after the taking of accounts. *Maher v. O'Shea*, 3 V.L.R. (E.,) 136.

Foreign Assets and Administrator—Person seeking Administration.]—In a suit for administration, plaintiff, pending the taking of accounts in the Master's office, moved for a receiver over the foreign assets, alleging discrepancies in the accounts of D., who was administrator both in Victoria and Tasmania, his incapacity to manage the property, and danger to the assets. The motion was refused, but *Held* that since D. had not answered the allegations against him, he must abide his own costs, and that, although the plaintiff had failed in his motion, his costs must be costs in the cause, the application being properly brought for protection of the property. *Dryden v. Dryden*, 4 V.L.R. (E.,) 202.

Of Plaintiff Beneficiaries.]—Where, in a suit for the administration of a testator's estate, by his beneficiaries against the representatives of his surviving trustee, the bill alleged improper investments, and non-investments of the estate, and the decree found that there had been such non-investments. *Held* that as no demand for accounts had been made from the surviving trustee, and the suit was amicably framed, and the bill did not pray for costs, the plaintiff should not be allowed costs of suit; that the surviving trustee having confused the affairs of the estate and occasioned the suit, no costs should be allowed his representatives. *Sichel v O'Shanassy*, 4 V.L.R. (E.,) 250.

Costs of Obtaining Administration—Jurisdiction to direct Payment out of Estate.]—The Supreme Court, in its ecclesiastical jurisdiction, has jurisdiction to direct payment out of the estate of administrator's costs in obtaining administration. Where litigation occurred between the administrators and M., claiming under a will subsequently propounded, *Held*, it was the duty of the administrators to protect the property, and they were entitled to their costs of litigation with M., in opposing such will. Administrators are entitled to their costs of obtaining administration in priority out of the assets. *Attorney-General v. Huon*, 7 V.L.R. (E.,) 30; 2 A.L.T., 130.

Plaintiff and Defendant each partly successful—Non-filing of Accounts by Administrator.]—In an administration suit the defendant, administrator of personalty, insisted upon the illegitimacy of the plaintiff. In the suit the plaintiff's legitimacy was established, and defendant proved his right to certain land, which right plaintiff denied. *Held per Molesworth, J.*, that each was to abide his own costs down to hearing and proceedings in Master's office with reference to the land; *per the Full Court*, that defendant was entitled to receive out of estate his costs as to the proceedings with reference to the land and subsequent costs, and that plaintiff was entitled out of estate to the costs respecting the land. *Dryden v. Dryden*, 7 V.L.R. (E.,) 166; 8 V.L.R. (E.,) 177 .

Where the defendant neglected to file accounts, and thereby in great measure occasioned the suit, *Held* that he should pay the costs of taking accounts in the suit. *Ibid.*

Of Executor behaving outrageously.]—Where an executor, a defendant in an administration suit, had executed a deed delegating all his powers to his co-executor, and subsequently revoked the deed and acted under the dictation of one of the *cestuisque trustent*, *Held per Molesworth, J.*, that he was not entitled to his costs out of the estate, but should be left to abide his own. *Leahy v. Lightfoot*, 8 V.L.R. (E.,) 344; 4 A.L.T., 109.

Costs out of the Estate—Executors allowing one Executor to Manage Estate and not filing Accounts.]—In an administration suit the bill alleged that the executors had allowed one of their number to manage the estate without interference by them; that he had mixed the moneys of the estate with his own money, and that as accounts had not been filed it was necessary to institute the suit. No loss had however been suffered by the estate, and the executors had received no allowance or commission for their expenses and trouble. *Held* that the executors should not be allowed their costs out of the estate. *Semble* that if they had applied for an allowance for expenses, &c., the Court would have allowed it. *Butcher v. Martin*, 10 V.L.R. (E.,) 260; 6 A.L.T. 113.

General Rule—Exception.]—The general rule in administration suits is that the costs should come out of the estate; though there are some instances in which the costs will be restricted to some part of the estate. Where the costs of any special inquiry not for the benefit of all the parties are trifling, the Court will not depart from the general rule, but will order costs to be paid out of the whole of the estate. *Pfeil v. Thorogood*, 10 V.L R. (E.,) 117.

Executors Mismanaging Estate.]—Where executors, though not acting wilfully or perversely, had been guilty of great negligence through which loss resulted, and the persons interested in the estate brought a suit seeking to make them liable and for account. *Held* that the executors should pay the costs of the suit. Upon appeal by the executors, the decree was varied in one or two particulars, and by way of set-off the costs of the appeal were ordered to be paid by the respondents. *Graham v. Gibson*, 8 V.L.R. (E.,) 43; 3 A.L.T., 106.

Person Submitting to be before the Court when there is a Doubt as to whether he is a Proper Party.]—In an administration suit, a defendant, as to whom there was some doubt whether he were a proper party, but who did not appeal from a decree keeping him before the Court, was not allowed his costs of suit. *Ibid.*

As between Solicitor and Client.]—In an administration suit the Court will not allow costs as between solicitor and client to all parties, but only to the trustees or executors, and not even to them, where the suit has been caused by their mismanagement of the estate. *Fraser v. Cameron*, 10 V.L.R. (E.,) 202.

ADMIRALTY (VICE.)

COURT OF.]—See SHIPPING.

ADMISSIONS.

See EVIDENCE.

ADULTERATION OF FOOD, DRINK AND DRUGS.

See HEALTH (PUBLIC.)

ADULTERY.

See HUSBAND AND WIFE.

ADVANCEMENT.

See WILL, TRUST AND TRUSTEE, AND INFANT.

ADVERTISEMENT.

UNDER PROBATE PRACTICE.]—*See* WILL.
UNDER MINING PRACTICE.]—*See* MINING.
UNDER PRACTICE IN ADMINISTRATION.]—*See* ADMINISTRATION.

AFFIDAVITS.

1. *Form and Contents.*
2. *Filing.*
3. *Practice relating to.*
4. *Under Probate Practice.*—*See* WILL.
5. *Under Insolvency Practice.*—See INSOLVENCY.

1. FORM AND CONTENTS.

Interlineation in the *jurat*—Common Law Procedure Statute 1865, Sec. 379—Instruments and Securities Statute, Sec. 56.]—An affidavit filed under the "*Instruments and Securities Statute,*" No. 204, Sec. 56, verifying the residence and occupation of the attesting witness to a bill of sale is not an affidavit "read or made use of in any matter depending in Court," within Sec. 379 of the "*Common Law Procedure Statute,* 1865," and so the fact that there is an interlineation or erasure in the *jurat* of such an affidavit will not render it invalid. *Smith v. Martin,* 3 W.W. & A'B. (L.,) 35.

Erasure in *jurat*—No Evidence that it was made before Affidavit sworn.]—Where there was an erasure in the *jurat* and no evidence that it was made before the affidavit was sworn the Court declined to consider its contents. *Regina v. Foster ex parte Molyneux,* 7 V.L.R. (L.,) 294; 3 A.L.T., 23.

2. FILING.

Time of.]—Affidavits upon a motion may be filed up to opening of motion, notwithstanding that motion has stood over on account of Court being unable to hear it on the day fixed in the notice. *Adelaide Steamship Company v. Martin,* 5 V.L.R. (E.,) 45.

3. PRACTICE RELATING TO.

Using—After Decree—Costs.]—Affidavits made after decree may, in certain cases, be used on hearings subsequent to decree, as affecting the imposition of costs; *e.g.,* to show that the amount had been tendered and refused. Where they merely allege that reasonable offers of compromise were not accepted, they should not influence the decision as to costs. *Jamieson v. Johnson,* 2 V.R. (E.,) 26; 2 A.J.R., 7.

Using—Filed after Motion.]—Answering affidavits filed after the opening of a motion for injunction cannot be read on the motion. *Davis v. Wekey,* 2 V.R. (E.,) 172.

Admissions—Statements contained in Affidavits.]—A bill set out statements made in affidavits sworn by the defendant in other judicial proceedings, and did not expressly negative their truth. *Held* that the truth of such statements was not to be taken as admitted for the purposes of the demurrer. *Jardine v. Hoyt,* 2 V.R. (E.,) 152; 2 A.J.R., 129.

Using.]—An affidavit containing an erasure not initialled by the Commissioner cannot be used in Court. *Regina v. Templeton, ex parte Jones,* 3 V.L.R. (L.,) 24.

See S.P. as to Interlineation. Blamires v. Dunning, 3 V.L.R. (L.,) 18.

But *see S. P., Jansen v. Beaney,* 4 V.L.R. (L.,) 167, where it was *Held* that it is not absolutely necessary for an interlineation in the body of an affidavit to be initialled before being used in Court.

Interlineation — Initialling — Affidavit of Time when Interlineation was Made.]—It is not absolutely necessary that the Commissioner, before whom an affidavit to be used in a cause in Court was sworn, should initial an interlineation in the body of the affidavit, and in answer to a summons to set aside an affidavit on the ground that such an interlineation was not initialled by the Commissioner, an affidavit may be filed that such interlineation was not made after the affidavit was sworn. *Jansen v. Beaney*, 4 V.L.R. (L.,) 167.

Affidavit sworn Abroad—Not Intituled—Defect how Cured.]—An affidavit sworn abroad before a Commissioner of the Supreme Court, verifying the execution of a power of attorney to a person to apply for letters of administration, but which affidavit is not intituled in any Court or matter, may be used, and the defect cured by making it an exhibit to a formal affidavit of the applicant under the power. *In the Estate of Downing*, 4 V.L.R. (I. P. & M.,) 49.

Taking Affidavit — Notary — Commissioner of Court.]—Where the execution of a power of attorney made in England was attested by a notary and not before a Commissioner of the Court for taking affidavits, the Court held that that was a matter which affected the Court only, and could be overlooked as a mere disrespect, and that the parties could not be affected by the irregularity. *In re Chaplin*, 1 A.L.T., 128.

Using with a View to Costs.]—On further directions an affidavit of facts occurring subsequent to the decree may be used on the question of costs *Murphy v. Mitchell*, 6 V.L.R. (E.,) 140, 141; 2 A.L.T., 26.

AFFILIATION.

See BASTARDS.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

ALIMONY.

See HUSBAND AND WIFE.

AMENDMENT.

See PRACTICE AND PLEADING.

ANIMALS.

1. Liability of Owner for Injuries by.

Vicious Bull—Negligence—Scienter.] — F., a mounted constable, went to a sale of M.'s stock on M.'s land. It was proved that F. had seen previously a notice "Beware of the Bull." The bull was offered for sale and M. declared in F.'s hearing that it was quiet. It was sold and turned out into a paddock on the fence of which F. was sitting. F. overheard remarks as to the animal's vice by people near him, and while crossing the paddock was injured by the bull. The jury returned a verdict with damages in favour of F. Rule *nisi* for a nonsuit. *Held* that F. had wilfully incurred an unnecessary risk and brought on himself the injuries inflicted. *Rule absolute. Per Privy Council* that there was evidence to go to jury in support of plaintiff's case, and that nonsuit was wrong, and that the finding of the jury was not so far against the weight of evidence as to justify sending the case to a new trial. Nonsuit set aside. Verdict entered for plaintiff. *Forbes v. M'Donald*, 3 V.R. (L.,), 185; 3 A.J.R., 78. On appeal to P.C., 5 A.J.R., 85.

Vicious Horse—Scienter.]—A defendant owned a vicious horse, and knew of its vice. The plaintiff and defendant owned adjoining lands, and defendant had fenced his half, but plaintiff had omitted to fence. Defendant's horse trespassed on plaintiff's land and kicked one of his horses. *Held* that defendant was liable. *Leyden v. Coram*, 3 V.L.R. (L.,) 94.

Kicking Horse—Injury Done on Owner's Land.]—The owner of a vicious horse, knowing it to be so, is liable for injuries done to persons on a piece of open land accessible to the public on which the owner has licenee to turn his horse loose. And apart from the owner's knowledge, he is liable if he turn a horse loose on such land so negligently as to endanger the safety of persons crossing it. *Southall v. Jones*, 5 V.L.R. (L.,) 402; 1 A.L.T., 98.

Injuries Done by Dogs.—*See Doyle v. Vance, post column* 28 *under* (3) *Dogs.*

Injury done by Trespassing Horse to Child sent to drive it off.]—A horse trespassed on land of M., whose wife, M. being absent, directed a child to drive it away, and the child while doing so

received a kick in the mouth. *Held* that the child might be regarded as the agent of the owner of the land, acting under his instructions in driving off the horse, and could recover against the owner of the horse. *Waugh v. Montgomery*, 8 V.L.R. (L.,) 290; 4 A.L.T., 77.

2. CONTAGIOUS DISEASES.

Scab—"Scab Act 1862," No. 143, Sec. 5.]—The words "when required by the inspector so to do" in Sec 5 refer only to the words immediately preceding them, viz., "or alter his brand," and do not relate to the earlier enactment in the section requiring all owners to brand. The obligation to brand is unconditional and not dependent on a previous requirement by the inspector. *McCrae v. Woodward*, 2 W. & W. (L.,) 113.

The information for breach of Act must be laid before justices in the name of the inspector. Where the information was laid in the name of an owner principally injured the Court granted an order to prohibit execution of the conviction. *In re Taylor, ex parte Nalder*, 2 W. & W. (L.,) 116.

"Pleuro-Pneumonia Act," No. 136—Act No. 123.]—The "*Pleuro-Pneumonia Act*," No. 136, did not continue the former Act No. 123, but expired with it. *Stick v. Hudson*, 1 W. W. & A'B. (L.,) 5.

Information for Keeping Scabby Sheep Without a License—Scienter.]—Magistrates dismissed an information under the Scab Act charging the defendant with keeping scabby sheep without a license, and stated an appeal case for the opinion of the Supreme Court. On the appeal the information was not before the Court, and the case as stated did not deny either knowledge by the defendant that his sheep were infected, or circumstances from which that knowledge might have been inferred. The Court refused to dismiss the appeal on the ground that it was necessary that a *scienter* should be alleged, and declined to consider how far it was bound to entertain the point then made for the defendant, and not previously made before the magistrates; holding that the information not being before the Court, it was sufficient that the case, as stated, did not necessarily negative knowledge by the defendant of his sheep having been affected, or circumstances from which that knowledge might have been inferred. *Shaw v. Phillips*, 3 W.W. & A'B. (L.,) 155.

An application for a scab-licence, made after the inspector has come upon the station for the express purpose of examining the sheep, is too late.—*Ibid.*

Scab—Act No. 231, Secs. 3, 15.]—G. was in charge of certain sheep which were scabby. He was summoned by the inspector and pleaded that the sheep were only in his charge temporarily, and belonged to several butchers whose names he offered to give. The justices dismissed the case. Upon appeal *Held* that G. being "in possession or charge" under Sec. 3 of the Act was liable. *Riley v. Gray*, 4 W.W. & A'B. (L.,) 217.

Scab—Appointment of Inspector—How Proved.]—The appointment of a scab-inspector and his having acted as such may be proved by his own *parol* evidence. *Goldie v. Allen*, 5 W. W. & A'B. (L.,) 82.

Scab—Evidence of Ownership of Scabby Sheep.]—On a proceeding against F. for having scabby sheep, a document signed by his overseer, and which was as follows:—"I hereby declare that there are depasturing on the Kangaroo Flat Paddock, 3,800 sheep, which I admit to be scabby, the same being in my charge, the property of F.," was *held* inadmissible as against F. *Ibid.*

Scab—Evidence of Infection—"Scab Act," No. 231, Sec. 22.]—Sec. 22 of the "*Scab Act*," No. 231, which provides that if any one sheep in a flock is proved to be infected with scab, all the sheep in such flock shall be deemed to be so infected, is to be construed as only establishing a presumption, capable of being rebutted by evidence, that the whole flock is so infected, and not as making the presence of one infected sheep conclusive evidence on that point. *Spurling v. Macartney*, 5 W. W. & A'B. (L.,) 166.

Scab—Information for not giving Notice of.]—An information alleged that F., on November 17th, on becoming aware that certain sheep of his were infected with scab, omitted to give notice to the inspector. *Held* that the information did not mean that F. only became aware of the sheep being infected on the 17th November; but that on the 17th November, being aware, he did not give notice. *Flower v. Stephen*, 2 V.R. (L.) 13; 2 A.J.R., 19.

Scab—"Scab Act 1870," Sec. 15.]—Section 15 of the "*Scab Act 1870*," No. 370, as to the publishing of the inspector's address in the *Government Gazette* is directory only and not mandatory. *Ibid.*

Scab—"Scab Act," No. 370, Sec. 47—Scab Brand on Sheep—No Evidence of Actual Infection.]—Where sheep were found running in a badly fenced paddock and not under care of a shepherd, and were branded with the scab brand, but the complainant could not state whether the sheep were actually infected on the day of seizure, the justices were of opinion that the words "deemed to be infected" were insufficient to satisfy Sec. 47 of the Act, and dismissed the summons. *Held* that the evidence was all in the direction of a breach of the Act, and that the justices, in the absence of evidence to the contrary, should have convicted, for that purpose amending the summons if necessary. *McKenzie v Coutts*, 3 A.J.R., 112.

Scab—Power to Increase Amount of Conviction.]—Justices had fined A. at the rate of one shilling per head of sheep for an offence under the "Scab Act," the number of sheep being then given as 700, and the amount of conviction being accordingly fixed at £35. It was afterwards discovered that there were 780 sheep, and the amount was accordingly

increased to £39. *Held* that the decision was in strict accordance with the facts proved. Rule to quash order discharged. *Regina v. Akehurst, ex parte Gavel*, 3 A.J.R., 119.

Scab—"Scab Act," No. 370, Secs. 25, 26.]—Sec. 26 is ancillary to Sec. 25, and provides the penalty for not branding and keeping branded sheep within Sec. 25. *Stirling v. Collins*, 3 V.R. (L.,) 162; 3 A.J.R., 70.

Act No. 370, Sec 67.]—L. had caused scabby sheep to be driven by his servant into a clean district without a written authority from the Inspector. *Held* that he was as liable under Sec. 67 as if he had driven them himself. *Stirling v. Little*, 3 V.R. (L.,) 180; 3 A.J.R., 73.

Scab—"Scab Act," No. 370, Sec. 49—Notice to Person across whose Run Scabby Sheep were driven.]—It is incumbent where the person who supports a prohibition to a conviction for driving scabby sheep across the run of a person owning 500 sheep on that run, without notice, to prove that the person across whose run the sheep were driven did not own 500 sheep. *Regina v. Puckle, ex parte McIntosh*, 4 A.J.R., 21.

Scab—"Scab Act," No. 370, Sec. 33—Notice of Disease.]—A notice to the Scab Inspector of the existence of a "doubtful" sheep on a run is not a sufficient notice within Section 33 of the "*Scab Act*" to entitle the owner to a protection for dipping, or to cover actual disease which appeared subsequently to the dipping. *Ker v. McWilliam*, 4 A.J.R., 22.

Scab—Answer to Permission to Dip—"Scab Act," No. 370, Sec. 30.]—J. was fined for not giving notice of the existence of scab in a flock of sheep when he became aware of it. The sheep were not actually infected with scab, but J. had dipped the sheep, his run being at the time in a quarantine district. J. had forwarded a letter to the inspector requesting permission to dip, but had received a reply that the request had been "laid before the board," but that the board had refused to grant the application. Sec. 30 of the "*Scab Act*" enacts that if an answer to a permission to dip is not received within seven days, the owner of the sheep may dip them without their being considered infected. On appeal by J.—*Held* that the reply that the board refused the application was not an answer within the meaning of Sec. 30, and appeal allowed. *Jones v. Stephen*, 4 A.J.R., 75.

Scab—"Scab Act, 1870," No. 370, Sec. 29—Notice—Amount of Fine.]—Where McC., the owner of a large number of sheep, was summoned for not giving notice of his sheep being infected, and the magistrates finding that twelve of the number only were actually infected, fined him for that number only. *Held* that by Sec. 29, the fact that one sheep was infected, was conclusive evidence of the whole number being infected, and that the fine should have been based upon that assumption; that notice given three years before, and a licence issued, were not a protection under the section. *McWilliam v. McJoll*, 5 A.J.R., 13.

Scab—Driving Infected Sheep into Clean District.]—A person who undertakes to send sheep by train from a place outside a clean district into such district, and who does not accompany them or send any one with them, and who signs a ticket for their carriage, is not liable to a penalty under Sec. 67 of the "*Scab Act* 1870" for driving such sheep into a clean district, since the offence is not committed till the sheep have crossed the boundary of the clean district, and at the time the sheep in the above case crossed, the defendant was not driving, conducting or conveying them, nor had he charge of them. *Matthews v. Elligett*, 2 V.L.R. (L.,) 49.

3. Dogs.

Poisoning.]—*See Regina v. Puckle, ex parte White*, 2 V.R. (L.,) 63; 2 A.J.R., 57, *post* under Offences (Statutory.)

Injuries caused by—Jurisdiction of Justices.]—*See ex parte Hilliard*, 2 V.L.R. (L.,) 2, *post* under Justice of the Peace.

Registration of—"Dog Act," No. 239, Secs. 3, 9.—Owner.]—In cases where no injury has been done by a dog the person to be held owner must have had the dog in his custody and control, and evidence that a dog unregistered has been harboured by or permitted to live on the premises of a person does not make such person the owner so as to be liable for non-registering it. *Skene v. Allen*, 5 V.L.R. (L.,) 179; 1 A.L.T., 12.

Injuries Done by—Liability of Owner.]—The owner of a dog is responsible for any damage fairly resulting from a trespass by that animal on the land of auother, even in the absence of its owner. *Doyle v. Vance*, 6 V.L.R. (L.,) 87; 1 A.L.T., 167. *Sub. nom., Vance v. Doyle.*

V.'s dog trespassed on D.'s land, and ran barking after a mare belonging to D., and so frightened her that she attempted to jump a fence, but fell and broke her neck. V. was not present at the time of the occurrence. *Held* that V. was liable for the value of the mare. *Ibid.*

4. Cruelty to Animals.

What is—"Police Offences Statute, 1865," Secs. 3, 23.]—Hunting a tame dog with a pack of hounds is sufficient to constitute the offence of committing cruelty to animals within the meaning of the "*Police Offences Statute*, 1865," Secs. 3, 23. *Anderson v. Wilson*, 4 A.J.R., 153.

5. Other Points.

Shooting Goats Trespassing—"Pounds' Statute," No. 478, Sec. 18.]—B.'s goats were trespassing on W.'s land, and W. shot at them and wounded one, which did not die until nine days afterwards. *Held* that W. was protected under Sec. 18 of the Act. *Bagshaw v. Wills*, 5 A.J.R., 115.

ANNUITY.

Chargeable on Real Estate.]—A testator bequeathed to his widow an annuity of £400, payable out of the rents of his real estate, and directed it to be charged in equal proportions on the *corpus* of the respective shares of his five children in such real estate, and declared such shares to be specific portions of real estate described as to each child by name. *Held* that the widow was entitled to five annuities of £80 each, to be a charge upon such shares respectively until paid. *Johnston v. Brophy*, 4 V.L.R. (E.,) 77.

Land Overrun by Rabbits—Motion for Leave to Spend Money in Extermination of out of Annuity.]—*See Brown v. Abbott, ante column.*

Restraint on Alienation of—Sum equivalent to Purchase of.]—A testator by will directed his executors to purchase an irredeemable Government annuity of £59 for life, declaring that it was intended to be a provision for his son for life, and that it should not "be competent for executors to pay the value of the annuity in lieu thereof." *Held* upon petition under Sec. 61 of "*Statute of Trusts* 1864," that the executors should pay the annuitant the price of the annuity, after deducting the amount of probate duty thereon. *In re Thomas*, 3 V.L.R. (E.,) 241.

Permanent or for Life.]—A. by deed poll executed a declaration of trust, stating he held certain property upon trust *inter alia* to pay B. "a sum of £100 per annum," and by will he confirmed this deed poll. *Held* that B. took a perpetual annuity of £100 per year. *McKinnon v. McInnes*, 3 V.L.R. (E.,) 253.

Annuity for Maintenance of Children during Infancy held to be an Annuity for Life of Annuitant—On what Property Chargeable.]—*See Westwood v. Kidney*, under WILL—Construction and Interpretation of—(*General Rules.*)

Devise of Lands subject to Charge—Devise in Codicil of Part of Lands free of Charge—Destruction of Charge.]—A. and his son J., being entitled to a station in the proportion of two-thirds and one-third respectively, obtained a Crown grant to them jointly of a pre-emptive section thereof. A. died, by his will devising the station and all pre-emptive sections thereof to J. and two brothers in equal shares, subject to their executing a mortgage of the station to secure a fund to provide an annuity for their sisters. J. in A.'s lifetime assigned his interest in the section to A., and A. by a codicil devised the section absolutely to J. The station property exclusive of the section being inadequate for the mortgage to be raised, owing to sales of sheep, &c., by A., *Held* that the station property was not chargeable with the annuities. *Howitt v. Smith*, 5 V.L.R. (E.,) 277; *sub. nom. Hewitt v. Smith*, 1 A.J.T., 73.

ANSWER.

See PRACTICE AND PLEADING.

APPEAL.

I. To Privy Council.

(1) *Where Appeal Lies.*
(2) *Appealable Amount.*
(3) *Security and Stay of Proceedings.*
(4) *Payment of Deposit and time for applying for leave.*
(5) *Appeal not Prosecuted.*
(6) *Practice.*
(7) *Other points.*

II. To Full Court.

(1) *Jurisdiction and Powers of Court.*
(2) *Where Appeal lies.*
(3) *Notice and Grounds of Appeal.*
(4) *Time for Appeal and Payment of Deposit.*
(5) *The Hearing.*
(6) *Security for Costs.*
(7) *Staying Proceedings pending Appeal.*
(8) *Costs of Appeal.*
(9) *Cross Appeal and other points.*

III. From Master in Equity.

In Insolvency.]—*See* Insolvency.
From Justices to Supreme Court.]—*See* Justice of Peace.
In Mining.]—*See* Mining.
From County Court.]—*See* County Court.
To General Sessions.]—*See* Sessions.

I. To Privy Council.

(1) *Where it Lies.*

From Insolvent Court—Appealable Amount.]—Where a rule *nisi* obtained by a creditor for £288 to expunge proof of a debt by another creditor for £50,000 was discharged. *Held* by the Full Court, reversing *Molesworth, J.*, that an appeal would lie. *Ex parte Rolfe, in re Rutledge and Co.*, 2 W. & W. (I. E. & M.,) 51.

Leave to Appeal to Privy Council—Act 15, Vic. No. 10, Sec. 33.]—An order confirming the Master's Report is one by which the rights of the parties may be ultimately determined and concluded, and therefore under Act 15, Vic. No. 10, Sec 33, an appeal to the Privy Council lies against such an order. *Heape v. Hawthorne*, 2 W.W. & A'B. (E.,) 76.

Decision by which the Merits are Concluded—What is—"Supreme Court Act," 15 Vic., No. 10, Sec. 33.]—An order granting a rule absolute for a new trial is not a "decision by which the merits of the case may be concluded" within the meaning of "*The Supreme Court Act*," 15 Vic., No. 10, Sec. 33, which allows an appeal

to the Privy Council from a decision concluding the merits of a case; but refusing such a rule is a "decision" by which the merits are concluded within the meaning of the section. *Crooks v. Ormerod*, 3 W. W. & A'B. (L.,) 132.

Plea—"Final Judgment, Decree, Order, or Sentence."]—In a suit by information by the Attorney-General at the relation of the B. Company, and bill by the B. Company against the P. Company, seeking an injunction and account of gold, the defendants put in a plea traversing the incorporation of the plaintiff company. This plea was allowed by *Molesworth, J.*, but overruled by the *full Court*. On summons for leave to appeal to the P. C.—*Held* that a judgment on a plea does not "conclude the merits of the case" within the meaning of 15 Vic., No. 10, Sec. 33, because an answer may be put in: That where no account has been directed, and where it is problematical whether any money will be found due by the defendants to the plaintiffs, the fact that if an account were directed there would be a dispute as to property worth £1000 will not authorise an appeal. Leave refused. *Attorney-General v. Prince of Wales Company*, 6 W. W. & A'B. (E.,) 4.

From Order Refusing Motion for Injunction.]—*Per Molesworth, J.* "The meaning of the Act 15 Vic., No. 10, is that before an appeal can be allowed the Court must do something by which the rights of the parties may be concluded; not merely intimate an opinion upon an interlocutory application, which being applied to the case at the hearing would determine the rights of the parties. The Court must do some curial act which would determine the rights of the parties." Motion for leave to appeal to the Privy Council from an order refusing a motion for an injunction dismissed with costs. *Melbourne and Hobson's Bay Railway Company v. Mayor of Prahran*, 6 W.W. & A'B. (E.,) 228, 238.

Interlocutory Injunction.]—Where an order sought to be appealed from is an interlocutory one, and the result of such appeal may or may not be final, inasmuch as there are other questions involved than those which the interlocutory application deals with, the Court will not give leave to appeal. *Davis v. The Queen*, 6 W.W. & A'B. (E.,) 106.

From Primary Judge.]—On motion for leave to appeal to the Privy Council from the decision of the Primary Judge, within the fourteen days allowed for an appeal to the Full Court, *Held* that the Act 19 Vic., No. 13, sec. 5, gives the right to appeal to the Privy Council without an appeal to the Full Court. *Davis v. The Queen*, 1 V.R. (E.,) 33; 1 A.J.R., 22.

Leave to appeal will not be granted against the refusal of an order *nisi* to quash on *certiorari* an order for commitment of an attorney for misbehaviour at Petty Sessions. *Regina v. Mollison*, 3 V.R. (L.,) 3.

Appeal to Privy Council—From Primary Judge—"Final Judgment Order or Decree."]—There may be an appeal direct to the Privy Council from the Primary Judge. The allowance of a demurrer is not generally conclusive, and therefore it is not the subject of appeal. But if the judgment even on demurrer is final leave will be given to appeal, but if a demurrer is for want of parties it is not final, and leave will be refused. *Woolley v. Ironstone Hill Lead G.M. Company*, 1 V.L.R. (E.,) 237.

Against an order placing shareholders on list of contributaries for the amount of £2300 each an appeal lies. *In re Cognac Company, Dwyer and Kelly's case*, 3 V.L.R. (E.,) 146.

An appeal does not lie against an order overruling a demurrer, because nothing is concluded by such order. *Longstaff v. Keogh*, 3 V.L.R. (E.,) 189.

Order Overruling Plea.]—Since an order overruling a plea is so conclusive that the same defence cannot be raised at the hearing, an appeal to the Privy Council lies from such an order. *Brougham v. Melbourne Banking Corporation*, 3 V.L.R. (E.,) 202.

Appeal from Interlocutory Decree.]—A motion, by a defendant, for leave to appeal to the Privy Council, was supported by an affidavit in general terms, that the interlocutory order sought to be appealed from was in respect of a matter in issue above the value of £500. The order affirmed a decree, which directed an account; and the amount payable by the defendant depended upon the result of the account. There was no affidavit by the plaintiff that the amount in issue was under £500. *Held*, that if the decree had been final, leave to appeal would have been granted; but that being only interlocutory, defendant would be entitled to raise the whole question of its liability, upon an appeal from the decree on further direction; and motion dismissed without costs. *United Hand-in-Hand and Band of Hope Company v. National Bank of Australasia*, 6 V.L.R. (E.,) 198; 2 A.L.T., 72.

From Order Discharging Rule Nisi to Rescind Order of Judge for Delivery of Bill of Costs.]—Leave was granted to appeal to the Privy Council against an order of the Court discharging a rule *nisi* to rescind an order of a judge for delivery of a bill of costs; it being sworn and not denied that the sum involved exceeded £500. *Re Duffett ex parte McEvoy*, 8 V.L.R. (L.,) 160.

Ejectment—Appeal by Unsuccessful Defendant.]—In an action of ejectment, where the lease would expire before the appeal could be decided, the Court allowed the unsuccessful defendant (tenant,) to appeal on the terms that the plaintiff be allowed to issue execution, on giving security for carrying out the decision of the Privy Council, and for paying to the appellant the *mesne* profits, after deducting rent, &c., the amount to be ascertained by

the prothonotary, if the parties could not agree upon it. The appellant to pay the costs of the action when execution issued, the plaintiff giving security to refund them if the appeal should be allowed, and the appellant to give security for £400 for the costs of the appeal. *Poole v. Halfey*, 8 V.L.R. (L.,) 317.

(2) *Appealable Amount.*

Value of Subject Matter.]—Upon application under the Orders in Council for leave to appeal to the Privy Council, the value of the matter in issue is a fact to be tried and controverted, and upon which both sides are to be heard. *Kettle v. The Queen*, 3 W. W. & A'B. (E.,) 141.

From Judgment on Demurrer—Claim £500 but Not yet Tried.]—Leave refused. *See M'Kinnon v. Board of Land and Works*, 3 A.J.R., 47.

Appealable Amount—Incidental Effect of a Decree.]—Where a decree was made in a suit for specific performance of an agreement to give a right-of-way by which a right-of-way was granted, the owner of an adjoining lot refused to give the defendant a right-of-way over a certain piece of land (alleged by the defendant to be worth to himself £500,) because of the defendant being unable to give to the said owner a certain right-of-way in consequence of the said decree. On motion for liberty to appeal to the Privy Council against the decree, *Held* that the incidental effect of a decree upon other property of the defendant not directly affected by the decree could not be taken into account in making up the appealable amount, and motion refused. *Wakefield v. Parker*, 6 W. W. & A'B. (E.,) 322; N.C., 40.

Matter "Indirectly" Involving a Claim or Demand Relative to Property of the Value of £500.]—A company was fined £10 by a Justice's Order, and the Supreme Court affirmed the order. An application for leave to appeal to the Privy Council was granted on the uncontradicted affidavit of the company's secretary that the case "indirectly" involved a claim or demand relating to property of the value of £500. *Bendigo Waterworks Company v. Thunder*, 1 V.R. (L.,) 123; 1 A.J.R., 103.

From Order as to Compulsory Sequestration—How Amount Determined.]—The value of the debtor's estate, and not the amount of the petitioning creditor's debt, is the standard by which the amount of the matter in issue is to be measured on an appeal to the Privy Council, under Sec. 33, of No. 10, from an order granting or refusing compulsory sequestration. *In re M'Donald*, 2 V.R. (I. E. & M.,) 12; 2 A.J.R., 131.

But where the property could be recovered by the assignee only by a litigation, which the Court thought must be unsuccessful, leave to appeal refused.—*Ibid.*

Direct from Primary Judge—Appealable Value—Amount of Security—Mining under a Street.]—By a decree made by the Primary Judge an injunction was granted restraining defendants from mining under a street *ad medium filum viae*. The plaintiff not being satisfied with this, applied for leave to appeal direct to Privy Council. The affidavit of the appellant stated value of the right sought to be £500. The affidavit of the respondent did not deny this, but stated that such a right could not have a definite value. *Held* that as no affidavit had been made specifically stating that the value of right was not £500, leave would be given, and the security was entered as £300, the case being not a heavy one. *The Extended Hustler's Freehold Company v. Moore's Hustler's Freehold Company*, 5 A.J.R., 154.

Amount in Issue of the Value of £500.]—Leave to appeal to the Privy Council, under the Orders in Council of June 9th, 1860, will not be granted where the matter in issue is of the value of £500, and there is nothing else involved. *Gardiner v. McCulloch*, 2 V.L.R. (L.,) 128.

Interest on Judgment.]—Interest upon the damages awarded in an action is not to be considered as part of the sum in issue for the purpose of obtaining leave to appeal to the Privy Council under the Orders in Council of June, 1860. *McSwain v. McMillan*, 2 V.L.R. (L.,) 271.

Amount in Issue—Award of £6000—Difference in New Award, £220.]—Arbitrators had made an award of £6000 as the purchase money of a business, and the award was referred back to the arbitrators by order of the Court, and the amount awarded by the new award was less by £220 than the sum awarded by the former one. On an application for leave to appeal to the Privy Council against the order referring back the award—*Held* that the matter in issue was not the value of the business, but the difference between the two valuations of the arbitrators, and this being under the appealable amount, leave was refused. *In re Armstrong and Culley*, 4 V.L.R. (L.,) 178.

(3) *Security for Costs and Staying Proceedings.*

Security for Costs—By the Crown—15 Vic., No. 10, Sec. 33—Act, No. 241.]—Under 15 Vic., No 10, the Court must require security for costs all cases; and under the "*Crown Remedies and Liabilities Statute*, 1865," No. 241, the Crown is in the same position as a subject as to the right and liability to security for costs. *Davis v. The Queen*, 1 V.R. (E.,) 33; 1 A.J.R., 22.

Staying Proceedings Pending an Appeal to Privy Council—Costs.]—On motion for leave for defendant to appeal to the Privy Council, and that all proceedings to execute the decree or enforce payment of the costs might be stayed pending such appeal. *Ordered* that taxation would continue, but that no execution or process for the recovery of costs should be taken if the defendant brought the amount into Court within one month after taxation. *Semble.* If the amount be brought into Court, the Court will direct that it may be taken out by plaintiffs on giving security to refund the amount so

taken out in the event of the decree being varied or reversed as to costs by the Privy Council. *Larnach v. Alleyne*, 2 W.W. & A'B. (E.,) 39.

Security—Against Crown.]—Upon leave being given to appeal against a decision in favour of the Crown the Court is bound by the Orders in Council, if the decree be carried into execution, to require that the Crown shall enter into security for the due performance of the order of the Privy Council on the appeal. *Kettle v. The Queen*, 3 W.W. & A'B. (E.,) 141.

Security for Costs.]—In giving leave to appeal to the Privy Council the Court has no jurisdiction to dispense with security for costs, but has merely a discretion as to the amount. *Goodman v. Boulton*, 5 W.W. & A'B. (E.,) 86.

Staying Proceedings.]—Execution of conveyances, and delivery of possession, come within the words "performing any duty" in the Act 15 Vic., No. 10, Sec. 33, and in the Order in Council relative to appeals to the Privy Council, as to which proceedings may be stayed, pending an appeal to the Privy Council. *Goodman v. Boulton*, 5 W. W. & A'B. (E.,) 86, 101.

Several actions were brought under Act 241, and judgments obtained against the Crown, but the Supreme Court refused leave to appeal except upon the terms of the Attorney-General paying the amounts of the verdicts with costs, and absolutely refused leave in two of the cases where the amount recovered was less than £500. *Held per Privy Council*, upon petition that leave to appeal should be given without the terms of finding security for the costs of the appeal or the other terms imposed, the appeals to be consolidated. *In re Attorney-General*, L.R. 1 P.C., 147.

Act 15 Vic., No. 10—Time for Perfecting Security.]—Leave to appeal was given by the Court on terms of giving security within three months for the costs of the appeal. A bond was approved of by the Master and filed as of record, but such bond, owing to objections by defendant's solicitors as to competency of sureties, was not filed within the three months. Thereupon the Court revoked the leave to appeal already given. *Held per Privy Council*, upon petition, that plaintiffs were at liberty to appeal upon lodging in the Colonial Office the sum of £300 as security for the costs of the appeal, liberty being given to the plaintiffs to apply to Supreme Court of Victoria to cancel the bond lodged there. *Webster v. Power*, L.R. 1 P.C., 150.

Issuing Execution pending Appeal—Restitution.]—Where a rule *nisi* for leave to appeal to the Privy Council has been obtained, if execution be issued before the return of the rule, a Judge in Chambers may order restitution to be made. *Munro v. Sutherland*, 4 A.J.R., 169.

Security for Costs—Failure to Give Security within the Three Months Provided in 15 Vic., No. 10—Absence of Master During Vacation—Supreme Court Rules, Chap. 1, Sec. 15.]—The defendant C. obtained an order on October 20, 1873, for leave to appeal to Privy Council, and did not give the security until February 11, 1874, alleging the intervention of the Long Vacation, December 23—February 1, and the absence of the Master during that time. On motion to set aside the order *Held* that in the case of an appeal time runs during the vacation, and that Supreme Court Rules, Chap. 1, Sec. 15, only applies to ordinary proceedings in the Victorian Court, and not to proceedings under Imperial provisions. Order made rescinding order of October 20, 1873. *Johnson v. Colclough*, 5 A.J.R., 66.

Stay of Proceedings—Security—Receiver.]—On motion for leave to appeal under the Orders in Council either execution of order appealed from may be stayed simply, or execution may be allowed to go, the respondent giving security to perform such order as Privy Council may make. A receiver may be appointed upon a substantive cross motion by the respondent. *Johnson v. Colclough*, 1 V.L.R. (E.,) 31.

15 Vic., No. 10, Sec. 33—Stay of Proceedings.]—On motion for leave to appeal against a decision of Mr. Justice Molesworth in a case respecting the forfeiture of mining shares, a consent order was drawn embodying terms on which plaintiff (the respondent) should be allowed to deal (pending appeal) with shares to which decree declared him entitled. *M'Lister v. Garden Gully Company*, 5 A.J.R., 170.

Security for Costs.]—*Semble*, that the Master cannot, when considering the security to be given, entertain the question of the probability or improbability of success. *Newey v. Garden Gully Company*, 2 V.L.R. (E.,) 26.

Staying Proceedings — When Granted.] — On motion for leave to appeal to the Privy Council, the Court can only stay execution of the judgment, upon the applicant giving security, or allow execution to be carried out, the respondent giving security. The Court has no power to impose terms on the appellant, notwithstanding that, by a decree in another suit almost similar in its facts, the Privy Council has virtually decided against him. *Ibid.*

Staying Proceedings.]—On leave being granted to appeal against an order placing two shareholders on the list of contributories to the amount of £2,300 each, such order being obtained by one creditor only, stay of proceedings will not be ordered unless all parties interested, including the official liquidator, are heard. *In re Cognac Company, Dwyer and Kelly's case*, 3 V.L.R. (E.,) 146.

Accounts.]—Proceedings will not be stayed pending an appeal on the ground that the decree directed accounts to be taken which in the event of an appeal being allowed would have to be taken on a different footing. *White v. London Chartered Bank*, 3 V.L.R. (E.,) 174.

Staying Proceedings — Security.] — When an appeal is pending to the Privy Council from an

original decree, and no stay of proceedings is obtained thereon, and an order on further directions is made, the Court will not stay proceedings until security be given to refund, so as to preserve the subject matter of the suit until the appeal to the Privy Council has been disposed of. *The United Hand-in-Hand and Band of Hope Company v. National Bank of Australasia*, 4 V.L.R. (E.,) 173.

(4) *Payment of Deposit and Time for Appealing.*

Time for Appealing—15 Vic., No. 10, Sec. 33.]—Where an application for leave to appeal had been made within the thirty days prescribed by the Act, and had been adjourned and referred to another judge, and was finally heard beyond the period of thirty days. *Held* that the application having originally been made within the thirty days, the provisions of the Act were sufficiently complied with, and leave to appeal given. *Attorney-General v. Prince of Wales Company*, 6 W. W. & A'B. (E.,) 4.

Payment of Deposit—Suing in forma pauperis.]—On motion to appeal to Privy Council, the deposit not having been paid, *Held* that the payment of deposit was a condition precedent, even although the appellant was suing *in formâ pauperis*, and appeal struck out *Merry v. Hawthorn*, 6 W. W. & A'B. (E.,) 329.

(5) *Appeal not Prosecuted.*

Appeal not Prosecuted.]—Defendants obtained leave to appeal to the Privy Council upon giving, within three months, security for the costs of the appeal; execution for recovery of plaintiffs' costs of suit being stayed until they gave security for refunding such costs if so ordered by the Privy Council. The appeal was not proceeded with, and no security for costs given by the defendants. After the lapse of the three months, order made revoking the leave to appeal, and giving liberty to the plaintiffs to proceed for their costs, notwithstanding the former order. *The Mayor, &c., of Ballarat v. the Bungaree Road Board*, 1 V.R. (E.,) 166.

Taking Bond for Security off File.]—A plaintiff obtained leave to appeal to the Privy Council on the usual terms as to security for costs, &c., and allowed two years to elapse without moving in the appeal. He applied to take off the file a bond which he had given as security for the repayment of costs. *Held* that the Court had no power to grant the application, the case being no longer in the Court, or within its jurisdiction. *Goldsbrough v. McCulloch*, 1 V.R. (L.,) 192; 2 A.J.R., 1.

6. *Practice.*

Leave to Appeal—Bond for Performance of Terms—Alteration in—Time for taking Objection—Power of Supreme Court to Rectify.]—Where a rule for leave was obtained to appeal to the Privy Council on certain terms, and two sureties entered into a bond for the due performance of those terms by the appellant; and where the rule and bond were subsequently, without the knowledge or consent of the sureties, but with the knowledge of the appellant's attorney, drawn up with an additional provision extending the liability of the sureties, and the bond was executed by them under the impression that it was in accordance with their original undertaking, and no notice or knowledge of the alteration reached the sureties till notification of the result of the appeal arrived in Victoria; *Held* that the time within which the sureties could take objection to the alteration should be considered to run from the time when the news of the result of the appeal reached Victoria; and that there was power in the Court to rectify the mistake by ordering the bond to be cancelled on payment of the amount for which the rule ought properly to have been drawn up. *Bateman v. Moffatt, Moffatt v. Hearn*, 1 V.R. (L.,) 107; 1 A.J.R., 97.

Making Privy Council Order as to Costs an Order of Court—Notice to Respondent.]—Motions by petitioners (all similar in effect) that order of Privy Council as to costs may be made an order of Supreme Court. *Held* it was necessary to serve respondent with notice of motion and it would be better to move for taxation of costs. On application being renewed *Ordered* that order of Privy Council be made an order of Court, and that costs of appeal be referred to be taxed. *McMillan v. The Queen, Winter v The Queen*, 1 V.L.R. (E.,) 253.

Costs of Preparing Transcript—Jurisdiction of Court.]—The costs of an appeal to the Privy Council, up to the order for leave to appeal are in the cognizance of the Court, and should be taxed by the Master. All subsequent costs, inclusive of the costs of preparing the transcript of the case for transmission to the Privy Council are, if not beyond the jurisdiction of the Court, certainly not within the scope of the present (April 16th, 1878,) rules of Court. *Blackwood v. Mayor, &c., of Essendon and Flemington*, 4 V.L.R. (L.,) 99.

Costs—Taxation—Costs Prior to Transmission of Case—Leave to Appeal.]—The costs prior to the transmission of a case for appeal to the Privy Council may be taxed on the rule giving leave to appeal. *Urquhart v. McPherson*, 4 V.L.R. (L.,) 290.

Summons in Chambers—15 Vic., No. 10, Sec. 19—Right to Begin.]—The party supporting the summons has a right to begin on a summons in Chambers under the Act 15 Vic., No. 10, Sec. 19. *Re Duffett, ex parte McEvoy*, 8 V.L.R. (L.,) 160.

(7) *Other Points.*

Rule to Rescind Order for Leave to Appeal.]—Where defendants had obtained liberty for leave to appeal, and had paid the £500 required into Court, on rule *nisi* by defendants to rescind the order, *Held* that Court had no jurisdiction, and rule discharged. *Byrnes v. Clough*, 2 W. W. & A'B. (L.,) 17.

Adding Costs of Appeal to Judgment of Supreme Court.]—Allowing the successful party to a petition against the Crown, which has gone on appeal to the Privy Council, to add the costs of the appeal awarded by the Privy Council to his final judgment, is not a violation of the principle restraining the Supreme Court of Victoria from interfering with a case after an appeal to the Privy Council, since that would be the most efficacious mode of giving effect to the judgment on appeal. *Regina v. Dallimore*, 3 W. W. & A'B. (L.,) 131.

Two Orders.]—Leave was given under 15 Vic., No. 10, to appeal and the security was perfected, and the appellants moved for leave to appeal, having given the security required in the former order. *Molesworth, J.*, made the second order, intimating that his granting the order did not prove that it was necessary. *In re Armytage*, 3 V.L.R. (I. P. & M.,) 41.

II. To Full Court.

(1) *Jurisdiction and Powers of the Court.*

Except by consent the Court will not hear an appeal from a decree unless the decree be drawn up. *Waddell v. Patterson*, 1 W. & W. (E.,) 43.

Objections to Form of an Appeal.]—Objections to form of an appeal should be heard by Full Court and not by Primary Judge. *Harrison v Smith*, 6 W. W. & A'B. (E.,) 182.

The Full Court will in certain instances control the exercise of discretion by the Primary Judge. *Learmonth v. Bailey*, 1 V.L.R. (E.,) 191.

For Facts—*See* S.C. under Practice and Pleadings—Bill.

Will—Mental Capacity—Questions of Fact.]—In an appeal from a judgment of *Molesworth, J.*, in which he decided that there was not sufficient evidence to show that a testator knew what he was doing, and that the will was invalid, *Held* that the Full Court in a case of this nature, in which the principles of law are very intelligible, and in which the real question is one of fact, will not disturb the judgment of the Primary Judge unless it is manifestly and unquestionably wrong. *In the will of Wolff*, 1 V.L.R. (I. P. & M.,) 21.

Equity Appeal Sittings—Court cannot take General Business.]—The Full Court sitting for the hearing of Equity appeals will not entertain any other business than such appeals, and consequently will not hear a motion to turn over a prisoner in the sheriff's custody for contempt. *Sturgeon v. Murray*, 8 V.L.R. (E.,) 41.

Appeal from Discretion of Judge—When Court will Disturb.]—The Appellate Court retain a controlling power in all cases in which a Judge has a discretion vested in him by a statute which does not declare his decision to be final. The Court will not exert that power, and overrule the Judge's decision, merely because it does not agree with him in opinion as to the grounds on which his discretion has been exercised, unless there is no evidence to support his decision; or it appears that the Judge has been misled by false evidence; or that injustice will be done through the mistaken exercise of his discretion. *Merry v. The Queen*, 10 V.L.R. (E.,) 135.

Where the defendants desired to have a commission to examine a person who was a most important witness for the defence, and no other witness could serve as a substitute for him upon certain questions on which the defence mainly rested, and there were no means by which such person could be compelled to come to Victoria and submit himself for examination there; *Held* that the case came within the third of the above exceptions, and an order refusing a commission was reversed on appeal, although a former commission obtained by some co-defendants, employing the same solicitor, had been allowed to expire without any evidence being taken under it. *Ibid.* S.C. 6 A.L.T., 14.

(2) *When Appeal lies.*

From Judge in Chambers—19 Vic., No. 13, Sec. 4.]—An appeal lies to the Full Court from an order of a Judge sitting in Chambers, the functions of the single Judge being by the Act subject to an appeal to the Full Court. *In re Kingsland*, 6 W. W. & A'B. (I. E. & M.) 10, 13; N.C., 33.

From Exercise of Discretion of Primary Judge.]—In a suit by an assignee of plaintiff's rights under a decree, the plaintiff having refused to prosecute the suit, the assignee moved, upon notice to the plaintiff and the defendants, for conduct of the suit and for an order on the plaintiff to attend in the Master's office for taking accounts. The Primary Judge refused the application. On appeal, *Held* that in the absence of precedent, and upon a mere matter of practice, the discretion of the Primary Judge would not be revised on appeal, and appeal dismissed with costs. *Watson v. Kyte*, 2 V.R. (E.,) 61; 2 A.J.R., 6, 41.

Opinion Given by Judge under Sec. 61 of Statute of Trusts.]—An appeal does not lie against the opinion of a judge given under Sec. 61 of "*Statute of Trusts* 1864" No. 234. *In re Isaac Folk*, 3 V.L.R. (E.,) 55.

From Order upon Further Directions.]—An order on further directions declared debts, legacies, funeral and testamentary expenses, &c., payable proportionately out of reversionary realty and personalty; and gave liberty to the trustees to sell the reversions, subject to the life estates. The trustees declined to exercise the liberty, and a subsequent order was made directing an absolute sale forthwith. From this second order the trustees appealed. *Held* that the appeal was too late; it should have been brought against the order on further directions. *Attorney-General v. M'Pherson*, 4 V.L.R. (E.,) 51.

For Costs.]—As a general rule, an appeal for costs will not lie; yet, where in a suit, in substance for redemption, but in form charging the mortgagee with improper dealings with the mortgaged property, with a fraudulent disposition of it, and retention of the proceeds, the mortgagee had been decreed to pay the costs; *Held* that such mortgagee was, under the special circumstances of the case, justified in appealing. The question of costs, as considered by the Court of Appeal, must be considered as a question of principle and not of discretion, and the Court of Appeal will not interfere with decision of Primary Judge in matters of costs, except under peculiar circumstances. *United Hand in Hand &c., Company v. National Bank of Australasia,* 4 V.L.R. (E.,) 173, 191.

See also Dryden v. Dryden, 8 V.L.R. (E.,) 177, 181; 4 A.L.T., 25, under heading COSTS—Of and against particular persons.

Costs — Discretion of Primary Judge.] — An appeal will not lie from the discretion of the Primary Judge in allowing or disallowing costs out of the estate to a person unsuccessfully attempting to obtain probate. *In the Will of Abel,* 4 A.L.T., 92.

For costs.]—Where an executor, who was nominally a defendant, acted with the plaintiffs, and was virtually a co-plaintiff, and the plaintiff failed in the object of the suit, *Held per* the Full Court, that he was not entitled to appeal on the ground that his costs were not allowed him out of the estate, unless he appealed from the whole decree made, and succeeded in establishing that he had been right throughout in his view. *Leahy v. Lightfoot,* 8 V.L.R. (E.,) 344; 4 A.L.T., 109.

Judge in Chambers—Refusal to grant Commission —19 Vic., No. 13, Sec. 5]—An appeal lies, under Sec. 5 of 19 Vic., No. 13, to the Full Court from a decision in Equity of a Judge in Chambers, refusing to grant a commission to examine witnesses abroad. *Merry v. The Queen,* 10 V.L.R. (E.,) 135.

(3) *Notice and Grounds of Appeal.*

Semble.—That the mere fact of any particular ground of appeal being included in the notice of appeal is not to bind the Court to take notice of it, if it be not opened or alluded to in argument. *Trainor v. the Municipal Council of Kilmore,* 1 W. & W. (E.,) 293, 307.

"Opposite Party"—Who is]—A co-defendant is not an "opposite party," so as to render it necessary to serve him with notice of appeal, especially when he has not appeared at the hearing. *London and Australian Agency Company Limited, v. Duff,* 5 W.W. & A'B. (E.,) 19, 26.

What Grounds Sufficient.]—Where a bill has been dismissed with costs, a notice of appeal, stating as the only ground—that the Judge dismissed the bill, with costs, whereas he ought, having regard to the evidence, to have made a decree, as prayed—is sufficient. *The Creswick Grand Trunk Gold Mining Company, Registered, v. Hassall,* 5 W.W. & A'B. (E.,) 49, 75.

"Notice of intention" without word "desire."]—The Act 19 Vic., No. 13, Sec. 5, prescribes no particular form of notice of appeal, and "Notice of intention," without using the word "desire," is sufficient. *Harrison v. Smith,* 6 W.W. & A'B. (E.,) 182; 1 A.J.R., 78.

A notice of appeal where deposit money was not paid, and case not set down for hearing, was set aside on motion for irregularity. *Patent Composition Pavement Company v. Mayor, &c., of Richmond,* 1 V.L.R. (E.,) 50, 55.

Notice of Appeal—Signature—Corporation.]—A notice of appeal is sufficiently "*signed* by the person giving the same," if it be under the seal of a corporation appealing. *Melbourne and H.B.U.R. Company v. Town of Richmond and Borough of Sandridge,* 4 V.L.R. (L.,) 81.

A notice of appeal given by a corporation, was sealed with the corporation seal, but the seal was not attested by the secretary and directors. There was an express provision in the Articles of the Association that proceedings requiring *signing* should be signed. *Held* that the notice was sufficient. *Victoria Sugar Company v. Borough of Sandridge,* 4 V.L.R. (L.,) 83.

(4) *Time for Appeal and Payment of Deposit.*

Right of Appeal when it runs from—Death of Party before Judgment.]—Where a party to a suit dies after judgment reserved, and the decree is subsequently made, the right of appeal runs from the date of the Court pronouncing the decree, and the court will not ante-date it. *Colonial Bank of Australasia v. Pie,* 6 V.L.R. (E.,) 186.

Deposit—Consolidation of Appeals.]—Where a decree has been made on further directions, and an order overruling exceptions to Master's Report, on motion for leave to appeal from both without payment of second deposit, *Held* that the Court had no power to waive the condition precedent as to the deposit for the second appeal. *Australian Trust Company v. Webster,* 2 W. & W. (E.,) 99.

"*Semble* the acceptance of a cheque for the £50 deposit money is a sufficient compliance with the Act 19 Vic., No. 13; if the clerk accepts the cheque he does it at his own peril to make it good." *Harrison v. Smith,* 6 W.W. & A'B. (E.,) 182; 1 A.J.R 78.

Two Defendants Answering Separately Joining on Appeal—One Deposit.—19 Vic., No. 13, Sec. 5.]—Where two defendants, who have answered separately, join on an appeal, under Sec. 5 of the Act 19 Vic., No. 13, only one deposit of £50 is necessary. *Merry v. The Queen,* 10 V.L.R. (E.,) 135, 139.

(5) *The Hearing.*

In appeals it is the practice in the Supreme Court that the appellant should begin. *Taylor v. Southwood,* 1 W. & W. (E.,) 29, 32.

Where no Appearance for Appellant.]—In an appeal in Equity where there was no appearance for appellant, the Court dismissed the appeal, so as to obviate any difficulty which might arise in the event of an appeal to the Privy Council, and held that it was not proper in such a case merely to strike out the appeal. *Graham v. Graham*, 3 A.J.R., 89.

(6) *Security for Costs of Appeal.*

Return of Deposit.]—Where there was no appearance for the respondent upon an appeal, and the appeal was dismissed, order made that the £50 deposit should be returned to the appellant. *Leahy v. Lightfoot*, 8 V.L.R. (E.,) 344, 355; 4 A.L.T., 109.

(7) *Staying Proceedings pending Appeal.*

Staying Proceedings Pending a Judgment Reserved.]—An appeal to the Full Court having been heard, and judgment reserved, *Held* by the Full Court (*dissentiente Molesworth, J.*) that proceedings for recovery of costs under the decree be stayed pending the delivery of judgment, notwithstanding that there was no notice given of the motion for such order. *Larnach v. Alleyne*, 2 W.W. & A'B. (E.,) 39.

How far a Stay to Proceedings—Further Directions.]—An appeal to the Full Court against a decree confirming Master's Reports was pending when suit came on for hearing on further directions. *Held* that it was no bar to the hearing and case heard. *The Attorney-General v. Boyd*, 3 A.J.R., 127.

Order rescinding an Order of Full Court.]—Where the Full Court had made an order in an application in the cause, and had directed certain issues to be sent to a jury, which were found in favour of the plaintiffs, and the Primary Judge had made an order rescinding the order of the Full Court so far as it related to the impounding of certain proceeds of a mine, the plaintiffs intending to appeal from the order of the Primary Judge, moved for a stay of proceedings on the order of the Full Court, *Held* that on the point submitted to the jury their finding was conclusive for the purposes of the interlocutory applications, and motion for stay of proceedings refused. *Learmonth v. Bailey*, 2 V.L.R. (E.,) 85. Affirmed on appeal, *Ibid*, 239.

Appeal from Order directing Issues—Issues to be tried before Appeal could be heard.]—At the hearing of a case an objection for want of parties was overruled, and order made directing issues to be tried at the next sittings at *nisi prius*, on August 2nd. The defendants lodged appeals, on the grounds that the objection for want of parties was improperly overruled; that plaintiff had no ground for relief in Equity; and that no issues ought to have been directed, or, if any, that they should have been in the form of the issues presented in the bill and answers. The next sittings to hear Equity appeals was not till September 1st. Mr. Justice Molesworth, while holding that the objection for want of parties was good, and that though issues should have been directed it was doubtful if they had been presented in the proper form, nevertheless refused to allow a stay of proceedings, on the ground that, inasmuch as if the appeal were successful the trial would go for nothing; he would not prevent the plaintiff from going on at his own risk, if he were desirous. *White v. Hoddle*, 1 A.L.T., 203.

(8) *Costs of Appeal.*

Usual Rule at Law—Departure.]—A suit in a Court of Mines for defining boundaries at the hearing turned out not to be a case for defining boundaries, but one in which one party denied the other's right *in toto*, and should therefore have been dismissed. The Judge did not dismiss it, and a question of fact having arisen, which was deemed material and could only be determined by an issue, an issue was framed, and tendered in a form which could decide nothing conclusively on the point. No objection to the form of the issue was made by the Judge, but he rejected it as if no issue at all would avail, and dismissed the suit. The Judge's direction was wrong as to the question of fact. Upon appeal to the Full Court, *Held*, that though the suit might have been dismissed by the Judge of the Court of Mines as wrongly framed, yet as the case had miscarried on two other points which arose, but were not argued, the appeal should be dismissed; but being dealt with not on the points principally dealt with in the case, but on the other points appearing but not argued, the usual rule of dismissing an appeal with costs should be departed from, and no costs allowed. *Banks v. Granville*, 1 W. & W. (L.,) 158.

The general rule is that the successful appellant is entitled to his costs, unless there are special circumstances to deprive him of them. *Solomon v. Miller*, 2 W.W. & A'B. (E.,) 135.

Where an appellant is partly successful the rule in the above case holds good. *Learmonth v. Bailey*, 1 V.L.R. (E.,) 34.

When a bill has, on the ground of the misconduct of the defendant, been properly dismissed without costs, if the plaintiff appeal and fail, the appeal will be dismissed with costs. *Mogg v. Lord Raglan and St. Arnaud G. M. Company*, 4 V.L.R. (E.,) 138.

Demurrer—Overruled by Straining of Pleading.]—Where a demurrer is overruled and equity discovered by straining the pleading, in such a case the general rule that a successful party on an appeal is entitled to his costs will not be followed, and order will be made without costs. *United Hand and Band Company v. National Bank of Australasia*, 5 V.L.R., (E.,) 74.

Appeal Partly Successful.—Where in an appeal against an order of the Primary Judge upon exceptions to Master's Report, the appellant succeeded on one ground only out of four, each party had to abide his own costs. *Attorney-General v. Huon*, 7 V.L.R. (E.,) 30, 46.

(9.) *Cross Appeal and other Points.*

When necessary.]—Where a plaintiff had succeeded upon one branch of a motion, but had failed on the other, and the defendant appealed from that part of the motion upon which Plaintiff had succeeded, *held*, that to enable the Court to entertain the question as to the plaintiff's rights upon the part of the motion upon which he had failed, it was not necessary for him to lodge a cross appeal. *Wolfe v. Hart*, 4 V.L.R. (E.,) 125.

Variation—How Obtained.]—A respondent may, without lodging a cross appeal, ask to have the decree altered. On an appeal the whole decree is open. *Attorney-General v. Lansell*, 8 V.L.R. (E.,) 155, 169.

Appeal on Facts.]—*Per Holroyd, J.* The reason of the rule against appeals on facts does not apply to a case where one of the appellate Judges has, as Primary Judge, taken the evidence, though the case is heard by another. *McClure v. Marshall*, 9 V.L.R. (E.,) 84, 92.

III. From Master in Equity.

Evidence — Demeanour of Witnesses.] — Upon appeals from the Master to the Primary Judge, or from the Primary Judge to the Full Court, on questions of fact, the appellate Court should not regard the prior tribunal as having any larger means of information by observing the deportment of witnesses or the like. But, *per Barry, J.* (in the Full Court,) where the Master, having seen the witnesses and attached weight to their demeanour, has found upon a question of fact, there must be a strong case made out by the other side to warrant a reversal of the finding, and his decision should not be disturbed on mere inference. *Dryden v. Dryden*, 4 V.L.R. (E.,) 148.

APPEARANCE.

See PRACTICE AND PLEADING.

APPORTIONMENT.

Rent Due at Date of Death—Not Apportionable.]—A testatrix left all her property to trustees upon trust to receive the rents and profits of two houses and to pay thereout to A. an annuity, and left the residue to B. for life. The houses were let to tenants, by agreements in writing for terms of years, rent payable monthly, on the 11th and 23rd respectively of each month. The testatrix died on the 11th of a month. *Held*, that the rent due on the 11th, as well as that due on the 23rd, accrued due after the testatrix' death, that there should be no apportionment, and that B. was entitled to the whole of each month's rent. *In re Thomas's Will*, 10 V.L.R. (E.,) 25.

APPRENTICE.

"Master and Apprentice Stat. No. 193," Secs. 6, 17—Indenture not Signed by Father.]—McP. had been apprenticed to H. with the consent of his father as alleged in the indenture, which was not signed by the father. McP. absented himself, and was sentenced to solitary confinement by the Justices therefor. *Held*, that if McP. was not under twenty-one the Act did not apply, and if he was under twenty-one, the father's signature was necessary. Order absolute for a prohibition. *Regina v. Templeton, ex parte McPherson*, 3 A.J.R., 106.

Liability of Master for Neglect to Instruct—Indenture not under Seal—"Master and Apprentice Statute, 1864," No. 193, Secs. 3, 15.]—Sec. 3 of the "*Master and Apprentice Statute* 1864," No. 193, defines a "Master" as any person to whom any child shall be bound apprentice by indenture. When there is no indenture binding the apprentice, the master is not liable under Sec. 15 of the Act for neglecting to instruct the apprentice. *Stead v. Gould*, 4 A.J.R., 115.

The Contract.—Whether Necessary to be in Writing.]—The "*Master and Apprentice Statute*," No. 193, Secs. 9 and 10, requires that an Indenture of apprenticeship must be in writing, but that is only for the purpose of the summary jurisdiction of Justices. Apart from the Statute of Frauds the contract need not be in writing, except for purposes of the above-mentioned jurisdiction. *Welshman v. Robertson*, 1 V.L.R. (L.,) 124.

Substituted Agreement.]—Where an agreement is required by the Statute of Frauds to be in writing, any agreement in substitution for it must also be in writing, but where there is a subsequent agreement referring only to the manner in which such contract is to be performed, such subsequent agreement need not necessarily be in writing. *Ibid.*

Amendment of Deed.]—Though the Court does not readily alter the language of a Deed, it will, to effect the intention of the parties, alter "himself" to "him" in a covenant by a father "to put himself apprentice to, &c." *Ibid, p.* 128.

Determination of Agreement—Death of One of Two Joint Masters.]—Where an apprentice is jointly bound to two partners, the death of one of the partners and the consequent dissolution of the partnership determines the apprenticeship. *Beaver v. Fox*, 2 V.L.R. (L.,) 4.

Master and Apprentice—Covenants to Learn and to Teach—Dependent Covenants.]—B's. son was bound to F. for five years by articles of apprenticeship to learn a trade, in which F. covenanted

to teach B's son the trade. After being three years in F's. service, during which time B's. son had not been taught anything, he deserted. On an action by F. for desertion and breach of covenant, *Held, per Stawell, C.J., and Williams, J.*, that the covenants were dependent, and that F.'s failure to teach for the three years already passed was a good defence to the action; *per Higinbotham, J.*, that the covenants were independent. *Fletcher v. Buzolich*, 7 V.L.R. (L.,) 348.

Master and Apprentice—Breach of Covenant to Teach—Right of Father to Sue.]—Where a father is not a party to the indenture of apprenticeship by which his son is bound, but is merely a surety for the performance of its covenants by his son, he is not the proper party to sue for a breach of the covenant to teach. *Buzolich v. Fletcher*, 7 V.L.R. (L.,) 356.

APPROPRIATION.

OF PAYMENT.]—*See* PAYMENT.

ARBITRATION AND AWARD.

1. SUBMISSION.

Construction — "Cause of Action or Matter in Difference"—Detention of Deeds.]—Plaintiff lodged with defendant certain title-deeds as security for a loan, which was repaid; but the deeds were not returned. Disputes occurred between the parties over a contract in respect of which the loan was made, and plaintiff and defendant agreed to refer "all matters in difference, and all actions and causes of action" to arbitration. No demand for the deeds was made before the submission to arbitration. Plaintiff sued in detinue for the deeds. *Held*, that before demand of the deeds there was no wrongful detention so as to form a "cause of action or matter in difference" within the reference to arbitration. *Timewell v. Virgoe*, 5 W.W. & A'B. (L.,) 147.

Order of Reference—Amendment.]—Where an order for reference of a suit to arbitration had been made, the Court sanctioned an amendment of it by inserting a clause providing that the death of any party should not abate the proceedings. *Tomkins v. Cuningham*, 9 V.L.R. (E.,) 142.

2. EFFECT OF AGREEMENT TO REFER.

When it Amounts to an Admission.]—A contract for the sale of a station, stock, &c., contained a provision that any deficiency in the number of sheep should be allowed to the purchaser at the rate of 5s. per head; and also a provision that all matters in dispute should be referred to arbitration. On mustering the sheep the purchaser found that there was a very large deficiency, and it was agreed to refer to arbitration what should be allowed per head for the sheep deficient. The arbitrator allowed more than 5s. per head for the sheep deficient. *Held* that sending the matter to arbitration operated as an admission that the deficiency was such that more than 5s. per head should be allowed to the purchaser for the deficiency in number. *Ryan v. Broughton*, 2 V.R. (L.,) 49; 2 A.J.R., 39.

Covenant to Refer Partnership Disputes to Arbitration—What is a Partnership Matter.] — *See Walker v. Born, post* under COVENANT.

Reference to Arbitration under Partnership Deed—What is Included.]—*See Gough v. Farrington, post* under PARTNERSHIP—The Contract.

3. MAKING AGREEMENT TO REFER A RULE OF COURT.

Practice.]—Where originals of submission are produced signed, the submission may be made a Rule of Court by side-bar application in Term as well as in Vacation. *See* under name ARBITRATION, 2 W. & W. (L.,) 251.

How and When made a Rule of Court.]—Where a submission provided that application to make it a Rule of Court should be made to the "Supreme Court of Victoria," such an application may, even in Term, and when the Full Court is sitting *in banco*, be made to a single Judge sitting in Equity; and when an award has been made, the award, as well as the submission, should be made a Rule of Court. *M'Meckan v. White*, 1 W. W. & A'B. (E.,) 165.

When Award Made Within Terms of Submission it Cannot be Re-opened.]—Where a submission to arbitration has been made a Rule of Court, and where the award has been made within the terms of the submission, neither of the parties can re-open the same question by a suit in Equity, though the award itself was not made a Rule of Court until *after* the filing of the bill, and the fairness of such award was impugned. *Crooke v. Swords*, 5 W. W. & A'B. (E.,) 136.

Effect of.]—Where the matters in dispute in a cause are referred to arbitration by the order of a Judge, such order giving power to deal with the costs of action, reference and award, and being afterwards made a Rule of Court,

the parties have no power to vary the terms of the reference by an agreement between themselves. *Cudmore v. McPherson, Brooks v. McPherson,* 8 V.L.R. (L.,) 208.

Costs.]—The successful party is entitled to the costs of making an order of reference a Rule of Court, where it is necessary for the purpose of enforcing the award. *Ibid.*

4 Staying Proceedings and Enforcing Agreement to Refer.

"Common Law Procedure Stat.," No. 274, Sec. 266—Arbitrator not an Indifferent Person.]—A clause in a contract provided that all disputes touching or concerning the work to be done, materials and other incidents of a similar nature, were to be referred to and settled by the decision of the Inspector-General. The contractors sued for certain breaches of the contract. The defendants obtained an order under Sec. 226 of the "*Common Law Procedure Stat.*" staying proceedings and enforcing the agreement to refer. The plaintiffs then moved to rescind the order on the ground that the matters could not be properly referred to the Inspector-General, as he was a member of the defendant Board, and had already done acts hostile to plaintiffs' interests. *Held,* that the breaches were disputes within the clause, and that as the contract referred such disputes to the Inspector-General the plaintiffs could not complain. Application refused. *Evans v. Board of Land and Works,* 5 A.J.R., 182.

Act No. 274, Sec. 266—Invalid Award Already Made.]—A contract contained an agreement to refer. An award had been made in favour of the defendants, which was invalid through a defect in its form, and defendants had taken no steps to rectify it. Plaintiffs then sued on the contract. After action commenced defendants obtained an order *nisi,* under Sec. 266, staying proceedings in the action. *Held,* on motion to rescind the order that, so long as the award remained, one of the essentials of the jurisdiction to make the order was wanting, viz., the Judge making the order could not be satisfied that no sufficient reason existed for not proceeding to refer, and no further reference could be insisted on. *Martin v. Board of Land and Works,* 5 V.L.R. (L.,) 117; 1 A.L.T., 107.

Costs—Power of Judge to Award—"Common Law Procedure Statute 1865," Sec. 266.]—In making an order under Sec. 266 of the "*Common Law Procedure Statute* 1865," staying proceedings in an action, the Judge has no power under the section to make any order as to the costs of the arbitration. *Farrell v. Imperial Fire Insurance Company.,* 10 V.L.R. (L.,) 116; 6 A.L.T., 10.

5. When Arbitration is a Condition Precedent to a Right of Action.

A clause in a contract for stevedoring, which stipulates that all matters in dispute arising touching the agreement should be referred to arbitration, and prohibits an action being brought in respect of the matters actually submitted, is a collateral and independent agreement, and an award thereunder is not a condition precedent to a right of action except (*per Privy Council*) as regards such sums as under the agreement are not payable until the amount thereof has been ascertained by such award. *Locke v. Collins,* 3 V.L.R. (L.,) 40. Affirmed on appeal to P.C. L.R. 4 App. Ca., 674.

See also cases under Work and Labour.

6. Award.

Validity of—Interest.]—Where an award was to the effect that H. should indemnify W. against all debts, demands, &c., of the late firm of H. and Co. against W., *Held* that there was a difference between indemnifying and giving security, and that the award was valid. An award that one of the parties give up the deeds deposited with the arbitrator is not too indefinite, as they might easily be identified. Where a sum awarded was made payable "forthwith," *Held* that, as no mention was made of a demand, a demand was unnecessary, and that interest might be recovered at the rate of eight per cent. from the day of publication. *Hancock v. Woolcott,* 5 A.J.R., 80.

Validity of.]—Where the arbitrators have stated matters which they need not have stated, but, upon the face of their award, they have not stated anything which conclusively shows that the sum awarded is wrong, it is not open to the defendant, upon a bill of exchange given for part of the sum awarded, to impeach the award on the ground that the award is wrong, since that would be in effect to hear an appeal from the decision of the arbitrators. *Anderson v. Stewart,* 2 V.L.R. (L.,) 75.

Validity of—Evidence—Misrecital.]—If an award contain a wrong recital of the submission that is immaterial. Where an arbitrator, an expert, made an award upon an inspection of certain leasehold premises—the subject matter—such inspection having been previously made professionally on behalf of one of the parties without taking other evidence, his award was upheld. *In re Backhaus & Steele,* 5 V.L.R. (L.,) 184; 1 A.L.T., 11.

Finality of Decision.]—There is a difference between a case where an arbitrator must award that different acts are to be done by several parties, and a case in which all the matters in dispute resolve themselves into money claims. In the former case the arbitrator must award specifically, in the latter he may award generally the amount to be paid by one or more of the parties, such amount being a balance struck in favour of one or other of the parties after all the items have been considered. Upon the settlement of partnership accounts between B., of the one part, and C. and others of the other part, an award that so much was due to B. by C. and the others was held to be valid and sufficiently final. *Mixner v. Blair,* 1 V.L.R. (L.,) 191.

Finality.]—The decision of an arbitrator, in the absence of fraud or corruption, is binding on the

parties, both as to matters of law and matters of fact, unless some mistake appears on the face of the award, or in some paper accompanying it, or, perhaps, by the affidavit of the arbitrator. *Anderson v. Stewart*, 2 V.L.R. (L.,) 75.

Finality.]—Where an arbitrator having power to state a special case valued certain machinery in two alternatives, one as a going concern, the other as material for removal, subject to the opinion of the Court as to how it should be regarded, such award is not bad as wanting in finality. *Chrysolite Hill Company v. Sandhurst and St. Arnaud Chrysolite Company*, 5 V.L.R. (L.,) 242; 1 A.L.T., 37.

If the party entitled to the money agrees to accept the lesser sum, in such a case the Court will not refer back the award to the arbitrators to state facts which would enable the Court to answer the questions. *Ibid.*

What may be Included in—Breach of Promise—Expenses for Journey taken at Other Party's Request.]—In an action for breach of promise to marry, with a second count for money paid in respect of a voyage undertaken by the lady at the request of the defendant, the defendant pleaded that it had been agreed under seal that it should be referred to arbitration to determine what damages the defendant should pay to the plaintiff for the breach of promise, and that the arbitrators might take into consideration all matters that would be proper for consideration by a jury, and that it had been admitted to the arbitrators that the voyage was undertaken at defendant's request, and that the defendant had paid the amount awarded, and that the arbitrators had considered the expense of the voyage in making the award. *Held* that the plea was bad, because the damages in respect of the voyage were not cognisable by the arbitrators, the claim being a distinct and independent cause of action, and that the award should not have included the amount, and judgment for plaintiff. *Khull v. Haddon*, 4 A.J.R., 35.

Enforcing Award—Practice.]—An action in the County Court was referred to arbitration, and an award made. The party in whose favour the award was made, at a subsequent sitting of the County Court, applied to have a verdict entered for the sum awarded. No leave to do so was contained in the agreement to refer; but the County Court Judge ordered a verdict to be entered. Upon appeal, *Held* that no such verdict could be entered, but that the proper course was to take a verdict subject to the reference, or to make the liberty to enter a verdict one of the terms of the reference. *Dart v. Machin*, 1 W. & W. (L.,) 54.

Attachment for Disobedience of—Service of Rule of Submission.]—The Court overruled an objection on a rule for an attachment for disobedience of an award, that a copy of the rule making the arbitration a Rule of Court was not served upon defendant when payment was demanded. *Bateman v. Bateman*, N.C., 11.

When Enforceable by Attachment.]—Where the enlargement by the Judge of the time for making the award has not been made a Rule of Court, the award is not enforceable by attachment, and the person in whose favour it has been made is left to his remedy to sue on the award. *Re Hancock and Woolcott*, 4 A.J.R., 155.

Referring Back Award—Arbitrators Misled.]—A contract was entered into for the sale of the goodwill of a business together with the stock-in-trade, which was to be taken at cost price, the prices to be fixed by three arbitrators. The arbitrators fixed the prices and made their award, and the purchaser entered into possession, and sold some of the stock and brought more into the business. Some months afterwards the purchaser applied to refer back the award on the ground that some of the articles had been greatly over-valued, and in support of his application produced affidavits by two of the arbitrators that they had been misled by certain cipher marks of prices marked on certain of the stock. The affidavit of the third arbitrator contradicted the statements of the other two as to their having been misled, and stated that they ascertained the value of the goods independently of the marked prices. *Held*, that the award should be referred back to the arbitrators so far as regarded articles which had not been sold since the former award, which should be produced, and as to the prices of which the arbitrators, or any two of them, had been misled. *In re Armstrong and Culley*, 4 V.L.R. (L.,) 178.

Rule Nisi to Refer Back—Service—Joint Party.]—Service on one of two persons, who constituted a joint party to an arbitration, of a rule *nisi* to refer back the award is sufficient. *Ibid*, p. 180.

Referring Back Award—Omission of Damages.]—Where the matters in issue in two actions against the same defendant were referred to arbitration by Rule of Court, and the parties afterwards agreed as to the amount of damages, but the arbitrators, by mistake, omitted such damages in drawing up the award, so that there was nothing for the taxing order to operate upon, the Court made absolute a rule to refer the award back to the arbitrators for amendment. *Brooks v. McPherson, Cudmore v. McPherson*, 8 V.L.R. (L.,) 154.

Referring Back Award—To Correct Errors—Costs.] Where a first award is referred back to correct an error, the party who succeeds is entitled to costs of the first award, so far as that has not been rendered wholly useless. *Ibid*, p. 208.

Setting Aside.]—An award which should have been made by three arbitrators, but was in fact only made by two, the third being completely ignored, was set aside. *Cain v. Cain*, 3 A.J.R., 122.

Setting Aside—Misconduct of Umpire.]—*See in re Fowler and Sinnot* and *in re Bailey and Hart, post columns* 54, 55.

Setting Aside—Excess of Authority in Awarding Costs.]—In a reference to an arbitrator, there

was no power given to award costs, but the arbitrator did award costs. *Held* that the direction to pay costs being separable from the rest of the award did not vitiate it, and the award was not to be set aside on that ground. *In re Bailey and Hart*, 9 V.L.R. (L.,) 311; 5 A.L.T., 102.

Award not Dealing with all Matters Submitted.]—An award showing on its face that the arbitrator has not dealt with all the matters submitted to him will be set aside on that ground. *In the matter of Husbands and Husbands*, 10 V.L.R. (L.,) 208; 6 A.L.T., 60.

A reference to arbitration by C. and H. recited that "there were disputes between the parties relative to claims made by C. to an account, and to certain rights as a partner" of H., and that C. claimed, "either as such partner or otherwise, to recover from H. a sum of money, and an account," and referred all matters in dispute. The award found that C. was indebted to H. in a sum named, but did not mention the question of partnership. *Held* that the award did not deal with all the matters in dispute; and award set aside. *Ibid.*

Application to Set Aside—9 and 10, Will. III., Cap. 15, Sec. 2—"Judicature Act 1883," No. 761, Sec. 13—Supreme Court Rules, 1884, O. 64, Rule 14.]—Although Sec. 13 of Act No. 761 abolishes Terms for the purpose of carrying on the business of the Court, yet it provides that they shall still be used as a measure for determining the time within which any act is required to be done, and rule 14 of Order 64 makes special provision for the time within which applications to set aside awards are to be made, the object of the rule being to substitute "the last day of the sittings of the Full Court" for the last day of Term in 9 and 10, Will. III., Cap. 15, Sec. 2. Under the joint application therefore of the Stat. of Will. III., "the Judicature Act," and the rules, an application to set aside an award must be made to the Court, or the Full Court, at some time before the last day of the sittings of the Full Court next after the award has been made. *Ibid.*

Continuance of Action after—For Claim Already Considered.]—Declaration for money payable by the defendant to the plaintiff for money paid and expended by plaintiff for the defendant at his request, in making a voyage. Plea—That it had been agreed under seal to refer to arbitration the damages defendant should pay plaintiff for breach of promise: that the arbitrators might take into consideration in assessing damages matters that would be proper for a jury to consider; and it was admitted to the arbitrators that the voyage was taken at defendant's request, and that a sum had been awarded, which defendant had paid, and that the expense of the voyage had been considered in making the award. Replication—That plaintiff had not been allowed to state the amount of the expenses of the voyage, or the circumstances under which defendant requested her to take it. *Held* that the replication was bad, on the ground that if the claim could have been treated as the subject of damages it ought to have been so treated, and in that aspect it was immaterial whether it was or was not included in the award, because no action can be maintained for the recovery of further damages in respect of a cause of action for which damages have already been given by arbitration, unlike the case where "all matters in difference" are referred, in which case matters in difference not brought before the arbitrator may be subsequently sued for; and that, in this instance, the specific matter of damages for breach of contract having been submitted, and an award having been given on it, no further claim on it could be maintained. *Khull v. Haddon*, 4 A.J.R., 35.

7. Arbitrators and Umpires.

Delegation of Functions—Discretion—Remission.] An act involving discretion cannot be delegated by an arbitrator. *Levy v. Farrell*, 1 W. & W. (E.,) 10.

The delegation by an arbitrator of the preparation of a mortgage to a conveyancer is not warranted. *Ibid.*

When the preparation of a mortgage had been delegated by an arbitrator to a conveyancer, the award was remitted to the arbitrator to direct the contents of the mortgage. *Ibid.*

Appointment of.]—Where a proviso in a lease provided for a submission to arbitration, and that one arbitrator might proceed alone in default of appointment of a second, and that the award shall be made a Rule of Court, *Held*, that the appointment of an arbitrator must be part of the submission, and that such appointment must be made in writing, and such writing ought to form part of the rule. *In re Backhaus and Steele*, 5 V.L.R. (L.,) 184; 1 A.L.T., 11.

Misconduct of Umpire—Setting Aside Award.] Certain matters were referred to two arbitrators. These being unable to agree the matters were referred to an umpire. The umpire, after the close of the arbitration, called for the attendance of the arbitrators who had been examined as witnesses on either side, before him, and consulted one in the absence of the other. He then made his award in favour of the defendant, whose arbitrator he had so consulted. A rule *nisi* was obtained to set aside the award and the answering affidavits of the umpire and the arbitrator stated that the reason for sending for the arbitrators was to explain to them his views, and so to allay the dissensions between them. Rule discharged. *In re Fowler and Sinnot*, 5 V.L.R. (L.,) 320; 1 A.L.T., 49.

Appointing Umpire Without Express Authority—Act No. 274, Sec. 269.]—Where a submission provided in Clause 27 that the award of the arbitrators should be final and gave them no power to appoint an umpire, but they did so appoint, *Held*, that Clause 27 did not mean that there should not be an umpire, and that Sec. 269 of the Act No. 274 applied and gave

them the power they had exercised. *In re Bailey and Hart*, 9 V.L.R. (L.,) 311; 5 A. L. T. 102.

Misconduct—Partiality—Refusal to Stats Case.—Act No. 274, Sec. 21.]—It was sought to set aside an award on account of the partiality and misconduct of an umpire, based upon several instances in which he seemed to have shown partiality towards one of the persons, and his refusal to state a case under Sec. 21 of Act No. 274 for the opinion of the Court upon a difficult point of law, and deciding it in that person's favour. *Held* that the 21st Section of Act No. 274, was permissive, and not compulsory, and though it is desirable that the clauses should make the statement of a case compulsory, yet the refusal did not constitute legal misconduct; and though the instances of partiality, taken collectively, raised a suspicion, yet they did not necessarily lead to the inference of partiality such as is necessary to make them a good ground for setting aside an award. *Ibid.*

8. Costs.

Reference under 21 Vic., No. 38, Sec. 24—Subsequent Trial by Jury—Board of Land and Works.]—The Board of Land and Works, having occasion to take land for a railway, disputed with the owner the amount of compensation to be paid. Eventually it was agreed to refer the matter to arbitration, and by the reference the costs were to be in the discretion of the arbitrators. The arbitrators awarded a certain sum and costs to the owner. The Board, being dissatisfied with the amount, applied under Act No. 38, Sec. 24, for a trial by jury, and the jury awarded a less sum than that awarded by the arbitrators. Upon a special case the question was, whether the owner of the land was entitled, under these circumstances, to recover the costs of the submission, reference and award. *Held, per Stawell, C. J., and Williams, J.*, that, the Act being silent as to costs, the award as to costs was still binding by the agreement of the parties, and that the owner could recover them; but *per Barry, J.*, that the costs were gone completely. *Fenton v. Board of Land and Works*, 1 W. & W. (L.,) 22.

Taxation of.]—An attorney's clerk sued for salary, and the defendant pleaded a set-off for a delivered bill of costs. There was a submission to arbitration and one of the terms was "Costs of action, reference and award to abide the event of the award." The arbitrator awarded a balance to the plaintiff, deeming a certain portion of the plaintiff's claim, and also a certain portion of the defendant's set-off proved. On such award the Prothonotary gave the plaintiff costs, holding that the "event of the award" was in the plaintiff's favour. The Court refused to review the taxation. *Woolcott v. Wisewould*, 1 W. W. & A'B. (L.,) 129.

Taxation—Discretion of Taxing Officer.]—If the taxing officer proceeds on a right principle the Court does not interfere with his discretion, even where it might be disposed to take a different view. He cannot treat any part of the award as a nullity till it is set aside by the Court. *Cudmore v. McPherson, Brooks v. McPherson*, 8 V.L.R. (L.,) 208.

Fees of Counsel.]—There is no rule as to the cost of an arbitration, that counsels' fees are not to be allowed unless previous notice has been given. *Ibid.*

Of Setting Aside Award.]—When the ground upon which an award was set aside was not mentioned in the notice of motion to set it aside, the application to set aside was granted without costs. *In the matter of Husbands and Husbands*, 10 V.L.R. (L.,) 208; 6 A.L.T., 60.

ARCHITECT.

Action to Recover Fees in Respect of Plans.]—M. employed F. to prepare plans for the erection of a store, such store not to cost more than £4000 for erection. F. prepared plans, but such that a building could not be erected in accordance with them for less than £6000. Various alterations were made with a view to bring the plans within the limit, but unsuccessfully, and the project of building the store was abandoned. F. sued M. for his fees in respect of the plans, and recovered a verdict. On rule for a new trial *Held*, that F. was not entitled to succeed, and rule made absolute. *Flannagan v. Matc*, 2 V.L.R. (L.,) 157.

See also under Work and Labour.

ARMY AND NAVY.

"Military and Naval Discipline Act 1870," Sec. 2—Infant.]—An infant may, under Sec. 2 of the "*Military and Naval Discipline Act* 1870," No. 389, even without his parent's consent, enter into an agreement to serve; and an application by an infant's mother for his discharge from service as a "boy" on board a ship of war was refused. *In re Hayes*, 4 A.J.R., 34.

"Military and Naval Discipline Act 1870," Sec. 4—Habeas Corpus.]—On a return to a writ of *habeas corpus* by which the officer in charge of the ship was required to bring up the body of the infant in question, and show cause why he was detained on board, it did not appear on the face of the returns that the infant so detained was an infant, and so that an objection that he could not take the oath of fealty could not be maintained. It did not appear on the face of the return, moreover, that the officer who administered the oath had authority under Sec. 4 of the Act to administer it; but there being no doubt as to his jurisdiction, an amendment was allowed. The Court moreover held

that the engagement to serve was one for the benefit of the infant. *Ibid, p.* 77.

"Military and Naval Discipline Act 1870," Secs. 3-5—Commissionsd Officers.]—Commissioned officers appointed under Sec. 5 of the "*Military and Naval Discipline Act* 1870," are not subject to the provisions of the Act as to fines or any other punishment, except dismissal, though persons engaged under Secs. 3 and 4 are subject to the provisions of the Act as regards fines, &c. *Regina v. Sturt, ex parte Johnson,* 4 A.J.R., 78.

Wrongful Dismissal from Forces—Action against the Crown.]—The contract to serve the Crown in the colonial military or naval forces is unilateral, and implies no corresponding obligation on the part of the Crown to continue the employment; and a petition against the Crown cannot be maintained for wrongful dismissal from such forces. *Flynn v. The Queen,* 6 V.L.R. (L.,) 208; 2 A.L.T., 21.

S.P. *See Power v. The Queen,* 4 A.J.R. 144 *post,* POLICE.

29 and 30 Vic., Cap. 109, Secs. 19, 23, 50—Re-arrest by Commodore on a Charge of Desertion after Discharge of Prisoner on Habeas Corpus from Custody for Offence of Absence without Leave.]—A bandsman on one of H.M. ships of war was arrested and put into custody for the offence of being absent without leave, under Sec. 23, and was discharged on *habeas corpus:* he was re-arrested under a charge of desertion, under Sec. 19. *Holroyd, J.* (in Chambers,) being of opinion on the evidence that the second warrant was not issued for the same offence as the first, dismissed a motion for attachment for contempt of Court. *Regina v. Wilson, ex parte Yates,* 3 A.L.T., 55.

ARREST.

ON NON-PAYMENT OF DEBTS.]—*See* DEBTOR'S ACT.
MALICIOUS.]—*See* MALICIOUS PROSECUTION.
OF INSOLVENTS.]—*See* INSOLVENCY.

ARSON.

See CRIMINAL LAW.

ASSAULT.

See TRESPASS—CRIMINAL LAW.

ASSESSORS.

IN MINING CASES.]—*See* MINING.

ASSIGNMENT.

Equitable—Revocation.]—C., by writing, directed P. and another to hold moneys on trust, to pay the interest to his wife for life, and the trustees consented to act on such directions, and made payment accordingly till the commencement of an action by C. against the trustees for money had and received. C. alleged that before suit he had revoked the directions to the trustees. *Held* that the equitable assignment was complete; and that C. could not afterwards revoke the directions or sue for the money. *Cowper v. Plaisted,* 5 W.W. & A'B. (L.,) 88.

Equitable Assignment—Right of Assignee to Sue Third Party Directly in Equity.]—Per *Stephen, J.,* that equitable assignments are not confined to assignments of choses in action, but if third party is under liability to assignor and assignor refuses the use of his name in action at law by assignee, the assignee may sue third party directly in Equity. *Ross v. Blackham,* 1 V.L.R. (E.,) 220.

Equitable Assignment—Government "H" Order—Notice.]—F., who had undertaken some Government contracts, was in the habit of giving Government "H" orders to a bank as security for advances before and after upon the entire amount payable to him. These orders were in form regulated by *Gazette,* August 24, 1858, and were in blank, the bank filling up the blank to the extent of the amount payable. In an interpleader suit, which was brought by Board of Land and Works against the bank, who claimed as a security the sum due by Government to F., and against E. and G., who claimed the sum due as the official assignees of F., who became insolvent in November, 1874, *Held* affirming *Molesworth, J.,* that a presentment of the order by the bank, and an oral request for payment did not apprise the Government of an equitable assignment, but was merely a request for payment, that the right to the contract money was in the apparent possession of F. at the date of his insolvency, and vested in E. and G. as trustees of the insolvent estate. *Quære* whether such an order filled up in blank would operate on moneys earned after its date. *Quære* per Full Court whether such notice should be given to the Contracting Department of Government, to the Treasurer, or to both. *Board of Land and Works v. Ecroyd,* 1 V.L.R. (E.,) 304; 2 V.L.R. (E.,) 45.

By Operation of Law—Sheriff's Sale—"Land Act 1865," Sec. 22.]—A bargain and sale by the Sheriff of the leasehold interest held by an execution debtor under the "*Land Act* 1865,"

No 237, is an assignment by operation of law which the Board of Land and Works is bound to register under Sec. 22 of the Act. *Regina v. Board of Land and Works*, 2 V.R. (L.,) 151; 2 A.J.R., 87.

Of Growing Crops—Absolute Assignment—Purchase without Notice.]—*See Mueller v. White, post* under BILL OF SALE.

FOR BENEFIT OF CREDITORS.]—*See* INSOLVENCY AND DEBTOR AND CREDITOR.
FRAUDULENT.]—*See* INSOLVENCY.
OF PERSONAL PROPERTY.]—*See* BILL OF SALE.
OF LEASES AND TERMS.]—*See* LANDLORD AND TENANT.
OF MORTGAGES.]—*See* MORTGAGE.
OF DEBTS.]—*See* DEBTOR AND CREDITOR.
OF CHOSES IN ACTION.]—*See* DEBTOR AND CREDITOR.

ATTACHMENT.

I. OF DEBTS.

(1) *In What Cases, column* 59.
(2) *What may be Attached, column* 59.
(3) *Practice, column* 60.
(4) *Other Points, column* 61.

II. OF PERSONS.

(1) *Practice and Proceedings on, column* 63.
(2) *Of Solicitors—See* SOLICITOR.

I. OF DEBTS.

(1) *In What Cases.*

Foreign Attachment—"Common Law Procedure Statute" Sec. 225.]—Upon an application to set aside a writ of foreign attachment the affidavits showed that defendant had his place of business in Melbourne, and he had no other place of residence. While he was abroad in Sydney an action was commenced against him, and a writ of foreign attachment issued. *Held* that the circumstances were sufficiently suspicious to justify the writ, and application refused. *Synnot v. Ray*, 1 V.L.R. (L.,) 70.

(2) *What may be attached.*

"Common Law Practice Act," Sec. 179—Construction—Surplus in hands of Sheriff after Sale.]—The surplus in the hands of the Sheriff after a levy and sale by him under an execution, are not "monies of the judgment debtor in his hands," which can be attached by a second judgment creditor, under the "*Common Law Practice Act*," Sec. 179. *Per Stawell, C.J.*—"I think that the Act only applies to cases in which the money, or goods to be converted into money, has been placed in the hands of one person by another; and, where the person has received them by the express or implied consent of the debtor, then only is he a garnishee within this Act. In all cases of agency and bailment the Act will apply, and has been held to apply." *Oriental Bank v. Grant*, 1 W. & W. (L.,) 16.

Writ of Foreign Attachment When Issued—What may be Attached Thereunder.]—A writ of foreign attachment may be issued in an action in the Supreme Court on a judgment recovered in the Court of Vice-Admiralty; and the separate property of one defendant may be attached on such a writ for a joint debt of himself and other defendants. *White v. Glover*, 5 W. W. & A'B. (L.,) 40.

Debt Accruing Due—Money Due on Contract—Assignment.]—G. contracted with a Borough Council to construct a drain, under an agreement which provided that payments at the rate of 50 per cent. on the work done should be made to the contractor and the balance on completion of contract. G. received the 50 per cent. on the work he had done. He then assigned to R., whom the Council accepted as contractor. H., a creditor of G., sought to attach moneys in the Council's hands. *Held*, that the debt was not one existing or accruing due to G., and that G. having assigned all his interest, H. could not be in any better position than G. Judgment for defendant. *Harkness v. Mayor, &c., of Maryborough*, 3 A.J.R., 26.

(3) *Practice.*

On Foreign Judgment—Irregularity—Waiver.]—As a rule no attachment can be granted under a foreign judgment unless a rule or summons to show cause has previously been granted; but where an order had been obtained for attachment under a foreign judgment, and no rule or order to show cause had been taken out, but the plaintiff had slept on his rights and allowed two months to elapse without taking any steps to set aside the attachment, *Held*, that he had waived the irregularity and could not have the attachment set aside. *Main v. Kirk*, 1 A.J.R., 155.

Assignment of Debt Before Attachment Issued.]—Where an assignment of the garnishee's debt had been made by the judgment debtor before attachment was issued, the Court set aside the attachment. *Cohu v. Strachan*, 5 A.J.R., 38.

Foreign Attachment—Appearance after Judgment.]—Where after judgment had been signed in default and foreign attachment issued, defendants moved for leave to defend the action, and to set aside the attachment; the Court directed that defendants might plead to the declaration in the action, the trial to take place in the usual way, but no proceedings to be taken on the record beyond verdict and trial without special leave. *Croaker v. Baines*, N.C., 16.

Foreign Attachment—Act No. 274, Sec. 221—Appearance and Pleading Without Entering into a Bond.]—A writ of foreign attachment was issued against D. D. afterwards appeared to the declaration, and pleaded without entering into a bond. *Held, per Stawell, C. J., and Stephen, J. (dissentiente Barry, J.)* that

there was nothing in Sec. 221 to deprive D. of his common-law right to appear and plead without entering into a bond. *Fogarty v. Dennis*, 5 V.L.R. (L.,) 479.

Garnishee Disputing Liability—Defence—"Common Law Procedure Statute 1864," Sec. 204.]—Where a garnishee denies his liability, and proceedings are taken under Sec. 204 of the "*Common Law Procedure Statute* 1864," to compel payment of the amount of a judgment debt, the only question between the judgment creditor and the garnishee is, whether the latter owes money to the judgment debtor, and he cannot impeach the validity of the judgment obtained by the plaintiff; nor is the insolvency of the debtor since the attachment of the debt any defence to him, since the service of the order *nisi* to attach the debt operates as a charge, so as to make the judgment creditor a secured creditor under Sub-sec v. of Sec. 65 of the "*Insolvency Statute* 1871." *Watson v. Morrow*, 6 V.L.R. (L.,) 134; 1 A.L.T., 167.

Foreign Attachment—Writ Addressed to Garnishee in Wrong Name—Practice.]—Where a writ of foreign attachment was addressed to the garnishee in the wrong name, *Holroyd, J.*, held that looking at Sec. 211 of the "*Common Law Procedure Statute*, 1865," which provides that the garnishee must be named in the affidavit, he would not allow the writ to be amended, but that the application must be commenced *de novo*. *Bailey v. Barclay*, 6 A.L.T., 66.

(4) *Other Points.*

Effect of a Consent Order—Costs—4 Vic., No. 6, Sec. 5.]—C. sued S. a foreign debtor, and issued a writ of foreign attachment to N. as garnishee, who held valuables of S. attaching such to a certain extent. P. sued S., and issued another writ. The parties agreed that N. should sell and hold proceeds, subject to attachment to meet the claim in each action *with costs*, and that N. should write to S. and learn if he admitted claims, and if so, N. should pay; but, if not, that S. should be at liberty to appear and defend each action, N. retaining sufficient proceeds to satisfy judgments. This agreement was embodied in a consent order. U. then sued S. and obtained a writ, subject to the order supposed to exist, and referred to in the consent order, and attaching the "residue" of the valuables in N.'s hands. On summons by U. calling upon S., N. and other plaintiffs to show cause why the whole of the valuables in N.'s hands should not be attached to satisfy U.'s claim. *Held*, that the consent order was informal and invalid; but as it embodied a *bonâ fide* agreement, supported by consideration, and as U.'s order recognised the claims in the preceding actions, those claims were protected by Sec. 5 of Act No. 6, and U.'s order could only be enforced subject to such claims as far as the actual debts were concerned, but not as to costs, which were prospective, and could not then be the subject of a *bonâ fide* claim or lien. *Udall v. Stevens*, 2 W. & W. (L.,) 203.

Foreign Attachment—Return to Writ—Non est Inventus—No. 274, Secs. 211, 214.]—A return to a writ of foreign attachment in the words "He cannot be found," instead of "*Non est inventus*," as prescribed by Secs. 211, 214 of the "*Common Law Procedure Statute* 1865," is a sufficient compliance with the Act. *Wilson v. Threlkeld*, 3 W. W. & A'B. (L.,) 158.

Foreign Attachment—Affidavits of Cause of Action—No. 274, Sec. 211.]—Under Sec. 211 of the "*Common Law Procedure Statute* 1865," separate affidavits in support of a writ of foreign attachment need not be made, one of the cause of action, and another that the cause arose in Victoria; but the two statements may be, and should be when convenient, made in the same affidavit. *Ibid.*

Foreign Attachment—Order for Sale—Application by Garnishee Necessary—Consent—No. 274, Sec. 217.]—By Sec. 217 of the "*Common Law Procedure Statute* 1865," if the garnishee be desirous of disposing of goods attached in his hands, he must make an application to the Court or a Judge for that purpose, and *semble*, that an order to sell made without such application is *ultra vires*, and that an order made by consent of the garnishee without such application should be set aside. *Ibid.*

Foreign Attachment—"Common Law Procedure Statute," No. 274, Sec. 215—Damages for Sale of Goods by Garnishee.]—W. purchased tea from T., a Sydney merchant. Some of the parcels arrived, but as they did not correspond with the tea purchased, W. brought an action and recovered damages. W. issued a writ of foreign attachment, and the teas sent to Melbourne were attached. When so attached they had got into the hands of A., a creditor of T., and the writ of attachment was directed to A. as garnishee. A Judge's order, directing A. to sell part of the tea and hold the proceeds subject to the attachment, was set aside. After this A. sold the tea, shipping it to Sydney. Subsequently another order was made to the same effect, ante-dated to the date of the former order. Summons, under Sec. 215 of the Statute, calling upon A. to show cause why he should not pay damages for removal of the property attached. The summons being adjourned to Court, *Held*, it appearing from affidavits that the tea did not belong to T., but to another Sydney merchant, T. selling them only as broker, that W. had suffered no damage and the garnishee was not liable. Summons dismissed. *Wilson v. Threlkeld*, 4 W.W. and A'B. (L.,) 173.

Affirmed on appeal, where the Privy Council held that it was essential that the property should belong actually and not constructively to the defendant in the action, and that being satisfied of that fact, the granting an issue to try the question of property, or making an order against the garnishee in respect thereof, is a matter for the discretion of the Court. *Wilson v. Trail*, L.R. 3, P.C. 33.

Garnishee—Crown Cannot be.]—The provisions of the "*Common Law Procedure Act* 1865," No.

274, as to garnishees do not apply to the Crown, or to public officers, in respect of moneys due by the Crown to the judgment debtor. *Aitken v. Godkin*, 5 W. W. & A'B. (L.,) 216.

Recovering Moneys Erroneously Paid by Garnishees.]—An action may be maintained by garnishees who have paid over to judgment creditor moneys which they erroneously believed to belong to the judgment debtor, and who, after payment, have discovered their mistake, and have obtained the setting aside of the garnishee proceedings against the judgment creditor for money had and received to their use, and may recover the amount. *Beauchamp v. Nathan*, 5 W. W. & A'B (L.,) 219.

Affidavit—"Common Law Procsdure Statute," Sec. 201.]—On an application by a bank to attach a debt in the hands of third persons, the affidavit, under Sec. 201 of the "*Common Law Procedure Statute*," began, "I, B., Inspector of the —— Bank, make oath, &c." On objection that the affidavit did not appear to be made by the judgment creditor or his attorney. *Held* (in chambers) that the objection was fatal and order discharged. *London Chartered Bank v. Webb*, 1 A.J.R., 119.

Foreign Attachmsnt—"Common Law Procedurs Statute," No. 274, Ssc. 224.]—A judgment creditor, who has obtained a writ of foreign attachment, has only an inchoate right, it may be rendered complete by levy; such a levy to perfect title against an official assignee of the debtor who becomes insolvent after the writ is issued, is necessary under Sec. 224 of the "*Common Law Procedure Statute*." *Lauratet v. McCracken*, 3 V.R. (L.,) 41; 3 A.J.R., 35.

See S.C. under INSOLVENCY—Effect of.

Foreign Attachmsnt—"Common Law Procsdurs Statute 1865," Ssc. 225.]—A writ of foreign attachment will not be set aside merely because it is addressed to a bank as garnishee instead of to the inspector. If a writ is wrongly addressed, it will not bind the property. *Synnot v. Ray*, I. V.L.R. (L.,) 70.

II. OF PERSONS.

(1) *Procedure and Practice on.*

For Debt and Costs—Barrsd as to Costs by Liquidation.]—In an order for payment of debt and costs, the costs are incidental to the debt, and therefore when the enforcement of a decree for the debt is prevented by a liquidation, there can be no attachment for the coste, though they were not provable under the liquidation. *England v. Moore*, 6 V.L.R. (E.,) 48, 54; 1 A.L.T. 172.

For Non-Payment of Debt and Costs—Will not be Granted after Liquidation.]—The "*Insolvency Statute* 1871," No. 379, Sec. 150 (xi.,) forbids any suit or action against a debtor whose affairs have been liquidated, and therefore, since a suit must be carried on in order to obtain an attachment against a defendant for non-payment of his debt and costs, if such debtor before the order has entered into liquidation by arrangement with his creditors, such attachment will not be granted. *England v. Moore*, 6 V.L.R. (E.,) 48; 1 A.L.T., 158.

For Non-Payment of Costs—Defect in Decree Cured by Subpœna.]—Where a decree directing payment of costs does not specify any time for payment, such defect is cured by the issue of a subpœna, and attachment may issue. *Forbes v. Clarton*, 4 V.L.R. (E.,) 200.

For Non-Paymsnt of Costs—Attorney under Power Demanding Payment.]—A subpœna for the payment of costs to the plaintiff having issued, he executed a power of attorney to a person, H. J. B., to demand and receive payment. Upon the affidavit of the attorney of a demand by him, under the name of H. B., and refusal to pay, an attachment was issued and the defendant was arrested. Upon motion to turn him over, an objection that the power of attorney was directed to H. J. B., and the demand was made by H. B., *i.e*, not the person authorised to receive payment, was overruled, and it was held that a demand by any agent of the principal bearing the subpœna was sufficient. *Ibid.*

Non-Payment of Costs undsr Interlocutory Order.]—Where in an interlocutory order nothing is said about time of payment of costs, the presumption arises that they are to be paid when finally taxed; but where an interlocutory order directing a postponement of the action ordered payment of costs already incurred "when taxed," and costs were taxed and a demand was made, *Held* that the party to whom costs should have been paid was entitled to enforce payment by attachment before final taxation. *Robertson v. Mohabeer*, 5 V.L.R. (L.,) 482.

In What Cases—For Non-Payment of Costs—"Act for Abolishing Imprisonment for Debt," Sec. 2.]—*Semble*, that the "*Act for Abolishing Imprisonment for Debt*," No. 292, Sec. 2, does not affect the power of the Court to issue an attachment for disobedience of an order to pay costs. *In re Sandilands, ex parte Browne*, 4 V.L.R. (L.) 318.

The Acts for abolishing imprisonment for debt do not affect the power of the Court to issue an attachment for disobedience of a rule ordering payment of costs. *Ex parte Dalton*, 4 V.L.R. (L.,) 417.

Semble, that the Court will not grant an attachment, after the applicant has had resort to a purely civil remedy, as, for instance, by obtaining a rule to show cause why the money should not be paid, or by issuing execution. *Ibid.*

For Non-Payment of Costs—Subpœna.]—A writ of attachment for non-payment of costs may issue from the office upon the mere production of the subpœna for costs, and an affidavit of its service and of demand and non-payment, and no order of the Court for its issue is necessary. *Evans v. Guthridge*, 1 W. W. & A'B. (E.,) 49.

Discharge from.]—A party should only be discharged from an attachment for non-payment of costs, upon paying, as well as the costs endorsed upon the writ of attachment, the costs of the certificate upon which the subpœna for costs was based, the subpœna itself and of the attachment. *Ibid.*

Subpœna for Attachment.]—The Supreme Court Rules do not abolish the power of arrest under subpœna for costs, and the Court will issue an attachment for their non-payment. *Blake v. Watson*, 1 W. & W. (E.,) 139.

Costs — Ecclesiastical Suit — Attachment.]—Where costs in an ecclesiastical suit were not paid pursuant to the decree, an order absolute in the first instance for attachment granted. *Cawley v. Cawley*, 6 W. W. & A'B. (I. E. & M.,) 41.

An attachment will be granted for non-payment of arrears due under a decree for alimony *pendente lite*. *Hunter v. Hunter*, 2 W. & W. (I. E. & M.,) 123.

How Enforced.]—The proper course to enforce payment of costs by attachment, is to proceed by subpœna.

But *Semble*, payment may be enforced under "*Supreme Court Rules*," Cap. 6, Rule 43, although no time is fixed by the original order, if a time within which payment is to be made be fixed by a subsequent order. *Pokorney v. Ditchburne*, 1 V.R. (E.,) 16.

The whole costs as taxed, and as named in the prothonotary's *allocatur*, amounted to a certain sum, including sheriff's costs. Rule for attachment refused where the sheriff's costs had been demanded separately, and also the amount of taxed costs. *Held* that the sum named in the *allocatur* should be demanded with a statement that it included all. *Commercial Bank v. McDonald*, 3 A.J.R., 29.

Discharge from Arrest—5 Vic., No. 17, Sec. 3.]—A defendant in custody under an attachment for non-payment of costs, voluntarily sequestrated his estate, under 5 Vic., No. 17, Sec. 3. On motion for his discharge from custody, *Held*, that the attachment was a "process against the person," within the meaning of the 5 Vic., No. 17, Sec. 30, and that the defendant must be discharged. *Laing v. Campbell*, 1 W. & W. (E.,) 372.

For Disobedience of Order to Pay Alimony—Not Dissolved on Ground of Inability.]—An attachment for disobedience of an order to pay alimony will not be dissolved on the ground of inability. If the inability arises from want of means, the proper course is to apply to the Court, on notice to the other side, to have the order set aside. *Campbell v. Campbell*, 5 W. W. & A'B., (I. E. & M.,) 59.

For Breach of Injunction.]—An injunction was obtained against a defendant company restraining it, its manager, directors, workmen and servants from (*inter alia*) permitting sludge to flow over plaintiff's land. On motion for attachment for breach, *Held* that the utmost such an injunction means is, that if they caused the sludge to flow, they should accompany it by some precaution to prevent the flowing of the sludge; and that in working out an injunction of that nature, there is no contempt on the part of individual members or servants unless there is evidence of their doing what they are commanded not to do; but that the company should pay their costs of resisting the motion. Subsequently the Court being of opinion that the injunction was disobeyed, granted a motion for sequestration. *Seal v. Webster-st. G.M. Company*, 5 W. W & A'B. (E.,) 129.

Rule Nisi for Against Administrator not Filing "Three Months'" Inventory.]—A rule *nisi* had been granted calling upon an administrator to show cause why he should not be attached for not filing inventories within three months of the grant of administration, and since the rules were taken out the inventories had been filed upon affidavit, but no time had been given for examination of them. The inventory of the real estate was accepted as correct, but that of the personal estate only set out what the administrator had received, and did not state that this comprised all the personalty. The order made by the Court was rule absolute, with costs; disallow cause; no attachment to issue. *In re Dowling*, 1 A.J.R., 14.

Non-Payment of Amount Under an Award.]—No attachment will lie for non-payment of an amount found due under an award where the award contains no order to pay such amount. *Fowler v. Walker*, 1 A.J.R., 35.

Contempt of Court—Preparing Conveyance by Unauthorised Person.]—Upon a rule *nisi* for attachment for contempt of Court in preparing a conveyance by an unauthorised person, such a rule should precisely apprise the respondent of the subject of the complaint, especially as a simpler proceeding is provided under Sec. 13 of Act No. 33, and a second application based upon the same affidavits was refused, the first not having failed merely for a defect in the *jurat* or title. *In re Heron*, 5 A.J.R., 161.

Evasion of Service of Rule Nisi—Motion for Rule Absolute.]—A defendant had disobeyed an Order of the Court as to payment of a certain sum within a specified time, and had evaded service of the rule *nisi*. Motion for rule absolute without rule *nisi*. *Held*, that considering the other orders that had been made in the cause no such order would be made, but order for rule *nisi* made to be served on defendant's solicitor and returnable in a week. *Punch v. Punch*, 3 A.J.R., 43.

Arrest—Escape and Re-capture—Date of Return.]—A writ of attachment for non-payment of costs directed the Sheriff to bring up the person arrested on 17th June, 1875, or on the first day

on which the Supreme Court should sit in Equity next after the arrest. On the morning of 17th June the person escaped and was re-arrested on 3rd July. On *habeas corpus* for his discharge on the ground that the writ had lapsed before the re-arrest—*Held* that the writ was not in proper form, as it did not follow Cap. 6 of "*Supreme Court Rules*," Rule 42, in directing production upon the "next day in Term, or on the next day on which the Court shall sit in Equity out of Term after such arrest, or as soon afterwards as possible"—that its force expired on 17th June, and it afforded no justification for the subsequent re-arrest. Prisoner discharged. *In re Wall*, 1 V.L.R, (L.,) 246.

Rule for Returnable on a Holiday.]—A rule for attachment returnable on a holiday was discharged with costs. *In re Dryden*, 3 A.J.R., 42.

"Common Law Procedure Statute," No. 274, Sec. 80—Writ Returnable on a Holiday.]—A writ returnable on a certain day in Term is void when such a day is one of the holidays fixed by Sec. 80 of the Act No. 274. *Merry v. Nicholson*, 3 V.L.R. (L.,) 299.

In connection with the same case a rule absolute was granted in the first instance on the last day of Term for the issue of another writ of attachment tested of the date of issue and not of the date of the issue of the void writ. *Evans v. The Queen*, 3 V.L.R. (L.,) 336.

Writ of Attachment—Rule for Not Discharged unless Terms of Order Complied With.]—A Rule of Court was made for the payment of a sum of money to the prosecutor, who executed a power of attorney to his solicitor or his clerk to receive the money. The money was not paid, and a rule was made absolute with costs for the issue of a writ of attachment, unless the defendant should pay the sum due and the costs of the rule to the prosecutor or his solicitor. Subsequently to this rule the defendant paid the sum due to the solicitor's clerk, under the first rule. *Held* that this was no payment so as to make the writ for attachment no longer operative. *Re Phelps*, 6 V.L.R. (L.,) 37; 1 A.L.T., 152.

Duty of Sheriff under Writ.]—The duty of the sheriff under writ of attachment, ordering him to attach a defendant, "so that you may have him before us" on a certain day, is to arrest the defendant, lodge him in the gaol nearest to the place of arrest, unless the Court order otherwise, and there keep him until directed by the process of the Court to bring him up. *Ibid.*

Defendant Applying for Discharge—Matter Between Defendant and Prosecutor—Objections—Turning Over.]—If a defendant who has been arrested on a writ of attachment have himself brought before the Court on an application to be discharged, he cannot take any other exceptions to the regularity of the writ than he could have taken had he applied the day after his arrest for discharge on the ground of such irregularity; and when a defendant has so brought himself before the Court, the matter is then one entirely between him and the prosecutor, and not between him and the Sheriff, and he must be turned over as of course to the gaoler, unless he can show that the whole proceedings are void *ab initio*, or that he has purged his contempt. *Ibid.*

For Non-Compliance with Decree—Practice.]—Where a decree was made directing defendant to transfer a mining share to plaintiff, and deliver up the scrip to him, with a duly executed transfer endorsed thereon, within one month, and such decree was served personally upon the defendant, who failed to comply therewith. Upon motion for attachment, *Held* that a demand should have been made on defendant to comply with the decree, and there could be no contempt till such a demand was made. An order was made, however, directing defendant to hand in the scrip, duly endorsed, to the office of the plaintiff's solicitor, at an hour named, and upon affidavit of non-compliance attachment to issue. *Filler v. Stephens*, 6 V.L.R. (E.,) 144.

For Contempt—Heading of Rule for Attachment.]—A rule to attach a person in contempt or to turn him over to the custody of the gaoler is not invalid for being irregularly headed "*Re Reg. v.* ——," instead of "*Reg. v.* ——;" or because the costs of the rule are not endorsed on the writ. These irregularities merely form matter for objections which may be waived by delay in applying to the Court or a Judge. *Re Phelps*, 6 V.L.R. (L.,) 164; 2 A.L.T., 4.

Person Decreed to Pay Money Becoming Insolvent.]—An order on *ex parte* motion will not be made for attachment of a defendant who has failed to pay money ordered by a decree when such defendant has subsequently become insolvent. Notice of motion is necessary in such a case. *Lane v. Loughnan*, 7 V.L.R. (E.,) 19; 2 A.L.T., 134.

Writ of—"Supreme Court Rules," Cap. VI., Rule 42—Wrong Date.]—Where a writ of attachment directed that defendant should be brought before the Court on the 26th day of June, or on the next day after the arrest on which the Court should be sitting, June being put in in error for May, and Sheriff brought up prisoner on 26th May. *Held*, that prisoner should be turned over without prejudice to any application he might wish to make to the Court. *In re Givan*, 7 V.L.R. (E.,) 52.

Refusal to Execute Conveyance—Time to be Fixed in Order Nisi.]—An attachment for refusal to sign a conveyance directed by an order under further directions was refused on ground that order *nisi* did not fix a time within which conveyance was to be executed. Order made on subsequent motion, appointing a time, and directing an attachment to issue on non-compliance with the order. *Cameron v. M'Namara*, 9 V.L.R. (E.,) 17.

ATTORNEY.

See SOLICTOR.

ATTORNEY, POWER OF.

See POWER OF ATTORNEY.

ATTORNEY-GENERAL.

1. *When he is a Necessary Party.*
2. *When he Represents the Crown.*
3. *Costs of and Against.*

1. When he is a Necessary Party.

Mining on Private Property—Rights of Shareholders and Directors inter se.]—Where a Mining Company was mining on private property alienated from the Crown, and a suit was brought to enforce the liabilities of directors to the shareholders, *Held*, that as to enforcing liabilities between shareholders and directors, it was not right that either should be embarrassed by the fact that both were liable to be treated as trespassers by the Crown, and that the Attorney-General was not a necessary party. *Reeves v. Croyle*, 6 W.W. & A'B. (E.,) 302.

Held, per Molesworth, J., that in a suit by bill and information, seeking an injunction to restrain persons from mining on another's private property, the Attorney-General of Victoria, and not the Attorney-General of England nor the Commissioners of Crown Lands, is the proper officer to file the information, and that the Constitution Act, though it transferred the management of Crown property to local authorities, does not transfer the remedy for encroachment upon it, and those rights can only be enforced by the law officers of the Crown, and that the Attorney-General is the proper person to enforce such rights in Victoria. *Attorney-General v. Gee*, 2 W. & W. (E.,) 122.

Joinder of Attorney-General with a Municipal Corporation and an Owner of Private Property to Restrain Mining.]—Where the Attorney-General, a Municipal Corporation, and an owner of private property joined in an information and bill to restrain mining, *Semble, per Molesworth, J.*, the Attorney-General, a Municipal Corporation, and the owner cannot join for different injuries—the one complaining of the removal of the gold, the other of the injury to the streets, and the third of injury to his property. *Attorney-General v. Rogers*, 1 V.R. (E.,) 132, 139; 1 A.J.R., 120, 149.

Landlords and tenants may join in a suit for injury to the soil, and the Attorney-General as representing the Crown may join in the suit for an injunction and account. *Attorney-General v. Boyd*, 3 A.J.R., 18, 99, 130.

The Attorney-General and freehold owners may join in a suit to restrain a trespasser from mining for gold on the land. *Attorney-General v. Lansell*, 8 V.L.R. (E.,) 155, 172; 3 A.L.T., 141.

Motion for Inspection.]—*Semble*, in a suit for encroachment by Attorney-General and licensees if the encroachment is admitted, a motion for inspection, to which the Attorney-General is not a party, will not be granted. *Ibid.*

Licensees from Owner Mining on Private Land—Encroachment—Suit for Account of Gold Taken.]—Where plaintiff and defendant held licenses from the owner of private property to mine on his land, and defendant had encroached, on bill by plaintiff seeking *inter alia* an injunction restraining defendant from driving for or taking gold or auriferous earth from plaintiff's part of the land, and for an account of gold already taken, *Held* that since the Attorney-General was not made a party the injunction and account could not be granted. *Astley United Gold Mining Company v. Cosmopolitan Gold Mining Company*, 4 W.W. & A'B. (E.,) 96.

Mining Suit—One Applicant for a Lease Suing Another for Trespass.]—The Attorney-General is not a necessary party to a suit of trespass instituted by one applicant for a mining lease against another who has an expectation of a lease. *Robertson v. Morris*, 7 V.L.R. (M.,) 1; 2 A.L.T., 109.

Sale of Crown Lands.]—In a suit to restrain the sale of Crown lands the Attorney-General, as representing the Crown, is a necessary party. *Palmer v. Board of Land and Works*, 1 V.L.R. (E.,) 80.

For facts see S. C. *post* under Crown.

Injunction Against Nuisance.]—A municipal corporation, charged with the care and management of streets, suing for an injunction to restrain mining under a street upon the ground of expenses incurred in keeping down nuisance occasioned by subsidence of the street may in that aspect sue alone, and the Attorney-General is not a necessary party. *Mayor, &c. of Ballarat v. Victoria United G.M. Company*, 4 V.L.R. (E.,) 10.

2. When he Represents the Crown.

In a suit by bill and information against a private person to set aside a sale of Crown lands to him on the ground of mutual mistake as to the value of improvements on the land, the Attorney-General is the proper person to represent the Crown; he has the right and duty to do all acts done by usage by an officer of the same name in the mother country. *Semble*, there is no distinction between proceedings to protect unalienated Crown property, and to set aside

improper alienations; it is not necessary for the Attorney-General to prove his appointment. *Attorney-General v. Belson*, 4 W. W. & A'B. (E.,) 57.

His Right to Represent the Grand Jury.]—*See Regina v. Patterson, post* CRIMINAL LAW—Practice and Procedure—*Jury*.

3. COSTS OF AND AGAINST.

When entitled to.]—Where the Attorney-General was a necessary party to a suit respecting charities, though he rendered the Court no assistance, the Court allowed him his costs. *Treacy v. Watson*, 10 V.L.R. (E.,) 96; 5 A.L.T., 201.

For other cases *see* under COSTS—Of and Against Particular Persons.

AUCTION AND AUCTIONEER.

Entries by Auctioneer's Clerk—Sufficiency within "Statute of Frauds."]—At a sale by auction where the auctioneer's clerk acts as amanuensis and writes down the names of the purchasers, the names of the purchasers should be called out by the clerk to show that he was aware of the person to whom the goods were knocked down. *Moss v. Cohen*, 3 V.R. (L.,) 205; 3 A.J.R., 104.

Agent for Purchaser—Entry of Purchaser's Name in the Sale-Book by Auctioneer's Clerk.]—An entry by the auctioneer's clerk of a person's name to whom goods are knocked down at an auction sale is not a sufficient signature by the agent of a purchaser to satisfy the "*Statute of Frauds.*" *Pratt v. Rush*, 5 V.L.R. (L.,) 421.

Auctioneer's Clerk—How far he Binds a Purchaser by Entering his Name in a Sale-Book.]—*See Service v. Walker*, under SALE—OF GOODS—*post*.

Agent for Purchaser—Sale of Land—Revocation of Authority.]—Certain land was sold by auction, and D. had it knocked down to him. The auctioneer's clerk entered D.'s name as purchaser in the contract for sale. D. was asked to sign the contract, which he refused, and afterwards repudiated the sale. Six months after auction, but before action, the auctioneer signed the contract of sale as agent for D., the purchaser. The vendor sued D. on the contract, and recovered a verdict. On rule *nisi* for a nonsuit, *Held*, that the auctioneer became the purchaser's agent directly the hammer fell, and as such had authority to sign the contract on his behalf, but that such authority was revocable, and was in this case actually revoked. Rule absolute. *Ecroyd v. Davis*, 3 V.R. (L.,) 228; 3 A.J.R., 114.

Sale by—Warranty of Title.]—An engine was put up for sale in the vendor's presence, a third person B. put in his claim to it, and the auctioneer said he had a guarantee from the vendor. R. purchased it, but B. recovered possession of it in an action of trover. In an action by R. against the vendor, *Held*, there had been an express warranty of title. *Robbins v. McCulloch*, 1 V.L.R. (L.,) 20.

Sale "as Agents of Vendors"—Commission—Costs.]—An auctioneer, M., sold certain land under conditions of sale, which provided for the purchaser paying a deposit to M., "as agent for the vendor." *Held* that M. was entitled to commission. The vendors could not make title, and the purchaser sued M. for a return of the deposit, and succeeded, getting certain costs. *Held* that M. could not recover from the vendors the costs paid to the purchaser or his own costs, because he had not raised a proper defence, *i.e.* that he was not a stakeholder, to the action. *McMillan v. Read*, 3 V.L.R. (L.,) 284.

Effecting Sales Without a License—Partners—License to One Partner—"Sales by Auction Statute 1864," Sec. 18.]—An unlicensed partner in a firm, which has the word "auctioneers" painted up on its business premises, is liable to the penalty imposed by Sec. 18 of the "*Sales by Auction Statute* 1864," for having words painted on his premises which led to the belief that he was an auctioneer, not being a licensed auctioneer, though all sales by auction are conducted by the partner who has a license. *Ex parte Mills re Alley*, 8 V.L.R. (L.,) 316; 4 A.L.T., 80.

Commission—Sale by Owner.]—W. put certain property into B.'s hands for sale by auction, and without formally withdrawing it from sale by B. W. sold it to a purchaser not introduced by B. *Held*, that B. was not entitled to a commission. *Bliss v. Withers*, 9 V.L.R. (L.,) 32.

Commission — Sale under Decree.]—Where a decree was made for the sale of real estate under the direction of the Master, the proceeds of sale to be paid into Court to abide the order of the Court, *Held*, that the auctioneer should retain his commission out of the proceeds before paying into Court, and pay the net proceeds into Court. *McMillan v. Houston*, 9 V.L.R. (E.,) 168.

AUDIT AND AUDITORS.

Of Accounts of Road District—Special Auditors—"District and Shires Act," No. 176, Sec. 164.]—Special auditors appointed under the Act No. 176, Sec. 164, for a certain Road District, were required to make a special audit of the accounts of the Board. At the audit, which was held in December, they had submitted to them the balanced accounts of the two complete months of October and November, which

had elapsed since the last general audit for the year ending 30th September. Not finding what they required in the accounts submitted to them, the auditors called for the accounts of the year ending 30th September, and, no objection being made, specially audited the accounts for the whole fourteen months. On suing in the County Court for their fees for the fourteen months, the Judge held that they were only entitled to payment for the two months of October and November, not being competent to re-audit the accounts of the previous twelve months already audited by the general auditors under Sec. 162 of the Act. On appeal, *Held*, that the decision was right, and appeal dismissed. *Rucker v. Moorabbin District Road Board*, 3 W. W. & A'B. (L.,) 101.

Applicant for Mandamus to Compel Shire Council to Pay Fees for Special Audit—Smaller Amount Awarded than that Sought.]—An applicant for a *mandamus* to a shire council compelling them to pay him the fees of a special audit, is entitled to his costs notwithstanding that a smaller amount has been awarded him than that sought. *Regina v. Shire of Pyalong*, 4 A.J.R., 124.

Mandamus to Borough Council to Compel Payment of Audit Fees—"Local Government Act 1874," Sec. 519.]—The Council refused to grant a *Mandamus* (questioning *Regina v. Shire of Pyalong*, 4 A.J.R., 124,) to compel a municipal body to pay fees for auditing its accounts, pointing out that there was a remedy by arbitration under Sec. 519 of the "*Local Government Act* 1874." *Regina v. Mayor, &c., of Collingwood*, 2 V.L.R. (L.,) 46.

Audit of Accounts of a Road Board—Disallowing Items—Powers of Auditors—27 Vic., No. 176, Secs. 149, 160.]—*Heidelberg Road Board v. Young.* *See post* under LOCAL GOVERNMENT.

AVERAGE.

See INSURANCE AND SHIPPING.

BAIL.

In Criminal Matters—Estreatment.]—M., being convicted of embezzlement was sentenced, but several points were reserved, and pending the decision of such points, execution of the sentence was respited. M. and two sureties entered into a recognizance before a Justice of the Peace, conditioned that M. should "appear at the next Court of General Gaol delivery, to be holden at Melbourne, on the 7th of September, or whenever thereto required." No Court of Gaol Delivery sat in Melbourne on the 7th September, because the Court was sitting in Banco for Michaelmas term. M. appeared, however, and the points reserved were argued, and judgment was reserved. On the 30th September the case was called on for judgment, but M. did not appear, having absconded. The Court accordingly did not deliver judgment, but permission was given for an application to be made at the next Ballarat Circuit Court for an order requiring his sureties to produce him, and an order was made at such Circuit Court for M.'s appearance at the next General Gaol delivery at Melbourne on the 16th October. It was served at M.'s residence on his wife, and also on the sureties. M. did not surrender himself on the day named, and an application was made to the presiding Judge at Criminal Sessions to have the recognizances estreated, which was referred to the Full Court. *Held*, that M. having appeared to receive sentence in the terms of the recognizances, which did not require him to render himself, and no Court having sat on the day upon which he was to appear, the recognizances could not be estreated. *Regina v. Moore*, 2 V.R. (L.,) 190; 2 A.J.R., 115.

When Granted or Refused]—After conviction and sentence for conspiracy, questions of law were reserved, and the prisoners were let out on bail; but judgment was given for the Crown on the questions reserved, and immediately afterwards a rule *nisi* for a new trial was obtained, on the ground that the verdict was against evidence, and that the jury had acted partially. An application that the prisoners should go again on bail was refused. *Regina v. Nathan*, 1 W. & W. (L.,) 317.

Bailable Process — Writ of *ca. re.*] — *See post* under CAPIAS.

BAILIFF.

Appointment of Spscial Bailiff—15 Vic., No. 10, Sec. 24.]—*See House v. O'Farrell*, under TRESPASS—To houses and lands.

County Court Bailiff.]—*See post* under COUNTY COURT.

BAILMENT.

Deposit of Scrip as Security for Debt—Rights of Pledgee.]—Generally speaking, a pledgee of chattels has a right to reimburse himself by a sale, but this sale should not be to the pledgee, or to a trustee for him, and should, according to American authorities, be by auction. R. deposited scrip for 130 shares with N. to secure payment of a debt within a month. R. made default, and N. advertised the scrip for sale by auction. At this sale N. bought the shares in, and stated he would allow redemption within a week, and took an I.O.U. from R. in part

payment, which proved valueless. N. afterwards, without further notice to R., sold the shares to S., as trustee for M. On a bill by R. against M. and N.'s official assignee to set aside the sale to M., and for redemption of the shares and transfer, *Held* that after the attempted auction sale, R. and N. resumed their former positions of pledgor and pledgee, and that the sale to M. was an improper sale. Declaration that plaintiff was entitled to redeem. *Ryan v. Macintosh*, 4 W. W. & A'B. (E.,) 8.

Pledge—Sub-Pledge.]—Certain mining scrip was pledged to B., as security for certain advances, and was sub-pledged by B. to a bank to secure an overdraft. The pledgor then tendered to the bank the amount of B.'s advances. *Held* that the pledgor was entitled to have the property restored. *Colonial Bank v. Mitchell*, 3 V.L.R. (L.,) 12.

Fraudulent Bailss.]—*See* CRIMINAL LAW.

BAKER.

Selling Bread Without Weighing It—"Bakers' and Millers' Statute 1865," Sec. 11—Sale by Servant.]—A baker is liable to the penalty imposed by Sec. 11 of the "*Bakers' and Millers' Statute* 1865," for selling bread *in his shop* without previously weighing it in the presence of the customer, though the sale may, in fact, have been made by his servant. *Regina v. Panton, ex parte Edmonds.* 8 V.L.R. (L.,) 301.

BANKERS AND BANKING COMPANIES.

I. GENERALLY.

Evidence of Banker's Books—Act No. 620, Secs. 4, 8.]—A defendant Bank may, under Sec. 4, prove the entries in books by secondary evidence of the copies, and need not, under Sec. 8, require the production of the originals. *Oriental Banking Corporation v. Smith*, 1 A.L.T., 76.

II. NEGOTIABLE INSTRUMENTS.

(1) *Cheques.*

(*a*) *Generally.*

Post-dated—Liability of Banker Paying before Due.]—A post-dated cheque is a bill of exchange for the number of days for which it is post-dated; and a banker paying such a cheque before the date upon it may become liable to his customer for negligence. *Hinchcliffe v. Ballarat Banking Company*, 1 V.R. (L.,) 229; 1 A.J.R., 169.

(*b*) *Endorsement.*

Consideration for—Cashing]—Cashing a cheque for the convenience of the holder is a purchase of the cheque, if there be funds to meet it, when presented with due diligence, and does not render the holder, who delivers it to the person cashing it without endorsing it, liable thereon, and does not furnish a consideration for a subsequent endorsement of it by him. *Campbell v. Connor*, 6 V.L.R. (L.,) 297; 2 A.L.T., 46; *sub. nom., Connor v. Campbell.*

When not a New Drawing.]—Where a cheque which had been cashed and presented by the person cashing it was dishonored, and the person cashing it thereupon brought it back to the person for whom he had cashed it, and, without informing him of the presentment and dishonor, requested him to endorse it, *Held*, that such endorsement was not a new drawing. *Ibid.*

(*c*) *Presentment for Payment.*

In Due Time—Notice of Dishonour.]—In the case of a Bill of Exchange the time for presentment is clearly fixed; but, assuming the solvency of all the parties, in the case of a cheque there is no limitation for presentment, short of the six years of the Statute; and, when there is also no insolvency, notice of dishonour may be given within any reasonable time. *Hutton v. Glass*, 5 W. W. & A'B. (L.,) 163.

(*d*) *Crossed Cheques.*

"Instrument and Securities Statute," No. 204, Secs. 33, 34, 35.]—To an action by the bearer of a cheque against the maker it was pleaded, that before and at the time the plaintiffs became the bearers, and before and at the time of its presentment, the cheque bore across its face two transverse or parallel lines and was a duly crossed cheque within the meaning of Act No. 204. *Held*, on demurrer to the plea by *Stawell, C. J., and Barry, J.* (*dissentiente Williams, J.,*) that it was quite consistent with the plea that when the cheque left the drawer it was not a crossed cheque, and that irrespective of legislation the lines were not a

material part thereof; and that under Act No. 204, the lines were not a material part of the cheque, and that the plea was no answer to the declaration. Judgment for plaintiffs. *Golden Lake Company v Wood*, 6 W. W. & A'B. (L.,) 170; N. C. 2.

(e) *Honouring Cheques.*

Cheque Improperly Filled In—Essential Features of Chequss.]—The statement in the body of a cheque is the dominant and essential mode of expressing the essential element of a valid complete instrument, viz., the sum of money, and until this portion is filled in, the instrument is incomplete, and a banker is not liable to an action at the suit of the customer for refusing to honour, on presentment, a cheque thus imperfect. *Commercial Bank of Australia v. Hulls*, 10 V.L.R. (L.,) 110; 6 A.L.T., 9.

Crossed Cheques—Notice Not to Pay from Holdsr of Lost Cheque—Liability of Bank.]—The holder of a crossed cheque, dated 20th April, lost it on that day. The 21st and 22nd were bank holidays. On the 23rd, before the bank opened, the holder gave notice of his loss, and required the bank not to pay it. A customer of the bank, on the 24th, brought in the cheque to be carried to his account, and the bank disregarding the holder's notice credited the customer with the amount of the cheque, considering themselves only bound by a direction from the drawer. On an action in the County Court, the Judge held the bank liable to make good the cheque to the holder, and gave him a verdict for the amount. Upon appeal, *Held* erroneous, and appeal allowed with costs. *Colonial Bank of Australasia v. Hunter*, 1 W. & W. (L.,) 236.

Notice of Dishonour.]—Notice of dishonour of a cheque to the drawer is necessary. Knowledge of dishonour is not enough. *Clarke v. McLean*, 4 W. W. & A'B. (L.,) 275.

For cases of Bank's liability for dishonouring cheques. *See post* under *Liability of Bankers, &c.*

(2) *Deposit Notes.*

Liability of Bank for Paying to Wrong Person—Gross Negligence.]—M., on August 4th, 1869, paid £60 into a bank and received a deposit receipt in the following terms:—"Fixed deposit receipt, No. 7,196, the ——— Bank, Melbourne, 4th August, 1869, £60. Period, six months, repayable 4th February, 1870. Received from No. 7,196, the sum of £60 sterling, to be placed to his credit for six months fixed on deposit account with this bank, bearing interest during that period at the rate of 4 per cent. per annum, and in the terms detailed by the depositor in his paid-in voucher of this date. This receipt must be produced when this money is called for." Across the receipt was written the words "not transferable." The deposit voucher referred to was signed by M., and was as follows: "4th August, 1869. Paid into the ——— Bank the sum of £60 sterling, for which I have received a deposit receipt; and I agree that, in consideration of the bank taking charge of the amount, the deposit shall not be withdrawn except on giving up this receipt, and that the possession of the same by the bank shall be conclusive evidence of my having, or some person on my behalf, having received the amount therein expressed. Paid-in Voucher No. 7,196. *James McConkey.*" M., when paying in the money, signed his name "*James McConkey*" in a book, so as to give the bank a specimen of his signature. Another person stole the receipt from M., and got it cashed at the bank, writing across it a signature purporting to be M.'s, but which was unlike M.'s, and wrongly spelt, as follows:—"*James McCornkey.*" The bank, however, took no notice of the difference, and M. sued them for the amount. *Held* that the clause in the deposit voucher as to the possession of the receipt by the bank being conclusive evidence that M., or some one on his behalf, had received the money, only shifted the burden of proof, and made it incumbent on M. to prove gross negligence on the part of the bank; and that he had done so, and was entitled to recover. *Colonial Bank v. McConkey* 1 A.J.R., 91.

III. Powers and Liabilities.

(1) *Powers.*

Taking Real Security for Present Advances—Violation of Charter.]—Where a bank's Act of Incorporation prohibited the taking a mortgage of real estate to secure a present advance, and only authorised taking land as security for any debt incurred previously and not in anticipation or expectation of such security, and the bank took over from another bank an existing debt, and took a mortgage as security for it, and the debt having increased, subsequently took a second mortgage of the same land to secure the aggregate amount, *Held, per Molesworth, J.*, following *National Bank v. Cherry* (L.R. 3 P.C. 299,) that the mortgage was not in respect of advances made in expectation or anticipation and therefore was valid. Upon appeal affirmed, and *Held* that the transaction was not a violation of the bank's charter. *Droop v. Colonial Bank*, 6 V.L.R. (E.,) 228; 2 A.L.T., 90. *On Appeal*, 7 V.L.R. (E.,) 71; 3 A.L.T., 13.

Power to Advance on Security of Land.]—Where a bank had taken an equitable mortgage of lands under the "*Transfer of Land Statute*" to secure further advances, a decree was made for sale of such lands, although advances on security of land might be in contravention of the bank's charter. *London Chartered Bank v. Hayes*, 2 V.R. (E.,) 104; 2 A.J.R., 60.

"Colonial Bank Act," 19 Vic., Secs. 1, 3, 12, 13—Lsass of Land for Non-Banking Purposss.]—The Colonial Bank obtained a lease of land, with an option of purchase. Bill by bank for specific performance of contract for sale. There was evidence that the bank contemplated to lease the land when purchased for other than banking purposes. *Held*, that under Secs. 1, 3, 12, and 13 of the "*Colonial Bank Act*," the purchase of the land and the contract for

purchase were illegal unless for banking purposes. *Colonial Bank of Australasia v. Buckland*, 9 V.L.R. (E.,) 29; 4 A.L.T. 143.

Lien on Bill of Exchange—Specific Appropriation.]—In an action by the endorsees of a bill of exchange against L., the acceptor, it appeared that the defendant accepted the bill at three months, on 28th July, 1869, and that one K. had drawn the bill and placed it in a bank for collection, endorsing it in blank. K. had three months previously assigned his estate for the benefit of creditors (including the bank,) and before the assignment K. had agreed that all bills lodged should be held as security against his overdraft. After the assignment, both when the bill was drawn and when it fell due, K.'s account was overdrawn. The bank advanced to one C., a sum to enable him to purchase K.'s estate from the trustees, and among other security that C. gave was an acceptance of his own that did not fall due till June, 1870; and in K.'s pass-book was an entry that the bill sued on was held as security for C.'s acceptance. *Held*, that the specific appropriation in the pass-book did not debar the bank from applying L.'s bill in payment of K.'s overdraft, and that they could sue L. as endorsee. *Commercial Bank v. Lawrence*, 1 A.J.R., 119.

Purchase of Shares in a Mining Company—Act of Incorporation—Authority of Manager—Corporate Seal.]—E. deposited 550 shares in the G. Mining Company with a bank as security for his debt to the bank, and subsequently made a statutory assignment in favour of his creditors. The G. Company applied for a lease, and during the application stopped work, by which it incurred a forfeiture of the claim. S., a previous director, resigned his directorship, opposed the application for a lease, and took out a summons to enforce the forfeiture; the Warden dismissed this summons, and S. appealed. Pending the appeal S. agreed to withdraw his proceedings for forfeiture, and to an amalgamation of the G. Company with the A1 Company in consideration of receiving eighty shares in the amalgamated company and of the bank's undertaking to pay the calls on E.'s share. On 14th June, 1867, M., the manager of the bank, signed an undertaking to see all calls paid. On 11th June, 1867, E.'s trustees sold the shares by auction, when they were bought by H. and the other plaintiffs, as nominees for the bank and in trust for the bank. S., to whom the bank's undertaking was first known in July, 1867, repudiated the letter of 14th June, as not binding on the bank, and prosecuted the appeal. On 26th June, S. wrote to M. consenting to the amalgamation, and undertaking to assign to all the shareholders in the G. Company, except E. and those claiming through him, shares equivalent to those previously held by them. S. wrote afterwards, stating that his undertaking was conditional on the success of the appeal, if unopposed. The appeal was unopposed, and S. was successful. The two companies were amalgamated, and S. distributed the shares according to the letter of 26th June, excluding the bank, and retained for himself the shares in the new company representing E.'s 550 shares in the G. Company. On a bill by the bank and its nominees, into whose names E.'s shares had been transferred, *Held* by the Full Court, reversing *Molesworth, J.*, (1) that the purchase of the shares by the bank was not a violation of the Act of Incorporation under the circumstances; that though the bank had no power to traffic in shares as an investment of its funds, yet lending money on the security of these shares was part of legitimate banking business, and the Court would not interfere with the bank respecting the management of securities or the method of making those securities most available: (2) that the undertaking of 14th June was within the scope of the manager's authority, and did not require the corporate seal, for the bank could not be regarded as likely to repudiate an undertaking for such an object: and (3) that the forfeiture of the mining claim had been brought about by unfair means; that a shareholder must treat all his co-shareholders alike, and must not treat some as partners in an undertaking and others as not; and that the defendant S. was a trustee for the bank of shares in the amalgamated company representing E.'s 550 shares in the G. Company. *Harrison v. Smith*, 6 W.W. & A'B. (E.,) 182. *Decision of Full Court affirmed on appeal to the Privy Council. See Smith v. Harrison*, 3 A.J.R., 44.

(2) *Liabilities.*

For Dishonouring Customer's Bill — Reasonable Time to Ascertain whether Account is in Credit.]—A banker is not liable to pay his customers' bills after banking hours; and, therefore, the time to be allowed for ascertaining what payments have been made into a customer's account should only be reckoned till 12 o'clock on Saturdays, and not till the departure of the clerk to the clearing house. *Troedel v. Colonial Bank of Australasia*, 1 A.J.R., 99.

Whether Relationship of Banker and Customer Exists.]—R.'s father had remitted to a bank certain moneys to be paid to R. by monthly instalments. An accumulation of these instalments took place at one time, and R. went to the bank, saw the manager, showed certain cheques running over a series of four or five months (the holder of these being present at the time,) and asked whether those cheques would be paid, and he was told, "Yes, if you draw no other," and these cheques were paid. Afterwards, and without any communication with the bank he drew a cheque for a less sum than the amount of the instalments which was paid, and subsequently drew another cheque, which was dishonoured. On an action for the dishonour, *Held* that the relation of banker and customer did not exist, and that the permission given by the bank was only as to a certain sum, and did not authorise its continuance. Rule absolute for nonsuit. *Robinson v. Oriental Bank*, 3 V.R. (L.,) 177; 3 A.J.R., 74.

For Dishonouring Cheques.]—A bank was under an arrangement made with S. to receive a certain sum of money, out of which it was to pay off a promissory note given by S. to a third person

and the balance was to be paid to S. S. drew a cheque upon the bank for the balance, which the bank refused to honour. *Held*, that the arrangement did not constitute the relationship of banker and customer between S. and the bank, and that the bank was not liable for the dishonour. *Stewart v. Bank of Australasia*, 9 V.L.R. (L.,) 240; 5 A.L.T., 77.

For Dishonouring Customer's Bill When Cheques Paid In to Meet It—Reasonable Time for Ascertaining Sufficiency of Cheques.]—M. kept an account at a bank for two years. An acceptance was given by M. which fell due on a Sunday, and therefore, according to custom was to be met on the Saturday preceding. On the Friday before M. paid in certain sums in cheques and cash, and on the Saturday, about twenty minutes to twelve, he paid in, in cash and cheques, a sum, which assuming the cheques to be good was, with those paid in on Friday, more than sufficient to meet the bill. All the cheques were drawn on banks in Melbourne. By the practice of the clearing house cheques paid in late on Friday are not sent to be cleared till Saturday at 12.30 p.m., and the clearing on that day is not effected till 1 p.m. and the cheques do not come back to the banks on which they are paid till Monday following. The bill was presented and dishonoured shortly before 12 on Saturday, and the bank made no inquiries as to whether the cheques would be met. As a fact they were all met, and in M.'s pass-book, under date the Friday the bill was presented, he was credited with the sums paid in on that day. The ledger-keeper told M. that town bills would be treated as cash, and that town cheques paid in on Saturday would meet bills due that day. The acceptance as returned had on it the words "effects not cleared." The jury returned a verdict for M., the judge having directed them that it was the duty of the bank to make inquiries before dishonouring the bill. On rule *nisi* for a new trial, *Held* that it was unnecessary to decide whether the judge's direction was right, since the entry in the pass-book afforded very strong evidence that M. had to his credit funds sufficient to meet the bill, and rule for a new trial discharged. *MacDermott v. Bank of Australasia*, 4 A.J.R., 37.

Agreement that Bank should Hold the Proceeds of Bills Held as Security till Bills under Discount had been Paid.]—M'C., the plaintiff, was in the habit of discounting bills with the defendant bank. By an agreement, the manager was in the habit of taking the longer dated bills, and holding them as security for the shorter dated ones, and of putting the security bills when paid to the plaintiff's credit. On one occasion (in September) the security bills were paid, but the proceeds were not placed to McC.'s credit, and at this time a cheque of his was dishonoured. M'C. sued the bank for the dishonour and obtained a verdict. On rule *nisi* for a nonsuit, *Held*, that the agreement being that the bank should hold the proceeds of the security bills till all bills under discount had been paid they were not bound to place the proceeds of the September bills to the plaintiff's credit. Rule absolute. *M'Cooey v. Bank of New South Wales*, 5 A. J. R., 23.

Agreement as to Advances—Verbal Agreement—Subsequent Deed.]—A bank verbally agreed to advance to a customer, A., £1 per acre on Crown leasehold property (319 acres) so soon as he obtained leave to mortgage the lease as a security from the Governor-in-Council. A. obtained leave, and executed a mortgage to secure repayment of £150 then due, and all sums which the bank might (*but without any obligation for it to do so,*) advance to A. A., at the time of the verbal contract, owed £150 to the bank, and sued the bank for dishonouring a cheque given by A., believing that the bank had agreed to advance £169 besides as under the agreement and deed. *Held* that the verbal agreement was inconsistent with the mortgage deed by reason of the words in brackets, and that A., in executing the mortgage which contained a condition inconsistent with the verbal promise had precluded himself from enforcing such promise. Rule absolute for verdict for defendant. *Abbott v. Commercial Bank*, 5 V.L.R. (L.,) 366; 1 A.L.T. 57.

Agreement by Banker Under a Mistake—Excessive Damages—Previous Loss of Mercantile Character by Customer.]—A banker verbally agreed with a customer, D., to allow him an overdraft to a certain amount, but by mistake the banker, in a letter purporting to embody the terms of such agreement, really agreed to allow an overdraft to a larger amount. The banker did not withdraw the letter. D. sued the bank for dishonouring a cheque, and proved some special damage, and the jury awarded heavy damages: it was proved that D. had previously lost his mercantile reputation by allowing previous cheques of his to be dishonoured. *Held* that the banker was bound by the terms of his letter, and that although the damages seemed excessive, owing to D.'s loss of character, yet, as he proved special damage, the verdict could not be disturbed. *Doria v. Bank of Victoria*, 5 V.L.R. (L.,) 393; 1 A.L.T., 97.

Damages—Farmer, what Damages Entitled to—Trader.]—A farmer is not a trader, and has therefore no mercantile character, and cannot recover more than nominal damages for the dishonouring of his cheque, unless he prove special damage, or that he has a mercantile character. *Bank of New South Wales v. Milvain*, 10 V.L.R. (L.,) 3; 5 A.L.T., 167.

Liquidator—Winding-up Order Set Aside—Act No. 409, Secs. 89, 187.]—A company was ordered to be wound up, and plaintiff, the manager, was appointed liquidator, and as such paid into the defendant bank money to the credit of the company in liquidation. Afterwards an order was made setting aside the winding-up order, and the directors of the company wrote to the bank requiring them to hold all moneys paid into the bank to the credit of H. on behalf of the company. H. afterwards presented a cheque which was dishonoured. *Held* that H. could not sue for the money in his individual capacity, as the money was paid in by him as liquidator, and he could not after the last order draw upon

the account as liquidator. Rule absolute to enter verdict for defendant. *Macdougall v. Bank of Victoria*, 7 V.L.R. (L.,) 230; 3 A.L.T., 6.

Statute of Limitations.]—To a declaration for dishonour of a cheque, the defendant bank pleaded that it did not receive any moneys of the plaintiff's, applicable to the payment of the cheque within six years before presentment, or within six years before suit. *Held*, a good plea on general demurrer. *O'Ferrall v. Bank of Australasia*, 9 V.L.R. (L.,) 119; 5 A.L.T., 20.

For Act of Branch Manager—Waiver of Promissory Note.]—A manager of a local branch of a bank has power, in the ordinary course of his business as manager, to waive verbally, for consideration, the liability of the maker of a promissory note held by such manager as security for the account of a customer at such branch. *Bank of Australasia v. Cotchett*, 4 V.L.R. (L.,) 226, 237.

For Promises of a Defaulting Manager.]—*See Blackwood v. Rourke, post* under *Customers' Accounts.*

For Act of Manager.]—The authority of a bank manager, as between the bank and the public, in the absence of any express announcement to the contrary, extends to a waiver of the liability of any party to a bill or note of which the bank is holder. *Colonial Bank v. Ettershank*, 4 A.J.R. 94, 185. Affirmed on appeal to the Privy Council, 4 V.L.R. (L.,) 239.

For Acts of Manager—Manager who was also Executor Acting Fraudulently—Bank not Liable.]—An executor, who was also manager of a bank, signed a cheque payable to bearer, and a deposit slip, for the purpose of transferring moneys of the estate, lying in the bank. He sent these documents to his co-executor for his signature, and on the documents being returned, misappropriated the money. *Held*, that since the fraudulent executor must be joined as co-plaintiff in an action against the bank, the latter was not liable at law for the moneys; and *Semble*, that even if the fraudulent executor were not estopped from suing, the bank would not be liable at law for such fraudulent act of the manager. *Nichol v. London Chartered Bank of Australia*, 4 V.L.R. (L.,) 324.

Loss of Securities through Theft of Clerk—Negligence.]—L. deposited with a bank £10,450 worth of debentures for safe keeping, these being kept in a strong-room, deposited in a box, the keys of which L. kept, and he often examined the box. The key of the strong-room was kept by F., a clerk in the bank. F. left the bank in July, 1864, having been in the bank's service eight years, and having borne a good character. Later in July, L. discovered that the debentures had been stolen from the box sometime between April and July, and evidence was given to show that F. had stolen the debentures. L. brought an action against the bank manager for the loss, and the declaration contained two counts; one alleging a bailment for hire, the second bailment without hire. The jury found for the bank on the first count, for L. on the second, damages £10,450 on that count. Rule *nisi* for a *nonsuit, Held* that, as negligence involves the non-performance of a duty, and that duty, though affected by the special facts of the case, must be determined by the Court, and not by the jury; that the bank as being only gratuitious bailees were only bound to take ordinary care, and that there was no actionable negligence, F. not being known to the bank to be a dishonest servant. Rule absolute for a *nonsuit. Lewis v M'Mullen*, 4 W.W. & A'B. (L.,) 1. Affirmed on appeal to P.C. (*sub. nomine,*) *Giblin v. M'Mullen*, L.R. 2, P.C., 317.

IV. Customers' Accounts.

(1) *Of what Persons.*

Husband and Wife.]—A wife having property settled to her separate use for life, with remainder as she should, notwithstanding coverture, by deed or will appoint, with remainder to her executors or administrators, opened two accounts with her bankers, a private and an administration account, and directed the bankers, by the joint letter of herself and her husband, to consider any overdraft on her private account secured by the administration account. The administration account was subject to the trusts of the settlement. At her death the private account was overdrawn. *Held* that she had contracted so as to bind her separate estate, and that the bankers had a lien on the administration account in respect of the overdrawn private account. *London Chartered Bank of Australia v. Lempriere*, L.R. 4 P.C., 572; 42 L.J.P.C., 49; 29 L.T., 186; 21 W.R., 513.

Public Company—Personal Liability of Directors.]—Two of the directors of a company, by a letter to the company's bankers, notified that their manager had authority to draw cheques on account of the company. These two directors did not form a majority of the directors so as to bind the company. Although the company's account was overdrawn at the time, to the knowledge of the two directors, the bankers honoured the manager's cheques on the authority so given. In an action by the bank against the two directors for advances made on the faith of the letter, *Held*, and affirmed on appeal to the Privy Council, that there was an implied warranty on their part that the manager had authority to bind the company, and that they were personally liable to the bank to the extent of the sums overdrawn by the manager subsequently to the date of their letter of authority. *Cherry v. Colonial Bank*, 4 W.W. & A'B. (L.,) 177; L.R. 3 P.C., 24.

(2) *Generally.*

How far Liable for Promise of Manager—Overdraft.]—C., a bank manager, indebted to R., a customer of a bank, promised to pay £150 of this by placing it to R.'s credit and letting R. draw against it. C. was convicted of defalcations in his accounts, and shortly afterwards R.

was informed that his account was overdrawn, C. having paid in no money to his credit. On an action against R. for the overdraft, *Held* that C.'s promise did not bind the bank so as to remove R.'s liability on his overdraft, *per Barry and Fellows, JJ.*, because C. exceeded his authority; per *Stephen, J.*, because C. could not bind the bank without making proper entries in the bank books, or at all events giving a cheque to R. *Blackwood v. Rourke*, 1 V.L.R. (L.,) 201.

(3.) *Duty, Obligation, and Powers in Paying Acceptances.*

Extent of Power—Overdue Acceptance.]—The authority of a bank to pay a bill of exchange accepted by a customer payable at the bank, continues after the maturity of the bill until countermanded by the acceptor. *Wine v. Bank of New South Wales*, 4 A.J.R., 78.

(4.) *Securities, Deposit, Pledge and Mortgage.*

Deposit—Liability to pay—Loss of Receipt.]—When money has been lodged with a bank on the condition that it is not to be withdrawn except on production of the deposit receipt, and the depositor has lost the receipt, the bank is not entitled to withhold the amount of the deposit, since the production of the receipt is not a condition precedent to the depositor's right to recover. The non-production is, however, a breach of contract, for which the bank could recover damages, such damages would, however, from the nature of the case, be merely nominal. *Dunlop v. London Chartered Bank*, 4 A.J.R., 154.

Deposit—Specific Appropriation—Authority of Teller.]—If a teller of a bank, though he have no authority to receive deposits except in the ordinary way of banking, receive a deposit subject to special conditions as to the manner of its appropriation, which special conditions it was his duty to have communicated to the manager, and the bank retains the deposit, the bank will be deemed affected with notice and bound by the special conditions, not because it is answerable for all the acts of the teller, but because that officer received the deposit subject to a condition of which it was his duty to have informed the manager. *Chamberlain v. English, Scottish and Australian Chartered Bank*, 4 V.L.R. (L.,) 45.

C., not having previously had an account with a certain bank, and not knowing that they were the holders of his promissory note, which was made payable at another bank, went to the bank and told the receiving teller that he wanted to pay money into the bank. On being asked if he wished to open an account, C. replied that he wished to pay money in to meet cheques drawn by him. C. paid in the money, and some of the cheques mentioned were afterwards honoured, but the rest, owing to the bank using C.'s money to pay the note, were dishonoured. The teller did not inform the manager of the conditions under which C. paid in his money. On an action for dishonouring the cheques, *Held* that the bank was liable, since it was the teller's duty to have informed the manager of the conditions. *Ibid.*

Cheque Deposited by Way of Security—Pre-existing Debt—Consideration.]—L. drew a cheque upon the Bank of Victoria, payable to bearer, and the plaintiff bank became the holders. The plaintiff bank sued L. upon the cheque. L. pleaded that he drew the cheque for S.'s accommodation, and that S. became the bearer without any consideration, and on terms of giving security for repayment thereof; that S. was a customer of the plaintiff bank's, and was indebted to them for an overdraft, and that the cheque was deposited with and kept by the bank as security, and that the bank did not after the deposit of the cheque give S. any further credit whatsoever. *Held*, on demurrer to the plea, that a pre-existing debt without further forbearance or advance before dishonour of the cheque did not give the bank the right to sue, and did not place the bank in any better position than S., who could not have sued on the cheque. Judgment for defendant. *English, Scottish and Australian Chartered Bank v. Levinger*, 4 W.W. & A'B. (L.,) 208.

(5.) *Lien.*

Upon What.]—A banker may have a lien upon title deeds of his customer deposited with him in the ordinary course of his business as banker; but not over deeds deposited with him for safe custody only. *Dale v. Bank of New South Wales*, 2 V.L.R. (L.,) 27.

Bill of Exchange Endorsed to Bank.]—A bill of exchange was drawn by R., upon and accepted by W., endorsed by R. to the bank, and offered by R. to the bank for discount. R.'s account being overdrawn, the bank refused to discount the bill, and R. left it in the bank and drew a cheque, by which he proposed to increase his overdraft, and got further advances on the security of the bill. *Held* that the Bank had a lien upon this bill, notwithstanding the fact that it was found in the "Bills for Collection" ledger, and, having property in it as endorsees, they had a right to sue W. *Bank of Australasia v. Walters*, 2 W.W. & A'B. (L.,) 89.

Bills Left for Collection.]—*Per Stawell, C. J.* The deposit of a bill with a blank endorsement for collection, followed by an advance upon it, would constitute a complete endorsement for value transferring the property to the bank. *Per Barry, J.* An advance upon the general credit of a customer would establish a lien on all bills in their hands at the time. *Colonial Bank v. McDonald*, 5 V.L.R. (L.,) 214; 1 A.L.T., 21.

Evidence of Advances.]—The deposit of a bill was proved by the drawer, and the advances were proved by the bank manager and the drawer. The defendant gave as evidence a statement by a travelling inspector in an affidavit in support of proof of a debt in the insolvent estate of the drawer that the bank had no security for the amount. *Held* that this statement as to a conclusion of law did

not contradict the positive statements of fact made by the bank manager and the drawer. *Ibid.*

Promissory Note Deposited for Collection—Set off.]—A. to secure an overdraft of B.'s gave to the defendant bank a promissory note for £2500. The bank, on B.'s insolvency, recovered payment of the note, and received a dividend out of the insolvent's estate for B.'s overdraft, which exceeded £2500. An overdue and unpaid promissory note of A.'s for £800 was deposited for collection with the bank by executors of a deceased customer of the bank indebted to it. Bill by A. to enforce payment by bank of a sum of £326, being the proportionate amount as on the note of £2500 of dividends received by bank out of B.'s estate. *Held* and affirmed that there might be a set off in equity, but in the absence of other evidence as to the consideration for the note of £800 the bank was not entitled to a lien on that note, and could not sue on it, or set it off against the £326 claimed. *Ford v. London Chartered Bank*, 5 V.L.R. (E.,) 328; 1 A.L.T., 66, 117.

On Securities—Government "H" Order.]—A Government "H" order deposited with a banker is not a security of a customer deposited on which bank can claim a lien, but is merely an authority given to bank for collection. *Board of Land and Works v. Ecroyd*, 1 V.L.R. (E.,) 304.

For facts *see* S.C., *Equitable Assignment, ante column* 58.

An agreement in writing by a customer that, in consideration of a bank discounting and allowing an overdraft, it should have a lien on all securities belonging to him which might be in its hands for discounts and overdrafts gives no more than an ordinary banker's lien, and "securities" mean no more than securities given to a customer and lodged by him, not securities given to bank by him. *Per Molesworth, J. White v. London Chartered Bank*, 3 V.L.R. (E.,) 33.

Bankers have a general lien on all securities deposited with them as bankers by a customer, unless there be an express contract or circumstances showing an implied contract inconsistent with the lien. And the bankers having acquiesced in the finding of the first Court that securities deposited with them were in respect of specific sums, and not on the general account, and not having objected thereto in their grounds of appeal to the Supreme Court, were precluded from raising that question in their appeal to the Privy Council. *London Chartered Bank v. White*, L.R., 4 App. Cas., 413.

Simple interest is only allowed on such a specific amount as to a mortgagee, notwithstanding any banker's custom to the contrary, *per* Privy Council, affirming *Molesworth, J., and Full Court* [3 V.L.R. (E.,) 33, 168.] *Ibid.*

Bankers improperly or without title retaining moneys overpaid to them as mortgagees are chargeable with interest thereon, *per* Privy Council. *Ibid.*

BARRISTER-AT-LAW.

Calling to the Bar—Rule 9, Cap. 2, of "Suprsme Court Rules."]—*Per Stawell, C.J.* There is a marked distinction in the Rule 9 of Cap. 2 of the "*Supreme Court Rules*" between the word "trade" and the word "business," and those who take upon themselves the responsibility of making declarations, putting their own interpretation on the Rules, must, if they afterwards find themselves to be wrong, take the consequences of so acting. *In re Goslett*, 1 W. W. & A'B. (L.,) 161.

Calling to the Bar—Trade or Business.]—Rule 9 of the "*Supreme Court Rules*," which requires that every person applying to be admitted to practise as a barrister "must not be engaged in trade or business" during the next three years preceding the time he submits himself to be examined, strictly speaking excludes a candidate who during a period of three months in those three years had been clerical assistant of the accountant of the Victorian Railways. *Ibid.*

See also *in re Spensley, post column* 90.

Calling to the Bar—English Barristers—"Supreme Court Rules," Rule 10.]—The Court has power, under Rule 10 of the "*Supreme Court Rules*" of 3rd December, 1872, to admit a member of the English Bar to practise for a limited period before the expiration of the notice prescribed by the Rule in question. *In re Vale*, 4 V.L.R. (L.,) 485.

Calling to the Bar—Decision of Board of Examiners.]—If no appeal has been made from the decision of the Board of Examiners, the certificate of the Board touching the compliance with the rules and the fitness of an applicant for admission to the Bar, will be received by the Court as conclusive, and acted upon accordingly. *In re Shaw*, 4 V.L.R. (L.,) 509.

Calling to the Bar—Applicant Previously Admitted as Attorney in a Colony Where Professions are Amalgamated.]—*Quære* whether a person admitted in another colony, where the professions are amalgamated, "as a Barrister solely," does not, by afterwards obtaining admission there as an Attorney, surrender his qualification to be admitted to the Bar of Victoria. *Ibid.*

Calling to the Bar—Omission to Sign Roll-Book.]—A student-at-law who had complied with all the conditions for admission, but had inadvertently omitted to sign the roll-book as required by Rule 7 of Regulae Generales,

December, 1872, was allowed to sign *nunc pro tunc*. *In re Duffy*, 7 V.L.R. (L.,) 133; 3 A.L.T., 3.

Calling to the Bar.]—The Form of Certificate (A) in Schedule to Cap. 2 of "*Supreme Court Rules*" which would require an applicant to be 24 years old is in antagonism to the *Rules* which require him to be 21 years old when applying for admission and must yield to the Rules. *In re Molesworth*, 2 W. & W. (L.,) 190.

Calling to the Bar—Admission.]—Motions for admissions to the bar of gentlemen who have not been previously admitted elsewhere should be made on the last day of term. *In re Anonymous*, 2 W. & W. (L.,) 210.

Calling to the Bar—Practice on.]—Applications for the admission of colonial barristers, not previously called to the bar, should be made to the Full Court during term, unless there be some special reason for the application at another time. *In re Verdon*, 2 W. & W. (E.,) 82.

Calling to the Bar—Barrister of Queensland—Reciprocity.]—On the admission of a barrister of Queensland, not admitted elsewhere, the rule of August 10, 1878, providing for reciprocity applies, and his personal attendance under the General Rules of December, 1872, is not required. *In re Lilley*, 5 V.L.R. (L.,) 121.

Calling to the Bar.]—A student-at-law having completed half his year of studentship, and being about to leave for England under certain favourable circumstances, was permitted under the circumstances to be admitted in his absence when the proper time arrived. *In re Johnstone*, 3 V.L.R. (L.,) 335.

Calling to the Bar—Student-at-Law—Notice.]—Where a student-at-law was about to give the notice of his intention to apply for admission too soon, but was deterred from thus giving it by the advice of the Secretary of the Board of Examiners, and then omitted to give it at the proper time, the Board refused a certificate that he had complied with the rules, and on petition the Judges affirmed their decision. *Ex parte Skinner*, 2 V.L.R. (L.,) 79.

Calling to the Bar.]—Where a student applying for admission had, in reliance upon his father's advice, who was in turn advised by a solicitor, failed to lodge the documents marked A. and B. in the Schedule to the Rules at the proper time, the Court, under the special circumstances of the case, allowed them to be lodged *nunc pro tunc*. *In re Evans*, 5 A.J.R., 184.

Student-at-Law—Who may be.]—A person in priest's orders, who has resigned and withdrawn from the ministry, and whose resignation has been accepted by the bishop, may be admitted as a student-at-law under the Rules of Court for admission to the Bar. *In re Macartney*, 5 W.W. & A'B. (L.,) 248.

Admission as Student-at-law—Issuing Certificate nunc pro tunc.]—Where a person had given his notice of intention to apply for a certificate of admission as a student-at-law, but had not followed it up by attending before the Board and applying for his certificate, supposing that he would have received some notice of the meeting of the Board, the Court held that they had no power to order the certificate to be issued *nunc pro tunc*. *Ex parte Ferguson*, 4 A.J.R., 29.

Authority of Counsel to Compromise an Action—Collateral Claim.]—As between a client and his adversary the only modes of withdrawing a counsel's authority to compromise are (1) by withdrawing the brief delivered—a grave and inadvisable step—and (2) by the client giving notice to his adversary that he has withdrawn from his counsel all authority to compromise. Where the declaration claimed damages for the future contingent liability of the plaintiff's land being covered with water, and so becoming depreciated, *Held* that the pleadings fairly apprised the defendant of such a claim, and such future damages were not a matter collateral to the main cause of action, but were fairly in issue and within the authority of counsel to compromise in respect of them, although not legally recoverable if resisted. *Manson v. Shire of Maffra*, 7 V.L.R. (L.,) 364; 3 A.L.T., 32.

Authority of Counsel to Consent to Verdict.]—*Jones v. Hodgson*, *post* under NEW TRIAL—On what grounds granted.

Limit of Right to Comment on Conduct of Opposing Counsel.]—*Challacombe v. Wiggins*, *post* under NEW TRIAL—On what grounds granted.

Barrister a Member of Parliament.]—A barrister a member of one house of Parliament may plead before a committee of the other house. *Harbison v. Dobson*, 2 A.J.R., 51.

Disbarring — Obtaining Admission by Improper Means—Knowledge—Suspension.]—On motion to disbar S., on the grounds that he had followed a trade or business within three years before he applied for examination as a candidate for admission to the bar, and that being so disqualified for admission, he obtained admission to the bar by improper means, it appeared that S. was during part of the three years preceding his application the proprietor, printer and publisher of a newspaper, and collected the debts of the paper, and printed for gain matters not essential to the owning, printing and publishing of the newspaper; and that he was also on the list of the members of the Melbourne Stock and Share Exchange. Before admission he swore the necessary affidavit that he was not during the three years engaged in any "trade or business." *Held* that he had followed a trade or business, and was disqualified as to the portion of the three years during which he did so; that the Court was not satisfied he had obtained admission with knowledge of his disqualification; and that the case was met by suspending him from practising for twelve months. *In re Spensley*, 1 W. W. & A'B. (L.,) 173.

Fees.]—*See* COSTS.

BASTARD.

Evidence of Paternity.]—The only evidence corroborating a mother's statement was that the child was born on 13th December, 1864, and that the putative father, on 16th March, 1864, drove her home in a cart, and was seen in her company on that day, but not afterwards. *Held* that there was not sufficient corroboration in a material particular. *Phillips v. Tomlinson*, 2 W. W. & A'B. (L.,) 92.

Order for Maintenance—Merely Personal.]—A bastardy order is merely personal, and cannot be made after the death of the father; and there cannot be a supplemental order upon the representatives of the father, after the original order has expired. *Regina v. Sturt*, 5 W.W.& A'B. (L.,) 174.

Maintenance—Warrant of Commitment for Not Finding Security for.]—A warrant of commitment for not finding security for payment of maintenance of a bastard, must recite service of the order on which it was based, upon the defendant. *Regina v. M'Cormick, ex parte Brennan*, 4 V.L.R., (L.,) 36.

Complaint for Maintenance—Dismissal—Second Complaint.]—If a complaint before justices for maintenance of a bastard has been dismissed for want of sufficient evidence to corroborate the statement of the mother, a fresh complaint may be entertained by other justices when sufficient evidence is procured, and the decision of the first justices may be regarded not as a decision but as in the nature of a *nonsuit*. *Ibid.*

Maintenance Independent of Affiliation Orders—Form of Order.]—An order of Justices on a father for the support of his illegitimate children, should recite that the children are without means of support, and that the father is able to maintain them, or to contribute to their maintenance. *Moran v. Connors*, 1 V.R. (L.,) 105; 1 A.J.R., 107.

Act No. 268, Secs. 30, 31—Order for Maintenance.]—An order for maintenance of a bastard which follows the form given in Act No. 267 ("*Justices of Peace Statute*") is sufficient, and need not be made contingent upon the life of the child, but the order is bad in so far as it gives costs to the mother who was not the complainant, and requires security to be given for payment of the amount of costs awarded. *Regina v. Bindon, ex parte Fitzpatrick*, 3 V.L.R. (L.,) 3.

Act No. 268, Sec. 40—Quashing Bastardy Order.—*Per Macfarland, J.* (in General Sessions,) under Sec. 40 the Court of General Sessions has jurisdiction to quash, confirm or vary a bastardy order whether an appeal as to it was entered or not. Order quashed. *Ludgrave v. Belcher*, 5 A.L.T., 72.

"Neglected and Criminal Children's Act" No. 216, Secs. 24, 25, 27—"Parent."]—Rule *nisi* granted to quash an order of a magistrate by which W. was ordered to pay 5s. a week towards the maintenance of an illegitimate child at the Industrial Schools, on the ground there was no complaint in writing on which to found it, and that W. was not the "parent" within the meaning of the Act. *Regina v. Gaunt, ex parte Ward*, 3 A.J.R., 29.

Custody of Illegitimate Children.]—A putative father has no right to the possession of an illegitimate child. *Habeas corpus* refused. *In re Bates*, 1 V.L.R., (L.,) 178.

BETTING.

See GAMING.

BIGAMY.

See CRIMINAL LAW AND HUSBAND AND WIFE.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Parties to.

Drawer not Capable — Acceptor Estopped from Objecting.]—The acceptor of a bill of exchange cannot be permitted to object to the capacity of the drawer. *Coombs v. McDougall*, 4 A.J.R., 25.

A mining company, incorporated under the Act No. 409, drew a bill on M., who accepted it, and afterwards raised the objection that the company had no power under the Act 409 to draw bills of exchange. *Held* that M. could not be allowed to raise the objection. *Ibid.*

2. Form and Stamping of.

Bill of Exchange—What is—Contingency.]—A document as follows:—"Six days after the ship *Childers* clears the Port Philip Heads, pay John Dynan or bearer the sum of £5 sterling, provided he proceeds to sea in the above vessel.—E.," is not a bill of exchange, and cannot be sued upon as an agreement by a third person to whom it has been delivered for value, on the ground of want of privity of contract, and of consideration. *Baker v. Efford*, 4 A.J.R., 161.

Promissory Note—What is—Uncertain Sum.]—An instrument as follows:—"I promise to pay the sum of £49 13s. 4d., and costs, for value received," is not a promissory note, being for an uncertain sum; and cannot be made such by striking out the costs in the particulars of demand; nor is such an instrument evidence of a contract, or on an account stated. *Bentley v. Jamieson*, 1 W. & W. (L.,) 145.

Promissory Note—When Not Negotiable.]—A promissory note containing a promise to pay an impossible payee, "or order," is payable to bearer; but a note which does not mention payee, order, or bearer is not negotiable. *McDonald v. Moffatt*, 5 W. W. & A'B. (L.,) 193.

Date.]—A date is not a material part of a bill of exchange, and may be proved by parol evidence. *Regina v. Gurnett*, 5 W.W. & A'B. (L.,) 28.

Psriod of Payment in Blank.]—*Semble* a bill of exchange in which the period of payment is left blank is payable on demand, at any rate it is negotiable, and may be sued upon two months after having been drawn. *M'Lean v. Nichlen*, 3 V.L.R. (L.,) 107.

When Bill May be Deemed Stamped—"Stamp Duties Act 1879," Sec. 57.]—A bill of exchange in the hands of a *bona fide* holder may be deemed to be duly stamped, and within the protection of Sec. 57 (iv.) of the "*Stamp Duties Act* 1879," if, when such holder received it, it had a proper stamp cancelled in the initals of the acceptor, and a date a few days subsequent to the date of the drawing. *Whitty v. Dunning*, 6 V.L.R. (L.,) 324; 2 A.L.T., 61.

Act, No. 645, Sec. 47—Cancellation of Stamp.]—If the name or initials of any one of the persons signing the note are written across the stamp with the date, in such a way as to preclude its use for any other document, there is a sufficient cancellation within Sec. 47. *Per Holroyd, J.* It is for the persons disputing the valid cancellation, in a case where the person whose signature appeared as the last of three signatures cancelled the stamp, to prove that he was the first to sign. *Harriman v. Purches*, 9 V.L.R. (L.,) 234; 5 A.L.T., 76.

Act No. 645, Sec. 51—Guarantee.]—*Semble* a guarantee to pay an amount of money is not one which requires to be stamped under the Act. *Croft v. Grimbly*, 5 A.L.T., 89.

3. Consideration for.

Bill Given for Debt Provable in Insolvency.]—D. owed T. £12, and became insolvent, and, after sequestration, gave T. a bill of exchange for the debt, which was provable on the estate. *Held* that there was sufficient consideration for the bill. *Tulk v. Davies*, 2 A.J.R., 114.

Accommodation Note—For Shares in a Company.]—K. gave the P. Company a promissory note for 100 shares in the company. K.'s note, with a number of others, was lodged with a bank, which had the account of the P. Company, which was overdrawn at the time of the action. For K. it was urged that the note was merely an accommodation note, and that the P. Company had given him no consideration for the note. It appeared that at the time K. applied for the shares the prospectus contained certain provisions with regard to the issue of land-warrants, which were altered before the note matured; but K. had signed the deed of association as for 320 shares at the time he gave the note, and the deed contained the altered provisions. *Held* that the note was connected with the shares, since K. signed the deed, and that it was for him to show that the shares had no connection with the note; and rule to enter a verdict for K. discharged. *Commercial Bank v. Keith*, 1 A.J.R., 131.

4. Acceptance and Presentment for.

Foreign Bill—Duty of Agent.]—A bill must be presented within a reasonable time, which is a mixed question of law and fact—and in determining that question, not the interests of the drawer only, but those of the holder must be taken into account, and the bill need not be sent for acceptance by the very earliest opportunity, though it must be sent without improper delay. Where a foreign bill of exchange (Tasmanian) was received in Melbourne for collection by the defendant bank as agent for the plaintiff bank, on Friday, 8th February, at 12 o'clock, and was left with the drawers at 2 p.m. on the same day. On Saturday (9th) one of the drawees wrote an acceptance for the firm on the defendant, and gave it to a clerk for delivery, and the clerk mislaid it, and on the agent calling at 11.30 a.m., as business closed that day at 12 noon, he was told to call on Monday (11th.) The agent called on Monday and was told to call on Tuesday; the acceptance made on Saturday had been cancelled. *Held*, and affirmed on appeal to the Privy Council, that the agent need not have presented till the Saturday (*i.e.* the day after its receipt,) and had till Monday to obtain an acceptance or refusal to accept, and if not accepted to give notice of dishonour. *Bank of Van Dieman's Land v. Bank of Victoria*, 6 W. W. & A'B. (L.,) 178; N. C. 1; L.R. 3 P.C., 526; 40 L.J. P.C., 28.

Per Privy Council. The object of the transmission of a bill from principal to agent being to obtain the acceptance and payment of the bill, or if not accepted to guard the rights of the principal against the drawer, the duty of the agent must be measured by these considerations, and the agent ought not to prese unduly

for acceptance, provided he obtains acceptance or refusal within the time which will preserve the rights of the principal against the drawer. *Ibid.*

Where a drawee has written his name on the bill with the intention to accept, he is at liberty to cancel the acceptance before the bill is delivered, or (following a dictum of *Mr. Justice Byles*) "at least before the fact of acceptance is communicated to the holder." But *Held* on the facts that the draft, though accepted in writing, was not delivered as an acceptance, nor was anything which could be regarded as equivalent to a delivery having taken place communicated by a duly authorised agent. *Ibid;* 6 W. W. & A'B. (L.,) 192.

5. Transfer and Endorsement.

Contract for Endorsement—Release of Acceptor—Law Merchant.]—F. Z. and Co., being indebted to a bank and pressed for payment, agreed to give as security a bill of exchange drawn by them, accepted by C. and Co., and endorsed by G. This bill was drawn, and accepted, and endorsed twice by the drawers, G., after delivery of the bill to him, writing his name as endorser between the two endorsements signed by the drawers. It was placed in the bank for collection and dishonoured. G. sued M'L., one of the partners of C. and Co., on the bill and obtained a verdict of £2500 damages. Rule *nisi* to enter a verdict for defendant on grounds (1) that there was no such endorsement as would enable G. to sue; (2) that G. had waived his right to sue C. and Co. as acceptors. *Held* that as F. Z. and Co. had endorsed and delivered the bill to G., he was entitled to sue, but that the jury having found that G. promised to release C. and Co., and bills of exchange being governed by the Law Merchant, G.'s verbal renunciation of all claims was as full a discharge as a release under seal. Rule absolute. *Glass v. McLeery,* 4 W.W. & A'B. (L.,) 159.

Transfer of Overdue Bill—Rights of Holder.]—If a person takes an overdue bill he is just in the same position as the worst of the previous holders would be in if he were to sue—that is, any defence available against a prior holder would be available against him. *Webster v. Tulloch,* 2 A.J.R., 57.

Endorsement—When it Constitutes Endorsee Holder—Qualified Endorsement.]—The last endorsee of a promissory note, obtained an advance from a bank, and handed over the note, among others, as security for the advance. The advance was paid off, but there was a general balance due by the endorsee to the bank, for which the bank sued on the bill, claiming that it was given for the general balance. The jury found that it was given merely for the advance, and the Court held that this being so, since the advance was repaid, the delivery and endorsement to the bank did not make the bank the holders of the note as against the endorsee. *Bank of New South Wales v. King,* 2 A.J.R., 75.

Promissory Note—Maker Estopped from Denying Power of Payee to Endorse.]—The directors of a mining company registered under No. 228, and the manager obtained an overdraft from the plaintiff bank upon depositing promissory notes of the shareholders. The defendant (a director) gave his promissory note payable to the company or order, and it was endorsed by two directors (the defendant being one,) the manager, and with the seal of the company, and handed to the bank. There was no other consideration but the above-mentioned accommodation. The bank sued the defendant on the note. *Held* that the defendant could not deny the capacity of the payee to endorse. Judgment for plaintiff. *Bank of Victoria v. Brown,* 1 V.L.R. (L.,) 47.

Endorsement of Over-Due Accommodation Promissory Note by Payee.]—If a promissory note is given to a person for his accommodation, on the understanding that it is only to be used for the accommodation of such payee, and not to be put into circulation except for such accommodation, and after having been put into circulation for such accommodation it returns at maturity to the hands of the payee, the note is spent, and a subsequent endorsement by him for value to a third person confers no right of action by such endorsee against the maker; in other words, the endorsee takes it subject to the agreement. *Wrixon v. Macoboy,* 6 V.L.R. (L.,) 359; 2 A.L.T., 60.

Equities Affecting Transfer of Over-Due Bills—Accommodation Bill—Agreement not to put into Circulation.]—An accommodation bill of exchange accepted subject to an agreement that it shall not be put into circulation, is taken by a holder for value after maturity subject to such agreement. *Wrixon v. Macoboy,* 2 A.L.T., 60.

6. Payment.

(*a*) *Presentation for.*

When Necessary—Demand.]—There is no necessity, in order to charge the acceptor, to present an unqualified general acceptance for payment, and bringing an action on such an acceptance is a sufficient demand. *Lillies v. Harty,* 2 A.J.R., 83.

(*b*) *Payment.*

What Amounts to.]—A bill of exchange was drawn by R. upon and accepted by H. When the bill arrived at maturity it was dishonoured, and the endorsee (a bank) debited it to the account of R., whose account at the bank was then only in credit to the extent of 16s. 6d. The bill was never paid by R. or H. *Held* that debiting the account at the bank did not amount to payment, and that the acceptor was not discharged. *London Chartered Bank v. Hickey,* 2 A.J.R., 83.

7. Renewal.

Time for.]—The request for renewal should be made as promptly as possible; when one bill has matured the other should be ready to take its place, or the holder should be apprised as

quickly as possible of the acceptor's intention to ask for a renewal. *Per Barry, J.*, the request for renewal should be made before the first bill is presented. *Rowan v. Mitchell*, 3 V.R. (L.,) 20; 3 A.J.R., 31.

8. Notice of Dishonour.

To Whom Given—Drawer and Endorser having Assigned his Estate.]—L. drew and endorsed a bill in favour of A. L. afterwards assigned his estate to trustees, by a creditor's deed, upon trust for his creditors. The bill was subsequently dishonoured, and A., without giving notice of dishonour to L. or the trustees, sought to prove on the estate in respect of the bill. *Held* that notice of dishonour should have been given to the trustees, and that A. could not prove. *In re Levy*, 2 V.R. (E.,) 33; 2 A.J.R., 11.

Waiver of.]—A., after the dishonour, executed the creditors' deed. *Held* that A., as the holder of the bill for which the trustee was liable, having lost his right to resort to him by not giving notice of dishonour, neither the assignor nor trustee could revive the liability as against other creditors. *Ibid.*

Waiver—What is.]—An acknowledgement that the amount of a bill is due by an endorser seems not to be a waiver of want of notice of dishonour, but admissible evidence that it has been given. *In re Levy*, 2 A.J.R., 11.

Omission to Give.]—The inability of the acceptor of a bill of exchange to pay it affords no excuse for the omission to give notice of hishonour. *Ibid.*

Notice Given by Holder to his Immediate Endorser and Communicated to Drawer.]—Action by holder against drawer and endorser. Verdict for plaintiff. It appeared that notice of dishonour was given by plaintiff to his immediate endorser, and that by him it was communicated to the drawer. *Held* on rule nisi for *nonsuit* to be a sufficient notice; notice of dishonour by any one party to the bill enuring to the benefit of the holder. *Commercial Bank v. Ashton*, 5 A.J.R., 78.

Duty of Agent—Foreign Bill.]—Where a bill (Tasmanian) was dishonoured in Melbourne on Monday, February 11th, and notice of dishonour was sent to Tasmania on Tuesday, though it might have been sent on Monday by a mail leaving on that day, *Held* that although it was received as soon as if it had been sent on Monday, the agents in Melbourne had not used due diligence, but that the agents had not been so negligent as to entitle the principal to substantial damages, *Bank of Van Diemen's Land v. Bank of Victoria*, 6 W.W. & A'B. (L.,) 178, N.C. 1; affirmed on appeal by Privy Council, 3 L.R., P.C., 526; 40 L.J., P.C., 28.

Excuse for Delay in Giving Notice.]—A declaration in an action on a bill of exchange set out that a bill of exchange was made by plaintiff and directed to B.; that, in consequence of an agreement between plaintiff, defendant, and B., that B. would assign chattels of equal value to amount of the bill to defendant, the defendant would endorse the bill to plaintiff as surety for the due payment, that defendant had received and retained the chattels, that plaintiff endorsed to defendant, and that defendant re-endorsed to plaintiff in consideration of the agreement, and that bill was dishonoured. *Held* on demurrer that in order to excuse want of notice to endorser, he must, as between the acceptor and himself, be primarily liable; that the assignment being by way of security only did not relieve the acceptor or make it incumbent on the endorser to meet the bill in the first instance. Demurrer allowed. Judgment for defendant. *Rees v. Martin*, 5 A.J.R., 77.

Misdescription in—Executors.]—There are two requisites which are indispensable to a good notice of dishonour, viz., a description of the bill, and an intimation of its having been presented for payment and dishonoured. A bill of exchange was endorsed to the defendant and L., the executors of a will, by them endorsed to the defendant, who endorsed to the plaintiff. The bill was by the plaintiff placed in a bank for collection, and the bank gave notice of dishonour to the executors, describing the bill as placed by *them* and not by *plaintiff* for collection, and intimating its dishonour. The plaintiff sued the defendant as his immediate endorser upon the bill. *Held* that as the defendant had not proved he was misled, the description of the bill, though erroneous, was sufficient, and that defendant was liable either personally or as executor. *Billson v. Hood*, 5 V.L.R. (L.,) 125.

9. Actions on.

(a) *Generally.*

Parties Liable.]—The endorser of a bill of exchange cannot be sued as such unless the bill has been endorsed to him. W., a drawer, sued M., the endorser, on a bill of exchange. M. demurred on the ground that it was not alleged that the bill was accepted or endorsed by the drawer. Judgment on demurrer for defendant. *Wood v. M'Mahon*, 3 V.L.R. (L.,) 282.

Right of Action—How Transferred.]—A bill of exchange drawn by the plaintiff on the defendant, and accepted by him, and made payable to a bank, but not "or order," was dishonoured and sent back to the plaintiff. *Held*, that the return of the bill unpaid to plaintiff transferred to him the right of action on the bill, without endorsement; and that he might sue upon the original consideration for which the bill was given, as the dishonouring of the bill remitted the parties to their original rights. *Bateman v. Connell*, 5 W.W. & A'B. (L.,) 203.

Procedure on—"Instruments and Securities Statute" No. 204, Sec. 24—Writ against Several Defendants—Affidavit of Service.]—A writ of summons had issued against the drawer and acceptor of a bill, and judgment by default was signed against the acceptor. *Held*, that under Sec. 24, the affidavit of service being entitled (? intituled)

s against both defendants, the judgment was regular. Judgment set aside. *Maritime Mercal Credit Company, v. Christie*, 5 A.J.R., 5.

Payment of Money Out of Court—Act No. 204, Sec. 20—Insolvency of Defendant.]—In an action on a bill of exchange, the defendant obtained leave to defend under Sec. 20 upon paying money into Court. Plaintiff recovered a verdict, and defendant moved for a rule *nisi* for a new trial, which was refused, and, on the next day, became insolvent. Judgment was afterwards signed. *Held*, that the action having been tried, and plaintiff having recovered a verdict, he was entitled to have the money paid out to him. *Playford v. O'Sullivan*, 5 A.J.R., 115.

Per Stephen, J. (in Chambers.)—After leave is given to appear and defend, the action is at large, and the defendant may plead any defence he desires (even though such defence was not disclosed in his affidavit.) *English Scottish and Australian Chartered Bank v. Lavars*, A.L.T., 63.

Application for Leave to Defend—"Supreme Court Rules 1884," Order 38, Rules 23 and 24.]—*Per Higinbotham, J.* (in Chambers,) Rules 23 and 24 of Order 38 of the "*Supreme Court Rules* 1884," apply to applications under the "*Instruments and Securities Statute* 1864," and the copy of the writ and summons should not be annexed to the affidavit or referred to in the affidavit as annexed, but must be referred to as an exhibit, and as such must be certified to by the commissioner before whom the affidavit is sworn under Rule 24 of the same Order. *London Discount Bank v. Prendergast*, 6 A.L.T., 19.

Practice under "Judicature Act"—Order 20, Rule 1, (a,) (c)—Order 26, Rule 1—Appendix C., Sec. 4—Act No. 204, Sec. 19, Sch. 2.]—If a writ is endorsed according to the form given in Sch. 2 of Act No. 204 ("*Instruments and Securities Statute*,") it is a specially endorsed writ within the meaning of Appendix C., Sec. 4 "*Supreme Court Rules* 1884," requiring a statement of defence. *Woodwin v. Heanchain*, 6 A.L.T., 160.

Payment into Court.]—Defendants in obtaining leave to defend had paid money into Court. *Barry, J.* (in Chambers,) ordered that this sum be held by the Prothonotary as if paid in under a plea of payment. *Young v. Dellar*, A.L.T., 87.

(*b*) *Matters of Defence.*

Made and Accepted on Sunday.]—A bill of exchange made and accepted on a Sunday, if not in the ordinary course of business, is not bad. *Walsh v. Hosking*, 4 W.W. & A'B. (L.,) 35.

Pleading Set-off.]—Where there is a set of bills accepted by the defendant, to whom the plaintiff is indebted, the plea of set-off should not be raised till the last bill of the set is due. *Nisbet v. Cox*, 4 A.J.R., 115.

Equitable Plea—Contemporaneous Agreement not in Writing.]—To a declaration by the endorsee against the acceptors of a bill of exchange, the acceptors put in a plea on equitable grounds that before drawing the bill it had been agreed that the bill was not to be paid unless the acceptors should recover a similar amount from a third person, and alleged that, though judgment had been recovered against such third person, the acceptors had received nothing thereunder. The plea did not allege the agreement to be in writing. *Held* a good plea, and that there was no occasion to allege that the agreement was in writing. *Waxman v. Barnard*, 2 V.L.R. (L.,) 238.

Prior Agreement to Refer to Arbitration—Set-off.]—M., as endorsee of a bill of exchange, sued G., the endorser. G., as an equitable plea, alleged that, as to part of the amount, £4000, under a prior agreement in pursuance of which the bills were given, matters in dispute had been referred to arbitration, and an award was made by which M. was to pay H., the acceptor, a certain sum of money, viz., the above-mentioned sum of £4000; and that H. claimed and offered to set-off the said sum. M. demurred to this plea on the ground that it did not show circumstances in which a Court of Equity would grant a perpetual and unconditional injunction. Replication (1) that an award had been made before the award stated in the plea (5) traversing the set-off claimed by H. Demurrer to replication. *Held* that the plea was good; that there was an absolute and unconditional answer in Equity to the part of the declaration pleaded to, and the fact of there being no such answer to the whole cause of action did not affect its validity; that there might be several awards and arbitrations. Judgment for defendant on all the demurrers. *Murphy v. Glass*, 4 W.W. & A'B. (L.,) 199; affirmed on appeal to Privy Council, L.R., 2 P.C., 408.

Agreement as to Payment of a Promissory Note.]—Plaintiffs sued on a promissory note made by defendants in favour of plaintiffs. Defendants pleaded on equitable grounds that after the note became due, and before action, it was agreed between the plaintiffs and defendants and the other makers of the note who were defendants' partners, that one of the other makers should give the plaintiffs a note for the same sum instead of the original one, provided that such other note should be paid when due, that the plaintiffs had taken such note which had been duly paid at maturity. On demurrer, *Held* that though several objections to the plea might possibly be sustained before a Judge in Chambers, yet the plea, being in effect that the Plaintiffs had been paid through another channel, afforded on general demurrer a substantial defence on equitable grounds. *Ettershank v Curr*, 2 V.R. (L.,) 88; 2 A.J.R., 74.

Equitable Plea—Bill of Exchange—Firm Accepting—Notice of Retirement.]—One of the defendants in an action on a bill of exchange by the endorsee against a firm which had accepted the bill, pleaded on equitable grounds that before acceptance he had retired from the firm, and that the endorsement to plaintiff was made when the bill was overdue. *Held* bad because

it did not allege notice of the retirement to the previous holders. *Webster v. Tulloch*, 2 A.J.R., 57.

Plea of Payment.]—In an action against the acceptor, the defendant pleaded that he had given a lien to the plaintiff over certain shares, and that he was to retain the dividends thereon, and that he did retain them, and that the proceeds were more than the amount of the bill. Demurrer to plea. *Held* that the plea amounted to a plea of payment, there being an agreement to give and take certain things, directing the application of the thing to be done. *Saunders v. Matthews*, 5 A.J.R., 83.

Plea that Consideration Wholly Failed.]—To a declaration on a bill of exchange, the defendant pleaded an agreement by which the consideration wholly failed. *Held*, on demurrer to plea, that the plea should have alleged that there was no other consideration. Demurrer allowed. *Peck v. Willison*, 5 A.J.R., 121.

Note Made in Favour of Dissolved Firm.]—*Semble*, that it does not lie in the mouth of the maker of a promissory note to aver that the payees of the note, formerly members of a dissolved firm, were fictitious persons, when he was thoroughly aware of the dissolution, and of the circumstances attending the making of the note. *Paterson v. Hughes*, 2 V.R. (L.) 148; 2 A.J.R., 96.

Presumption of Drawer's Liability—What Will Rebut.]—Unless there is some written document or substantial fact to rebut the ordinary presumption that a man, when he gives a bill, means to pay it, the holder must be held to recover on it. *Kong Meng v. Peters*, 1 A.L.T., 136.

Endorsement after Maturity—No Consideration—Promise to Accept Composition.]—To an action by endorsee of a promissory note against the maker, the latter pleaded—(1) that the note was endorsed to plaintiff after it became due—(2) that plaintiff gave no consideration for it—(3) that, before the note was endorsed, the payee promised to accept a composition on the amount due. *Held*, no defence to the action. *Breading v. Doria*, 2 A.L.T., 6.

Alteration.]—After the issuing and acceptance of a bill of exchange by A., the name of A.'s wife was added as a joint acceptor with A., without the consent of the drawer. *Held*, a material alteration, notwithstanding that at the time of the wife's name being added, and thenceforward, she was a *feme covert*. *Oriental Bank v. Beilby*, 1 V.R. (L.,) 66; 1 A.J.R., 81.

Alteration.]—A material alteration in a bill of exchange or a promissory note is one by which the instrument is made to operate differently, to speak a different language. *Luth v. Stewart*, 6 V.L.R. (L.,) 383; 2 A.L.T., 78.

A drawer of a bill sent it to another person for endorsement before he himself had done so; such person endorsed and returned it; the drawer then endorsed, and subsequently the words "without recourse" were inserted in the bill before the endorsement of the drawer's name. *Held* a material alteration; but that, since it was merely carrying out the intention of the parties to the bill that the drawer should not be sued by such person, it did not vitiate the bill or prevent the drawer from suing him, even though his consent was not asked to the alteration, the jury finding that he must have known that he was intended to be held liable. *Ibid.*

Forgery — Evidence to Sustain — Ratification—Estoppel.]—K.'s signature was forged to a promissory note of which he was alleged to be the maker, and after dishonour, K. said that the signature was his, and had made the same statement as to a previous forged note held by the same holder. *Held* that there was no evidence by which an estoppel could be proved or a ratification inferred. *Semble*, that had K. previously paid a forged note and thereby misled an innocent holder, the case would have been different. *Kernan v. London Discount and Mortgage Bank*, 4 V.L.R. (L.,) 279.

Forgery—Admission as to Other Bills.]—A statement by an acceptor resisting payment of a bill on the ground of alteration by forgery after acceptance, that other bills similarly altered were "all right and would be paid," is no admission of liability on the bill on which he is being sued. *Levinger v. Fitzgerald, Johnston v. Fitzgerald*, 4 A.J.R., 138.

Forgery—Alteration after Acceptance—Evidence—Questions for Jury.]—K. drew bills upon F., who accepted them, and they were subsequently endorsed to the plaintiffs. The bills were drawn upon graved forms, in which a ruled space was left in the body of the bill after the words "sum of," for the insertion of the amount. K. wrote in the ruled space what was supposed to be "one Hundred" and some odd pounds, beginning the first word with a small letter. Before this the letter "F" was subsequently inserted, and the amount in figures altered correspondingly, thus making the bills appear to be for £400 and odd pounds. Skilled witnesses could not determine whether this was done before or after the acceptance was written across the bill, but defendant swore that it was done after acceptance, and the jury accepted his version, and found in addition that any person using due and ordinary diligence could have, from the appearance of the bill, discovered the alteration, and that it was not negligence or want of caution on the acceptor's part to accept bills drawn with a space before the amount which began with a small letter, and brought in a verdict for the defendant. On application for a new trial or to enter a verdict for the plaintiffs, *Held* that the jury were at liberty to disregard the evidence of the skilled witnesses as regards the respective dates of the alterations and acceptance, and to act upon the evidence of their own senses; that if there could be any doubt at all about the matter, the question whether it were negligence or want of caution on the part of the acceptor

to accept bills drawn as described, was entirely one of fact for the jury, and not of law for the Court, but that such a question should not even have been left to the jury; and application refused. *Ibid.*

Discharge.]—All the makers of a bill of exchange being primarily liable, giving time to one does not discharge the others. *Colonial Bank v. Ettershank*, 4 A.J.R., 94, 185.

Waiver.]—Waiver may be by an absolute, unconditional renunciation by the holder, though unaccompanied by satisfaction or any solemn instrument, and is a question for the jury. *Ibid.*

As to what was held to amount to a waiver *see Colonial Bank v. Ettershank*, 4 A.J.R., 10, 45, 94, 185, affirmed on appeal to the Privy Council, 4 V.L.R. (L.) 239.

Waiver — Proof — New Trial.]—On a plea of waiver to an action on a promissory note, the fact of waiver must be clearly proved, and if the jury find in favour of the plea, on evidence unsatisfactory to the Court, a new trial will be ordered. *Bank of Australasia v. Cotchett*, 4 V.L.R. (L.,) 226.

10. Other Points.

Promissory Note—Evidence of Account Stated.]—A promissory note is evidence of an account stated between the maker and the payee; but not between the maker and an endorsee. *Paterson v. Hughes*, 2 V.R. (L.,) 148; 2 A.J.R., 96.

Accommodation Bill—When Negotiable.]—An accommodation bill in the hands of the original person for whose accommodation it was given is negotiable both before and after maturity, and before and after the death of the accommodation acceptor. *Clough v. Gray*, 1 W. & W. (E.,) 225.

BILL OF SALE.

Statutes—"*Instruments and Securities Statute 1864,*" *No.* 204, *Part vii.*

"*Instruments and Securities Statute Amendment Act* 1876," *No.* 557.

1. Definition of.

Bill of Sale or Absolute Sale.]—A document as follows:—"Sold to J. (certain property,) total price, £58 10s. . . . received payment, M. Witness J.M," is not a bill of sale. *Jones v. Rede*, 2 A.J.R., 17.

2. What Require Registration.

Act No. 204, Sec. 56—Act No. 557, Sec. 1—Possession Remaining in the Vendor.]—Under the two Acts the term "bill of sale" is to be construed according to their policy to include written instruments in the form of sale notes, receipts, &c., really intended as securities where the possession remains in the so-called vendor. S. signed a sale note to the following effect: "I have this day sold to B. my carts, &c., for the sum of £55, to be paid for at any time before" —a certain date. B. wrote out a cheque and paid for them at once. S. retained the possession of the carts, &c., for a time, but B. seized them the day before S.'s insolvency. *Held* that the sale note required registration as a bill of sale, and, being unregistered, S.'s trustee in insolvency was entitled to the goods. *In re Shaw*, 9 V.L.R. (I.P. & M.,) 16; 5 A.L.T., 107.

No Change of Possession—"Instruments and Securities Statute 1864," Secs. 56, 63.]—B. was claimant of goods seized by an execution creditor under a bill of sale, whereby B. had possession of furniture in a hotel prior to the seizure of it by the creditor under the Justices' order. The bill was as follows:—"Memorandum of agreement entered into this —— day of —— between C. M., of ——, publican, and B., whereby the said C. M. sells to the said B. that public house known as the ——, situated in the main street, ——, with all the furniture, fixtures and fittings therein, for the sum of £ ——, £ —— in hand paid, the receipt whereof is hereby acknowledged; an acceptance of this date, payable three months after date, granted by the said B. to the said C. M.; and two further acceptances for £ — each, also of this day's date, payable the first six months after date, and the second nine months after date, receipt of which acceptances from the said B. is acknowledged by the said C. M., and the said C. M. hereby undertakes to give up immediate possession of the aforesaid house and premises, with all furniture, &c., to the said B., and also to apply to the magistrates to have the license transferred from him, the said C. M., to the said B. (Signed) C. M., B." The license was not transferred, nor was there any change of possession. *Held* that this was not a sale in the ordinary course of the trade or business of a publican, but a transfer of all that C. M. had; and that, there having been no change of possession, the bill was void for want of registration. *Wangaratta Brewery Company v. Betts*, 1 A.J.R., 79.

Deed of Assignment—Property in Assignor.]—If under a deed purporting to be a deed of assignment for benefit of creditors, but not so in fact, any part of the property is allowed to remain in the apparent possession of the would-be assignor, such deed requires registration. *Port v. London Chartered Bank*, 1 V.R., (L.,) 162; 1 A.J.R., 146.

Sale Note Upon an Auction—Debtor Left in Possession.]—A sale note given on a sale at auction by a bailiff, under an execution, need not be registered as a bill of sale, though the judgment debtor be left in possession of the goods. *Barnard v. Mann*, 2 V.L.R., (L.,) 140.

Assignment of Stock-in-Trade in Trust—Immediate Possession.]—W., being sued by a Bank on an overdue promissory note, and being also indebted to M., who, however, was not pressing him for payment, made an arrangement with M. and the Bank whereby, in consideration of a further small advance from M., and M.'s forbearing to sue W. for a reasonable time, and also obtaining from the Bank a forbearance to sue W. on the overdue note, W. executed an assignment to M. of nearly all his stock-in-trade in trust, to sell and pay M. and the Bank rateably, and hand over the surplus to W. if there should be any. Immediate possession was given to M. *Held* that M.'s taking possession dispensed with the necessity of registering the assignment as a bill of sale. *Cohen v. McGee*, 4 V.L.R. (L.,) 543.

Over Stock on a Farm—"Instruments and Securities Statute 1864," Sec. 63.]—Sec. 63 of the "*Instruments and Securities Statute* 1864," which excludes from the definition of "personal chattels" "stock upon any farm which by virtue of any covenant or agreement ought not to be removed therefrom," does not apply to a covenant in a stock mortgage not to remove the stock. It applies only to a covenant or agreement existing prior to the stock mortgage. Such a mortgage is a bill of sale requiring registration within the meaning of the Act. *Teague v. Farrell*, 6 V.L.R. (L.,) 480; 2 A.L.T., 98.

Absolute Sale—Contemporaneous Parol Understanding as to Redemption—Act No. 557, Sec. 15.]—A contract purported to be an absolute sale of certain goods. Attached to this was a contract of the same date, under seal, for the letting and hiring of the same goods from the purchaser to the vendor, which was not filed as a bill of sale. There was also a contemporaneous parol undertaking that the vendor should have the goods back if he paid the purchaser off. *Held* that the contract did not come within Sec. 15 of Act No. 557, as there was no sale free from the proviso for redemption, and for the contract to be valid it required filing under Part VII. of Act No. 204. *Rosel v. Stephens*, 9 V.L.R. (L.,) 379; 5 A.L.T., 142.

Act No. 204, Secs. 56, 63—Act No. 557, Sec. 15—Deed of Hiring.]—An arrangement was made between the plaintiff company and the defendant that goods to be supplied to the plaintiff should be divided into three lots, of which one lot was bought by the plaintiff and the other two were to be hired to the company, the plaintiff giving as security three contracts of hiring covering all the goods. Afterwards, in April, 1879, a fresh deed of hiring was drawn up, similar in other respects to the former ones, but declaring that the whole of the goods belonged to the defendant. *Held*, that the deed of April, 1879, was so far in its nature a bill of sale that it required registration under Acts No. 204 and 557, and that the intended estoppel in the deed did not prevent the hirer from showing the real nature of the transaction, *i.e.*, that it was a bill of sale. *Per Barry, J.*, that the admission in the deed of April, that the goods were the defendant's and not the company's, must be taken as evidence that there was a contract for the sale, which ought to have been in writing and registered with the deed. *Oriental Hotel Company v. Thomson*, 5 V.L.R. (L.,) 485.

Memorandum of Transfer when Necessary—Bill duly Filed.]—It is unnecessary to file or register a memorandum of transfer from the grantee to another person of a duly filed bill of sale. *Marr v. Mayger*, 4 V.L.R. (L.,) 494.

Act No. 557, Secs. 15, 16—Consideration.]—In an action for detinue and conversion the defendant as a defence produced a contract of sale from the plaintiff, and a contract of letting and hiring, which were not filed in the manner provided by Sec. 16 of the Act. It appeared also that no proper consideration was given. *Held*, that the defence was bad. Verdict for plaintiff. *Howse v. Glowry*, 8 V.L.R. (L.,) 280.

Receipt for Purchase Money with Inventory Attached—Act No. 557, Sec. 1.]—S. purchased a piano from A., and paid for it. Subsequently he sold his furniture, including the piano, to G., but remained in possession. Upon this sale the following document was given:—"6th August, 1878. Received from A. £250, being in full for purchase of household furniture and effects set out in inventory, hereunder written. [*Here followed the inventory.*] S." *Held* that this document required registration under the Act No. 557, Sec. 1. *Glen v. Abbott*, 6 V.L.R. (L.,) 483.

3. Possession of the Goods.

(*a*) *In Grantor.*

Possession in Grantor until Default of Payment—Property in Grantee—Unauthorised Sale by Auctioneer at Grantor's Direction before Default Made—Auctioneer Liable for Money Had and Received in Action by Grantee.]—*See Lockhart v. Gray, post* under Money Claims; and *see* cases under preceding heading.

Until Default.]—Where the grantor of a bill of sale transfers his property in the goods to the grantee, but subject to his right of redemption, although it be not specifically stated in the instrument, the grantor has clearly reserved to him a special property in the goods until he makes default in payment, and has therefore a right of action for seizing and selling the

goods before that event arises. *Frith v. Maritime General Credit and Discount Company*, 2 V.R. (L.,) 165, 168; 2 A.J.R., 111

(*b*) *In Grantee.*

Successive Grantees.] — As between two grantees of the same goods the property is absolutely and indefeasibly vested in the first grantee if the condition be not performed by the grantor, and no action will lie by the second grantee against the first for negligently and carelessly selling the goods described in the securities of both at an undervalue. *Frith v. Maritime General Credit and Discount Company*, 2 V.R. (L.,) 165, 168; 2 A.J.R., 111.

Possession Taken and Sale Made on Default.]—In 1869, B. and Co. sold a timber-yard to S., payment for which was made partly in cash, partly by bills extending over a long period. S. gave a bill of sale to secure the bills, which was not registered, and which provided that S. was to furnish monthly accounts. In May, 1872, default was made in furnishing the accounts and in payment, and B. took possession and sold to W. Another creditor of S.'s recovered a judgment against S., and issued execution. B. paid off this judgment debt. S. sequestrated his estate, and Sharp, the official assignee, turned W. out of possession. W. brought an action against Sharp, in which a verdict was given for defendant. A rule *nisi* for a new trial, on the ground of the verdict being against evidence, was discharged, the Court refusing to disturb the verdict, which evidently was based upon B.'s act in paying the judgment debt being inconsistent with his former possession. *Williams v. Sharp*, 3 A.J.R., 80.

4. Property Passing By.

Growing Crops—Absolute Conveyance—Purchaser without Notice.]—G. by deed absolutely conveyed to W. a crop of wheat growing on his farm, this deed was duly registered as a bill of sale. Afterwards G. sold to M. part of this crop, M. having no notice of W.'s title to the wheat. *Held* that the property being absolutely in W., G. had no title to confer upon M. *Mueller v. White*, 3 V.L.R. (L.,) 92.

Goods Referred to in the Schedule.]—The body of a bill of sale contained a provision that it should comprise all goods, &c., "described, or comprised, or mentioned, or referred to, in or by the schedule" annexed, "and now standing in and upon" the premises, or used by the mortgagor in his business. The schedule contained an inventory of several goods, but did not mention others, and concluded with the words:—"Together with all such goods and chattels as may for the time being be in or upon the said premises." Goods were seized which were not mentioned expressly in the schedule, but which were on the premises. *Held* that where a schedule was referred to in the body of a bill of sale for the purpose of furnishing detailed particulars of the articles over which the bill of sale purported to give security, it has to be regarded merely as an inventory, and could not enlarge the operation of the deed. But where the deed itself declared that it was intended to pass not only the property described but also that referred to in the schedule, the bill was not impaired by the schedule, and the words of the deed were not restricted to the articles enumerated, and that the goods seized were comprised in the bill. *Gibbes v Rolls*, 2 A.J.R., 113.

A bill of sale comprised all chattels mentioned in the schedule upon certain premises at A., or otherwise used by the grantor in connection with his business in a tenement in Melbourne, and all goods brought upon the said premises, or used in connection with the said business, in addition to or substitution of the chattels mentioned in the schedule. The grantor removed to C., and acquired other chattels apart from those mentioned in the schedule. *Held* that the last mentioned chattels did not pass under the bill of sale. *Smith v. Leroy*, 5 A.J.R., 174.

Future Property.]—The defendants as trustees were the assignees under a bill of sale of all the plaintiff's property, present and future, on their premises and elsewhere. This property, according to the deed filed as a bill of sale, included "spirits, &c." Certain spirits which were not in existence at the time of the execution of the bill (nor were the materials from which they were made in the possession of the plaintiffs) were sent away from the premises to a bonded store before the defendants took possession of the premises. *Held* that such spirits were comprised in and passed to the defendants under the bill of sale. *Victorian Beetroot Sugar Company v. Sherrard*, 5 A.J.R., 105.

After Acquired Property — Evidence as to.] — Where a bill of sale purports to include after acquired property, the holder must adduce evidence of some act of affirmance by the grantor respecting such after acquired property. *Dunlop v. Tutty*, 2 V.R. (L.,) 14; 2 A.J.R., 35.

After Acquired Property—Demand—Waiver.]—Under a bill of sale which declared that all chattels to be thereafter brought upon the premises should form part of the security, and which gave a power to seize on default after demand in writing, the grantee seized after default, but without such demand. *Held*, that the seizure was illegal, and did not vest the after acquired property in the grantee. *Cohen v. Oriental Banking Corporation*, 6 V.L.R. (L.,) 278; 1 A.L.T., 198.

Goods Seized Under an Illegal Distress.]—A bill of sale is paramount to a faulty distress, and a person claiming under a bill of sale will have a better title than a person who has seized the goods comprised in the bill of sale under a prior distress which is invalid. *Regina v. Templeton, ex parte Allen*, 4 A.J.R., 70.

5. Successive Bills of Sale.

Registered Bill Passing Property Comprised in Prior Unregistered Bill.—"Instruments and Securities Statute," Sec. 56.]—A debtor executed a bill of sale over all his property, but the bill was not

registered. He afterwards executed another bill of sale to the same persons over a greater part of the same property, and this bill was registered. Certain creditors obtained a judgment against the assignor, and seized part of the property comprised in the registered bill. On an interpleader issue it was contended that the registered bill was void, as the assignor had no property on which it could operate at the time of executing it. *Held* that the registered bill was valid as against the subsequent execution creditor. *Hedrich v. Commercial Bank*, 1 V.R. (L.,) 198; 1 A.J.R., 155.

6. Fraudulent.

Duty of Justices as to Evidence.]—Where a bill of sale has been executed and filed, Justices on an interpleader summons should admit evidence which is tendered with the object of showing that the bill was not properly executed, and that no consideration was paid, and that the bill was within the mischief of 13 Eliz., Cap. V., as given to hinder, delay and defraud creditors. *Dunlop v. Tutly*, 2 V.R. (L.,) 14: 2 A.J.R., 35.

See also Insolvency—*Fraudulent Conveyance.*

7. Registration.

(*a*) *Affidavit.*

Description of Attesting Witness—"Clsrk."]—In a bill of sale the attesting witness was described as "of S—— street, Melbourne, pawnbroker's clerk." In the affidavit he described himself as of "B—— street, Emerald Hill, clerk." There was no allusion in the affidavit to the person who had attested the bill of sale—nothing to identify the attesting witness of the bill of sale with the person who made the affidavit. *Held* that the description of "clerk" in the affidavit was insufficient. *O'Donnell v. Goldstein*, 4 A.J.R., 85.

Act No. 204, Sec. 56—Affidavit.]—An affidavit verifying the residence and occupation of the attesting witness to a bill of sale as follows:—"I reside at Geelong, and am a law clerk." *Held* sufficient under Sec. 56. *Douglass v. Simson*, 6 W.W. & A.B. (E.,) 32.

Act No. 204, Sec. 56.]—An affidavit of verification contained a description of the attesting witness, "of Kerang, in the Colony of Victoria, *storeman*," and there was evidence that he could be easily found by that description. *Held* that it was sufficient. *O'Donnell v. Patchell*, 5 V.L.R. (L.,) 360.

On Same Sheet of Paper—Separately Initialled.]—Where a bill of sale and the verifying affidavit are upon the same piece of paper, the affidavit need not be separately initialled by the Commissioner before whom it was sworn. *O'Donnell v. Goldstein*, 4 A.J.R., 85.

Bill of Sale on Several Sheets.]—A bill of sale, forming one continuous document, was written upon 11 pages; the affidavit of verification was upon the 12th, or outer page, and the interior pages were stitched together, forming an instrument like a conveyance. *Held*, that the affidavit was sufficient, and that it was not necessary that the different pages should have any mark to identify them. *London Chartered Bank v. Kirk*, 1 V.L.R. (L.,) 266.

"Instruments and Securities Statuts," No. 204, Sec. 56, et seq.]—At the hearing of an interpleader summons before Justices, a bill of sale was put in, and on the back of it was endorsed the affidavit of filing, but with the blanks therein not filled up. *Held* that the bill of sale so endorsed was no evidence, there being nothing to connect the copy filed in the Registrar's office with the original bill produced before the Justices. *Baird v. Forrest*, 3 A.J.R., 22.

Interlineation Unattested.]—An interlineation in an affidavit verifying a bill of sale, not initialled by the Commissioner, does not invalidate the registration, although such affidavit could not be used in court. *Blamires v. Dunning*, 3 V.L.R. (L.,) 18.

(*b*) *Renewal.*

When Unnecessary—Seizure under Bill within Twelve Months from Registration—Act No. 557, Sec. 13.]—A bill of sale, by which chattels were mortgaged, dated July 12th, 1879, was filed on the 29th of that month, and registration was renewed on the 19th July, 1880. The grantee, on February 22nd, 1881, assigned the chattels comprised in the bill to a third person, who at once took possession of them, the grantor having made default. Disputes arising as to some of the chattels, an action was instituted more than twelve months after the 19th of July, 1880. In the action the bill was tendered in evidence, but objected to on the ground that the registration had not been renewed within twelve months after the 19th of July, 1880, under Sec. 13 of the Act No. 557. *Held* that the objection was untenable. *Pettit v. Walker*, 8 V.L.R (L.,) 72; 3 A.L.T., 118; *sub nom. Walker v. Pettit.*

Annual Affidavits—Stating Amount Incorrectly—Bill Void—Act No. 557, Sec. 13.]—Where a bill of sale has been properly registered, but the subsequent annual affidavit, required by Sec. 13 of the Act No. 557, states the amount due upon the bill incorrectly, the effect is to render the bill absolutely void as a bill of sale, as between the immediate parties to it, as well as between all others. *Black v. Zevenboom*, 6 V.L.R. (L.,) 473; 2 A.L.T., 96.

Annual Affidavit—By Whom Made—Act No. 557, Sec. 13.]—The annual affidavit required by Sec. 13 of the Act No. 557, to be made and filed in order to keep alive a bill of sale, must be made by the person entitled to the benefit of the security, and cannot be made by his attorney under power. *Martin v. Blamires*, 4 V.L.R. (L.,) 498.

"Instruments and Securities (Bills of Sale) Statuts," No. 557, Sec. 13—"Manager."]—The word "manager," in the Act No. 557, Sec. 13, means, with reference to a banking corporation, either the head manager at the head office,

wherever situate, or the manager of the branch bank at which the debt is due. An inspector in Melbourne of a bank having its head office in New South Wales, is only an "officer" within that section, and, if he make the affidavit of renewal of a bill of sale, must depose of his own knowledge to the facts. *Bank of New South Wales v. Jones*, 4 V.L.R. (E.,) 253.

"Able to Depose of His Own Knowledge."]—*Quære*, whether the words, "able to depose of his own knowledge," in the Act No. 557, Sec. 13, apply to the antecedent word, "manager," as well as to "other officer." *Ibid.*

(*c*) *Consideration for.*

What Sufficient—Agreement to Advance Money.]—On an interpleader summons to try the right to goods seized under an execution, and over which a bill of sale has been given, it appeared that the consideration for the bill was—not the actual payment of, but an agreement to advance money, *Held*, that this was a sufficient consideration, and that the person claiming under the bill was entitled to the goods. *Harrison v. Moore*, 2 V.R. (L.,) 69; 2 A.J.R., 56.

See also, for remarks upon consideration *Howse v. Glowry*, 8 V.L.R. (L.,) 280.

Act No. 557, Sec. 15—What Must be in Writing—Consideration.]—The 15th Sec. of Act No. 557 requires that the real contract between the parties must be in writing, and the real contract is not in writing if the writing do not truly state the consideration. The consideration is not truly stated if it is stated to be the advance by the purchaser of a certain sum, when in reality the transaction is merely the discharge by the vendor of past debts, due to the purchaser to the amount of such sum. *Bruce v. Garnett, in re Riedle*, 10 V.L.R. (L.,) 126; 6 A.L.T., 13.

(*d*) *Attestation of.*

Attesting Witness—What Description Sufficient.]—The description of an attesting witness to a bill of sale as "managing law clerk," without stating whose clerk he is, is a sufficient description. *O'Connor v. Paul*, 5 W.W. & A'B. (L.,) 97.

Description of Attesting Witness.]—In an affidavit accompanying the registration of a bill of sale the attesting witness was described as "W.T.P., of Swanston-street, in the City of Melbourne, Law Clerk." *Held*, a sufficient description. *Treacey v. Balderson*, 2 V.R. (L.,) 3; 2 A.J.R., 15.

Attesting Witness—Description—Affidavit—Act No. 141, Sec. 2.]—The affidavit did not in the swearing part contain a description of the occupation of the attesting witness, but it did in its heading; and it did not swear to the truth of facts stated in the attestation clause, where a sufficient description of the occupation of the witness was given, but swore only to "truth of the copy" of attestation clause set out in the affidavits. *Held*, that the description in the heading was not sufficient, and that there being no description in the binding part, or in any document so referred to and incorporated into the affidavit as to make the facts appearing in the document part of the facts sworn to by the affidavit, the Act was not complied with. *McCulloch v. Harfoot*, 2 W. & W. (L.,) 267.

Attesting Witness—Description—Act No. 141, Sec. 2.]—The attestation clause in a bill of sale was witnessed by "H. C. C., Solicitor, Melbourne," and the signature was merely "M. B." In the affidavit filed the residence and occupation of M. B. were set out, but it did not either expressly or by reference to the attestation clause above mentioned set out the residence and occupation of H. C. C. In the heading of the affidavit H. C. C. was described as "gentleman, Melbourne." *Held* that the requirements of Sec. 2 of Act No. 141 had not been complied with. *Nathan v. Naylor*, 2 W. & W. (L.,) 263.

"Instruments and Securities Statute," No. 204, Sec. 56—What Requisits.]—The "*Instruments and Securities Statute*," No. 204, Sec. 56, must not be read as requiring that there shall in every case be an attestation of the execution of a bill of sale, but only that wherever there is such an attestation there shall be filed a true copy of it, and an affidavit containing, among other matters, a true description of the residence and occupation of the attesting witness; and under the "*Statute of Evidence*," No. 197, Sec. 55, it is not necessary that an attesting witness should be called to prove the execution of an instrument the validity of which is not dependent upon attestation. *Smith v. Martin*, 3 W.W. & A'B. (L.,) 35.

Description of Attesting Witness.]—The verifying affidavit of an attesting witness to a bill of sale, began "I, A. S., clerk to Messrs. B. & T., of 107 Collins Street West, in the City of Melbourne, do make oath and say——." There was no further description of the witness in the affidavit, but the attestation clause of the bill of sale contained a similar description. *Held*, that this was a sufficient description of the witness, though he was only described as deponent. *Cohen v. Oriental Banking Corporation*, 6 V.L.R. (L.,) 278; 1 A.L.T., 198.

See also cases on *column* 109.

(*e*) *Other Points.*

Act No. 204, Sec. 56—Time for Registering—Antecedent Verbal Agreement.]—The time for registration in Sec. 56 runs from the execution of the written bill of sale, and not from the time of an antecedent verbal agreement to assign. *O'Donnell v. Patchell*, 5 V.L.R. (L.,) 360.

Contract of Sale Not Registered under Act No. 557.]—Where a contract of sale of chattels is not registered as a bill of sale under the Act No. 557, if such contract is invalid the remedy is at Law, and not in Equity. *Davey v. Bailey*, 10 V.L.R. (E.,) 240.

Caveat Against Registration—Creditor, Who is—"Bills of Sale Act," No. 557, Sec. 7.]—A caveator, in his affidavit in support of his caveat against registration of a bill of sale, alleged that one

H., the mother of W., the intended grantor of the bill of sale, was entitled to dower from certain real estate which W. had entered into possession of as heir-at-law; that the caveator had advanced moneys to H., and had taken a mortgage of her dower rights as security; and that W. had received certain sums as net rents, one-third of which the caveator claimed as such mortgagee. On these facts the caveator claimed to be a creditor of W. within No. 557. *Held, per Cope, J.*, that the caveator was not a creditor within the meaning of Sec. 7 of No. 557, since there was no privity between him and W., the caveator being like a mortgagee out of possession; and caveat ordered to be removed. *In re Caveat of Mitchison*, 1 A.L.T., 124.

8. Seizure Under.

Before Default—Parol Extension of Time.]—A mortgagor by bill of sale of chattels is not guilty of default so as to make the title of the mortgagee absolute, by non-payment at the time mentioned in the bill, if the mortgagee has agreed by parol to extend the time for payment. *Frith v. Maritime General Credit and Discount Company.*, 2 V.R. (L.,) 165; 2 A.J.R., 111.

On Demand.]—A. borrowed from B. £200 for three months, at interest at 10 per cent. per annum, and granted a bill of sale of all his furniture to B., conditioned to be void on payment *on demand* of £200 and interest at 10 per cent. per annum. On the same day A. gave to B. his (A.'s) acceptance at three months for £205. During the currency of the acceptance B. demanded payment of the £200, and interest to the time of such demand; and, on non-payment, seized the furniture under the bill of sale, and advertised its sale. A. then tendered to B. £200 and interest, conditionally on the bill of sale and acceptance being given up, which was refused. A. then filed his bill against B. for an injunction to restrain the sale, and for rectification of the bill of sale, and obtained an *ex parte* injunction. On motion to dissolve the injunction, *Held* that the defendant should not be allowed to take the acceptance and use it as his own, and at the same time enforce immediate payment under the bill of sale; that although the plaintiff did not make a strictly legal tender, there had been a substantial, proper, and adequate offer of payment, and one sufficient to induce the Court to interfere by injunction and restrain the sale. *Murphy v. Martin*, 1 W.W. & A'B. (E.,) 26.

After Demand—Further Notice.]—Where a mortgage of chattels, by way of bill of sale, is made payable on demand, with a power of sale on default, and a demand of payment has been made, no further notice to the mortgagor, before sale, is requisite. *United Hand-in-Hand and Band of Hope Company v. National Bank of Australasia*, 3 V.L.R. (E.,) 61.

9. Priority.

After Acquired Property.]—An action was brought in *detinue* to recover a billiard table, and plaintiff obtained a verdict. It appeared that the billiard table formed part of the furniture of a hotel in defendant's occupation, but previously owned by B.; that B. had given a bill of sale over the furniture, including after acquired property, to W. The table was brought on to the premises after the first bill of sale. B. then gave a second bill of sale over the table to the plaintiff, and W. sold the furniture to the defendant. *Held* on rule *nisi* to enter verdict for defendant that before W. had done any act to acquire a title at law, the plaintiff acquired the property; that there were two equities, and in a court of law that which is clothed with the legal title must prevail, and rule refused. *Henry v. Miller*, 3 V.L.R. (L.,) 293.

Parol evidence of a prior bill of sale and of its satisfaction is no answer to the claim of a holder of a bill of sale which is produced. *Ford v. Parker*, 5 A.J.R., 169.

10. Other Points.

Bill of Sale Subject to Defeasance not Comprised Therein—"Instruments and Securities Act," No. 204, Secs. 57, 56, 63.]—W., more than 60 days before his insolvency, executed and registered a bill of sale in favour of L. S., W.'s official assignee, sued L. for the goods, and at the trial it appeared that though absolute in form, it had been made subject to a verbal condition of defeasance on repayment, so that it was really a mortgage to secure a debt of the ostensible purchase-money of the apparent absolute sale; and that W. had for a time left the premises and then returned, and remained apparently as occupant, and had been supplied with goods by L. to carry on business as before. The jury gave a verdict for defendant. On rule *nisi* for a new trial, *Held* that under Sec. 57 it was void as subject to a defeasance not upon its face; and that it was void at common law under Secs. 56 and 63 as being made in order to give "false apparent possession" and "collusive credit;" or on the view that, if the jury had found "apparent possession" to have changed from assignor to assignee, the finding was against evidence. Rule absolute. *Simpson v. Luth*, 4 W. W. & A'B. (L.,) 143.

"Instruments and Securities Statute," No. 204, Sec. 57.]—Where an agreement was made *after* a bill of sale was executed, to the effect that grantor of bill was to have goods back on repayment of money, and such agreement was not endorsed on the bill, *Held* that the agreement being made after execution distinguished it from *Simpson v. Luth*, and that bill of sale was valid. *Gane v. McGrane*, 3 A.J.R., 22.

Illegal in Part—Independent Clauses.]—Illegality, apart from fraud, only vitiates that part of a document which is declared illegal, not other independent clauses contained in the same document. *Tidyman v. Collins*, 4 V.L.R. (L.,) 478.

If, therefore, a bill of sale be null and void by failure to file the prescribed affidavit of renewal, the grantee may recover the debt

from the grantor, upon an independent covenant to pay contained in the same deed. *Ibid.*

Bill Given as Collateral Security for Payment of Rent Under a Lease.]—A bill of sale given as collateral security for payment of rent under a lease is not limited to the rent actually due, but is valid for the currency of a lease as against an execution creditor. *Sweeney v. Shepherd*, 3 A J.R., 49.

Construction — Licence to Break in and Seize Chattels in Default of Payment.]—A licence contained in a bill of sale for the grantee to break and enter the grantor's premises and to seize the goods secured in default in payment, is an essential part of the instrument, regarded as a bill of sale, and is avoided with the instrument itself if the latter becomes void. *Black v. Zevenboom*, 6 V.L.R. (L.,) 473, 479; 2 A.L.T., 96.

BOARD OF LAND AND WORKS.

1. When a Necessary Party.

Sale of Crown Lands.]—*Per totam curiam*—A suit to restrain the sale of Crown Lands is defective if the Board of Land and Works is not a party. *Semble*, the substantial rights of the Crown to waste lands have been ceded to the Board of Land and Works by Statute; the sale and disposition of them have been entrusted to the Board; the Board is the sole agent as regards these lands, and the Crown could not move in the matter of selling them without the Board. *Davis v. the Queen*, 6 W.W. & A'B. (E.,) 106, 127.

Contract—Position as Agent for Crown.]—The Board of Land and Works has been constituted for the express purpose of giving it an independence of action, and although its corporate acts are for the benefit of the Crown, the maxim *Respondeat Superior* is not applicable so as to exempt the Board from liability on a contract which it has made; the Board may be sued by the contractor, and it is not necessary for him to bring his action against the Crown by petition. *Young v. Board of Land and Works*, 3 V.R. (L.,) 110, 118; 3 A.J.R., 54, 77.

Suit Against the Crown — Board of Land and Works.] — E. L. & M. in July, 1858, contracted with the then members of the Board of Land and Works on behalf of the Government, for the construction of a railway. In December, E. L. & M. became partners. In 1860 they dissolved, L. becoming liable to E. and M. for shares of profits, L. and W. to complete the contract. E. M. & L. assigned to H. and others the percentages retained by the Government upon trust, and to W. their interest under the contract. Moneys became due under the contract for breaches and deviations before and after the dissolution, and the Government retained a percentage on moneys payable until completion. Actions were commenced in the names of E. M. & L. and others, against the Queen to recover these percentages, and for relief as to breaches. In 1870 the actions were compromised, and C. purporting to act as M.'s attorney, consented to a discontinuance and settlement for £60,000, and to entry of satisfaction on judgment for that sum. A release, to which the Board was a party, was also executed by H. and others, releasing the Queen and the Board from all actions under the contract. M. petitioned against the Board, H. and others, to have the release set aside, and accounts taken under the contract, the compromise and release having been entered into without his consent and against his protest. The Board demurred on the ground (*inter alia*) that it was not a necessary party. *Held*, that the Board was rightly made a party, as it deals as an agent for the Crown. *Merry v. The Queen*, 6 V.L.R. (E.,) 7; 1 A.L.T, 137.

2. Rights, Powers, Duties, and Liabilities of.

Sale of Crown Lands.]—*See Palmer v. Board of Land and Works*, under Crown—*Privileges and Prerogatives.*

Under Land Acts.]—*See* under Land Acts.

For Improper Construction of Works.] — Although the Board is a public body, discharging statutory duties, it is liable for the improper execution, either by the Board or its agents, of works constructed in discharge of those duties by which injury is occasioned. *Victorian Woollen and Cloth Manufacturing Company v. Board of Land and Works*, 7 V.L.R. (L.,) 461; 3 A.L.T., 65.

"Amending Land Act, 1865," No. 237, Sec. 22—Liability of Board of Land and Works for Tort.]—McK. brought an action against the Board for not registering the transfer of a lease under Sec. 22 of Act No. 237. *Held*, on demurrer to the declaration, that although the plaintiff had paid a fee, and although the Act authorised certain things to be done on payment of fees, a contract was not thereby created, but that the Board was liable as in tort. Judgment for plaintiff. *McKinnon v. Board of Land and Works*, 3 V.R. (L.) 70; 3 A.J.R., 41.

Railway Platform Insufficiently Lighted—Friend of Passenger—Tort.]—The Board of Land and Works is liable, in an action of *tort*, for injuries occasioned to the friend of a passenger, whom he accompanied to the train, by the neglect to sufficiently light the platform, if the practice has been to allow friends of passengers to accompany them to the train. *Sweeney v. Board of Land and Works*, 4 V.L.R. (L.) 440.

Public Officers.]—As regards the Government Railways, the Board of Land and Works are

not public officers, but merely a body of trustees, one of whom is a public officer for the time being, and to all of whom is entrusted the property belonging to the railways, on which they carry on the business of carriers for hire, the carrying on of such business forming no portion of the Government service. *Ibid.*

The mere fact that the Board of Land and Works are trustees, or receive no profit from the performance of their trust, will not exempt them from liability for acts of negligence committed by them in the execution of their trust. *Ibid.*

See also S.C. under NEGLIGENCE.

3. Costs.

No. 344, Secs. 49, 50—No. 392—Infant Owner of Land.]—An infant was entitled to a piece of land which the Board of Land and Works required for a railway, and which the Board took, and an order was made appointing the receiver, appointed by the Court in suit, a special guardian for purpose of selling and conveying land to Board. On motion as to costs, *Held* that the Board was not liable for any costs under the Acts, except the costs of conveyance, which may be obtained by going before the Master under Secs. 49 and 50. *Hunter v. Hunter*, 5 A.J.R., 2.

16 Vic., No. 39—Acts No. 59, Sec. 2, No. 96, Secs. 1, 12—"Public Works Statute 1865," No. 289, Sec. 5—Lands Compulsorily Taken—Costs of Petition as to.]—A board called the "Commissioners of Sewers," &c., was incorporated under 16 Vic., No. 39. This board compulsorily took land, paying purchase-money into Court. Under powers of No. 59, Sec. 2, a proclamation was made by Governor-in-Council, dissolving the board and transferring their rights, powers and liabilities to the Board of Land and Works. By Sec. 12 of No. 96, all the property, rights, &c., of the Commissioners of Sewers were vested in the Board of Land and Works, and Sec. 1 incorporated the Board of Land and Works. No. 289, Sec. 5, vested in the reconstituted Board of Land and Works all the rights, powers, liabilities, &c., of the existing board. *Held* that Board of Land and Works were liable to pay the costs of a petition for payment out of Court of purchase-moneys, and also of a disentailing deed necessarily executed. *In re Bear's Estate*, 7 V.L.R. (E.,) 53; 2 A.L.T., 153.

Act No. 617.]—The Act No. 617, vesting in the Board of Land and Works the undertaking, &c., of the Melbourne and Hobson's Bay United Railway Company, does not transfer to the Board any of the liabilities of the Company; and the Board is not liable to pay the costs of a petition for payment out of Court of moneys paid in in respect of land compulsorily taken by the Melbourne and Suburban Railway Company under "Land Clauses Consolidation Act 1845." *In re Thompson*, 8 V.L.R. (E.,) 213; 4 A.L.T., 1.

BONDS.

Breach—Setting Out.]—In an action against sureties in a bond for payment of any sum of money that might be recovered in a certain action, *under the declaration*, the declaration in the action on the bond contained no averment that the money was recovered *under the declaration*. *Held*, that the words "under the declaration" were material to be alleged in the breach. *Day v. Union G. M. Company*, 2 V.L.R., (L.,) 11.

Assignment of Breaches, 8 & 9, Will. III., Cap. 11, Sec. 8.]—A bond secured the payment of a certain sum due for principal and interest upon a mortgage of even date after default in payment of such principal and interest on a certain date. The plea averred payment of such sum according to the conditions, and the replication merely joined issue. *Held*, upon demurrer to the replication that the bond was substantially a bond to secure payment of a principal sum by instalments, and therefore within 8 and 9, Will. III., Cap. 11, Sec. 8, and that it was necessary that replication should assign breaches of condition. Demurrer allowed. *Miller v. Tripp*, 2 W. & W. (L.,) 12.

BOROUGHS.

See CORPORATION AND LOCAL GOVERNMENT.

BOTTOMRY.

See SHIPPING.

BOUNDARIES.

Of City—Boundary Described by Road—Side of Road—Centre Line—"Local Government Act 1874," Sec. 18.]—A city was described in the Second Schedule to the "*Local Government Act* 1874," as bounded by the "western side" of a road. *Held*, nevertheless, that Sec. 18 of the Act applied, and that the boundary of the city was in fact a line along the centre of the road. *Hawkes v. Mayor, &c., of South Melbourne*, 10 V.L.R. (L.,) 203; 6 A.L.T., 59.

BREAD.

See BAKER.

BRIDGE.

See WAY.

BUILDING.

Metropolitan.]—*See* METROPOLIS.

BUILDING SOCIETY.

1. CONSTITUTION AND RULES.

Rules — Effect of Long Continued Departure from.]—The rules of a building society must be strictly adhered to, and are binding on the members and all persons claiming as or through members, and as between a society and its members a long continued course of dealing at variance with the rules is of no validity, and length of time cannot validate it. *Watson v. Bendigo Building Society*, 10 V.L.R. (L.,) 26; 5 A.L.T., 174.

Rules Providing for Arbitration.]—The rules of a building society provided that all disputes between the society and a member should be referred to arbitration. The society sued D., a borrowing member, in ejectment for default in his payments as a mortgagor. *Held* that the rules were no bar to the action; to render them such it must be established by strict proof that there was a dispute between the Society and the defendant *quâ* member. *Delaney v. Sandhurst Building Society*, 5 V.L.R. (L.,) 189; 1 A.L.T., 13.

"Building Societies Act," No. 493, Secs. 2, 12, 22, 27, 38—"Acquiring" Land—Rule *ultra vires*.]—The M. Society framed a new rule authorising the board to "acquire freehold or leasehold estate, or take leases or under-leases, and, where deemed expedient, erect buildings on any freehold or leasehold, for the time being, held by the society, and to sell or lease the same respectively." The Registrar refused to register this rule as being *ultra vires*. *Held*, on summons under Sec. 38 of the Act, that nothing in the Act gave the society power to take land on lease or build; the only power given being to buy, sell, and mortgage freehold or leasehold land, and that such rule was *ultra vires*. *In re Metropolitan Permanent Building Society*, 7 V.L.R. (E.,) 86; 3 A.L.T., 26.

2. REGISTRATION.

"Building Societies Act 1874," No, 493, Secs. 2, 4, 38—Refusal to Register—Similarity of Names—Existing Society.]—The Registrar was summoned to uphold the grounds of his refusal to register a society on the grounds that in his opinion the proposed name nearly resembled the name of an existing society, the Registrar relying on Sec. 4 of the Act. The existing society was registered after the Act 493 came into force, and it was contended that it was not an "existing society" within meaning of Sec. 2, and therefore Sec. 4 did not apply. *Held* that "existing society" does not strictly mean a society existing at time of passing of Act, inasmuch as the purpose of the Act was to prevent any registered society from bearing a name too closely resembling that of another society then existing, whether registered before or after the passing of the Act, and that the Court would not interfere to supplant the opinion of the Registrar when he has formed a real and genuine one. Summons dismissed. *In re Fourth South Melbourne Building Society*, 9 V.L.R. (E.,) 54; 4 A.L.T., 182.

Act No. 493, Secs. 7, 8, 9—Practice—Proof of Registration and Rules.]—The notification in the *Government "Gazette"* is sufficient proof of registration and incorporation of a building society under Sec. 8, but the rules must be proved by the production of the originals. *Sandhurst Building Society v. Delaney*, 3 V.L.R. (L.,) 234.

A society sued D. on the covenant in a mortgage deed. The new rules of the society, made since the passing of Act No. 493, were not properly proved. *Held* that the plaintiff society was not entitled to recover anything due under the rules since registration under the Act. *Ibid.*

3. POWERS AND LIABILITIES OF DIRECTORS AND OFFICERS.

Secretary—Excess of Power.]—Where the committee of a building society authorised its secretary to place lands, of which the society was mortgagee, in the hands of an auctioneer for sale, *Held*, that the secretary had no power in himself to retract or suspend the authority given to the auctioneer without a resolution of the committee to that effect. *Ross v. Victorian Permanent Building Society*, 8 V.L.R. (E.,) 254, 264; 4 A.L.T., 17.

Secrstary—Power of.]—The secretary of a building society must be held to have authority to answer questions connected with property in the society's possession asked by persons interested in such property, and to receive notices in respect of it binding on the society. *Hollowood v. Fourth Union Building Society*, 2 A.L.T., 95.

4. Powers and Liabilities of Trustees.

Trustees Selling Property—Not Precluded from Suing for Unpaid Instalments.]—The trustees of a building society gave notice to a contributing member, whose monthly instalments in respect of certain property were in arrear, that they intended to sell the property in respect of which the instalments were so in arrear, and also sued the member personally for the unpaid instalments. *Held* that the trustees were not precluded, by selling the property, from suing the member. *Clendinning v Broadbent*, 4 A.J.R., 157.

Ejectment by Trustees—Title.]—A certificate of title in the name of the trustees of a building society personally, and not as trustees for the society, is sufficient to enable them to maintain an action of ejectment as trustees of the society. *Clendinning v. Garrick*, 4 A.J.R., 120.

5. Powers and Liabilities of Society.

Paying Deposit to Married Woman—Liability to Husband.]—A building society which pays a deposit made with it at interest by a married woman is not protected in making such payment from the liability of paying it again to the husband, although the society give him notice that they intend to pay the wife, unless he obtains an order from a Judge under Sec. 12 of the "*Married Women's Property Act.*" *Griffiths v. Victorian Permanent Building Society*, 6 V.L.R. (L.,) 259; 2 A.L.T., 34.

6. Relation between Societies and their Members.

Mortgages—Sale of Mortgaged Property—Buying-in.]—The trustees of a building society have power to authorise the buying-in by their agents of property mortgaged to the society for an advance, and sold in default of payment. *Wynne v. Moore*, 1 A.J.R., 156.

BYE-LAW.

Of Municipal Corporations.] — *See* Corporations.

Mining.]—*See* Mining.

CALLS.

See COMPANY.

CAPIAS.

1. *Capias ad Satisfaciendum.*
2. *Capias ad Respondendum.*

1. Capias ad Satisfaciendum.

Ca. Sa.—Writ not Abolished by "Imprisonment for Debt Act," No. 284.]—Although Act No. 284 provides that "no persons shall be arrested under a writ of *ca. sa.* unless as hereinafter provided," it does not prevent the issue of the writ, it rather contemplates its issue. *Proudfoot v. Mackenzie*, 6 W. W. & A'B. (L.,) 144.

Writ of Ca. Sa.]—A writ of *capias ad satisfaciendum* is merely a writ of the Supreme Court and as such only has authority within the limits of the Colony.—Writ refused in the case of an absconder from bail who had gone to Sydney. *Regina v. Robinson*, 6 A.L.T., 141.

2. Capias ad Respondendum.

Setting Aside.]—On a rule *nisi* to set aside an order to hold to bail, the Court will not inquire into the cause of action on affidavits of the defendant, even where the affidavits show a greater value than that which plaintiff had sworn to in his affidavit. *Smith v. Parnell*, 2 W. & W. (L.,) 115.

Capias ad Respondendum—Affidavit in Support—"Common Law Procedure Statute 1865," Sec. 332.]—If an affidavit in support of an application for a *ca. re.* under Sec. 332 of the "*Common Law Procedure Statute* 1865," on the ground that the defendant is about to leave the colony, shows a debt divided into distinct and severable items, the Court may sever them, if necessary, so as to sustain the application. But if the several items are so mingled in one sum as not to be severable, and if any one of them cannot be sustained, such fault vitiates the whole, and an order to hold to bail ought not to issue, or ought to be rescinded. And great particularity is necessary to justify the arrest of the defendant. *Ivey v. Cavanagh*, 4 V.L.R. (L.,) 274.

When, therefore, in an affidavit in support of a *ca. re.*, besides the general claim for interest on the bulk sum of the debt, the debt itself was stated to be composed of several items, one of which was interest on other items, the particular item itself not being severable from such bulk sum, *Held* that the whole affidavit becoming, in consequence, insufficient, the *ca. re.* must be rescinded. *Ibid.*

Capias ad Respondendum—Affidavit in Support.]—An affidavit in support of a *ca. re.* must state facts and materials sufficient to satisfy the Judge that the action will probably be defeated if the defendant be not held to bail. *Ibid.*

Semble, that the mere fact that the defendant is about to depart upon a voyage in the usual course of his business is insufficient ground for holding him to bail. *Ibid.*

Capias ad Respondendum—When Issued.]—*Per Holroyd, J.* (in Chambers,) a writ of *capias ad respondendum* cannot be issued after judgment. *Union Bank v. Rinderman*, 6 A.L.T., 27.

Capias ad Satisfaciendum.]—A writ of *capias ad satisfaciendum* may be issued, but no one can be arrested on it. *Ibid.*

"Common Law Procedure Statute 1865," Sec. 339—Capias.]—The word "capias," in Sec. 339 of the "*Common Law Procedure Statute* 1865," refers only to a "*capias ad respondendum.*" *Ibid.*

Where a defendant had been arrested on a writ of *capias ad respondendum*, issued upon a judgment debt, *Held* that the writ should be set aside and the defendant discharged. *Ibid.*

CARRIER.

1. *Common.*
2. *Generally.*

And *See* SHIPPING.

1. COMMON.

Lien — When Entitled to.]—M. carried a quantity of wool under contract with the lienor of the wool, and delivered it to the lienees, who did not pay him his freight. M. claimed a lien over the residue of the wool for a general balance owing to him and for his freight. *Held*, that he had not, as under a plea averring a carriage "for the lienees" at their request, a lien for his general balance, and that a contract with the lienees would not, in the circumstances, be implied; but that M. had, at common law, a lien upon the residue of the wool which was still undelivered, for its carriage. *Goldsbrough v. McCulloch*, 5 W. W. & A'B. (L.,) 154.

See S.C. under LIEN.

Liability and Duty of as to Delivery—Special Contract.]—F., a Chinaman, delivered to R. a case of opium to be carried to a certain place. F. signed the delivery note in Chinese characters, and R. signed the receipt note in English characters. F. could only speak English imperfectly and could not read English, and on the back of the delivery note there was a condition endorsed to the effect that R. would not be responsible for the safe delivery of any parcels containing goods over £10 in value, unless the value be declared and entered on the receipt and an extra price paid. The value was £180; this was declared, but the value was not entered on the receipt note. *Held* that as F. signed voluntarily, and it must be assumed he was aware of the contents of the delivery note in order to entitle him to sue he must show that he had complied with conditions. *Fong Gaep v. Reynolds*, 2 W. & W. (L.,) 80.

Liability for Non-Delivery within Reasonable Time—Notice—Consequential Damages.]—Consequential damages will be allowed against a common carrier for the non-delivery of goods within a reasonable time, when the carrier had express notice that unless the goods were delivered within a reasonable time, such consequential damages would ensue. *Lambrick v. Bentwitch*, 4 A.J.R., 73.

2. GENERALLY.

Licensed Carrier—Proof of Negligence by—"Licensed Carriags Statute 1864," Sec. 20.]—The disregard of the provieions of Sec. 14 of the "*Licensed Carriage Statute* 1864," No. 217, forbidding more than one person to be carried on the box of a coach, is not conclusive proof of negligence as against the owners of a vehicle in the case of an accident. *Robertson v. Carmody*, 1 V.R. (L.,) 6; 1 A.J.R., 24.

Unlicensed Carrier—Special Contract—Act No. 78.]—In an action for the value of work and labour done in the carriage and delivery of goods, the defendant pleaded that the work and labour was done by plaintiff "as a carrier by land for hire, within the Colony of Victoria," and that plaintiff had not a license "to carry on business as a carrier" under the Act No. 78. Replication that the work was done under a special contract. On demurrer to the replication, *Held*, that the Act No. 78 requires carriers generally to take out licenses, and is not limited to the class known to the common law as "common carriers;" and that though a "common carrier," who enters into a special contract for the carriage of goods, ceases to be a common carrier *quoad* such contract; yet a carrier, within the meaning of the Act No. 78, may enter into a special contract for carriage, and still continue a carrier *quoad* the subject matter of that contract; and that therefore plaintiff could not recover. *Renwick v. McCulloch*, 1 W.W. & A'B. (L.,) 48.

When Liable for Non-Delivery—Privity of Contract.]—Plaintiff took silk to a dressmaker to be made up, and instructed her to send the parcel home by a cabman. The parcel was delivered to the cabman by the dressmaker's servant, but the cabman did not deliver the parcel. The plaintiff was nonsuited in the County Court, on the ground that there was no privity between plaintiff and the cabman, and that the action would only lie at the suit of the dressmaker. On appeal, *Held* that if the action were for trover, plaintiff could sue, but that the cabman was not liable to plaintiff as a carrier, and decision upheld. *Gwyatt v. Hayes*, 2 A.J.R., 107.

Carrier by Sea.]—*See* SHIPPING.

CERTIFICATE.

For Costs.]—*See* COSTS.

Of Architects and Surveyors.]—*See* WORK AND LABOUR.

Of Discharge from Insolvency.]—*See* INSOLVENCY.

CERTIORARI.

Where the Writ Lies.]—*Certiorari* does not operate on persons whose duties are merely ministerial, or whose functions are merely administrative, engaged in carrying into execution powers delegated to them by law. The writ will not lie, therefore, to bring up a regulation made by the Board of Education under the "*Common Schools Act*," No. 149, where such regulation possesses none of the characteristics of a judicial proceeding, for the purpose of having it quashed as being *ultra vires*; but the regulation must be attacked in some other manner. *Regina v. Board of Education*, 2 V.R. (L.,) 176; 2 A.J.R., 97.

Where the Writ Lies.]—*Quære* whether *certiorari* is the proper remedy for a prisoner who has been convicted, as he contends, irregularly. *Regina v. Schreibvogel*, 10 V.L.R. (L.,) 92.

Where the Writ Lies—Appeal.]—Where appeal lies *certiorari* will not, unless the party who wishes to bring up the proceedings on *certiorari* can show that there has been a manifest and total want of jurisdiction or fraud. *Regina v. Quinlan, ex parte Sampson*, 10 V.L.R. (L.,) 102; 6 A.L.T., 8.

In a mining partnership suit under Sec. 101, Sub-sec. vii. of the "*Mining Statute* 1865," the Judge of a Court of Mines at the hearing of a suit made a decree simply for the plaintiff, with costs; but no costs were taxed by the Judge at the hearing, as there should have been under Sec. 230 of the Statute in question. Afterwards the Clerk of the Court taxed the costs and drew up the decree, which was settled and signed by the Judge, and under it the costs to be paid by the defendants were fixed at £4 9s. The defendant had notice to attend at the drawing up of the decree, but did not do so. The defendant had the decree brought up on *certiorari*, and sought to quash it on the grounds that the Judge had acted wrongly in not himself taxing the costs of the decree, and that, under Sec. 230 of the Statute, the Clerk of the Court had no power to tax the costs. *Held*, that defendant might have appealed from the decree as settled, as containing more than the decree actually pronounced; but that, since the Judge had jurisdiction to settle the decree, an appeal was the proper remedy, and it could not be quashed on *certiorari*. *Ibid.*

Jurisdiction to Grant.]—When a *certiorari* is said to be taken away by statute, the superior Court is not absolutely deprived of the power to issue the writ; but its action as to the writ is controlled and limited, and it cannot quash the order removed on *certiorari* except upon the ground of manifest defect of jurisdiction in the tribunal that made the order, or of manifest fraud in the party procuring it. Matters on which the defect of jurisdiction depends may be apparent on the face of the proceedings or may be brought before the superior Court by affidavit, but must be extrinsic to the adjudication impeached. *Colonial Bank v. Willan*, 5 L.R., P.C., 417; 43 L.J., P.C., 39; 5 A.J.R., 53.

"Mining Statute 1865," No. 291, Secs. 244, 172—Winding-Up Order.]—The Courts of Mines stand to the Supreme Court in the relation of inferior Courts, but the power of issuing a *certiorari* in respect of any proceeding under Act No. 291 is taken away by Sec. 244. *Ibid.*

Courts of Mines—Jurisdiction of Supreme Court.]—An order had been made by the Court of Mines for the winding up of a company registered under Act No. 228. The order was regular upon the face of it, but the Supreme Court held that the petitioning creditor's debt was not proved, and that there was no foundation for the order, and quashed it on *certiorari* [*Regina v. Bowman, ex parte Willan*, 3 V.R. (L.,) 258; 3 A.J.R., 122.] *Held*, on appeal to Privy Council, that the order was within the provisions of Sec. 244 of Act No. 291, and although the Supreme Court had, notwithstanding the provisions of the section, power to issue a *certiorari* in the case of manifest defect of jurisdiction, or of manifest fraud in the person procuring it, yet the reason on which this order was quashed did not justify the exercise of the jurisdiction. *Ibid.*

Act No. 565, Sec. 36—Jurisdiction of Court.]—A Chairman of General Sessions fixed the valuation of certain property for rating purposes upon a wrong principle, as it appeared to the Court, and did not state a case. Upon a rule *nisi* to quash the return to a writ of *certiorari* issued upon the *fiat* of the Attorney-General, *Held* that *certiorari* having been taken away by the statute, the Court had no jurisdiction to consider the merits of the case, as the Chairman had jurisdiction to fix the valuation. Rule discharged. *Regina v. Cope, ex parte Mayor of Essendon and Flemington*, 7 V.L.R. (L.,) 337; 3 A.L.T., 30.

Where the Writ Lies—Court of Mines.]—*Certiorari* will not lie to bring up a winding-up order made to wind-up a mining company, where the order is good on its face, showing no excess or defect of jurisdiction. The proper method of questioning the sufficiency of the materials upon which the order is made is by appeal. *Regina v. Leech, ex parte Tolstrup*, 5 V.L.R. (L.,) 494.

Court of Mines—Winding-up Order.]—*See Regina v. Hackett, ex parte Golden Gate Company, post* under MINING—Company—Winding-up Order.

Court of Mines.]—A writ of *certiorari* will not issue to bring up to the Supreme Court the decision of a Judge of a district Court of Mines on the sufficiency of the service of a petition for winding-up a mining company. If the writ did issue it would be making the Supreme Court a Court of Appeal on a question of fact. *Re New Ringwood Company, ex parte Smith*, 4 A.L.T., 58.

Court of Mines—"Mining Statute 1864 Amendment Act," Sec. 23.]—A *certiorari* will not lie to a Court of Mines to quash a judgment on the ground that the Judge has refused to state a case or suspend his decree for ten days, as required by Sec. 23 of the "*Mining Statute* 1864 *Amendment Act*," No. 446, where the question

n dispute is one of fact and not of law. *Regina v. Dunne, ex parte Golden Fleece Old Chum Company*, 4 A.J.R., 123.

Restraining Judge of Court of Mines from Taking Accounts after Decree.]—*Regina v. Rogers, post* under MINING—Practice—Jurisdiction of Court of Mines.

Mining Warden.] — Where a summons to appear before a warden was not signed by the warden, but was signed by the warden's clerk, not in the name of the warden (under No. 446, Sec. 14,) but in his own; but the defendants took no objection to this at the hearing, and the trial proceeded, and a verdict was given for the complainant. On rule for a *certiorari*, *Held* that if the objection had been taken at the hearing before the warden it would have been good, but that having allowed the trial to proceed, and having had an opportunity of being heard upon every point, they could not afterwards take the objection; and rule discharged. *Regina v. Strutt*, 4 A.J.R., 147.

Quashing Warden's Order—No Jurisdiction in Warden over Land under Lease from Crown.]—*Regina v. Smith*, under MINING—Practice, &c. —Warden's Jurisdiction.

Warden's Order — Appeal Pending — Warden's Refusal to Grant Order of Possession Quashed under Sec. 3 of Act No. 446.]—*Regina v. Orme, ex parte Droscher, post* under MINING—*Ibid.*

County Court.] — Application for *certiorari* to remove a case from the County Court to the Supreme Court should be made to a Judge in Chambers. *Gilmer v. Burmister*, 6 W. W. & A'B. (L.,) 209.

County Court—Act No. 345, Sec. 121—County Court Judge Irregularly Granting a New Trial and Setting Aside Judgment.]—A County Court Judge possesses authority to set aside a judgment and grant a new trial as often as he likes, and even where he sets aside a judgment after a lapse of 16 years in an unusual way, and in violation of the rules, his disregard of the rules does not deprive him of his jurisdiction so as to justify the issue of a writ of *certiorari*. *Regina v. Bindon, ex parte Cairns*, 5 V.L.R. (L.,) 93.

Where the Writ Lies—Court of Insolvency.]—The Supreme Court has no jurisdiction by *certiorari* over the Insolvent Court. *In re Slack*, 2 V.R. (L.,) 135.

Where the Writ Lies.]—*Certiorari* lies from a Military Court, though under the "*Military and Naval Discipline Act* 1870," the proceedings of such Court are lodged and recorded in the office of the Attorney-General. *Regina v. Sturt, ex parte Johnson*, 4 A.J.R., 78.

Where the Writ Lies.]—The proper remedy where the justices who adjudicated in a summary proceeding under Sec. 511 of the "*Local Government Act* 1874," for obstructing a person employed by a municipal council to remove obstructions from a road, are also members of the prosecuting council, is by *certiorari*, and not by prohibition; for a prohibition would imply that no justices could hear the case. *Ex parte Scott*, 2 V.L.R. (L.,) 70.

Where Writ Lies—Not Required under "Justices of the Peace Amendment Act," No. 571, Sec. 4.]—It is not necessary, when it is desired to quash a proceeding under Act No. 571 ("*Justices of the Peace Amendment Act*,") Sec. 4, to bring up such proceeding before the Court by *certiorari* or otherwise. *Regina v. Browne, ex parte Sandilands*, 4 V.L.R. (L.,) 138.

To Quash Justices' Order—Rule Nisi Omitting to State Objection—Act No. 267, Sec. 148.]—A rule *nisi* for *certiorari* to quash an order of Justices, discharged *with costs*, on the ground that the rule *nisi* did not, under Sec. 148 of Act No. 267, set out the objections to the order. *Regina v. Sturt, ex parte Lloyd*, 3 A.J.R., 22.

To Quash Conviction — Justice Exceeding his Authority—Act No. 267, Sec. 159.]—Although *certiorari* is taken away by Act No. 267, yet *certiorari* to quash a conviction where a magistrate exceeds his jurisdiction still exists. *Hunter v. Sherwin*, 6 W.W. & A'B. (L.,) 26, 32.

"Scab Act 1870."] — The Court granted a *certiorari* to quash an order of Justices convicting a person for driving scabby sheep into a clear district without the order of an inspector, where the summons had directed such person to appear at one place, and the case was heard at another in his absence. *Regina v. Drury, ex parte Cullen*, 4 A.J.R., 169.

And *see* generally as to Quashing Orders of Justices, *post* under JUSTICE OF PEACE—Prohibitions to and Quashing Convictions, &c.

Judge Interested.]—An order of *certiorari* had been obtained on the ground that a Judge in the Court below had persisted in hearing the case although he was interested in the question. Rule *nisi* to set it aside on ground that material facts had been concealed from the Judge who granted the order. *Held* that the fact that the applicant after knowing the Judge was interested went on with the case was not a material fact for setting aside order and rule discharged. *Molloy v. Gunn*, 2 W. & W. (L.,) 76.

Practice—Title of Affidavits—Writ of Certiorari upon Fiat of Attorney-General—Returns.]—A writ had been obtained upon a *fiat* of the Attorney-General, directed to the Court of General Sessions, &c., to remove all judgments, &c., in a certain appeal on a rating valuation. To this writ a return was made sending up a *copy* of the minute in the Court-book, and the Justices were ordered to make a further return, which was made, certifying that "after the coming of this writ and the return thereto, the paper writing annexed hereto, marked A, had come into their custody, and is returned according to the exigency of the writ." The return and the document were sealed with the seal of the Court. *Held* that the return was good. When the return to a writ is filed, the cause

below being then in the Supreme Court, the affidavits and the rule to quash the return should be intituled "in the Supreme Court," but the affidavits and rule may be amended. *Regina v. Cope, ex parte Mayor of Essendon and Flemington*, 7 V.L.R. (L.,) 337; 3 A.L.T., 30.

Fiat for Writ—Proof on Oath of Six Days Notice in Writing — 13 Geo. II., Cap. 18, Ssc. 5.] — *Higinbotham, J.* (in Chambers) refused an application for a *fiat* for a writ of *certiorari* where the applicant had not offered any proof upon oath, as required by 13 Geo. II., Cap. 18, Sec. 5, that six days' notice in writing had been given to the justices whose proceedings were sought to be quashed. *Ex parte Sayers*, 6 A.L.T., 24.

By Judge in Chambers.]—A Judge in Chambers can grant an order absolute in the first instance for a *certiorari*, and there is no sound distinction between the case of Justices and Wardens as to giving notice. *Regina v. Carr*, 6 W.W. & A'B. (L.,) 240; N.C., 59.

Rule Nisi Obtained in Vacation.]—Where a rule *nisi* for *certiorari* was obtained in vacation, and made returnable before the Court on the first day of Term, *Held* that the Judge in Chambers had no jurisdiction to grant such a rule. *Regina v. McIntyre*, 4 W. W. & A'B. (L.,) 42.

Order Nisi Made in Vacation—When Returnable.] —An order *nisi* for a *certiorari* granted in vacation cannot be made returnable in term, but must be made absolute in the first instance. *Regina v. Pohlman, ex parte Thomson*, 4 A.J.R., 154.

After the discharge of the order, a prohibition may be applied for if the application be made on proper materials. *Ibid.*

Superseding — Taking Return Off the File.] — Where a Judge had granted a writ of *certiorari*, notwithstanding that it was objected that the applicant had disentitled himself by delay, and the same objection was again taken on the return to the writ, on a rule to quash the order brought up, which was confessedly bad, *Held* that the objection as to delay could be taken on the rule to quash, and that the Court would in such a case review the discretion of the Judge who had granted the *certiorari*; and rule to quash discharged, and the return taken off the file. *Regina v. Bowman, ex parte Garrett*, 4 A.J.R., 177.

CHAMPERTY.

What Amounts to.] — In order to constitute Champerty it is not necessary that there must be a binding contract as between the parties, and that the contract must be such that, apart from its illegality, it would have been binding and valid; an honorary engagement is sufficient, and parol evidence is admissible to show the true state of facts and the illegalities. A suit was instituted by nine plaintiffs to recover ground as in the illegal occupation of the defendants, the plaintiffs having no title but miners' rights. It appeared that a solicitor was substantially the plaintiff in the suit, that he had paid the expenses of the suit and had bought miners' rights for the plaintiffs. *Held* that it was a claim in its inception and concoction based upon champerty and maintenance. *Semble*, where a plaintiff has originally a good right and makes a bargain with his solicitor savouring of champerty, he is not to be defeated of his rights in consequence of that bargain. *Collins v. Hayes*, 6 W. W. & A'B. (M.) 5.

What Amounts to.]—In a suit by a sole plaintiff to set aside a forfeiture of his shares in a mining company, other persons whose shares had been similarly forfeited contributed to the plaintiff's costs of suit, but without any agreement to share in the immediate result of the suit, *Held* that their identity of interest warranted them in so contributing, and that this did not amount to champerty or maintenance. *Wood v. The Freehold United Quartz Mining Company, Registered*, 1 V.R. (E.,) 168; 1 A.J.R., 173.

What Amounts to.]—An assignment by mortgagees of goods, at the time or lately the property of the mortgagors, and then in the custody of the warehouseman, of all their right and title to the goods, is not champertous. *Ross v. Blackham*, 2 V.L.R. (E.,) 159.

What Amounts to.] — A mortgagor became insolvent, and his official assignee, in consideration of the mortgage debt, released the equity of redemption to the mortgagees. Upon obtaining his certificate, the mortgagor procured a conveyance from the assignee of all his interest in the insolvent estate, and brought a suit to set aside the release. *Held* there was no champerty in the mortgagor's purchase. *Brougham v. Melbourne Banking Corporation*, 6 V.L.R. (E.,) 214, 226; 2 A.L.T., 81, 84.

What Amounts to.]—In a suit for forfeiture of a mining claim, the sole plaintiff admitted, upon being cross-examined, that another person had advanced money for the purposes of the suit, and was to have a share in the claim if plaintiff was successful. *Held* that this amounted to champerty or maintenance, and suit dismissed with costs. *Mitten v. Spargo*, 1 V.R. (M.,) 22; 1 A.J.R., 69.

What Amounts to—Maintenance.]—M. sued Y. for a bill of costs incurred in a suit A. *v.* B. Y. had advanced money to A., on security of her claims against B., and M. had for some time conducted the case, but refused to go further unless he received security. Y. gave the undertaking to pay the costs on which this action was founded. *Held* that Y. was interested in the suit of A. *v.* B., and was not guilty of maintenance; that there is a great difference between the mortgage of a right to litigate and the mortgage of an interest in a

suit then existing, and that a person is able to mortgage his interest in an existing suit without being guilty of champerty. *Morrison v. Young*, 3 V.R. (L.,) 35; 3 A.J.R., 34.

Creditor Purchasing from Official Assignee of an Insolvent Heir-at-Law of Mortgagor — Suit to Redeem by.]—See *Slack v. Atkinson*, MORTGAGE—*Right to Redeem.*

CHARGE.

See MORTGAGE.

CHARITY.

1. GIFTS TO.

When Valid.]—A bequest to trustees of property "to be employed in such charitable purposes as the trustees shall in their absolute discretion think fit," is not void from uncertainty. *Sumner v. Sumner*, 10 V.L.R. (E.,) 261; 6 A.L.T., 111.

Semble, per Molesworth, J., that if the Court should hold that an application to purposes of private charity is illegal, it should prohibit the trustees from making such, not defeat the trust altogether. *Ibid.*

"Religious, Charitable and Useful."]—A testator bequeathed a fund to trustees upon trust to distribute it amongst "such one or more, to the exclusion of any other or others, of the various religious, charitable, and useful institutions in the Colony of Victoria," and in such shares and proportions as the trustees should in their absolute discretion think fit. *Held* that the words were not to be read as "religious or charitable or useful" in which case the gift would be bad, but the ordinary grammatical reading would be institutions which fulfilled each of the three conditions, and the gift was to be read as "religious and useful" or "charitable and useful," the word "useful" qualifying the preceding words, and that the gift was good. *Attorney-General v. Wilson*, 8 V.L.R. (E.,) 215; 4 A.L.T., 14.

2. APPLICATION OF THE FUND.

Charitable Trust in Favour of Unincorporated Institutions—Scheme Imposed by Attorney-General—Representatives of Institutions.]—Where the Attorney-General appears as representing the public in a suit for the administration of the charitable trusts of a will, the Court will adopt any condition as to the payment of the money which he sees fit to impose; but where he imposes no conditions, and the institutions are incorporated, the Court will recognise the representatives of the institutions as being the persons entitled under the will, and will order payment of the money to the managers of the respective departments of the institutions named in the will. *Treacy v. Watson*, 10 V.L.R. (E.,) 96; 5 A.L.T., 201.

Scheme Settled by Court.]—A subscription having been raised under the name of "The Taranaki Relief Fund," for the relief of the distress caused by the Maori rebellion, the amount subscribed was found to be in excess of the requirements, and a surplus remained in the hands of the treasurers of the fund. Upon an information by the Attorney-General, decree made for the administration of the fund. See decree for form of scheme. *Attorney-General v. Lorimer*, 3 W.W. & a'B. (E.,) 82.

3. JURISDICTION OF COURT OF EQUITY.

Charitable Trust.]—A number of persons, including the plaintiff, formed themselves into a society for charitable purposes, one of the rules of which was that there should be a community of goods and other property. Suit by plaintiff, on behalf of himself and all others, against the curator who had administered to the estate of K., the founder of the society, and the Attorney-General, seeking to restrain curator from selling land, and seeking to establish a trust, and for Court to settle a scheme. *Quære*, whether Court had jurisdiction at the suit of an individual member to interfere, but as no opposition was made by other members, a decree was made. *Pratz v. Weigall*, 7 V.L.R. (E.,) 156.

CHEQUE.

Consideration for Cashing.] — *Campbell v. Connor, ante column 76.* *See* under BANKERS AND BANKING COMPANIES.

When Endorsing is Not a New Drawing.]—*Ibid.*

Presentment for Payment—In Due Time—Notice of Dishonour.]—*Hutton v. Glass, ante column 76.* *See* under BANKERS AND BANKING COMPANIES.

Crossed Cheques.]—*See* under BANKERS AND BANKING COMPANIES, *ante column 76.*

Honouring Cheques.]—*See* cases under BANKERS AND BANKING COMPANIES.

Notice of Dishonour.]—*Clarke v. McLean, ante column 77.* *See* under BANKERS AND BANKING COMPANIES.

Dishonouring—Liability of Bank.]—*See* cases collected under BANKERS AND BANKING COMPANIES—POWERS AND LIABILITIES OF,—Liability. *Ante column 77 et seq.*

Specially Endorsed Writ on a Cheque—Order 3, Rule 6, App. C., Sec. 4—Notice of Dishonour.]—*See Nathan v. Turnbull, post* under PRACTICE AND PLEADING—Under Judicature Act.

CHILDREN.

See INFANT.

CHOSE IN ACTION.

See ASSIGNMENT — DEBTOR AND CREDITOR—INSOLVENCY.

CIVIL SERVICE.

"Civil Service Act," No. 160, Sec. 40—What Constitutes a Civil Servant—Retiring Allowances on Services Being "Dispensed with."]—M. was elected at a meeting of the Board of Agriculture to fill the office of Secretary; this appointment as such was approved by the Governor-in-Council. He was not classified under Sec. 8 of the Act, nor included in any list under Sec. 11. His salary was not voted separately by any Appropriation Bill, but was paid out of moneys granted annually to the Board. M. gave two bonds of fidelity, one reciting that he had been appointed to a certain office in the service of the Government, and in the other he was styled an *employé* in the Colonial Secretary's department in the capacity of Secretary to the Board. M. held office till the Board was abolished. *Held*, on special case, that he was not entitled to any retiring allowance under Sec. 40, that the Crown was not concluded by the recitals in the bonds, that M. was not a member of the Civil Service. *Matson v. The Queen*, 2 V.R. (L.,) 233; 3 A.J.R., 27.

"Civil Service Act," No. 160 — Superannuation Allowance—Service not Continuous.]—P. served in the Civil Service for three years previously to October, 1857, when his services were dispensed with, and he received three months' salary as a compensation for his want of sufficient notice, which was to be deemed a "bar to all future pecuniary claims." P. was afterwards appointed to another office from which he retired in October, 1880. *Held* that Sec. 44 did not imply that the service was to be continuous, and in estimating the rate of his superannuation allowance the three previous years of service were to be taken into account, the compensation only being a bar to claims in respect of his dismissal without notice. *Payne v. the Queen*, 7 V.L.R. (L.,) 55; 2 A.L.T., 126.

"Civil Service Act," No. 160, Sec. 16—Compensation—Services Dispensed With by Change in Department.]—F. prior to the Act No. 552 held a post as Harbor Master. Upon the coming into operation of Act No. 552, F. was transferred to the Harbor Trust Commissioners under Sec. 40 of that Act, and continued to hold office as Harbor Master under such commissioners. *Held* that by the change in the department his services were dispensed with within the meaning of Act No. 160, Sec. 16, and that he was entitled to compensation therefor. *Fullarton v. the Queen*, 9 V.L.R. (L.,) 181; 5 A.L.T., 64.

"Civil Service Act," No. 160, Sec. 16—"Dispensing with" Services.]—G. was in July, 1857, appointed Inspector of Denominational Schools at a salary of £600 per annum by the Governor-in-Council. In August, 1862, he agreed with Government to accept office temporarily under the Board of Education, and was in October, 1862, appointed by Governor-in-Council Organising Inspector under the "*Common Schools Act*" No. 149, passed 18th June, 1862. Section 2 of No. 149, dissolved the Denominational School Board. In September, 1862, the Governor-in-Council by proclamation pursuant to Section 1 of "*Civil Service Act*" No. 160, declared that that Act "should not apply to officers or other persons whose salaries were or had been paid out of a vote for education." G.'s salary had up to that date been paid out of the vote for education. *Held* (1) that G.'s services had been "dispensed with" within the meaning of No. 160, Sec. 16; (2) that the determination of G.'s appointment by the dissolution of the Denominational Board was a change in the department; (3) that the proclamation of September, 1862, was prospective, and did not deprive G. of rights acquired at the date of such proclamation. *Geary v. The Queen*, 2 W. W. & A'B. (L.,) 50.

CLAIM.

Of Mining.]—*See* MINING

COERCION.

See DURESS.

COHABITATION.

Persons Cohabiting — Rights and Duties as Between Themselves and with Regard to Third Persons.]—If a woman continues to live with a man apparently as his wife, the man's liabilities are, to the world, as if they were married, as between themselves their rights of property should, in the absence of evidence, be as near as may be those of married persons. Property resulting from the man's business uninvested would belong to him; but where the property was invested in land, purchased with the man's knowledge in the woman's name, of which she has the legal estate, upon which buildings were erected, with his knowledge, with money the proceeds of a business which he allowed her to carry on, it will as between her and beneficiaries under the man's will, be held to be hers. But *aliter* if creditors were insisting that such gifts were a fraud on them. *Murdock v. Aherne*, 4 V.L.R. (E.,) 244.

COIN AND COINAGE.

Uttering Counterfeit.]—*See* CRIMINAL LAW.

COLLISION.

At Sea.]—*See* SHIPPING.

COMMISSION.

Of Trustees of a Creditor's Deed.]—In a suit to administer trusts of a deed of assignment in trust for creditors, the Master allowed to the trustees a commission on their receipts under the deed. Upon exceptions such commission disallowed. *Heape v. Hawthorne*, 2 W. W. & A'B. (E.,) 76, 88.

Of Agents.]—*See* PRINCIPAL AND AGENT.

Of Auctioneers.]—*See* AUCTION AND AUCTIONEERS.

Of Executors and Administrators.]—*See* EXECUTOR AND ADMINISTRATOR.

For Taking Evidence.]—*See* EVIDENCE.

De Lunatico Inquirendo.]—*See* LUNATIC.

COMMITMENT.

By Justices.]—*See* JUSTICE OF THE PEACE.

For Non-payment of Judgment Debt or Orders.]—*See* COUNTY COURT—DEBTOR'S ACT.

Of Trustees.—*See* TRUST.

COMMON.

Statutes—Act No. 117—Construction—"Cattle and Horses."]—The words of the Act No. 117, "cattle and horses," do not include "sheep." *In re Clow*, 1 W. & W. (L.,) 43.

Summary Jurisdiction.]—*Quære*, whether any persons but commoners under the Act No. 117, are subject to the summary jurisdiction given by the Act. *Ibid.*

COMPANY.

I. FORMATION, CONSTITUTION AND INCORPORATION OF COMPANY.

1. *Prospectus.*

(*a*) *Misrepresentation in.*

What is.]—H. & H. sold eight mining leases to W. & B. for certain money down, promissory notes for more, and 11,200 paid-up £1 shares in a mining company to be formed by W. & B. for the balance, amounting altogether to the nominal value of £26,840. A company was

formed by W. & B., and a prospectus issued by them, which stated the price in shares and money to be paid to H. & H. for the purchase of the shares as £36,640, consisting of 12,000 paid-up £1 shares, and 18,000 shares paid up to 10s., besides payments by cash and notes, and the shares were fixed in accordance with this sum, there being thus an excess of 800 paid-up shares, and 18,000 paid up to 10s. This excess of shares was appropriated by W. & B. to their own use. *Held*, that the prospectus was intended to mislead purchasers of shares in the company. *Benjamin v. Wymond*, 10 V.L.R. (E.,) 3; 5 A.L.T., 153.

See also *Allan v. Gotch*, *post column* 164.

Impossibility of Object for which Company was Formed a Bar to Proceedings to Recover Calls.]—*See Sandhurst and Inglewood Tramway Company v. Morrow*, *post column* 161, under CALLS.

(b) Variance between Prospectus and Memorandum.

What is Consistent with Deed of Association Substantially Bearing out Prospectus.]—The prospectus of a company stated that the capital was to consist of £5,000 in £1 shares; that the company was projected with a view of purchasing the claim held by the F. Company, and that as it was estimated the issue of 4,000 shares would be enough to enable the proposed company to purchase the interest of the shareholders in the F. Company, to purchase and erect machinery, and defray working and other incidental expenses, only that number of shares would be then issued. The deed of association provided that there should be 2,500 shares, the whole of which should be money shares. The company began operations with only 2,475 shares, of which 1,289 were given to the old proprietors as compensation, leaving no more than 1,186 shares liable for calls. *Held*, that the deed substantially bore out the prospectus. *Bowman v. Homan*, 1 W. & W. (L.,) 390.

(c) Alteration.

When Shareholders Bound by.]—*See Commercial Bank v. Keith*, 1 A.J.R., 131, *ante column* 94. BILLS OF EXCHANGE.

2. Memorandum and Articles of Association.

Alteration of by Resolution—When Shareholders Bound.]—The Memorandum of Association of a banking company registered under "*The Companies Statute* 1864," provided for £5 shares. After £3 had been paid up, the company in general meeting resolved to write off £1 per share, and the subsequent quarterly returns under "*The Companies Statute* 1864," No. 190, and "*The Banks and Currency Statute* 1864," No. 194, stated £2 per share only as paid up. Upon winding-up, the liquidators sought to enforce the liability to the additional £1 per share. *Held*, that the writing off would not bind a dissentient shareholder, or shareholders generally, though individuals might assent and be bound; that there was no contract implied in the Statutes that shareholders are responsible if the returns furnished are not true. Application refused. *In re Provincial and Suburban Bank*, 6 V.L.R. (E.,) 145.

Invalid if not in Accordance with the Terms of the Act.]—The provisions of the articles of association of a mining company and the regulations thereunder are invalid if not in accordance with the terms of the Act. Therefore when the articles of association of a company provided for elections of directors at half-yearly intervals, but provided that if meetings should not be held, the former directors should continue in office as if re-elected (so that they might possibly hold office for more than a year,) and the appointed period of election was afterwards departed from, and a director elected for a period beyond that appointed, and a whole board was elected at an intermediate half-yearly meeting prescribed for election of part only, *Held* that Section 39 of the Act No. 228, enabling rules to be made for election and annual retirement of directors impliedly prohibited any director from continuing for a longer period in office. Upon appeal, *Semble*, that if special notice had been given of the intention to elect the whole board that it would have been a valid election. *Schmidt v. The Garden Gully Company*, 4 A.J.R., 66. Affirmed on appeal. *Ibid*, 137.

3. Registration.

Registration of Members—Non-compliance with Secs. 24, 25 of the "Companies Statute 1864"—Several Offences.]—A non-compliance, extending over several days, with Sec. 24 of the "*Companies Statute* 1864," which requires a list of members and a summary to be forwarded at certain times to the Registrar-General, does not constitute a separate offence for each day so as to be incapable of being comprised in one summons and one conviction under Sec. 25 of the Act. *Ex parte The Colonial Mutual Life Assurance Company, in re Bishop*, 4 V.L.R. (L.,) 287.

4. Proof of Registration and Incorporation.

Evidence of Registration—Estoppel.]—G., who had signed the deed of association of a mining company, was sued for calls. This deed recited the registration and incorporation. It appeared that the registration was defective. *Held*, that G. was not estopped by his signing the deed, its recitals being only *primâ facie* evidence: if it were proved *aliunde* that the deed was defective, such evidence might be adopted. *Reeves v. Greene*, 6 W.W. & A'B. (L.,) 87.

"Companies Statute 1864," Secs. 168, 169—Validity of Winding-up Order.]—A company was being wound up under order of Court on December 8th, 1864. Upon summons requiring that certain directors should appear and be examined, objections were taken against the validity of the winding-up order. It appeared that on June 9th, 1864, the Registrar-General published a notice that the company was "registered" under the Statute, and that on May 19th, 1865, a further notice appeared "That the company was on the 9th day of

June, 1864, incorporated as a company limited by shares." *Held*, that the *Gazette* notice of June 9th was insufficient as a notice of incorporation, but that the retrospective effect of the *Gazette* notice of May 19th operated to validate previous proceedings, and the directors were required to submit to the examination. *In re The Melbourne and Newcastle Minmi Colliery Company*, 2 W.W. & A'B. (E.,) 127.

Proof of Incorporation.]—In an action by a corporation the declaration described the corporation as the W., &c., Company, "Registered," the word "registered" being added to show that the company was incorporated under the Act. *Held*, that if the word were improperly in the declaration, the defendant should have applied to have it struck out, and if rightly, then the proper course was to traverse it; and that not being traversed it was admitted. *Wellington Gold and Tin Mining Company v. Lambrick*, 1 V.R. (L.,) 13; 1 A.J.R., 26.

Certificate Signed by Deputy-Registrar—"R. P. Statute," No. 213, Sec. 215—"Mining Companies Act," No. 409, Sec. 10.]—In a criminal information for embezzling monies belonging to a Mining Company it appeared that the certificate of registration was signed by the Deputy-Registrar. *Held*, that under Sec. 215 of Act No. 213, the certificate of registration was sufficient. Conviction affirmed. *Regina v. Walter*, 5 A.J.R., 25.

5. *Amalgamation and Transfer.*

Purchase of Shares to Increase Votes—When "intra vires."]—The committee of management of the A. Company entered into an agreement with the B. Company as to the compromise of a suit pending as to a certain piece of land, and the amalgamation of all the ground of the two companies, except the piece of land in dispute. Some of the shareholders brought a bill as on behalf of themselves and others to restrain the agreement, alleging that the agreement was *ultra vires* and invalid and prejudicial to the shareholders, and that shareholders in the B. Company had purchased shares in the A. Company to obtain votes, and enforce the agreement. On motion to dissolve the *ex parte* injunction obtained, *Held*, that it was competent for persons desirous of carrying a point, lawfully within the functions of the company to purchase shares in the market to increase their number of votes, and to reject committee men opposed to their views, and elect others in their place. *Lee v. Robertson*, 1 W. & W. (E.,) 374.

Amalgamation of Companies—Duties of Shareholders, *inter se*.]—Where two mining companies are on the point of amalgamation, and a shareholder in one of the original companies is prosecuting a suit in a District Court to have a mining claim forfeited, and promises to transfer to all the shareholders, except one, shares in the amalgamated company equivalent to their old shares in the original company, such shareholder must treat all the co-shareholders alike, and cannot be permitted to deal with one shareholder as if he were still his partner in the undertaking, and another as if he were not. Such shareholder will be treated as a trustee for the excluded shareholder of the shares in the amalgamated company, representing the charges held by the excluded shareholder in the original company. *Harrison v. Smith*, 6 W.W. & A'B. (E.,) 182, 212. On appeal to Privy Council, 3 A.J.R., 44.

See S.C., BANKER AND BANKING COMPANIES, *column* 79.

Distribution of Shares—Between Shareholders in the Two Companies.]—A bank was entitled to 550 shares in the G. G. Company, which had forfeited its title to a mining claim. S., who was also a large shareholder in the company, obtained possession of the claim, and, conceiving that the bank had not acted properly in several transactions connected with the company, refused to allow them any interest in the ground. To the other shareholders he allowed the same interest as they had in the old company. An amalgamation took place between the G. G. Company and the A1 Company, 2040 shares in the amalgamated company being allotted to the shareholders in the G. G. Company. In the Equity suit instituted by the bank the Court held that the bank were entitled to shares, as well as the other shareholders, and a decree was made referring it to the Master to ascertain to what number of shares they were entitled in the amalgamated company. The Master found that the bank ought to receive 550 shares, and reported accordingly, The bank excepted, on the ground that they ought to receive an interest proportionate to the 550 shares in the G. G. Company. S., in answer to this, said that only 1600 shares were distributed among the shareholders in the G. G. Company, 440 of the 2040 being given to him for his consent to the amalgamation, and the bank were not entitled to any share in the 440 shares so given. *Held* that this question was concluded by the decree, and that the bank were entitled to a rateable share of the 2,040 shares. *Harrison v. Smith*, 1 A.J.R., 22. Affirmed on appeal, p. 75.

Shareholdsr Repudiating—Share Regietsr.]—Two mining companies, B. and D., were amalgamated, on the terms that the shares in the B. Company should be increased, and the additional shares allotted to the shareholders in the D. Company. One of the shareholders in that company refused to assent to the amalgamation, and repudiated the shares allotted to him; but he was entered on the register of the B. Company as proprietor, but subsequently forfeited the shares, and they were sold, and his name removed from the register. Subsequently the plaintiff instituted an action for the recovery of these shares on the ground that they had been illegally forfeited. *Held*, that the amalgamation was not binding on him, and that he might have followed the property of company D. into the hands of the amalgamated company; but that he could not, under the circumstances, claim to be a shareholder in the amalgamated company, and to have his name put on its register

of shareholders. *Cock v. Lady Barkly Gold Mining Company*, 8 V.L.R. (M.,) 51; 4 A.L.T., 115.

Suit by Shareholder to have his Name Re-instated in Register — Amalgamation of Companies after Forfeiture — Necessary Parties.]—*See Cushing v. Lady Barkly Gold Mining Company, post column* 163.

Person Owning an Interest in a Claim—Amalgamation Behind his Back—His Rights as Against Company.]—*Parle v. Harp of Erin Company, post* under PARTNERSHIP—Retirement and Expulsion of Members.

II. PROMOTERS AND DIRECTORS.

(A) PROMOTERS.

Liability for Secret Profit.]—H. and H. sold eight mining leases to W. and B. for certain money down, promissory notes for more, and 11,200 £1 paid-up shares in a mining company to be formed by W. and B., for the rest, amounting altogether to the nominal value of £26,840. A company was formed by W. and B., and a prospectus issued by them, which stated the price in shares and money to be paid to H. and H. for the purchase of the lease as £36,640, comprising besides the payments in cash and notes 12,000 fully paid-up shares, and 18,000 shares paid up to 10s. This excess of shares was appropriated by W. and B. to their own use. As to the 18,000 shares, they were issued in the names of H. and H., who signed transfers in blank of them, and handed them to W. to be dealt with as he thought fit. The remainder (800 fully paid-up shares) were issued directly to B., who divided them equally between himself, W., and one S., who joined in endorsing the promissory notes to H. and H. *Held*, that W. and B. were liable to the company for the surplus shares appropriated by them, and that the proper measure of the value of the shares appropriated by W. and B., who were constructive trustees, was the price they would have fetched in the market at the time they were appropriated, and not the highest price that might have been obtained for them up to the time of the suit being instituted. *Benjamin v. Wymond*, 10 V.L.R. (E.,) 3; 5 A.L.T., 153.

(B) DIRECTORS.

1. *Election.*

Appointment of Directors—Construction of Rules.]—It was provided by a rule of a mining company "that an extraordinary meeting of the company shall have full power to rescind, cancel, alter, or vary any resolution passed at any meeting of the company, or by the board of directors if the matter or thing required to be done by any resolution shall not have been done at the time of calling the extraordinary meeting." Another rule provided "that the board of directors, consisting of five shareholders, shall be elected at each annual general meeting of the company . . . and the directors shall continue in office till the next annual general meeting of the company, when they shall retire from office." *Held*, that the appointment of directors arrived at by an annual general meeting could not be set aside by an extraordinary general meeting. *Schaw v. Wekey*, 1 V.R. (L.,) 205; 1 A.J.R., 161.

Election and Continuance in Office.]—A rule made by a majority of the shareholders of a mining company under Act No. 228, that the powers of the directors shall continue as long as there exists a *quorum*, is not inconsistent with the terms of Sec. 39 of that Act, although the number of directors may thereby be fluctuating; but a rule, that if general meetings for the election of directors be not held at the times appointed, the directors shall continue in office indefinitely, and be considered as re-elected, is *ultra vires* under Sec. 39. *Schmidt v. The Garden Gully Company*, 4 A.J.R., 137.

See also S.C., *ante column* 138.

Act No. 228, Sec. 23.]—Where an advertisement had been inserted in a local newspaper to the effect that the half-yearly meeting would be held on a certain day for the purpose (*inter alia*) of electing a full board of directors, six days before the meeting was held, *Held*, that such notice should have been a fourteen days' notice under Sec. 23, and that the meeting and election of directors were invalid, and that two directors elected previously, who had not retired from office, could not continue in office after such meeting, for the election of a full board, even if invalid, necessarily involved their retirement. *M'Lister v. Garden Gully Company*, 5 A.J.R., 152. Affirmed on appeal to Privy Council, L.R., 1 App. Ca., 39.

Election by Resolution.—Rescinding.]—When directors are elected by a resolution, the power to rescind resolutions does not include a power to rescind such election. [*Schaw v. Wekey*, 1 V.R. (L.,) 205, followed.] *Aberfeldie Gold Mining Company v. Walters*, 2 V.L.R. (E.,) 116.

Mining Company—Election of Directors—Quorum—Extraordinary Meeting.]—By the rules an annual general meeting was to be held in July, and if within an hour of the time of meeting there was not a quorum present the meeting should stand adjourned for a week, and then if there was no quorum it should stand till next general meeting—old directors continuing. At the first general meeting, July 31st, there was not a quorum; but no one called attention to it, and the meeting elected two new directors. The manager then summoned a second meeting for August 7th, a week after the first meeting, and five directors were elected, two being among those elected at the first meeting, and summoned an extraordinary general meeting to confirm this, which was done. Differences existed between the directors, the two sets working independently. Motion for injunction to restrain the two common directors from acting. *Held* that the Court is disinclined to interfere in such a case by interlocutory injunction. *Semble, per Molesworth, J.*, no one objecting to first meeting, and calling attention to fact that there was not a quorum, the election at that meeting was valid. At the hearing, *Held* by *Williams J.*, that the election at the first meeting was invalid, and it appearing that the quorum at

the meeting of August 7th was made up by the inclusion of shareholders, representing certain shares which were alleged to have been forfeited and sold to such shareholders, but the sale of which the Court held to be a sham, there was no proper quorum at the meeting of August 7th, and that the lawful directors were those holding office prior to the first meeting of July 31st. *Old Welshman's Reef Company v. Bucirde*, 7 V.L.R. (E.,) 12, 115; 2 A.L.T., 129.

2. *Qualification.*

Non-Payment of Calls—Articlss of Association.]—Under articles 72 and 73 of articles of association of a company, it was provided that no person who was indebted to the company in respect of calls was eligible for the office of director, and that a director being so indebted at the day for payment, must vacate his office. W., a director, had given his promissory notes in payment of certain calls. *Held* that he was not qualified to be a director, nor in seeking re-election was he eligible for that office. *Umphelby v. Wilkie*, 5 A.J.R., 108.

See also *Reeves v. McCafferty, post column* 153.

3. *Contracts and Profits made with and from Company.*

Quære.—How far it would be open for a man, who is a director, or a person in any other fiduciary position, when there is a forfeiture of a mining lease committed from any cause, to resign his office, and take proceedings for the purpose of availing himself of that forfeiture, and obtaining the property for his own benefit, to the exclusion of his *cestius que trustent*. *Semble*, that such a course would not be open to him, and *Held* that a director, or any other person in a fiduciary position, who causes a forfeiture cannot avail himself of it. *Smith v. Harrison* (on appeal to the Privy Council,) 3 A.J.R., 44.

See also *Australasian Boot Company v. Thomson, post column* 145.

Contract for Commission.]—H., the plaintiff and a director of the defendant company, declared upon an agreement whereby the defendant company promised that, in consideration of H.'s guaranteeing a credit granted to the company by its bankers, they would give him a commission of 1 per cent. on the amount received from a contract; there were also counts for work done, and money had and received. *Held*, on a demurrer to a plea on equitable grounds, that upon the pleadings it must be taken as an action to recover profits, and that such a contract was against public policy, H. endeavouring to recover from his co-partners a commission for having done that which it was his duty as a co-partner to do. *Hardy v. Phœnix Foundry Company*, 7 V.L.R. (L.,) 211; 3 A.L.T., 5.

4. *Personal Liability of.*

C. and M., two directors of a mining company, by a letter to the company's bankers, notified that their manager had authority to draw cheques on account of the company. C. and M. did not form a majority of the directors as required by the Act of Incorporation so as to bind the company. Although the company's account was at the time overdrawn, and that fact was known to C. and M., the bank honoured the manager's cheques on the authority so given them. The bank sued C. and M. for advances made on the faith of the letter. *Held* that there was an implied warranty on their part, and that they were personally liable to the bank. Judgment given to the extent of the sums overdrawn since the date of the letter. *Colonial Bank v. Cherry*, 4 W. W. & A'B. (L.,) 177.

Affirmed on appeal to Privy Council. L.R., 3 P.C., 24.

Joint and Several Promissory Note.]—To a declaration upon a joint and several promissory note, given by the directors of a mining company, the plea alleged that the note was given on behalf of the company, and set out the note in which were the words, "value received on account of the company." *Held*, on demurrer, that the directors had rendered themselves personally liable upon the note. *M'Mullen v. O'Connor*, 5 W.W.A'B. (L.,) 200.

Company Illegal under "Companiss Statute 1864," Sec. 4—Goods Sold.]—Where a sale of goods was established to the defendants as directors and manager of a company, and the defendants pleaded that the company had not been properly registered, and consisted of more than twenty members, and was, therefore, illegal under Sec. 4 of the "*Companies Statute* 1864," *Held*, that the sale having been established, and the Court not being seized of the necessary facts to decide that the partnership was illegal, the defendants ought not to be allowed to prove them, but should be held liable for the price of the goods. *Masterton v. Blair*, 2 V.R. (L.,) 19; 2 A.J.R., 16.

For Wrongful Acts.]—The directors of a mining company, in contravention of a rule in the deed of Association, declared dividends, not entirely out of profits, but to a certain extent encroached upon capital in order to do so; they also, in order to avoid sequestration under a pending equity suit, sold all the plant and property of the company at an undervalue owing to the haste of the sale—this sale being under a consent execution issued by a bank, to whom the company owed a *bonâ fide* debt, and the proceeds of the sale being divided between the company and the bank. They also sold the freehold land without the authority of the company in a general meeting; they kept no proper account of gold washed or calls received, and the books and papers of account under their control were lost. On a suit by the official agent (the company being wound-up) to make them personally liable, *Held* (1) that the plaintiff had no remedy against the directors for the declaration of dividends, the company having none, as it was not shown to be fraudulent; (2) that the directors were responsible for any loss arising from the hasty sale; (3) that the sale of freehold land was voidable, and the directors personally liable for the fair value of the land; (4) that the

directors were liable for loss arising from gold and calls received by the manager, as to which no accounts were kept; but (5) that the manager alone was responsible for the loss of the books and papers, there being no evidence to fix the directors with that loss. *Reeves v. Croyle*, 2 V.R. (E.,) 42; 2 A.J.R., 13.

Retiring Directors.]—Where a bill was filed against the directors of a company, seeking to make them personally responsible for wrongful acts, and two of the directors had retired from the directory before the commission of any of the wrongful acts, except the payment of dividends out of an overdraft instead of out of profits; but they had not retired in the manner prescribed by the deed of association, the bill was dismissed against them with costs. *Reeves v. Croyle*, 2 V.R. (E.,) 42; 2 A.J.R., 13.

For False Representation of Secretary.]—Where directors of an incorporated company were sued in an action for conspiracy, for loss resulting from a false and fraudulent representation made by the secretary of the company by the procurement of the directors, *Held* that the directors were personally liable for the loss. *Stevenson v. Bear*, 2 V.R. (L.,) 220; 3 A.J.R., 23.

Breach of Trust—Managing Director Holding Bill of Sale over Plant, &c.—Sale Thereunder, and Purchase by Him in Name of Wife—Dealings with Company for his Own Advantage.]—Suit by company against T., a managing director, impugning certain acts of his in respect of the company. T. held a bill of sale over plant, &c., for certain money advanced by him, and bought the plant for a sum less than the money covered in the name of his wife, who had no separate property. The company was a boot manufacturing company, and the defendant was a boot and shoe manufacturer, and tanner, and bought materials for the company from himself, and boots for himself from the company. *Held* that sale of plant under bill of sale was unwarranted and void, and accounts decreed of defendant's transactions with the company, the defendant to be charged at company's option as to goods bought by defendant from the company either with sum allowed or with true market value, or with the wholesale price produced from same upon a re-sale, and to be allowed at company's option as to goods bought by company from defendant, either with sum charged or true market value, or price paid by defendant for same in case there was no alteration made in the process of manufacture by defendant. *Australasian Boot Company v. Thomson*, 3 A.J.R., 96.

Instituting Proceedings Outside Scope of Authority—Injury to Shareholders Not to Company—Malicious Prosecution.] — *See Thurling v. North British Company, post* under MALICIOUS PROSECUTION.

Liability under Secs. 24 and 25 of the "Companies Statute 1864"—Default Must be Wilful.]—A conviction against the directors and manager of a company for non-compliance with the provisions of Sec. 24 of the "*Companies Statute* 1864," in neglecting to forward a list of members, cannot, under Sec. 25 of the Act, be sustained unless such non-compliance were made wilfully and knowingly. *Ex parte the Colonial Mutual Life Assurance Company in re Bishop*, 4 V.L.R. (L.,) 287. *See* S.C., *ante column* 138, under *Registration*.

"Companies Statute 1864," No. 190, Secs. 135, 149—Fraudulent Preference.]—In pursuance of a resolution of board of directors of a company, before winding-up, and to obtain accommodation, A, B, and C, directors, endorsed a promissory note upon the understanding that it should be protected as a first charge upon the assets. There were no assets to meet it when due. Subsequently C, by cheque drawn by A and D, another director, upon the funds of the company, paid the note. A petition for winding-up having been presented on preceding day (on which an order was afterwards made,) the liquidators applied, under Sec. 149 of Act No. 190, by summons, and *Held*, affirming *Molesworth, J.*, that A, C, and D were liable to repay the amount of the cheque with interest. *In re Provincial and Suburban Bank*, 5 V.L.R. (E.,) 343; 1 A.L.T., 117.

In Action of Deceit—Misrepresentation—Publication of Balance-sheet Not Finally Adopted.]—Directors of a company, who ought to know that the company is in an insolvent condition, but who nevertheless allow a balance-sheet, representing the company to be in a sound condition, to be circulated, although such balance-sheet may not be finally adopted, may be liable in an action of deceit at the suit of a person who has been induced by an agent of the company to purchase shares in it on the faith of the statements in such balance-sheet. It must, however, be shown that they knew, or, but for culpable negligence, might have known, that the statements in the balance-sheet were false; there must, in fact, be moral fraud. *Paternoster v. Hackett*, 6 V.L.R. (L.,) 232; 2 A.L.T., 24.

In such a case the directors are liable if they made the statements in the balance-sheet, being indifferent or reckless as to their truth or falsity, although they may not have actually known them to be false. *Semble*, that if they made the statements believing them to be true, but with no reasonable ground for such belief, they would be liable. S.C., 6 V.L.R. (L.,) 396; 2 A.L.T., 77.

Payment of Manager's Costs of Litigation.]—Where directors advised and sanctioned the defence of a suit undertaken by the manager, in which litigation he incurred costs and paid him his costs out of the assets, *Held* that under the circumstances the manager was not a litigant on his own account, and that the directors were not personally liable for the costs so paid by them. *Hardy v. Wilson*, 9 V.L.R. (E.,) 62; 4 A.L.T., 37.

On Bills and Notes.]—Two directors of a company signed a promissory note thus—"B.C.H., M.G., and J.W.G.Y., Secretary," and the seal

of the company was impressed upon the face of the note. *Held* that the directors and secretary were personally liable, there being nothing to show that any other person or body was to be liable, the seal of the company not being sufficient for that purpose. *Harriman v. Purches*, 9 V.L.R. (L.,) 234; 5 A.L.T., 76.

5. *Effect of Acts of on Company.*

Power to Bind Company.]—Where the incurring of a debt is not *ultra vires* of the directors under the statute or deed of the company, but where some mere preliminaries are omitted, then, inasmuch as the public are only supposed to be acquainted with the statute or deed, and not with the *modus operandi*, it must be assumed that all the preliminaries have been complied with. And where a board of directors of a mining company incurred a debt to a bank, without the consent of the general body of the shareholders, and by the Act No. 228, under which the company was registered, the directors were substantially the company, in that the whole management of the company was entrusted to them, and they had to conduct its affairs, so that speaking of the directors, practically and legally the company would be meant, *Held* that the money was received and the debt incurred by the company. *In re Tyson's Reef Company*, 3 W. W. & A'B. (L.,) 162.

Power to Bind Company.]—A mining company, managed by a board of five directors, borrowed money from a bank on the drafts of the manager, authorised in that behalf by a meeting of the board at which less than a quorum were present, a fact of which the bank was aware. Subsequently a meeting of a quorum acknowledged the loan without any consideration for so doing. *Held*, distinguishing *In re Tyson's Reef Company* [3 W. W. & A'B. (L.,) 162] on the ground of the bank's knowledge of the irregularity, that the company were not bound by the loan either as originally authorised by a board less than a quorum or as subsequently without consideration acknowledged by a quorum. *Colonial Bank v. Loch Fyne Company*, 3 W. W. & A'B. (L.,) 168.

Overdraft Sanctioned by Quorum—Cheques Signed by One instead of Two Directors.]—Where a company was sued on an overdraft, and it appeared that the overdraft was sanctioned by a quorum of three out of one or other of two sub-boards of five instead of out of a single board of ten, as required by the deed, but that it was clear from the evidence there was only one board, and that two quorums of the same board were sitting at one and the same time at different places, and that, although the cheques were signed by one director, yet that the accounts of payments and receipts were received, examined, and passed by the board of directors; *Held* that there was sufficient sanction for the overdraft, and that the authority to draw the cheques was sufficiently proved. *Bank of New South Wales v. Moyston Junction Company*, 4 W. W. & A'B. (L.,) 234.

Wrongful Dismissal of Servant—Quantum Meruit.]—An agreement was entered into between C. and one of the directors of the defendant company deputed for the purpose by the other directors, whereby C. agreed to serve for a year as manager at a certain salary; this was not put into writing, though it was ratified by the other directors. *Held* that though the agreement lacked the formality to make it binding for more than a year, yet the directors could and did ratify the agreement so as to make it good as a *quantum meruit*. *Clough v. London and Australian Agency Company*, 4 A.J.R., 69.

Guarantee—Seal Not Affixed.]—The directors of a mining company gave a guarantee to a bank, headed "The New Ringwood Antimony Mining Company, Limited," and commencing "We the undersigned directors of the" above company, &c. Opposite the signatures of the directors who gave the guarantee was written "Directors of the New Ringwood Antimony Mining Company, Limited," but the seal of the company was not affixed to the guarantee. *Held* that, assuming the directors had power to give the guarantee, their styling themselves as "directors" was merely descriptive, and did not bind the company, since the guarantee did not purport to be executed by them as directors of the company. *White v. Bank of Victoria*, 8 V.L.R. (M.,) 8; 3 A.L.T., 90.

See also cases under MINING—Company—Directors and Officers.

6. *Ratification by Shareholders of Acts ultra vires of the Directors.*

Acquiescence in Acts of Company.]—Acquiescence of individual shareholders in an incorporated company cannot amount to the acquiescence of the corporation; nor can a corporation by acquiescence validate an illegal transaction, or disentitle itself to relief in respect of it. *The Creswick Grand Trunk Gold Mining Company v. Hassall*, 5 W. W. & A'B. (E.,) 49, 83.

7. *Powers of Directors in Management of Company.*

Power of Directors Holding Office Longer than Time Prescribed to Make a Call.]—The deed of a mining company registered under Act No. 228 provided that meetings should be held in February and August of each year, for the appointment of directors; if a quorum of shareholders was not present the meeting might be adjourned for a week, and that if no new directors were appointed at these meetings the old directors were to act till new directors were appointed at the first meeting in the following year. Certain directors who made the call sued on were appointed in February, 1866; in August, 1866, the meeting fell through for want of a quorum, and the adjourned meeting also fell through for the same reason. No meeting was held after that, and the call was made in August, 1868. *Held* that the directors could not hold office for longer than a year, whether a meeting was held or not, and the nonsuit of the County Court upheld. *Barfold Estate Gold Mining Company v. Klingender*, 6 W. W. & A'B. (L.,) 231; N.C., 25.

For other cases as to making calls *see* cases under *Calls*, *post columns* 157 *et seq.*, and as to *Forfeiture*, *column* 153.

Sale of Shares—Employing Broker.]—The articles of association of a banking company provided that the directors should manage the business of the company, and out of the funds of the company pay all expenses incurred in getting up the company, and that the directors might commence and prosecute the business of the company as soon as 20,000 shares had been allotted, and the company registered. *Held* that the directors had power to authorise the manager to employ a broker to place the shares in order to fulfil this condition, and that the funds of the company were liable for the broker's expenses. *Strong v. Land Credit Bank of Australasia*, 4 V.L.R. (L.,) 24.

Evidence of Validity of Resolutions to Satisfy Sec. 64 of the "Companies Statute 1864."] — The minutes of resolutions of directors for the making of calls and for winding-up a joint-stock company were entered in a rough scrap-book, which was used for roughly drafting such minutes before entering them in the regular minute-book, and were signed by the chairman. *Held* that such minutes were *prima facie* evidence, under Sec. 64 of the "*Companies Statute* 1864," of all the conditions precedent to the validity of such resolutions. *Legal and General Life Assurance Company v. Gill*, 4 V.L.R. (L.,) 204.

Indemnifying Manager Against Costs of Suit to which the Company is Not a Party.]—The directors of a company have no right to indemnify the manager against the costs of a suit instituted by him in his individual capacity, to which the company was not a party and in which it was only indirectly interested. *Hardy v. Wilson*, 8 V.L.R. (E.,) 289; 4 A.L.T., 175.

Payment to Officer of More than is Legally Due.] —It is within the limits of the powers of the directors of a company to pay to an officer of the company deserving of it more than they are bound to pay; and in the absence of special circumstances, *e.g.*, improper motives, such payment is not such a grievance as would entitle the members of the company to ask for redress. *Hardy v. Wilson*, 8 V.L.R. (E.,) 289; 4 A.L.T., 37, 175.

III. Shareholders' Meetings and Their Rights.

Business of Meeting as Advertised—Injunction—Proxies.]—An extraordinary meeting of shareholders in a mining company incorporated under Act No. 228 was held pursuant to an advertisement, specifying the business as "To decide as to the winding-up of the company," at which a resolution was passed empowering directors to realise the assets. Plaintiff, a shareholder, protested against this resolution, and handed in proxies of absent shareholders held by himself and others. The chairman refused to receive these, and on a division taking place the resolution was carried by a small majority, whereas if the proxies had been received it would have been lost. The property was then advertised for sale by public auction. On a bill by the plaintiff, on behalf of himself and other shareholders, to restrain the sale, *Held* that as rules of the company provided for the reception of proxies, they should have been received; that the advertisement only warranted a resolution to wind-up under the Act, and not a sale; that the meeting might have passed such a resolution to realise assets if proper notice thereof had been given; that the plaintiff having a right to oppose the sale, was not barred from relief by any *laches* in not convening a meeting to protest, four days only having intervened between the plaintiff's receiving notice of the proposed sale and the sale itself; but that though plaintiff could restrain the sale as under the vote of the meeting, he was not entitled to restrain any sale. Injunction restraining defendants from selling the lease, machinery and effects of the company as under the resolution, without prejudice to their general power to sell. *Hick v. Havilah Gold Mining Company*, 4 W. W. & A'B. (E.,) 87.

Right to Impeach Rules.]—A shareholder is not estopped from impeaching the rules of a company by a statement in his scrip that the shares are held upon the terms of the articles of association and the rules of the company. *Schmidt v. The Garden Gully Company*, 4 A.J.R., 137.

Mining Company—Act No. 228, Sec. 39—Resolution by a Majority.]—Rules passed by a majority of shareholders in a mining company, but not by all, must be in accordance with the terms of Sec. 39 of Act No. 228. *Ibid.*

See S.P., *M'Lister v. Garden Gully Company*, 5 A.J.R., 152.

Vote—Neglect to Pay Calls.]—*Semble*, that a rule which provides that no shareholder shall be entitled to vote at any meeting unless all calls, interest, and expenses due by him have been paid, does not make a vote of such shareholder bad, unless it be objected to on being tendered. *Aberfeldie Gold Mining Company v. Walters*, 2 V.L.R. (E.,) 116.

Meeting Irregularly Called.]—A rule of a company provided that if the manager neglected for four days to call a meeting after a requisition had been delivered, then a majority of the requisitionists might call a meeting. *Held*, that the act of the requisitionists in calling a meeting by a notice given within the four days, was not validated by the subsequent neglect of the manager to call a meeting. *Ibid.*

Notice of Meeting Under Act No. 228, Sec. 23.]—*See M'Lister v. Garden Gully Company*, *ante column* 142.

Notice of Meeting.]—Per Full Court, where a general meeting of a company is properly convened in accordance with the provisions of Act No. 228, Sec. 23, a shareholder has legal notice of the meeting, and stands in the same position as if fully cognizant of what was intended to be done thereat without actual knowledge having been brought home to him. *Cushing v. Lady Barkly Gold Mining Company*, 9 V.L.R. (E.,) 108, 124; 5 A.L.T., 98.

IV. Contracts By and With Company.

Ultra Vires.]—As to acts of a company which are *ultra vires*, in the case of companies constituted by Act of Parliament, there is an element of public interest which forbids their exceeding their powers, even though all the shareholders agree; whereas companies constituted by deed of settlement may exceed their powers, provided all the shareholders agree. *Lee v. Robertson*, 1 W. & W. (E.,) 374, 386.

Contracts With—When Company Bound.]—To render a contract made by a person with a mining company binding on the company, it is only necessary for such person to read the Act of Incorporation, or the Deed of Association, and if he is satisfied that those have been complied with, and on the face of any document brought to his knowledge there is nothing to negative that compliance, he is not obliged to go further; but is entitled to assume that the directors have done that which they professed, and which they ought to have done. *Anderson v. Duke and Timor Gold Mining Company*, 1 V.R. (L.,) 203; 1 A.J.R., 161.

Duty of Person Contracting with Company.]—Persons dealing with a company are bound to see that the Act of Incorporation, or Deed of Settlement, authorises the transaction; they are not bound to inquire into the regularity of all the proceedings. *Commercial Bank v. McDonald*, 2 V.R. (L.,) 211; 2 A.J.R., 120.

See also *post* under Mining—Company—Contracts, etc.

V. Railway Company.

Act No. 269, Sec. 31—Hobson's Bay Railway Company.]—By the Act No. 269, Sec. 31, it was provided that the Hobson's Bay Railway Company should not be obliged to complete, use, or maintain a piece of railway called the "loop-line," and if not completely maintained and used within two years, the Crown land on which a part of it was constructed should revert to the Crown, and the company might sell the remainder on which the line had been constructed. The company completed and used for one purpose only, but not for general traffic, the portion of the loop-line constructed on private land, but no part of that constructed on Crown land. The portion used crossed a public street on a level, under an Act authorising the construction of the whole line. The municipal authorities threatened to remove the gates and rails on the part crossing the street. On bill for an injunction, *Held by Full Court*, affirming *Molesworth, J.*, that the option given to the company applied to the whole loop-line, and was to be exercised or not as regarded the whole, and that the company having acted as it did, must be taken to have abandoned the loop-line altogether. *Melbourne and Hobson's Bay Railway Company v. Mayor, &c., of Prahran*, 6 W. W. & A'B. (E.,) 228.

Compensation for Taking Lands.]—*See* under Lands Compensation.

VI. Capital.

Resolution to "Write Off" Part of Paid-up Capital—False Returns under "Companies Statute 1864" and "Banking Statute."]—A resolution passed at a meeting of the shareholders of a company incorporated as a limited liability company under the "*Companies Statute* 1864," to "write off" part of the capital account is *ultra vires*, and though individual shareholders may assent to such an agreement, the shareholders, as a body, have no power to bind dissenting shareholders. The shareholders will not be bound to such a resolution by their subsequent acquiescence in the balance sheets and the returns prescribed by the directors under the "*Companies Statute* 1864" and the "*Banking Statute*." *Re the Provincial and Suburban Bank*, 2 A.L.T., 47.

See also *post* under Mining—Company—Rules and Articles.

VII. Shares.

1. *Allotment.*

Formal Notice of—When Necessary.]—G. applied for shares in a company with a view of qualifying himself as a director. The form upon which he made his application requested the company to return his deposit (forwarded with the application) if the shares should not be allotted to him. The company allotted the shares, and G. subsequently sat as a director, but no formal notice of allotment was sent to him. *Held*, that no formal notice was necessary since the non-return of the deposit, G. never having asked for it or complained of its detention, was evidence that the shares were allotted; and that G.'s having sat as a director was further evidence on the same point. *Legal and General Life Assurance Company v. Gill*, 4 V.L.R. (L.,) 204.

See also *post* under Mining—Company—Shares.

2. *Issue.*

Suit to Compel Issue of—Illegal Sale of Shares.]—The plaintiff was owner of ten shares in a company registered under 24 Vic. No. 109, which was registered subsequently under Act No. 228, on which registration original shares were each subdivided into four. Before this second registration the ten shares had been sold under a County Court execution to K. After the second registration the plaintiff applied to the company to execute a deed of settlement as holder of forty shares, and to have shares issued to him, but the company refused. Plaintiff filed a bill against the company to compel the company to permit him to execute a deed of settlement to issue certificates and to enter his name on the register, submitting that the sale under the County Court execution was invalid. K. was not a party to this suit. *Held*, that K was not a necessary party, and decree made, as prayed. *Semble*. Mining shares cannot be sold under a County Court execution. *Eddy v. Working Miners' Gold Mining Company*, 2 W.W. & A'B. (E.,) 110.

3. *Mortgage and Lien.*

Mortgage or Sale.] — In October, 1861, the plaintiff, in consideration of £18 cash, and of a debt of £20 due by him to W. & W., gave a bill of exchange and a memorandum of sale of a mining share to W. & W., who gave him a written undertaking to return the share upon payment of the bill. After the bill fell due the plaintiff absconded, W. & W. then transferred the share (which was afterwards subdivided into eight shares) into their own names, paid calls in arrear and further calls, and took an active part in the management of the company. For about two years the shares were unsaleable, but at the end of that time they rose greatly in value, and W. & W. received about £1200 in dividends. The plaintiff then, hearing of the rise in value, returned from New Zealand, and applied to redeem. After his application, and notice in the newspaper cautioning purchasers, M. & K. respectively purchased from W. & W. Before the shares were transferred in the books of the company, the plaintiff filed his bill for redemption against W. & W. and M. & K. as purchasers with notice. *Held* that the original transaction was a mortgage, and that the plaintiff was entitled to redeem as against W. & W., an option of issues as to notice being given to M. & K. *Niemann v. Weller*, 3 W.W. & A'B. (E.,) 125.

4. *Forfeiture of.*

Power of Company Registered under Act No. 228 to Make Rules as to—Sec. 39—Estoppel.]—In a company registered under Act No. 228, a rule was passed which purported to provide for forfeiture of shares on non-payment of calls. N. assented to this rule, and was a witness to the affixing of the seal to it. N. being absent from home when a call was made, the notice of call was not forwarded to him by an agent who received it; the call was unpaid, and N.'s shares were forfeited. Suit by N. to set aside forfeiture. *Held* that provisions for forfeiture are regarded as exceptional and to be strictly construed, and that Sec. 39 of Act No. 228, the only section which enabled the making of rules, did not authorise the company to make such a rule; that N.'s assent to the rule did not estop him from impeaching the validity of the rule, the principle of estoppel between individuals and an incorporated company not being the same as between individuals, but that N.'s conduct disentitled him to costs. *Nolan v. Annabella Company*, 6 W. W. & A'B. (M.,) 38; N.C., 19.

Validity of Forfeiture—Qualification of Directors.]—The rules of a mining company provided that three directors should form a quorum. At a meeting at which shares were declared forfeited, three directors only attended, one of whom had previously transferred all his shares. *Held*, that the forfeiture was valid, since the rule as to qualification only applied to the time of election. *Reeves v. McCafferty*, 1 V.R. (L.,) 190; 1 A.J.R., 153.

Validity—Appointment of Directors.]—A forfeiture of shares is not valid unless the directors of the company are respectively competent to make calls and declare forfeiture. Therefore, where the directors of a company had not been duly elected in compliance with the terms of Sec. 39 of the Act No. 228, *Held*, that the forfeiture of shares made by them was irregular. *Schmidt v. Garden Gully Company*, 4 A.J.R., 66. Affirmed on appeal. *Ibid*, 137.

It is not enough to forfeit a share that the calls which remained unpaid were made by *de facto* directors; the directors must be properly qualified. *Ibid*, 137.

See also *McLister v. Garden Gully Company*, 5 A.J.R., 152. Affirmed on appeal to Privy Council, L.R., 1 Ap. Ca., 39.

Validity.]—By the rules of a mining company it was provided that the manager should enter in the share register, opposite forfeited shares, the words, "Forfeited by a resolution of the Board of Directors." *Held*, that the mere omission to make the entry did not prevent the forfeiture, if other necessary requisites had been complied with. *Reeves v. M'Cafferty*, 1 V.R. (L.,) 190; 1 A.J.R., 153.

Notice — Impossible Day.] — The articles of association of a mining company provided that the directors might declare any share forfeited upon which any call was in arrear, provided that notice of the intention to forfeit was given by advertisement, and the call remained unpaid at the then next or any other meeting of directors. Calls being in arrear, notice was advertised by the company of the intention to forfeit "unless all calls be paid on or before Thursday, the 31st June." Thursday was, in fact, the 1st of July, *Held* that the notice was insufficient as fixing an impossible day, and forfeiture set aside. It was also provided that after forfeiture the manager should cause all forfeited shares to be sold by auction, and the proceeds be applied first in payment of arrears of calls and expenses, and the surplus, if any, paid to the shareholder. *Semble*, that a forfeiture, if regular, would, before sale, be complete so as to disentitle the shareholder to redemption; but that until sale he would be entitled to have the shares sold, and to have the benefit of the intermediate dividends and the price procured over the amount of the unpaid calls. *Wood v. The Freehold United Quartz Mining Company Registered*, 1 V.R. (E., 168; 1 A.J.R., 173.

Notice—Forfeiture.]—It was provided by the rules of a mining company that the forfeiture of shares should be confirmed by the next meeting of the company; that special meetings should be convened by notice stating the particular business to be transacted; and that no matter should be determined upon unless specially mentioned in the notice by which the meeting was convened. The forfeiture of shares of the plaintiff was confirmed at a meeting convened by an advertisement stating that the meeting was convened "to confirm forfeiture of certain shares." *Held*, that this notice was sufficiently specific, and the confirmation of the forfeiture good. *Marshall v. Creswick Grand Trunk Company*, 1 V.R. (M.,) 29; 1 A.J.R., 85

Notice of—Invalid.]—Where a company had power under one of its rules, on non-payment of a call, (1) to debit the shareholder's account therewith and with interest thereon at 15 per cent.; or (2) to proceed against him to recover it; or (3) to forfeit the shares; and the shareholder was served with notice that the directors would, at their option, proceed to forfeit and sell the shares for the amount due and 15 per cent. interest, *Held, per Molesworth, J.*, such notice was bad, that there was no direct declaration of forfeiture, but a direction for sale, and that such declaration was necessary. *Cushing v. Lady Barkly Gold Mining Company*, 9 V.L.R. (E.,) 108, 115; 5 A.L.T., 10.

Where directors met at a special meeting, "to deal with such shares as are in arrear of a certain call," and decided that those which were "in arrear should be sold by auction" on a certain day, *Semble, per Molesworth, J.*, that a distinct vote of forfeiture was necessary to make a forfeiture. *Ibid.*

See also cases *post* under MINING—Company —Shares.

Delay—Invalid Forfeiture.]—Long delay in asserting his rights will not debar a shareholder from asserting his rights in respect of shares of which there has been an invalid forfeiture. *Schmidt v. The Garden Gully Company*, 4 A.J.R., 66. Affirmed on appeal, *Ibid*, 137.

(5) *Transfer and Transmission.*

Evidence of In Writing.]—The 12th Rule of a company provided that all transfers of shares in the company by or from any shareholder should be made in writing. B. was sued in Petty Sessions for calls as a shareholder. It appeared that B. had from time to time become the holder of thirty shares, and was entered as such in the register, and that B. had never transferred them or any of them as far as the register showed. As to fifteen of these shares a written authority was given to the manager by the original vendor; as to ten more, a similar written authority was given by the vendor *after* the sale, and as to the remaining five, they were transferred upon the verbal authority of the transferor. B. alleged that he had parted with twenty-five of the shares previous to action. The magistrates dismissed the case. *Held* on appeal that the Court would not presume that B. transferred any of his shares without better proof, and that there was evidence to go to the magistrates of B.'s liability for calls which he had not disproved. *Reefs Gold Mining Company v. Bennett*, 6 W. W. & A'B. (L.,) 79.

Transfer to Escape Payment of Calls.] — An absolute transfer of shares made to a third person, though made to avoid payment of calls, is not, *per se, mala fide. Sleep v. Virtue*, 2 V.R. (L.,) 29; 2 A.J.R., 20.

Issue of New Shares—Fraud—Liability of Transferee to Pay Calls.]—A resolution was passed at an extraordinary meeting of a mining company that the capital of the company should be increased by the issue of new shares, to be allotted to old shareholders. On the list of old shareholders which was handed to a person who accepted a transfer of six shares of the new issue, to show that the shares had been taken up, appeared the names of two dummies, but the list was not handed to him till after he had accepted the transfer. *Held* that this was not evidence of fraud that would invalidate the transfer, and that the transferee was not relieved from the liability to pay calls. *Creswick Grand Trunk Company v. Rowell*, 2 A.J.R., 35.

"The Companies Statute," Sec. 33, Schedule 2, Table A, Rule 10—Shareholder's Indebtedness—Rectification of Register—Transferee—Practice—Notice to Transferor.]—Motion by C. to compel a company to register him as owner by transfer of certain shares in company. One S. was a shareholder in the company and also its secretary. Prior to August 11th, 1873, S. was known by directors to be a defaulter in his accounts. On August 11th, 1873, though company alleged that S. was indebted to it in the sum of £1880, it gave S. a receipt for £980 "in full of all demands against him by company." S. transferred ten shares to C., July 24th, 1874, but company refused to register till balance of S.'s indebtedness was paid. *Held* that Sec. 33 includes as an alleged member a person requiring a transfer, and enables him to procure a rectification of the register, either against company or against transferor; that Schedule 2, Table A, Rule 10, enables a company to enforce a debt due to it by an officer by refusing to let him assign his shares, and is not confined to debts due to company in respect of shares, calls, &c., but that transferor should have notice of the motion. On the motion being renewed, supported by an affidavit that S. had gone to New Zealand a few weeks after his purchase of shares, and that it was impossible to serve notice, *Held* that release given on August 11th, 1873, was good, and the benefit of it enured to C. Motion granted. *In re Gippsland Steam Navigation Company, ex parte Chuck*, 1 V.L.R. (E.,) 141.

Refusal to Register Transfer—Indebtedness.]—A provision in a company's rules (Schedule II., Table A, Article 10, of Act No. 190) provided that the company might decline to register any transfer made by a person indebted to it, and also that no member could transfer without first offering shares to directors of company for the purchase of such by them. *Held* (1) that this power to refuse to register only applied to a voluntary transfer, and not to a transfer *in invitum*, as where shares were sold by a bailiff of the County Court under execution; (2) that the indebtedness was an indebtedness *quâ* member as for calls, fines, &c., and did not apply to a member in the company's service who made default in his accounts; the Act did not intend to give the company as to debts outside the constitution of the company a preferential claim above all other creditors. *In re "Companies Act," ex parte Trevascus*, 5 V.L.R. (L.,) 195; 1 A.L.T., 17.

See also cases *post* under MINING—Company —Shares.

Assignment by Blank Transfers.]—Assignments of shares in a mining company by blank forms of transfer, to be filled in by ultimate purchasers, are valid as between the parties thereto. *Atkinson v. Lansell*, 4 V.L.R. (E.,) 236.

VIII. Executions By and Against Company.

Judgment Recovered by Company — Subsequent Winding-up—Suggestion on the Record—"County Court Statute 1869," Sec. 93.]—Where a company, which has recovered judgment in the County Court, is, after the judgment has been recovered, wound-up, a suggestion of the winding-up and of the appointment of the official agent must be entered on the record before judgment can be signed and execution issued in the Supreme Court under Sec. 93 of the "*County Court Statute* 1869," No. 345. *Barfold Estate Gold Mining Company v. Davies*, 2 V.R. (L.,) 154; 2 A.J.R., 97.

Collusive Execution—Effect of Sale.]—A collusive proceeding to execution upon the property of a company, and a sale thereunder to a new company organised for the purpose, is not operative in equity to pass the property though the object be honest; and such a proceeding is inconsistent with the rights, as well of the company as of dissentient shareholders. *United Hand-in-Hand and Band of Hope Company v. National Bank of Australasia*, 2 V.L.R. (E.,) 206, 217, 218.

IX. Calls.

Notice of Making—Advertisements.]—The deed of settlement of a N.S.W. company provided that calls should be made "at such times and places as the directors may determine, by one or more advertisement or advertisements in one or more of the daily newspapers published at Sydney and at Melbourne respectively." Calls were made by one advertisement in a Sydney daily paper and one in a Melbourne daily paper, and by these advertisements one day was fixed for payment of the calls at Sydney, and another for payment of the calls at Melbourne. On action by the company in the Supreme Court of Victoria, the plea set up the defence that "no time" was fixed, because two different times had been fixed; and that different times could not be fixed for Sydney and Melbourne. *Held*, on demurrer, that the advertisements were in compliance with the deed of settlement, and judgment for the company. *Melbourne and Newcastle Minmi Colliery Company v. Hodgson*, 1 W. W. & A'B. (L.,) 205.

Notice of.]—Where the rules of a company provide for publication of notice of calls by advertisement in certain newspapers, it is not sufficient if the notices are published in circulars. The directors are not at liberty of their own accord to substitute notice by circular for the one prescribed. *Solomon v. The Collingwood Quartz Mining Company*, 4 W. W. & A'B. (L.,) 128.

Mining Company — Notice of—When Bad.]—A notice of calls containing neither the time nor place when and where the calls are payable is bad. *Clunes and Blackwood Company v. Coulter*, 1 V.R. (L.,) 192; 1 A.J.R., 172.

Objection to Sufficiency of Notice, When Taken in Time.]—On an appeal from the County Court from a decision giving a verdict for calls on shares to the company, it appeared that there had been three cases by the company against shareholders, and in the first case, which was heard before the present one, an objection as to the sufficiency of the notice of the call was taken and overruled, and it was agreed that the result of the other cases should be dependent on the decision in the first, from which an appeal was made, but abandoned. *Held*, on appeal, that the objection as to sufficiency of notice having been taken at the proper time could be entertained on appeal, and the notice having omitted to state the time and place when and where the call was payable was held to be bad by the Court; and appeal allowed. *Clunes and Blackwood Company v. Coulter*, 1 A.J.R., 172.

Mining Company—Notice Unnecessary.]—It is not necessary for directors of a mining company to give notice of their intention of making a call before making it. *Goldsborough Mining Company v. McBride*, 3 A.J.R., 126.

Act No. 190, Sch. 2, Table A, Rule 4—Notice of Call.]—Where a shareholder promised to pay a call, *Held* that that was sufficient evidence of his having received due notice. *Mount Brown Gold Mining and Crushing Company v. Hughes*, 9 V.L.R. (L.,) 383.

Making—When Made.]—Calls are made when the resolution is passed, not when the calls are payable. Where, therefore, a company's rules provided that "no call or calls shall exceed the sum of one pound per share, and there shall be an interval of one month between the making of any calls," and two calls were made at a meeting, but with an interval of one month between the time such calls were payable; *Held* that the two calls were made in contravention of the rules; and that it was doubtful whether two calls made at the same time, although made by two separate and independent resolutions, could be severed. *Hodgson v. The Fermoy Gold Mining Company*, 3 W. W. & A'B. (L.,) 70.

Making.]—Where, by resolution of directors a call is made, but no time or place of payment therein fixed, none being required by the rules of the company, and the manager got verbal instructions from the directors fixing time and place, *Semble*, such subsequent verbal directions are not sufficient. *Cushing v. Lady Barkly Gold Mining Company*, 9 V.L.R. (E.,) 108, 114; 5 A.L.T., 10.

Liability of Shareholder—Calls Made by Increased Number of Directors.]—H. verbally applied for shares in a company, offering to pay by bills at three and four months; this offer was accepted and carried into effect by H. accepting two bills drawn by him on the company, and by the company retaining the scrip during the currency of the bills. H. did not sign any application

or articles of association, but his name was entered in the register as a shareholder. Six directors made the first call, that being the number fixed by a rule of the company, but by resolution the number was increased to nine, of which no notice was sent to the Registrar-General in accordance with Sec. 51 of the "*Companies Statute* 1864." Seven directors, three of whom had not been appointed originally under Rule 50, made other calls for which H. was sued by the company, pending the currency of the bills. The County Court Judge nonsuited the plaintiff company, *Held* that the registry was *prima facie* evidence of membership sufficient to prevent a nonsuit; that the form of application, though irregular, was sufficient, being accepted by the company; that Sec. 51 and Schedule A taken together made the act of the seven directors *de facto* valid. Appeal allowed. *The McIvor Company v. Hughes*, 4 W.W. & A'B. (L.,) 111.

Calls Made by Directors not Duly Elected—Shareholders not Liable.] — *Highett v. Sun Quartz Mining Company, post* under MINING—Company—Rules, &c.

Validity of Rules Giving Power to Make Calls.]—Where in an action for calls S. objected that the rules of the company under which power was given to make the calls sued for were not made at an extraordinary general meeting called in conformity with the "*Mining Companies Act* 1864," *Held* that S. having presided as chairman and signed the minutes of the meeting at which the resolution was passed, could not dispute those facts which he had thus admitted. *Solomon v. The Collingwood Quartz Mining Company*, 4 W.W. & A'B. (L.,) 128.

Second Payment to Official Agent of a Mining Company—When Calls Properly Made.]—B. was sued by R., the official agent of a mining company which had been wound-up, for calls. It appeared that a large amount of the 9th call was not paid up when the 10th, 11th, and 12th calls were respectively made. B. had paid his full amount of the 10th and 11th calls. The 11th call was for machinery, and was made after the works had stopped, and after the 12th call was made there would be still uncalled capital to be called up. The magistrate held that the 10th, 11th, and 12th calls were improper, and that the 12th call could only be paid to R., and ordered B. to pay a certain sum representing all the unpaid capital he was liable for after the 9th call. *Held*, on appeal, that the official agent was in no better position than the directors, and B. having been treated by the directors as having paid the 10th and 11th calls, he could not be compelled to pay them a second time to the official agent. Judgment to be reduced by the amount B. had paid on the 10th and 11th calls. *Reeves v. Brown*, 6 W. W. & A'B. (L.,) 87.

Payment—By Cheque—By Promissory Note.]—Payment by cheque (the payer having funds to meet it) is good payment of calls; but payment of calls by promissory note is not good payment. *Umphelby v. Wilkie*, 5 A.J.R., 108.

How far Payment of Evidence of Membership—Application for and Receipt of Calls by Agent of Company.]—When a plaintiff's title to shares in a mining company was denied by the defendants, it was held that the fact of a duly constituted agent of the defendants, having applied to plaintiff for a call, after payment of all the original calls, his payment of that call and the receipt thereof by that agent, formed sufficient evidence of membership as against defendants. *Ogier v. Smith*, N.C., 3.

Rules Made After Incorporation—Estoppel of Members of Company.]—Rules made by a mining company registered under the Act No. 228 after incorporation, unless made at an extraordinary meeting, are illegal, and calls made by virtue of such rules are invalid, and payment of them cannot be enforced. *Sed quære*, whether if *all* the shareholders in such a company, after its incorporation, signed a deed or articles of agreement embodying rules, they would be not be estopped from setting up the invalidity of the rules. *Ballarat and Chiltern Gold Mining Company v. Cleeland.* 1 V.R. (L.,) 183; 1 A.J.R., 142.

Mining Company—Act No, 228—Shareholder Not Signing Deed of Association.]—L. was sued for calls due on certain shares. L. had applied for shares and enclosed £30. 25 shares were allotted and the extra £5 was returned to him. L. did not sign the deed of association. *Held* that although the Act No. 228 does not contemplate a deed of association as essential, yet it appearing that both L. and the company contemplated the signing of a deed to constitute L. a member of the company, and that L. had not signed he had not become a shareholder so as to be liable for calls. *Guiding Star Company v. Luth*, 4 W.W. & A'B. (L.,) 94.

See also S.P., *Farrar v. Bowman*, 1 W. & W. (L.,) 150, *post* under MINING — Company — Calls.

Transferee Objecting to Validity of his Title to Shares.]—The directors of a mining company forfeited certain shares and sold them to J. J. retained the shares, but refused to pay the calls. The company sued him for calls. *Held* that J., having retained the shares, was liable for the calls, the Court not expressing any opinion as to whether the company had power to forfeit the shares, an objection raised by J.; and that the seal of the company appearing on the document appointing the solicitor would, in the absence of evidence to the contrary, be presumed to have been duly attached. *Jones v. Star Freehold Company*, 4 W. W. & A'B. (L.,) 223.

Company Unable to Raise Capital Agreed Upon—Impossibility of Object for which Company was Formed.]—In an action by a tramway company for calls, the defendant pleaded (2) that he had agreed, before the passing of the Act incorporating the company, to subscribe for shares in a company having certain capital, that the capital never was nor could be raised, and that only two-thirds of the number of shares agreed upon were subscribed for: (3)

that at the time of making the calls the company was indebted for more than they could legally borrow, and that the calls were to pay such illegal debts; (5) that the time for completing the tramway had elapsed without the tramway being completed, and that the time had not been extended. *Held* that pleas (2) and (3) were bad, but that (5) was good. *Sandhurst and Inglewood Tramway Company v. Morrow*, 4 W. W. & A'B. (L.,) 277.

Calls Made in Respect of Increased Capital—Company may not Sue for.]—*A1 Gold Mining Company v. Stackpoole, post* under MINING—Company—Rules, &c.

Rules Imposing Fines on Non-Payment of Calls—Fine Set Off Against Dividend.]—A clause of the deed of association of a mining company provided that if any shareholder refused or neglected to pay a call at the time specified for payment, he should be fined sixpence per week so long as it remained unpaid; but no provision was made for enforcing payment of the fine. *Held* that the fine was not a penalty but a liquidated sum as for interest, and, being equally recoverable with a dividend, might be set off in a suit by the defaulting shareholder for recovery of a dividend payable to him by the company. *Cotchett v. Hardy*, 5 W. W. & A'B. (M.,) 59.

Agreement Not to Sue for—Validity.]—A rule of a company, after providing for forfeiture of shares on the non-payment of calls, proceeded—"and the parties hereto hereby specially agree that the company shall have no power or authority, and are hereby expressly barred from enforcing payment of any call or calls in any court of law, or in equity." *Held* that the agreement was binding, and that a shareholder who had paid a call under this rule when he might have avoided doing so, could not recover the amount, since, as the company could not recover the call from him, the payment was voluntary. *Coulter v. Wardill*, 1 A.J.R., 165.

Evidence of Registration of Company.] — *See Reeves v. Greene, ante column* 138.

Proceeding Before Justices—Act No. 228, Schedule—Act No. 267, Sec. 73.]—The Court held an objection, that there must be a separate complaint and order for each call, fatal in an appeal from an order made by justices for the whole amount. *Ogier v. Ballarat Pyrites Company*, 4 W. W. & A'B. (L.,) 245.

See also cases *post* MINING — Company—Calls.

X. SUITS AND ACTIONS BY AND AGAINST.

Injunction—Parties.]—Where the act of a company, which is sought to be restrained, is such that the majority is not competent to bind the minority, one dissentient shareholder may obtain an injunction in a suit on behalf of himself and all other shareholders except the managing body, it is not necessary to obtain the consent of such shareholders to make them parties, and it is no answer to show that some agree with the directors in the act complained of. *Lee v. Robertson*, 1 W. & W. (E.,) 374, 387.

S.C. *See* COMPANY—SHARES.

Company Suing in a Name Different from its Registered Name.—A company was registered as the *G.S.Q.M. Company*. I. held certain shares in the company known to him as the *G.S.G.M. Company*, and the Company sued him under the latter name for calls. There was no proof that any other company was incorporated under the name sued under. *Held*, reversing the magistrates, that the variance between the names was fatal, and that there should have been a nonsuit. *Iredale v. Guiding Star Gold Mining Company*, 4 W.W. & A'B. (L.,) 198.

Action at Law by Members of a Company Against the Company—Special Agreement.]—B. and others, solicitors for and shareholders in a mining company, sued the other shareholders in an action for a bill of costs for work done in winding-up a gold mining company some years ago. It appeared that at a shareholders' meeting it was agreed in conversation that B. should undertake necessary proceedings, and by special agreement that B. should be entitled to sue the company for costs. On a rule *nisi* to enter a nonsuit, *Held* that there was evidence to go to a jury to enable them to infer that a special agreement had been made, taking the case out of the general rule that partners cannot sue their co-partners at law. Rule discharged. *Bennett v. Solomon*, 4 W. W. & A'B. (L.,) 227.

Frame of Suit—Sale by Resolution Ultra Vires.]—Where the property of an incorporated company has been sold under a resolution of the shareholders, which is *ultra vires*, the dissentient minority may properly institute a suit in the name of the company as plaintiff; and such a suit is the proper form of obtaining relief, and not a suit by some shareholders on behalf of themselves and all other shareholders except the defendants. *The Creswick Grand Trunk Gold Mining Company, Registered v. Hassall*, 5 W.W. & A'B. (E.,) 49, 79.

Frame of Suit—Action for Breach of Agreement to Take up Shares.]—Where R. was sued for breach of agreement to take up shares in a company by individual shareholders, it appearing that he had signed the memorandum of association, *Held*, that R. was not liable to the individual shareholders, though he might have been to the company. Nonsuit by County Court Judge, on the ground that the action should have been brought by the company, upheld. *Lindsay v. Rowan*, 5 A.J.R., 22.

By Director and Shareholder When there is a Corporate Body Able to Sue—Suit to Restrain Directors from Acting.]—An individual member of a company cannot take proceedings to restrain directors, even though they are disqualified by non-payment of calls, from acting until they have set the coporation in motion, and a suit by one director and shareholder for that purpose is improperly framed. *Umphelby v. Wilkie*, 5 A.J.R., 108.

Suit Against Company—By Shareholder on Behalf of Othsrs—Pleading.]—A member of a company complaining of a payment which the directors had made in excess of their powers, and suing on behalf of himself and other members of the company, must state distinctly whether he is one of a majority or a minority as regards the suit, and also that he was unable to get the company to institute proceedings. *Hardy v. Wilson*, 8 V.L.R. (E.,) 289; 4 A.L.T., 37.

Such a member must generally show the impossibility of inducing others to join by a result of votes at a meeting duly convened for the purpose, or in which the point is specifically dealt with, the members generally expecting that it will be. *Hardy v. Wilson*, 9 V.L.R. (E.,) 62; 4 A.L.T., 175.

Frsme of Suit—By Shsreholdar on Behalf of all Shareholders Except Defendants.]—Before instituting a suit on behalf of himself and all other shareholders in a company, except the defendants, the shareholder instituting it procured a meeting of the company, at which it was resolved that no action should be taken in the matter by the company. *Held*, that the plaintiff was not thereby precluded from suing on behalf, &c. *Benjamin v. Wymond*, 10 V.L.R. (E.,) 3; 5 A.L.T., 153.

Delay in Bringing—Excuse for.]—The necessity of first endeavouring to induce a company to proceed in its corporate name to redress an injury to it, is an excuse for delay in the institution of a suit by one shareholder on behalf of himself and all other shareholders except the defendants. *Ibid.*

Suit Against Company—Nominal Plaintiff.]—In a suit against the directors and manager of a mining company seeking to make them responsible for certain wrongful acts, and to recover calls due on shares in their names, the person by whom the suit was, in fact, instituted, and who was responsible to the nominal plaintiff for the costs of it, was a creditor of the company, who before the institution of the suit had covenanted, for valuable consideration, not to enforce the personal liability of certain of the defendants in respect of the Acts complained of by the bill, and this was pleaded by the answers as amounting to a release. *Held*, that as the plaintiff on the record was discharging a duty to other creditors in prosecuting the suit, and his solvency was not questioned, he was entitled to maintain the suit. *Reeves v. Croyle*, 2 V.R. (E.,) 42; 2 A.J.R., 13.

Suit by Shareholder Impeaching Forfeiture—Amalgamation of Company—Necessary and Proper Parties.]—A shareholder in a mining company, whose shares had been forfeited and name removed from the register, brought a suit against the company impeaching the forfeiture, and seeking to have his name restored to the register. The answer of the company stated, and it was proved in evidence, that after the forfeiture the company had amalgamated with another company, and fresh shares had been issued to all the shareholders in the two companies, the old members of the defendant company accepting each one-third fewer shares than they had previously held. *Held*, that the present registered holders of the shares, representing the plaintiff's original shares, were necessary parties to the suit, and that it was not necessary that the defendant should set out their names, but it was sufficient if the answer unequivocally designated the class of persons who ought to be made parties. *Cushing v. The Lady Barkly Gold Mining Company*, 9 V.L.R. (E.,) 108, 124, 125; 5 A.L.T., 98.

Suit Nominally in Name of Company—Costs.]—Where a suit was brought seeking interference of the Court as to management of the company, nominally in the name of the company, but really without the sanction of the company, and by the manager to work out his own ends, the bill was on that ground dismissed with costs. *Old Welshman's Reef Company v. Bucirde*, 7 V.L.R. (E.,) 115; 3 A.L.T., 45.

Pleadings—Incorporation of Company—How Raised—Never Indebted—"Mining Companies Act," No. 228, Sec. 11.]—On a rule *nisi* to enter a nonsuit, it was argued that there was no evidence of due registration, the person who signed the certificate not having been proved to be a clerk of the Court of Mines (Act No. 228, Sec. 11), *Held*, that the plea of "never indebted" does not put in issue the incorporation of a Company, that that fact invites a special traverse. *Bank of New South Wales v. Moyston Junction Company*, 4 W.W. & A'B. (L.,) 234.

Action for Deceit—Misrepresentations in Prospectus.]—Action by shareholders against the directors of a company for misrepresentations in a prospectus. It appeared that a balance-sheet had been struck for June, 1881, showing profits of 12½ per cent., and the business then fell off and produced only 1½ per cent. profits for the last half. The prospectus was published and received by the plaintiff towards the end of 1881, and before the latter balance was struck. *Held* that there was no evidence of moral turpitude necessary to maintain an action of deceit. *Per Higinbotham, J.*, that even if there were misrepresentations, the plaintiff was not misled by them, but by expectations founded on the announced intentions of the defendant, and that an action for deceit cannot be based upon a statement of intentions. *Allan v. Gotch*, 9 V.L.R. (L.,) 371.

Action for Malicious Prosecution.]—*Youngsdale v. Keogh.* *See post* under MALICIOUS PROCEDURE AND PROSECUTION—*Other points.*

And *see* cases *post* under MINING—Company—Suits and Actions, &c.

XI. WINDING UP.

(1.) *What Companies.*

Railway Company—"Joint Stock Company's Winding-up Act," 11 Vic., No. 19.]—*Held* by Full Court, affirming *Molesworth, J.*, that a railway company incorporated by Act of Council was not within the provisions of that Act, and a rule *nisi* for compulsory sequestration under that Act

discharged. *In re St. Kilda and Brighton Railway Company ex parte Plevins*, 2 W. & W. (I. E. & M.,) 69.

Railway Company.]—The provisions of "*The Companies Statute* 1864," relative to winding-up of companies, do not apply to a railway company incorporated by Act of Parliament. *In re St. Kilda and Brighton Railway Company*, 1 W. W. & A'B. (E.,) 157.

Unregistered Company—Act No. 228—"The Companies Statute 1864."]—A mining company under the Act No. 228 is not an "unregistered company" within the meaning of "*The Companies Statute* 1864," and cannot be wound-up under the latter Act. *In re the Collingwood Quartz Mining Company*, 5 W. W. & A'B. (E.,) 190.

Foreign Corporation.] — The Oriental Bank Corporation was incorporated under that title for banking purposes throughout the British dominions by Royal charter in England. Its directors, board of management, and head office were in England, and it carried on the business of exchange and remittance there, but not the general business of banking. It had several branches or agencies in India, Victoria, and other colonies; and it had shareholders and creditors throughout England, India, and the colonies. It consisted of more than five members, and was not registered under the "*Companies Statute* 1864," or under the "*English Companies Act* 1862." On the petition of a Victorian creditor for winding it up under the "*Companies Statute* 1864," Part VI., *Held* that the corporation could be wound-up on such a petition, even if the English Courts had already made an order to wind it up in England. *In re Oriental Bank Corporation*, 10 V.L.R. (E.,) 154.

(2) *Voluntary or Compulsory.*

Petition by Creditor for Compulsory Winding-up After Resolution for Voluntary Winding-up.]—Where the shareholders of a company had passed a resolution for a voluntary winding-up upon petition by a creditor for a compulsory winding-up, *Held*, that notwithstanding the voluntary winding-up the Court might, at its discretion, grant a compulsory winding-up, but that the Court would have regard to the wishes of the majority in number and value of the creditors, and such majority being in favour of a voluntary winding-up, application for a compulsory winding-up refused. *In re Co-operative Meat Supply Association*, 8 V.L.R., (E.,) 227.

The Court will not, unless something in the shape of misconduct on the part of the liquidator appointed under the arrangements for voluntary winding-up be proved as a thing done and not contemplated, interfere and make an order for a compulsory winding-up. *Ibid.*

Grounds for Granting a Compulsory Winding-up —"Companies Statute 1864," Sec. 73, Sub-sec. 5.]—On a petition under Sec. 73 (V.) of the "*Companies Statute* 1864," for winding-up a company, it appeared that the grounds on which it was sought to wind-up the company were—(1) that the company had been from the first carried on at a loss; (2) that the company was largely indebted; (3) that certain patent rights for working which the company was formed had not been transferred to it; (4) that certain plans proposed for preparing paints according to the patent in the specifications would not produce paints at a price to compete with other makers; (5) that certain persons were elected directors who had not paid calls; (6) that disputes and quarrels were taking place between the shareholders and directors. The Court held that there were insufficient grounds upon which to make the order, and declined to interfere as to the squabbles among the members and directors, intimating that if a majority of the company wished it the company could be wound-up voluntarily. *In re Buzolich Paint Company*, 10 V.L.R. (E.,) 276, 281, 282; 6 A.L.T., 130.

(3) *Petition and Practice on.*

(*a*) *By whom Presented.*

Under "Companies Statute 1864," No. 190—Petition by Agent under Power of a Corporation Sufficient by Virtue of Sec. 154 of the Act No. 190.]—Where a corporation sought to have a company wound-up, and the petition for winding-up, and the affidavit verifying the petition were both made by an agent under power of the corporation, *Held* that Sec. 154 of the Act No. 190 rendered it possible for the Court to dispense with the letter of Schedule 7, Clause 4, by which the petition must be verified by the petitioner or one of the petitioners, and that the petition and affidavit were sufficient. *In re the Oriental Rice Company*, 4 A.J.R., 33.

Corporation—Power of Attorney—Sufficiency of Authority.]—A., being appointed attorney under power of a bank, the power authorising him to commence and carry on any suit, action, or *other proceeding*, and also, upon insolvency of any person or firm who at the time of such insolvency should be indebted to bank, or upon any such firm or person entering into composition with his creditors, to prove against his or its estate, and to take such other proceedings with relation thereto as should seem fit. A. presented a petition for winding-up of a company. *Held* that "the other proceeding" meant something *ejusdem generis* with an action or suit, which such a petition was not, and that second part of power did not give power to originate proceedings in insolvency, and petition dismissed. *In re Provincial and Suburban Bank*, 5 V.L.R. (E.,) 159, 166; 1 A.L.T., 6.

(*b*) *Debts and Assets.*

Where Petition Refused.]—D. obtained judgment and issued execution against a company, and a return of *nulla bona* was made to the writ. D. was a shareholder in the company, and had also been a director; and in this capacity was present at a meeting at which it was agreed that the company's bank should have a first charge upon any amount which might be recovered in an action against another bank. This amount D. subsequently, but ineffectually, attempted to attach. The assets of the company were considered sufficient to pay all debts,

ut were not readily available, and the company's prosperity depended partly upon the action against the bank, to which action a winding-up would put an end, and would sacrifice nearly the whole claim. It was not apparent that a winding-up would satisfy the petitioner's D.'s) debt, several creditors of the company opposed him, and it was not clearly proved that any supported him. Upon petition for winding-up, *Held* that the Court had a discretion in the matter, and petition dismissed without prejudice to renewal under altered circumstances of the company. *In re Polynesia Company*, 4 A.J.R., 47.

(c) *Service, Verification and Advertisement of Petition.*

Affidavit Verifying Petition.]—Where a petition is presented for the winding-up of a company under the "*Companies Statute*, 1864," the affidavit verifying it must be filed within four days of the presentment of the petition, in accordance with Schedule 7, Rule 4, of that Statute. A petition and affidavit were each dated 3rd of July, 1865; the petition was presented 22nd July, and the affidavit filed August 4th. Petition dismissed with costs. *Semble* the rule is only directory for the purpose of protecting an order inadvertently made in a case where rule has not been complied with, otherwise it is mandatory. *Semble* a defect in the service of a petition is not waived by appearance, but where the affidavits of service were unsatisfactory the case was allowed to stand over for further proof of service, the petitioners paying the costs of the day. *In re Victorian Street Railway Company*, 2 W.W. & A'B. (E.,) 32.

Verification of Petition.]—A petition for winding up a company under "*The Companies Statute* 1864." No. 190, Sec. 75, is to be accepted without verification, and is afterwards to be verified by an affidavit made and filed within four days. *In re Malmesbury United Brewery Company*. 3 W.W. & A'B. (E.,) 81.

Injunction Under No. 190, Sec. 77.]—The affidavit to ground a motion for an injunction under No. 190, Sec. 77, should be made after the presentation and acceptance of the petition. *Ibid.*

Service—Foreign Corporation—Head Office in England.]—Under the "*Companies Statute* 1864," if it apply to a corporation which has an office here, though not its head office, and is not registered under the statute or the "*English Companies Act* 1862," if the Act apply to such a corporation, service of a petition for winding-up is sufficient at the principal place of business in Victoria, since the "*Companies Statute* 1864," provides that such principal place of business shall be in lieu of a registered office. *In re Oriental Bank Corporation*, 10 V.L.R. (E.,) 154.

(d) *Effect of Order to Wind-up.*

First Order Bad—Second Order.]—Where an order for winding-up was bad on the face of it as showing no jurisdiction, a second order for winding-up was allowed to be made without an order to set aside the first order, the petitioner being held justified in treating the first order as a nullity. *Reeves v. Bowden*, 6 W.W. & A'B. (L.,) 218; N.C., 17.

A winding-up order is not a sequestration within the meaning of Sec. 74 of "*Insolvency Statute* 1871." *See Oriental Bank v. Wattle Gully Company, post under* INSOLVENCY—Effect of.

Suit Against the Company Sought to be Wound-Up.]—On the hearing of a petition under "*The Companies Statute* 1864," for an order to wind-up a company, the Court will not, at the instance of plaintiffs in a suit against the company, give leave to proceed with the suit notwithstanding the winding-up order; but such application must be brought forward as a substantive motion after the winding-up order has been made. *In re the Melbourne and Newcastle Minmi Colliery Company*, 1 W.W. & A'B. (E.,) 166.

(e) *Concurrent Petitions.*

Two Petitions—Priority.]—A petition for the winding-up of a company was presented by A. on June 24th, and another for the winding-up of the same company on June 25th by B. In the newspapers B.'s advertisement appeared in the column before A.'s A.'s petition was set down for hearing on June 26th, B.'s on June 27th. *Held, per Molesworth, J.*, that according to the practice adopted by him, the priority of presentment, and not the advertisements, determined the precedence, and that A.'s petition was therefore entitled to precedence. The Court will hear both petitions, and decide between them. *In re Provincial and Suburban Bank*, 5 V.L.R. (E.,) 159, 177; 1 A.L.T., 15.

In a contest between two petitions, one seeking winding-up order, and the other a voluntary winding-up under supervision of the Court, the Court prefers to make order for compulsory winding-up, especially where there is difficulty in deciding as to liquidators selected by creditors. *Ibid*, pp. 178, 179.

Foreign Corporation—Petitions in England and Victoria—Staying Proceedings.]—The Court, on the petition of a creditor, made an order, under Sec. 176 of the "*Companies Statute* 1864," winding-up a banking company incorporated by Royal charter in England, and having its head office and directors there, and also an agency in Victoria. An order for winding-up the same company had also been made in England. The Court therefore directed a meeting of creditors to be held, under Sec. 83 of the Statute, and their opinion taken as to whether the winding-up in Victoria should proceed or not; and on their unanimous decision in favour of staying proceedings, made an order under Sec. 81, staying the proceedings absolutely. *In re Oriental Bank Corporation*, 10 V.L.R. (E.,) 154.

Contributories were not allowed to attend the meeting, the Court holding that the wishes of the creditors should be paramount. *Ibid.*

(*f*) *Costs.*

Two Petitions.]—Where one petition for winding up a company is presented, and after notice of the first a second petition is presented for winding up same company or for a supervision order, the Court will not follow the usual practice of making an order on one giving carriage of proceedings and of allowing costs of both, but will only allow the costs of the former, the uncertainty in the second disentitling petitioners to costs. *In re Provincial and Suburban Bank*, 5 V.L.R., (E.,) 159, 174, 179.

Compulsory—Abandoning—Appearance of Company.]—Where a petition for compulsory winding up was presented, but owing to a technical defect the petitioner gave notice of abandoning it, but the company appeared on the day fixed for hearing, *Held*, that the company was entitled to its costs of such appearance. *In re Co-operative Meat Supply Association*, 8 V.L.R., (E.,) 227.

(*g*) *Other Points.*

Injunction — Sequestration — Motion to Dissolve Injunction.]—Two shareholders in the "Provident Institute" filed separate bills against the directors to wind up the institute, and obtained injunctions restraining the directors from further acting in the affairs or dealing with the property of the institute. Subsequently the directors voluntarily sequestrated the estate of the institute, under 11 Vic., No. 19, Sec. 3, and E. C. was appointed official assignee. The official assignee, under 5 Vic., No. 17, Sec. 56, elected to defend the suits, and he delivered to the plaintiffs a suggestion of the insolvency, and of his appointment as official assignee. On motion for the official assignee to dissolve the injunctions obtained by the plaintiffs, *Held* that as the suit was by one of the members of the institute against the other members, and as "The Institute," *eo nomine* represented by the official assignee was insolvent, and not the individual members parties to the suit, the suit was not a "suit or action pending against the insolvent" within the meaning of 5 Vic., No. 17, Sec. 56. Motion dismissed. *Dodds v. Foxton, Dancker v. Porter*, 1 W. & W. (E.,) 271.

Semble, that there is great difficulty in extending the words "suit or action at law" contained in 5 Vic., No. 17, Sec. 56, beyond an action at law. *Ibid.*

Semble, that it is competent for the directors of a joint-stock company to effect a voluntary sequestration of the estate of the company under the 11 Vic., No. 19, Sec. 3. *Ibid*, at p. 276.

Who May be Heard on Petition for.]—On a petition under "*The Companies Statute* 1864," for a winding-up order, a company, neither a creditor nor a contributor of the company sought to be wound-up, is not entitled to be heard. *In re the St. Kilda and Brighton Railway Company*, 1 W. W. & A'B. (E.,) 157, 160.

Petition for under "The Companies Statuts 1864."]—On a petition under "*The Companies Statute* 1864," for winding-up a company within the provisions of that Act, it is discretionary with the Court to grant the prayer of the petition. *Ibid.*

Facts Alleged in Affidavits and not in Petition.]—On a petition under Sec. 73, Sub-sec. 5, of the "*Companies Statute* 1864," the Court refused to regard anything stated in the affidavit which was not alleged in the petition. *In re Buzolich Paint Company*, 10 V.L.R. (E.,) 276, 280.

Order for Shareholders to Pay up Calls—Service—Attachment.]—On application, under Sec. 121 of the "*Companies Statute* 1864," by liquidators for order for payment of calls by defaulting shareholders, the order was made and personal service on each of the shareholders was directed. After service of order some failed to obey it. The Court made a joint order for separate attachments for contempt to issue against those who had failed to obey. *In re the Ballarat Patent Fuel and Manure Company Limited*, 2 W.W. & A'B. (E.,) 172.

Ex parte Order for Payment of Calls by Contributories.]—In a voluntary winding-up under "*The Companies Statute* 1864," No. 190, the Court may make an *ex parte* order for payment of calls by the contributories within a specified time after service of the order, or for application by them within the same time, to revoke or vary the order; and after the lapse of the specified time, the order will be absolute, and not liable to be set aside. *In re the Belmore Silver and Lead Mining Company*, 2 V.R. (E.,) 126; 2 A.J.R., 76.

"Companies Statute 1864"—Discretion of Court.] A creditor showing that he comes within the terms of the Act is not entitled to a winding-up order *ex debito justitiae*; but it is discretionary in the Court to grant it, and the Court may have regard to the wishes of the other creditors. *In re Polynesia Company*, 4 A J.R, 47.

Order—Advertising and Filing—No. 190, Sch. 7, Sub-secs., 6, 7—Post Dating Order.]—Where an order was obtained to wind up a company, but the petitioning creditors omitted to advertise the order in the *Government Gazette*, and to file it in the office of the Insolvency Court as directed by the "*Companies Act*," No. 190, Sch. 7, Sub-secs. 6, 7, the Court refused au application to post-date the order. *In re Cognac Company*, 2 V.L R. (E.,) 73.

Semble, that the provision as to filing the order in the Court of Insolvency is merely directory. *Ibid.*

In such a case the old order is treated as having lapsed, and a fresh order may be made without the old order being discharged. *In re Cognac Company, Dwyer and Kelly's case*, 3 V.L.R. (E.,) 146.

Præcipe—"Stamp Statute," No. 355, Secs. 4, 10.]—Where on a petition for winding-up the fee for the *præcipe* is too small, and the full fee is afterwards paid before the hearing, that is no

valid objection to the petition. *In re Provincial and Suburban Bank*, 5 V.L.R. (E.,) 159, 172, 177; 1 A.L.T., 15.

(4.) *Liquidators.*

Not Appointed by Winding-Up Order.] — The Court will not, in its discretion, include in an order for winding-up an order appointing a liquidator, although it may have the power. *In re Red Anchor Preserving Company*, 9 V.L.R. (E.,) 77.

Removal—"Companies Statute 1864" No. 190, Secs. 85, 124.]—*Semble*, the Court may, on an order for voluntary winding-up under supervision of the Court, remove, under Sec. 124, liquidators appointed by shareholders, and appoint others selected by creditors, disregarding the three official liquidators appointed by Governor-in-Council under Sec. 85. The Court prefers liquidators selected by the creditors to those appointed by shareholders. *In re Provincial and Suburban Bank*, 5 V.L.R. (E.,) 159, 178.

A person indebted to the company is not eligible to be appointed liquidator. *Ibid.*

Power of Liquidator Under Winding-up Order Under the "Companies Statute 1864."]—A winding-up order, under the "*Companies Statute* 1864," does not vest the property of the company wound-up in the liquidator, but merely enables him to recover property as a kind of agent of the company, suing in its name. *In re Oriental Bank Corporation*, 10 V.L.R. (E.,) 154, 178.

(5) *Sequestration.*

Advertising List of Shareholders—Notice to Admit or Deny Liability—11 Vic., No. 19, Sec. 17.]—By an order under the provisions of the 11th Vic., No. 19, Sec. 17, the estate of a joint-stock company was sequestrated, and the Chief Commissioner, proceeding under this order, caused a list of shareholders to be made and advertised, and by the same advertisement gave notice that he had appointed a day for such shareholders to come in and dispute their liability in respect of their shares respectively; and stated that in default of their so coming in by the time fixed, each of such shareholders would be peremptorily held liable in respect of such shares respectively. On the day named several shareholders appeared, and objected to any proceedings being taken till proof was given that all the shareholders in the advertised list had been served with a copy of the notice. The Commissioner declined to settle the point, and certified to the Court that a difficulty had arisen in the prosecution of the order. *Held*, that the meaning of the order should be taken to be that an advertisement should be published requiring the person named in it to appear at the day fixed, and that upon their appearing they should admit or deny their liability, and in the latter case have it ascertained; but that the advertisement threatening them with being bound by the list, in default of appearance, should be regarded as a *brutum fulmen*, and that the order did not properly purport so to bind them; and that no shareholder could be bound until after service upon him requiring him to show cause, or his voluntary appearance. *Held*, also, that there was no necessity to show service upon all in the list before proceeding in the inquiry as to any. *In re The Provident Institute of Victoria*, 1 W.W. & A'B. (I. E. & M.,) 3.

Difficulties having arisen in the prosecution of the above order, the Court varied and added to the original order in certain respects, upon the *ex parte* application of the assignees seeking direction upon the difficulties in working the order. *Ibid.*

Under 11 Vic., No. 19—Jurisdiction of Insolvent Court.]—The deed of settlement of the P. Joint-stock Company provided that the board of directors should consist of not more than six or less than three, that all directors should be elected by ballot; and by an affirmative and merely directory clause the directors were empowered to sequestrate if the auditors should report that the company could not meet its engagements. The board dwindled to four directors, of whom two were re-appointed without ballot; one was the company's solicitor. In spite of the fact that the auditors had not reported that the company was unable to meet its engagements, a meeting of the board, duly summoned for that purpose, passed a resolution that the company was unable to meet its engagements, and a minute of the resolution was made, which, together with the resolution, was signed by the chairman and attested by the solicitor, and filed in the office of the Chief Commissioner of Insolvent Estates. On the petition of the chairman and managing director, under 11 Vic., No. 19, a Judge made an order for sequestration. At the time of the presentation of the petition and making of the order, an injunction, obtained in an equity suit by a shareholder to wind-up the company, restraining the chairman and managing director from dealing with the company's property, was in force, and the plaintiff in the equity suit obtained a rule *nisi* to set aside the order for sequestration. *Held* that the requirements of the deed of settlement and of the Act were complied with; that the requirements as to sequestration being merely directory the Court had power to entertain the sequestration, and, *Semble*, that it would, even had the clause been mandatory; and that notwithstanding the suit and injunction it was competent for the chairman and managing director to avail themselves of the liberty given to them by Sec. 3 of 11 Vic., No. 19, and competent for the Judge to exercise jurisdiction in spite of the injunction if it were brought before him. *Ex parte Dodds*, 1 W. & W. (I. E. & M.,) 163.

6. *Contributories.*

Married Woman—Attachment for Non-Payment of Contribution.]—A married woman, after due notice of an application to place her on the list of contributories, may, at the application, plead her coverture, and it is then in the discretion of the Court to relieve her. Where a

married woman did not plead coverture at the application, but at the hearing of a motion for attachment on her non-payment of contribution, *Held* that the Court would not hear the plea at that stage, and order for attachment made. *In re Australian Sub-Marine Working Company, ex parte Longley*, 4 W. W. & A'B. (E.,) 124.

Paid-Up Shares—Consideration for.]—D. and K. subscribed memorandum of association and were registered as holders of 27 shares, all printed across as "paid-up." By subsequent arrangements the property of this company was transferred to a new company, and in this new company D. and K. were registered as holders of 24 shares treated as "paid-up." None of these shares were in fact paid-up, but D. and K. gave a guarantee to the bank for advances to the company; but there was no distinct evidence as to there being a contract that the guarantee was in consideration of the shares being treated as paid-up. *Held, by Molesworth, J.*, and affirmed, that D. and K. were liable as contributories for 23 out of the 24 shares, that the scrip purporting to be paid-up could not, if untrue, assist D. and K.; that the guarantee was not money or money's worth, *i.e.*, capital, to the company, and that D. and K. were not, under the circumstances, protected by the guarantees given. By the Full Court, though the Court will not go into the value of the consideration where a company purchased the goodwill and stock-in-trade of a business, yet the Court will inquire where the actual money value of services performed is capable of exact estimation. *In re Cognac Company, Dwyer and Kelly's case*, 3 V.L.R. (E.,) 146.

After a winding-up order had been made on the petition of two creditors, a summons to place members on list of contributories may be taken out by the survivor of the two creditors without making the personal representative of the deceased a party, but that fact must appear on the face of summons. *Ibid.*

In such a case the course of procedure, when case is adjourned into Court, will be the same as at *nisi prius*. *Ibid.*

Calls Due Before Winding-up.]—Where a company was being wound-up voluntarily, and at the date of the winding-up, arrears of past calls were due, upon motion under No. 190, "*Companies Statute* 1864," Sec. 121, by the liquidators, *Held* (reversing *Molesworth, J.*, who refused to make an order affecting calls due before and after liquidation) that the past and present members of the company were liable for such calls. *In re Melbourne and Champion Bay Lead Mining Company*, 6 V.L.R. (E.,) 211.

Order for Shareholders to Pay up Calls—Attachment.]—*In re Ballarat Patent Fuel Company, ante column* 170.

Ex parte Order for Payment of Calls by Contributories.]—*In re Belmore Silver, &c., Company, ante column* 170.

Withdrawal of Application for Shares Before Allotment.]—H. and G., relying on certain alleged misrepresentations of a company's agent, applied for shares in the company, and gave cheques and promissory notes as security for value. Discovering the misrepresentations before allotment, H. and G. withdrew their application, and applied for return of cheques and notes, which was refused, although the company never attempted to enforce payment. The names of H. and G. were entered on the register of shareholders, but no notice of allotment was ever sent to them. *Held*, upon the company being wound-up, that the applications for allotment were, as between H. and G. and the directors, retracted before they were acted upon; and as they never received notice of the allotment or registry they were not, as between themselves and creditors or other shareholders, bound to apply to alter the registry; and that H. and G. were not liable as contributories. *In re Provincial and Suburban Bank (Hall's case, Gregory's case,)* 7 V.L.R. (E.,) 63; 3 A.L.T., 11.

COMPENSATION.

For Injuries.]—*See* Negligence.
For Taking Lands.]—*See* Lands Compensation.

COMPROMISE.

Agrsement for Compromiss — Construction — Costs.]—An agreement of compromise contained the words, "actions on both sides to be withdrawn, and all costs and costs of security to be paid" by the defendant. *Held* that these words included only costs as between party and party, and not costs as between attorney and client. *Splatt v. Quarterman*, 1 W. & W. (L.,) 334.

Of Clients' Suits or Claims.]—*See Manson v. Shire of Maffra, ante column* 90, under Barrister-at-Law.

CONDITIONS.

In Contract.]—*See* Contract or Agreement.
In Covenants.]—*See* Covenants.
On Sale of Property.]—*See* Sale—Vendor and Purchaser.
In Bills of Sale.]—*See* Bill of Sale.
In Will.]—*See* Will.

CONSIDERATION.

See BILLS OF EXCHANGE—BILL OF SALE—CONTRACT.

CONSIGNEE.

UNDER BILLS OF LADING.]—*See* SHIPPING.
UNDER CONTRACTS OF SALE.]—*See* SALE.
IN CARRIAGE OF GOODS.]—*See* CARRIER.

CONSPIRACY.

See CRIMINAL LAW.

CONSTABLE.

See POLICE.

CONSTITUTIONAL LAW.

1. PARLIAMENT.

Privilege—Powsr to Commit for Libel.]—The Legislative Council and Legislative Assembly of Victoria have all the privileges, immunities and powers which were legally held, enjoyed, and exercised by the Commons House of Parliament at the time of the passing of the "*Constitution Act,*" and the publication outside the House, in a newspaper, of an article which the Assembly adjudged to be a libel on the Assembly, on a select committee thereof, and on a member of each, *qua* such member, is a contempt for which the House has authority to commit. *In re Dill,* 1 W. & W. (L.,) 171.

Brsach of Privilege—Arrest for—Speaker's Warrant.]—*Quœre,* whether in a warrant issued by the Speaker of the Legislative Assembly to arrest a person for breach of privilege by publication of a libel, it is necessary to allege that the privilege is one which was held, enjoyed, and exercised by the House of Commons at the time of the passing of the "*Constitution Act.*" *Ibid.*

Privilege—20 Vic., No. 1—"Constitution Act," Sec. 35.]—In passing the Act 20 Vic., No. 1, the Legislature of Victoria acted within the power given to them by the "*Constitution Act,*" Sec. 35, "for the Legislature of Victoria by any Act or Acts to define the privileges immunities and powers to be held enjoyed and exercised by the Council and Assembly and the members thereof respectively." *Ibid.*

Privilegs—"Constitution Act," Ssc. 35.]—The impossibility of the Legislative Council or Assembly exercising the power of impeachment, which is a relative power, owing to the absence of its correlative, does not restrict the general words of Sec. 35 of the "*Constitution Act*" creating a power, or render invalid an enactment which gives other powers that may be exercised by the Council and Assembly. *Dill v. Murphy,* 1 W. & W. (L.,) 342, 356.

Privilegs—"Constitution Act," Ssc. 35.]—Sec. 35 of the "*Constitution Act,*" which empowers the Victorian Legislature to define the privileges of the Council and Assembly, so nevertheless that no such privilege should exceed "those now held, enjoyed and exercised by the Commons House of Parliament or the members thereof," does not refer to, and imposes no restriction in consequence of, the manner in which the privileges of the House of Commons have been acquired by it, or the capacity in which they are exercised by it; and, by virtue of Sec. 35, the powers and privileges of the Commons House, whether obtained by the *lex et consuetudo parliamenti* or otherwise, and whether enjoyed as a deliberative assembly or as a component part of the highest Court of the realm, may be rightly conferred by the Victorian Legislature on the Legislative Council and Legislative Assembly of Victoria. *Ibid.*

Privilege—How Dstermined.]—*Per Stawell, C.J.* It is not clear from the terms of 20 Vic., No. 1, Sec. 2, whether the determining on the privileges, &c., held by the House of Commons is to be regarded as a question of law, of which the Judges are to possess judicial knowledge, or a matter of fact susceptible of proof. *Ibid,* p. 359.

Privilege—How Determined.]—*Per Molesworth, J.*—Sec. 2 of 20 Vic., No. 1, recognises the convenience of producing the journals of the House of Commons as evidence for some debatable question. It may mean to enable our Houses themselves to decide their own powers, or to influence their discretion in the exercise of them. It may be to enable some other tribunal to decide upon the powers of the House which are disputed by some antagonist. *Ibid,* p. 364.

Privilegs—Act 20 Vic., No. 1—"Constitution Act," Sec. 35.]—The Act 20 Vic., No. 1, is an express exercise of the power given by the 35th Sec. only of the "*Constitution Act*" to the Victorian Legislature to confer powers and privileges upon the Legislative Council and Assembly; and the powers given in the 35th Sec. to define such privilege is duly exercised

by the Act 20 Vic., No. 1, and the power to commit for contempt is one within the meaning of the section. *Ibid.*

Privileges.]—The Act only confers upon the Legislative Assembly the same powers possessed by the House of Commons in 1855, *i.e.*, limited powers, and if the Assembly issue a warrant of commitment for contempt against a member, such warrant should contain statements from which it may be determined whether those limited powers have been exceeded or not. *In re Glass*, 6 W.W. & A'B. (L.,) 45.

Privileges of Legislative Assembly—Warrant of Commitment by the Legislative Assembly.]—G. was committed to prison by a warrant of the Legislative Assembly. The warrant stated only that the Legislative Assembly did resolve that G. was guilty of contempt and breach of the privileges of the said Legislative Assembly, and that the said Legislative Assembly had adjudged that the said G. be for the said offence taken into the custody of the Sergeant-at-Arms and by the said Sergeant-at-Arms delivered to and kept in Her Majesty's Gaol, &c. On return to a writ of *Habeas corpus*, *Held* that the Legislative Assembly only possessed the privileges possessed by the House of Commons in 1855, *i.e.*, limited powers, and, therefore, it was essential that the warrant should contain statements similar to those set out in the warrant in *Dill v. Murphy*, or general statements, or statements equivalent thereto, *i.e.*, averments showing whether those limited powers have been exceeded or not. Prisoner discharged. *Ibid.*

On appeal to the Privy Council, *Held* that there was vested in the Legislative Assembly the right of judging for itself what constituted a contempt, and of ordering the commitment of offenders by a general warrant without setting forth the specific grounds of such commitment, and that as G. had been duly committed for his contempt, the Supreme Court had no power to discharge him from custody. Appeal allowed. *The Speaker v. Glass*, L.R., 3 P.C., 560.

Privilege of Legislative Assembly—Customs Duties.]—The Legislative Assembly does not possess the privilege, by passing resolutions imposing customs duties, to authorise the collection of those duties by a customs officer till the end of the session of Parliament in which such resolutions have been passed. The Supreme Court has power by itself to determine the legality of the privilege. And the statement in the pleadings of such a privilege is a question of law and not of fact, and Sec. 2 of Act 20 Vic., No. 1, making the journals of the House of Commons, and consequently of the Assembly, *primâ facie* evidence of the privilege, does not turn the question of privilege into a question of fact; and therefore the privilege could not be admitted by a demurrer to a plea averring such privilege. *Stevenson v. The Queen, Banks v. The Queen, Sargood v. The Queen, Watson v. The Queen, McNaughton v. The Queen*, 2 W. W. & A'B. (L.,) 143.

Powers—Re-enacting Old Laws.]—There is a great distinction between Parliament and a corporation; the former possesses unlimited powers, viz., to legislate for an unlimited period, even though its duration is limited the duration and powers of the latter are both limited. The Legislature, notwithstanding Sec. 40 of the "*Constitution Act*," has power to re-enact an old Act (19 Vic., No. 3,) which did not come into force until after the passing of the "*Constitution Act.*" *Ryall v. Kenealy*, 6 W. W. & A'B. (L.,) 193, 202, 203, 204; N.C., 7

See S.C., STATUTES — Construction, &c. — Particular Statutes.

Qualification of Members—Act No. 128—"Constitution Act," Secs. 60, 61.]—C. before and after the Act No. 128, was an uncertificated insolvent and as such was elected as a member. He was sued by K. therefor. *Held* that Act No. 128 was an Act altering the qualification of members within the meaning of Sec. 61 of the "*Constitution Act*," 19 Vic., and as such did not require to be passed by an absolute majority of the whole number of the members of the Council and Assembly respectively, or to be reserved for the signification of Her Majesty's pleasure thereon in accordance with Sec. 60 of 19 Vic. Judgment for plaintiff. *Kenny v Chapman*, 1 W. & W. (L.,) 93.

And *see* PARLIAMENT.

2. OTHER POINTS.

Power of Extradition.]—The power of extradition from one part of the British dominions to another is not inherent in any colony, but requires the sanction of the Imperial Parliament. The Legislature has full power over the person of an individual so long as he remains within the limits of the colony, so as to detain persons charged with misdemeanours in other colonies, and (*per Stephen, J.,*) to pass laws to prevent such persons coming to the colony or to turn them out if they do come, but no further. *Ray v. M'Mackin*, 1 V.L.R. (L.,) 274.

How Far Act 241 is an Appropriation Act—How the Consolidated Revenue May be Applied in Satisfaction of Judgments Against the Crown.]—*See Alcock v. Fergie, post* CROWN—Crown Remedies and Liabilities.

CONTEMPT OF COURT.

1. WHAT AMOUNTS TO.

Newspaper Comments on Pending Action.]—Disparaging reflections on the members of the Court calculated to lower the Court in the estimation of the public, and comments made during the proceedings which are directly or

indirectly calculated to prevent a fair trial to a litigant, amount to a contempt of Court. But where, during an action, a newspaper commented on the action as a "bogus" or "trumpery" action, and spoke of the political bias of the Judge in connection with an interlocutory decision of his, the Court *Held* that such comments did not amount to a contempt of Court, although the last comment approached very nearly to the border line. *In re Syme, ex parte Daily Telegraph Newspaper Company*, 5 V.L.R. (L.,) 291.

Comment on Pending Case.]—A reference in a newspaper to an alleged libel as "said to have been of a most brutal character," made while the action in respect of such libel was pending, was held to be beyond the line of permissible comment, as tending to prejudice a fair trial and to warp the mind of the jury, and to be, therefore, a contempt of Court, but not such a grave contempt as to call for severe punishment. The Court, moreover, allowed a rule *nisi* for committal to be discharged after an apology made by the offender, on the terms of his paying the costs of the rule. *Re Syme, ex parte McKinley*, 6 V.L.R. (L.,) 51; 1 A.L.T., 154.

Publication in Newspaper—Ex parte Statements.]—If a newspaper proprietor comments on *ex parte* proceedings before the case is determined, in such a way that the comments have a clear and distinct tendency towards directing and swaying the mind of the Court or jury, he is guilty of contempt of Court. *In re Feigl ex parte Herman*, 9 V.L.R. (L.,) 143; 5 A.L.T., 20.

Non-Payment of Money.]—The mere non-payment of costs is not a contempt of Court. The refusal to pay may be a ground for proceeding by way of attachment to found a contempt, but is not in itself a contempt. *In re Harward*, 4 V.L.R. (I. P. & M.,)65.

Unauthorised Person Preparing Transfer—11 Vic., No. 33, Sec. 13.]—A person preparing a transfer of land for reward without proper authorisation to do so is guilty of a contempt of Court under Sec. 13 of the Act 11 Vic., No. 33. *Re Strong*, 4 A.J.R., 150.

Non-Compliance With Requirements of Act of Parliament.]—Entry upon land by a railway company in contravention of the "*Land Clauses Consolidation Act* 1845," is a contempt. *Williamson v. Courtenay*, 1 W. & W. (E.,) 21; *post under* LANDS COMPENSATION.

Suit Pending—Proceedings at Law.]—The mere filing of a bill by the next friend of an infant seeking an account of the infant's property, and the appointment of new trustees without any order having been made, does not make it contempt for another person to proceed at law on the infant's behalf by an action of trespass and no leave of the Court is necessary to institute such proceedings at law. *Durbridge v. Scholes*, 6. W.W. & A'B. (E.,) 1.

Party Not Obeying Order Within Time Limited for Appeal.]—Where a decree directs payment of a sum of money "forthwith," a reasonable time must be intended. A party against whom such an order is made refusing to pay within the time limited for appealing against the order, is not thereby guilty of a contempt. *United Hand-in-Hand and Band of Hope Company v. National Bank of Australasia*, 4 V.L.R. (E.,) 173.

Offence Under 29 and 30 Vic., Clause 109, Secs. 19, 23—Discharge from Arrest for One Offence—Re-Arrest on Another.]—*Regina v. Wilson, ex parte Yates; ante column* 57.

Failure to Pay Calls on a Company Being Wound-up.]—*In re Ballarat Patent Fuel Company, ante column* 170.

2. JURISDICTION.

Warrant for Commitment.]—It is unnecessary, in the case of a superior Court, to set out in the warrant for arrest for a contempt of such Court, what the nature of the contempt is. *In re Slack*, 4 V.L.R. (L.,) 454.

Commitment—Punishment.]—Commitment for contempt may be during pleasure, or until the further order of the Court, or for a time certain, or no time need be stated at all. The punishment may be by fine or imprisonment, or both. *Ibid.*

Commitment for Definite Period.]—In certain cases a commitment to prison for a definite period for contempt of Court may be proper. *Ibid.*

Commitment Fixing no Term of Imprisonment.]—*Quære*, whether a commitment for breach of No. 33, Sec. 13, fixing no term of imprisonment, be not illegal. *In re Thompson*, 1 W. & W. (L.,) 24.

Discharge from Arrest Before Expiration of Period of Commitment.]—An order of the Court, in its Equity jurisdiction, adjudicated a party guilty of contempt, and ordered him to be committed for two months. Two days afterwards, before a warrant was drawn up thereunder, the party voluntarily surrendered himself, and on applying to be discharged on the same day, on the ground that no warrant for his commitment was yet drawn up, was told by the Judge, "You may go." *Held* that the surrender and detention did not constitute an arrest under the warrant, and that had it done so the Judge could not have discharged him before the expiration of the two months. *In re Slack*, 4 V.L.R. (L.,) 454.

Court of Insolvency.]—*See* cases collected, *post* under INSOLVENCY—Jurisdiction.

Coroner's Court.]—*Casey v. Candler, post* under CORONER.

3. PRACTICE.

For practice generally, *see ante column* 63, under ATTACHMENT.

Interrogatories when Necessary.]—Where cause had been shown against commitment of a defendant for contempt of Court, by breach of 11 Vic., No. 33, Sec. 13, and the Court determined that there was a contempt, and adjudged the defendant to be committed to gaol, *Held*, that after these proceedings there was no need of interrogatories, there being no doubt about the contempt, the act charged against the defendant being a contempt *per se*. *In re Thompson*, 1 W. & W. (L.,) 24.

Where Order Wrong.]—It is no defence to an application for committal for disobedience of an order to show that the order was wrong; the party should apply to vary the order, and not disobey it. B. was ordered to be imprisoned, but execution was stayed provided B. paid £500 every six months. B. disobeyed the order, and alleged that the order was wrong in containing the name of the wrong Official Assignee Order for B's. imprisonment. *In re Bateman*, 6 W.W. & A'B. (I. E. & M.,) 15, 22; N.C. 42.

Contempt of Court in Master's Office—Copies of Certificate Furnished to Defendant.]—During the taking of accounts in the Master's office, a defendant so behaved himself that the Master reported him as guilty of contempt of Court. The Master, in person, presented his certificate, supported by the affidavits of witnesses, and the Court held the defendant guilty of contempt, and, after hearing his defence, committed him for fourteen days. At the hearing, the defendant appeared in person, and the Court ordered that he should be furnished gratuitously with copies of the Master's certificate and the affidavits in support thereof. *In re Slack*, 2 V.L.R. (E.,) 204.

Service of Order Nisi to Show Cause Against Attachment.]—S., a party to a suit, attending before the Master upon taxation of costs, committed acts of violence and used insulting language, and the Master reported him to the Court as guilty of contempt. The Court directed an order *nisi* to issue, calling upon him to show cause why he should not be attached for contempt. S. avoided service of the order by keeping house, and the Court made an order for substituted service thereof. *Slack v. Atkinson, in re Slack*, 4 V.L.R. (E.,) 230.

Order for Committal Where Party Did Not Appear.]—Upon the hearing of an order *nisi*, calling upon the party in contempt to show cause against committal, the party did not appear, and the Court made an order for his committal for a fixed period, to commence to run from the date of his arrest. *Slack v. Atkinson, in re Slack*, 4 V.L.R. (E.,) 230.

For Not Filing Accounts—Four-day Order—Attachment.]—Where a party disobeys the order of the Master to file accounts, a certificate of default should be obtained from the Master, and a four-day order obtained from the Court thereon, and in default of compliance with the order, an attachment for contempt may be obtained. *Tyrrell v. Stewart*, 4 V.L.R. (E.,) 60.

Marrying Female Ward—Execution of Settlement Under Direction of the Court—Discharge.] — A medical man committed contempt by eloping with a ward of Court, and took her out of the jurisdiction and married her. He then executed a settlement of her property, giving himself a life estate, and entered into an arrangement for the practice of his profession out of the jurisdiction, which prevented his return for three years. After that time he returned, and submitting to the jurisdiction was committed to the Melbourne Gaol. Upon motion for his release, submitting to execute such settlement as the Court might direct, the Court made no order for his discharge, but intimated its intention of preparing minutes of a proposed settlement, which were subsequently handed out, settling the ward's property upon herself and the children of the marriage, and excluding the husband, save in the event of there being no children living to attain a vested interest. Upon the confirmation of the report of the Master that the settlement had been executed by the parties, a verbal order was made for the discharge of the prisoner, upon which it was intimated the sheriff might act, and a written order be drawn up afterwards. *Ware v. Ware*, 4 V.L.R. (E.,) 119.

Turning Over — Discharge.] — Defendants arrested under an attachment for contempt should whenever arrested be turned over to the custody of the keeper of Her Majesty's gaol in Melbourne. On an application for a discharge of two of them upon consent of Attorney-General, the contempt being non-payment of costs ordered in a suit instituted by information by Attorney-General at relation of a corporation and bill by corporation, *Held* that Court would not hear counsel instructed by Attorney-General directly to pursue a course different from that which relators wish, but will only hear counsel instructed by solicitor on the record. Three of the five imprisoned were discharged from custody on payment of their proportion of costs in suit, and the costs of their contempt. *Held* that such discharge did not release them or remaining two from the balance of the costs due, and that remaining two were only entitled to discharge on payment of such balance and the costs of their contempt. *Attorney-General v. Bentley*, 6 W.W. & A'B. (E.,) 175.

CONTRACT OR AGREEMENT.

I. Formation of Contracts.

(A) Agreement.

Ambiguous Agreement—Intention of Parties How Ascertained.]—Where an agreement is ambiguous, the Court may look at documents of the preliminary negotiations between the parties in order to ascertain their intention. *Norton v. Williamson*, 6 A.L.T., 101.

Offer—Silence of Other Party.]—*Per Full Court.* One person cannot, merely by an offer, in the absence of any previous arrangement, place another in the position of being compelled to give an answer; and in such case silence does not evidence acceptance of the offer. *Boyd v. Holmes*, 4 V.L.R. (E.,) 161, 170, 171.

Offer by Telegram—No Reply.] — Plaintiff at Amoy from time to time consigned tea to defendant in Melbourne, for sale upon their joint account. Each adventure formed a transaction, there being no general partnership. In December, 1873, defendant wrote to plaintiff, "When there is no reply by either side to a telegram, the sender should use his own judgment;" and in April, 1874, wrote, asking that "before further ventures on joint account," they should "wire such particulars as quantity obtainable, if good values, or can be bought well, average cost, and if freight tonnage is then obtainable; when, if I do not reply, I will then leave the operation to your judgment fully, and as a joint account venture." In July, 1875, plaintiffs telegraphed, "Can buy at nineteen, but exchange so much lower, equals eighteen last year. What say you?" to which defendant sent no reply by telegraph, but subsequently by letter declined to accept the offer. Before the receipt of the letter, however, plaintiffs had shipped the tea, which, upon its arrival in Melbourne, defendant treated as a consignment to him as agent merely, and sold it as such agent. A loss was incurred on the transaction, and plaintiff filed a bill seeking to make defendant liable for a moiety. Upon demurrer, *Held* by the Full Court (overruling *Molesworth, J.*,) that the arrangement of December, 1873, was revoked and a new arrangement, viz., that of April, 1874, set up, and that the telegram not purporting to proceed under the new arrangement, there was no obligation upon the defendant to answer it, and that his silence could not be treated as assent to make a binding contract; that there was no partnership, but only a series of isolated transactions on joint account. *Ibid*, pp. 161, 169.

Definite or Indefinite—Authority to Doctor—Revocation before Cure.]—A ship-master retained a medical practitioner to attend one of his seamen, and before the man was out of danger told him his services would no longer be required, as the seaman was to be removed to the hospital, and paid into Court the fees earned before his authority was revoked. *Held* that it was not a contract for an indefinite period, and that the master could revoke the authority. *Brown v. Figg*, 5 V.L.R. (L.,) 136; 1 A.L.T. 3.

As to certainty of agreement and whether agreement is completed, *see post* under Specific Performance.

And as to Sale of Land, *see* Vendor and Purchaser.

And as to Sale of Goods, *see* Sale.

(B) In Writing.

(1) *Formation of.*

Alternative Offer—Acceptance of One Alternative—Subsequent Correspondence as to Mode of Carrying out Contract.]—N. wrote to M., June 24th, asking him whether he would buy certain property at a certain price, or would take a lease of it at a certain rent. N. replied, June 27th, that he was willing to buy at the price named, and then followed a correspondence as to the mode of payment and of taking possession. *Held* that there was a binding contract, and that the subsequent correspondence might be disregarded. *Morrison v. Neill*, 1 V.L.R. (L.,) 287.

Conditional Offer by Letter.]—H. wrote a letter to C., April 24th, offering him the whole of a cargo of coals to arrive per ship "J.," 450 tons, half cash, the balance by acceptances, and the letter contained a note that this offer was subject to C. paying a bill for £460, due May 20th, and sending by return post a bill for balance due. *Held* that this letter did not contain an enforceable contract. *Cakebread v. Huddart*, 3 A.J.R., 121.

Correspondence — Promise.] — Previously to November, 1853, a piece of Crown land in Melbourne had been excepted from sale with the intention of being used for the water supply of the city. In November, 1853, the

Municipal Council applied to the Crown for a grant of the land for the purpose of a market. In December, 1853, the Colonial Secretary, on behalf of the Crown, wrote, sanctioning the occupation of the ground for corporation purposes, and in a further communication in February, 1854, notified that it would be necessary to resume possession of part of land for water tanks to be erected thereon. By letter in February, 1854, from Council, it was stated that no objection would be taken to resumption of part of land, but that as steps had been taken for establishment of a market something more than a permissive occupancy was required, and another request for the grant was made. By letter April, 1854, the Colonial Secretary informed the Council that "the Lieutenant-Governor had been pleased to approve of the appropriation, as such market, of a part of the land applied for, &c." On petition under Act No. 241, and bill seeking to restrain Crown from selling the land, and to enforce specific performance of the agreement, *Held, per Molesworth, J.*, that there was, in fact, no promise on the part of the Crown to grant the land, and if there was the right to claim under it was barred by Act No. 145, Sec. 6, as fulfilment of the promise was not sought within a year after the passing of that Act, and that even if there were a right under the Act No. 145, it was not enforceable under the Act No. 241, as amounting to a contract subsequent to the passing of the Act No. 49. *Held* by the *Full Court on Appeal* that there was in fact a promise to grant the land, but there was no promise in law, there being no consideration for the promise, and the promise itself being a *nudum pactum*; that Sec. 6 of No 145 is merely an enabling enactment, and it does not bar a claim which rests upon a promise supported by consideration. *Mayor, &c., of Melbourne v. The Queen*, 4 W.W. & A'B. (E.,) 19.

And *see* cases *post* under VENDOR AND PURCHASER AND SPECIFIC PERFORMANCE.

(2) *Parol Evidence.*

(*a*) *Admissible.*

Written Offer Verbally Accepted—Verbal Condition.]—At the time a written offer to do certain work was accepted verbally, the defendant accompanied such acceptance by a verbal condition to which the plaintiff assented. On an action on the contract, *Held* that verbal condition was a part of the contract, and was admissible in evidence. *Bonham v. Brophy*, 6 V.L.R. (L.,) 64; 1 A.L.T., 162.

Practice—When Objection Should be Made.]—Any objection to the admissibility of oral evidence as proof of a written contract should be made to the evidence when tendered, and it is too late if brought forward as a ground of nonsuit at the close of the plaintiff's case, if no objection was made at the time of tendering it. *Whelan v. Hannigan*, 5 V.L.R. (L.,) 35.

And *see* EVIDENCE.

(*b*) *Inadmissible.*

Contract as to Shares—Parol Addition—Local Custom.] — C. sued defendant for breach of contract in refusing to deliver certain shares in tributes Nos. 2 and 3. The contract in writing referred only to shares in the company; but C. proved a conversation between himself and defendant in which defendant verbally promised that the tributes should be included. *Held* that the parol addition could not be admitted to alter the contract; that a custom could not be admissible in evidence unless it was general, and that C. had denied the existence of a custom by admitting he had sometimes sold tributes apart from the shares. Plaintiff nonsuited. *Chaplin v. Chalk*, 3 A.J.R., 26.

Collateral Parol Agreement.]—There may be a valid verbal promise collateral with a written undertaking, but the verbal promise must be in no way inconsistent with the subsequent written document; if there is any variation the written agreement supersedes the verbal one. *Abbott v. Commercial Bank*, 5 V.L.R. (L.,) 366; 1 A.L.T., 57.

For facts *see* S.C. under BANKERS, &c., *column* 82.

Experts.]—Where the meaning of words in general use is clear, the evidence of experts is not admissible to abridge their ordinary meaning by explaining a special meaning attached to such words. *Bartlett v. Pyers*, 5 V.L.R. (L.,) 69.

And *see* also EVIDENCE.

(3) *Construction.*

Proviso that in One Event Contract Shall be Void—Parties not in statu quo.]—A contract, which arranged for the assignment of a licence and interest in a public-house in consideration of £75, of which £25 was to be paid in cash, and the balance secured by a bill of sale, contained a proviso that if the transferee refused to execute a bill of sale the agreement should be void. *Held*, that the transferee having obtained possession could not be permitted, after having received a benefit under the contract, to urge the proviso as an objection. *Wood v. Cutts*, 5 V.L.R. (L.,) 275; 1 A.L.T., 40.

Intention of Parties Governing Strict Grammatical Construction.] — J. D. contracted by the following writing:—"I have this day sold to P. 500 bushels of oats, say feed oats, at a price of 6s. 6d. per bushel, to be delivered within one month from this date, at X; and 150 bushels to be taken from my store this day, and 1s. per bag to be paid or returned, and cash on delivery of the lot." *Held* that as the intention of the parties was shown by specifying the nature of the oats, and the price as to the 500 bushels, and there was no mention of these particulars as to the 150 bushels unless they were part of the 500 bushels, the intention governed the grammatical construction; that it was a contract for 500 bushels, 150 to be taken from the store at once, and the remainder to be delivered at X within a month's time. *Dixon v. Perkins*, 2 W. & W. (L.,) 10.

Implied Mutuality.]—A contract was made between manufacturers and H., by which the manufacturers agreed to employ H. as their

agent for sale of the whole of the goods manufactured during a certain period, unless by accumulated stock or insufficient sales the manufacturers should not be enabled to work the machinery to the full power; in which event they might terminate the contract, or place a traveller on the road to effect sales at H's. expense. *Held*, that there was an implied obligation upon the manufacturers to deliver all goods sold by the agent. *Hobart v. Victorian Woollen Company*, 7 V.L.R. (L.,) 30; 2 A.L.T., 120.

Three Contracts in One Document—Unilateral.]—C. agreed with H. and B. in writing as follows: "I agree to make for H. and B. the whole of the ironwork for one of their patent American sawmills," &c., "for the net sum of one hundred pounds, delivered in Melbourne (say £100). I also agree to furnish the above work with pine wood framing," &c., "for the net sum of one hundred and twenty pounds (say £120). H. and B. hereby agree to allow C. the sole right and title to the making of the said patent sawmill, according to their plans furnished, by the payment to them of £50 for each machine as their patent right. C." This was accepted and signed by H. and B.'s agent. Action for that the defendants (H. and B.) did not allow C. the sole right and title to the making of the said patent machines, but granted a license, &c., to one F. to do so, whereby plaintiff lost great profits, &c. *Held* that the document contained three independent contracts; and that the contract for breach of which C. claimed damages was unilateral, and not mutually binding, and formed no sufficient ground of action by him against H. and B. *Crossley v. Hoffman*, 1 W. & W. (L.,) 198.

Two Documents Forming One Contract—Vendor's Lien.]—M. sold to S. two engines and sent him the following invoice:—"Melbourne, 28th June, 1872. Mr. S., Bought of M.—terms, four months—one engine, C.D.F., £170; one engine, W.M.B., £175—£345. By acceptance, M." Simultaneously with this note, S. gave a storage receipt as for the same two engines:—"Melbourne, 28th June. 1872. Received from M. the undermentioned engines as storage:—One engine, C.D.F.; one do., W.M.B.—S." S. gave M. a bill drawn 28th June at four months. During the currency of the bill, S. sold one of the engines to C., who claimed under the sale. The bill not having been paid by S. to M., the latter also claimed it, contending that they had not parted with the right of property in it, but had only agreed to give it to S. at the end of four months if he paid for it. On an interpleader issue, *Held* that the two agreements, the one for sale, and the other for storage, were contemporaneous, the Court could consider them as forming one contract, and that their effect was to postpone payment for the goods for four months, but in the meantime the right of possession remained with the vendors. *Martin v. Coombes*, 4 A.J.R., 27.

Two Documents of Different Date—Read Together.]—In 1860 A., the owner of patent machines for stone-breaking, and W., railway contractor, agreed in writing that A. should supply machines to W., and repair them, and that W. should pay a royalty of £3750, or 9d. per yard on 100,000 yards of ballast, and should W. elect to break more stone then 6d. per yard after the first 100,000 yards; W. to pay these sums from time to time within fourteen days after the ballast should have been "spread on the railway (by W.,) and passed and certified" by the Government engineers; and "when such ballast should have been spread on the railway (by W.) without the intermixture (by him) of any other ballast, then and in such case the quantity should be ascertained by and taken according to the Government measure thereof." 4000 cubic yards were broken under this agreement, and in 1861 A. and W. agreed in writing that W. should thenceforth repair the machines and that A. should allow them for the repairs at the rate of 4d. per cubic yard out of the royalty on the first 50,000 yards that might be broken, and 3d. per yard out of the royalty for all broken after that number; and that "such allowance should be deducted from the amount payable to A." under the agreement already entered into, by which the first agreement was intended; and it was expressly agreed that "except as regards the repairs and the deduction, the second memorandum should not alter the original contract." *Held* that the contracts must be read as if both were made on the date of the first, and that the deduction of 4d. per yard must be made on the 4000 yards of ballast broken before the second agreement, and *semble*, that under the contracts A. could recover for breaking stone "intermixed by W. with other broken stone," though not spread. *Appleton v. Williams*, 1 W. & W. (L.,) 292.

Double Event.]—An agreement that one person should deliver and another accept goods of a certain kind *ex* a certain ship, to arrive, at a certain price per pound in bond all round, was held to be on a double event—the arrival of the ship, and her arrival with goods of the kind named. *Cohen v. Cleve*, 1 W.W. & A'B. (L.,) 167.

"More or Less"—Acceptance of Smaller Number—Rescission or New Contract.]—W. agreed to sell B. 3000 ewes and 1500 wethers, "more or less," and delivered in all 3563 sheep, which were accepted by B.'s agent, in pursuance, as W. alleged, of an agreement between their agent and B.'s agent to rescind the contract and to take the number delivered in satisfaction of the contract. B. recovered a verdict. *Held* on rule *nisi* for a nonsuit, that the evidence only showed that plaintiff determined to get what he could and did not amount to a new contract to take less than the original number, and that plaintiff did not take lesser number in satisfaction. Rule discharged. *Brown v. White*, 3 A.J.R., 43.

Quality.]—A contract contained a clause that the article contracted for should be "of the exact dimensions, the same quality of material and workmanship in wood, iron, paint, and upholstery work, and in all other respects as

the omnibuses now in use by the said Melbourne Omnibus Company, and known as the New York Omnibuses." *Held*, that "quality" was to be taken as meaning "kind;" that a substantial compliance was insufficient; and that no claim could be maintained for extras to work done under the contract, and properly rejected as not being in accordance with the terms of the contract. *McGregor v. Melbourne Omnibus Company*, 1 V.R. (L.,) 56; 1 A.J.R., 73.

Province of Court and Jury.—Where a pattern is specified and put forward in a contract, it is for the Court to decide whether there is any evidence that the article is of the kind prescribed; and then for the jury to decide as to the quality. *Ibid.*

As to Construction of Building Contracts Generally.]—*See* under WORK AND LABOUR.

Contract to Carry on Up and Down Journeys—Entire Contract.]—A carrier contracted by written agreement as follows:—"J. M. agrees to load from W. M. & Co., Echuca, three tons general loading, and deliver same to R., B. station, within eighteen days from this date, failing which to forfeit 1s. 6d. per ton per day for each and every day after expiration of said time. The said J. M. further agrees to load from B. station six tons wool, and deliver same to W. M. and Co., Echuca, within fourteen days from date of loading, failing which to forfeit 1s. 6d. per ton per day after expiration of said time." J. M. carried the goods to B. station, but on arrival there the wool was not ready, and after waiting for it for a month he departed without it, and loaded wool at M. station, which he delivered to W. M. & Co. On suit by J. M. for payment for the carriage of the goods to B. station, *Held* that the contract was entire, and not having been performed J. M. could not recover. *McCulloch v. Mackie*, 5 W.W. & A'B. (L.,) 1.

Exercise of Option by One of Contracting Parties—Contract Including all Shipments.]—R. contracted with the Crown to procure certain railway plant from England and to convey it to Victoria. The 9th condition provided that it should be discharged at piers or into lighters at the option of the Government. Several cargoes arrived and were delivered, some alongside one pier, sometimes alongside another, and sometimes into lighters. On the arrival of one cargo, in November 1869, the Board of Land and Works, on behalf of the Crown, intimated that R. might discharge by "the best and cheapest way he could." In October, 1860, the Board gave notice that all cargoes were to be delivered alongside the pier at Williamstown; but the contractors continued to discharge according to their permission given in November, 1869, and thereby saved considerable expense. The Board refused to give the contractors their lighterage expenses since October, 1860. Petition by contractors for the amount. *Held*, that the contract was an undertaking by one of the parties to deliver cargo in one of two modes as the other party might elect; that such a contract was open till election made, and when made, it was closed; that the election was to be made generally as to *all* goods and not for each shipment; and that having been made in November, 1869, such election related to all subsequent shipments. Rule absolute to enter verdict for petitioners. *Raleigh v. the Queen*, 2 W. W. & A'B. (L.,) 126.

Contract to Tow Ship for Fixed Price—Employment of Extra Tug.]—A contract was entered into by a tug-owner with a ship-owner, to tow the ships of the latter for a fixed price, the contract to exist for a year. The contract was taken over by another tug-owner, who, during the contract, towed one of the ship-owner's vessels up the Bay, and in so doing used an additional tug. *Held*, that the contract included the extra tug, and that the tug-owner could charge nothing additional for her services. *Holmes v. Norton*, 1 A.J.R., 93.

Agreement for Hiring a Ship.]—S., owner of a ship, of which T. A. was master, agreed with A., in Melbourne, that the ship "shall be hired by A. from S., for the term of three months, commencing from the 21st day of November, 1865, and ending the 20th day of February, 1866, to trade between Melbourne and the Gippsland Lakes. A. to insure and pay all working expenses, crew's wages," &c. "The present master, T. A., to remain as master, but under the pay of A. Terms—forty pounds per month, payable monthly in advance." The ship made one voyage to the Lakes and back, and a second voyage to the Lakes, and whilst in the Lakes on her second voyage, the outlet from them was closed by storms, and the ship could not get out till June, 1866. While she was so shut in, A. gave notice to S.'s agent that he should not require her after the end of the second month of the three mentioned in the agreement, and at the end of the two months he said to the master at Sale—"We have nothing to do with the vessel; she's given up to P. (S.'s agent) for the owners." In an action for her hire, and for detaining her beyond the three months, &c., the plaintiff recovered a verdict and damages; but leave was reserved to move to enter a verdict for the defendant, on the ground that the detention was not the detention of the defendant. *Held*, that under the agreement the possession of the ship was not transferred to A.; that under it the possession remained in S.; that delivery of the ship in Melbourne was not necessary, and the delivery by A., in Gippsland, was sufficient; that the detention was not the detention of A., and that the verdict on the issue as to detention should be entered for A. *Stewart v. Austin*, 3 W.W. & A'B. (L.,) 112.

Exclusive License.]—A mining company entered into a written agreement with a tributor enabling him to mine on a certain portion of their land, and take and remove all gold, &c., therefrom, receiving from the company an amount, as wages, proportionate to the amount of gold he extracted. The agreement provided that the mine and all gold taken therefrom should for all purposes be deemed to be the

property of the company, and further that the contractor should work such portions of the company's claim as the mine manager of the company should from time to time determine during the five years during which the agreement was to run, and the tributor was bound to employ not less than a certain number of workmen stated in the agreement. *Held*, reversing *Higinbotham, J.*, that this amounted to an exclusive license to mine on all the land included in the agreement; and that the company could not subsequently grant to another a license to mine in a portion of the same land. *Chun Goon v. Reform Gold Mining Company*, 8 V.L.R. (E.,) 128, 153; 3 A.L.T., 137.

Contract as to Mining and Auriferous Sand.]—The defendant company agreed with W. "that he should have the whole and sole right to collect clean and take away all the mundic sand and pyrites from the company's battery after such has passed from the tables and *amalgamating barrels* and outside the battery house" at a certain price per ton. The defendants had erected ordinary stampers with a table to catch "the blanket sand;" did not erect amalgamating barrels, and saved the sand from the table and extracted the gold from it, thus allowing none of it in its original state to go to the plaintiff H. *Held* that H. was entitled to all the sand after it had passed from the blanket, and that although the amalgamating barrels were not used, yet what passed from the tables would represent what he was entitled to under the original agreement. *Wilson v. Rising Star Quartz Mining Company*, 7 V.L.R. (L.,) 274.

Security for Performance by Deposit of Stakes—Damages.]—A. and B. agreed together for the transfer of a lease and goodwill of a public-house, each party to deposit with C., a party to the deed, as stakeholder, a certain sum as security for the performance, and C. was to declare it forfeited in case of non-performance. B. deposited a cheque for the amount and not cash, and received a receipt as for the cheque; this cheque was presented and dishonoured. *Held* that A. was entitled to nominal damages for breach of the agreement to deposit cash, even if a forfeiture were not declared. *Yon v. Tresnan*, 5 V.L.R. (L.,) 407.

Contract for Delivery of Railway Sleepers.]—Defendants contracted to supply plaintiff, at their mills at one place, with railway sleepers, and the contract provided that defendants should deduct or allow for all which did not pass the inspector at another place. The evidence showed that defendants delivered some of the sleepers at the second place. Plaintiff sued for failure to deliver the residue, and the jury found for the defendant. On rule *nisi* for a new trial, *Held* that the sleepers were to be delivered at the mills, subject to a condition of their being afterwards approved of by the inspector at the other place. *Williamson v. Mitchell*, 9 V.L.R. (L.,) 343.

Bill of Sale—Assignment.]—A bill of sale given over certain chattels stated that the chattels were bargained, sold and delivered to the grantee, subject to a proviso for redemption, but contained no stipulation that the grantor might retain possession till default. After default the grantor assigned the chattels comprised in the bill to W. by deed poll, which recited that the grantor had bargained, sold, and delivered the chattels to the grantee, and assigned to W. the chattels comprised in the bill of sale to hold them for his own benefit as the grantee might have held them, subject to the proviso for redemption. *Held, per Stawell, C. J.* and *Williams, J.*, that the legal effect of the deed was that by it the goods comprised in the bill of sale were bargained and sold to W.; that the sale was absolute on default being made by the grantor of the bill; and that after such default the grantee was liable to deliver actual possession of the chattels to W., under an implied contract, whether he had such possession himself or not. *Pettitt v. Walker*, 8 V.L.R. (L.,) 72; 3 A.L.T., 118.

Hydraulic Press—Calculated to Stand a Pressure of 200 Tons.]—Defendant agreed to supply plaintiff with a hydraulic press "calculated to stand a pressure of 200 tons." *Held* that by this agreement no power of continual resistance to a pressure of 200 tons was bargained for, and that it was sufficient if the machine resisted such a pressure when applied to it as a test. *Nathan v. Tozer*, 2 A.L.T., 34.

Condition for Increase of Price on Alteration of Tariff Affecting Subject Matter.]—H. contracted with H.M. Government to supply meat at a certain price, with a proviso that should there be any alteration in the tariff "affecting meat," H. should be entitled to a proportionate increase in price. *Held* that a tax imposed upon live stock imported into Victoria might affect meat, and that it was a question for the jury. Judgment on demurrer for the petitioner. *Hann v. The Queen*, 5 V.L.R. (L.,) 424; 1 A.L.T., 101.

Agreement by Auctioneer to Purchase Land for Customer.]—B. wrote to R. as follows: "Referring to our conversation of this morning, I understood you to say that if you became the purchaser of the 50 acres at E., that I should have the re-sale in lots, that you should pay me 5 per cent. and disbursements in connection with all sales, and I should keep your counsel, attend to sale, and endeavour to secure the property for you by bidding up to a certain price. If you did not succeed in getting the property I should make no charge for my services." R. replied: "In reply, I beg to say that I agree to the terms and conditions" in your letter. "I therefore authorise you to purchase, on my account, at auction, the 50 acres of land situated at E., at a price not exceeding £60 per acre. I shall be in the room myself, and will bid personally should I so decide, if you are not the purchaser on my behalf at or under £60." B. attended at the sale, and bid for the land, but did not succeed in purchasing it at or under £60 per acre; but R. attended the sale and purchased for himself at £87 10s. per acre. The question was whether B.'s right to have the conduct of the

re-sale depended on his buying for the defendant at or under £60 per acre, or whether he was to have the re-sale if the defendant became the purchaser at any price. *Held* that the latter interpretation was the correct one. *Bliss v. Rowan*, 4 A.L.T., 77.

Sale of Racehorses—"Cleared Themselves."]—In a sale of racehorses the purchaser agreed to pay additional purchase money as soon as they "cleared themselves." *Held* that "clearing themselves" meant clearing expenses of feeding, training, &c., as well as the original purchase money. *Bartlett v. Pyers*, 5 V.L.R. (L.,) 69.

As to cases on Concluded and Certain Agreements *see post* under SPECIFIC PERFORMANCE.

As to cases on Construction of Contracts for Sale of Goods *see post* under SALE.

As to cases on Contracts for Sale of Land *see* VENDOR AND PURCHASER.

(c) STATUTE OF FRAUDS.

(1) *Contracts within the Statute.*

Sec. 17—Contract Resulting in the Sale of a Chattel.]—L. sent the following order to H.:—"You will please supply the order my son will give you, and oblige—Yours, 'L.'" The particulars of the apparatus had before this been given by L.'s manager, and H. had supplied a list of prices. The work was proceeded with, and before it was executed L. countermanded the order by a memo in writing. H. sued L. by a plaint in the County Court claiming £14 as for work and labour done, and recovered a verdict. *Held*, on appeal, that it was a contract for the making of a chattel, which, when completed, would result in the sale of a chattel of greater value than £10, and was within Sec. 17; that the memo in writing was not sufficient; that an action for work and labour done could not be maintained. Nonsuit entered. *Lyons v. Hughes*, 1 V.L.R. (L.,) 1.

Interest in Land.]—A. verbally agreed with B., a selector under the "*Land Act* 1869," that A. should expend labour upon B.'s selection by felling timber and preparing the land for cultivation, in consideration of A.'s having the first crop raised from such land. A. cleared and sowed the land and reaped the crop, which he removed for safe custody to B.'s house, on another part of the land. B. then refused to allow him to remove it, and A. sued him in trover. *Held*, that B. had no defence either under the "*Land Act* 1869," or the "*Statute of Frauds*." *Lorenz v. Heffernan*, 3 V.L.R. (L.,) 129.

Semble, per Stawell, C.J. Such a contract is not a contract for an interest in land. *Ibid.*

Interest in Land.]—A permission given by a landlord to a tenant to pull down two brick walls is not an interest in lands within Sec. 4 of the Statute; and unless the contrary is expressed, carries with it leave to dispose of the proceeds. *Georgeson v. Geach*, 3 V.L.R. (L.,) 144.

Land Speculation—Partnership.]—A contract for partnership in land speculation is not within the "*Statute of Frauds*." *Kilpatrick v. Mackay*, 4 V.L.R. (E.,) 28.

Sale of Fixtures.]—A contract for the sale of fixtures is not within the 4th or 17th Section of the Statute, and does not require to be in writing. *Malmsbury Confluence Gold Mining Company v. Tucker*, 3 V.L.R. (L.,) 213.

Substituted Agreement.]—Where an agreement is required to be in writing, any agreement in substitution thereof must be in writing also, but the parties may by subsequent agreement not in writing alter or vary the mode in which the contract is to be carried out. *Welshman v. Robertson*, 1 V.L.R. (L.,) 124.

Agreement to Pay a Composition.]—A contract by G. to pay creditors of C. a composition of 10s. in the £ on all debts owing by C. is original and not collateral; it is not within the 4th Sec. of the "*Statute of Frauds*," and need not be in writing. *Gray v. Pearson*, 3 V.L.R. (L.,) 81.

Contract for Hiring for more than a Year—Not in Writing—Quantum Meruit.]—*Clough v. London and Australian Agency Company, ante column* 148.

(2) *Forms and Conditions Required.*

Contract Partly by Telegrams, Partly by Correspondence.]—M'L., at Sandhurst, and S., at Castlemaine, contracted as to employment of the former by the latter as publisher of a daily newspaper as follows:—M'L. and S. met on September 8th, and, after a conference, settled upon the terms of M'L.'s remuneration, which was embodied in a memorandum signed by S. only, one of the terms being, "if price as per telegram be accepted." On the 9th, S. sent a signed telegram fixing the price, and in some respects modifying the terms in the memorandum. M'L. on same day sent a signed telegram announcing he would send in his resignation to his old employers the next day, and he would "write by guard to-night," and on the same evening sent a letter referring to new terms, and ending, "This, unless contradicted by 10 a.m. on Wednesday, I shall consider your proposition, and tender my resignation." On September 10th S. wrote to M'L. referring to M'L's. letter, and stating, "Drop me a telegram to-morrow stating day and hour when you will meet the 'runners.'" And on September 11th M'L. sent a signed telegram stating he would meet them on Saturday, 21st of September, at 4 p.m. *Held* that there was in these documents a sufficient contract to satisfy statute, the one referring to the others or some of them in such a way as without any parol evidence to connect the whole with each other. *M'Levy v. Matthews*, 2 W. & W. (L.,) 63.

Signature.]—It is not necessary, in order to a compliance with the "*Statute of Frauds*," that the signature should be after or at the end of every part of a paper which it purports to cover. *Gladstone v. Ball*, 1 W. & W. (E.,) 277, 285, 286.

Assignment of Contract—Act No. 204, Sscs. 107, 108.]—R. entered into a contract with M. & Co. for the sale by R. of sewing machines, and this was assigned by M. & Co. to A. by an endorsement signed by M. & Co., but not by R., although R. had notice of it. There were letters in evidence from R. to A., treating the contract as binding between him and A., and in other respects the contract was acted upon. *Held* that the requirements of the Statute as to the assignment of the contract were satisfied. *Rennick v. Riches*, 9 V.L.R. (L.,) 366.

As to Compliance with Statute in the Case of a Guarantee.] — *M'Ewan v. Dynon*, *post* under GUARANTEE.

As to Signature by Auctioneer, or Entry by Auctioneer's Clerk.]—*See* cases *ante column* 71, and cases *post* under SALE.

As to Compliance with Statute in Cases of Sale of Goods.]—*See* cases *post* under SALE.

As to Compliance with Statute in Sales of Land.]—*See post* under VENDOR AND PURCHASER.

And *see* also cases under SPECIFIC PERFORMANCE—Matters of Defence.

(3) *Part Performance.*

Verbal Contract that Purchase should be for Plaintiff's Benefit—Subsequent Dealings on Faith of Contract.] — The plaintiffs were sons of an owner of station property. Their mother, after the father's death, married again and mortgaged this property, and it was sold to pay the debt. The plaintiffs wishing to buy the property applied to B., an old friend, who made a verbal agreement with them that he would advance the money for the purchase, charging them 10 per cent. on the sum advanced, and that, as security, the purchase should be made in B.'s name, the license of the stations and the stock should be assigned to him, and that, upon payment of money advanced and the interest thereon, he would convey and assign to plaintiffs. The plaintiffs remained on the stations and managed them, sold the stock, and credited B. with the receipts. Strict accounts were kept, and the evidence showed that the arrangement as acted upon was that the property and stock were treated as the plaintiffs', subject to their indebtedness to B., and that this indebtedness was discharged by plaintiffs' selling stock as their own, crediting B. with the proceeds, who applied them in reduction of his principal and interest, B. acting throughout as a patient creditor. B. died, and a suit was brought by the plaintiffs against B.'s executors to enforce the contract, and seeking other relief in the nature of a redemption suit, by paying off principal and interest due to B.'s estate, and seeking assignments of licenses and stock. *Held* that, though there was no written evidence of the contract to satisfy the "*Statute of Frauds*," yet the plaintiffs having given their time and labour and incurred liability as owners, and having made large payments to B., as on the footing of a contract, they were entitled to relief. *O'Rourke v. Huon*, 5 A.J.R., 87, 88.

Agreement for Compromise.]—A bank's solicitor settled a draft agreement of compromise as to real estate between the bank and S. and M., and returned it to S. and M.'s solicitor with a letter saying, "The bank seal cannot be affixed before twelve o'clock on Monday. We shall be prepared to settle at two." The bank paid S. and M. some money upon the footing of the compromise; and S. and M., in consequence of the compromise, did not go to trial in an action of ejectment in which they were plaintiffs and the bank defendant. The bank having refused to carry out the compromise, *Held* that the settling the draft, and the above letter, did not constitute an agreement binding under the "*Statute of Frauds*," and that there had been no part performance by S. and M. entitling them to a specific performance of the agreement, by reason of the plaintiffs not going to trial in the action of ejectment in pursuance of an agreement then incomplete. *Shiel v. The Colonial Bank of Australasia*, 1 V.R. (E.,) 40; 1 A.J.R., 30.

As to Part Performance of Contracts of Sale of Goods—*See* SALE.

As to Part Performance of Contracts of Sale of Land—*See* VENDOR AND PURCHASER.

And *see* generally SPECIFIC PERFORMANCE.

(D) CAUSES VITIATING.

(1) *Mistake*—*See* MISTAKE.

(2) *Fraud*—*See* FRAUD.

(E) IMPLIED CONTRACTS.

To Take Goods Returned.]—Where the vendee returns goods to the carrier as not being in accordance with the contract, and the vendor attempts to obtain them from the carrier, but does not do so, there is no implied contract on the part of the vendee to take the goods. *Bailliere v. Foster*, 1 A.J.R., 77.

On Sale of Goods—Delivery.]—In every bargain and sale of goods there is an implied contract to deliver the goods bargained and sold. *Pettit v. Walker*, 8 V.L.R. (L.,) 72; 3 A.L.T., 118, 120.

See also as to implied mutuality. *Hobart v. Victorian Woollen Company*, *ante column* 186.

II. PARTIES TO CONTRACTS.

(1) *Capacity of*—*See* DRUNKENNESS—INFANT—LUNATIC—HUSBAND AND WIFE.

2. *Other Points.*

An agreement was made between W. "as authorised by J.S." and C., to the effect that in consideration of £75 W. should transfer to C. all his interest in a certain hotel, licence, &c., and that the £75 should be paid as follows—£25 in cash, and £50 secured by a bill of sale over the furniture. W. sued C. for breach of contract in refusing to give a bill of sale. *Held* that the words "as authorised by J.S." did not in anywise affect the liability of either party, it being clear that W. was to have the

advantage of the contract, and that he was beneficially interested in it. *Wood v. Cutts*, 5 V.L.R. (L.,) 275; 1 A.L.T., 40.

III. The Matter of Contracts.

(1) *Consideration.*

Valuable Consideration—Purchaser for Value—What is Value.]—Per *Holroyd, J.* Valuable consideration by a purchaser without notice must be something given or done, or some obligation entered into at the time, by which the circumstances of the person giving, doing, or entering into the obligation are altered. In order for forbearance to sue being such a consideration, there must be an intention to sue and an abandonment of it. Where a policy of life assurance was transferred in consideration of a past debt, and under circumstances which did not show great pressure by the purchasing creditors, *Held* not a valuable consideration. *Evans v. Stevenson*, 8 V.L.R. (E.,) 108, 120; 3 A.L.T., 95, 130.

What is Sufficient.]—A declaration stated that in consideration that A. was then indebted to B. for money lent and for goods sold and delivered, it was agreed between A. and B., and A. then promised B., within twelve months to provide and ship cattle into the port of H., to be there sold and the proceeds there paid over by the agents of A. to B., in satisfaction and discharge of the money which A. owed as aforesaid to B., and stated a breach in that A. did not provide and ship cattle, &c. Demurrer, that (1) the consideration would not support the promise; (2) the consideration being executed, the promise should be such as the law would imply; (3) the law will imply no promise by a debtor that he will provide and ship cattle; (4) no promise by plaintiff was stated which would be a sufficient consideration for the promise of defendant; (5) plaintiff did not by the agreement bind himself to forbear for any period of time. Demurrer allowed; but leave given to amend. *Murdoch v. Bell*, 1 W. & W. (L.,) 51.

Action on Cheque.]—In an action on a cheque which was dishonoured, the plaintiff alleged that the cheque was given in consideration of a promise to sign an agreement. The plea alleged that the plaintiff did not sign the agreement. *Held* that the promise to sign was sufficient consideration for the cheque. Rule absolute to enter verdict for plaintiff. *Fattorini v. Clemence*, 9 V.L.R. (L.,) 51.

"More or Less"—Plea of Acceptance of Lesser Quantity.]—B. declared on a contract by which he agreed to buy, and defendant agreed to sell, 3000 ewes and 1500 wethers, "more or less." Defendant only tendered and delivered 3563 sheep in all. Defendant pleaded an agreement that in consideration of the delivery of the 3563, and the defendant giving an assurance that they had delivered all the sheep intended to be sold, the plaintiff would dispense with residue and pay for what he got, and the plea averred the fulfilment of this agreement. *Held* that the plea was bad, there being no consideration to support plaintiff's promise. *Brown v. White*, 3 A.J.R., 40.

Judgment Recoverable Upon an Uncertain Event—Whether a Good Consideration.]—A. was indebted to F. in a sum of £120, and F. promised to give A. time on consideration of A.'s assigning to him a judgment recovered against the Crown for £157. F. sued A. for the £120, and A. now sued F. for breach of the agreement to give time. *Held* that, although the judgment debt of the Crown was recovered on a contract which the Crown could not make, and that although the moneys to pay such judgment could not be so expended except under the certificate of the Audit Commissioners, and a vote by Parliament for the purpose, yet the judgment was valid, and a valuable security, although depending upon an uncertain event, and the assignment of it was a good consideration to support the promise to give time. *Alcock v. Fergie*, 4 W. W. & A'B. (L.,) 285, 321.

For facts, *See* S. C., under Crown—Liabilities, under Act No. 241.

Offer of Reward—Discovery by a Police Constable.]—McE., on March 4th, 1864, published a notice that, in February, a large quantity of goods were stolen from his branch store, and offering £100 reward to any person giving such information as would lead to the recovery of such goods and the conviction of the thieves. R., a police constable, arrested three persons on suspicion in February, and recovered some of the goods which had been in their possession, and gave the defendant, McE., information which led to his recovering the whole of the goods stolen. The three persons were convicted of larceny, and evidence was given as to identity of the goods. R. obtained a verdict. On rule *nisi* for a nonsuit, *Held* that the plaintiff's information was the original and meritorious cause of the recovery of the goods, and the fact that the plaintiff had before the notice seized goods in the possession of suspected persons did not preclude him from receiving the reward, and that, on the *primâ facie* evidence, all the persons connected with the theft had been convicted. Rule discharged. *Robinson v. McEwan*, 2 W.W. & A'B. (L.,) 65.

Promise to Pay Debt of Intestate.]—A promise in writing by an administrator absolutely to pay a debt of his intestate, with interest, one month after notice, whether such administrator were administrator or not at the time of the promise, discloses sufficient consideration, viz., a promise to forbear for one month. *Wilson v. Luth*, 6 V.L.R. (L.,) 73; 1 A.L.T., 162.

Uncertainty of.]—An agreement, by a married woman, that she should attend upon her aged father and mother as long as they lived, and provide them with necessary services, and in consideration thereof her father should, when requested, transfer to her his interest in certain land, was held void for uncertainty. *Shiels v. Drysdale*, 6 V.L.R. (E.,) 126; 2 A.L.T., 14.

Void Ante-Nuptial Agreement.]—An ante-nuptial agreement, void under the "*Statute of Frauds*," can form no valuable consideration for the conveyance of land after the marriage. *Crow v. Campbell*, 10 V.L.R. (E.,) 186; 6 A.L.T., 34.

See S.C., *post* under TRUST AND TRUSTEE.

Nudum Pactum.]—G. promised to give his overseer increased wages, not only for the future but for a past period during which the wages had been at a lower rate previously agreed upon. *Held* void as to the past period for want of consideration, being a promise to increase wages for services that had been actually performed before the promise was given. *Anderson v. Glass*, 5 W. W. & A'B. (L.,) 152.

Nudum Pactum, Acting on Terms of.]—Previously to November, 1863, a piece of Crown land had been excepted from sale on the application of the Municipal Council, with the intention of its being used for the purpose of the water supply of the city. The Council then applied for a grant of the land for the purposes of a market, and according to the view taken by the Full Court a promise was in fact given by the Crown that the land should be granted for that purpose. The letter from the Council requesting the grant stated that the necessary steps to establish a market were then in progress. The Council entered upon the land and expended £800 in improvements. *Held*, by the Full Court, that if the establishment of the market were the consideration for the grant, that consideration had been well-nigh spent before the promise on which it was said to be rested had been made, and that there was no consideration for the promise, it being a *nudum pactum*, and that the Council unwisely affecting improvements on land which was not theirs by law, did not create a consideration or afford grounds from which its existence might be inferred. *Mayor, &c., of Melbourne v. the Queen*, 4 W.W. & A'B. (E.,) 19.

Promiss by Crown—Nudum Pactum—Acting on Terms of.]—The Moderator of the Presbytery of Melbourne applied in May, 1852, to the Government for a grant of Crown land as a site for a church, school-house, and manse. This application was answered, June, 1852, by the Colonial Secretary, stating the Governor's sanction to an appropriation of two acres of land for the purpose required. Trustees were appointed and approved of by the Governor-in-Council, August, 1853. The land was taken possession of and fenced, and a school-house erected on part of the land; on other parts of the land houses were erected and let, the rents being applied to church purposes; but no church or manse was erected. No grant of the land was issued, and in November, 1868, the Board of Land and Works advertised the land, other than that on which school-house was erected, for sale, under Sec. 40 of the "*Land Act* 1862." On petition and bill by the trustees against the Crown and Board of Land and Works seeking to restrain sale, *Held*, following the *Mayor of Melbourne v. the Queen*, that the promise of the land to the trustees for a particular purpose, and the acts done upon the land, did not amount to a consideration sufficient to support a claim enforceable as a contract, and bill and petition dismissed. *MacPherson v. the Queen*, 6 W.W. & A'B. (E.,) 131.

(2) *Promise—Condition Precedent.*

Action for Shares for which Note was Given.]—K. took shares in a company under an agreement which allowed the projectors to receive payment in cash or by promissory note. Attached to taking the shares were certain promises as to the granting of land warrants. K. took shares and gave a promissory note for them, and subsequently sued for fulfilment of the promises as to the land warrants. *Held* that it was not enough to give the note to become entitled to the shares; but that K. should have alleged and proved payment of it; that the promises as to the land warrants could only be enforced when K. was entitled to the shares; and that not being entitled to them he could not sue. *Keith v. Polynesia Company*, 1 A.J.R., 156.

Price to be Fixed by Valuators—Failure to Appoint an Umpire.]—A written contract provided for determination of price to be paid by valuators, who, before commencing valuation, were to appoint an umpire. The valuators omitted to appoint an umpire before they commenced their valuation, and in their valuation they could not agree. The plaintiff brought an action to recover deposit of part of purchase money, and obtained a verdict. On rule *nisi* to set it aside, *Held* that the appointment of the umpire was a condition precedent, and that the agreement was broken. Rule *nisi* discharged. *Finn v. Ray*, 6 W.W. & A'B. (L.,) 13.

Conditions Precedent.]—Where the drawer and acceptor of a bill agree that, if at maturity the acceptor pays a certain amount, the drawer will renew for the remainder, a full payment of the amount agreed upon to be paid, is a condition precedent to the acceptor's right to claim a renewal for the remainder, for there can be no remainder till the part to be paid is first deducted from the whole. *Pachten v. Politz*, 1 V.R. (L.,) 11; 1 A.J.R., 26.

Condition Precedent.]—Tributors agreed with a mining company to work a claim, and the agreement contained the following clause:—"The company will deduct 2 per cent. of the tributors' portion of gold in addition to royalty and wages, until such sum amounts to £100, such money to be retained by the company until the termination of the agreement, as security for any breakage or injury to the property of the company." Another clause required the tributors to keep the pumps, &c., in a proper state of repair, and to make good any damage that might occur to the mine and machinery or plant during their term, and to hand them over to the company in good order and condition at the end of their agreement. The tributors worked out the ground and handed the claim over to the company, but did not repair the machinery, and sued for the £100. *Held* that the making the repairs was a condition precedent to the repayment of the £100, and plaintiffs nonsuited. *Great Gulf Company v. Sutherland*, 4 A.J.R., 158.

Condition Precedent — Non-performance of—When Defendant Allowed to Plead.]—If the

defendant has already recovered judgment against the plaintiff in respect of the non-performance of conditions precedent in a contract, he will not be allowed, in an action on the contract, to plead such non-performance. *Withers v. Greenwood*, 4 V.L.R. (L.,) 491.

Condition Precedent—Sale of Ground Comprised in an Application for a Mining Lease—Readiness to Transfer.]—In an action on a contract for the sale of lands, which are comprised in an application for a mining lease, readiness and willingness to assign or transfer is not a concurrent or precedent condition to the vendor's right to recover the money, at least in a Court of law. *Cane v. Sinclair*, 10 V.L.R. (L.,) 60; 5 A.L.T., 186.

Covenant to Pump a Mine "Constantly and Without Stoppags."]—For what was considered a sufficient compliance with a condition precedent, *see Stevens v. Craven, post* under COVENANT.

And *see* WORK AND LABOUR.

(3) *Impossible Contracts.*

By Reason of Act of God.]—*See* cases, *ante column* 8.

Party Not Performing Guilty of a Breach.]—The general rule is that where the performance of a contract depends upon the existence of a given person or thing, a condition is implied that the impossibility arising from the perishing of the person or thing shall excuse the performance; but if a man chooses to enter into an agreement to sell a chattel or a piece of land belonging to a third person, there is no such inherent impossibility of his performing that contract, as to excuse him for not performing it in the event of his not being able to induce the third person to part with the chattel or land. *Rosel v. Adam*, 2 V.L.R. (L.,) 170, 176.

When, therefore, A. undertook to transfer to R. licences to mine on certain lands, and to do all necessary acts to obtain the consent of the President of the Board of Land and Works to the transfer, upon consideration of R. giving certain acceptances, and A. undertook to pay R. a certain sum if he did not transfer, &c., and A. allowed one of the licences to lapse, and it became, therefore, impossible to transfer it, &c., *Held* that A. had committed a breach of the contract, and that A. could recover the sum agreed to be paid in default of the transfer, &c., even though R. had not paid the last of the acceptances, but that the amount of such acceptance should be deducted from the sum recovered. *Ibid.*

(4) *Illegal Contracts.*

Illegal Condition—No Ground for Breach by Party Inserting.]—R. sued for breach of contract to let tolls to him, averring that defendants would not let him into possession of the toll-gate. Plea, that the contract contained a condition for illegal exemptions from tolls. Demurrer, that the illegality of one clause in the contract upon which both parties could have acted without violating any enactment, did not show any defence to the breach; and that though defendants had no right to insert the clause mentioned, yet they could not set up such illegal clause to defeat a claim founded on not giving possession under the contract. Demurrer allowed. *Ryan v. District Road Board of Broadford*, 4 A.J.R., 110.

Agreement to Pay Money to Jurors in Addition to their Proper Fees.]—An agreement by the parties to a cause to pay the jurors engaged in the trial, a remuneration in addition to the fees allowed them by law is illegal and void. *Glass v. Martin*, 3 W. W. & A'B. (L.,) 117.

Scrip Lent for Illegal Purpose—Action in Trover to Recover it.]—In an action for the recovery of certain scrip which had been lent to the defendant, it appeared that it had been lent for the purpose of enabling defendant to vote at the meeting of the company. The Court allowed, on argument of a rule *nisi*, to enter a verdict for defendant, the record to be amended by adding the plea of illegality, and then made the rule absolute, the Court not assisting a person to recover his property when it has been lent or given for an illegal purpose. *Cane v. Levey*, 3 V.R. (L.,) 198; 3 A.J.R., 81.

Against Public Policy.]—M., who was inspector of a bank, and was a partner with D. in certain station property, agreed in consideration of being released from the liabilities of the partnership to permit D., who was a customer of the bank, to discount such paper as he might place in the bank until the property could be sold at a profit, so long as he kept deposited in the bank certain securities sufficient to secure the amount of the discounts. The bank refused to discount, and the station was sold at a loss. D. sued M. for breach of contract, averring as an inducement for him to enter into the contract that M. was inspector. *Held, per Barry and Fellows, J. J.* (*dissentiente Williams, J.*) that the contract was against public policy, as offending against the principles of commercial morality which regulate the duty owing by the defendant to the bank—principles which apply alike to all persons holding positions of trust or under obligation similar in character to their superiors. *Degraves v. McMullen*, 5 A.J.R., 8.

Courts Will Not Assist Parties to.]—Courts will not assist parties to illegal transactions, except in certain cases; and *Semble* not even then, where property has been conveyed, and it is sought to obtain an order for its re-conveyance on the ground that such conveyance originated in an illegal dealing. *McCahill v. Henty*, 4 V.L.R. (E.,) 68.

Property Acquired on an Illegal Consideration.]—Property acquired on an immoral and illegal consideration, as of cohabitation, cannot be recovered by volunteers under one party to the illegality from the other party who has the legal estate, the position of the possessor, as between them, being the better. *Murdock v. Aherne*, 4 V.L.R. (E.,) 244.

Immoral Consideration—How Far a Stranger to the Contract may Take Advantage of.]—W. let certain premises to P. for immoral purposes. N. let a piano on hire to P. P.'s rent being in arrear, W. distrained upon the piano, and N. then sued W. for the conversion of the piano. The County Court Judge refused a nonsuit, on the ground that N. being a stranger to the contract between W. and P., could not take advantage of the immoral nature of the contract. *Held*, on appeal, that N. could. Appeal allowed, verdict entered for plaintiff. *Nicholson v. West*, 5 V.L.R. (L.,) 80.

Gaming and Wagering.]—*See* GAMING AND WAGERING.

And *see* under LAND ACTS—MINING.

(5) *In Restraint of Trade.*

What is—Combination Contrary to Public Policy]—Several butchers agreed under seal that they would not send or cause to be sent any meat for sale in the Melbourne Market, and that a company should be formed for the purpose of leasing land for the erection of suitable buildings in which to sell meat. *Held* that this was an agreement in restraint of trade, to benefit the parties, but to injure the public, that it was contrary to public policy, and unenforceable, although the consideration was ample. *Birtwistle v. Hann*, 4 V.L.R. (L.,) 153.

Reasonableness of Restraint.]—E. sold R. his business as a carrier, E. covenanting for 10 years not to carry on such business in *Melbourne, Ballarat, Echuca*, or other specified places, or any place within the Colonies of *Victoria* and *New South Wales*, where E. might be for the time being or within six months next preceding such time have been carrying it on. *Breach*, that E. did carry on such business within the time at Melbourne, Ballarat, and Echuca. *Held* that the consideration must be limited to the towns named in the breach, and that a restraint not to carry on business in those places so named was reasonable and not void as being too large, and as in general restraint of trade. *Robertson v. English*, 4 W. W. & A'B. (L.,) 238.

By a memorandum in writing, R., in selling to McL. his business and stock-in-trade in Collingwood, agreed not to start in the same line of business within nine miles of Collingwood. *Held* that the limit was a reasonable one. *McLeod v. Roberts*, 3 V.R. (L.,) 145; 3 A.J.R., 97.

Sale of Goodwill.]—In a contract for the sale of the goodwill of a business, a provision which restrained A. from carrying on a butcher's business within one and a-half miles from a certain shop for an unlimited time was held reasonable. *Goss v. Richardson*, 3 V.L.R. (L.,) 264.

Contract for Stevedoring—Reasonableness of Restraint.]—Where the object of an agreement is to parcel out the stevedoring business of a port amongst the parties to it, by which certain ships were allotted to each of the parties to which they were to confine themselves, and they stipulated not to compete with each other, *Held* by the Privy Council, affirming the judgment of the Supreme Court, that such agreement was not invalid if carried into effect by provisions reasonably necessary for the purpose, though thereby a partial restraint upon the power of the parties to exercise their trade might be created. *Locke v. Collins*, 3 V.L.R. (L.,) 40. S.C. *sub. nom. Collins v. Locke*, L.R., 4 App. Cas., 674.

Per Privy Council—Agreements in restraint of trade are against public policy and void unless the restraint is partial and reasonable in relation to the objects of the contract, and also unless they are made upon a real and *bona fide* consideration. A provision that, if a particular merchant named should refuse to allow the person entitled to it under the agreement to stevedore his ship, and should require one of the other parties to do it, such party so required should give an equivalent to the party losing the stevedoring, is not unreasonable, either as regards the party entitled or the merchant. But a provision that, in the case of ships passing out of the hands of merchants named into the hands of others refusing to employ the person entitled under the agreement, all the parties thereto should be deprived of the work is unreasonable and cannot be justified. *Collins v. Locke*, L.R., 4 App. Cas., 674.

Proviso in Restraint of Trade when Inseparable.]—An agreement in writing was as follows:—"I., E. J. doth hereby sell to you W. H. one butcher's shop, two-roomed cottage, two yards and boiler, also tools, &c., situated at Stringer's Creek, for the sum of ninety pounds (£90 0s. 0d.,) the half to be paid in cash, and the balance, viz., forty-five pounds (£45,) in four months from date. And I., E. J., doth hereby agree *not to start in business on Stringer's Creek in opposition to him.* E. J. Witness—W. E." *Held* void on the ground that the proviso in *italics* was part of the contract and could not be rejected, and being in general restraint of trade rendered the whole agreement void. *Hollaghan v. Jones*, 3 W.W. & A'B. (L.,) 37.

IV. DISCHARGE AND BREACH OF CONTRACT.

When Justified—Partial Failure to Perform.]—A partial failure by one party to perform a contract, where there is no absolute inability or refusal on his part to continue the contract, does not justify a rescission of it by the other party. *Prendergast v. Lee*, 6 V.L.R. (L.,) 411.

L. agreed to take meat from P. for twelve months, and it was also agreed that P. should give L. a bonus or present of £10, which was paid. P. did not supply L. regularly with meat, and L. lost some customers in consequence of the irregularity. L. therefore rescinded the contract, though P. had heard no complaints and was willing to continue the supply of meat. *Held* that L. was not justified in rescinding the agreement. *Ibid.*

Contract Terminated by Third Person—Authority—Onus Probandi.]—Where a contract is terminated by a third person, the *onus* lies on the plaintiff to shew the authority, or facts from which the authority might be presumed, of such third party. *Norton v. Williamson*, 6 A.L.T., 101.

What Amounts to a Breach.]—*See Bruce v. the Queen, post under* CROWN—Liabilities, &c.

Count for Money Had and Received—Breach of Contract—Failure of Consideration.]—A tender by M. for the lease of a turnpike gate was accepted by the Government, and M. paid a deposit by way of rent in advance. Before he entered into possession the name of the gate was changed, and the gate itself moved four miles in situation. M. took possession, paid the rent in advance for three months, but not for the fourth, and, without making any complaint of the inferior value of the gate so moved, kept possession until the 23rd of the fourth month, when he was evicted for rent due and payable in advance for the fourth month. His receipts for the fourth month were less by £75 than his original deposit; he therefore sued the Government for damages, alleging for breach of the demise, that they never gave him the gate actually demised, and he also sued them on the money count for his deposit, alleging a total failure of consideration. M. recovered a verdict generally, with damages one shilling; but leave was given to move for an equitable verdict. On the motion, *Held* that M. could not recover his deposit on the money count as for a total failure of consideration, the parties not being able to be replaced in *statu quo*. The Court, however, offered to make the rule absolute without costs, to increase the damages on the first count, but the defendant refusing, a new trial was granted, costs to abide the event. *Martin v. Board of Land and Works*, 1 W. & W. (L.,) 123.

Damages for Breach — Maintenance Money for Detention as Witness.]—In assessing damages for breach of contract the jury are not at liberty to include in such damages as a separate item the plaintiff's maintenance as a witness during the time he has been awaiting the trial. *Norton v. Williamson*, 6 A.L.T., 128.

Damages for Breach.]—*Yon v. Tresnan, ante column* 191.

And *see* cases *post* under DAMAGES.

CONTRACTOR.

See NEGLIGENCE — WAY—WORK AND LABOUR.

CONTRIBUTORY.

See COMPANY.

CONVERSION.

When Effected.]—Where imperfect instructions, executed as and purporting to be a will, but which were held by the Court to be effectual only in passing the income, contained directions for sale and conversion without any directions as to distribution of proceeds, *Held* that the direction for sale did not work a conversion, so as to change the nature of the property, which, as to the *corpus*, was distributable as upon intestacy. *Read v. Read*, 5 V.L.R. (E.,) 212.

Contract for Sale—Default of Purchaser.]—The right as between real and personal representatives of the vendor depends upon there being a valid contract at the time of his death; if there is a valid contract then that is in Equity considered to be done which is contracted to be done. If, however, the property being sold, the title afterwards fails, the effect of the conversion ceases. Where the purchaser, after remaining in possession for some time, threw up his contract owing to his inability to pay, *Held* that that had not the same effect as a defect in title, and that there was a conversion and decree made for a vesting order vesting the legal estate in the executors of the deceased intestate vendor as against the universal devisees of his heir-at-law. *Flower v. Wilson* 3 W.W. & A'B. (E.,) 84.

Under Act No. 230 ("Intestate's Real Estate Act")—Application for Administration Required.]—The Act No. 230 does not of itself convert real into personal estate, but requires an application for administration to be made, which, when granted, has a retrospective effect to the death of the intestate. Until then the property continues real estate with all the incidents of real estate. *English v. English*, 3 W.W. & A'B. (E.,) 170.

CONVEYANCE.

Of Personal Property.]—*See* BILL OF SALE AND ASSIGNMENT.

Of Lands Tenements and Hereditaments.]—*See* DEED.

CONVEYANCER.

Admission of—Fees.]—The Court has no power to entertain a petition for remission of any part of the fees payable before examination of candidates for admission as conveyancers, &c., under the "*Supreme Court Rules* 1884," the fees being payable by Act of Parliament. *In re Scott*, 1 W. & W. (L.,) 7.

CONVICTION.

See CRIMINAL LAW—JUSTICE OF THE PEACE.

COPIES OF DOCUMENTS.

See EVIDENCE.

COPYRIGHT.

1. Paintings, Photographs, Engravings, and Designs.

Photographs—"Copyright Act 1869," No. 350, Secs. 36, 38.]—N. summoned P. for selling a colourable imitation of a photograph duly registered by the proprietor N., and without his consent. *Held* under Sec. 36 of the Act, that the selling of a copy did not deprive the registered proprietor of the copyright; that the Section protects only photos taken, not through the intervention of a negative, and does not apply to those taken through such intervention; that the description of a photograph, "Collins-street, looking East," is a sufficient description for the purposes of registration under Sec. 38. Decision of justices fining P. affirmed. *Pyrke v. Nettleton*, 3 V.R. (L.,) 6; 3 A.J.R., 27.

Person Aggrieved—"Copyright Act 1869," Sec. 50.]—A "person aggrieved" within the meaning of Sec. 50 of the "*Copyright Act* 1869," applying to expunge an entry of copyright in an engraving, &c., must have some substantial objection, and one going to the merits of the registered proprietor's title, or he must show that the entry is inconsistent with some right that he sets up in himself or in some other person, or that the entry would really interfere with some intended action on his part. *In re Martin, ex parte The Equitable Life Assurance Society*, 10 V.L.R. (L.,) 196; 6 A.L.T., 31, 61.

A life assurance society starting business in Victoria made an application to expunge the entry of the name of the manager of a similar society, which had been for some time carrying on business in Victoria, as the proprietor of the copyright in an engraving. The applicants proved that for several years prior to their registration in Victoria they had made use of a design very closely resembling that which was registered, and there was no direct evidence as to the originality or otherwise of either design. *Held* that the applicants were persons aggrieved, that the design of the registered engraving was probably copied from theirs, and order made expunging entry. *Ibid.*

Copyright in Engraving—Who may Apply to Expunge Entry of—Person Aggrieved—"Copyright Act 1869," Secs. 36, 50.]—The entry of a copyright in an engraving, under Sec. 36 of the "*Copyright Act* 1869," may be expunged on the application of the person aggrieved, under Sec. 50, if such engraving be not new and original. *Ibid.*

"Original" Engraving, What is.]—An engraving which is a mere reproduction of another is not "original." *Ibid.*

Design—"Copyright Act 1869," Sec. 3.]—A new shape for an iron frame for the door of a safe is not a "design" within the meaning of Sec. 3, so as to be capable of registration. *Regina v. Radke, ex parte Dyke*, 8 V.L.R. (L.,) 23; *post* under PATENT.

2. Telegrams.

Copyright of Newspapsr Proprietors in—Injunction to Restrain Infringement.]—Certain newspaper proprietors entered into a contract with a telegraph company for the supply of news. By agreement with two other papers the proprietors of these journals were allowed to publish these telegrams simultaneously with the original journal. Defendant, proprietor of an evening journal at Geelong, copied the telegrams from one of the two journals who published under the agreement, and published them in his paper. Upon motion to restrain him from so doing, *Held* that the telegrams were copyright; that the publication by defendant was a sufficient injury to justify the interference of a Court of Equity, and injunction granted to restrain defendant from printing or publishing telegrams supplied or published by the plaintiffs. *Wilson v. Rowcroft*, 4 A.J.R., 57.

"Copyright Act" 350, Sec. 24—Newspaper—Telegrams from England—Injunction.]—Bill by proprietors of *Argus* newspaper against defendant, proprietor of the *Gippsland Mercury*, from publishing the contents of telegrams daily received by former and published in *Argus*. Plaintiff's paper was registered under Act No. 350, which expressly extends to newspapers, Sec. 24. Bill alleged that the intelligence published in the *Argus* as telegrams from England appeared in defendant's paper before the *Argus* reached Gippsland so nearly in the same words that it must be inferred that the *Argus*

intelligence was copied into telegrams sent to Gippsland, and then inserted in defendant's paper. Case made by defendant was that news contained in *Argus* became a matter of common talk, and was sent by defendant's Melbourne correspondent as such. *Held* that the odour of defendant's publication was so perfectly identical with that of plaintiffs' that it was clear it was taken from the plaintiffs' publication; that right of copyright extends to results of inquiries as to facts which writer reduces to order, such being property from to-day acquired which is habitually infringed as soon as acquired with such speed that no effectual remedy could be found after publication. *Ordered* that defendant be restrained from publishing as news from England, or in any other form, in the *Gippsland Mercury* or otherwise, any copy or colourable alteration or adaptation in the nature of copies of any telegrams from England received and published by the plaintiffs. *Wilson v. Luke*, 1 V.L.R. (E.,) 127.

3. Books.

"Book"—Acts No. 5 and 6 Vic., Cap. 45.]—In a suit for an injunction to restrain the defendant from infringing the plaintiff's copyright in a "book" consisting of plans and diagrams with instructions for their use printed on them, for an improved method of cutting out ladies' and children's dresses, it appeared that although the defendant's system was superior to that of the plaintiff, nevertheless the defendant had copied the plaintiff's and had incorporated a great part of the latter's book in his. *Held* that the case should be dealt with as a mere subject of copyright, that as such the defendant was virtually stealing the plaintiff's book, and interim injunction granted. *Hanbury v. Dumsday*, 10 V.L.R. (E.,) 172.

CORONER.

A coroner's court is a Court of record in Victoria, and the Coroner has, under Sec. 4 of the "*Coroner's Act*," No. 253, and Sec. 39 of the Act No. 267, power to commit for contempt for a period of 48 hours. *Casey v. Candler*, 5 A.J.R., 179; for facts *see* S.C., *post* under Trespass.

CORPORATION.

Statutes.

"*Municipal Institutions Act*," 18 Vic., No. 15, and "*Amending Acts*," 18 Vic., No. 32, and 19 Vic., No. 16, repealed by 24 Vic., No. 114.

24 Vic., No. 110 (Improvement of Fitzroy Ward.)

24 Vic., No. 114 (Municipal Institutions,) repealed by 27 Vic., 184.

"*Shires Statute* 1863," No. 176, repealed by Act No. 358.

"*Municipal Institutions Act* 1863," No. 184, repealed by Act No. 359.

"*Shires Statute* 1869," No. 358, and "*Amending Acts*," Nos. 387 and 401, repealed by Act No. 506.

"*Boroughs Statute* 1869," No. 359, and "*Amending Act*," No. 373 repealed by Act No. 506.

"*Local Government Act* 1874," No. 506, and various Amending Acts: 1876—Nos. 553 and 564 (Dancing Saloons;) 1877—No. 573; 1881—No. 687 (Rate Surplus,) No. 688 (Waterworks,) No. 711 (Sinking Fund;) 1883—No. 756, No. 762 (Change of Name.)

(A) Municipal Corporations.

I. Rights and Duties of.

(1) *Powers and Liabilities of.*

(*a*) *Generally.*

Accepting Contract—Estimate.]—Before a corporation can accept a contract, an estimate of the cost of the proposed work should be prepared, and the rate made on that basis, except in cases of emergency or when the cost is small. *Attorney-General v. Shire of Wimmera*, 6 V.L.R. (E.,) 24; 1 A.L.T., 125 [following *Attorney-General v. Mayor of St. Kilda*, 6 W.W. & A'B. (E.,) 141, and *Attorney-General v. Shire of Kyneton*, 1 V.L.R. (E.,) 269.]

For facts of cases *Attorney-General v. Mayor of St. Kilda and Attorney-General v. Shire of Kyneton, see post columns* 218, 219.

In Contracting—"Local Government Act, 1874," Sec. 169.]—Sec. 169 of the "*Local Government Act* 1874," prescribing the form in which contracts are to be made by a municipal council, though in form permissive is really mandatory. *Shire of Leigh v. Shire of Hampden,* 8 V.L.R. (L.,) 370.

Powers in Accepting Tenders for Contract — "Boroughs Statute 1869," No. 359, Secs. 35, 37, 39, 122, 140 — Vote of Interested Councillors — Accepting Highest Tender.]—A municipal council called for tenders for lighting the streets, and two companies put in tenders, one company, which had previously had the contract, at £5, the other, of which three of the councillors were shareholders and directors, at £7 5s. The council, by a majority of six to three, resolved to accept the higher tender. Of the majority three were the Councillors who held shares in the successful company. An information was brought against the council, and an injunction prayed for seeking to restrain them from affixing the corporate seal to the contract. Five of the defendants, who had voted for the resolution, demurred on the ground that it did not appear that they or any of them were incapacitated from voting as in the bill alleged, or that by reason of having so voted, the proceedings were null and void. Upon the motion for injunction, *Held, per Molesworth, J.,* that the councillors who were shareholders committed a breach of the 122nd Section of Act No. 359, and subjected themselves to the penalty; but that their so doing did not avoid the corporate resolution; that the council were not warranted in sacrificing the interests of the corporation for the alleged good of the locality, and the injunction was granted until further orders. Upon the demurrer, *Held, per Molesworth, J.,* that the bill sufficiently alleged facts impeaching the propriety of the council's acts, and demurrer overruled. Against the decision upon the demurrer the demurring defendants appealed, and pending the appeal the information was set down for hearing; and, upon the hearing, *Held, per Molesworth, J.,* that the acceptance of the highest tender is within the discretionary power of a municipal council, though several councillors be interested in the contract, if the motive for accepting the tender be the ultimate benefit of the corporation; that the Court ought not to interfere with their discretion, and information dismissed with costs. *Upon appeal,* the Full Court upheld the decision overruling the demurrer, but reversed that dismissing the information upon the grounds that if Sec. 122 applied, it avoided the resolution to accept the tender; that the proviso of Sec. 39, validating the acts of an incapacitated councillor, relates to qualification and not to being interested, and that the resolution to enter into the contract was avoided by the interested councillors having voted upon it. *Attorney-General v. Mayor of Emerald Hill,* 4 A.J.R., 14, 32, 48, 104. On appeal, *Ibid,* 135.

[NOTE.—Sec. 56 of Act No. 506 follows Sec. 39 of Act No. 359, and Sec. 152 of Act No. 506 follows Sec. 122 of Act No. 359.]

Power to Contract—Act No. 506, Sec. 169—Contract for Construction of a Bridge.]—Contracts by municipal corporations must be made in one of the modes or forms prescribed by Act No. 506 ("*Local Government Act* 1874,") and the provisions of the Act being for the protection of the ratepayers are mandatory. *Mayor of Richmond v. Edwards,* 9 V.L.R. (L.,) 348; 5 A.L.T., 118.

Liability of Corporation on Contract Entered into by One Council at Request of Other—Ratification.]—Three municipal councils agreed to join in the erection of a bridge at their common boundary. One of the councils sent a member to the meeting of one of the other councils with a letter written by the secretary with its authority, stating that such member had full authority to represent such council at the meeting of the other council. The latter council entered into a contract on the joint behalf of the two councils, with the concurrence of the member sent by the former council. *Held* that the former council was bound by the contract; that the council which, by agreement, had entered into the contract and superintended the execution thereof, had necessarily a reasonable discretion as to details in carrying it out, dealing with unlooked for difficulties, allowing extras, and in remitting penalties under the contract; and that the first-mentioned council waived any necessity for consulting it further about subsidiary contracts which might not perhaps have been thought to come within the authority given to approve the main contract by subsequently paying a part of its share of the expense of such subsidiary contracts. *Shire of Leigh v. Shire of Hampden,* 8 V.L.R. (L.,) 370.

Under "Local Government Act 1874," Sec. 392.]—The obligation imposed by Sec. 392 of the "*Local Government Act* 1874," upon adjoining municipalities to unite in building and maintaining a bridge at their common boundary, confers upon them, by necessary implication, a power to unite for the purpose by voluntary agreement in either of the modes prescribed by Sec. 169, without the formal preliminaries required to start the process of compulsion. *Ibid,* p. 379.

"Local Government Act 1874," Sec. 394 — Agreement.]—The agreement between two shire corporations, for the carrying out of works within the boundary of two shires, must be a definite and formal agreement clearly binding on the parties. *Semble,* a mere acquiescence by one shire in the acts of the other is insufficient. *Attorney-General v. Shire of Echuca,* 4 V.L.R. (E.,) 4.

Statutory Authority to do an Act — How far Private Rights may be Interfered with.]—*King v. Mayor of Kew, post* under STATUTES—Construction and Interpretation—General Rules.

Council Suing to Restrain a Nuisance—Right to Sue—"Municipal Corporations Act 1863."]—A municipal corporation, established under the "*Municipal Corporations Act* 1863," does not represent the interests of the population of the municipality, so as to be entitled to maintain a suit to abate a nuisance existing in the municipality, but not shown to be upon soil the property of the corporation. Such a corporation has no right to institute, on behalf of the public or any private individual, proceedings to restrain the continuance of such a nuisance. *The Mayor of Ballarat East v. Smith*, 1 W.W. & A'B. (E.,) 52.

Powers of City Council under the "City of Melbourne Building Act," No. 39.]—*Regina v. Call, ex parte Seamark.* *See post* under METROPOLIS.

Charging for Use of Land Reserved for Public Purposes.] — *Semble*, that where Crown land within a municipality has been reserved for recreative and gymnastic purposes, and the municipal council has incurred expense about such land in order to assist its use for public exercises, the council may lawfully remunerate themselves by charging particular companies for its partial use; and such companies, again, having incurred expense for particular amusements or games, might lawfully charge an admission price to pay for that expense. *United Sir William Don Company v. Koh-i-nor Company*, 3 W.W. & A'B. (M.,) 63, 75.

Liabilities, Adjustment of on Separation of Borough—"Local Government Act 1874," Secs. 530, 531.]—Where the Governor has, by an Order in Council, under Sec. 530 of the "*Local Government Act* 1874," severed one portion of a municipality and constituted it as a new one, the proper construction to be put upon Sec. 531 of the Act is that no adjustment of existing liabilities between the original municipalities and the new one so constituted can be made by the same order, but such adjustment must be made by a separate order after hearing both parties. *Roebuck v. Mayor of Geelong West*, 2 V.L.R. (L.,) 189.

Investigation of Accounts at Annual Meeting—Ratepayers—"Local Government Act 1874," Sec. 202.]—Under Sec. 202 of the "*Local Government Act* 1874," ratepayers, though they have a right to be present, have no right to be heard before the Shire council at a meeting of such council for the investigation of accounts. *Rippon v. Dennis*, 6 V.L.R. (L.,) 81; 1 A.L.T., 164.

Liability for Trespass of Revenue Inspector—"Wines, Beer, and Spirits Sale Statute," No. 227, Sec. 67.]—E. had been appointed by the Corporation of Melbourne to be inspector of licenses under Act No. 227. E. had received no instructions further than to prosecute in cases of default of license. E. laid an information against H., and obtained a warrant to a constable to seize beer, which it afterwards appeared did not belong to H. H. sued the Corporation in trespass. *Held* that E. acted beyond the scope of his authority, and that there being no ratification by the Corporation, they were not liable. *Henderson v. the Mayor of Melbourne*, 5 A.J.R., 134.

Appointment and Removal of Officers — Town Clerk — Appointment.] — The town clerk of a municipality established under the Act 18 Vic., No. 15, being an officer whose services are necessarily incidental to the very object for which the corporation was established need not be appointed under seal. *Regina v. East Collingwood*, 1 W. & W. (L.,) 1.

Appointment and Removal of Officers—Wrongful Dismissal—Salary—Damages.]—Where a municipal corporation had wrongfully dismissed its town clerk, to whom an ascertained balance of salary was owing, upon application by the clerk for a *mandamus* to compel payment of the salary due to him and damages, *Held* that as the sum payable for services between the last payment and dismissal could be calculated the rule for a *mandamus* should go for that amount; but that, in the absence of any certainty or capability of certainty as to the sum claimed for damages, no *mandamus* to compel payment of it could be granted. *Ibid.*

Appointment and Removal of Officers — Officer Removed Disputing Validity of New Appointment —What is the Proper Course.]—The town clerk of a borough was removed *de facto* from office. He disputed the validity of his successor's appointment, and sued the council for salary subsequent to such removal. *Held* that his remedy, if any, was not by proceeding for wages in a County Court, such Court not being competent to try the right to an office; and that the proper course was to apply for a rule calling upon the corporation to show cause why a *mandamus* should not issue commanding them to reinstate him in his office. *Smith v. Mayor, &c., of Clunes*, 5 W.W. & A'B. (L.,) 86.

Appointment and Removal of Officers—Removal—"Local Government Act 1874," Secs. 155, 157, 159, 160, 173.]—A special meeting under Sec. 160 of the "*Local Government Act* 1874," is not necessary to remove an officer of a municipal corporation. The council may remove an officer either by a special meeting, of which, and the business to be done thereat, due notice must be given under Secs. 157 and 159 of the Act, and may then proceed under Sec. 160; or it may give notice under Sec. 155 of extraordinary business to be transacted at an ordinary meeting, at which, under Sec. 173, the council can remove any of its officers. *Ex parte Downey*, 2 V.L.R. (L.,) 3.

Resolution to Appoint Secretary Followed by Appointment—Council Cannot Rescind.]—A resolution of a Shire Council to appoint a person as secretary, followed up by an appointment, is incapable of rescission. *Mandamus* to compel the calling of a meeting of the council to rescind a resolution under which a secretary had been appointed, refused. *Ex parte Knight, Regina v. Howes*, 5 A.J.R., 107.

As to Mandamus to Compel Payment of Officer's Salary.]—*See Regina v. Mayor of Footscray*, and *Regina v. Shire of Bulla, ex parte Daniel*, under MANDAMUS.

As to Payment of Audit Fees.]—*See* cases under AUDIT.

(*b*) *In Respect of Making and Managing Streets, Roads, Drains, Waterworks, &c.*

For Negligent Making and Management Generally.]—*See post* under LOCAL GOVERNMENT.

Liability for Construction of Drain—Act No. 176, Sec. 237.]—C. sued the defendant Shire Council, for negligence in constructing a drain, whereby large quantities of sludge were distributed over plaintiff's land in all directions, and not in a defined channel, and recovered a verdict. On rule *nisi* for new trial, *Held* that the Shire Council was liable for the negligent construction of the drain, and that there was a good cause of action, but as the evidence of engineers pointed to the fact that no such damage had been done as the verdict assumed, the Court directed damages to be reduced, or, in default, rule absolute. *Cameron v. Shire of Mount Rouse*, 5 A.J.R., 136.

[NOTE.—Compare Sec. 384 of Act No. 506.]

Covenant to Repair.]—A municipal corporation, under the Act 18 Vic., No. 15, cannot effectually covenant to repair drains made for the streets over the lands of strangers. *Mayor of St. Kilda v. Stevens*, 2 V.R. (E.,) 165; 2 A.J.R., 102.

Constructing Reservoirs and Waterworks—"Local Government Act 1874," Sec. 446.]—The power of a municipal council to construct reservoirs or waterworks under Sec. 446 of the "*Local Government Act* 1874," only arises after the consent of the Governor-in-Council has been obtained to such construction. *Smith v. Shire of Lexton*, 3 V.L.R. (L.,) 324.

Semble, that a pitched crossing through a creek in a highway, with the lower edge raised so as to dam back water on the road, would not fall within the term "reservoir" or "waterworks." *Ibid.*

Authorising Removal of Material from Crown Lands—"Local Government Act 1874," Sec. 386.]—A municipal council is not enabled by Sec. 386 of the "*Local Government Act* 1874," to authorise the removal of material from Crown lands, whether within or without the municipality, such Crown lands not being specially set apart for that purpose. *Rotherly v. Patterson*, 10 V.L.R. (L.,) 213; 6 A.L.T., 92.

As to Removal of Material for Road Making from Land Temporarily Reserved for a Purpose of Water Supply.]—*See Mayor of Ballarat and Ballarat East v. Bungaree Road Board*, under LOCAL GOVERNMENT.

Under 24 Vic., No. 110—Taking Land for Streets.]—It is enacted by 24 Vic., No. 110, Secs. 6 and 7, that if at any time within three years from its passing a person should establish his title to the satisfaction of the council to debentures lodged for land taken for the improvement of the ward, the council should issue to him a certificate to that effect, and the treasurer of the City of Melbourne should pay out of the corporation funds the amount of the debenture; and that after the expiration of the three years the balance of the money secured by the debentures should be paid to the Colonial Treasurer, who should be liable therefor for ten years subsequently. A plaintiff laid claim to a balance of money which had, under these sections, been paid over to the Colonial Treasurer. *Held* that the liability of the council to issue the certificate did not cease when the money was paid over; that the three years must have expired before action could be taken against the council for withholding the certificate; and that to entitle a person to maintain such action at all he must have proved his title to the land taken within the three years, since the time, being fixed by an Act of Parliament, could be waived by neither party, and evidence tendered to show that there had been such a waiver as to certain of the title deeds, and subsequent acceptance by the council of plaintiff's title, was held inadmissible. *Hodgson v. Mayor of Fitzroy*, 1 V.R. (L.,) 218; 1 A.J.R., 167.

In Respect of Dangerous Hole on Private Land—Act 359, Sec. 393.]—Sec. 393 imposes upon a borough a new duty wholly different from what it had before at Common Law. It justifies a borough in going upon private property to make a street, &c., and so justifies what would otherwise be a trespass, but in such a case the borough is liable for injuries occasioned by leaving a dangerous hole on private property near a street, it being its duty to fence and enclose such a hole. This case was decided upon demurrer to a declaration. *Daly v. Mayor of Ballarat*, 1 V.L.R. (L.,) 134.

[NOTE.—Compare Sec. 388 of Act No. 506.]

(2) *Bye-Laws.*

Power to Make—Act No. 506, Sec. 213, Sub-sec. 8.]—A shire has only power to make bye-laws suppressing what are already nuisances at common law, not to create or define nuisances under Act No. 506, Sec. 213, Sub-sec. 8. *Higgins v. Egleson*, 3 V.L.R. (L.,) 196.

Building Regulations—"Bye-Law Incorporating Act," No. 359, Sch. 12, Part I., Sub-Div. 6, Clause 30.]—The notice required by Clause 30, Sub-Division 6, of Act No. 359, Sch. 12, Part I., incorporated as a bye-law by a council is only required to be given where the house is within ten feet of the street. *Mayor of Prahran v. Wild*, 3 V.R. (L.,) 249; 3 A.J.R., 122.

Ultra Vires.]—Under Sec. 27 of the Act 18 Vic., No. 15, municipal corporations established under that Act were given the care and management of the roads, public streets, paths,

wharves, jetties, piers, and public thoroughfares, and were given power to make such bye-laws for carrying out these objects, &c., as might to them seem fit. A municipal corporation passed a bye-law "for compelling the fencing of certain lands abutting upon the public footpaths," and took proceedings to convict an owner of property for non-compliance with it. *Held ultra vires*, and the execution of the conviction prohibited. *In re Municipal Council of Kyneton*, 1 W. & W. (L.) 11.

Ultra Vires—Keeping Swine—"Municipal Act," 18 Vic., No. 15, Sec. 26.]—A municipal bye-law which totally prohibits the keeping of swine within the boundaries of the municipality is *ultra vires* of the "*Municipal Act*," 18 Vic., No. 15, Sec. 26. *Regina v. Cowie, ex parte Ardill*, 6 V.L.R. (L.,) 20; 1 A.L.T. 136.

Act No. 506, Sec. 213—Keeping Swine—Powers of Corporation to Exclude the Whole Municipality.] —By Sec. 213 of Act No. 506, the Town Council of Emerald Hill had power to make regulations setting forth the limits of the portions of the municipality within which it should not be lawful to keep swine, and passed a regulation comprising the whole of the town. *Held* that there was no excess of authority in including the whole municipality in one regulation. *Same case*, 7 V.L.R. (L.,) 88; 2 A.L.T., 122.

Ultra Vires—"Local Government Act 1874," Sec. 239.]—A municipal bye-law prohibiting the driving of cattle at certain hours through the streets, and imposing a fine of so much per head for every head of cattle so driven is *ultra vires*, since in such case the aggregate penalty may exceed the limit of penalty, *i.e.*, £20, fixed by Sec. 239 of the "*Local Government Act* 1874." *Regina v. Shuter, ex parte Wren*, 8 V.L.R. (L.,) 138.

"Licensed Carriages Statute 1864," No. 217—Power to Enforce Bye-Laws—Hackney Carriage—"Railway Yard."]—The Act No. 217 does not give a corporation the right to enforce their bye-laws within the boundaries of a railway fence; the land within that fence is private property as far as the corporation is concerned. Rule absolute for order prohibiting proceedings by corporation to enforce a conviction of a driver of a hackney carriage for standing for hire in a railway yard of a Government railway at Geelong. *Regina v. Johnstone, ex parte Breen*, 4 W. W. & A'B. (L.,) 246.

Validity—Processions—"Local Government Act 1874," Sec. 213, Sub-sec. 17.]—A bye-law which enacts that no procession of persons or of vehicles, or both, for other than funeral purposes, shall parade or pass through any of the streets of a city, unless with the previous consent in writing of the mayor, or in his absence of the town clerk, and that twenty-four hours' notice shall be given to the police is not unreasonable, and is within the powers given to a municipal corporation by Sec. 213, Sub-sec. 17 of the "*Local Government Act* 1874," for regulating traffic and processions. *Rider v. Phillips*, 10 V.L.R. (L.,) 147; 6 A.L.T., 37.

S.P. *See Bannon v. Barker*, 10 V.L.R. (L.,) 200, where it was *Held* that an exactly similar regulation is within Sec. 2 of the "*Police Offences Statute Amending Act*," No. 630, which confers powers upon local authorities to make regulations for the route to be observed in carriage and footways, and preventing obstruction thereof.

Validity—Impeaching—Power of Justices—"Local Government Act 1874," Secs. 225, 246.]—*Per Higinbotham, J.* Sec. 225 of the "*Local Government Act* 1874," takes away from justices who have to enforce any bye-law made under that Act any jurisdiction to entertain objections to the validity of such bye-law. If it is desired to impeach its validity it must be done in the manner prescribed by Sec. 246 of the Act. *Rider v. Phillips*, 10 V.L.R. (L.,) 147; 6 A.L.T., 37.

Validity—Impeaching.]—The liability of a power to abuse cannot be considered as an argument against such power having been created. *Ibid*, p. 152.

(3) *Application of Funds.*

Expenditure—Contracts.]—Where a municipal corporation enters into a prospective contract involving a large outlay, not only in the current but in future years, the liability should be provided for by the levying a special rate, or the outlay in each year should not go beyond the income of that year. Where the council of a borough entered into a contract by which it appeared that they would incur prospective liabilities beyond the current year, (and that not by means of a special rate,) or run themselves into debt as for the current year, on information by the Attorney-General, at the relation of a ratepayer seeking to restrain them from entering into the contract, *Held* that an injunction would be granted in such a case. *Quære*, how far an estimate prepared under Act No. 184, Sec. 186, binds a borough council. *Attorney-General v. Mayor of St. Kilda*, 6 W.W. & A'B. (E.,) 141.

Expenditure in Excess of Assets.]—The council of a shire placed upon the estimate of expenditure, under Act No. 358, Sec. 204, an item of £1100 for a bridge and shire hall. The actual revenue proved much less than that estimated; and the shire being actually in debt for liabilities already incurred, the council by a majority of one entered into a contract for erecting a shire hall at a cost of £628. Upon motion for an injunction upon an information at the relation of a ratepayer, with the consent of the dissentient minority of the council, to restrain the council from expending any of the shire funds in the erection of the hall, *Held* that the dissentient minority had no right to assume a discriminating discretion as to which particular expenditure should be stopped; and that the contract having been entered into, the Court would not subject the shire to liability for damages by stopping its execution. *Attorney-General v. Mayor, &c., of St. Kilda*, distinguished. *Attorney-General v. Shire of Darebin*, 2 V.R. (E.,) 88; 2 A.J.R., 42.

"Local Government Act 1874," Secs. 151, 260—Shire Council — Expenditure — Estimats — Council Meeting—Quorum — Resolution — Intsrprstation of Statutes.]—Under Act No. 506, corporations are bound before incurring any considerable expense to call public attention to it by having a scheme of expenditure prepared in accordance with the Act. Bill and information by Attorney-General at relation of M. against the defendant corporation. Motion for injunction to restrain defendants from entering into any contract for the purpose of or expending any municipal funds in the erection of a shire hall. In an appropriation of ways and means of March 6, 1875, the first item was "Formation of streets, kerbing and channelling, making footpaths, and other public works, £2040." *Held*, an item of this kind, as to concluding words, implies only purposes *ejusdem generis*, and does not mean erection of a shire hall at £2200; that a resolution to do an entire thing does not warrant doing a part only of a thing. *Quære*, whether at a meeting of a shire council, at which a full quorum is present, if one-half withdraw, and the members left, though not a quorum, pass a resolution in accordance with a clause in the bye-laws in the schedule to the Act, the dissentients have power to withdraw and neutralise the powers of the council. *Attorney-General v. Shire of Kyneton*, 1 V.L.R. (E.,) 269.

Information to Restrain Unlawful Expenditurs.]—A shire being desirous of erecting a bridge over a river, which formed its boundary with another shire, and failing to agree, under Sec. 393 of the "*Local Government Act*," No. 506, or to have the matter settled by general sessions under Sec. 394 of that Act, proceeded without obtaining the sanction of the Governor-in-Council, under Sec. 391, to erect the bridge at its own expense. A contract was entered into, and the erection of the bridge commenced simultaneously on both banks, the other shire making no objection. The Attorney-General, at the relation of a ratepayer of the shire, brought an information to restrain the expenditure of any of the municipal funds upon any work outside the municipal limits. Injunction granted. *Attorney-General v. Shire of Echuca*, 4 V.L.R. (E.,) 4.

4. *Rates.*

Valuations—"Local Government Act 1874," Secs. 264-269.]—The "*Local Government Act* 1874" shows a distinct general intent that all rates shall be based on valuations made by valuers under declaration, which valuations are to be binding unless appealed from by any person aggrieved by their being too high or too low; and municipal corporations have no power, under Sec. 264 of the Act, to make any alteration in such valuations. The only redress of a person aggrieved by the lowering of the rate of the lands of others is to appeal within a month, and the language of the Act makes it doubtful if appeal lies by any one except a person improperly put upon the roll. *Attorney-General v. Shire of Hampden*, 2 V.L.R. (E.,) 138.

Alteration of Rates by Council.]—Even had a council the power (under Sec. 264) of redressing individual grievances it would not extend to the grievance of a class. The singular number may embrace a number of individuals, but not an entire class of individuals. *Ibid.*

Power of Council to Grant Relief for Overpayment.]—Where a rate assessed has not been appealed from, and has been paid, the matter is concluded as between the ratepayer, the council, and the other ratepayers; and it is not in the power of the council to relieve from what it regards as the hardship of an overpayment, by applying the corporate funds to repayment. *Ibid.*

Corporation Suing for Rates—Act No. 506, Secs. 12, 285.]—A council is empowered by Sec. 285 to sue for rates, and an objection that the corporation sued as the "Council of the Municipality of E." instead of under the corporate style given by Sec. 12 as "The Mayor, &c., of the Borough of E." Overruled. *Hearn v. Council of the Borough of Essendon*, 5 V.L.R. (L.,) 142; 1 A.L.T., 4.

Invalid Rate—Ratspayer not Paying is Entitled to be on Burgess List—Duty of Town Clerk.]—A rate was not signed by the members of a municipal council in due time as required by the "*Municipal and Local Corporations Act*," 27 Vic., No. 184, and a ratepayer making default as regards that rate was not placed upon the burgess list for that year. He thereupon laid an information against the town clerk for his omission to observe the requirements of Sec. 50 of the "*Boroughs Statute*," No. 359. *Held* that the rate being an invalid one, and the plaintiff having paid the last legally-made rate, he was entitled to be placed upon the burgess list for the year, and that the town clerk should be fined under Sec. 72 of the Act No. 359, for the omission so to place the plaintiff on the list, it being his duty to see that the rate was in accordance with the Act under which it was made. *Lennon v. Evans*, 1 V.R. (L.,) 133; 1 A.J.R., 123.

[NOTE.—The corresponding Secs. of Act No. 506 are Secs. 77 and 100.]

And *see* generally under RATES AND RATING.

II. ELECTION OF MEMBERS.

(1) *Voters.*

"Electoral Act," No. 279, Sec. 67—Notice of Intention to Apply to Become a Voter—No Summons to Show Cause.]—H. sent a notice to the town clerk (F.) of his intention to apply to have his name put on the roll of electors for Melbourne, but did not require the town clerk to appear to show cause. F. did not appear, and an order was made that a certificate be forwarded to the returning officer. *Held*, on rule *nisi* for prohibition, that the order should have been preceded by a summons to show cause, and that the notice should have stated that H.'s name was erroneously omitted, or that H. was upon the roll between August 1st and 12th of the previous year, or that he was a ratepayer. Rule absolute. *Regina v. Sturt, ex parte Fitzgibbon*, 5 A.J.R., 71.

(2) *Nomination and Election.*

"Shires Statute," No. 358, Secs. 97, 373—Last Day for Nomination of Candidates.]—Three councillors were to be elected for a certain shire. The returning officer on March 10th gave notice that candidates were to be nominated not less that four days from notice, and not more than seven, and appointed Monday, the 16th, as the day of nomination. On Saturday, the 14th, K's. nomination was duly made, and so were two other nominations, and on Monday the returning officer accepted two other nominations. *Held* that these nominations were too late; that Sec. 373 only applied to a case where an act was required to be done on a specified day, and that day was a Sunday, but not to a case like the present where two or three days were specified for nomination. Rule absolute for a *mandamus* to compel returning officer to declare K. elected under Sec. 101 of the Act. *Regina v. Hennessey, ex parte Knight*, 5 A.J.R, 35.

[NOTE.—Sec. 116 of Act No. 506 corresponds with Sec. 97 of Act No. 358.]

Nomination Paper—Signature—Act No. 176, Sec. 84.]—The nomination of G. was signed by ten ratepayers. Below the names were the words, "And I, the abovenamed *James G.*, hereby consent to such nomination," in G.'s own hand writing. *Held* that the words Jas. G. must be taken as being intended for a signature. Rule absolute to oust from office the other candidate, such nomination paper having been treated by the returning officer as invalid. *Regina v. Oddie*, 6 W.W. & A'B. (L.,) 221; N.C., 21.

[NOTE.—Sec. 116 of Act No. 506 corresponds with Sec. 84 of Act No. 176.]

S.P., *See re Cordell, ex parte Walsh*, 6 A.L.T., 47.

Nomination Paper—Validity.]—The fact that the nomination paper of a candidate as member of a road board for a *sub-division* of a district, nominates him for the office of member for the *district*, does not render such nomination paper invalid, as being contrary to the provisions of of No. 176, Sec. 84. *Regina v. Munday, ex parte Daft*, 5 W. W. & A'B. (L.,) 143.

[Compare Sec. 106 of Act No. 506.]

Invalid Nomination Paper—Waiver of Objection—"Shires Statute 1869," Secs. 97, 98.]—The nomination of a candidate for office as a shire councillor, if not delivered to the returning officer, *at the office of the council*, is invalid "under Secs. 97 and 98 of the "*Shires Statute*, 1869," and the objection to such nomination is not waived by the relator proceeding in the election, after protest. *Regina v. O'Dwyer, ex parte Wilson*, 4 A.J.R., 151.

[NOTE.—The corresponding Secs. of Act No. 506 are Secs. 116 and 136.]

Compelling Returning Officer to Receive Nomination Paper—What Course is Proper.]—A *mandamus* will not be issued to compel a returning officer to receive the nomination paper of a candidate for election as a member of a road board which he had rejected and to hold an election on it. The proper course is by *quo warranto*. *Ex parte Attenborough, in re Bent*, 5 W.W. & A'B. (L.,) 103.

Duty of Returning Officer.] — *Semble, per Stawell, J.*, that the returning officer of a district is not to take upon him to decide technical points of law as to the validity of a nomination paper of a candidate for membership of the district board, or to reject such paper for want of form; and that, if it do not afford him sufficient information he should return it to the nominators to supply any omission there may be. *Regina v. Munday, ex parte Daft*, 5 W.W. & A'B. (L.,) 143.

Rejection of Nomination Paper—Waiver of Objection—Act No. 506, Sec. 116.]—At an election for a borough council, a returning officer rejected a nomination paper as not being signed by the candidate. The candidate voted at the election. Rule *nisi* to oust the elected councillor from office made absolute. *Semble* the directions of Sec. 116 as to publication of the time and place for lodging nomination papers are mandatory. *Regina v. Jones, ex parte Darcy*, 5 V.L.R. (L.,) 334; 1 A.L.T., 50.

Election—Two Persons of the Same Name on the Roll.]—There were two M. R.'s on the voter's roll, one of them (No. 162) did vote, the other (No. 170) did not vote at an election in which D. was elected by a majority of one. There was conflicting evidence as to whether two votes at the election were not given under the name of M. R. *Held* that if two persons did vote under the name of M. R. the election was invalid, but the Court gave the defendant D. the option of choosing the issue of an information in the nature of a *quo warranto* to have the point of fact tried by a jury, or of having the rule for ouster made absolute. *Regina v. Duffus* 4 W. W. & A'B. (L.,) 251.

Irregularity in Election—Polling Booth Not Kept Open the Whole Time of Election—"Local Government Act 1874," Sec. 122.]—At an election for a municipal councillor the polling booth was not kept open between the hours of 9 a.m. and 4 p.m. on the polling day, as required by Sec. 122 of the "*Local Government Act* 1874," but was closed half-an-hour to allow the scrutineers to get some luncheon. It was not shown that any voter was prevented altogether from voting, or did not vote by reason of not being able to v ote during the half-hour. *Held* on application for a rule *nisi* to oust, that a rule should not be granted unless it were shown that some person was injured through the irregularity; and that the mere existence of an inconvenience of this kind, which was not shown to have deprived any voter of his vote, was insufficient; and rule refused. *In re Smith, ex parte Topper*, 8 V.L.R. (L.,) 223; 4 A.L.T., 58.

Person Elected in Place of Councillor Illegally Remaining in Office—Election Invalid.]—Where a councillor illegally remains in office his retirement creates no vacancy, and if a candidate be elected to fill the supposed vacancy made by his retirement his election is invalid, and the matter is not mended by the invitation of the returning officer for candidates to come forward and fill the vacancy. *Regina v. Percy, ex parte Watson,* 2 A.J.R., 122.

Councillor Disqualified Resigning—Extraordinary Election to Fill the Supposed Vacancy — Election Void.]—*Regina v. Dreverman, ex parte Watson, post column* .

Election—When Void—"Boroughs Statute" No. 359, Sec. 44—Councillor in Excess for a Ward—Person Elected on His Resignation.]—The Borough of Hotham was divided into three wards, and on the councillors being allotted to the wards, pursuant to Sec. 32 of the Act, six claimed to be councillors for the Middle Ward; of these three, M., F. and P. should have been the three councillors. D. claimed to be a councillor, but on an application being made to oust him, he resigned before the case was argued, and the defendant was elected in his place, and about the same time one of the three, M., F. and P., resigned or was got rid of. On information in the nature of a *quo warranto, Held* that D. had no right to his seat when he was elected, and had nothing to resign, and that the defendant elected in his place was in no better position, even if all the three, M., P. and F., had resigned. *Regina v. Percy,* 3 A.J.R., 29.

[The corresponding Section of Act No. 506 is Sec. 59.]

Improper Election.]—Where the returning officer tore up three ballot papers on the ground that they were informal, and G., the candidate for whom they voted, was defeated by three votes, and moved to oust W., the successful candidate, from office on the ground that the three votes ought to be added to the votes scored by G., and that one of W.'s votes was informal because the one of those who had voted for him, and whose number was 53 on the roll, had voted as No. 47, the real owner of that number not having voted, *Held* that the three voters having sworn that they voted for G., and no affidavit to the contrary having been produced from the returning officer, their votes must be added to G.'s; and that the number on the roll being as much a part of the description as the name, the vote which had been given under the wrong number for W. must be deducted from W.'s votes, and rule to oust W. made absolute. *Regina v. Wilson,* 1 A.J.R., 150.

Informal Election—Act No. 358, Sec. 97.]—On a rule to oust a councillor from office it appeared that the advertisement for the election was inserted only in an advertising supplement of a newspaper circulating in the district; and that the returning officer did not receive the nomination paper and the deposit till the morning of the nomination day, instead of the afternoon preceding. *Held* that the first objection was immaterial, but that the second was fatal; and rule to oust made absolute. *Regina v. Miller, ex parte Nash,* 1 A.J.R., 156.

[NOTE.—The corresponding Section of Act No. 506 is Sec. 116.]

Election of Mayor—Casting Vote of Chairman—Costs.]—Where a chairman gave his casting vote at an election for mayor in a case of equal voting, instead of drawing lots as required by Sec. 128 of the Act No. 184, *Held* that election was invalid, and that the relator was entitled to his costs. *Regina v. Richard, ex parte Froggatt,* N.C., 63.

Election of President—When Office Full de facto—Practice.]—A shire was divided into three ridings; at the time of the division there were nine councillors, five qualified for one riding, four for a second, and none for the third. Two out of the five and one out of the four ceased to be members, and three new councillors were elected for the third riding. At a shire meeting attended by six councillors (five forming a quorum) of which two were surplus councillors, W. was elected president. An Order in Council, subsequently gazetted, directed the three surplus councillors to retire. At another meeting of the shire, six being present, of whom S., a surplus councillor, was one, R. was elected president. Upon an order to oust R., *Held* that the office at the time of R.'s election was not full *de facto* as there was nothing to show that W. had acted as president, and that the second election was not irregular. Rule discharged. *Regina v. Robinson, ex parte Torrance,* 1 V.L.R. (L.,) 50.

(3) *Ballot and Voting Papers.*

Validity of Ballot Papers—Act No. 176, Sec. 147.]—Three ballot papers delivered to voters were not signed by the returning officer. Rule *nisi* to oust from office, under Sec. 147 of Act No. 176, or for a *quo warranto. Held* that the signature on the ballot papers was not so essential under the Act that its absence rendered the election invalid. Rule refused. *In re Lloyd, ex parte Leaker,* 4 W. W. & A'B. (L.,) 226.

Act No. 359, Sec. 91.]—One voting paper had the names of three out of four candidates struck out, and the Christian name of the fourth only, the surname being followed by the words, "I vote for Hutton only." It appeared too that the paper was that of O'S., and that the words were written by F. on behalf of O'S., who was illiterate. *Held* that the ballot paper was good, and the election valid. *In re Hutton, ex parte Haynes,* 5 A.J.R., 135.

[NOTE.—The corresponding Section of Act No. 506 is Sec. 129.]

Ballot Papers Handed to Voters Before 9 a.m.—"Shires Statute 1869," Sec. 104.]—A rule to oust a shire councillor on the ground that the ballot papers had been handed to some of the voters shortly after 8 o'clock, instead of at 9 o'clock, as required by Sec. 104 of the "*Shires Statute*

1869," was refused, as there was a statement in the returning officer's affidavit that he held the poll from 9 to 4 o'clock, and it did not expressly appear that the voters who obtained the ballot papers voted before 9 o'clock. *Regina v. Ross, ex parte Rettigan*, 4 A.J.R., 166.

[NOTE.—Sec. 122 is the corresponding Section of Act No. 506.]

Names of Candidates Not put in Alphabetical Order in Ballot Paper—Act No. 506, Sec. 122.]—Ouster of a councillor was granted on the ground that the names of the councillors were not printed in alphabetical order as required by Sec. 122 of the "*Local Government Act*," No. 506. *Regina v. Pooley, ex parte Scarlett*, 6 A.L.T., 160.

(4) *Disqualification, Removal and Retirement from Office of Persons Elected.*

Test of Qualification as Regards Property.]—The best test as to the property qualification of a borough councillor is the rate book. Other tests are to take the testimony of witnesses for the relator; to take the testimony of witnesses for the councillor, and again to take the average of the value of the property sworn to by witnesses for both. Where the rate collector, on his own authority, reduced the rates in respect of a property on account of certain buildings having been removed, and returned a portion of the rate paid in consequence, *Held* that the councillor having paid him the full rates was entitled to the benefit of such payment; and that the Court was inclined to deal liberally with a person supporting a *bona fide* claim. *Regina v. Power, ex parte Irons*, 2 A.J.R., 107.

Payment of Rates—"Boroughs Statute," No. 359, Sec. 46—Repeal of Previous Statute.]—An action was brought against M. to recover a penalty for sitting as a councillor without possessing the due qualification. The action was brought under Sec. 46 of the "*Boroughs Statute* 1869," No. 359, which provided that "no person shall be entitled to be enrolled in any year in respect of any rateable property unless before or on the 10th day of June aforesaid *all such rates as shall under the provisions hereof* have been made in respect of such property shall have been paid." The rates that had not been paid by M. had been made under a previous Act which the Act of 1869 had repealed. *Held* that there was no offence committed against the Act No. 359, and that M. was not disqualified from sitting, and rule to enter a verdict for plaintiff discharged. *Scotchmer v. Michael*, 2 A.J.R., 118.

Act No. 358, Secs. 43, 57, 157—Part of Qualification Parted With.]—P. was on June 20th rated at an amount allowing a clear surplus of £5 over the necessary amount of qualification, viz., £20. Afterwards he let part of this property (rated at £16) to a bank which erected a building on it, and in respect of which the bank was rated at £10. *Held* that the reduction to be made was the value of the land when so let, which would have allowed a sufficient margin for the necessary qualification, and not at its present improved value owing to the erection. Rule for ouster of P. from office discharged. *Regina v. Perrin, ex parte M'Intyre*, 5 A.J.R., 138.

[NOTE.—Sec. 52 of Act No. 506 corresponds with Sec. 43 of Act No. 358.]

Uncertificated Insolvent—"Municipal Corporations Act 1863," Sec. 33.]—K. was insolvent in 1855 and his certificate suspended for twelve months, and he took no steps to obtain his certificate. In 1859 he became insolvent again and obtained his certificate as for that insolvency. In 1862, being again insolvent, his certificate was suspended for six weeks and granted at the end of that time. On the 14th of May he was elected a councillor of a borough, and on the 31st of May, 1866, he obtained his certificate as to his first insolvency in 1855. *Held* that K. was an uncertificated insolvent within the meaning of the "*Municipal Corporations Act* 1863," No. 184, Sec. 33, at the time of his election, and was, therefore, incapable of being elected a councillor. *Regina v. Knipe*, 3 W. W. & A'B. (L.,) 46.

[NOTE.—The corresponding Section of Act No. 506 is Sec. 53.]

27 Vic., No. 184, Sec. 34—Member Printing for Council.]—A member of a municipal council, a printer, who executed the printing required by the council, was held disqualified as a councillor, although his printing office was the only one within twenty-five miles round, and the work was done *bonâ fide* at the usual rates; and an order *nisi* to oust him was made absolute, with costs. *Regina v. Haverfield*, 5 W. W. & A'B. (L.,) 228.

[NOTE.—The corresponding Section of Act No. 506 is Sec. 54.]

Not Being on the Burgess Roll—No. 184, Sec. 32.]—In January, 1868, T. was elected a borough councillor. He had not paid his rates by the 30th of June previous, and was, therefore, not placed on the roll; but on the 28th of June he paid his rates. *Held*, on rule *nisi* for *quo warranto*, that under Sec. 32 of No. 184, a councillor must be entitled to be placed on the burgess roll for the time being in force before he is qualified for election; and that as T. was not so entitled, not having paid his rates, the rule must be made absolute. *Regina v. Thompson*, 5 W. W. & A'B. (L.,) 34.

Qualification for being a Member of a Road Board—Act No. 176, Sec. 33.]—*In re Cope, ex parte Egan, post* under LOCAL GOVERNMENT.

Payment of Deposit by Dishonoured Cheque—"Boroughs Statute," Sec. 80.]—Where a councillor had paid the deposit of £10 required from a candidate by Sec. 80 of the "*Boroughs Statute*," No. 359, by a cheque which was dishonoured, the Court made absolute a rule to oust him from office. *Regina v. Weickhardt*, 1 A.J.R., 78.

[NOTE.—The corresponding Section of Act No. 506 is Sec. 117.]

Act No. 506, Secs. 54, 71—Candidate Interested in a Contract with a Municipality.]—D. at the time of his nomination entered into a contract with a shire council to lease certain land from them for seven years and subject to certain covenants in the lease. D. was elected but did not take his seat. Afterwards D. endeavoured by a letter to resign, and his resignation being accepted, an extraordinary election was held to fill the supposed extraordinary vacancy at which D. was again elected. On a rule to oust from office, *Held* that D. was interested within the meaning of Sec. 54 of Act No. 506, and did not become a councillor either *de jure* or *de facto* at the first election, and that as he had nothing to resign there was no extraordinary vacancy, and that, therefore, the second election was void. Rule absolute. *Regina v. Drevermann, ex parte Watson*, 6 A.L.T., 141.

Rule to Oust, Who May Obtain—Relator Who Has Voted.]—A person who has voted for a candidate whom he knows to be disqualified, cannot afterwards proceed to set aside the election. When, however, such person, although he has voted at the election, did not acquiesce in considering the candidate's qualification sufficient, he may proceed to set aside the election. *Regina v. Eddy, ex parte Forbes*, 2 A.J.R., 83.

Rule to Oust—Heading.]—"In the Supreme Court" is a sufficient heading in a rule to oust a councillor. *Regina v. Joseph, ex parte Oliver*, 6 A.L.T., 85.

Councillor declared Elected not Taking Seat—Rule to Oust—"Local Government Act 1874," Sec. 71—Mandamus.]—An application under Sec. 71 of the "*Local Government Act* 1874," is not the proper proceeding to annul an election where a councillor declared duly elected has not taken his seat or done any act which would have the effect of filling the seat. The proper proceeding is by way of *mandamus* to compel the council to hold an election. *Re Cordell, ex parte Walsh*, 6 A.L.T., 47.

Rule to Oust—Quo Warranto.]—A councillor was elected to fill a vacancy, there being two vacancies, but he was not elected specifically for either vacancy. One of the councillors in whose place the new ones were elected should have retired within twelve months of the election and it was sought to obtain a rule to oust one of the new ones eighteen months after the election. *Held* that the rule to oust could not be granted, having been made more than six months from the time of the election, and that the proper course was by *quo warranto*; and a rule for *quo warranto* granted on payment of costs. *Regina v. Donaldson*, 1 A.J.R., 162.

Practice—Rule to Oust—Grounds.]—It is not enough for a rule *nisi* to oust a councillor to state that he was unduly elected, but such rule must state fully the grounds of disqualification, and leave to amend such a rule was refused. *Regina v. McDougall, ex parte Dingsdale*, 4 A.J.R., 153.

Practice.]—Where answering affidavits state facts which raise a suspicion that a relator, in an application to oust from office, is put forward by a disappointed candidate, who has disqualified himself by waiver and acquiescence from raising the objection, the Court before granting a rule absolute for ouster, requires an affidavit that there was no collusion between such person and the relator. *Regina v. Jones, ex parte Darcy*, 5 V.L R. (L.,) 334; 1 A.L.T., 50.

Amendment of Rule and Affidavits—Costs.]—When a rule *nisi* to oust a member of a "district" board, and the affidavits in support of the application called the board a "road" board, the error was allowed to be amended at the hearing of the argument, but costs were given against the parties amending. *Regina v. Munday, ex parte Daft*, 5 W. W. & A'B. (L.,) 143.

Rule to Oust — Improperly Elected Municipal Councillor Refusing to Resign—Costs.]—Where an improperly elected councillor had not acted or taken his seat, but had refused to resign, *Held* that he should pay the costs of a rule to oust him, which was made absolute. *Regina v. Wilson*, 1 A.J.R., 150.

Rule to Oust—Resignation—Costs.]—A borough councillor, who has been elected without any qualification, cannot, by resigning after a rule to oust has been obtained, relieve himself from the costs of making the rule absolute. *Regina v. Peck*, 4 A.J.R., 117.

"Melbourne Corporation Act," Sec. 35—6 Vic., No. 7, Sec. 49—Mayor-Elect—Retiring Councillor.]—A councillor whose turn it was to go out of office on November 1st, was, on October 9th, chosen to be mayor-elect. He did not take advantage of the enlarged term of tenure given by Sec. 35 of the "*Melbourne Corporation Act*," No. 178, but retired, and was elected, notwithstanding the protest of the other candidate that by virtue of Sec. 35 of No. 178, he was already a councillor. *Held* that the office of "mayor-elect" was not an office within the meaning of Sec. 49 of 6 Vic., No. 7, so as to disqualify him from being elected to fill the vacancy caused by his retirement; that though he became a supernumerary councillor *ex officio*, he still had to go out by rotation, as *elected* councillor, and that the turn to go out does not then fall upon the councillor whose turn it would be to go out after him. *Ex parte Bent*, 2 V.L.R. (L.,) 246.

(5) *Bribery.*

Penalties For—24 Vic., No. 114.]—C. and M. were proprietors and publishers of a paper circulating in a district of which C. was elected a member of the municipal council. Before and after the election the council sent advertisements to the paper and subscribed to it. Shortly before the election, while negotiations were pending between C., M. and one M'L. to let their office to M'L. as a job printing office, the council accepted M'L.'s tender to print an electoral roll without C.'s or M.'s knowledge, and just before the election M'L. took the office and printed the roll, but C. and M. derived no benefit nor ratified the contract, and made

no entry of it. C. was elected a member. *Held* that C. had incurred no penalties under the Act, since the purchase of the paper and sending advertisements by the Council were not within the meaning of the Act, and the Council's contract was not executed by C. *O'Dwyer v. Casey*, 2 W. & W. (L.,) 85.

(B) Corporations other than Municipal.

"Quorum."]—A "quorum" of a body means those present, when all should and might be present; not a casual meeting of the required number of the body. *Brougham v. Melbourne Banking Corporation*, 6 V.L.R. (E.,) 214, 222; 2 A.L.T., 81.

Power to Acquire Property in Violation of Charter.]—*Semble*, a corporation may have a good title to property acquired in violation of its charter. *London Chartered Bank v. Hayes*, 2 V.R. (E.,) 104; 2 A.J.R., 60.

(c) Liability of Corporations on Contracts and Otherwise.

(1) *Contracts and Resolutions.*

(a) *Generally.*

Act No. 506, Secs. 169, 173—Position of Person Contracting—Formality of Meeting.]—The outside public are not required in contracting with a shire council to ascertain that all the internal formalities have been complied with, but they are bound to know the extent of the powers conferred by the Act of incorporation, and to see that the formalities essential to the constitution of the contract itself are complied with—*e.g.*, that the seal is attached and duly attested. Where, therefore, a contractor was called before a meeting of councillors sufficient to form a quorum, and purporting to act as a duly constituted meeting, and was told that his tender was accepted, *Held* that he was at liberty to assume that every form necessary to constitute a meeting had been observed. *Shire of Gisborne v. Murphy*, 7 V.L.R. (L.,) 63; 2 A.L.T., 118.

Contract Not Under Seal—Fraud.]—Courts of Equity do not allow corporations to use their incompetency to act without seal, to obtain the advantages of incomplete bargains, and then repudiate them in a manner which would operate as fraud. *Connolly v. Shire of Beechworth*, 2 V.L.R. (E.,) 1; for facts *see* S.C. *post* under Specific Performance; and *see* S.P. *Trainor v. Council of Kilmore, post column* 230.

(b) *When Sealing Necessary.*

Contract for Erecting a Dam—Municipal Corporation.] — In contracts with corporations, other than joint stock companies, all the formalities required in their execution should be observed. The affixing the seal of the corporation affords all members a protection on which they rely against the assent of the whole body being improperly pledged, and an objection to a contract on the ground of the seal not being affixed should be held valid if urged. In an action against a corporation for the erection of a large dam, a verdict was given for plaintiff, and a rule *nisi* for nonsuit was obtained on the ground *inter alia* that the contract was not sealed. *Held*, that since the contract sued on was dependent wholly on the instrument, and it was not for any matter essential to the corporation or for carrying on its business, and for work executory and not executed, it should have been under seal. Rule made absolute. *Barker v. Municipal Council of Clunes*, 2 W. & W. (L.,) 315.

Attorney's Bill of Costs—Retainer Not Under Seal.]—Where a solicitor's retainer was not under seal but the solicitor was appointed by a resolution of a council, *Held* that a retainer under seal was essential to enable plaintiff to recover on his bill of costs. *Shire of Colac v. Butler*, 5 V.L.R. (L.,) 137; 1 A.L.T., 3.

Where a seal of a company is attached to the document appointing a solicitor, the Court will presume it was duly attached. *Jones v. Star Freehold Company, ante column* 160.

"Mining Company's Act," No. 409, Sec. 48.]—A bill of sale given by a mining company was sealed with the company's seal, but was not so sealed in the presence of two directors as required by the rules of the company; these rules, however, did not require attestation by the directors. *Held* that, under Sec. 48 of the Act No. 409. the bill of sale was binding on the company. *Newey v. Rutherford*, 3 V.L.R. (L.,) 340.

(c) *When Sealing Unnecessary.*

Contract Acted on—Consideration Executed.]—When the consideration for a release by an official assignee of an insolvent's equity of redemption to a corporation (mortgagee) is an agreement not under seal by the corporation to abstain from proving any portion of its debt, and such agreement has been acted on by accepting the release, *Held* by Privy Council, reversing *Molesworth, J.* (3 V.L.R., E., 190,) that the corporation is bound thereby, and that the consideration has not failed. *Melbourne Banking Corporation v. Brougham*, L.R., 4 App. Cas., 156.

Corporation Taking Benefit Under Agreement not Under Seal—Not Allowed to Repudiate it.]—Where a corporation kept possession of certain land, the subject of an agreement for sale, even although such agreement was not under seal, the Full Court *Held*, apart from the ground of part performance (on which ground *Chapman, J.*, had held they were liable,) that the corporation were liable for the purchase money, as it must be presumed they took the land under the agreement, and that, therefore, it was only just that they should pay for it. *Trainor v. Council of Kilmore*, 1 W. & W. (E.,) 293, 301, 303, 306.

Executed Contract—Liability for Nuisance Committed Under.]—A borough council entered into an agreement with B. that he should receive nightsoil from the nightmen and dispose of it in a certain reserve. The corporation supervised the disposal of the nightsoil in the garden, and subsequently returned to B. a deposit which had been required from him as security for the due performance of it. The

contract, though signed by B., was not sealed by the council. A nuisance was committed by the improper disposal of the nightsoil, and plaintiff sued the council for injury caused to him by such nuisance. *Held* that the council having ordered the work to be done, supervised, its execution, exercised control over it, accepted the work when done, and returned the deposit to the contractor, could not be permitted to say that there was no contract; and that they were liable. *Weir v. Mayor, &c., of East Collingwood*, 2 V.R. (L.,) 32; 2 A.J.R., 39.

The Court presumes that, when a professional gentleman says he appears on behalf of a Corporation, he is properly authorised. Rule for a prohibition applied for, on the ground that the attorney by whom a company was represented in the Police Court did not prove any retainer under seal—refused. *Regina v. Call, ex parte Gillow*, 6 W.W. & A'B. (L.,) 216; N.C., 15.

(2) *In Other Cases.*

"Town and Country Police Act 1854," No. 14, Sec. 5, Par. 19—License not Under Seal.]—K. obtained a license, not under seal, from a Municipal Corporation to slaughter cattle. This was issued subject to payment of certain market dues, which were not paid, and security for paving, flagging, &c., prescribed by the Act No. 14, was not taken by the Corporation. This license was revoked, on the ground that K. had not observed conditions. K. was summoned and convicted. A rule *nisi* to prohibit execution was obtained. *Held*, that the license should have been under seal, but that the one actually given was a substitute for what might have been given under the Act, and that K. should have conformed to its terms. Rule discharged. *Ex parte Kettle, in re McIntyre*, 2 W. & W. (L.,) 21.

Debentures Secured Upon a Special Rate—Act No. 184, Secs. 218, 239.]—A. sued on a debenture issued by the defendant corporation upon a special rate. The defendants demurred on the ground that they were not liable on the debentures except as to the amount of the special rate in their hands. *Held* that the fact that a special rate was assigned as a security did not relieve the corporation from liability as to its general funds, unless it was provided that that fund (the special rate,) was to form the sole mode of payment; that the words of Sec. 239 of the Act No. 184, providing for the appointment of a receiver "without prejudice to any other mode of recovery," pointed to the conclusion that the loan was intended to be a debt of the corporation, and that plaintiff was entitled to maintain his action. *Alroe v. Mayor of Sebastopol*, 5 V.L.R. (L.,) 217; 1 A.L.T., 22.

Ratification — Compromise.] — The ratification by the directors of a bank of an agreement for compromise entered into by the bank's solicitor does not bind the bank if the corporate seal be not attached. *Shiel v. Colonial Bank of Australasia*, 1 V.R. (E.,) 40; 1 A.J.R., 30.

(D) PROCEEDINGS BY AND AGAINST CORPORATIONS.

Parties.]—Where a corporation is doing an illegal act, the councillors who persist in the illegality are proper parties to a suit to restrain the illegality. *Attorney-General v. Shire of Hampden*, 2 V.L.R. (E.,) 221.

Suit to Restrain Injury to Strset—Parties.]—Where a municipal corporation is charged with the care and management of a street within its boundaries, it may, as representing the ratepayers, sue to restrain irreparable injury thereto without joining the Attorney-General as a plaintiff. *Mayor, &c., of Ballarat East v. Victoria United Gold Mining Company*, 4 V.L.R. (E.,) 10.

Suit to Restrain Mining.]—*Semble per Molesworth J.* The Attorney-General, a municipal corporation, and the owner of private property, cannot join in an information and bill to restrain mining for the different injuries, the one complaining of removal of gold, the other of injury to the streets, and the third of injury to his private property. *Attorney-General v. Rogers*, 1 V.R. (E.,) 132, 139; 1 A.J.R., 120, 149.

Joinder of Officer for Discovery.]—An officer of a corporation may be made a defendant to a suit for purposes of discovery merely. B., as agent for the defendant bank, was made a defendant merely for the purposes of discovery. *Held* he was a necessary party. *Droop v. Colonial Bank of Australasia*, 8 V.L.R. (E.,) 7, 12.

Action for Slander—Newspaper Company Registered Under Act No. 190—Act No. 212, Secs. 11, 12, 19.]—A newspaper company registered as a corporation under Act No. 190 cannot, as a corporation, make the affidavit required by a newspaper proprietor under Act No. 212, and cannot enter into the recognizances prescribed by Sec. 19 of that Act; it cannot therefore lawfully carry on the business of newspaper proprietors nor maintain an action for slander in such business. A plea of not guilty is sufficient to raise a defence to such action. *Daily Telegraph Newspaper Company v. Berry*, 5 V.L.R. (L.,) 469; 1 A.L.T., 103.

Injunction to Restrain Corporation from Accepting Tenders.]—Where an injunction restraining a municipal corporation from accepting tenders for contracts was obtained *ex parte* upon the statement that tenders had been called for, when, in fact, instructions had been given to its officer to call for tenders, which he had not carried out, *Held*, as there was therefore no pressing emergency, and an omission to state all the facts, the injunction should be dissolved. *Attorney-General v. Shire of Wimmera*, 6 V.L.R. (E.,) 24; 1 A.L.T., 125.

Practice.]—Defendants cannot at the hearing for the first time raise an objection that the authority of a corporate plaintiff's solicitor to institute a suit is not proved to be under the corporate seal. *Astley United Gold Mining Company v. Cosmopolitan Gold Mining Company*, 4 W.W. & A'B. (E.,) 96, 110.

Costs.]—Where an information, which was brought against a corporation and certain councillors who were acting illegally, stated several acts which appeared unwarrantable, and the defendants admitted them without palliation, *Held* that the relator was entitled to his costs from the defendants, but decision refused in the suit, whether they should be paid by the corporation or by the individual defendants, on the ground that the Court had merely to deal with the plaintiffs on one hand and the defendants on the other, and not with the defendants among themselves. *Attorney-General v. Shire of Hampden*, 2 V.L.R. (E.,) 221.

Costs of Manager in Suit by Corporation.]—The costs of the attendance in the master's office of the manager of a corporate plaintiff will not be allowed, on taxation between party and party, except in so far as he attends as a witness. *United Hand-in-Hand and Band of Hope Company v. National Bank of Australasia*, 4 V.L.R. (E.,) 271, 273.

COSTS.

In Suits for Account.]—*See* ACCOUNT.

In Suits for Administration.]—*See* ADMINISTRATION.

Of Appeal.]—*See* APPEAL.

Of Arbitration.]—*See* ARBITRATION.

In Winding-up of Company.]—*See* COMPANY.

In Proceedings By or Against a Corporation.]—*See* CORPORATION.

Of Proceedings in County Court.]—*See* COUNTY COURT.

In Actions of Slander and Libel.]—*See* DEFAMATION.

Of Commissions to Take Evidence.]—*See* EVIDENCE.

Of Executor and Administrator.]—*See* ADMINISTRATION AND EXECUTOR.

In Matrimonial Proceedings.]—*See* HUSBAND AND WIFE.

Of Infant.]—*See* INFANT.

Of Injunctions.]—*See* INJUNCTIONS.

In Insolvency.]—*See* INSOLVENCY.

In Reference to Proceedings Before Justices and General Sessions.]—*See* JUSTICE OF PEACE AND SESSIONS.

Of Proceedings in Mining.]—*See* MINING.

Of Suits Between Mortgagor and Mortgagee.]—*See* MORTGAGE.

Of New Trial.]—*See* NEW TRIAL.

Of Specific Performance.]—*See* SPECIFIC PERFORMANCE.

Of Trustee.]—*See* TRUST AND TRUSTEE.

Of Vendor and Purchaser.]—*See* VENDOR AND PURCHASER.

And generally *see* various headings throughout the book.

(A) IN EQUITY.

(1) *Matters of Pleading.*

Of Plea and Argument when Costs in the Cause.]—Where a plea is held good in law, the costs of the plea and argument will be made defendant's costs in the cause. *Ramsay v. The Board of Land and Works*, 5 W. W. & A'B. (E.,) 16.

Dismissal of Bill—Injunction, Costs of Opposing.]—After a bill has been, on the motion of the defendant, dismissed with costs for want of prosecution, the Court cannot entertain a motion by the defendant for payment of the costs of opposing a motion for an injunction which was refused, the costs being reserved. *Gourlay v. Kyte*, 5 W. W. & A'B. (E.,) 194.

Dismissal of Bill—Defendants Not Appearing.]—Motion for dismissal of bill with costs as to those who had answered without costs as to those who had not. Bill dismissed with costs as to all defendants. *Lord v. Spence*, 5 A.J.R., 99.

Where Bill Dismissed on Objection Taken at the Bar.]—Where an objection upon which a bill was dismissed was not taken by answer or demurrer, but at the bar, the Court dismissed the bill without costs. *Douglas v. M'Intyre*, 10 V.L.R. (E.,) 249; 6 A.L.T., 90.

Costs where Objection Taken by Answer as Upon Demurrer—Costs of Defendant who is Not Required to Answer Demurrable Part of Bill.]—Where a bill is demurrable by reason of the Statute of Limitations, and the defence is not raised by demurrer or plea, but in the answer, and taken as a preliminary objection the bill was dismissed *with costs* against the principal defendant, and also *with costs* as against a defendant who was required only to answer two paragraphs not affecting the demurrable part of the bill. *Kemp v. Douglas*, 1 V.L.R. (E.,) 92.

Dismissal of Bill for Want of Prosecution.]—*See Govett v. Crooke, Thompson v. Tullidge, Flannagan v. Flannagan, and Virtue v. Cameron, post* under PRACTICE AND PLEADING—In Equity—Bill.

Technical Pleading.]—"I always give costs where the defence is merely one of technical pleading." *Per Molesworth, J. Attorney-General v. Mayor of Emerald Hill,* 4 A.J.R., 48.

Person Wrongly Disclaiming.]—Where a person having an interest in the subject matter of a suit when the bill is filed, puts in an answer disclaiming all interest, he is not entitled to his costs. *White v. London Chartered Bank of Australia,* 3 V.L.R. (E.,) 33, 48.

Effect of Joinder of Innocent Parties with Guilty Ones as Plaintiffs.]—In a suit against trustees for administration and accounts a tenant for life, who had been a party to breaches of trust, was joined as a co-plaintiff with infant remaindermen who were ignorant of such breaches. *Held,* that under such circumstances none of the plaintiffs were entitled to their costs. *Lane v. Loughnan,* 7 V.L.R. (E.,) 19; 2 A.L.T., 113.

Mining Company a Defendant—Manager Appearing by a Separate Counsel.]—In a suit against a mining company and its manager, if the manager has no interest distinct from the company, his appearance by a separate counsel is not justified, and he must abide his own costs. *United Hand and Band of Hope Company v. Winter's Freehold Company,* 3 A.J.R., 59.

A defendant, against whom no relief is sought, will not be allowed his costs, and should not inflict costs by putting in an answer. *Dight v Mackay,* 6 W.W. & A'B. (E.,) 163.

Persons Against Whom no Relief is Prayed Appearing.]—In a suit in which the bill prayed no relief against two defendants, who nevertheless appeared and defended the suit, *Held* that they should abide their own costs. *Benjamin v. Wymond,* 10 V.L.R. (E.,) 3; 5 A.L.T., 153.

Costs of Charge of Collusion, Where not Proved.]—In a suit to set aside a conveyance on the ground of fraud and collusion with the trustees of a prior settlement, the charge of collusion was not proved against the trustee who appeared. *Held* that the Bill should be dismissed with costs as against him, and that the plaintiffs were not entitled to have such costs over as against two other defendants, who were condemned in the other costs of the suit. *Ronalds v. Duncan,* 2 V.R. (E.,) 65; 2 A.J.R., 30, 45.

Charges of Fraud.]—A charge of fraud unsustained always carries costs against the unsuccessful party to the extent to which costs were occasioned by that charge. And a defendant who has set up a charge of misrepresentation to a suit for specific performance, which charge has broken down, and where the whole evidence was directed to that charge, must pay costs. *Bramley v. Parrott,* 7 V.L.R. (E.,) 172.

Charges of Fraud.] — General costs are not given to an unsuccessful defendant, on the ground that fraud was improperly imputed to him in the bill. *Walduck v. Corbett,* 4 W. W. & A'B. (E.,) 48, 55.

Where there is sufficient equity stated and proved to sustain a bill, an unsuccessful charge of fraud is only a matter affecting costs. *London Chartered Bank v. Lempriere,* L.R. 4 P.C., 572.

2. Other Cases.

Of Abandoned Motion.]—Where a motion had been listed by a party to a suit, and, after service and before the day for hearing, notice was given to the other parties of withdrawal, and the motion had been struck out of the list, the Court refused to make an order for costs of the parties served, without notice to the party serving the notice. *Warren v. Lange,* 9 V.L.R. (E.,) 127.

Abandoned Motion.]—After bill filed by two partners of a firm of three against the third for dissolution, and after notice of motion for an injunction to restrain defendant from dealing with the partnership assets, plaintiffs voluntarily sequestrated the estate of the firm, and neither the motion was proceeded with nor the notice countermanded. *Held,* that defendant was entitled to have his costs, as in case of an abandoned motion. *Bates v. Loewe,* 1 W. & W. (E.,) 7.

See S.C. *post* under PARTNERSHIP.

Where a suit, viz., a suit to recover back a sum of money paid under mistake on a dissolution of partnership, is in its nature nearly like an action at law to try a right, the costs must follow the result. *Manson v. Yeo,* 1 W. & W. (E.,) 187, 192.

Unnecessary Notice of Motion.]—On a motion for liberty to a receiver to bring ejectment against a person in possession of land, the subject of the suit, and for an order that the person bring into Court the title-deeds of the land, separate notices of motion were given to the person of each branch of the motion, no order for costs was made, because, as an unnecessary notice was given, one portion of the costs might be set off against the other. *Royce v. Parker,* 1 W. & W. (E.,) 267.

Suit to Compel Election.]—In a suit to compel election, though the defendant was not called upon to elect till the bill was sealed, he was visited with costs for litigating as to the election. *Whitehead v. Whitehead,* 4 A.J.R., 165.

Of Rule for Payment of Dividends to an Assignee of a Debt Assigned After the Execution of a Creditor's Deed.]—Assignments of debts after the execution of a creditor's deed are not to be encouraged, and on making absolute two rules for payment of dividends to such an assignee, and to his assignor, who retained part of his debt, costs of only one rule allowed. *In re Sloman,* 1 V.R. (E.,) 129.

Of Undefended Suit—Prayer for Costs.]—Where a suit is undefended, and a decree made in the terms of the prayer of the Bill, the Court will not include in the original decree an order for payment of costs by the defendant, unless there is a specific prayer for payment of them. *Tyrrell v. Stewart*, 4 V.L.R. (E.,) 19.

Upon Appeal—Discretion of Primary Judge.]—Although on appeal the Court will entertain the question of costs, the appeal being launched on other grounds, yet a very clear case must be made out to induce the Court to interfere with the discretion of the Judge below. *James v. Greenwood*, 2 A.J.R., 41.

An Unsuccessful Plaintiff Refused Inspection of a Deed Until After Answer.]—A. brought a suit against trustees of a creditor's deed for payment of dividends under the deed and was, until after answer, refused inspection of the deed which at the hearing was held conclusive as to plaintiff's rights. *Held* that though A. was unsuccessful in the suit he was entitled to his costs up to inspection of the deed. *Hermann v. French*, 5 V.L.R. (E.,) 15.

Effect of Correspondence Upon Costs.]—Where repeated letters before suit from the plaintiff and his solicitor to the defendant were left wholly unanswered, and the plaintiff failed to establish his case, the bill was dismissed, but without costs. *Ogier v. Booth*, 9 V.L.R. (E.,) 160; 5 A.L.T., 109.

Writ of Distringas.]—Upon a return of a writ of *distringas* against the defendant bank which appeared to answer, the plaintiff moved for a rule *nisi* for sequestration against the bank, which was postponed until the defendant bank's motion to dismiss the writ should be heard. The Court having dismissed the writ upon such motion refused upon defendant bank's motion to make any order for costs as to bank's appearance to writ or of motion for sequestration. *United Hand-in-Hand and Band of Hope Company v. National Bank of Australasia*, 5 V.L.R. (E.,) 8.

(B) At Law.

(1) *Higher or Lower Scale.*

"Common Law Procedure Statute," No. 274, Sec. 440.]—Sec. 440 applies to defendants as well as plaintiffs. Costs in an action on a bill of exchange, where £100 was the amount sued for in the writ, and jury found verdict for defendant, taxed on lower scale. *Henry v. Newstead*, 3 A.J.R., 42.

In an action for breach of contract the amount claimed in the writ was £50, but in the declaration the damages were laid at £120. Verdict for defendant. Costs taxed on higher scale, because alteration had been made by plaintiff himself. *Sutton v. Gemmell*, 3 A.J.R., 83.

Where, in a similar action, the writ claimed £150 and the declaration £100, and a verdict was returned for £56. *Held* that taxation should be on higher scale. *Kronheimer v. Berghoff*, 3 A.J.R., 83.

Amount Claimed in Writ Governs.] — In an action on a bill of exchange, where the amount claimed in the writ was £53, and the defendant obtained leave to defend, and the amount claimed in the declaration was £105, the Court held that the amount in the writ governed the case, and costs taxed on lower scale. *Hornby v. Livingstone*, 3 A.J.R., 117.

Act No. 274, Sec. 440.]—"The debt or damage claimed in any action," referred to in Sec. 440, is the amount named in the writ and not in the particulars of demand. The writ claimed £200, and the particulars of demand showed a balance of £92. Costs taxed on higher scale. *Moorhead v. Reidle*, 5 V.L.R. (L.,) 11.

"Common Law Procedure Statute 1865," Sec. 440.]—The proper construction to be put upon Sec. 440 of the "*Common Law Procedure Statute* 1865," is that where the plaintiff's claim does not exceed £100, the costs of the successful party, whether plaintiff or defendant, and whatever may be the amount recovered, must be taxed on the lower scale; and that whenever less than £50 has been recovered, whatever may have been the amount claimed, costs must in this case also be taxed upon the lower scale. This applies only to cases in which Supreme Court costs are recoverable, and where the question is between the higher and lower scales, and does not affect cases within the "*County Court Statute.*" *Parsons v. McEwan*, 4 A.J.R., 157.

Act No. 274, Sec. 440.]—An action for false imprisonment was brought in the Supreme Court, and resulted in a verdict for plaintiff, damages £75, which by consent were reduced to £20. The cause of action arising in New Zealand it could not be brought in the County Court. The Prothonatary refused to tax except on County Court scale. A Supreme Court Judge in Chambers refused to certify for Supreme Court costs on the higher scale. On rule *nisi* for taxation on the higher scale, the Court refused to interfere. *Gonerson v. Muir*, 5 V.L.R. (L.,) 286; 1 A.L.T., 41

Act No. 274, Sec. 440.]—Plaintiff brought an action against defendant claiming £500. To the first count defendant pleaded a set-off exceeding £300, and obtained a verdict for £56. On the second count the plaintiff obtained a verdict for £25. *Held* that costs were to be taxed on the lower scale. *Tattersall v. Slater*, 5 A.L.T., 18.

Discretion of Judge.]—The Court will not interfere with the discretion of the Judge who tried the case, as to granting a certificate for costs on the higher sale. *Moore v. Nolan*, 4 V.L.R. (L.,) 465.

Action for Slander—Plea of Justification Not Proved.]—Defendant pleaded justification, but the Court held that the plea was not proved, and a verdict was returned for plaintiff with £5 damages. *Held* that costs of the action should be taxed on the higher scale. *Byrne v. Lewis*, 6 A.L.T., 116.

Suggestion to Enable Plaintiff to Obtain Higher Scale of Costs—"Common Law Procedure Statute," No. 274, Sec. 440, Schedule 39—Sec. 429.]—Rule *nisi* to enter a suggestion on the record to enable plaintiff to obtain the higher scale of costs in an action of trespass. The action was removed from the County Court into the Supreme Court by *certiorari* and the plaintiff got a verdict. The Judge certified for costs on the higher scale, Schedule 39 of No. 274, but the Prothonotary refused to tax on that scale unless plaintiff obtained a certificate that trespass was "wilful and malicious" (Sec. 429,) which the Judge refused to grant. At the trial a letter was proved warning defendant not to trespass, but it was uncertain and a matter of contest whether this letter came to defendant before or after the trespass. The suggestion was to enter this notice as before trespass. *Held* that such a suggestion might be traversed and Rule discharged. *Dunn v. Walduck*, 6 W. W. & A'B. (L.,) 41.

(2) *Matters of Practice and Pleading.*

Allowing Preliminary Objection.]—No Court, in allowing a preliminary objection, ever gives costs. *Regina v. Cogdon*, 2 V.R. (L.,) 134; 2 A.J.R., 84.

Person Taking Technical Objection.]—An objection, though technical, if taken at the proper time, generally entitles the successful objector to his costs. *In re Phelan*, 3 W.W. & A'B. (I. E. & M.,) 1.

Of Defendant Causing Case to Become a Remanet.]—A defendant, who had obtained a transfer of a cause from the list for trial by juries of four, to that by juries of twelve, after the prescribed time for such an application, on terms of paying the costs of and occasioned by the application, was held liable to pay the costs occasioned by the cause being made a *remanet* to the next sittings. *Ray v. Synnot*, 2 V.L.R. (L.,) 112.

Of Interrogatories—Interrogatories Not Used.]—The costs of interrogatories not used at the trial by the party delivering them, should in ordinary cases be disallowed, unless the application for interrogatories has been an act of prudence on the part of the attorney, for the omission of which he would be liable to an action of negligence. *Per Higinbotham, J.* (in Chambers.) *English, Scottish, and Australian Chartered Bank v. Adcock*, 3 A.L.T. 27.

Costs of Claimant not Proceeding to Trial—"Common Law Procedure Statute 1865," Sec. 191.]—*Per Stawell, C. J.* (in Chambers.) The Court has power, under Sec. 191 of the "*Common Law Procedure Statute* 1865," to award costs against a *claimant* failing to proceed to trial of an issue. *Caton v. Oriental Bank*, 3 A.L.T., 104.

Of Amendment to Cure a Nonsuit.]—Where on a nonsuit point the plaintiff declined to amend at the trial, but obtained leave to apply to the Court in Banco to amend, so as to cure the nonsuit, if the Court in Banco should consider amendment necessary, and the Court in Banco did consider such amendment necessary, on the argument of the rule *nisi*, and that the objection was fatal unless the plaintiff amended, *Held* that under the circumstances the plaintiff should have leave to amend, and without payment by him of the costs of the trial or of the rule. *Ross v. Adelaide Insurance Company*, 1 V.R. (L.,) 232; 1 A.J.R., 170.

Of Appeal From Nonsuit.]—A successful appellant against a nonsuit is entitled to his costs of appeal, though he made no application in the Court below to set aside the nonsuit. *Rule v. Lobbe*, 4 V.L.R. (L.,) 427.

(c) Under "Judicature Act 1883," and "Supreme Court Rules 1884."

Rules of Supreme Court, August, 1884—Rule 6 (a) Action of Ejectment.]—*Per Williams J.* (in Chambers.) Rule 6 (*a*) of August, 1884, does not apply to actions in ejectment. *Rudduck v. Clarke*, 6 A.L.T., 45.

Application in Chambers—Powsr of Judge to Fix Costs.]—*Per Holroyd, J.* (in Chambers.) A Judge in Chambers has no power without the consent of both sides to fix the amount of the costs of an interlocutory application in Chambers. *Freehold Investment and Banking Company v. Thompson*, 6 A.L.T., 65.

Discretion of Judge in Chambers as to Costs "Judicature Act 1883," Sec. 22—Ordsr 65, Rule 1.]—Where a plaintiff made an application for the costs of attending a summons under Sec. 43 of the "*County Court Statute* 1869," *Held, per Higinbotham J.* (in Chambers,) that the combined effect of Sec. 22 of the "*Judicature Act* 1883," and Order 65, Rule 1, was to allow a Judge in Chambers to exercise the full discretion now vested in the Court with regard to costs, and granted the application. *Fahey v. Ivey and Kennedy*, 6 A.L.T., 26.

Jurisdiction as to Costs of Judge in Chambers—Act No. 761, Sec. 22.]—*Per Williams, J.* A Judge in Chambers has power to deal with costs under Sec. 22 of Act No. 761. *Coulson v. Campbell*, 6 A.L.T., 89.

(d) Generally.

(1) *Mode of Ascertaining, Taxation, &c.*

Taxation of Solicitors Bills of Costs, Generally.]—*See* Solicitor.

When Taxable.]—Where personal representatives have actually paid costs, and an agreement has been effected by which certain items were to be allowed, and the master was to "moderate" others, and a sum of £150 was struck off, *Sembls, per Molesworth, J.*, that the whole costs were liable to taxation. *Held*, on appeal, that the striking off of the sum of £150, in lieu of moderation, was a waiver of the right (if any) to have the whole costs taxed. *Attorney-General v. Huon*, 7 V.L.R. (Eq.,) 30, 39, 45; 2 A.L.T., 138.

Subject Matter Within County Court Jurisdiction.]—Where value of subject matter of suit in the Supreme Court is under £500, costs in such a suit should be taxed on the County Court scale. *Cunningham v Gundry*, 3 V.L.R. (E.,) 51.

Transfer from County Court — "County Court Statute," Sec. 44.]—By virtue of Sec. 44 of the "*County Court Statute* 1869," No. 345, if a defendant removes a cause from the County Court to the Supreme Court, and the plaintiff recover a verdict for any amount, the plaintiff is entitled to his full costs, as between party and party, without any Judge's certificate, rule, or order, and free from the effect of any privative statute, or of those which direct that costs shall be taxed on different scales, according to the amount recovered. *Gerard v. Kreitmayer*, 2 V. R. (L.,) 174; 2 A.J.R., 112.

Re-Taxing—How Dispensed With.]—Where in an action in which costs have been already taxed as between party and party, and under such taxation costs have been paid or are payable to one party, and such party then changes his attorney, if he thinks the items already taxed as between party and party should not be re-taxed, he need not consent to tax within the month mentioned in 11 Vic., No. 33, but may wait till the month has expired, or may go before a Judge within the month, and stating the special circumstances of the case as the reason why the items already taxed should not be re-taxed, and obtain such special order as may be proper under the circumstances. *Ex parte Mouatt*, 1 W. & W. (L.,) 339.

Summons to Review Taxation.]—Upon a summons to review taxation the party seeking to review should have his costs, if successful, in principle, although the amount gained be small. *Hardy v. Wilson*, 9 V.L.R. (E.,) 135.

Taxation — Costs of — Change of Attorney.]—Where under a taxation of costs in an action as between party and party costs have been paid or become payable to one party, and such party then changes his attorney, and within the month mentioned in 11 Vic., No. 33, has the costs taxed as between attorney and client, and the Prothonotary re-taxes the whole bill as it is; the items already taxed as between party and party must be included in such bill, in order that the propriety of the *extra* costs may be judged of by the taxing-officer; and the costs of taxation will depend, not on the bill of *extra* charges only, but on whether there is, or is not, a reduction of one-sixth of the whole bill. *Ex parte Mouatt*, 1 W. & W. (L.,) 339.

Where the Prothonotary in taxing costs made an affidavit showing "that he had exercised a discretion, and had in fact allowed only so much as, in his opinion, the plaintiff would have been entitled to, had the issues on which he succeeded been the only ones on which the parties went to trial," the Court refused to interfere, although it was of opinion that the taxation was inconsistent. *Bowie v. Wilson*, 1 W. & W. (L.,) 252.

Of Abortive Trial.]—The costs of an abortive trial should be disallowed. When, therefore, at a trial the jury were discharged, and the case set down for a second trial at the same sittings, and on the second trial a verdict was found for the plaintiff, he was nevertheless disallowed the expenses of his witnesses for attending the Court five days previous to the abortive trial. *Finlayson v. Adelaide Fire and Marine Assurance Company*, 1 A.J.R., 116.

"Common Law Procedure Statute 1865," Sec. 141 —Effect of.]—Sec. 141 of the "*Common Law Procedure Statute* 1865," merely prescribes the method of obtaining costs of the day, &c., and does not award them as a matter of course, and a rule for costs drawn up under this section will be set aside, if there be a reasonable ground shown for withdrawing the record. *Searle v. Hackett*, 2 A.L.T., 88. Confirmed on appeal.

Certificate—Delay.]—A plaintiff recovered 1s. damages in an action for libel, and immediately afterwards applied to the presiding Judge for a certificate for costs. The Judge reserved his decision, and twenty-six days afterwards granted the certificate. On an application to set aside the certificate on the ground that he was only empowered to give the certificate immediately, and not to allow such a long time to elapse between the application and the grant of the certificate, *Held* that the Judge was not bound to give the certificate at once; that the defendant being present when the decision was reserved, if he had wished to object should have done so at once, and that the certificate should not be set aside. *Henderson v. Daily Telegraph Company*, 2 V.R. (L.,) 201; 2 A.J.R., 118.

Certificate for Costs—Informal.]—An informal or insufficient certificate for costs is a mere nullity, and need not be set aside. *Noyes v. Robertson*, 3 V.L.R. (L.,) 195.

Trespass—No Certificate at Trial—Act No. 274, Sec. 429—Act No. 345, Sec. 41—Order to Tax.]—In an action for trespass, where the plaintiff recovered less than £10, the Judge refused at the trial a certificate of costs, under Sec. 429 of No. 274. A subsequent application was made for a certificate under Sec. 41 of Act No. 345, which was refused; plaintiff then obtained an order to tax his costs under the County Court scale. On a rule *nisi* to set aside the last-mentioned order, *Held*, that Sec. 41 of No. 345 does not profess to repeal Sec. 429 of Act No. 274, and there was no repeal by implication, and that as the certificate required by 3 and 4 Vict., Cap. 24, had not been obtained, the order to tax costs was a nullity, and there could be no waiver of it. Rule absolute. *Pearce v. Thomas*, 7 V.L.R. (L.,) 125; 2 A.L.T., 137.

In Action for Trespass—Certificate—3 & 4 Will. IV., Cap. 42, Sec. 32—8 & 9 Will. III., Cap. 11.]—The Act 8 & 9 Will. III. Cap. 11, which enables a Judge to give a certificate that there was reason for joining a defendant who succeeds, so as to deprive him of costs, is in force in this

colony, but applies only to actions for pure trespass; but the provisions in Sec. 32 of the Act 3 & 4 Will. IV., Cap. 42, which is more extensive, have not been incorporated in the "*Common Law Procedure Statute* 1865," and a Judge, therefore, cannot give such a certificate in actions for trespass on the case. *Dakin v. Heller*, 4 V.L.R. (L..) 114.

Certificate for Costs in Action to Try a Right.]—*Gill v. Ellerman*, *post* under TRESPASS—To Land, &c.

(3) *Security for Costs.*

By Plaintiff Resident in New South Wales.]—A plaintiff resident in New South Wales need not give security for costs, as the law of that colony, allowing a judgment of any other colony to be registered and enforced there, renders such security unnecessary. *Martin v. McDonough*, 2 V.L.R. (L.,) 37.

Applications for Security for Costs—Act No. 274, Sec. 441—Act No. 345, Sec. 43.]—*Per Higinbotham, J.* (in Chambers.) Under Sec. 441 of Act No. 274, applications for security for costs must be made before issue joined, and the provisions of that Section extend to applications under Sec. 43 of Act No. 345; where defendant has sufficient property in New South Wales to pay defendant's costs, no order for security will be made. *Reeve v. Tuthill*, 2 A.L.T., 146.

No security for costs can be required from a plaintiff if he is actually in Victoria, even though it appeared that the plaintiff had formerly lived in New Zealand, and her residence in Victoria was not likely to be permanent. *Brooks v. Smith*, 2 A.L.T, 147.

Who Need Not Give.]—*Per Higinbotham, J.* (in Chambers.) A person recently released from prison, who is in destitute circumstances, and who brings an action for his own benefit, is not liable to give security for costs, provided that he permanently resides within the jurisdiction of the Court. *Main v. Donald*, 6 A.L.T., 23.

The omission to set out the address of the next friend will not entitle the defendant to insist upon security for costs. *Graham v. Gibson*, 5 V.L.R. (E.,) 103.

(4) *Of and Against Particular Persons.*

Of the Crown.]—The rule as to costs—"That where the Attorney-General might at the hearing be called upon to pay costs had he been a private individual, there he ought not to receive costs"—applies also before the hearing, on a motion by plaintiff to dismiss his own bill. *Barber v. Barter*, 1 W. & W. (E.,) 153.

Per Higinbotham, J. (in Chambers.) Although the crown solicitor is a civil servant, and paid an annual salary by the Crown for all work done by him on behalf of Her Majesty, he is entitled to receive the costs incurred by him in opposing a rule *nisi* for a *mandamus* on behalf of an inspector of police. *Ex parte Slack*, 6 A.L.T., 23.

Costs Against Crown.]—Where the Crown has not unequivocally admitted the right of a petitioner, but has put him to prove his case, and put forward certain objections which were given up at the hearing, costs will be given against the Crown. *Allnutt v. The Queen*, 2 W. & W. (E.,) 135.

Attorney-General—Administration Suit.]—In an administration suit by Attorney-General claiming the estate for the Crown, inquiries were directed as to next of kin. The Attorney-General then refused to go on with the suit, as the Crown had no interest. *Semble*, the claim of the Crown having failed, the Attorney-General was not entitled to his costs of suit. *Attorney-General v. Huon*, 5 V.L.R. (E.,) 119.

Attorney-General.] — Where the Attorney-General sues for revenue purposes, or for the recovery of Crown property, and fails, he will not be allowed costs out of the property sued for. *Attorney-General v. Huon*, 8 V.L.R. (E.,) 182; 3 A.L.T., 131.

Where the Attorney-General instituted a suit for administration of an intestate's estate, but on the appearance of the next of kin, who proved their claims, though not parties to the cause, withdrew from the suit, his costs were not allowed. *Ibid.*

Except in cases arising out of charities, the Attorney-General is placed in the same position as a private individual as to costs. *Ibid.*

Agent's Charges—Commissioner's Fees—Taking Evidence on Commission.]—*See Anderson v. Berridge*, *post* under EVIDENCE—Commission for Examination of Witnesses.

Against Borough Councillor of Rule to Oust.]—*See Regina v. Peck*, 4 A.J.R., 117, *ante column* 228.

Of Official Assignee.]—An official assignee who takes no interest in property settled upon the wife of an insolvent, but who is made a party to a suit respecting such property, is entitled to his costs against the plaintiff. *Woodward v. Jennings*, 1 W.W. & A'B. (E.,) 1, 5.

Of Official Assignee.]—An official assignee of a person taking a beneficial interest under a settlement, who refuses, when applied to, to become a co-plaintiff, but does not then disclaim, and is therefore necessarily made a defendant, is not entitled to his costs. *Ibid.*

And *see* cases *post* under INSOLVENCY—Trustees and Official Assignees, their Rights, &c.

Public Body—Road Board.] —For circumstances in which the Court refused to give costs against a road board as a public body, *see Lindsay v. Tullaroop District Road Board*, 1 W.W. & A'B. (L.,) 61.

Married Woman—No Separate Estate.] — Where a wife is a co-defendant in a suit by official assignee or her husband, to set aside a conveyance as fraudulent and void, the wife having no

separate estate is not liable for costs. *Smith v. Smith*, 3 V.L.R. (E.,) 2.

See also S.P., *Shiels v. Drysdale*, 6 V.L.R. (E.,) 126, *post under* HUSBAND AND WIFE—Wife's Rights, &c.—In other cases.

Married Woman — Separate Property Without Power of Anticipation.]—The estate of a married woman settled to her separate use without power of anticipation cannot in anticipation be charged with costs. *Webster v. Yorke*, 6 W. W. & A'B. (E.,) 294, 301.

Incumbrancer of Principal Defendant—Suit for Specific Performance.]—An incumbrancer from the principal defendant will not be treated differently to him in the matter of costs. *Stewart v. Ferrari*, 5 V.L.R. (E.,) 200.

Foreigner Ignorant of English Language and Law.] —Where a foreigner, ignorant of the English language and laws, had for some time worked a portion of the land of a mining company under a parol agreement with the directors, and subsequently entered into a parol agreement with the manager to work other part of the company's land on tribute, which subsequent agreement was afterwards repudiated by the company, a suit by him for specific performance of the agreement having been dismissed he was not mulcted in costs. *Chun Goon v. Reform Gold Mining Company*, 8 V.L.R. (E.,) 128, 154; 3 A.L.T., 137.

Trustees and Mortgagees—Appeal for Costs.]—As regards trustees and mortgagees the question of costs is one of contract, not of discretion, and trustees and mortgagees are not to be deprived of their right to costs, except for some culpable conduct, of the existence or non-existence of which an appellate Court is at liberty to judge. *Per Stawell, C.J. Dryden v. Dryden*, 8 V.L.R. (E.,) 177, 181; 4 A.L.T., 25.

(5) *Of Counsel, Briefs, Instructions and Fees.*

Number of Counsel — Demurrer — Trial.] — In taxing costs as between party and party, only two counsel are allowed for on the argument of demurrers, and then only in heavy cases, and the fact of there being cross demurrers is not a special circumstance which will warrant the allowance of a greater number. And at the trial, three counsel will, in heavy cases, be allowed for on taxation. *Young v. Ballarat Water Commissioners*, 6 V.L.R. (L.,) 14; 1 A.L.T., 133.

Refreshers.]—Refreshers will be allowed to one counsel for attending on each day occupied by the jury in deliberating upon their verdict, where the case is of such a nature that the jury are likely to need the direction of the Court at any time. *Ibid.*

Taxation—Act No. 294, Sec. 440, Sch. 39.]—*Per Higinbotham, J.* (in Chambers.) The words in Sec. 39 "where costs are taxed on the lower scale the fees on briefs shall be allowed proportionally," necessarily involve a reduction of the reasonable and proper fee, proportional to the prevailing difference between the higher scale and lower scale, *i.e.*, a difference of one-half. *Everingham v. Waddell*, 3 A.L.T., 34.

Refresher Fees.] — *Per Higinbotham, J.* (in Chambers.) When a case occupies more than one day, *i.e.*, more than the time of one day, the Prothonotary has a discretion to allow refreshers to counsel; but where the case occupies less than the time of one day he has no discretion and cannot allow them. And, if the Prothonotary exercise his discretion erroneously, his decision ought not to be reversed, unless the mistake be a plain and also a serious mistake, or unless the Prothonotary acted on an erroneous principle. *Stephen v. Board of Land & Works*, 3 A.L.T., 112.

There is no rule which fixes the limits of a day of legal labour to six hours, or confers a right to refresher fees if these limits are exceeded in any degree however small. *Ibid.*

The hearing of a case was commenced at two o'clock on one day and was concluded at half-past two on the following day, occupying six and a-half hours in hearing. Refreshers were marked on the briefs of the plaintiff's counsel, and these amounts, together with a charge for attendance to mark them, were included in the plaintiff's bill of costs. On taxation these amounts were disallowed by the Prothonotary. *Held* that the Prothonotary was right in disallowing them. *Ibid.*

Number of Counsel.]—The name of a plaintiff having been inserted in a bill without his knowledge or authority, his name was ordered to be struck out, but the Court, holding that the case was perfectly clear, only allowed him the costs of one counsel. *Lane v. Goold*, 8 V.L.R. (E.,) 236.

Copies of Documents Accompanying Brief.]—The Court will not review the disallowance of costs of copies of documents accompanying brief to settle answers. *Hardy v. Wilson*, 9 V.L.R. (E.,) 135.

Number of Counsel.] — *Per Higinbotham, J.* (in Chambers.) The allowance or disallowance of charges made for a second counsel is a matter within the discretion of the taxing officer. *Austin v. Mackinnon*, 6 A.L.T., 19.

COUNSEL.

See BARRISTER-AT-LAW.

COUNTERFEIT COIN.

See CRIMINAL LAW.

COUNTY COURT.

Statutes.

"*County Court Act*," No. 29—Repealed.

"*County Court Statute* 1865," No. 261—Repealed.

"*County Court Statute* 1865 *Amendment Act*," No. 282—Repealed.

"*County Court Statute* 1869," No. 345—Part 4 relating to Probate Jurisdiction repealed by Act No. 427. Remainder, except Sec. 11, unrepealed.

"*County Court Statute* 1869 *Amendment Act*," No. 356.

I. Jurisdiction and Practice.

(1) *Jurisdiction.*

Equitable—"County Court Statute 1869," No. 345, Sec. 100 (2)—Devise of a Portion (not specified) of a Farm, the Value of the Part being Less, but that of Whole being Greater than Limit of Jurisdiction, £500.]—A testator devised and bequeathed unto his wife all his real and personal estate, with directions for her to manage his real estate (a farm of 120 acres) during her life, and to convey to his son B. a portion of 20 acres severed from such part of the farm as she should think fit when B. came of age. B. came of age, and assigned his interest by indenture to C. C. brought a suit in the County Court, praying that widow should be decreed to mark out a portion and assure it to him. The Judge of the County Court took the test of jurisdiction to be the value of the 20 acres, it appearing that the value of the whole farm was £555, and made a decree in plaintiff's favor. *Held* on appeal, by *Molesworth, J.*, that though County Court Judge had jurisdiction in a suit of this kind under Sub-division 2 of Sec. 100, when value was within the limit £500, yet that the test of jurisdiction was the value of the whole, the trust estate being the whole farm, and that County Court Judge had no jurisdiction. Decree reversed. *Boyle v. Carolin*, 3 A.J.R., 71.

Equitable—Suit for Performance of an Agreement not to Use a Patent—"County Court Statute 1869," Secs. 100, 101.]—The inventor of a patent, by deed, for consideration, transferred it to a company, with the sole privilege of using it. He subsequently used it for hire. *Held* that this was a breach of an implied contract in the deed, to prevent which a suit for specific performance might be maintained in the County Court under Act No. 345, Secs. 100, 101. *Shepherd v. The Patent Composition Pavement Company*, 4 A.J.R., 143.

Equitable—Patent Cases—"County Court Statute 1869," No. 345, Secs. 100, 108, 110—"Copyright Act 1869," No. 350, Sec. 55—It Liss on Defendant to Oust Jurisdiction—As to Amount Involved.]—*Per Molesworth, J.* Secs. 100 and 108 of Act No. 345 give an injunction jurisdiction to County Courts in cases where an action would lie. Sec. 55 of Act 350 enacts that County Courts shall have jurisdiction over actions, suits, &c., in matters relating to patents for inventions, and removes any restriction to such County Court proceedings under Act No. 345, and this most probably without reference to amount involved. It is not necessary in the equitable jurisdiction under the Act No. 345, having regard to Secs. 100, 110, for the plaintiff to show that the amount is under the jurisdiction to maintain his case, it lying upon the defendant to oust the jurisdiction. *Shepherd v. Patent Composition Pavement Company*, 5 A.J.R., 27.

Equitable—"County Court Statute 1869"—Specific Performance—Declaration of Trust—Subsequent Purchaser With Notice.]—In a suit for specific performance and a declaration of trust against a vendor and a subsequent purchaser with notice, *Held* that County Courts had jurisdiction under Sec. 100, even though the bill alleged fraud. *Cunningham v. Gundry*, 3 V.L.R. (E.,) 51.

Equitable—"County Court Statute 1869," No. 345, Sec. 100, Sub-sec. 7—Suit to Dissolve Partnership—Disputed Partnership.]—The County Court has jurisdiction in suits to dissolve partnership where existence of partnership is disputed. The fact that there is a genuine dispute as to existence of the partnership does not oust its jurisdiction, and the fact of partnership is one which a County Court Judge is competent to try; it arises in the suit itself, and is not extrinsic to the adjudication. *Lee v. Andrew*, 7 V.L.R. (E.,) 92.

Equitable—"County Court Statute 1869," Sec. 100, Sub-sec. 4—Exchange of Lands.]—An agreement for exchange of lands comes within the Sub-sec. 4 of Sec. 100 of "*The County Court Statute* 1869," No. 345, and the County Court has jurisdiction in a suit for specific performance of such an agreement if neither property to

be exchanged is above £500 in value. *Darcy v. Ryan*, 8 V.L.R. (E.,) 36; 3 A.L.T., 108.

Equitable—Setting Aside Sale of Mortgaged Premises—"County Court Statute 1869," Sec. 100.]—*Semble, per Holroyd, J.* (in Chambers,) that a suit to set aside a sale of property referred to a mortgage, and to have an account of what is due on an equitable mortgage, and to redeem the property comprised therein or to set aside the equitable mortgage, is within the jurisdiction conferred upon the County Court by Sec. 100 of the "*County Court Statute* 1869." *Andrew v. Figg*, 6 A.L.T., 86.

Cause of Action Arising Within the Jurisdiction.]—J., in Sandhurst, ordered goods of F. & Co., in Melbourne, "to be forwarded by a carrier to J., at Sandhurst," and F. & Co. delivered the goods in Melbourne to a carrier, to be taken to J., in Sandhurst. The Judge of the County Court at Melbourne nonsuited F. & Co. in an action for goods sold and delivered, on the ground that the cause of action did not arise "in some material point" nearer to the County Court at Melbourne than to the County Court at Sandhurst. Upon appeal, *Held*, that the cause of action did so arise, and that J. might be sued at Melbourne under the "*County Court Act*," No. 29, Sec. 3, *Flower v. Jackson*, 1 W. & W. (L.,) 42.

Causes of Action Arising Within the Jurisdiction.]—A contract was made by letter by H., in Melbourne, with S., at Newstead, for the delivery of flour by S., at Castlemaine. S. broke the contract, and H. sued him in the County Court at Melbourne, and was nonsuited on the ground that the suit should have been brought at Castlemaine. On appeal by H.'s attorney, who had not been allowed his costs on the ground that he was negligent in advising his client to sue in the wrong Court, *Semble* that the action was brought in the right Court. *Bullen v. Hooper*, 2 V.R. (L.,) 108; 2 A.J.R., 66.

Cause of Action Arising Within the Jurisdiction.]—A County Court has no jurisdiction to hear an action on a contract which was made and broken outside the local limits of its jurisdiction, even though the defendant may reside within such limits. *Crooke v. Smith*, 4 V.L.R. (L.,) 95.

Contract Made Out of the Colony.—A County Court has no jurisdiction in a case where the cause of action arose out of the colony. Where, therefore, C., in Melbourne, wrote to S., at Stuttgart, requesting that some goods, of which he gave a description, might be sent out to him, and stating that if they answered expectation he would give a large order, and some goods were forwarded by S. to C., a bill of lading being forwarded by S. in favour of C., and the goods arrived, and C. paid part of the purchase money, but declined to pay the balance, for which S. sued him in the County Court, *Held*, that the cause of action arose out of Victoria, inasmuch as the delivery to the carrier at Stuttgart was a delivery to C., and that the County Court had no jurisdiction. *Chapman v. Scheidmayer*, 1 A.J.R., 115.

Territorial Limits—"County Court Statute 1869," Sec. 5.]—The County Court has jurisdiction over an action for the price of goods, where the goods were offered by a person in Victoria, by letter, to a person in New Zealand, who accepted by letter giving general instructions to forward them, and was served with the summons while temporarily in Victoria, since the plaintiff being resident, the defendant served, and the delivery effected in Victoria, the cause of action arose there. *Green v. Lewis*, 4 V.L.R. (L.,) 197.

Property Converted in Victoria and Sold in India.]—Certain property was wrongfully converted in Victoria and shipped to and sold in India. The wrongdoer offered in Victoria to pay the owner the proceeds of the sale. *Held* that the Court had jurisdiction over a plaint for conversion, and also over a claim contained therein for money had and received. *Powell v. Gidney*, 5 V.L.R. (L.,) 20.

Breach of Contract—Test of Jurisdiction.]—On a contract for the sale of 4500 sheep, the price of which came to more than £250, 937, the price of which was under £250, were short delivered. On suit in the County Court for £70 5s. 6d., damages for short delivery, the evidence showed that the first contract had been rescinded, and a new one to take a less number of sheep substituted. The Judge nonsuited the plaintiff on the ground of want of jurisdiction. *Held*, on appeal, that the issue (*non assumpsit*) involved the validity of the original agreement, and that the case was therefore beyond the jurisdiction of the County Court. *Brown v. White*, 2 V.R. (L.,) 209; 2 A.J.R., 119. But *see infra*.

Breach of Contract.]—Where a contract was for doing certain work for a sum of £300, and the damages for breach claimed in the plaint were for a sum of £50, *Held* that the whole amount of the contract must be looked at and that the case was beyond the jurisdiction. *Hogg v. Irving*, 3 A.J.R., 59. But *see infra*.

Breach of Contract.]—G. and K. tendered for repairs to a ship. The contract was obtained for the sum of £1650, and the profits amounted to £354. A dispute arose as to the proportion in which the profits were to be divided, and G. sued K. in the County Court. The County Court Judge *Held* that the matter was beyond the equitable jurisdiction of the County Court, and transferred it to the Supreme Court. On summons in Chambers to remit it to the County Court, *Held* that the matter was within the equitable jurisdiction of the County Court, and order to remit made. *Glassford v. Kennedy*, 4 A.J.R., 108.

Breach of Contract—Act No. 345, Secs. 39, 47.]—*Held* overruling *Brown* and *White*, and *Hogg v. Irving*, and following *Glassford v. Kennedy*, and *Laven v. Flower*, that the amount of a contract is immaterial so long as the sum sought to be recovered in the plaint by virtue of it does not exceed the limited amount. *Cavanagh v. Sach*, 3 V.L.R. (L.,) 259.

For the facts of *Laven v. Flower*, in which the point turned upon the jurisdiction of Justices, *see post* under JUSTICE OF THE PEACE —Jurisdiction and duty—In other cases.

Amount Within the Jurisdiction—Sum Claimed in Particulars of Demand in Excess of Limit—"County Court Statute 1865"—"Amending Act," No. 282, Sec. 2.]—M'G. was an executor, and paid £1100, belonging to the estate, into a bank. K. was by the will appointed manager of certain property, and permitted by M'G. to draw cheques against the sum paid in. M'G. examined K.'s accounts, and required an explanation of a sum of £264. K. explained that £80 was spent in a way he thought satisfactory. M'G. sued K. in the County Court, issuing a plaint for £184, but claiming in the particulars of demand £264, and giving credit for the £80. By Sec. 2 of the Act No. 282, the County Court had jurisdiction over a claim on "balances of account where balance does not exceed £250." *Held* that, there being no evidence that an adjustment before action had been made by any person able to bind M'G. as to the £80 so credited, there was no jurisdiction. Prohibition granted against proceedings to enforce judgment in favour of plaintiff. *Regina v. Pohlman*, 4 W. W. & A'B. (L.,) 211.

Contract for Sale of Goods—Amount Reduced by Credits.]—M. agreed to purchase goods from C. to the amount of £274. M. refused to accept part of the goods, which were re-sold by C. C. sued M. for breach of contract and allowed credit in the particulars of demand for £27, the amount realised by the re-sale, and for £106 the amount of an accommodation bill accepted by C. and held by M. *Held* that the case was within the jurisdiction. *Murphy v. Clarke*, 3 A.J.R., 59.

Abandoning Excess—Act No. 345, Sec. 47.]—A plaintiff claiming as damages a sum in excess of the limit may, by abandoning the claim for the excess in his particulars of claim, bring the case within the jurisdiction and maintain his action. *Jensen v. Hagan*, 3 V.L.R. (L.,) 21.

Abandoning Excess—Act No. 345, Sec. 47.]—Where in a plaint the plaintiff indefinitely abandoned "all excess of any claim over and above the sum of £250." *Held* that it was sufficient to bring it within the jurisdiction. *Waxman v. McAuliffe*, 5 V.L.R. (L.,) 48.

Set-off Exceeding Limit.]—Where in an action for money lent brought in the County Court, defendant claims an amount (£318) by way of set-off exceeding the limit of the jurisdiction, the Court may satisfy itself as to the *bona fides* of the claim, and when so satisfied its jurisdiction ceases, and it can proceed no further. *Johnston v. Cox*, 1 V.L.R. (L.,) 284.

Act No. 345, Sec. 39—Balance of Accounts.]—A plaint claimed £244, but the particulars of demand showed a claim of £338 in respect of partnership transactions which was not reduced by credits to £250. The judge gave judgment for £246, the balance due up to date. *Higinbotham, J.* (in Chambers, under the Emergency Clause,) issued a prohibition. *Nicholson v. Plumpton*, 2 A.L.T., 140.

Joint Liability—Contribution Within Jurisdiction.]—Where a defendant is sued for contribution to a joint liability, the amount of which is beyond the jurisdiction of the County Court, if the defendant's contribution can be ascertained and is within the sum up to which the County Court has jurisdiction, the County Court has jurisdiction in respect of the case. *Parker v. Wood*, 2 A.J.R., 55.

Act No. 345, Sec. 77—Costs—Set-off Beyond Jurisdiction.]—The power of a Judge to give costs under Sec. 77 "whenever any action is brought which the Court has no jurisdiction to try," refers to want of jurisdiction appearing on the plaint itself, and before any evidence has been given. But where a defendant raises a defence of set-off which is beyond the jurisdiction, the Judge is then compelled to stay his hand, and the case being taken out of his jurisdiction by something which appeared during the course of the proceedings, he has no power to give costs under Sec. 77. *Regina v. Cope, ex parte Rawson*, 9 V.L.R. (L.,) 294.

Transfer Where Amount Exceeds £500 — Onus of Proof.] — Where in an administration suit an objection is raised as to the amount of the estate being beyond the jurisdiction of the County Court, the *onus* of proof lies on the defendant raising it, and the production of the probate showing the estate to have been sworn under £950, is not sufficient evidence of want of jurisdiction on that ground. *Martin v. Keane*, 4 V.L.R. (E.,) 115.

To Set Aside a Summons Where Judgment Registered in Supreme Court—"County Court Act," No. 261, Sec. 62.]—The words "no further proceeding" in Sec. 62 mean "proceedings with a view to advance," and not to set aside. The Judge of County Court has therefore jurisdiction, and not the Supreme Court, to set aside a judgment registered in the Supreme Court on the grounds of bad service of summons. *Wrixon v. Deehan*, 2 W. W., & A'B. (L.,) 16.

Act No. 345, Sec. 71—Setting Aside Judgment —Non-Service of Plaint Summons.]—Where judgment was obtained the defendant not being served with the plaint summons, and the Judge set the judgment aside, *Held* that the Judge had jurisdiction under Sec. 71 to set it aside, and the effect was the same as if the judgment had not been obtained, and in an action of trespass for issuing execution on such judgment, the plaintiff obtaining such judgment cannot justify under it. *Bruce v. Hart*, 7 V.L.R. (L.,) 482 ; 3 A.L.T., 73.

Foreign Judgment—Act No. 261, Secs. 2, 4.]—The County Court has only a local jurisdiction over judgments recovered in the colony, and has no jurisdiction in cases of judgments recovered in New South Wales. *Greville v. Smith*, N.C., 67.

Trying Title to Property Disposed of by Justices' Order Under "Justices of the Peace Statute," Sec. 121.]—B. H. mortgaged a mare to T. H., on November 21st, 1867. On May 26th, 1868, T. H. assigned the mare to the plaintiffs. The mortgage and assignment were duly registered, and on September 9th, 1868, a creditor recovered judgment against B. H., and the mare was levied on while in the possession of B. H. On September 28th T. H. gave notice that the mare was his property, and an interpleader summons was issued on September 22nd, when T. H. not appearing, the justices dismissed the interpleader summons, and ordered the sale under the execution to proceed. T. H.'s assignees then sued the purchaser in the County Court for recovery of the mare, and at the trial no order of the Justices, as mentioned in Sec. 121 of the "*Justices of the Peace Statute* 1865," was produced. *Held*, that the County Court had jurisdiction, and that plaintiff having had no notice of the interpleader summons were not bound by the order of the Justices. *Maritime General Credit Company v. Rands*, 1 A.J.R., 79.

Trial of Right to an Office.]—A County Court is not the proper tribunal to try the right to an office. *Smith v. Mayor, &c., of Clunes*, 5 W. W. & A'B. (L.,) 86.

In Matters of Trespass by Sheep—"Pounds Statute," Sec. 33.]—The "*Pounds Statute* 1865," Sec. 33, does not take away the jurisdiction of the County Court to give damages for trespass by sheep. *Mulhare v. Lindsay*, N.C., 14.

Commitment for Debt—Second Commitment for Same Debt—"County Court Statute 1869," Secs. 83, 84.]—A judgment debtor was summoned under Sec. 83 of the "*County Court Statute* 1869," and examined and an order made against him under Sec. 84 for payment of the debt by instalments, and for commitment in default of payment. Default having been made in payment of the second instalment the debtor was arrested under a warrant of commitment for the whole of the amount remaining unpaid, but was immediately discharged by the creditor on a part payment, with a promise to pay the balance. Default having been made in payment of the balance a second judgment summons was issued, and the debtor again committed. On rule *nisi* for a prohibition, *Held*, that the debtor having been arrested for the whole debt the jurisdiction was exhausted, and there was no power to make a second order under Sec. 84. *Regina v. Cope, ex parte Fraser*, 2 V.L.R., (L.,) 261.

Quære, whether there could be several commitments for default of payment of the several instalments where the amount of a judgment has been made payable by instalments. *Ibid.*

Fraud Summons—Debtor Committed—Insolvency—Discharge—"County Court Statute 1869," Sec. 89.]—A County Court Judge has no jurisdiction under Sec. 89 of the "*County Court Statute* 1869," to direct the discharge upon an *ex parte* application of a debtor committed under an order on a fraud summons, and who subsequently becomes insolvent. The application should be entertained in the presence of both parties. *Rowbottom v. Hennelly*, 6 V.L.R. (L.,) 409; 2 A.L.T., 85.

Act No. 345, Secs. 72, 73, 74—Action of Ejectment—Trial Without Jury—Waiver by Consent.]—The County Court Judge has no jurisdiction to try an action of ejectment without a jury under Secs. 72, 73, 74. Such a trial is a nullity, and not an irregularity, and the fact of the appellant consenting to such a trial does not operate by way of waiver, consent not operating to waive a nullity or create a jurisdiction. *Mason v. Ryan*, 10 V.L.R. (L.,) 335; 6 A.L.T., 152.

To Prevent Abuse of and Correct Irregularities in Practice.]—The County Court has an inherent power (though it has only the jurisdiction given by Legislature) to prevent the abuse of and correct irregularities in and frauds upon its own procedure and rules, and for that purpose to set aside proceedings which it may find to be void or irregular. *Mason v. Ryan*, 10 V.L.R. (L.,) 335, 340; 6 A.L.T., 152.

Act No. 345, Secs. 35, 68.]—Under Sec. 68 a County Court Judge has jurisdiction to reinstate a case, which has been struck out through a defect in the summons (the name of plaintiff's attorney not being registered in the County Court book,) and to order the action to be tried at the next sittings. *Giffard v. Unity Gold Mining Company*, 6 A.L.T., 159.

(2) *Practice.*

(*a*) *Service and Form of Plaint Summons.*

Service of Plaint—When Unnecessary.]—*Semble* that where defendant appears, and his counsel takes part in the examination of witnesses, it is unnecessary to prove service of the plaint. *Moore v. Prest*, 1 A.J.R., 151.

Service of Plaint—Affidavit.]—Where the plaint in a suit described the plaintiffs as trustees, but the affidavit of service did not so describe them, and it appeared that they were suing as trustees, *Held* that the affidavit was sufficient. *Ibid.*

Service of Plaint Summons.]—Service of a plaint summons may be effected by serving a copy thereof, the original being produced on demand. *Regina v. Bindon, ex parte Ah Soon*, 2 V.L.R. (L.,) 284.

Service of Plaint Summons—"County Court Rules," Order 3, Rule 17.]—A plaint summons against a defendant who had left Victoria was served upon an inmate of the defendant's place of business; the Judge thought such service insufficient, and dismissed the summons. *Held* that such service was sufficient within the meaning of Rule 17, and rule absolute for *mandamus* to Judge to hear the summons granted. *Regina v. Leech, ex parte Ah Poy*, 5 V.L.R. (L.,) 392; 1 A.L.T., 97.

Objecting to Sufficiency of Service — When Allowed—Rule 24 "County Court Rules."]—The County Court Judge dismissed a summons, asking that all proceedings on a plaint summons be stayed because it had not been properly served, on the grounds that the summons was irregular; that the question of service or no service should be decided by examination of witnesses when the case was called for hearing (Rule 24 "*County Court Rules*"); that it was a question entirely between the plaintiff and the Court, and that defendant could not appear to object to service but only to defend. *Edgerton v. Snowball*, 1 A.L.T., 204.

Plaint Tested as of a Day Subsequent to Return Day—Striking Out—Costs—Order 3, Rule 15.]—Where a plaint was tested as of a day subsequent to the return day, and the case was accordingly struck out for want of due service in accordance with the County Court Practice, Order 3, Rule 15, *Held*, that no costs could be awarded by the Judge of the County Court. *Regina v. Cope, ex parte Smillie*, 2 A.L.T., 66.

Plaint Summons—Occupation of Plaintiffs Not Stated.]—A plaint summons described the plaintiffs as "trustees," and gave their address by post as "to the care of H., Lydiard-street, Ballarat." *Held* that this was an insufficient description of the occupation of the plaintiffs. *Shaw v. Hamilton*, 2 A.J.R., 86.

Plaint—Particulars of Demand Annexed—"County Court Rules 1881," Rule 62.]—The particulars of demand annexed to the scheduled form of plaint are, under the "*County Court Rules* 1881," Rule 62, to be read as incorporated with the plaint. *Lawes v. Price, Warren v. Price*, 8 V.L.R. (L.,) 250.

Act No. 345, Sec. 56—Special Summons.]—A claim for goods sold and delivered, the price not being previously fixed, is a liquidated demand for which a special summons under Sec. 56 may issue. *Britt v. Merizzi*, 5 A.J.R., 161.

Pleading—Rules, Order 3, Rule 2—Bill of Exchange.]—Under Rule 2 of Order 3 a bill of exchange may be set out verbatim with endorsements, or by a statement of the legal effect of the bill and endorsements. *Morton v. Jacks*, 5 V.L.R (L.,) 181; 1 A.L.T., 12.

Pleading—Suing as Mortgagee—Order 3, Rules 89, 90.]—A building society sued in ejectment in the County Court. The plaint described the plaintiff as mortgagee in fee. It appeared that the plaintiff had a certificate of title in fee, and that a deed of defeasance had been executed between plaintiff society and the defendant reciting the transfer from the defendant to the society of even date, under which the plaintiff society was registered. *Held* that the society had substantially proved the allegation that it was suing as mortgagee. *Delany v. Sandhurst Building Society*, 5 V.L.R. (L.,) 189; 1 A.L.T., 13.

Endorsement on Plaint Summons.]—An objection that a plaint summons is not endorsed with the name and place of abode of the issuing attorney should be taken by means of a preliminary application, and is too late if taken at the hearing. *Ibid.*

Pleading—Plaint not Alleging that Married Woman has Separate Property.]—In a plaint the plaintiff was described as "M. R., the wife of T. R.," and she sued for injuries done to certain land of which "she was possessed." The plaint did not allege that she had separate property. The judge offered an amendment, and on refusal, nonsuited her. *Held* that no amendment was necessary; that as a married woman she could not be possessed of the property except as her separate estate, and the objection went to a matter of proof. Appeal allowed. *Ryan v. Topham*, 5 V.L.R. (L.,) 281; 1 A.L.T., 41.

(*b*) *Defence.*

Signing Notice of Defence—Attorney—"County Court Statuts," Secs. 35, 56.]—Where a defendant's attorney signed the notice of defence as required by Sec. 56 of the "*County Court Statute*," No. 345, but the attorney had not signed the roll as required by Sec. 35 of the Act, and before doing which no attorney is authorised to "act or appear" for any person, *Held* that the words "act or appear" did not apply to appearing in Court only, and that the notice of defence was bad. *Regina v. Cope, ex parte Huthnance*, 1 A.J.R., 23.

Notice of Intention to Defend.]—A notice of intention to defend under the "*County Court Statute*" is like a plea, and is delivered within sufficient time if delivered before judgment is signed, although it may have been delivered beyond the time prescribed for delivery. *Masterton v. Blair*, 2 V.R. (L.,) 19; 2 A.J.R., 16.

Special Defence—Notice of Delivered Too Late.]—It is within the discretion of a County Court Judge to say if he will allow a special defence to be entered into if notice be not properly given. *Ibid.*

Notice of Special Defence—Act No. 345, Sec. 58—Rules, Order 3, Rule 53.]—Notice of special defences (*inter alia*) "*The Statute of Limitations*" was served upon the plaintiff, but no copy was delivered to the Registrar under the rules. The Judge gave defendant leave to lodge a copy *nunc pro tunc*. *Held* that Sec. 58 of the Act only provided for delivery of a copy to the plaintiff, and that sufficient notice was substantially given. *Weigall v. Gaston*, 3 V.L.R. (L.,) 98.

Stating Defence—"County Court Rules 1881," Rule 157—Stating Different Defence.]—*Per Higinbotham, J.* If a defendant give, under "*County Court Rules* 1881," Rule 157, a concise statement of his defence to the action, and of the points on which he relies, the effect of this is to limit his evidence to the matters included in the defence and points so stated. He cannot set up another defence without the leave of the Court. *Howse v. Glowry*, 8 V.L.R. (L.,) 280, 284.

(c) *Amendment of Plaint Summons.*

Amendment—Costs.]—Where a plaint summons was held informal by a County Court Judge, and the plaintiff's attorney refused to amend, and the Judge ordered the case to be struck out with £1 15s. costs, on appeal, *Held* that the Court had no jurisdiction to determine whether the amount of costs which the Judge would have awarded as a condition for amendment was excessive or not. *Shaw v. Hamilton*, 2 A.J.R., 86.

Amendment of Summons—Order 3, Rule 3, "County Court Rules."]—Where an amendment of a plaint summons, which was defective in not containing the number of the plaint under Order 3, Rule 3, was refused by the County Court Judge, and the summons was struck out, *Barry, J.* (in Chambers) granted a *mandamus* for the Judge to hear the case. *Regina v. Leech, ex parte Joske*, 1 A.L.T., 32.

Amendment of Plaint—Act No. 345, Sec. 119.]—A County Court Judge has powers to amend in any way so as to bring forward for adjudication the questions really in controversy between the parties at the time when the action was commenced, provided that such amendment be in "the existing action." A plaint was for work done and commission as an auctioneer, and the evidence proving a case of breach of agreement, the Judge nonsuited the plaintiff, thinking he had no power to amend by inserting a claim for such breach. *Held* that he had such power. *Knipe v. Belson*, 5 V.L.R. (L.,) 405; 1 A.L.T., 99.

Amendment—Discretion of Judge.]—A plaintiff stated in his plaint that all his creditors had agreed to give time, but the evidence showed that only some had so agreed, and an application was made to alter the plaint, but this was refused. On appeal, *Held* that amendment was rightly disallowed, and that the County Court Judge having the right to conduct the business in his Court, under the circumstances the Supreme Court could not dictate to him as to how he should have conducted the case. *Wite v. Brodie*, 4 A.L.T., 88.

(d) *Payment Into Court.*

Payment Into Court—"Without Costs"—Act No. 345, Sec. 54.]—Where a sum was paid into Court "without costs" sufficient to answer defendant's liabilities, *Held* that Sec. 54 and Schedules 4 and 5, contemplate that costs in full, or proportionately, will also be paid in, and that the plaintiff might go on and recover his costs. *McEwan v. Dynon*, 3 V.L.R. (L.,) 271.

Payment Into Court—Verdict for Defendant.]—If the jury find that the sum paid into Court is a sufficient answer to the action, a verdict should be entered for the defendant. *Donaldson v. Woolcott*, 1 A.L.T., 98.

Payment into Court—Plaintiff's Right to Money—"County Court Statute 1869," Sec. 54.]—A plaintiff is entitled to money paid into Court under Sec. 54 of the "*County Court Statute* 1869," though he be subsequently nonsuited in the action. *Coote v. Gillespie*, 1 A.L.T., 151.

Payment into Court—Costs of Defendant Opposing Payment to Plaintiff.]—Where a defendant refused to consent to the plaintiff's taking a sum of money which had been paid into Court in an action in which the plaintiff was nonsuited, though the defendant did not appear on the application made by the plaintiff to the Court for that purpose, he was ordered to pay the costs of such application. *Ibid.*

Payment into Court—"County Court Rules," Order 3, Rule 41—Nonsuit.]—*Semble* that the effect of Rule 41 of Order 3 of the "*County Court Rules*," under the "*County Court Statute* 1869," as to payment into Court, is to prevent a nonsuit after such payment. S.C., 6 V.L.R. (L.,) 56; 1 A.L.T., 155.

Payment into Court—Admission of Whole Cause of Action.]—Payment into Court generally is an admission of the whole cause of action. A defendant paid a sum of money into Court generally, and the verdict was for a larger sum. The defendant appealed, and the Supreme Court directed a re-hearing, suggesting £70 as the measure of damages. At the re-hearing, the verdict was for a sum less than the first verdict, but greater than the £70. *Held* that defendant was entitled to a further re-hearing, but that he had admitted the whole cause of action, and the sum of £70 was again suggested. *Robinson v. Highett*, 9 V.L.R. (L.,) 384; 5 A.L.T., 122.

Payment Into Court—Costs not Paid—Action to Recover—Costs.]—If the defendant in the County Court pay money into such Court and do not also pay in the amount of the plaintiff's costs up to the payment into Court, the plaintiff is entitled to his costs of proceeding with the action to recover such costs, though the sum paid into Court was sufficient to meet his claim without costs. *Lawes v. Price, Warren v. Price*, 8 V.L.R. (L.,) 250.

(e) *Nonsuit and New Trial.*

Nonsuit—Power of Judge.]—A County Court Judge has no power to nonsuit a plaintiff against his will. *Rule v. Lobbe*, 4 V.L.R. (L.,) 427.

Nonsuit—"County Court Statute 1869," Sec. 78.]—A County Court Judge has no power under Sec. 78 of the "*County Court Statute* 1869," to nonsuit a plaintiff against his will. *Dobson v. Sinclair*, 2 A.L.T., 8.

Act No. 345, Sec. 75—Nonsuit Against Will.]—At the close of a plaintiff's case, the County Court Judge nonsuited him against his will, the plaintiff's attorney "objecting." *Held* that the Judge had no such power. *Ferguson v. Sparling*, 9 V.L.R. (L.,) 111.

Nonsuit—Power of Judge Where Defendant Does Not Appear—"County Court Statute 1869," Sec. 70.]—*Semble* that Sec. 70 of the "*County Court Statute* 1869" contemplates a case in which the defendant is not present at the hearing, and gives power to nonsuit in that case. *Creak v. Newlands*, 4 V.L.R. (L.,) 412.

Judge Sitting Without Assessors—Nonsuit—New Trial.]—Where a County Court Judge sitting without assessors sums up the evidence and gives the grounds of his decision, if the plaintiff in such a case abstain from interfering until the Judge has indicated his opinion on the facts, with the object of taking his chance of a verdict in his favour, he must abide that chance; but if not, then he is entitled to have the same benefit on appeal as if he had at the time submitted to an erroneous nonsuit, in deference to the opinion of the Judge; and where it is plain to the Supreme Court that the County Court Judge has misdirected himself on the law, the verdict ought to be set aside, and a new trial directed on such terms as to costs as may be fit. *Broadbent v. Vanrennen*, 1 W. & W. (L.,) 366.

Act No. 345, Secs. 58, 78—Nonsuit—New Trial.]—F. sued P. in the County Court for money due on the sale of sheep. P. claimed a set-off, but the Judge refused it, no notice of such defence having been given under Sec. 58 and rules thereunder, and gave a verdict for plaintiff. Defendant then applied for a nonsuit, or to enter verdict for defendant, but the Judge refused this, and also to grant a new trial, as a new trial had not been included in the notice of motion. *Held* that the County Court Judge was right, having no power to grant a new trial which was not asked for in the notice, or to enter a nonsuit, as no leave had been reserved for making it, or to enter a verdict for defendant except upon consent. *Powers v. Fairbairn*, 1 V.L.R. (L.,) 118.

New Trial.]—A new trial will not be granted owing to the absence of the defendant, who was misled by the state of the list and his witnesses, when the case was called over, if his counsel were present, cross-examined the plaintiff's witnesses, and did not ask for an adjournment till the plaintiff's case was closed. *Mays v. Watmough*, 6 V.L.R. (L.,) 169; 2 A.L.T., 5.

(*f*) *Other Points.*

County Court Judgment—Setting Aside—Act No. 261, Sec. 262—"County Court Rules," Rule 40.]—H. obtained a judgment in the County Court in 1863, but no execution was then issued. In 1869 he obtained a certificate that the judgment was still unsatisfied. H. then signed judgment in the Supreme Court in May, 1869, and issued execution under 28 Vic., No. 261, Sec. 262. Rule *nisi* to set aside judgment and execution under Clause 40, "*County Court Rules*," which provided that no execution shall be issued, except on summons to shew cause, after the expiration of a year and a day from date of trial or time limited for payment. *Held* that so long as the certificate remained the judgment was good, and that the plaintiff must apply to County Court to correct the judgment. Rule discharged. *Hancock v. Emmett*, 6 W.W. & A'B. (L.,) 142.

Setting Aside Judgment — Application For.]—The "*County Court Rules*," as to the time within which an application for setting aside a judgment should be made, do not apply to the case of an official assignee applying to set aside a judgment by consent signed against the insolvent, and which operates as a fraud on the creditors, since the assignee acts in a representative capacity, and has to consult the general body of creditors, who do not act as promptly as one person would act in the furtherance of his own interests. *Andrews v. Harley*, 1 V.R. (L.,) 127; 1 A.J.R., 122.

Judgment—Proof of—Act No. 345, Sec. 22.]—By Sec. 22, two ways are provided for proving a judgment, either by production of the register book, or of a certified copy of the entry therein; a rough note book, called a verdict-book, kept by the Registrar, and from which he used to enter judgment upon the register, is not evidence of the judgment within Sec. 22. *Bishop v. Woinarski*, 1 V.L.R. (L.,) 106.

Judgment—When Execution May Issue.]—J. sued P. in the County Court for detention of goods, and recovered a judgment, and the Judge ordered that damages were to be reduced to a shilling if the goods were returned. P. offered to return goods, but J. refused to accept them, and had execution issued. P. then sued J. in trespass. *Held* that the order as to return of goods was no part of judgment, being merely a separate order that satisfaction should be entered up if goods were returned, and that J. was at liberty to issue the execution. *Phillips v. Johnston*, 3 V.L.R. (L.,) 230.

Plaintiff Unable to Prove Service of Summons—Striking Out—Costs.]—Where the plaintiff appears at the hearing, but is unable to prove due service of the summons, the Judge has no jurisdiction to try the case, but in striking it out, he has under Sec. 77 of the "*County Court Statute* 1869," no power to give costs to the defendant, that section not applying to the case, since the Judge has jurisdiction in the sense of the term intended by that section, which refers to an excess of jurisdiction appearing on the plaint, or subsequently in the conduct of the proceedings. *Regina v. Cope, ex parte Smillie*, 6 V.L.R. (L.,) 366; 2 A.L.T., 66.

Act No. 345, Sec. 38—Costs Taxed After Trial.]—Where costs are taxed after trial and judgment for them is entered, the Court will not grant a writ of prohibition to stop the execution. *Rowe v. Thompson*, 3 V.L.R. (L.,) 135.

Taxation of Costs.]—Where at the trial a Judge of the County Court reserved his decision upon a nonsuit point, *Held* that he need not give any direction as to taxation of plaintiff's costs until he had decided upon that point. *Anderson v. Ziegler*, 3 V.L.R. (L.,) 338.

Taxation of Costs—Decree in Appellate Court.]—Where in an appeal from the County Court, the decree of the Appellate Court gives costs, such costs should be taxed on the County Court scale and not on the Supreme Court scale. *Cunningham v. Gundry*, 3 V.L.R. (E.,) 51.

Retaxation—Objection that Costs Should be on County Court Scale.]—A decree was made with costs on an appeal from the County Court, and the taxing-master taxed on the Supreme Court scale, no objection being made to that course at the taxation. *Per Barry, J.* (in Chambers) following *Cunningham v. Gundry*, that no certificate for costs having been given, but only an *allocatur*, the application was not too late, and that costs should be taxed on the County Court scale. *Howard v. Currie*, 1 A.L.T., 61.

Conduct Money—Debtor—"County Court Statute 1869," Sec. 83.]—Where on a summons under the provisions of Sec. 83 of the "*County Court Statute* 1869," the defendant had not been furnished with any conduct money, *Held, per M'Farland, J.*, that the defendant was like any other witness, and was not bound to appear or to allege an excuse for non-attendance unless he were furnished with conduct money. *Henry v. Greening*, 4 A.L.T., 16.

Judge's Notes of Evidence — Order 5, Rule 7 — "County Court Statute 1869."]—Rule 7 of Order 5, under the "*County Court Statute* 1869," No. 345, which provides that "any party to the suit may obtain a copy of the Judge's notes of the evidence at the hearing," only applies to equity proceedings, and not to actions at law. *Regina v. Pohlman*, 1 V.R. (L.,) 101; 1 A.J.R., 91.

Judge Sitting Without Assessors.]—If a County Court Judge, sitting by consent of parties without assessors, sums up the evidence and gives the grounds of his decision, his expression of opinion on the facts and on the law must be carefully distinguished. *Broadbent v. Vanrennen*, 1 W. & W. (L.,) 366.

Subsequent Alteration of Decision by Judge After Leaving Court.]—A County Court Judge has no power to correct a mistake in his decision when he has pronounced it, entered it in his book, and has left the Court although intending to return; and on his return one of the parties, in the absence of the other, points out the mistake and asks the Judge to correct it. *Regina v. Hackett, ex parte Cline*, 8 V.L.R. (L.,) 129; 4 A.L.T., 4.

Semble, that where such a *hiatus* occurs, the Judge has no power to alter his decision at all. *Ibid.*

II. Judges and Officers of the Court.

(1) *Judge.*

Tenure.]—Each County Court Judge holds office at the pleasure of the Governor-in-Council, and may be removed by him without cause assigned. *Per Barry & Molesworth, J.; dissentiente Stawell, C.J. Regina v. Rogers, ex parte Lewis*, 4 V.L.R. (L.,) 334.

Removal From Office.] — S.C. *See post* under Quo Warranto.

Mandamus to.]—*See* Mandamus.

Appointed for Particular Sittings—Jurisdiction.]—A County Court Judge appointed to act for certain sittings, in the absence of the regular Judge of the district, has jurisdiction, after the conclusion of the sittings and adjournment of the Court *sine die*, to deal with applications arising out of causes tried at such sittings, and to sign a case on appeal therefrom. *Quinlivan v. Darcey*, 6 V.L.R. (L.,) 370; 2 A.L.T., 67.

(2) *Registrar.*

Compelling to Accept Security for Costs of Appeal.]—On an appeal from a County Court, the appellant (defendant) tendered as security a bond of two sureties justifying in stock-in-trade. The registrar refused to accept this security unless the attorney for plaintiff consented. *Held* that this was insufficient ground for refusing to accept the security, though *semble* that he might refuse to accept it if the costs were not fixed. *Regina v. Stephen*, 1 A.J.R., 164.

Certificate.]—There is no rule of the County Court similar to that of the Supreme Court, that the Registrar set out or refer to the evidence upon which he acts, and the Judge may act on a certificate which does not refer to it. *Thomson v. Andrew*, 10 V.L.R. (E.,) 48, 56; 5 A.L.T., 181.

(3) *Bailiff.*

Action Against for Not Levying Execution—Notice of Action When Necessary—"County Court Statute 1869," Sec. 32.]—Before the plaintiff can be nonsuited for failing to give the notice required by Sec. 32 of the "*County Court Statute* 1869," in an action against a County Court Bailiff for not levying the amount of an execution, the defendant must prove that he acted in a *bonâ fide* belief that he was discharging his duty under the Act, and that he had reasonable and probable cause for his belief; and the question of reasonable and probable cause is one for the jury. *Solomons v. Mulcahy*, 4 V.L.R. (L.,) 462.

A County Court Bailiff was charged with misfeasance in the exercise of his duties, and an action was brought against him in respect thereof. *Held* that it was for the County Court Judge to determine whether defendant acted as he did in the *bonâ fide* execution of his office; but as the defendant in the case could not have acted otherwise, he was entitled to notice of action under Sec. 32. Rule absolute for a nonsuit. S.C., 5 V.L.R. (L.,) 64.

III. Remitting Cases to County Court.

Summons — Objection — Adjournment — "County Court Statute 1869," Sec. 42.]—In an application under Sec. 42 of the "*County Court Statute* 1869," where the plaintiff's sole objection to have the action remitted was that he wished to deliver interrogatories to the defendant, *Holroyd, J.* (in Chambers,) allowed the summons to be adjourned in order to enable him to do so. *Nixon v. Milton*, 6 A.L.T., 98.

"County Court Statute 1869," Sec. 43—Who May Apply—Corporation—Affidavit.]—*Per Holroyd, J.* A corporation can apply under Sec. 43 of the "*County Court Statute* 1869," to have an

action remitted to the County Court, and the town clerk, though not the only person who can make the necessary affidavit, is the best person to do so. *Stevens v. Mayor of Flemington and Kensington*, 6 A.L.T., 99.

See also *Tilley v. Hoyt*, 6 A.L.T., 67.

Application to Give Security for Costs or Remit Action—Proper Time for Making—"County Court Statute 1869," Sec. 43.]—*Per Williams, J.* (in Chambers.) The proper time for making an application for the plaintiff to show cause why he should not give security for costs, or otherwise why the action should not be remitted to the County Court, is immediately after the service of the writ, and before any pleadings are delivered. *Robertson v. Brown*, 6 A.L.T., 46.

Application Made Ex Parte.]—Where an application was made *ex parte*, under Sec. 43 of the "*County Court Statute* 1869," to remit an action to the County Court on the ground that the plaintiff was an uncertificated insolvent, *Williams, J.* (in Chambers,) granted the application and expressed an opinion that applications of this nature should be made *ex parte*, *Stevens v. Mayor of Flemington and Kensington*, 6 A.L.T., 98.

Costs—Application for Security for.]—*Per Cope, J.* When an action has been remitted to the County Court under Sec. 43 of the "*County Court Statute* 1869," the Judge of the County Court cannot entertain an application that the plaintiff should give security for costs. *Wite v. Brodie*, 4 A.L.T., 36.

Discretion of Judge—"County Court Statute, 1869," Sec. 103.]—*Per Holroyd, J.* (in Chambers.) A Judge has a discretion under Sec. 103 of the "*County Court Statute* 1869," as to whether he will order a case to be remitted to the County Court, and will not do so if he think it a proper one to be tried in the Supreme Court. *Andrew v. Figg*, 6 A.L.T., 86.

"County Court Statute 1869," Sec. 43.]—*Per Williams, J.* (in Chambers.) The words "other actions of tort," in Sec. 43 of the "*County Court Statute* 1869," refer to all actions of tort not specifically enumerated in the section, and include actions for negligence. *Taylor v. Port*, 10 V.L.R. (L.,) 300; 6 A.L.T., 129.

Practice — Staying Proceedings in Supreme Court.]—*Per Williams, J.* (in Chambers.) The application under Sec. 43 of the Statute for a conditional order staying proceedings in the Supreme Court, and remitting the case to the County Court, unless the plaintiff within the time named in the order give full security for defendant's costs, or satisfy a Judge that he has a fit cause of action to be tried in the Supreme Court, should not be made *ex parte*, as the effect mght be to shut the plaintiff out from showing that he has visible means of support, and confine him to doing one of the two things mentioned in the order. In all future cases the application for the conditional order must be made on summons, calling on the plaintiff to show cause why such order should not be made. If the plaintiff can show that he has visible means of support, the summons is dismissed. If he cannot, then he must do one of the two things mentioned in the order. If he does neither, the order becomes absolute. If he does the first he merely gives notice of the fact to the defendant. If he proposes to do the second he must give notice in writing to the defendant that on a certain day at a certain time within the time limited by the order he will appear before a Judge to satisfy such Judge that he has a cause of action fit to be presented in the Supreme Court. The other side can then attend or not at will. If the plaintiff fail to satisfy the Judge, the order becomes absolute. *Ibid.*

IV. Transfer from County Court.

Act No. 345, Sec. 44.]—*Williams J.* (in Chambers) made an order, transferring a case turning upon the construction of indentures of apprenticeship, and involving important points of law, to the Supreme Court. *Buzolich v. Fletcher*, 3 A.L.T., 15.

Costs—No. 345, Sec. 45.]—If a case be removed from the County Court into the Supreme Court by the defendant, under Sec. 45 of the "*County Court Statute*," No. 345, and the plaintiff recover a verdict, no certificate order or rule is required to enable the plaintiff to recover his "full" costs; that means as between party and party, and on the higher scale. *Gerard v. Kreitmayer*, 2 A.J.R., 112.

Costs—Summons Under Sec. 41 of "County Court Statute 1869."]—Where an action has been transferred from a County Court on the ground of want of territorial jurisdiction on the part of the County Court, and the plaintiff recovers less than £50, the application for Supreme Court costs should be made to the Judge at the trial; and where this has been omitted to be done, and no reason assigned for the omission, the costs of a subsequent summons, under Sec. 41 of the "*County Court Statute* 1869," for such costs will not be allowed. *Crooke v. Smith*, 4 V.L.R. (L.,) 95.

V. Appeal From.

(1) *Where Appeal Lies.*

Interpleader.]—An appeal lies, under Sec. 120 of the "*County Court Statute* 1869," from the decision of a County Court Judge, upon an interpleader summons. *Barnard v. Mann*, 2 V.L.R. (L.,) 140.

Attorney Suing Client for Costs—"County Court Statute," Sec. 120.]—Where an attorney sued his client for costs, and the client obtained a verdict on the ground of the attorney's negligence in the action in which the costs were incurred by bringing it in the wrong Court, *Held* that Sec. 120 of the "*County Court Statute*" did not preclude an appeal in a case of this kind. *Bullen v. Hooper*, 2 V.R. (L.,) 108; 2 A.J.R., 66.

From Verdict of Jury.]—Under Sec. 120 of the "*County Court Statute* 1869," an appeal lies from the verdict of a jury in the County Court, though no application has been made to the Judge of the County Court to set it aside. *Sheehan v. Park*, 8 V.L.R. (L.,) 25; 3 A.L.T., 98.

Order Discharging Debtor — "County Court Statute 1869," Secs. 89, 120.]—Sec. 120 of the "*County Court Statute* 1869," is wide enough in its terms to give the right of appeal from an order of a County Court Judge, under Sec. 89, directing the discharge of a judgment debtor committed upon a fraud summons. *Rowbottom v. Hennelly*, 6 V.L.R. (L.,) 409; 2 A.L.T., 85.

Order that Case be Struck Out on Failure to Give Security.]—An appeal is not the proper remedy against an order that a case should be *struck out* if the plaintiff fail to find security for costs within fourteen days. The plaintiff should apply to the Judge to have the order amended. *Hourigan v. Bourke*, 6 V.L.R. (L.,) 224.

Nonsuit.]—If a County Court Judge nonsuit a plaintiff wrongly, *i.e.*, against his consent, appeal is the remedy. The Judge has power and jurisdiction to nonsuit, and prohibition is not therefore the remedy. *Mau v. Weightman*, 3 V.L.R. (L.,) 110.

Nonsuit in Deference to Judge's Opinion.]—Where a plaintiff submits to a nonsuit in deference to a Judge's opinion, it is not necessary to remit the case; the propriety of the nonsuit becomes a question of law on which an appeal may be based. *Davidson v. Brown*, 5 V.L.R. (L.,) 288; 1 A.L.T., 43.

Where plaintiff's counsel in his opening statement pointed out certain evidence and that he would claim certain damages, and the Judge intimated his opinion that the damages were too remote and that he would hold them to be such, even if the evidence disclosed and proved the facts, and the plaintiff under such circumstances elected to be nonsuited, *Held* that plaintiff was not debarred thereby from appealing. *Harvey v. Shire of St. Arnaud*, 5 V.L.R. (L.,) 312; 1 A.L.T., 44.

"County Court Statute 1869," No. 345, Sec. 120—Interlocutory Order.]—Sec. 120 of Act No. 345 only contemplates appeals from such orders as, in one alternative at all events, finally dispose of case, so that the appellate Court may finally dispose of it. An appeal from an order confirming report of the registrar of County Court upon accounts directed to be taken by him in the course of the suit does not lie. *Thompson v. Andrew*, 9 V.L.R. (E.,) 28; 4 A.L.T., 164.

Commitment for Breach of Injunction—"County Court Statute 1869," Sec. 120.]—Where appellant had been committed by the Judge of a County Court for disobedience of an injunction of that Court, and had appealed to the Supreme Court in Equity against the order, *Held* that the words "order of commitment" in Sec. 120 of the "*County Court Statute* 1869," No. 345, refer only to commitments for misconduct in Court, and that an appeal would lie from the order then appealed from, if erroneous. *Shepherd v. The Patent Composition Pavement Company*, 4 A.J.R., 143.

Question of Fact.]—An appeal from a County Court to the Supreme Court will lie only on a question of law, or of improper admission or rejection of evidence, and not on a question of fact. *Kavanagh v. Haynes*, 4 A.J.R., 73.

Question of Fact.]—In an action in the County Court where the evidence, as appearing on the case for appeal, all points in one direction, and is inconsistent with the Judge's decision, the Supreme Court will reverse such decision, even upon a question of fact. *Hamilton v. Sefton*, 3 V.L.R. (L.,) 326.

Question of Fact—Act No. 345, Sec. 120—Amount Lodged on Appeal.]—Where a Judge has fallen into error in the reasons he gives for his decision, the Court will allow an appeal even on a question of fact, and order a re-hearing. There is no necessity for an order requiring registrar to pay over to appellant the money deposited on appeal. *Jensen v. Hagan*, 3 V.L.R. (L.,) 21.

Question of Fact.]—Under Sec. 120 of Act No. 345, an appeal lies from the determination of the County Court upon questions of fact, but the Court will not upset such determination unless it be made clearly apparent that the judge or jury arrived at an entirely wrong conclusion upon the evidence. [*Kavanagh v. Haynes*, overruled.] *Black v. Permewan, Wright & Company*, 7 V.L.R. (L.,) 292; 3 A.L.T., 21.

On Questions of Fact.]—In appeals involving a disputed question of fact, it is not sufficient for the appellant to show that the decision below was probably wrong. It is necessary to show conclusively that the Judge or jury have come to a wrong conclusion of fact. *Brundell v. Wane*, 7 V.L.R. (L.,) 319; 3 A.L.T., 22.

Conflicting Evidence.] — Where the evidence before a County Court Judge is conflicting, the Appellate Court will not review his decision on a question of fact. *Lee v. Andrew*, 7 V.L.R. (E.,) 92.

Where Allowed or Where Not.]—The Court will not disturb the finding of a Judge of a County Court where there is any evidence to support his finding. *Bank of Australasia v. Keave*, 4 A.L.T., 12.

Verdict Against Evidence.]—Where there is some evidence to support the finding of a County Court Judge, the Court will not disturb his finding on the ground that it is against evidence. *Nathan v. Tozer*, 2 A.L.T., 34.

New Trial—Re-hearing—Verdict Against Evidence.]—A County Court Judge in his charge to the jury told them there was no evidence of fraud, and the jury found the verdict for the plaintiff in opposition to the charge; the

Judge then, without giving any reason, refused a new trial. The Supreme Court allowed the appeal, and directed the case to be re-heard. *Waxman v. McAuliffe*, 5 V.L.R. (L.,) 48.

Discretion of County Court Judge—When Interfered With.]—On an appeal to the Supreme Court, that Court will not interfere with the discretion of the County Court Judge in his management of the business of his Court. *Mays v. Watmough*, 6 V.L.R. (L.,) 169; 2 A.L.T., 5.

A County Court Judge being dissatisfied with a verdict ordered a new trial. *Held* that the Court would not interfere in such a case; new trial to be held in the County Court. *Walker v. Graham*, 3 A.L.T., 75.

Discretion of County Court Judge—When Interfered With—Commitment to Prison—21 Vic., No. 29.]—Where R. had been committed to prison in default of payment of a judgment recovered against him in the County Court, and the Judge refused on his insolvency to order his discharge, the Full Court refused to interfere with his discretion. *Ex parte Robinson*, 2 W. & W. (L.,) 30.

New Trial Ordered in County Court.]—Where the Judge of a County Court, being dissatisfied with the verdict, orders a new trial, the Supreme Court will not interfere with his discretion on appeal. *Cooper v. Higgins*, 2 A.L.T., 8.

(2) *Time for Appealing.*

Time for Appeal.]—The time for an appeal from the judgment of a County Court begins to run from the last decision in the matter, *e.g.*, from a decision on a point reserved, and not from the trial; and after the final judgment has been given, every previous objection is open on appeal. *London and Lancashire Insurance Company v. Honey*, 2 V.R. (L.,) 7.

Time for Appeal—Power of Judge to Extend—Act No. 345, Sec. 120—Rules 1881, Form 44—Notice of Appeal.]—It is not necessary that the notice of appeal should state that the requisite security has already been given, and therefore Form 44 is *ultra vires*. A County Court Judge pronounced his decision on December 14th, 1882, but the judgment was not entered by the registrar, and the registrar refused to accept security within the seven days mentioned in Sec. 120. The appellant, being misled by Form 44, and thinking it necessary that security should be given before notice of appeal, failed to give the notice within seven days from December 14th, and the Judge allowed him further time. *Held* that the seven days runs from the date when judgment is pronounced, and that the Judge had not power to extend the time. Appeal struck out. *Murray v. Dabb*, 9 V.L.R. (L.,) 156; 5 A.L.T., 23.

Rules Regulating—Order 5, Rule 4.]—Rule 4 of Order 5 of the "*County Court Rules*," of the 16th September, 1869, which prescribes the time within which an appeal case must be transmitted to the Supreme Court, is inoperative, no penalty being provided by it for non-compliance. *Clarke v. Cameron*, 6 V.L.R. (L.,) 449; 2 A.L.T., 88.

The rules are to prescribe the mode of procedure, and cannot impose a condition precedent upon a right of appeal clearly given by the "*County Court Statute* 1869." *Ibid.*

Transmission of Case—Rules—Order 5, Rules 4 and 5.]—Where a case had not been transmitted within the time limited by Rule 4, but the Judge after transmission endorsed upon it an order to enlarge the time, the Court refused to strike the case off the list. *Hunt v. Barbour*, 3 V.L.R. (L.,) 189.

Setting Down Appeal—Notice—"Common Law Procedure Statute," Sec. 73.]—Where four days' notice of setting down an appeal is not given under Sec. 73 of the "*Common Law Procedure Statute*," this is no reason for striking it off; it must simply stand over till notice has been given. *Phillips v. Byrne*, 3 V.L.R. (L.,) 178.

Right to Appeal—When it Accrues.]—Where the defendant in the County Court has claimed a direction, but a verdict has been entered for the plaintiff subject to leave reserved for the defendant to move for a nonsuit, there is no final decision of the Judge till the motion for the nonsuit has been heard, and the defendant has no right to appeal before making such motion. *Henry v. Kidd*, 4 V.L.R. (L.,) 466.

(3) *Security for Appeal.*

Security for Costs—"County Court Statute," Sec. 120.]—On an appeal from the County Court the appellant must, under Sec. 120 of the "*County Court Statute*," pay into Court the amount of the judgment given against him, and £10, or give such security as shall be approved of by the registrar. Where plaintiff was nonsuited, and on appeal paid into Court £10, but not the amount of the costs given against him, *Held* that the Act meant the judgment to include the costs; and case struck out of the list. *Lucas v. Murray*, 1 A.J.R., 130.

Amount of Security.]—The amount of the judgment which an intending appellant must lodge, or give security for, includes the costs of the proceedings as well as the damages awarded. *Anderson v. Ziegler*, 3 V.L.R. (L.,) 338.

Security for Amount of Judgment—Act No. 345, Sec. 120.]—Sec. 120 only requires security for the amount of the judgment, where the judgment itself is a question involved in or the subject of the appeal. *Thompson v. Rowe*, 3 V.L.R. (L.,) 55.

Striking Out Appeal—Wrong Court—Act No. 345, Sec. 120—Bond.]—Where the bond entered into on an appeal wrongly stated the Court as the County Court at Stawell, and was, after the

expiration of seven days altered to Hamilton, and did not bind the appellant to pay costs in case of not prosecuting the appeal as required by Sec. 120, the Court ordered the appeal to be struck out. *Carroll v. Macgregor*, 5 A.J.R., 65.

Security for Costs—What is Sufficient—"County Court Statute 1869," Sec. 120.]—On an appeal from the County Court, in giving security for costs, the appellant, instead of giving a bond for the required amount to the respondent, gave it to the Registrar of the Court as a trustee for the respondent. *Held* (*dissentiente Stawell, C. J.,*) that this was sufficient compliance with Sec. 120 of the "*County Court Statute* 1869." *Playford v. Brown*, 6 V.L.R. (L.,) 467; 2 A.L.T., 101.

Insufficient Security—Waiver.]—On an appeal from a County Court, the amount of security given by the appellant was not in compliance with the Act, but after the case had been settled the agent of respondent's attorney accepted service of the case, and agreed to its being set down for hearing. *Held* that the objection was waived. *Churchward v. Lyons*, 2 A.J.R., 118.

Deposit of Judgment and Costs—Subsequent Withdrawal of Part.]—If the amount of a judgment and costs has been deposited in lieu of security for an appeal from a case in the County Court, and the registrar allows the appellant to withdraw part of the amount pending the appeal, the right of appeal is not thereby affected, since the registrar remains liable for the whole amount. *Bank of Australasia v. Keirce*, 8 V.L.R. (L.,) 147.

Deposit by Way of Security—Cheque.]—The appellant's cheque is a sufficient deposit to entitle him to proceed with the appeal, if the registrar of the County Court chooses to accept it as cash. *Whelan v. Hannigan*, 4 V.L.R. (L.,) 464.

Security for Untaxed Costs.]—In an appeal, the appellant lodged £10 to meet the costs of the appeal, but the costs of the action not having been taxed within the time for appealing, failed to lodge or give security for such costs. *Held* that the appellant might have taken out a summons to tax or tendered a sufficient sum to cover the costs, and that he had not done all he reasonably could. Case struck out. *Griffith v. Clancey*, 9 V.L.R. (L.,) 161; 5 A.L.T., 24.

Bond of Two Sureties Justifying in Stock-in-Trade.]—*Regina v. Stephen, ante column* 262.

Bond as Security.]—Where the operative part of the bond complies with the Act, it is sufficient, even if the recitals do not so comply with the Act. *Powell v. Gidney*, 5 V.L.R. (L.,) 20.

Bond as Security—Act No. 345, Secs. 18, 120.]—A bond as security for the prosecution of the appeal may be approved by the assistant registrar under Sec. 18, and if it be made simply for carrying out such order as the Supreme Court shall make or for payment of costs on dismissal of the appeal, it is insufficient, it should provide for the prosecution of the appeal; but the Court refused to make absolute a rule for striking out the appeal case where neither the bond itself nor a copy were produced. *Aarons v. Lewis*, 3 V.L.R. (L.,) 317.

Money Deposited on Appeal—May be Paid Over Without Order.]—*Jensen v. Hagan, ante column* 266.

(4) *Special Case—Form Settling and Delivery of.*

Statement of Case—Referring Back to County Court.]—The Supreme Court has power to refer a case, which has been stated on appeal from the County Court, back to the County Court to be rectified. The County Court Judge is, however, not to be directed to amend the case, but only to see if the evidence has been properly set out, and, if he thinks fit, to make any alteration he may choose. *M'Mullen v. Fraser*, 2 A.J.R., 117.

Form of Case—Judge's Notes of Evidence.]—Where a Judge signed a case for appeal "I, James F. Nolan," instead of "I, the Judge who tried the case," as directed by the rules, the case was remitted to be properly signed. *Guy v. Pierce*, 3 A.J.R., 39.

Discrepancy Between Case and Judge's Notes of Evidence.]—Every presumption should be made to reconcile the case as stated by the Judge with his notes of evidence. *Davies v. Breading*, 7 V.L.R. (L.,) 107; 2 A.L.T., 128.

Setting Out Evidence in the Case.]—Where the evidence required by Sec. 120 was not included in the case, but a note of the evidence was placed before the Supreme Court by consent which contained only an incomplete and inaccurate fragment of the evidence, *Held* (*per Higinbotham, J.,*) that for that reason, viz., the incompleteness of the evidence, the appeal must be dismissed. *Fletcher v. Buzolich*, 7 V.L.R. (L.,) 348, 353.

Although the evidence as furnished by the Judge's notes is very meagre, the Court will not scrutinise it too closely to discover reasons to reverse the decision. *Guy v. Pierce*, 3 A.J.R., 48.

Amendment—Where Judge May Amend.]—The initials of the County Court Judge to the rough draft of an appeal case, signifying his approval of that document as a draft only, cannot be regarded as his signature to the case for transmission to the Supreme Court. The case is not out of his hands finally until he has signed it in the ordinary way, and the seal of the Court has been attached to it. Up to that time he may further amend the case. *Henry v. Kidd*, 4 V.L.R. (L.,) 466.

Special Case — Settled by Judge — No Evidence that Parties Could Not Agree—Act No. 29, Sec. 68.]—On an appeal by special case under the Act No. 29, Sec. 68, the case had been settled and

signed by the County Court Judge, but there was nothing to show that the parties or their attorneys could not agree. The objection being insisted on, *Held* that the Supreme Court could not hear the case, and case struck out. *Broadfoot v. Wilson*, 1 W. & W. (L.,) 147.

Special Case — Settled by Judge — Consent of Parties—Act No. 29, Sec. 68.]—On an appeal by special case under the Act No. 29, Sec. 68, the County Court Judge had settled and signed the case, and on the face of the case there was nothing to show that the parties could not agree, but in the fold of the case was a consent by the parties' attorneys to the case being set down for argument before the Supreme Court. *Held* that the parties had agreed to waive the objections, and that the Supreme Court could hear the case. *Cooke v. Coward*, 1 W. & W. (L.,) 148.

This case was identical, save that the consent to the case being set down for hearing before the Supreme Court was on a separate piece of paper and was signed by the respondent's attorney only. *Held* that the consent was sufficient to show that the parties had agreed to waive the objection, and that the case could be heard. *Rucker v. Lyall*, 1 W. & W. (L.,) 149.

Case Signed by Judge—Presumption that Parties Differed.]—The fact of a County Court Judge stating that he had settled and signed an appeal case "in accordance with the provisions of Sec. 120 of the '*County Court Statute* 1869,'" necessarily implies that the parties must have differed, since he possessed no power under the statute to settle the case if the parties had not differed. *Martin v. Elsasser*, 4 V.L.R. (L.,) 481, 483.

Judge of County Court Desiring Case Sent Back.]—If the Judge of the County Court desires to make a communication to the Court, *e.g.*, that he wishes an appeal case sent back to him that he might state what his charge to the jury was, he should make it direct to the Court and not through counsel. *Brown v. Lyon*, 4 A.L.T., 39.

The Court will not go behind the case as stated, nor send back a case containing a wrong direction to the Judge for re-statement. *Currie v. McNeave*, 1 A.L.T., 18.

Case Irregularly Drawn up—"County Court Rules of 1881," Sec. 269, 271.]—On an appeal from a Court Court the appeal case was drawn up by the appellant's attorney, and a copy was made by the respondent's attorney, who made certain alterations in it. The case was then sent to the Judge, who settled the statements in it without further communication with the respondent. It was contended that the case was irregularly drawn up, since by the rules the Judge had no power to settle a case until the respondent had stated whether he had disapproved of the draft as prepared by the appellant, and here the respondent had not done so. *Held* that the case was irregularly drawn up, and case placed at the bottom of the list in order to give the parties an opportunity to agree on the facts in dispute. *Grant v. Gilligan*, 6 A.L.T., 10.

Settling Appeal Case.]—Plaintiff's solicitor prepared an appeal case and sent it to defendant's solicitor, who made some alterations and returned it. Plaintiff's solicitor agreed with the alterations, prepared a copy and sent it to defendant's solicitor, who refused to sign it. *Held* that the proper remedy was to take out a summons in the County Court, calling upon defendant to show cause why the case should not be returned signed, or should not be settled by the Judge. *Meury v. Mayor of Daylesford*, 4 A.L.T., 150.

Settling Appeal Case—Removal of Judge.]—If a County Court Judge who tried a case has been removed before an appeal, the appeal case may be settled from his notes and signed by his successor. *Bank of Australasia v. Keirce*, 8 V.L.R. (L.,) 147.

Settling Appeal Case—"County Court Rules 1881," Rules 269, 270—Non-Compliance With.]—In settling an appeal case in the County Court, Rules 269 and 270 of the "*County Court Rules of* 1881" should be strictly complied with; but if they are not complied with, the case will not necessarily be struck out, but may be sent back for re-statement. *Mason v. Ryan*, 10 V.L.R. (L.,) 189.

Duty of County Court Judge.]—It is the duty of the County Court Judge to give the Court of Appeal the benefit of the evidence which he was able to take, and to accompany it with the exhibits, to enable the Court of Appeal to form an opinion, and he is not to throw the duty upon any one else. *Bauld v. Williams*, 6 A.L.T., 162.

Appeal Case Not Sealed.]—The want of a seal on an appeal case transmitted to the Supreme Court, under Sec. 120 of the "*County Court Statute* 1869," is a defect which can be supplied, and is only to be regarded on the question of costs. *Mason v. Ryan*, 10 V.L.R. (L.,) 189.

Case Delivered to Attorney not Authorised to Receive it—Mandamus to State Another Case Refused.]—Where a special case had been stated, but owing to difficulties it had taken a long time before it was completed, and during this period the appellant was incarcerated in gaol, and the case was delivered to his attorney who was not authorised to receive it, and nothing more was heard of it, a *mandamus* to compel the Judge of the County Court to state another case was refused. *Regina v. Pohlman, ex parte Thomson*, 4 A.J.R., 29.

Delivery of Appeal Case to Respondent—Act No. 345, Sec. 120—Rules, Order 5, Rules 1 and 2—Extension of Time.]—Where an appellant had exceeded the fourteen days allowed in Order 5, Rules 1 and 2, for delivery, and applied for an extension of time, the County Court Judge refused on two grounds—(1) want of jurisdiction, (2) want of sufficient circumstances. *Held* that the Judge had jurisdiction to extend the time, as by Sec. 120 of the Act the right to appeal vests in the appellant fulfilling its requirement, but the Court refused by *mandamus* to interfere with the Judge's

discretion as to there being no sufficient circumstances to justify the extension. *Regina v. Hackett, ex parte Goodson,* 5 V.L.R. (L.,) 357; 1 A.L.T., 51.

Delivery of Copies to Judges.]—It is not necessary to deliver a copy to an absent Judge. When a Judge is absent from the colony, it is sufficient if the appellant furnishes one copy and the respondent another to the two Judges constituting the Court of Appeal under such circumstances. *Aarons v. Lewis,* 3 V.L.R. (L.,) 317.

(5) *Practice on Appeal.*

(*a*) *Generally.*

Taking Objections—Objection Appearing on the Face.]—Where a case stated for appeal was not sealed by the registrar of the County Court, in compliance with the County Court Practice, Order 5, Rule 4, the Court held that, inasmuch as the defect appeared on the face of the case, the proper time to take the objection was when the case was called on, and that the irregularity was no bar to the hearing the appeal, but merely a question of amendment with costs. *Wrixon v. Macoboy,* 2 A.L.T., 60.

Objection Not Taken Below.]—An objection which is not taken below, may, if fatal and incurable, be relied on in the Supreme Court on the appeal. *White v. Ross,* 4 A.L.T., 85.

What Points May be Taken on Appeal—Point Overruled.]—A point which was clearly raised in the plaint as a ground for a nonsuit and overruled, is open for argument on appeal, although it has not been specified in the grounds of appeal. *Hill v. Willis,* 6 V.L.R. (L.,) 193; 2 A.L.T., 20.

A fresh point cannot be taken before Appellate Court for the first time which has not been taken before County Court. *English v. White,* 2 W. & W. (L.,) 14.

Title of Rule Nisi.]—An objection that the rule *nisi* for an appeal from the County Court is not entitled in any cause, though endorsed as the appeal "A. *v.* B." is good; but on such an objection the Court allowed the rule to be amended on payment of the costs of the rule. *Lucas v. Murray,* 1 A.J.R., 130.

Practice—Name of Cause.]—*Per Curiam.* It is extremely inadvisable that in appeal cases the names of parties should be transposed. It would be more convenient if a cause bore the same title through all its stages which it bore when it was first instituted. *Marks v. Pett,* 10 V.L.R. (L.,) 342.

Payment Out of Sums Lodged in Lieu of Security —"County Court Rule," No. 93.]—On an appeal from a decision of the County Court, under which the plaintiff was nonsuited with costs, the plaintiff paid to the registrar the amount of the costs and £10 to abide the event of the appeal in lieu of giving security. There was no stay of proceedings, and the registrar paid the money to the defendant. The plaintiff succeeded on appeal, and the order allowing the appeal was drawn up and contained a clause ordering the registrar to pay the sums lodged with him by the plaintiff back to the plaintiff. On an application to amend the order by striking out this clause, *Held* that the registrar was not justified in paying the money to the defendant under Rule No. 93, since the money was not lodged to the credit of the cause, but only in lieu of security to enable plaintiff to appeal, and application to amend the order refused. *Moore v. Prest,* 1 A.J.R., 163.

Varying Order of Appeal—Act No. 345, Sec. 120.]—Under Sec. 120 the Supreme Court may impose and insert in the order of appeal such terms and conditions as may appear necessary and proper, the subject having been brought under its consideration at the time; but the Court cannot, by an order, *ex post facto,* insert any new condition into the original decision. *Corbett v. Bachelor,* 5 V.L.R. (L.,) 33.

New Trial.]—Where a new trial was ordered in an appeal from the County Court, the Supreme Court held that the trial should take place before a Judge only, to be set down at the next *Nisi Prius* Sittings after list of causes before a special jury of four, and before the list of causes for assessment of damages. *Morley v. Rice,* 3 A.J.R., 30.

New Trial—Damages Certain.]—Where in an appeal the decision of the County Court Judge is reversed, both parties have been fully heard, and the damages are certain, there being nothing for the jury to assess, the Court, to save expense, will not order a new trial, but will enter judgment for the amount certain. *Allison v. Byrne,* 3 V.R. (L.,) 155; 3 A.J.R., 67.

New Trial Before Judge of Supreme Court Without a Jury.]—A rule absolute in the first instance was granted, making the decision of the Judge a rule of Court upon a certificate of his decision by the Judge. *Queen Insurance Company v. King,* 5 A.J.R., 124.

Appeal from Nonsuit—"County Court Statute 1869," Sec. 120.]—Where a plaintiff is nonsuited against his will, and the County Court Judge has heard evidence on both sides, the Supreme Court has power under Sec. 120 of the "*County Court Statute* 1869," to consider the merits of the case, and give judgment accordingly. *Dobson v. Sinclair,* 2 A.L.T., 8.

Appeal from Nonsuit—Evidence Not Gone Into.] —Where an appeal is allowed from a nonsuit without going into evidence, and the case was not heard in the County Court, though it may be scarcely necessary that the case should be heard by a Judge of the Supreme Court, yet as the Court would not under the circumstances grant a *mandamus* to compel the Judge of the County Court to hear the case, *Semble* that the better course is to order a hearing before a Judge of the Supreme Court. *Solomons v. Mulcahy,* 4 V.L.R. (L.,) 462.

Damages—Limit of Jurisdiction.]—In a County Court action the plaintiff sued on three counts, and the jury assessed separate damages on the three counts. The Court refused to interfere with the damages, although it directed a re-hearing and refused leave to increase the claim to £500, inasmuch as a re-hearing before a Judge of the Supreme Court does not make it a Supreme Court action. *Bernstein v. Blashki*, 3 V.L.R. (L.,) 145.

Notice to Strike Out Case — Appearance of Appellant Not Necessary.]—The appellant is not bound to appear where notice of motion has been given by the respondent to strike out the appeal case, and, if he do not appear, the respondent can only obtain a rule *nisi*. *Bank of Australasia v. Keirce*, 8 V.L.R. (L.,) 147.

Case Ordered to be Re-heard in Supreme Court—Statement of Defence—"County Court Rules 1881," Rule 157.]—Rule 157 of the *"County Court Rules* 1881," under which a defendant may be called upon to state his defence, is not applicable to a case ordered to be re-heard in the Supreme Court. *Slack v. Terry*, 5 A.L.T., 167.

Equity Appeal—Accounts Taken Before the Master Not Before the Registrar.]—A creditor's suit for administration in the County Court having been dismissed upon a preliminary objection, upon appeal the order was reversed and the suit directed to be heard in the Supreme Court. Upon the ordinary decree for administration being made, the accounts were directed to be taken before the Master-in-Equity, and not the Registrar of the County Court. *Martin v. Keane*, 4 V.L.R. (E.,) 115.

(*b*) *Costs.*

In Suit — How Considered.] — Where the Registrar taxed costs, though there had been no adjudication thereupon, and the appeal case in no way disclosed what was the subject of the costs directed to be paid, the regular course would be that there should be a re-hearing, but, if the parties wish it, the Appeal Court will dispose of the question by examining the costs on affidavit, showing the subject of them. *Thomson v. Andrew*, 10 V.L.R. (E.,) 48, 56; 5 A.L.T., 181.

Of Person Served With Notice of Appeal.]—A party to a suit served with notice of appeal is entitled to his costs of appearing on the appeal. *Cunningham v. Gundry*, 3 V.L.R. (E.,) 51.

When and How Granted.]—On an appeal from a County Court, the costs are in the discretion of the Supreme Court, notwithstanding that the appellant succeeds; and costs will not be allowed when the appeal is decided on a point not taken in the Court below. *Great Gulf Company v. Sutherland*, 4 A.J.R., 164.

Where Appellant Succeeds in Part.] — In an appeal from a County Court where the appellant succeeds as to part only of the appeal, the general rule as to costs is not to be departed from, and he will be entitled to the costs of the appeal. *Fenton v. Earls*, 1 V.R. (L.,) 150; 1 A.J.R., 132.

Where Appeal Allowed on Ground of Misdirection.] —Where an appeal from the County Court is allowed on the ground of misdirection, the practice of the Supreme Court, in case of a rule absolute for a new trial, should be followed, *i.e.*, each party must pay his own costs occasioned by the mistake of the Judge, *i.e.*, of the County Court trial. *Green v. Godfrey*, 3 V.L.R. (L.,) 50.

Appellant Not Appearing.]—Where an appellant did not appear the case was struck out, and respondent allowed his costs. *Ryan v. Gray*, 5 A.J.R., 16, 17.

Rule to Remit Case for Amendment.]—The appellant is entitled to costs up to the time when the respondent offered to consent to an amendment, but if the respondent does not offer to pay them at that time, the party obtaining the rule (the appellant) may go on, and is entitled to his costs. *Whelan v. Hannigan*, 5 V.L.R. (L.,) 35.

Appeal—County Court Scale, Paragraphs 51-54.] —*Per Williams, J.* (in Chambers.) Paragraphs 51–54 do not refer to the respondent's costs at all; they relate only to the costs incurred by appellants in bringing case before the Court. *Mayor of Sandhurst v. Gruner*, 5 A.L.T., 12.

Summons for Apportionment of County Court Costs — Act No. 345, Secs. 38, 120.] — Where a defendant after judgment took out a summons for the apportionment of the County Court costs, which was dismissed, *Held* that Sec. 38 required such application to be made at the trial. *Thompson v. Rowe*, 3 V.L.R. (L.,) 55.

Re-Hearing in Suprsme Court — Act No. 345, Sec. 41—Scale of Costs.]—Where, on appeal from the County Court in an action of trespass, the Supreme Court directed a re-hearing before the Supreme Court, in which the plaintiff recovered a verdict with nominal damages, and the Supreme Court Judge refused to certify that the action was to try a right, *Held* that Sec. 41 of the Act did not apply; and as to the scale of costs, it was for the Prothonotary to tax them as he thought right, subject to a review. *Randall v. Smith*, 3 V.L.R. (L.,) 56.

Re-hearing—Costs Theretofore and Thereinafter Incurred.]—In a rule allowing an appeal from a County Court, and directing a re-hearing before a Judge of the Supreme Court, it was provided that the plaintiff should have the costs of the appeal, and the costs theretofore incurred (except the costs of the trial in the County Court), and that the costs "thereinafter" to be incurred should be borne by the unsuccessful party. *Held, per Holroyd, J.* (in Chambers,) that costs "thereinafter incurred" included the costs of the re-hearing. *Slack v. Terry*, 6 A.L.T., 30.

Counsel's Fees—Settling Special Case—Attendance Before Judge to Settle Case.]—*Per Williams, J.* (in Chambers.) A reasonable fee to counsel for settling the appeal case and attendance consequent thereon should be allowed; and

where the Judge has been in the habit of hearing parties on a summons to settle the case in the event of disagreement, counsel's fees on the summons should be allowed. *Brundell v. Wane*, 3 A.L.T., 36.

Practice.]—The practice as to costs on appeals from the County Court, which are allowed for the future, is as follows:—The appellant gets the costs of the appeal unless the Court thinks proper to take them away. The party who ultimately succeeds in the action gets the costs of the actions both in the County Court and in the Supreme Court, except the costs of the trial in the County Court. Each party bears his costs of this trial. The costs, both of the appeal and of the action, are taxed at the same time, and if the same party be not entitled to both, the less is deducted from the greater and an *allocatur* is given for the balance. *Marks v. Pett*, 10 V.L.R. (L.,) 342.

COURT.

Relation of Supreme Court to District Courts.]—The Supreme Court of Victoria does not stand in the same relation to the District Courts of the Colony as the Queen's Bench in England does to the Central Criminal Court there, the Circuit Court is merely the Supreme Court sitting on circuit as a Circuit Court, and is not a distinct Court. *Regina v. Costello*, 1 W. & W. (L.,) 86.

Supreme Court—Duty With Regard to Revenue.]—*Per Barry, J.* The Supreme Court, which acts as the Exchequer Court of England does in matters of revenue, is bound to protect the revenues of the Crown in this colony. *Fitzgerald v. Archer*, 1 W.W. & A'B. (L.,) 40.

Petition for Divorce.]—The Judges sitting *in Banco* in term have not jurisdiction to accept petitions in divorce. *Bell v. Bell*, 4 W.W. & A'B. (L.,) 244.

Jurisdiction of Court to Rescind Order Made in Chambers.]—A rule *nisi* was granted to rescind an order made by a Judge in Chambers discharging, on a writ of *Habeas Corpus*, H. G. from custody. Rule discharged on argument. *In re Glass*, 6 W. W. & A'B. (L.,) 103.

Judge Sitting Under "Emergency Clause."]—A Judge sitting in the vacation under the *"Emergency Clause"* as the Supreme Court, is bound by previous decisions of that Court. *Ex parte Nyberg*, 4 A.L.T., 83.

Overruling Decisions.]—*Per Barry and Williams, J. J.* Courts of co-ordinate jurisdiction do not directly overrule their own decisions; the safest guide is *stare decisis*. *The Tommy Dodd Company v. Patrick*, 5 A.J R., 14.

Supreme Court—Central Criminal Court.]—The Central Criminal Court is entirely distinct from the Supreme Court, and its records are not before the Supreme Court unless brought there. Sec. 23 of Act 502 applies only to trials upon a record of the Supreme Court. The Court refused a rule for a new trial in the case of a prisoner convicted and sentenced in the Criminal Court of a misdemeanour. *Regina v. Hall*, 1 V.L.R. (L.,) 270.

Supreme Court—Practice.]—The Supreme Court is not bound by the practice of any of the Courts at Westminster, but, in respect of matters in which it has no practice of its own, will, if there be a difference of practice among the Courts at Westminster, follow that of the Queen's Bench. *Re Phelps*, 6 V.L R. (L.,) 37.

Court in Banco—Postponement of Trial of Issues Sent by Primary Judge in Equity Pending Appeal.]—The Court sitting *in Banco* for common law business will not entertain a motion for a postponement of the trial of issues sent down to *Nisi Prius* by the Primary Judge in Equity, pending an appeal to the Full Court upon the direction that the issues should be tried, and upon the form in which they are stated, such motion being in effect an attempt to obtain an appeal from the refusal of the Primary Judge, in the exercise of his discretion, to stay the proceedings. *White v. Hoddle*, 6 V.L.R. (L.,) 183; 2 A.L.T., 18.

Jurisdiction—Supreme Court—Case Stated by General Sessions—New Trial.]—Sec. 390 of the *"Criminal Law and Practice Statute* 1864," empowering the Supreme Court to direct a *venire de novo* or new trial to be had, applies to ordering a new trial to be had before the Court in which the first trial took place. The Supreme Court, therefore, cannot, on a case stated by General Sessions, order a fresh trial to be had before itself. *Regina v. Herbert*, 8 V.L.R. (L.,) 205.

Supreme Court Rules—Construction.]—Where the written Rules of Court and the Schedules to those Rules are inconsistent, the Schedules are overruled. *Per Molesworth, J.*, "I apprehend, upon the analogy of cases where such questions have arisen under Acts of Parliament, the Schedule must be held to be overruled by the enacting part of the Rule." *Jamieson v. Allen*, 1 W. & W. (E.,) 19.

Rules of Court—15 Vic., No. 10, Sec. 32—Power to Relax.]—Rules made under 15 Vic., No. 10, Sec. 32 (*"Supreme Court Act"*) are given by that Act the force of Acts of Parliament, and the Court has no power to make a dispensation with them. *In re Gair*, 10 V.L.R. (L.,) 108.

An articled clerk made an application for permission to be examined before the time provided by the Regulæ Generales of October 16th, 1882. *Held* that though the application was one entitled to favourable consideration, the Court had no power to relax the Rules, and application refused. *Ibid.*

As to jurisdiction of a single Judge and the Full Court, under the "*Judicature Act* 1883," *see* under PRACTICE AND PLEADING—*Under* "*Judicature Act.*"

County Court.]—*See* COUNTY COURTS.

Insolvent Court.]—*See* INSOLVENCY.

Of Vice-Admiralty.]—*See* SHIPPING.

Courts of Mines and Warden's Courts.]—*See* MINING.

COVENANT.

1. *Construction of*, column 279.
2. *Relating to Land*, column 281.
3. *In Restraint of Trade*—*See* CONTRACT.
4. *In Leases*—*See* LANDLORD AND TENANT.

1. CONSTRUCTION OF.

Repugnant—Proviso.]—A mortgage deed contained the following covenant:—"The mortgagors do hereby for themselves jointly, and each of them doth for him separately, their and his heirs, &c., covenant with the said corporation that the said mortgagors, their executors, &c., shall and will on such demand as aforesaid, well and truly pay unto the said corporation the said principal sum with interest on the same as aforesaid: *Provided always*, the covenant last aforesaid shall not be construed to affect or extend the personal liability of the said mortgagors beyond the amount unpaid by them respectively as members of the said company on their respective shares in the same." *Held*, on demurrer to a plea setting up the proviso, that the proviso as repugnant to the covenant was void. *Oriental Bank v. Goujon*, 2 W. W. & A'B. (L.,) 10.

Of Trustee—When Personal.]—E., M. and L., partners in a contract, dissolved partnership, and E. and M. retired from the contract. By the deed dissolving the partnership, it was provided that E. and M. should each by L.'s bond be secured a sum equal to one-tenth of the profits of the contract throughout, and be indemnified against losses. L. was, in fact, only a trustee for others. Subsequently L. was removed as trustee, and W. appointed in his place, L.'s bonds being given up by E. and M. on their obtaining a covenant from W. to pay and do that which L. was bound by his bonds to pay and do. The contract being completed, E. and M. filed a bill against W. and his *cestuisque trustent* for an account and payment of a sum equal to one-tenth of the profits. *Held*, that E. and M. were only entitled to a personal decree against W., and not against the parties ultimately liable to indemnify him. *Evans v. Guthridge*, 1 W. W. & A'B. (E.,) 119, 132.

Covenant to Pump a Mine and Keep the Water "Forked" in the Shaft "Constantly and Without Stoppage"—Sunday.]—By deed S. covenanted that he would for two years, constantly and without stoppage, work and continue working the pumping gear erected on a claim, and would pump and continue pumping the mine, and would keep the water constantly "forked" in the engine or water shaft. S. during the two years pumped the mine and kept the water "forked" in the shaft, but owing to the engine being more than equal to keeping the water down it was necessary at times to stop owing to the pumps sucking, and S. always stopped the engine on Sundays. The water was, however, kept under, and no damage was done to the mine. *Held* that S. had sufficiently complied with the covenant, and was entitled to recover the remuneration agreed upon in the deed. *Stevens v. Craven*, 2 V.R. (L.,) 37; 2 A.J.R., 35.

Not to Cut, Destroy, or Injure Timber Unless the Trees were Grubbed.]—The construction of this covenant is, that the covenantor grub at the time of cutting, and not merely before the end of the term of the lease in which it is contained, the two things not being severable. *Urquhart v. Brooksbank*, 5 A.J.R., 162.

Movables—Fixtures.]—Where a lessee covenanted that the assignees should sell to the lessor certain buildings, engines, machinery, implements, &c., upon the land demised at a price to be agreed upon by the assignees and lessor, and "in case such valuation could not be agreed upon" at a price to be fixed by arbitration, *Held* that such a covenant did not run with the land as to moveables, but *semble* the contract was severable and would run with the land as to fixtures. *Malmsbury Confluence Gold Mining Company v. Tucker*, 3 V.L.R. (L.,) 213.

Theatre—Covenant for Account and for Affording Facilities for Ascertaining Correctness of Accounts—Lessor and Lessee.]—A lessee of a theatre covenanted with the lessor that he would daily furnish an account showing gross returns of the day previous, and would produce books for inspection, and afford every facility for ascertaining correctness of such daily returns. *Held*, that the covenant did not import that lessee should check returns in person; he might do it in person or by any other person as to whom lessor could have no reasonable ground of complaint; that under covenant to produce books the lessee was impliedly bound to keep books giving reasonable information, and a list of persons whom he allowed to pass free into the theatre accessible to lessor; that words "afford every facility" were not to be restricted to lessor himself, but should extend to his agent, and that words included the ascertainment of facts before the account, such as the number of free passes, with which the account, if true, should correspond. Injunctions ordered to be issued for any of those purposes if necessary. *Aarons v. Lewis*, 3 V.L.R., (E.,) 79, 234.

Penalty or Liquidated Damages.]—*See Gleeson v. Kingston*, 6 V.L.R. (L.,) 243, *post* under PENALTY.

In Deed Poll—Money Payable to Third Person.]—**Ambiguity as to Who is Covenantee.**]—*See Moss v. Legal and General Life Assurance Society*, *post* under INSURANCE—Life—Actions on Policies.

Recital in Deed of Agreement to Pay—No Express Covenant to Pay—Construed as Covenant to Pay.]—*Bruce v. Kerr*, *post* under DEED—Construction.

Covenant to Refer Partnership Disputes to Arbitration.]—Certain persons agreed to provide money for establishing the works of a partnership, and if any of them should fail to do so he should pay interest at a fixed rate, and also agreed that if W., one of them, would provide the money the others would repay him. The deed of partnership contained a covenant to refer all differences and disputes arising between the partners during the term of the partnership to arbitration. W. provided the money, and all the partners repaid him but B., whom W. sued for his contribution. B. pleaded the covenant to refer. *Held* that the fact that the amount advanced to each partner by W. was ascertainable by reference to the partnership deed did not make the transaction a partnership matter, and judgment for plaintiff. *Walker v. Born*, 6 V.L.R. (L.,) 447.

Joint or Several—Ambiguity — Evidence dehors to Explain.]—Where in the construction of a covenant there is a latent difficulty, or the language admits of two constructions, evidence *dehors* is admissible, not to explain away a difficulty patent, but to assist the Court in arriving at the intention of the parties. A covenant by A., his heirs, executors, &c., with B. and C., their executors, administrators, &c., construed as a joint covenant. *Henderson v. Woodburn*, 7 V.L.R. (L.,) 413; 3 A.L.T., 37.

Cancellation.]—A covenant to pay money may be discharged by the simple cancellation of the deed, before breach, with the consent of both parties. *Nicholson v. Merry*, 4 V.L.R. (L.,) 65.

2. RELATING TO LAND.

Covenant for Further Assurance—Lost Deed—Grantor Not Compelled to Execute a Duplicate After Many Years.]—G. lent his mother, who was married again to R., £100, to go in part payment of the purchase of certain land. The Crown Grant of this land issued to R., who, in February, 1856, by deed conveyed half of the land to G. as for £100 paid. G. entered into possession and built a house, and afterwards lost the deed. Disputes arose as to ownership, and, in 1874, G. brought a suit, seeking, *inter alia*, to compel R. to execute a duplicate of the lost deed under the covenant for further assurance in the deed of February, 1856. *Held* that, as the lost deed was eighteen years old and its efficacy had been long disputed, and as there was no distinct evidence of the language of the covenant, and no averment of conditions precedent to the right to enforce having been complied with, the relief sought would not be granted. *Quære* whether such a general right for further assurance can be enforced. *Geraghty v. Russell*, 5 A.J.R., 89, 90.

To Repair—Breach, What is.]—P. was tenant of G. of an hotel for three years under a covenant to keep and deliver up the premises in good repair as at present, fair wear and tear excepted. Before the expiration of the tenancy P. agreed with G. for a further tenancy, G. being permitted to enter and repair for the preservation of the property. G. entered, and by his workmen continued to repair for six weeks. G. refused to grant the further lease and demurred to a bill by P. for specific performance on the ground (amongst others) that the repairs were only what the plaintiff ought to have effected to prevent forfeiture of the license, and that by not effecting them P. had broken the covenant to repair. *Held* that there was no breach of covenant by P. *Polleykett v. Georgeson*, 4 V.L.R. (E.,) 207.

Covenant to Repair—Whether it Runs With the Land — Continuous Obligation.] — A lessor covenanted for himself, executors, administrators, and assigns to repair "forthwith" a certain part of the premises leased, and within a specified time to erect certain buildings. *Held* that these covenants did not run with the reversion, but fell within the second class in *Spencer's Case*, and the assignees being named would be bound; that each was a covenant to do a thing within a certain time, and was not of continuing obligation, and as it could only be broken once for all, the assignee was not liable unless it had not been broken before he became assignee. *Rankin v. Danby*, 9 V.L.R. (L.,) 278; 5 A.L.T., 92.

And *see* LANDLORD AND TENANT.

CREDITOR.

See DEBTOR AND CREDITOR.

Administration Suit by.]—*See* ADMINISTRATION.

Letters of Administration to.]—*See* WILL.

Insolvency Proceedings.]—*See* INSOLVENCY.

CRIMINAL INFORMATION.

Defamatory Libel—Act 15 Vic., No. 10, Secs. 12, 13—19 Vic., No. 4, Sec. 10.]—There are only two kinds of proceeding by information in criminal matters, one under the 12th Section of Act No. 10, viz., an information prosecuted by the Crown Prosecutor, and the other filed by a

private person with the leave of the Court under Sec. 13. "Private prosecutor" in Sec. 10 of the "*Libel Act*," 19 Vic., No. 4, means a person filing an information under Sec. 13 of Act No. 10. In a case where the Crown Prosecutor had signed an information for defamatory libel, and left the conduct of the case to a private individual, and the defendant had been convicted and fined, on a summons to amend the *postea* with a view to costs, *Held* that such individual was not a "private prosecutor" within meaning of Sec. 10 of the "*Libel Act*," and had no *locus standi*. Summons dismissed. *Regina v. O'Farrell.* 2 W. & W. (L.,) 117.

See, as to discretionary power of Court in a case of nuisance, *Regina v. McMeikan, post* under NUISANCE.

Libel—Complainant Obtaining a Commitment for Trial by Justices.]—Where F. summoned K. before justices for a libel, and K. was committed for trial, the Court discharged a rule *nisi* for criminal information, refusing to interfere where F. had obtained redress before the justices. *The Queen, ex partc Farrell v. King*, 5 A.J.R., 35.

CRIMINAL LAW.

STATUTES.

"*Criminal Law and Practice Statute* 1864," No. 233.
"*Criminal Law Amendment Act* 1869," No. 343.
"*Falsification of Accounts Statute* 1880," No. 655.

IMPERIAL STATUTES.

6 Geo. IV., Chap. 50.
9 Geo. IV., Chap. 31.
6 and 7 Vic., Chap. 34.
11 and 12 Vic., Chap. 13.
12 and 13 Vic., Chap. 96.
16 and 17 Vic., Chap. 99.
20 and 21 Vic., Chap. 3.
25 Vic., Chap. 96.

I. ABDUCTION.

Act No. 233, Sec. 52—Girl Taken in Absence of Father.]—W. was convicted of abduction. It appeared that the father of the girl abduced had been absent when the abduction took place. *Held*, that it was to be presumed that she had been taken against his will. Conviction affirmed. *Regina v. West*, 5 A.J.R., 19.

Abduction of Girl Under Age With Future Interest in Property—Evidence.]—T. was charged under Sec. 50 of the "*Criminal Law and Practice Statute* 1864," with the abduction of a girl under age, and having a future interest in certain personal estate. The only evidence of such future interest was that of the girl's parents, who had been informed that she was entitled under her grandfather's will to receive £1000 upon coming of age; that her sister actually did receive such a sum under the will upon coming of age, and that this had been told to T. *Held* sufficient to sustain a conviction. *Regina v. Taylor*, 2 V.L.R. (L.,) 95.

II. Arson and Burning.

Evidence — Existing Policy of Insurance.]—A.H.T. was convicted of arson, but questions were reserved as to whether certain acts and admissions by the defendant herself were receivable in evidence of a subsisting insurance. *Held* that they were. Conviction upheld. *Regina v. Thompson*, 4 W.W. & A'B. (L.,) 23.

Bark Hut.]—A bark hut which has been used as a dwelliing may be the subject of arson though there be no evidence of any conveyance of the property, and though it does not appear whether the land on which it stands is Crown land. *Regina v. Rowden*, 2 V.L.R. (L.,) 230.

III. Assault and Battery.

O'L. was convicted of a robbery in company, the property taken being described as "a piece of calico." The evidence showed that the robbers were in company with B., and saw him pull out of his pocket a purse containing money. B. suspecting their intentions changed the purse from his right to his left-hand pocket. Afterwards the robbers attacked him outside, and dragged out the whole of his right-hand pocket (intended by the piece of calico in the information,) but got no booty. There was no evidence of how long the pocket was held or what became of it. It was left to the jury "if there was evidence of robbery of the pocket if its materials were calico." *Held* that as the whole pocket was torn out, that fact in itself was evidence to go to the jury as to the intention. Conviction supported. *Regina v. O'Leary*, 2 W.W. & A'B. (L.,) 13.

Indecent Assault.] — M. was convicted of an indecent assault upon an adult woman. The information contained two counts, one for assault with intent to commit a rape, the other for an "indecent assault," but contained no count for a common assault. *Held* that, although an "indecent assault" upon an adult woman was not a specific offence, yet an "indecent assault" is nothing more than a "common assault" with circumstances of indecency on the part of the offender; that the conviction had a sufficient basis in the information. Conviction affirmed. *Regina v. Messenger*, 4 W.W. & A'B. (L.,) 253.

"Criminal Law and Practice Statute" No. 233, Sec. 369.]—An information charged L. with having feloniously caused grievous bodily harm to another, and the jury found him guilty of common assault. *Held* that in the absence of special enactment the misdemeanour and felony could not be included in one information, and similarly the verdict could not stand, as it would amount to an insertion in the information of an improper count. Sec. 369 of Act No. 233 is in favour of this. Conviction quashed. *Regina v. Longmuir*, 6 W.W. & A'B. (L.,) 237; N.C. 58.

Robbery—Under Arms — Servant — Property of Master—Presentment.]—A conviction, under Sec. 111 of the "*Criminal Law and Practice Statute* 1864," can be supported upon a presentment for robbery under arms from a servant of the property of his master, in the absence of the latter, such presentment being good, even before plea. *Regina v. De Theuars*, 6 V.L.R. (L.,) 23; 1 A.L.T., 134.

Robbery under arms is merely robbery with an aggravation. *Ibid.*

IV. Bigamy.

What Constitutes.]—S., within seven years of her first husband's disappearance, married again. Shortly before her second marriage she received a letter informing her that her first husband was dead. She married again, and on the reappearance of her first husband was tried for bigamy. The jury brought in a verdict of guilty, with a rider strongly recommending her to mercy, on the ground that she had been informed that her husband was dead. On questions of law reserved, it was argued that the rider made the verdict equivalent to "Not Guilty." *Held* that the verdict "Guilty" was rightly found. *Per Stawell, C. J.*—Seven years is the limit within which a second marriage is entered into at the risk of the party who ventures to marry again without full knowledge of the death of the first husband or wife, as the case may be. *Per Molesworth, J.*—The offence of bigamy is entirely the creation of the statute. Knowledge within seven years was never a necessary ingredient of this offence; the fact which constitutes the felony in bigamy is the second marriage; and the question as to whether, when that second marriage is entered into by the parties, their *status* is such as to make it criminal, is one on which they must be informed at their own peril so far as being liable to conviction. *Regina v Smith*, 1 W. & W. (L.,) 325.

Evidence of First Marriage.] — S. being tried for bigamy, her father gave evidence as follows: —"I am a Roman Catholic, and the marriage was performed again by Father ——, a Roman Catholic priest, in a house where prayers were said. There was no church built. I know the ceremony of my own church, and it was performed. Mr. and Mrs. S. (the latter the prisoner,) lived together for thirteen years. They took each other for man and wife. I cannot tell what was said, because it was in Latin. I am not certain whether there was a ring." The Judge refused to direct an acquittal. The jury brought in a verdict of guilty, with a strong recommendation to mercy on the ground that S. had, shortly before her second marriage, received a letter informing her of her husband's death. Two questions of law were reserved, one of which was, that the first marriage was not proved. *Held, dissentiente Williams, J.*, that there was sufficient evidence of the first marriage. *Ibid.*

Evidence of First Marriage—Admission by Wife of Protection Order Against First Husband.]—On a charge against a woman of having committed bigamy, the only evidence of her marriage with her first husband was an admission in an affidavit sworn by her that she had a protection

order against him. On a search in the Registry only one such order, dated some years before the trial, was found. *Held* that this evidence was sufficient to support a conviction. *Regina v. Moore*, 4 A.J.R., 74.

"Marriage and Matrimonial Causes Statute," No. 268, Secs. 4, 10, 27—Presumption in Favour of Compliance with Preliminaries to Marriage.]—Y. was convicted of bigamy. At the trial it appeared that there was no evidence of any compliance with the requirements of Sec. 4, except that the second marriage was solemnised by a minister of religion ordinarily officiating as such, and there was no proof of declarations under Sec. 10. *Held* that the Court must presume that all the preliminaries to the marriage ceremony had been duly performed. Conviction affirmed. *Regina v. Young*, 5 A.J.R., 19.

Regularity of Second Marriage—Declaration on Second Marriage Not on Oath—Act No. 268, Secs. 10, 29.]—M. had been convicted of bigamy, and it appeared that as to the second marriage, which was regular in other respects, the parties had made a declaration not on oath, and that they had not been asked whether they objected to an oath on conscientious grounds. *Held* that, by Secs. 10 and 29 of the Act, an option was given as to an oath or solemn declaration. Conviction confirmed. *Regina v. Medcalf*, 5 A.J.R., 76.

Act No. 268, Sec. 14—Marriage of a Minor.]—G. was convicted of bigamy. As to the first marriage, it appeared that the woman was under 21, and that the mother had consented to the marriage, but there was a doubt as to the consent having been given in writing. *Held* that the maxim *omnia praesumuntur rite esse acta* applied, and that Sec. 14 meant this:—The marriage ought not to take place without the consent, but if it does take place it is valid. Conviction affirmed. *Regina v. Griffin*, 3 V.L.R. (L.,) 278.

First Marriage—Validity of.]—*See Regina v. Benson*, 4 V.L.R., (L.,) 21, *post* under Husband and Wife—Marriage.

V. Coining and Uttering Counterfeit Coin.

Possessing Materials for Coining—Evidence.]—On on information against W. for unlawfully having in his possession a mould and implements used for the purpose of coining, the evidence against W. was that the mould and implements were found in the house of B., who had been convicted on a similar information; that W. had lived in the house of B., and had on several occasions purchased materials for coining similar to some that were found in the house. *Held* that on the evidence W. was properly convicted. *Regina v. Wilson*, 1 A.J.R., 118.

Medals Passed as Money.]—McC. passed three medals as coins, and though the fraud was palpable it appeared that a witness had thought that one of these was genuine since he received it and gave change for it. *Held* that McC.'s conviction was right. *Regina v. McCall*, 7 V.L.R. (L.,) 136.

VI. Conspiracy.

Evidence of.]—C., K. and W. were accused of conspiracy to defraud a company, and K. and W. were convicted. The only evidence to connect C. with the conspiracy was that he had bid at the sale of the company's property made under an execution put in by W. for a debt, and that a copy of a letter was found among W.'s papers addressed to C. requesting him to bid for the property. C. swore that he never received the letter, and could not read it if he had received it. *Held* that this, though suspicious, was not sufficient to connect C. with the conspiracy. *Regina v. Capes*, 1 A.J.R., 158.

To Cheat and Defraud.]—In an information for conspiracy to cheat and defraud one D.M.P. of moneys, several overt acts were laid, but the evidence only pointed to the last, which was for "causing twenty-two casks to be sent to P.'s store containing for the most part a dark greasy substance, not tallow, for the purpose of having it sold as good tallow." There was conflicting evidence as to whether this substance was tallow, and the jury were directed to convict if they thought that the information was true, averring a part filling of the casks with a substance of inferior value, even although they might believe the substance was in fact tallow. On this the jury convicted. *Held* that the words "not tallow" could not be rejected, as the conspiracy was not laid as an overt act, because a conspiracy could not be charged, and an overt act laid under one and the same form of words. Conviction quashed. New trial ordered. *Regina v. Govan*, 3 V.R. (L.,) 221; 3 A.J.R., 110.

Conspiracy — Statements by Co-Conspirators.]—S. and E. being in custody on a charge of conspiracy, S. made a statement as to E.'s guilt to a detective. This statement was repeated by the detective to E. who declined to say anything about it, acting under advice. *Held* that E.'s silence did not form evidence from which the jury were at liberty to draw any inference as from an admission. Conviction quashed. M. was convicted on the same charge as S. and E., and the evidence consisted of a statement made by M. to S. after S. was taken into custody, M. being free at the time, and of a statement by S. to the prosecutor. *Held*, that the former statement was admissible as it was for the purpose of preventing the recovery of the property fraudently obtained, but the latter was not admissible without a caution to the jury that it was to be disregarded unless S. was convicted. *Regina v. Eccles and Merritt*, 7 V.L.R. (L.,) 36; 2 A.L.T., 117.

Charge of Conspiracy Based on an Act Supposed to be Unlawful, but in fact Lawful.]—Where a charge of conspiracy is based on an act supposed to be unlawful, but in fact lawful, the charge cannot be sustained. *Regina v. Taylor*, 2 W & W. (L.,) 23.

VII. Embezzlement by Clerks and Servants.

Who is a Clerk or Servant—Change of Employment by Agent.]—S. was hired by a firm to act as storeman and traveller at a branch, and had acted solely under the terms of his hiring. The firm subsequently appointed at the branch a person as agent and sole manager, and gave him alone authority to collect moneys of the firm. The agent allowed a new practice to grow up, under which S. collected the moneys; and S. having misappropriated the moneys was convicted, but after conviction the Judge reserved a point of law. *Held* that S., having submitted to the practice allowed by the agent, could not gainsay it, and contend that he did not receive the moneys by virtue of his employment as clerk or servant, and that so far he was rightly convicted; but, there being no evidence that the agent had any authority to alter the employment of S., and the Court doubting very much if the jury should not have been asked to find specifically on that point, and, thinking that the benefit of the doubt should be given to the prisoner, directed a new trial. *Regina v. Stewart*, 1 W. & W. (L.,) 313.

Clerk or Servant—Who is.]—The rules of a friendly society provided that the treasurer should be paid in accordance with a resolution of the society. C. had been acting as treasurer for some time; but no resolution for paying him had been passed. C. appropriated the funds of the society, and was convicted of embezzlement. *Held*, on special case, that C. was clerk or servant of the society within the meaning of Sec. 139 of No. 233, as he might under the rules enforce some payment; and *semble*, that even if he were to receive no remuneration, the conviction would be affirmed. *Regina v. Cantlon*, 5 W. W. & A'B. (L.,) 24.

Collector for Hospital, and also for Private Persons.]—H. was convicted of embezzlement. It appeared that he was appointed collector for a hospital, being paid by salary and commission, and he had to account to the committee for moneys received by him. He had on several occasions paid over the moneys by means of his own cheques; H. also collected debts for private persons. *Held* that there was evidence to show that H. was the servant of the committee, and conviction affirmed. *Regina v. Herbert*, 4 A.J.R., 89.

By Servant of the Crown—Act No. 233, Sec. 141—Evidence of Appointment.]—O'F. was convicted as under Sec. 141 of No. 233, for embezzling moneys received by him as a Crown servant. There was evidence that O'F. had issued licenses for the occupation of Crown lands under Sec. 47 of the "*Land Act* 1869," and that he embezzled moneys received by him in his capacity of licensing clerk, and that he had paid over some of the moneys received to the Crown. *Held* that there was sufficient evidence of his being a servant of the Crown, and conviction affirmed. *Regina v. O'Ferrall*, 1 V.L.R. (L.,) 81.

What is Not Embezzlement — Appropriation of Money by Secretary of Secret Society whose Rules are Not Registered.]—A secret society within the meaning of 39 Geo. III., Cap. 123, and 57 Geo. III., Cap. 19, duly registered its rules. It also registered bye-laws made by a board who had the control of a fund for the widows and orphans of members. This board subsequently made other bye-laws, which were submitted to the revising officer, but were not certified by him, and therefore not registered. Under these the secretary had to receive contributions to the fund, and the management of the fund was vested in trustees. W., who was secretary, appropriated moneys contributed to the fund and received by him under the new rules. He was convicted of embezzlement upon an information which stated the property of the fund and contributions to it to be in the trustees under the new rules. On questions reserved, *Held* that, as the rules were not registered, the moneys were not the moneys of the society, and judgment for the prisoner. *Regina v. Wood*, 1 W. & W. (L.,) 371.

What is Embezzlement.]—Embezzlement consists in the appropriation by the servant of the property of the employer before it reaches his actual possession. Defendant was clerk and traveller of N. B. and Co. He was indebted to J. and P., who were indebted to N. B. and Co. Defendant fraudulently credited J. and P. in their account with N. B. and Co. with the sum he owed them, and received J. and P.'s receipt as for that sum. *Held* that this was no embezzlement as the moneys purloined were not legally the property of the employers, and the employers could still recover the amount due from P. and J. *Regina v. Sydenham*, 2 W. & W. (L.,) 16.

What is.]—Embezzlement, in contradistinction to larceny, may be styled an act of the mind—a mental operation—the feloniously appropriating property received by a person as the agent or clerk of another. The property is in the possession of the accused, and no question arises as to the *cepit* or *asportavit*, just as in the case of a person charged with appropriating property found by him, there is a clear and obvious distinction between the act itself, and the evidence of that act. *Regina v. Draper*, 1 V.R. (L.,) 39; 1 A J.R., 46.

What Is.]—C. was in B.'s employ, and his duty was to collect the moneys received from the sale of coals, and after paying expenses to remit or account for balances once a month. Being in difficulties, he operated on the cash credit, drawing cheques to a large amount to pay off his private debts, and he opened an account with himself in the ledger, debiting himself with the sums so drawn; he confessed to B., offering to pay off the debt by instalments. *Held* that C. was guilty of embezzlement. *Regina v. Church*, 9 V.L.R. (L.,) 153; 5 A.L.T., 23.

What is Sufficient Evidence.]—Where there was evidence that defendant had purloined certain amounts, but no evidence pointing out the

person from whom he received a particular portion, or by which any particular portion could be traced, conviction sustained on the ground that there was evidence to show a particular embezzlement of an amount on any day, though that amount might possibly have consisted of several smaller sums deducted from other amounts received on such day. *Regina v. Ashford*, 2 W. & W. (L.,) 171.

What Evidence Sufficient to Support a Conviction for Embezzlement.]—Evidence of a general deficiency held sufficient to uphold a conviction for embezzlement, affirming *Regina v. Ashford*, [2 W. & W. (L.,) 171.] *Regina v. Monckton*, 3 W. W. & A'B. (L.,) 25.

Evidence.]—A bank clerk passed a cheque into the bank, but to his own account, and not in accordance with the directions accompanying it when he received it in the course of his duty. He subsequently by means of a fictitious credit placed a sum equal to the amount of the cheque to the credit of the person to whose credit the cheque was directed to be paid. *Held*, that there was evidence to go to the jury of embezzlement, the subsequent acts of the clerk not being inconsistent with a felonious intention. *Regina v. Draper*, 1 V.R. (L.,) 39; 1 A.J.R., 46.

Evidence—Question for the Jury.]—It is a question for the jury, and not for the Judge, to decide what is the fair conclusion to be drawn from the overt act of appropriation and the rest of the evidence subsequent to the act. *Ibid.*

Evidence of—General Deficiency.]—Proof of a general deficiency without proof of the embezzlement of a specific sum is sufficient evidence of embezzlement. *Regina v. Macey*, 1 A.J.R., 151.

Evidence—Act No. 233, Sec. 143.]—C. gave S. a general direction as his agent to collect rents and to pay them into a certain bank to C.'s credit. S. appropriated to his own use an amount of £5, and was convicted. *Held* that the general direction applied under Sec. 143 to each sum as it was received, and was sufficient to support a conviction for the embezzlement of one sum. Conviction confirmed. *Regina v. Spencer*, 3 V.L.R. (L.,) 280.

Improper Conversion by Agent of Moneys Received by Him—"Criminal Law and Practice Statute 1864," Sec. 143.]—A conviction under Sec. 143 of the "*Criminal Law and Practice Statute* 1864," for the conversion by an agent of moneys received by him, contrary to the written directions of his principal, may be sustained, although the directions provided for the payment by the agent of a fixed rate, called in the directions "interest," but independent of time, for all moneys which should be unpaid by the agent after a time mentioned in the directions, such "interest" not really being interest but a penalty, and not operating so as to convert the unpaid moneys into a debt to the principal. *Regina v. Watson*, 4 V.L.R. (L.,) 174.

Embezzlement or Larceny—No. 233, Sec. 139—Evidence—Letter by Post.]—T. was cashier of a company, and while he was acting as such a letter containing a cheque, and properly addressed and stamped and directed to the manager of the company, was posted, but never reached the manager. It was not T.'s duty to open letters. On the 28th of February T. was dismissed, and on the 6th of March he cashed the cheque. *Held* that since the alteration of the law effected by Sec. 139 of the "*Criminal Law and Practice Statute* 1864," it did not matter that T. had not received the cheque in the course of his duty, and that he was properly convicted of embezzlement; and that there was evidence sufficient for the jury to presume that the letter was delivered in due course of post, and that T. opened it and took the cheque. *Regina v. Turner*, 2 V.R. (L.,) 84; 2 A.J.R., 59.

Embezzling Moneys Belonging to a Mining Company—Proof of Registration.]—In a charge for embezzling moneys belonging to a mining company, the certificate of registration was signed by the Deputy-Registrar. *Held* that under Sec. 215 of Act No. 213 (R. P. Stat.) this was sufficient, and conviction affirmed. *Regina v. Walter*, 5 A.J.R., 25.

VIII. False Pretences and Cheats.

(1) *What Amounts to.*

(*a*) *General Principles.*

Existing Fact.]—M. was convicted of falsely pretending to one, H., that he had taken a house in order that he and H. might live together in the house after marriage, and that he required a sum of money to furnish the house. It appeared that M. had taken a house, and had received money from H. on the said pretence, but had afterwards married another person. On a point reserved, *Held* that one only of the representations, viz., that he had taken a house, was a representation of an existing fact, the others were representations as to the future and not as to the present, and that there was no crime, since the first representation was true. Conviction quashed. *Regina v. Sullivan*, 4 W. W. & A'B. (L.,) 114.

A pretence of an existing fact is sufficient to support a conviction, although it is accompanied with promises to do an act at a future time. *Regina v. Apfel*, 3 V.R. (L.,) 172; 3 A.J.R., 73; for facts *see* S.C. *post column* 293.

Existing Fact—Obtaining Money by False Pretences—Sale of an Hotel Free from Incumbrances.]—S. sold to W. an hotel, representing that it would be free from incumbrances. At the time of the sale there was a bill of sale over the hotel as security for an acceptance *still current*, and immediately after T.'s taking possession the acceptance became due, was not paid, and the assignee under the bill of sale entered upon the hotel. *Held* that there was no false pretence, for if the acceptance had been paid there would have been no incumbrances on the hotel, and, therefore, there was no misrepresentation as to an existing fact; the representation was as to what S. would do in the future,

and conviction quashed. *Regina v. Savage*, 4 A.J.R., 165.

False Pretences—Obtaining Money by—What is.] A person is rightly convicted of obtaining money or valuable securities by means of false pretences, who has obtained a loan upon the security of a deposit of deeds, which he represents to be the true and only title deeds of the land conveyed by them, after he has himself brought the same land under the "*Transfer of Land Statute*," and obtained a certificate of title thereto. *Regina v. Thompson*, 8 V.L.R. (L.,) 12; 3 A.L.T., 96.

(*b*) *Cheques.*

Cheques—Post-Dated.]—In obtaining money by false pretences by means of cheques it makes no difference that the cheque is post-dated. The false pretence must relate to an existing fact, and if the fact exist that the prisoner when he gave the cheque had no funds, or any reasonable expectation of having funds to meet it, it makes no difference that the cheque is post-dated. *Regina v. Bathurst*, 1 A.J.R., 40.

Post-Dated Cheque.]—A post-dated cheque may be the subject of a false pretence. The mere issuing of a cheque is in itself evidence of making a false pretence, although the person who issues it may not say a word. A., on June 18th (Saturday,) bought mining shares from L.; told L. that there was no use sending the post-dated cheque he gave until the second exchange on June 20th. At the time of the purchase A. represented to L.'s partner that he had sold the shares to a person in Melbourne, with whom he had often done business. The broker employed by A. sold the shares with A.'s consent for £6 15s., though A. had given £8 for them, and handed A. the money. The cheque was presented and dishonoured, there being only £1 10s. to his credit at the bank. *Held* that these statements made by the prisoner did not lessen the effect of the evidence conveyed by the issuing of the cheque that it was a good and available instrument. Conviction affirmed. *Regina v. Apfel*, 3 V.R. (L.,) 172; 3 A.J.R., 73.

(2) *Information and Evidence.*

Ownership of Property.]—On a charge of obtaining money by false pretences it is not necessary either to allege or prove whose the property was; it is sufficient to show that it did not belong to the prisoner. *Regina v. Halliday*, 5 W. W. & A'B. (L.,) 33.

Evidence—Admissibility Of.]—On the trial of R. for obtaining money under false pretences, it appeared that the Victoria Racing Club issued badges to persons whom it registered as licensed to bet on the course, and that R. wore the badge of a person so registered. A witness, who had lodged money with R. for a bet, because, as he said, he saw that R. wore the badge, was asked, "What did you understand from the badge?" This question was objected to by R.'s counsel, who also objected that the minute-book of the club, from which the register of persons licensed by the club to bet was prepared, was inadmissible as evidence that R. was not licensed. *Held*, on special case, that the question was a proper one, and that the minute-book was admissible. *Regina v. Robinson*, 10 V.L.R. (L.,) 131; 6 A.L.T., 14.

IX. FORGERY.

Forging and Uttering—What Is.]—On the 28th July H. went to a country inn near Melbourne, giving out his name as L., and remained there for fourteen days, at the end of which his account amounted to £13 7s. 6d. It did not appear that the landlord applied for payment. On the 9th August H. gave the landlord a forged cheque in the name of L. for £15 to get cashed for him in Melbourne. Next day, before the landlord started for Melbourne, H. requested him to return the cheque, saying that he had a friend coming who would give him some money. The landlord did not return the cheque, but presented it in Melbourne, and it was dishonoured. On the landlord's return H. had departed, and being arrested ten miles off, said, "I gave the cheque to him to quiet him till the mail comes in." H. did receive £40 by the English mail. At the trial H. was convicted of forging and acquitted of uttering. *Held*, on a case reserved, that the conviction should be upheld. *Regina v. Hooper*, 1 W. W. & A'B. (L.,) 195.

What Constitutes Forgery—Forging Signatures to a Petition.]—The possibility of profit accruing to the person charged with the crime is not a necessary element in the crime of forgery, and a conviction for forging and uttering the signatures of several persons to a petition for the appointment of a justice of the peace was sustained. *Regina v. Flynn*, 4 A.J.R., 91.

Signature of Other Person's Name to Claim to be Put on Ratepayers' Roll—"Shires Statute 1869," Sec. 63.]—B. was informed against for having forged the name of a voter with intent to deceive the secretary of a shire council and the revision court of the shire. B. filled up and signed a claim to be put on the ratepayers' roll of a shire in the name of M., whose authority he falsely stated he had obtained. The name of M. was placed on the roll, and, at a subsequent election, M. voted, though he had given no authority for the claim. *Held* that Sec. 63 of the "*Shires Statute* 1869" required the signature of the person himself to be put to the claim, and that B. having signed in his own name was not guilty of forgery. *Regina v. Bourke*, 4 A.J.R., 164.

Evidence.]—On the trial of a prisoner for forgery of a cheque, a bank officer swore that no such person as the alleged drawer had any account at the bank. His knowledge of the matter was derived only from searching the bank books, which were not produced. *Held* that the evidence was properly admitted, and that the production of the bank books was unnecessary. *Regina v. Wright*, 4 W. W. & A'B. (L.,) 243.

Act No. 233, Sec. 227—Fraudulent Intent.]—K. was convicted of forging a receipt for money. It appeared that he had been employed by C.

to effect an insurance for her, and for that purpose obtained from her a larger sum than was necessary. He retained the excess and increased the amount named in the receipt. *Held* there was evidence of fraudulent intent. Conviction affirmed. *Regina v. Kitts*, 3 V.L.R. (L.,) 10.

Uttering Forged Cheque — Evidence.]—J. was convicted of uttering a forged cheque, knowing it to be forged. Evidence of the prisoner having previously uttered a forged bill of exchange was admitted. *Held* that such evidence was admissible, and conviction affirmed. *Regina v. James*, 3 V.L.R. (L.,) 11.

Information — For Forgery of an Undated Bill of Exchange.] — An information for forging described a document bearing no date as a "bill of exchange." *Held*, that the document was rightly described, the date not being a material part of a bill of exchange, and a conviction on the information affirmed. *Regina v. Gurnett*, 5 W. W. & A'B. (L.,) 28.

"Authority for the Delivery of Goods"—Bill of Lading—No. 233, Sec. 227.]—A bill of lading is an "authority for the delivery of goods" within the meaning of Sec. 227 of the "*Criminal Law and Practice Statute* 1864," No. 233. *Regina v. Wright*, 2 V.R. (L.,) 204 : 2 A.J.R., 119.

X. INSOLVENCY ACTS, OFFENCES UNDER.]—*See* INSOLVENCY.

XI. LARCENY AND RECEIVERS.

(1) *What Amounts to a Taking.*

Husband and Wife Acting in Concert.]—B. and his wife acted in concert for a theft, the wife taking and B. receiving. On their trial the wife was acquitted of stealing, on the presumption that she acted under B.'s coercion, but B. was convicted of receiving from her. On a question reserved, *Held* that there was a stealing in fact by the wife, and that the presumption, in consequence of which a wife is not amenable to punishment for such a stealing, did not alter that fact, and conviction affirmed. *Regina v. Bailey*, 1 W. W. & A'B. (L.,) 20.

H. met the prisoner at a railway station, H. having then certain bank notes on his person. The prisoner complained of poverty and asked for food. H. and the prisoner travelled together, were at an hotel together, and H. went to sleep in his waggon camped near to the hotel. On the next morning, on awakening, H. found his right hand pocket, in which were the notes, turned out and emptied. During the night he had been awakened by a noise, and saw a person (to the best of his knowledge the prisoner) standing thirty yards from the waggon. The next day the witness met the prisoner, who produced a bundle of notes, changed one for drinks, and spent others in buying clothes. H. could not in any way identify the notes found on prisoner when arrested or those he had spent, not knowing their numbers, or having any marks on them. The evidence was sent to the jury and the prisoner was convicted. *Held* by *Stawell, C. J.*, and *Barry, J.* (*dissenliente Williams, J.*) that there was no evidence to go to the jury. Conviction quashed. *Regina v. Wilson*, 2 W. W. & A'B. (L.,) 22.

Of Money Entrusted to One Person to Give to Another.] — A mining company owed J. G. certain money. S., the manager of the company, seeing L. G., the brother of J. G., on the mine, gave him a cheque for the sum due to give to his brother, and took a receipt from him signed as for J. G. L. G. never gave the money to J. G., and some months afterwards when arrested some distance away and asked if he knew S., he said "No." On trial for larceny he was convicted, and on a question reserved the conviction was upheld. *Regina v. Godenzi*, 3 W. W. & A'B. (L.,) 75.

Gold — What is a Mine — "Criminal Law and Practice Statute," No. 233, Sec. 104.]—Where a prisoner was convicted of larceny of gold, objections were taken (1) that there was no mine, (2) no taking, (3) no felonious intent. *Held*, on case reserved, that where gold is in its natural position (*in situ*,) even if it is in the form of separate grains contained in auriferous earth (wash-dirt,) it is in a bed or vein within Sec. 104 of Act No. 233; that to constitute a mine there need be no shaft opened on the surface of the land itself; that mining may be carried on under several portions of land accessible by one shaft only; that miners' rights confer no authority to enter on and take, without the consent of the proprietor, gold from lands which have been alienated from the Crown; and that the evidence of the prisoner, a servant of the company whose gold was stolen, having clandestinely opened a secret drive from the main drive, and having masked the entrance was sufficient to go to the jury on the question of criminal intention. *Regina v. Davies*, 6 W. W. & A'B. (L.,) 246; N.C., 64.

Receiving Security Under an Agreement—Evidence of Felonious Intention.]—B. received G. B. into his service, and required £300 deposit as security from him, and the following agreement was drawn up:—"I, G. B., agree to work for B., Richmond, at £1 per week and board, and to give £300 as security for three months, free of interest—G. B., B." G. B. gave B. a cheque for £300 of the same date as the agreement, and it was cashed the same day. G. B. remained more than three months in B.'s service, and eventually left without obtaining his cheque again, and B. shortly after became insolvent. On a charge against B. for larceny of the cheque, *Held*, on special case, that there was evidence to go to the jury that G. B. deposited the cheque as security for his conduct, and that B. was not to have the use of the money, and that the suggestion of the security was but an artifice to obtain possession of the money, the prisoner intending at the time he got it to appropriate it to himself and defraud G. B.; and that B. was rightfully convicted. *Regina v. Brockman*, 1 A.J.R., 152.

Evidence of Receiving — Production of Stolen Goods.]—L. was tried for burglary and receiving, and was convicted of receiving, subject to a

question as to whether there was evidence to go to a jury. It appeared that the owner proved that his house was burglariously entered and jewels stolen, and identified some of them produced in the Police Court by three pawnbrokers. The pawnbrokers proved that at different hours on the day after the alleged burglary, the prisoner pawned such articles. They were not produced at the trial, nor was any reason given for their non-production. *Held* that the non-production was a matter for the jury, and if they were satisfied by other evidence of the identity of the goods, their production was not indispensable. Conviction supported. *Regina v. Lynch*, 2 W. W. & A'B. (L.,) 102.

Receiving—Evidence of.]—Explanation of how stolen property, discovered in a person's possession two years after the robbery, came into his possession is not needed; and if such possession be the only evidence on a charge of receiving, an acquittal should be directed. But if the person accused give a false account of the possession, and thus afford evidence against himself, it then becomes a question of identity, to be considered by the jury, and if the goods be identified sufficiently, there will be evidence enough to sustain a conviction. *Regina v. McGowan*, 5 W.W. & A'B. (L.,) 180.

Gold from a Mine—Evidence of Corpus Delicti.]—A prisoner was convicted of larceny, and it appeared that the gold alleged to have been stolen was proved by analysis and assay to correspond with gold taken from the mine in which prisoner was working, that he was working where he would have opportunities of stealing it, and that the prisoner had stated that he was penniless immediately before he sold the gold. *Held* there was sufficient evidence. Conviction affirmed. *Regina v. Bramwell*, 1 V.L.R. (L.,) 311.

Possession Obtained by Fraud.]—Where the jury have found that there was a fraudulent intent, and where possession has been obtained by fraud, and that fraud was meditated, an *asportavit* may be inferred and the offence be complete. *Regina v. Bull and Wall*, 7 V.L.R. (L.,) 134; 3 A.L.T., 2.

Evidence.]—H. was convicted of larceny. It appeared that N. and he had taken part in a fight, and that N. had taken off his coat and thrown it down; that on taking it up again some money was missing. Money of the same description (bank notes) was found on H., but otherwise it was not identified. H. afterwards admitted to a constable that the notes were picked up by him, and that he had not asked N. about his loss and had told no one of his finding the money. *Held* that there was evidence to go to the jury, and conviction affirmed. *Regina v. Harry*, 9 V.L.R. (L.,) 369.

(*b*) *What May be the Subject of Larceny.*

Gold—No. 233, Sec. 107—"Claim."]—D. was convicted under Sec. 107 of the "*Criminal Law and Practice Statute* 1864," No. 233, of keeping back and concealing from his co-partners, or co-adventurers, gold taken from a "claim." The evidence showed that the ground from which the gold was taken was held under a lease from the Crown by D. and his co-partners. *Held* that land held under a mining lease was not a "claim" within the meaning of Sec. 107; and conviction quashed. *Regina v. Davies*, 2 V.R. (L.,) 117; 2 A.J.R. 74.

See also, as to Gold from a Mine, *Regina v. Davies*, 6 W. W. & A'B. (L.,) 246, *ante column* 296.

(3) *By Bailees.*

25 Vic., Cap. 96, Sec. 3.]—F. was manager and shareholder of a company carrying on the business of pawnbroking, and had a licence in his own name, but "as agent of" the company. H. deposited a watch with F., and F. absconded with the watch, but was captured at King George's Sound and brought back in custody with the property. H. was convicted of stealing the watch, but a question was reserved as to F.'s liability as such bailee to be convicted of larceny. *Held* that there was no necessity that the information should have been laid under 25 Vic., Cap. 96, Sec. 3, as there was evidence on which to frame an information irrespective of the Act. Conviction supported. *Regina v. Fischel*, 2 W.W. & A'B. (L.,) 11.

What is—Mortgagor Selling Articles Given by Bill of Sale.]—D. was the owner of certain chattels over which he gave A. a bill of sale. Default was made in the payment, and A. wrote to B. requesting him to remove the chattels from the lands belonging to A., on which they were, to some other land, and informing him that he was not at liberty to dispose of them. B. did remove them and subsequently sold them. *Held* that the letter sent to B., and his acting upon it by removing the chattels, showed that he recognised the authority of A. to ask him to move the chattels, but not to dispose of them; and that this recognition of authority formed sufficient evidence to go to the jury that B. was a bailee; and conviction upheld. *Regina v. Boyd*, 1 A.J.R., 88.

Conversion of a Bank Note Entrusted to a Person to Procure Change.]—Defendant was entrusted with a bank note to procure change. He converted it to his own use and offered the person entrusting him with it a smaller sum as satisfaction, which was declined. *Held* that he was rightly convicted of larceny as a bailee. *Regina v. Ah Poo*, 7 V.L.R. (L.,) 8.

(4) *Procedure.*

D. was convicted of larceny as clerk of the Oriental Bank. At the trial, a clerk in the office of the Registrar-General produced a copy of the original charter of the bank, and a copy supplemental charter, both registered under Act 27 Vic., No. 204, Secs. 89 and 90. The copy charter was put in and proved; it was complete in itself, duly incorporating the bank. The copy of the supplemental charter was tendered, but on an objection being made that the proof of this copy being in conformity with the Act was insufficient, it was withdrawn.

Counsel for the prisoner objected to the withdrawal, on the ground that the client was bound by his counsel's statement, and the Crown having endeavoured to prove, and having tendered the copy supplemental charter, ought not to be permitted to say that the supplemental charter was unnecessary, and to withdraw it. On case stated, *Held* that the objection could not be supported. Conviction upheld. *Regina v. Dickson*, 4 W. W. & A'B. (L.,) 116.

Allegation and Proof of Ownership—Stealing from Dead Body.]—J. was convicted of stealing a watch from the dead body of N. The question reserved was, in whom the property should be laid. It was in fact laid in the widow of N., who had not taken out administration. The Court held that the property was rightly laid in the widow. Conviction affirmed. *Regina v. Johnstone*, 4 W.W. & A'B. (L.,) 216.

Allegations and Proof of Ownership—Misdirection of Judge—Amendment—"Criminal Law and Practice Statute 1864," No. 233, Sec. 390.]—M. and others were tried for stealing and "receiving" certain goods on board a ship. The information contained eight counts—four for stealing, respectively laying the property in four different persons, and four for receiving, laying the property in the same way. The Judge directed the jury that, if satisfied with the identity of the goods and of their being shipped on the particular ship, the property might be laid in the different persons named, and that it must be necessarily in one of the several persons. The jury returned a verdict of "guilty of receiving," and in answer to a question put by the Judge said they couldn't tell whose property it was which had been stolen. *Held* that there was a misdirection; that the Judge might have directed them to find the property in the master; that, in strictness, there should have been a finding on each count; and that the Court could not amend under Sec. 390. New trial ordered. *Regina v. Murphy*, 4 W.W. & A'B. (L.,) 218.

Proof of Identity.]—B. was convicted of stealing tobacco. The evidence showed that C. had placed a tierce of tobacco outside his shop; it was found some distance off the next morning and was identified by C., but seven pounds of it were missing. Three hours afterwards the same quantity of tobacco, similar in all respects, was found wrapped up in a swag in the prisoner's bed. In the evening before B.'s room had been searched and the swag also, but the tobacco was not there. *Held* that the evidence as to the identity was not sufficient to go to a jury. Conviction quashed. *Regina v. Bond*, 4 W. W. & A'B. (L.,) 280.

Laying Property in Two Persons.]—Where a prisoner was convicted on 22 counts, for one class of which the gold stolen was laid in the Crown, and for the other in the B. Company, *Held* that the offence being one, and one only, viz., "stealing," it was not necessary that the verdict should be restricted to one or the other of these cases; that for the offence, though formally judgment must be pronounced on each count, yet substantially only one punishment is inflicted, and the verdict might be pleaded in bar to any future prosecution. Conviction affirmed. *Regina v. Davies*, 6 W. W. & A'B. (L.,) 246.

View of Stolen Property by Jury After Conclusion of Case.]—On the trial of W. on counts for stealing and receiving hides, the jury retired to consider their verdict, and on their return into Court stated that they had great doubt as to the identification of the hides, and that there was no probability of their agreeing. The Judge then accompanied the jury to the place where the hides lay, and allowed the jury to inspect them, and also allowed the witnesses to point out the marks by which the hides were identified. The jury then found the prisoner guilty of receiving, and he was sentenced. On special case reserved, *Held* that there was no impropriety in the course adopted, and conviction affirmed. *Regina v. Westlake*, 2 V.R. (L.,) 8; 2 A.J.R., 17.

XII. Malicious Injury to Property.

Act No. 233, Sec. 204.]—M. was tried and convicted for an offence under Sec. 204. It appeared that M. had sown drake, sorrel, and wild oats in a field where a crop of wheat and oats had been recently sown before, and there was evidence of the actual germination of the seeds. Conviction affirmed. *Regina v. Maund*, 3 W.W. & A'B. (L.,) 96.

And *see* under Offences (Statutory) and Justice of Peace—Jurisdiction and Duty—Question of Title.

XIII. Misdemeanours.

Under Act No. 228, "Mining Company's Statute," Sec. 24.]—A manager of a mining company would incur liability as for a misdemeanour by neglecting to comply with Sec. 24, notwithstanding the provision making false notices a misdemeanour. *Robin Hood Company v. Stavely*, 4 W. W. & A'B. (M.,) 26.

False Declaration Under "Land Acts."]—*See Regina v. Taylor*, *post* column 303, under Perjury.

XIV. Murder, Manslaughter and Offences Against the Person.

(*a*) *Murder and Manslaughter.*

Evidence—Corpus Delicti—"Degrees of Cogency."]—M. was tried and convicted of the murder of one *Mara*. They were last seen together in company on October 18th. On December 25th, certain remains were found of a human being, it being unascertainable whether of a male or female, the body having been burned, but a belt, buttons, pieces of a shirt and trousers were found close by, indicating that the remains were those of a male. Close by the spot was a piece of paper found, which it was proved *Mara* had put into his pocket on October 16th, and being a counterpart of a piece produced in Court, and also pieces of clothing of the same pattern and colour as those which *Mara* wore. M. was found in possession of a horse and

cart belonging to *Mara* on October 19th, and they remained in his possession until his arrest, though he had made several attempts to dispose of them, and also of a deposit receipt for £12, payable to *Mara's* order, which M. had tried also to dispose of. Near the remains were tracks of the precise size of the wheels of *Mara's* cart, and corresponding with the width of the cart. *Mara* had never been seen or heard of since October 18th, 1866. On case reserved, *Held* that there was evidence to go to the jury of the *corpus delicti*; that there was evidence that the remains were those of a human being whose life had been unlawfully taken, and of the identity of the remains with those of the person charged with having been murdered; that a greater degree of cogency is not required to prove the *corpus delicti* than to establish the criminal agency; that there is no test by which a Judge is enabled, as a matter of law, to say whether evidence is of any certain degree of cogency or not. *Per Barry, J.*—That until the *corpus delicti* is established, the evidence bearing on criminal agency cannot be considered, but when the first is established sufficiently, the evidence used in establishing it may be used in proving the criminal agency. Conviction confirmed. *Regina v. Murphy*, 4 W.W. & A'B. (L.,) 63.

Person Ordered to Shoot Another—Withdrawal of Order—Question for the Jury.]—L. was supercargo of a British ship which was conveying natives to be employed as labourers by the planters in Fiji. On the voyage a conflict ensued between some Tanna and Palmar natives, the Palmar natives shooting arrows from the hold in all directions, both at the crew as well as at the Tanna men. L. said, "It's no use getting a rope to make them fast, as they have bows and arrows," and gave muskets to the crew, giving orders to the effect, "Shoot at them if you get a good shot." These directions were heard by the cook and cabin boy only. About twenty minutes afterwards the cook held a light down the main-hatch into the hold, and three of the crew (none of them having heard L.'s directions to shoot) fired and shot three of the Palmar men. L. was convicted of manslaughter. On special case reserved, *Held*, by *Stawell, C. J.*, and *Barry, J.* (*dissentiente Williams, J.*,) that it was for the jury and not for the Court to determine the nature of the orders given, and then whether, during the interval between their delivery and the discharge of the last shot, circumstances had so changed, or so long a time had elapsed to justify the conclusion that the order had been virtually though not expressly withdrawn. Conviction affirmed. *Regina v. Levinger*, 6 W. W. & A'B. (L.,) 147.

Murder—What Is.]—S. pursued G. S. with a loaded pistol intending to kill him, and actually fired three shots at him. While in pursuit he was intercepted by W., and in the struggle between them the pistol went off accidentally and killed W. *Held* that S. had murdered W. *Regina v. Supple*, 1 V.R. (L.,) 151; 1 A.J.R., 129.

Through Neglect of Duty.]—Where a sick and helpless child is under the care of its mother, there is no duty cast upon the step-father, for neglect of which he is criminally responsible in case the child died from want of proper care, to see that his wife is paying the child the attention required by her helpless condition. *Regina v. Duffy*, 6 V.L.R. (L.,) 430; 2 A.L.T., 85.

(*b*) *Other Offences Against the Person.*

Administering Cantharides—Intent to do Grievous Bodily Harm—Evidence of Intent.]—A prisoner administered cantharides to a girl of sixteen with the object of having connexion, but had no intent, though the effect was necessary, of doing grievous bodily harm, and there was evidence that the prisoner knew what the drug might do, and what might follow the use of it. *Held*, that though his primary object might have been to seduce, there being direct evidence of malice and bodily harm having resulted, the jury might properly infer from these facts that he had both objects in view, and, if they did so, it was utterly immaterial which intent was the primary one. *Regina v. Grandison*, 1 W. & W. (L.,) 132.

Sodomy—"Criminal Law and Practice Statute," No. 233, Sec. 58.]—On an information under Sec. 58 of No. 233, for committing an assault upon a person, and without the consent of such person violently committing sodomy, the prisoner cannot be found guilty of the minor offence of committing sodomy without violence, or with consent. *Regina v. O'Connor*, 1 A.J R., 118.

Admissibility of Evidence—Intent.]—A. M. D. was convicted of having administered a deadly poison to F. D. with intent to murder. The Crown prosecutor proposed to give evidence of subsequent administration of the same kind of poison by the prisoner from which deceased had suffered, with the object of proving the intent, of showing the history of the case, and that the poisoning was not accidental. This evidence was admitted at the trial. *Held* that, although there was no direct proof that the other poisons had been administered by the prisoner, the evidence was properly admitted to show the intent alleged. Conviction affirmed. *Regina v. Davis*, 3 V.R. (L.,) 95; 3 A.J.R., 52.

XV. Perjury, False Oaths, and Declarations.

False Declaration—Materiality—9 Vic., No. 9, Sec. 9.]—P. was convicted under 9 Vic., No. 9, Sec. 9, for having made a false declaration before a magistrate as to a juror's expressed partiality in another criminal charge against another man. *Held* that this was an offence under the Act, that materiality of the fact so stated was not important, the purpose of making the declaration being immaterial, and that the offence was complete when the declaration was made. *Regina v. Pearce*, 1 W. & W. (L.,) 248.

False Declarations Under "Land Act 1862."]—A false statement respecting an act which the Statute does not forbid and provides no issue to try, ought not by implication and in the absence of express words, to be deemed a misdemeanour. *Regina v. Taylor*, 2 W. & W. (L.,) 23.

For facts, *see* S.C., under LAND ACTS — Offences against.

False-Oath in Proceedings Coram non Judice not Perjury.]—A father sued C. before justices in Petty Sessions in a plaint claiming damages as due to himself for an assault by C. on his infant child. At the hearing of the plaint C. swore that he never laid a hand on the child, and this being proved false, an information was laid against him in the Supreme Court for perjury, and he was convicted, and a question of law reserved by the Judge. *Held* that the proceedings by the father before the Justices in Petty Sessions to recover damages as for himself for an assault committed on his infant child, were in every aspect *coram non judice*, and the oath in such proceedings not one on which perjury could be assigned; and conviction quashed. *Regina v. Charles*, 3 W.W. & A'B. (L.,) 52.

"Criminal Law and Practice Statuts 1864," No. 233, Sec. 271—"Evidence Statute 1864," No. 197—"Amending Land Act 1865," No. 237—Declaration as to Improvements.]—M. was convicted of having made a false declaration, under the regulations of Act No. 237, as to nature and value of improvements made upon the land, before a Justice of the Peace, under and in pursuance of the "*Evidence Statute* 1864," Sec. 37. *Held* that as the making a voluntary declaration, respecting the facts forming the subject matter of the prosecution, has not been required by any Act of Parliament, but only by the usage and practice of one of the departments of the Government (the Board of Lands and Works,) perjury cannot be assigned on a voluntary declaration made respecting "any fact, matter, or thing whatsoever," in the words of Sec. 271 of No. 233, but only on those declarations made in "verification, assurance or the ascertaining" of some fact, matter, or thing respecting which a voluntary declaration is "required or authorised" by law to be made. Conviction quashed. *Regina v. Mungovan*, 6 W.W. & A'B. (L.,) 157.

Voluntary False Declaration, Act No. 343—Not Retrospective.]—The "*Criminal Law Amendment Act* 1869," No. 343, relating to voluntary false declarations, is not retrospective, and therefore the making of a false voluntary declaration before the passing of the Act cannot constitute an offence under it. *Regina v. Gallagher*, 4 V.R. (L.,) 20; 1 A.J.R., 27.

False Declaration—Not Before a Magistrate—Act No. 230, Sec. 33.]—A declaration which is false need not be made before a magistrate, in order to render a person liable, under Sec. 33 of Act No. 230, for making a false declaration. *Regina v. Halliday*, 2 V.R. (L.,) 83; 2 A.J.R., 59.

Statutory Declaration Under "Land Act 1869."]—G., on an application for land under the "*Land Act* 1869," made the usual statutory declaration that he had not selected the maximum number of acres allowed by the Act, and that the land he was then applying for added to what he had already selected would not exceed the maximum number of acres so allowed. As a matter of fact, G. had previously selected more than the quantity allowed, but the land for which he applied was then in the occupation of another selector, but such selector had forfeited it, and, subsequent to G.'s declaration, he received a lease of the forfeited land applied for. *Held* that the offence did not depend upon the success or non-success of the application in respect of which the declaration was made, since he had sworn that he had not taken up the maximum quantity allowed, and it was proved that he had taken up more than such quantity; and a conviction for perjury affirmed. *Regina v. Greaney*, 4 A.J.R., 116.

Swearing False Information — Identification.]—L. applied to a clerk of Petty Sessions for an information, and the clerk prepared one, and read it over to L., who made his mark in the presence of the clerk, who thereupon attested his signature and delivered the information to a justice to be sworn. The justice administered an oath to L. to make true answers to such questions as he should put to him, and asked L. whether he knew the contents of the information, and whether it was true and signed by his mark, but did not then read the information over to him. The justice then signed the information. *Held* that the paper read over to L. by the clerk could not be sufficiently identified with that attested by him before the justice, and a conviction for perjury quashed. *Regina v. Levy*, 4 A.J.R., 116.

False Declaration — Act No. 343, Sec. 3.]—H. was convicted for perjury upon a voluntary declaration. A declaration was in the form given by Act No. 343, and the word "declared" was in the memorandum at the foot instead of the word "sworn" in the *jurat* of an affidavit, but the prisoner was sworn to the truth of the declaration. The declaration referred to "certain cattle at Corowa branded in a certain way," which the prisoner declared "were free from contact with any diseased stock," which was false; the cattle were not at Corowa at the time of the declaration. *Held* (1) that the super-addition of the oath did not make the declaration less a declaration, (2) and that although the *description* of the cattle being at Corowa was incorrect, that did not prevent their being identified by other means. Conviction affirmed. *Regina v. Hickey*, 5 A.J.R., 104.

Evidence—Production of Information—"Wines, Beer, and Spirits Sale Statuts."]—A complaint was laid under the Statute which does not require an information to be laid. *Held*, that though the summons before the justices for the offence against the Statute, under which the perjury was committed, recited an information, and the clerk who proved the proceedings stated it was in writing, yet the information need not be produced at the trial for perjury. *Regina v. Miller*, 5 A.J.R., 166.

Corroborative Evidence.]—Corroborative evidence need not amount to an independent case against the prisoner. *See* as to sufficient corroborative evidence. *Regina v. Cameron*, 3 V.L.R. (L.,) 85.

Declaration Not Read Over in Presence of Commissioner—Act No. 343, Sec. 1.]—A false declaration is duly taken and received within the meaning of Sec. 1 of the "*Criminal Law and Practice Amendment Act* 1869," No. 343, and a conviction for making such false declaration may be sustained, although the declaration was not read over to the declarant, who was illiterate, in the presence of the Commissioner before whom it was made, if it appear that the Commissioner was satisfied that it had been read over to the declarant and that he knew its contents. *Regina v. Thornton*, 6 V.L.R. (L.,) 427; 2 A.L.T., 85.

XVI. Personation.

Personating a Voter.]—K. was charged by information with personating a voter named *Ronald McDonald*, at a general election of members for the Legislative Assembly. At the trial on circuit evidence was given that the name of *Ronald McDonald* appeared on the electoral roll, and that K. had voted under that name, and afterwards attempted to vote under another name appearing on the electoral roll, and being taken into custody gave his name as K. No other evidence that such a person as *Ronald McDonald* existed was given. *Molesworth, J.*, directed that the prisoner might be properly convicted, though no such person as *Ronald McDonald* had ever existed. The prisoner was convicted. *Held, per Stawell, C.J., and Williams, J.*, that the crime of personation might be committed, though there was no further proof of the existence of the elector personated than the appearance of his name on the electoral roll afforded. *Per Molesworth, J.*, that the direction to the jury was doubtful, the case not having been treated as one in which the electoral roll was some evidence, but as one of the personation of a fictitious person. Conviction upheld. *Regina v. Keating*, 1 W. &. W. (L.,) 207.

XVII. Rape and Abusing Women and Children.

Attempt.]—G. was acquitted of the capital offence, but both he and B. were found guilty of an attempt. There was no doubt as to G.'s crime. As to B. he was not in the room when G. made his attempt, and there was no evidence of B.'s own separate assault, but he found the girl tied down, and left her so tied after hearing G. express his intention to commit the offence. *Held* that B.'s acts showed the intent, though the purpose was not completed, and B.'s conviction upheld. *Regina v. Branch*, 2 W. & W. (L.,) 253.

Evidence.]—Witnesses called to corroborate the statement of the prosecutrix, on a charge of rape, that she made a complaint, can only be examined by counsel, as to whether the complaint was in fact made; and cannot be asked to state any detail of such complaint. Where a witness gave evidence of the terms of the complaint, and in such complaint the prisoner was mentioned by name as the offender, a conviction which followed on such evidence as corroborating the testimony of the prosecutrix, was quashed. *Regina v. Cooper*, 1 W. W. & A'B. (L.,) 123.

Carnally Abusing a Child Under Ten Years of Age—Evidence.]—On the trial of a prisoner for carnally abusing a child under the age of ten years, a statement obtained by the child's parents from the child against her will, and long after the offence was committed, is not admissible in evidence against the prisoner. *Regina v. Nixon*, 8 V.L.R. (L.,) 32; 3 A.L.T., 95.

Carnally Abusing Child Under Ten Years of Age — Evidence — Res Gestæ — Statement of Child in Answer to Questions.]—Evidence is admissible, as confirmatory evidence, on a charge of carnally abusing, or of indecently assaulting, a child under the age of ten years, not merely of the fact that a complaint was made by the child immediately after the commission of the offence, but also of what the child said; and such ststement is not the less admissible because it was made in answer to questions by the person to whom the statement was made, as to what was the matter. *Regina v. Bates, Regina v. Brown*, 8 V.L.R. (L.,) 310; 4 A.L.T., 79.

XVIII. Seas (Offences on the High Seas.)

Murder—Warrant Issued in New South Wales—Capture in Victoria—Trial, Where Held—6 & 7 Vic., Cap. 34—12 & 13 Vic., Cap. 96.]—Where L. was arrested and detained in Victoria upon a warrant issued in New South Wales, and endorsed in Viotoris, for murder on the high seas, upon return to a writ of *habeas corpus*, *Held* that the two statutes were completely independent of each other, and that the case did not fall within 6 and 7 Vic., Cap. 34; and that L. could not be sent back to Sydney, but must be discharged. *In re Levinger*, 6 W. W. & A'B. (L.,) 8.

And *see Regina v. Mount and Morris, post columns* 317, 318.

XIX. Procedure and Practice.

(1) *Information and Presentment.*

Form Of.]—At the trial of H. for obtaining money by false pretences, the information was objected to on the ground that it did not aver that the money was obtained by the false pretences. The chairman of General Sessions refused to allow an amendment, but discharged the jury, and proceeded to try H. upon a fresh information for the same offence. *Held* that the more regular course would have been to quash the first information; but that the course taken was not invalid. *Regina v. Halliday*, 5 W. W. & A'B. (L.,) 33.

Description of Instrument in.]—Where a criminal information describes a written instrument by several designations, and then sets it out *in hæc verba*, with or without a *videlicit*, the Court will treat as surplusage such descriptive averments, and consider as material only the instrument itself. *Regina v. Wright*, 2 V.R. (L.,) 204; 2 A.J.R., 119.

Information Containing Charges of Misdemeanour and Felony.] —*See Regina v. Longmuir, ante column* 285.

Conviction Under Sec. 111 of Act No. 233, Supported Upon a Presentment For Robbery Under Arms.]—*See Regina v. De Theuars, ante column* 286.

Act No. 502, Sec. 20—Presentment by Attorney-General.]—There is no limitation to the powers conferred by Sec. 30 of Act No. 502 ("*Judicature Act* 1875,") and under these powers a prisoner at the trial may be charged in the presentment with a different offence from that for which he was committed. *Regina v. Martin*, 10 V.L.R. (L.,) 343; 6 A.L.T., 163.

(2) *Trial.*

(*a*) *Postponement.*

Postponement of Trial.]—An application for a postponement of a criminal trial must be supported by an affidavit; it cannot be made before plea except in prosecutions by indictment. *Regina v. Jones*, 3 V.L.R. (L.,) 163.

Discretion of Judge to Order.]—Where a Judge on a criminal trial has, for any reason, discharged the jury without a verdict and postponed the trial, the Court will not review his discretion by quashing a conviction made upon the second trial. *Regina v. McNamara*, 4 V.L.R. (L.,) 19.

(*b*) *Changing Venue.*

Order for Changing Not Annexed to Information —Amendment.]—An information filed in the Supreme Court at Melbourne, was tried at Ballarat, but there was nothing on the face of the record to show that it ought to be tried at Ballarat. On motion in arrest of judgment for error on the face of the information, the Full Court ordered the record to be produced, and ordered the Prothonotary to annex to it the Judge's order changing the venue from Melbourne to Ballarat, considering that as the objection had not been taken at the trial, and that judgment was not passed at the trial solely in consequence of an objection being then reserved to be argued on behalf of the defendants, which was not raised before the Full Court, the Crown should have leave to amend; and on the record so amended judgment was given for the Crown. *Regina v. Costello*, 1 W. & W. (L.,) 86.

Criminal Information for Libel—Change of Venue.] —The reason for granting a change of *venue* is the existence of excitement in any particular locality, and that excitement so bearing on the case as to make a fair trial improbable. Where a motion for a change of *venue* was made on affidavits showing only that general political interests were involved, motion refused. *Regina v. Syme*, 2 W. W. & A'B. (L.,) 167.

Attorney-General — Change of Venue.] — The Attorney-General is constituted a standing grand jury for the colony, and as such has power to file an information where he pleases. Where arson was committed at Daylesford and the Attorney-General filed the information in Melbourne, on a rule *nisi* calling on the Attorney-General to show cause why the venue should not be changed, *Held* that he had the power to file the information at Melbourne; that the Court has, in order to prevent any possible injustice, power to change the venue, but declined to do so under the circumstances alleged in the affidavit. *Regina v. Patterson*, 4 W. W. & A'B. (L.,) 43.

Change of Venue—When Court Will Grant.]—An application was made to change the venue on the ground that the newspapers circulating in the district were full of comments of a most inflammatory character likely to prejudice the prisoner's case. *Held* that the materials disclosed merely a conjecture as to the probability of prisoner not having a fair trial. Application refused. *Regina v. Jackson*, 7 V.L.R. (L.,) 313; 3 A.L.T., 24.

(*c*) *Jury.*

Foreign Juror.]—After a jury had retired, the foreman returned to Court and informed the chairman of General Sessions that one of the jurors was a foreigner who could speak English a little but could not understand it. The evidence was then interpreted to him, and the prisoner was convicted. On case stated, *Held* that if the Judge was satisfied that the juror could have performed his duties, the conviction was good, but, if the Judge was of opinion that from ignorance of the English language he was unable to do so, there was no trial. *Regina v. Hoctor*, 2 W. W. & A'B. (L.,) 124.

Grand Jury—Attorney-General Standing in Place of.]—*See Regina v. Patterson Supra.*

Peremptory Challenge—Jury de Medietate Linguæ —"Juries Statute 1865," Secs. 37, 38.] — The "*Juries Statute* 1865," Sec. 37, modifying the Common Law, gives a right of peremptory challenge up to the number of twenty, in any trial or inquest taken before any Court wherein the Crown is a party. Sec. 38, following 6 Geo. IV., c. 50, providing for a jury *de medietate linguæ* in the case of aliens, does not take away this right in whole or in part, but merely prescribes the composition of such a jury, and the incidents of the trial are annexed by the Common Law, and are therefore implied and included in the Statute. *Regina v. Levinger*, L.R. 3, P.C. 282; 1 A.J.R., 137.

Whenever the case requires it, and the reason of the rule applies, the law of juries, in the absence of a positive provision to the contrary, is applicable to both moieties of a jury *de medietate linguæ*. The Common Law regarding juries, is, in the absence of a positive provision to the contrary, applicable to such a jury. *Ibid.*

Where, therefore, an alien prisoner tried for felony claimed the right of a jury *de medietate*, which was granted, and he challenged peremptorily an alien juror, and the Crown demurred to the challenge, which was adjudged bad, and

the prisoner was convicted and sentenced, *Held*, by the Privy Council (special leave to appeal having been granted by the Judicial Committee,) that he was entitled to such peremptory challenge; that the judgment denying the right was wrong; and conviction and verdict thereon quashed, and *venire de novo* awarded. *Ibid.*

Privy Verdict—Adjournment.]—On a trial for cattle stealing the prisoner pleaded "Not Guilty." After the case was closed, the jury retired to consider their verdict, and before they had agreed the Court was adjourned until 10 a.m. of the following day. After adjournment, the jury remained in their room till 10.10 p.m., and then sent word that they had agreed, and the Judge attended at Court, the prisoner was placed in the dock, the jury requested to look upon him, their names called over to which they answered, and upon being asked if they had agreed they replied that they had and gave their verdict. They were then directed to attend next day, and dismissed. Next day they attended, formally gave their verdict, and it was recorded in their presence and that of the prisoner, and sentence was passed. On case stated by the Judge as to the regularity of the proceedings, *Held* that there had been no adjournment in the legal technical sense so as to render the verdict a privy verdict, or to prevent the Judge stating the case; and conviction affirmed. *Regina v. Spencer*, 4 A.J.R., 29.

"Juries Statute," No. 272, Sec. 17.]—An order for a special jury may be made under Sec. 17 of Act No. 372 without any summons or notice to the person accused to show cause. *Regina v. Downey and Warburton*, 3 V.L.R. (L.,) 87.

Power of Judge to Set Aside a Juror.]—At a criminal trial, the Judge in striking the jury, ordered a juryman who was called to stand aside, and not to be allowed to enter into the box to deal with the case, the juryman in his opinion not being sober or in a fit state to do his duty. *Held* that the Judge had such power to set the juror aside. *Regina v. Burns*, 9 V.L.R. (L.,) 191; 5 A.L.T., 67.

And *see post* under JURY.

(*d*) *View by Jury.*

View by Jury After Case Concluded Not Irregular.]—*See Regina v. Westlake, ante column* 300.

(*e*) *Pleas.*

Autrefois Acquit.]—On a plea of *autrefois acquit*, where a verdict has been entered for the Crown, the usual practice is to proceed with the trial on the plea of not guilty. Where this was not done, and the prisoner was not convicted, the Banco Court *held* that, under Sec. 389 of the *"Criminal Law and Practice Statute* 1864," which authorises the reservation of a question of law for its opinion on the "trial of any person *convicted* of an indictable offence," it had no jurisdiction to deal with a point so reserved. *Regina v. Prendergast*, 4 A.J.R., 154.

(*f*) *Prosecution and Defence.*

Duty of Court Where Prisoner May Not Take Objection.]—Although an Act may prohibit a prisoner or his counsel from taking certain objections, the Court is not thereby exonerated from its duty to see that there is a case to go to the jury. *Regina v. Gallagher*, 1 V.R. (L.,) 20; 1 A.J.R., 27.

Money Found on Prisoner—Portion Allowed for Defence.]—The property on a prisoner should not be retained unless it was in some way connected with the offence with which he was charged. When there is no clear evidence as to how the prisoners came by money found on them the property should not be returned to them, but a portion may be allowed for conducting their defence. *Regina v. Williams*, 1 A.J.R., 39.

Cross-Examination of Witness — Depositions in Court Below.]—On a trial the witnesses for the prosecution may be cross-examined on their depositions in the police court without such depositions being put in and read. *Regina v. Robertson*, 1 A.J.R., 140.

Criminal Assault on Successive Days.]—A criminal assault committed on successive days may be treated as one offence, and the Crown will not be put to its election as to the particular assault upon which it intends to rely. *Regina v. Garland*, 4 A.J.R., 157.

(*g*) *Other Points.*

The list of criminal cases, with the order of trial, which is published at each criminal sessions, is not binding on the Court. *Regina v. Schreibvogel*, 10 V.L.R. (L.,) 92.

Jurisdiction of Circuit Court.]—By a proclamation of December, 1866, which, after reciting that by Act No. 10, Sec. 17, the Governor-in-Council was authorised to define, alter, and vary the limits of districts within which District Courts should be holden, and that the limits of the circuit districts of Geelong, Portland, Ballarat, Castlemaine, and Sandhurst were defined, the limits were varied and the limits of the District Court of Sandhurst and Castlemaine were defined according to such variation. A. H. T. was tried at Castlemaine for arson at Sandhurst. *Held* that the Court at Castlemaine had jurisdiction to try the case; that the pre-existing limits might exist simultaneously with the new ones, and the Court have concurrent jurisdiction as to each in different places without abolishing them. *Regina v Thompson*, 4 W. W. & A'B. (L.,) 23.

Identification of Prisoners on New Trial.]—Where on a new trial the prisoner, having at the former trial pleaded "Not Guilty," was not arraigned or called upon to plead, but was placed at the bar, represented by counsel, called by name, told to look to his challenges, and never raised the question of identity, *Held* that he was sufficiently identified with the prisoner convicted at the former trial. *Regina v. Whelan*, 5 W. W. & A'B. (L.,) 7.

Wrongful Admission of Evidence—Correction by Judge.]—A Judge at a criminal trial overruled an objection as to the admissibility of certain evidence, but afterwards, being on consideration of the opinion that it should not have been admitted, informed the counsel for the prisoner, in the hearing of the jury before he rose to address them, that it had been struck out and was not to be considered as given. *Held* that the Judge had the power so to withdraw it, and that the withdrawal was sufficient, without distinctly warning the jury to disregard it. *Regina v. Burns*, 9 V.L.R. (L.,) 191; 5 A.L.T., 67.

Charging Jury—Suggested Motive.]—In charging a jury on a trial for murder, the Judge may tell the jury that in considering the case, assuming them to be of opinion that a prisoner had a motive for committing a crime, they might take into consideration that it was not suggested that any one else entertained any ill-feeling to the deceased, or had any motive for, or inducement to commit the crime. *Regina v. O'Brien*, 10 V.L.R. (L.,) 242; 6 A.L.T., 95.

Objection Taken After Verdict.]—An objection taken after verdict recorded is not too late. *Regina v. Herbert*, 8 V.L.R. (L.,) 205.

(3) *Evidence.*

(*a*) *Competency of Persons.*

Wife Against Husband.] — The unsworn evidence of an aboriginal woman was received under the "*Evidence Consolidation Act*" on a trial of an aboriginal for murder, though the woman described herself as the prisoner's "lubra," and as "married" to him, there being no other evidence of marriage. *Regina v. Neddy Monkey*, 1 W. & W. (L.,) 40.

Letter From Husband to Wife.]—*See Regina v. Dowling, post column* 314.

Person Offending Against the "Pounds Act," 18 Vic., No. 30.] — Impounding cattle out of the police district in which they were distrained is "an offence," so that the accused is not a competent witness. *Ex parte Beilby*, 1 W. & W. (L.,) 281.

(*b*) *Depositions.*

(1) *Of Persons Who Cannot be Present.*

Woman Approaching Her Confinement—11 & 12 Vic., Cap. 42, Sec. 17.]—The words "or so ill as not to be able to travel," contained in Sec. 17 of 11 and 12 Vic., Cap. 42, include the case of a woman sworn by her husband to be suffering from no other illness than her approaching confinement, but to be in an unfit state to travel solely on account of such approaching confinement; and a conviction which was supported by the depositions of a woman absent for such reasons was upheld. *Regina v. Ah Pock*, 1 W. W. & A'B. (L.,) 127.

Inability to Travel—Act No. 267, Sec. 80.]—H. was convicted of stealing a cheque. At the trial, depositions of a pregnant woman who was unable to travel, were put in under Sec. 80 of the Act No. 267. The fact of pregnancy was deposed to by a constable who had seen the witness shortly before the trial, and the Judge admitted the depositions. *Held*, on case reserved, that the constable was competent to give an opinion on the witness's inability to travel, and that there was sufficient evidence to go to the Judge of such inability. Conviction affirmed. *Regina v. Hay*, 3 V.R. (L.,) 160; 3 A.J.R., 69.

(2) *Of Prisoner Taken in Another Matter.*

T. had been tried for the murder of a child and had been acquitted. He was then tried for aiding and abetting the mother in concealing the birth (1) By throwing the body into a river. (2) By placing the body in a hole and covering it up with sand. The evidence was as follows:—(1) The mother of the child stated that defendant had thrown the child into the river. (2) That of a witness who was told by defendant that the mother had had a child, and was shown the hole where the child was buried. (3) The depositions of defendant himself before coroner, when he was not informed of his right to refuse to be sworn. T. was convicted. *Held* that T.'s evidence before the coroner was not admissible, as it was not that of a "free" man voluntarily given, and that without such evidence there was no evidence to convict T. Conviction quashed. *Regina v. Taylor*, 2 W. & W. (L.,) 153.

Admissibility of Statements Before Coroner.]—*Semble*, it is a safe rule that, if suspicion attaches to a witness at any time before the proceedings have terminated, such a witness should be cautioned, and any evidence given after that may be used as evidence, otherwise depositions before a coroner should be rejected. C. and R. were convicted of arson; R. as an accessory. Depositions before the Coroner were tendered, C. having been cautioned, but R. having received no caution. Conviction as to C. affirmed, quashed as to R. *Regina v. Coldwell*, 2 W. & W. (L.,) 208.

Act No. 379, Secs. 3, 132, 134—Act No. 301, Sec. 157.]—If a person answer a question voluntarily his answer is admissible against him, or if an Act provides that he must answer and affords him no protection from the consequences of his answers, his position appears substantially the same as if he had answered voluntarily. Where a prisoner was charged with an offence under Act No. 379, and at the trial depositions were tendered as evidence which he had made at a compulsory examination under Sec. 132, *Held* that such depositions were admissible, and that Sec. 157 of Act No. 301 did not apply to such a case. *Regina v. M'Cooey, Regina v. Johnson and Smith*, 5 V.L.R. (L.,) 38.

(*c*) *Dying Declaration.*

At a trial for murder certain declarations of the murdered man were admitted in evidence, and the prisoner was convicted. It appeared from the evidence that, on September 11th, a police magistrate put the question to him, "Do

you feel you are in a dying condition." The deceased replied, "Well, I don't know that I am dying now." In reply to question, "Do you believe you will die or are about to die," he answered, "Yes; I don't think I shall get over it," and that he told the doctor that he was convinced that nothing could save him; that during a period ranging from the 11th to the 20th of September he told his wife that "he thought he should get better." The declarations were taken on September 11th, and the man died on September 20th. *Held* by *Barry and Williams, J. J.*, (*dissentiente Stawell, C. J.*,) that the evidence was inadmissible, that the expression of such a hope of recovery rendered the declaration inadmissible; *per Stawell, C. J.*, that his answer to the doctor showed that he had a fair settled conviction that recovery was hopeless, and that the declaration was made under that conviction and therefore admissible. Conviction quashed. *Regina v. Whelan*, 4 W. W. & A'B. (L.,) 264.

(*d*) *In Other Cases.*

It is a very salutary rule, and one to be observed, that the Court will not, without a very strong excuse indeed, allow evidence to be admitted, the knowledge of which has been withheld from the prisoner until the trial. *Regina v. Brown*, 6 W. W. & A'B. (L.,) 239; N.C., 59.

"Criminal Law and Practice Statute," No. 233, Sec. 389.]—The propriety of the admission of such evidence is not a question of law within Sec. 389, but merely a rule of practice. *Ibid.*

Evidence Not Produced at Committal Produced at Trial.]—The rule that evidence not produced at the committal of a prisoner should not be produced at his trial, is one of practice only and may be departed from. *Regina v. Schreibvogel*, 10 V.L.R. (L.,) 92.

Admissibility—Statements Made in Prisoner's Absence—Admissions by Conduct.]—On the trial of R. for stealing boots, L. gave evidence (subject to objection as to its admissibility) that he had heard one P. say in another Court, in R.'s hearing, that R. had brought to him certain boots, like samples which P. then produced, that R. thereupon desired that samples of the boots produced by P. might be compared with samples of the stolen boots produced by L., and that P., L. and R. made the comparison; that P. then said he was sure that both samples belonged to the same lot of boots, and that to this R. said nothing. R. was convicted, but on case stated for opinion of the Full Court, *Held* that the only part of the evidence objected to that was admissible was the request of R. for a comparison, and the fact of the comparison, which by themselves were of no weight, and conviction quashed. *Regina v. Rooney*, 10 V.L.R. (L.,) 227; 6 A.L.T., 100.

Proof of Handwriting—"Evidence Act," Sec. 18—Writing in Dispute—Comparison of Handwriting.]—On an information against S. N. and J. N. for conspiring to procure a false affidavit of debt, witnesses were examined on a comparison of handwriting in proof of the signature of S. N. to the affidavit. D. produced a writing which he had seen S. N. sign, and, on comparison, was of opinion that the signatures were by the same person. C. looked at an order to pay money brought to him by J. N., and purporting to be signed by J. N., on which order C. had acted; and he also looked at the instructions to prepare the affidavit of debt, which were signed by S. N. On comparing the signature to the affidavit with either of these signatures he was of opinion that the signature to the affidavit was that of the same person. The document D. had referred to, and the affidavit, both went to the jury, and counsel for S. N. and J. N. cross-examined C. and D. on their evidence as to the signature of the affidavit by S. N., and urged that their evidence, not being receivable before the "*Evidence Act*," was not now admissible under that Act for comparison of writings. *Held, per totam curiam*, that the affidavit was a document in dispute, under the Sec. 18 of the "*Evidence Act*," No. 100; that D.'s and C.'s evidence for comparison of handwritings was admissible; and that sending the document produced by D. to the jury, though not regular, was not a ground for a new trial on the question of law reserved at the trial. *Per Stawell, C.J.*, and *Williams, J.*, that the affidavit was a document in dispute, simply because counsel for the prisoners cross-examined upon it. *Per Molesworth, J.*, not only on that ground, but also because the point had not been thus argued at the trial, he not being prepared to say that mere cross-examination on a document would be enough to make it "in dispute." *Regina v. Nathan*, 1 W. & W. (L.,) 317.

Rebutting Evidence—To Prove General Bad Character.]—P. was convicted of stealing from the person. Evidence was given of her good character by witnesses, and then the Crown Prosecutor called as rebutting evidence two constables, who swore that P. was known to them as a prostitute and the associate of thieves. *Held* that the evidence was of particular and not general bad character and inadmissible. Conviction quashed. *Regina v. Pearce*, 3 V.L.R. (L.,) 125.

Letter from Husband to Wife.]—Communications between husband and wife are, as a rule, not admissible in a criminal charge against the husband, but where the communications have come into the hands of a third person and are produced, they are admissible. *Regina v. Dowling*, 9 V.L.R. (L.,) 79; 5 A.L.T., 5.

Right of Jury to Ask Questions so as to Elicit Evidence.]—A jury may, with the leave of the Court, through their foreman, make any inquiry which could be properly made on behalf of the prosecution or defence. *Regina v. James*, 10 V.L.R. (L.,) 193; 6 A.L.T., 58.

At the trial of J. for stealing money from L., it appeared that L. had lodged some of his money in the Savings' Bank. After the Judge had summed up, the jury, without objection from counsel on either side, asked L. if there was an entry in his Savings' Bank pass-book which would show that he had lodged his

money as alleged, and whether this pass-book could be produced. L. answering in the affirmative, the jury requested that the book should be produced, in order that they might examine it. To this counsel for the prisoner objected, but the Judge overruled the objection, and the jury saw the book and convicted J. *Held*, on special case, that the evidence was rightly admitted. *Ibid.*

Admissibility—Comparison of Plaster Casts of Foot-prints.]—In order to prove that certain foot-prints had been made by a prisoner, it was proved that one of his boots had been pressed into the soil beside these foot-prints, and had made a similar impression. Plaster casts, which had been taken of the foot-prints in question, were also produced in Court, and a comparison made between them and the boots of the prisoner. *Held* that this evidence was properly obtained, and was admissible. *Regina v. O'Brien*, 10 V.L.R. (L.,) 242; 6 A.L.T., 95.

Admissibility of Evidence—Threats Used by Accused.]—Evidence of threats used by a prisoner that he would shoot any person who should take land, which formerly belonged to the prisoner, was held admissible against him on his trial for the murder of a person who had obtained an allotment of such land, and had been found shot dead, though the threats in question had been uttered some years before, and were used specially with reference to another allotment. *Ibid.*

Admissibility to Show Intent.]—*See Regina v. Davis, ante column* 302.

Irrelevant Evidence of Immaterial Fact.]—*See Regina v. Ainsworth, post column* 319.

Wrongful Admission—Correction by Judge.]—*See Regina v. Burns, ante column* 311.

(4) *Previous Convictions, Records, and Judgments.*

Act No. 233, Sec. 298—Cumulative Sentence.]—M. was tried under Act No. 267, Sec. 27, for escaping from a gaol. Three records were produced, the first of which showed that he had been sentenced to three years' imprisonment, and the two other records showed sentences "cumulative upon former sentence." *Held* that Sec. 298 of the Act was not sufficiently complied with; that the former sentence should have been referred to specifically. *Regina v. Desmond*, 3 V.L.R. (L.,) 48.

Cumulative Sentences—Evidence of Former Conviction—Amendment.]—One sentence cannot be postponed so as to commence at the end of a period for which a person is already in prison, unless the imprisonment then being undergone by the prisoner was under a sentence for another crime, and the conviction for such crime should be proved, and can only be proved by legal evidence, viz., production of the previous conviction, or by a certificate signed by the officer having the custody of the records of the Court where the prisoner was sentenced, and mere oral evidence of the previous conviction is insufficient. Where, however, a sentence has been postponed improperly, the Court has power to amend it by making the imprisonment commence from the time the sentence was passed. *Regina v. Fennell*, 2 V.L.R. (L.,) 183.

(5) *Sentence and Punishment.*

Two Counts—Sentence on Each.]—Sentences, the one cumulative on the other, may be passed on each count of an information containing two counts, each of which charges a distinct misdemeanour. *Regina v. Jones*, 1 W. & W. (L.,) 221.

Cumulative Sentences—Evidence of Former Conviction.]—*See Regina v. Desmond* and *Regina v. Fennell, ante columns* 315, 316.

Offences Committed on High Seas—Penal Servitude — Return to Habeas Corpus.]—Two prisoners being convicted of an offence on board a British ship upon the high seas, were sentenced to penal servitude for fifteen years, and were thereupon detained in a public gaol within the meaning of the "*Statute of Gaols* 1864." A *habeas corpus* was sued out, and on the return to the writ, which was to the effect that the prisoners were detained "for the cause and to the end that they may undergo the sentence aforesaid," the Court ordered the prisoners to be discharged and set at large, on the ground that sentence of penal servitude could not be carried into execution in the colony without the intervention of a Secretary of State, as provided by 16 and 17 Vic., Cap. 99, Sec. 6. On appeal to the Privy Council, *Held* that the return to the writ was sufficient; and that even if it were not, the Court had at all events erred in not remanding the prisoners until it was clear that there were no lawful means of executing the sentence. *Regina v. Mount and Morris*, 4 A.J.R., 124; 6 L.R., P.C., 283; 44 L.J., P.C., 58; 32 L.T., 279; 23 W.R., 572.

For Offences Committed on the Seas — Penal Servitude.]—Even though no provision were made in the colonies for the carrying into execution of a sentence of penal servitude, yet if an Imperial Act directed such a punishment, the sentence could not be treated as a nullity, merely because no means were provided in the colonies for carrying it out; but on the review of Imperial and Colonial legislation, it is apparent that a sentence of penal servitude may be passed in Victoria for offences within the jurisdiction conferred on the Courts of the Colony by 12 and 13 Vic., Cap. 96. *Regina v. Mount and Morris*, 6 L.R., P.C., 283; 44 L.J., P.C., 58; 32 L.T., 279; 23 W.R., 572.

For Offences Committed on the Seas—12 and 13 Vic., Cap. 96 — 20 and 21 Vic., Cap. 3.] — Although the Act 12 and 13 Vic., Cap. 96, only authorised the colonial Courts to inflict punishment in the case of offences committed on the seas according to the law then in force, such law authorising transportation only for any period not less than seven years, and though the Act 20 and 21 Vic., Cap. 3, which abolished transportation and substituted penal

servitude, does not expressly include the colonies, it is applicable to them with respect to the sentences to be passed on persons convicted in the colonies of offences only triable there by virtue of the Admiralty jurisdiction conferred by the Imperial Act 12 and 13 Vic., Cap. 96, on colonial Courts. Such offences might be tried after that Act in England or in the colonies, and the policy of the Act was that such offences before triable in England only should after it be tried in the colonies as well, and that the same consequences should ensue in the way of punishment as if they had been tried in England, and this general intent and policy should govern the construction of both Acts, in the absence of an expressed intention to the contrary. *Ibid.*

Offence Committed Upon the High Seas—Manslaughtsr—12 and 13 Vic., Cap. 96—9 Geo. IV., Cap. 31, Sec. 9 — 16 and 17 Vic., Cap. 99, Sec. 6 —20 and 21 Vic., Cap. 3.]—Two prisoners were tried by the Supreme Court at the Criminal Sessions for murder committed on board a British ship upon the high seas, and were convicted of manslaughter. The jurisdiction to try persons charged with offences committed on the sea within the jurisdiction of the Admiralty was conferred on colonial Courts in 1849 by the Act 12 and 13 Vic., Cap. 96, Sec. 1, which enacts that colonial Courts should have the same jurisdiction for trying such offences, and be empowered to take and exercise all such proceedings for bringing persons charged therewith to trial, and "for and auxiliary to and consequent upon the trial," as by the law of the colony might have been taken if the offence had been committed upon any waters within the limits of the colony. Sec. 2, which relates to the sentence to be passed in such cases, provides that convicted persons shall be subject to the same punishment as "by any law *now* in force" persons convicted of the same offence would be liable to in case such offence had been committed, and was "enquired of, tried, and adjudged in England." At the time the Act passed the punishment for manslaughter in England was, under 9 Geo. IV., Cap. 31, Sec. 9, transportation for life, or for a term not less than seven years, or imprisonment, with or without hard labour, not exceeding four years, or fine. By 16 and 17 Vic., Cap. 99, penal servitude was, in some cases, substituted for this punishment, and by 20 and 21 Vic., Cap. 3, penal servitude was substituted for transportation. The Judge who tried the prisoners sent the case for opinion to the other Judges of the Supreme Court, who gave as their opinion that the prisoners might be sentenced to penal servitude for the same period, as under 12 and 13 Vic., Cap. 96, they would have been sentenced to transportation; but that by virtue of 16 and 17 Vic., Cap. 99, Sec. 6, sentence of penal servitude could not be carried into execution without the intervention of the Secretary of State. On appeal to the Privy Council, *Held* that the Judges were right so far as they decided that sentence of penal servitude could be passed, and that such a sentence amounted to one of detention and compulsory service under 27 Vic., No. 233; but that the intervention of a Secretary of State was not necessary, since the direction in Sec. 6 of the Act 16 and 17 Vic., Cap. 99, that the Secretary of State should point out the place of confinement in case of a person sentenced to penal servitude, relates only to the manner of executing the sentence, and to matters of administration, and therefore need not be resorted to in the case of sentences passed in the colonies, which may be executed according to the local procedure. *Regina v. Mount and Morris*, 4 A.J.R., 1, 38, 124; 6 L.R., P.C., 283; 44 L.J., P.C., 58; 32 L.T., 279; 23 W.R., 572.

Removal of Prisoner to Pentridge.]—A prisoner sentenced to imprisonment at Portland Gaol, with hard labour, may be removed to the penal establishment at Pentridge by a warrant or order of the Governor, which need not be addressed to any person in particular, need not be under seal, and is not to be construed in the same manner as a warrant of commitment. *Regina v. McCarthy*, 4 A.J.R., 155.

(6) *Error, Appeal, and New Trial.*

Error Does Not Lie in Supreme Court to Review Judgments.]—A prisoner was convicted of fraudulent insolvency on an information containing four counts, and he received cumulative sentences on each count, amounting in all to six years with hard labour. On motion for a rule *nisi* for a writ of *habeas corpus*, or for the writ itself, on the ground that there is but one offence of fraudulent insolvency, that the four counts were for but one offence, and that the longest sentence allowable for that offence was three years with hard labour. *Held*, that the motion must be refused, and that to grant the application would be an assumption by the Court of a jurisdiction in error to review judgment which it does not possess. *In re Millar*, 3 W. W. & A'B. (L.,) 41.

The Supreme Court does not sit as a Court of Error in criminal cases, nor is there any Court of Error in such cases in the Colony. *Regina v. Cleary*, 5 W. W. & A'B. (L.,) 85.

Appeal to Privy Council—How Granted.]—Leave to appeal against a decision of the Supreme Court discharging two prisoners under sentence was granted to the Crown, upon the terms that the order allowing the appeal should be served upon the parties themselves if they could be found, and, if they could not, upon the attorney on whose application the writ of *habeas corpus* upon the return of which they were discharged issued. *Regina v. Mount and Morris*, 5 A J.R., 58.

New Trial—When Granted or Refused—Partiality of the Jury.]—After conviction of two prisoners for conspiracy, a new trial was applied for on the ground, amongst others, of partiality and prejudice on the part of the jury. The affidavits as to the conduct of the jury were to the effect that one of the jurors had said before the trial that the two defendants were the "two greatest rascals in Melbourne," and that another had used words of nearly equal force in respect of the defendants, or one of them, on account of their, or his, connection with personation at a

parliamentary election. *Held*, that a much stronger case would be required if this were the only ground for a new trial. *Regina v. Nathan*, 1 W. & W. (L.,) 317, 322.

New Trial in Cases of Felony—Power of Court to Grant—"Criminal Law and Practice Statute," No. 233.]—The Court has power, under the "*Criminal Law and Practice Statute*," No. 233, to grant new trials in cases of felony; and an order for a new trial was held good, though made at the time of quashing the first conviction, and though the prisoner's counsel did not appear to object, the prisoner having had ample opportunity to test the question by writ of *habeas*, requiring the gaoler to show the grounds on which he was detained in custody, and there having been a long interval between the order for the new trial and the new trial itself. *Regina v. Whelan*, 5 W. W. & A'B. (L.,) 7.

Granting new trials in cases of felony is a matter of practice, and so is not affected by the fact that the "*Criminal Law and Practice Statute*" does not in so many words give the power of granting new trials in such cases, or by there being no provision made for new trials in cases of felony by the law of England. *Ibid.*

New Trial—When Granted or Refused.]—Unless there has been a great and manifest misconduct of proceedings, the Court will not grant a new trial where the prisoner has been acquitted on a charge of misdemeanour. *Regina v. Benjamin*, 5 W. W. & A'B. (L.,) 178.

New Trial After Judgment.]—A new trial will not be granted after judgment pronounced on a criminal charge until the judgment has been got rid of. An affidavit of the fact of a judgment is not necessary where the presiding Judge at the trial is a member of the Supreme Court Bench. *Regina v. Ryan*, 3 V.R. (L.,) 77; 3 A.J.R., 49.

Irrelevant Evidsnce of Immaterial Fact.]—The evidence of a document, itself irrelevant, to prove an immaterial fact does not invalidate conviction, and is not a ground for a new trial. *Regina v. Ainsworth*, 1 V.L.R. (L.,) 26.

Evidence Improprsrly Admitted.]—Where, on a trial of a prisoner for carnally abusing a child under the age of ten years, a statement of the child, obtained by the parents by means of punishment, and made long after the commission of the offence, had been received in evidence, the Court allowed a new trial instead of quashing the conviction. *Regina v. Nixon*, 8 V.L.R. (L.,) 32; 3 A.L.T., 95.

When Granted — Misdemeanour.]— A prisoner who has been convicted in the Central Criminal Court of a misdemeanour seeking before sentence passed for a new trial, must show to the satisfaction of the Supreme Court that a definite wrong has been done him, and for that purpose he cannot refer to the course which the Crown has taken in instituting or carrying on the proceedings. *Regina v. Schreibvogel*, 10 V.L.R. (L.,) 92.

Costs of Application for New Trial.]—The Court has uniformly adhered to the principle of not recognising that the Crown can receive any assistance in prosecutions, and of insisting that each prosecution should be regarded as either entirely a public, or entirely a private, proceeding. If, however, the Attorney-General feel bound to sign an information, in his function of a grand jury, and not feeling bound to go any further and put the country to the expense of prosecution, leaves the option of prosecuting to private persons, and in such a case the private person bears the whole cost, the Court will not allow the prisoners a new trial on the ground that the verdict was against evidence, unless the applicant pays the costs of the first trial; and the Court not having power to enforce such payment, the applicants must consent to pay such costs. *Regina v. Nathan*, 1 W. & W. (L.,) 317.

(7) *Special Case Reserved for Full Court.*

Practice—No Appearance for Prisoner.]—*Semble*, on a special case reserved, when there is no appearance for the prisoner, the Court will not hear Counsel for the Crown. *Regina v. Grandison*, 1 W. & W. (L.,) 132.

On a Crown case reserved, counsel for the Crown is entitled to be heard, although there is no appearance for the prisoner. *Regina v. Taylor*, 2 W. & W. (L.,) 153.

Power to State on New Trial—When it May be Stated—Question of Difficulty at Trial—No. 233, Sec. 389.]—W. was tried for murder and convicted, but the conviction was quashed and a new trial ordered on the ground of evidence having been improperly admitted. At the new trial W. was not arraigned, having before pleaded "Not Guilty," but was told to look to his challenges, and the trial proceeded on the previous plea. An objection was raised that W. should not be given in charge to the jury, because the information showed by its endorsement that the previous conviction had been quashed, and no fresh information had been filed. The Judge, considering that the objection did not arise at the trial, and was matter to be raised in arrest of judgment, W. was allowed to enter new pleas, and was not afterwards allowed to withdraw. Another objection was raised, that the Court which had previously tried the prisoner was no longer a court, having adjourned *sine die*. W. was convicted, and his counsel moved in arrest of judgment, which was refused. The Judge in Chambers, some time afterwards, consented to state a case. *Held* that the questions in dispute had arisen at the trial, and that the trial commenced as soon as the prisoner was told to look to his challenges; that "the reasonable time" for stating the case ought not to expire till the first four days of the ensuing term; and that the case in question was not reserved and stated too late, though the Court before which the question arose was gone when the case was reserved. *Regina v. Whelan*, 5 W. W. & A'B. (L.,) 7.

Special Case—Lapse of.]—On the acquittal of a prisoner on a charge of misdemeanour, a special case, if reserved, would lapse. *Regina v. Benjamin*, 5 W. W. & A'B. (L.,) 178.

Act No. 233, Sec. 389—On the Trial—Hear and Determine.]—On a trial for murder committed on the high seas, after the jury had given their verdict of "guilty," doubts arose as to the proper sentence, and a case was reserved for the opinion of the Full Court. On the case coming before the Full Court, *Held* that the difficulty was one which had arisen "on the trial" within the meaning of Sec. 389 of the "*Criminal Law and Practice Statute* 1864;" but that since the Court, where a case was reserved, had to "hear and finally determine the question," it had no power to deal with the question, since it could not compel the Supreme Court to pass the sentence which it might deem legal. The Court, however, gave its opinion to the Judge of the Supreme Court, who had reserved the case. *Regina v. Mount and Morris*, 4 A.J.R., 38.

Proper Questions on Which it May be Stated.]—A question as to the manner in which a jury is empanelled, provided it be done in a manner not contrary to the "*Jury Statute*," is not a question of law upon which a special case could properly be stated for the opinion of the Court, but is a mere matter of procedure. *Regina v. Lee*, 6 V.L.R. (L.,) 225; 2 A.L.T., 23.

Drawn Up by Deceased Judge—No Signature—"Criminal Law and Practice Statute 1864," Sec. 390.]—Where a Judge drew up a special case, and it was in his own handwriting, but not signed by him as required by Sec. 390 of the "*Criminal Law and Practice Statute* 1864," and he died before it came on to be heard, the Court considered the case sufficiently stated and entertained it. *Regina v. Duffy*, 6 V.L.R. (L.,) 430; 2 A.L.T., 85.

CROWN.

1. *Its Privileges and Prerogatives, column* 321.
2. *Its Liabilities Under the "Crown Remedies and Liabilities Statutes" and Otherwise, column* 324.

1. Its Privileges and Prerogatives.

Property of the Crown.]—The property of the Crown is not subject to distress for arrears of rent due to the landlord of the premises on which that property is found. *Regina v. Tucker*, 1 W. W. & A'B. (L.,) 193.

Right to a Trial at Bar.]—Where the Crown is substantially a party, or is immediately or directly interested, the Crown is of right entitled to the application for a trial at bar being granted. The fact that a petitioner, under a contract made with the Victorian Government, representing the Queen, claims money, which will have to be paid out of the Consolidated Fund, does not make the Crown directly interested; such a suit is really against the Local Government and only nominally against the Crown. Application refused. [Note.—An order for a trial at bar was subsequently maintained upon affidavits as to nature and merits of the case.] *Bruce v. The Queen*, 2 W. W. & A'B. (L.,) 193, 201, 202.

Rights of to Gold upon Private Property.]—In respect of mining for gold by strangers upon private land, the Attorney-General has a right to an account of the gold raised, and to stop further mining. *Attorney-General v. Scholes*, 5 W. W. & A'B. (E.,) 164.

By the law of England, which is also the law of this country, all gold mines belong to the Crown, and that though the Crown may have granted the lands containing the mines to a subject without reservation, the gold under the grantee's land is not his, and neither he nor anybody else has a right against the Crown to take it. *Millar v. Wildish*, 2 W. & W. (E.,) 37.

Right of Crown to Gold—Crown Grant of Lands—6 & 6 Vic., Cap. 36.]—A grant of Crown lands under 5 and 6 Vic., Cap. 36, made before the passing of the Act 18 and 19 Vic., Cap. 55, does not transfer to the grantee the gold and silver that may be found under the lands so granted. *Woolley v. Ironstone Company*, 1 V.L.R. (E.) 237.

Affirmed, on appeal to P.C., L.R., 2 App. Ca. 163.

Per Privy Council.]—The prerogative right of the Crown to gold and silver found in mines will not pass under a grant of the land from the Crown unless the intention that it should so pass is expressed by apt and precise words. Since the Act 5 and 6 Vic., Cap. 36, contains no reference to the rights of the Crown in the precious metals to be found under the soil, *Held* that the Statute has not so modified the common law that a sale of waste lands under it must be taken to include a grant of the gold and silver found under land so sold. *Woolley v. Attorney-General* (Victoria,) L.R., 2 App. Ca., 163.

The garnishee provisions of the Act No. 274 are not applicable against the Crown. *Aitkin v. Godkin*, 5 W. W. & A'B. (L.,) 216.

Royal Pardon — "Influx of Criminals Act," 18 Vic., No. 3—"Constitution Act," 22 Vic., No. 68.]—Act No. 3, being recited in the Schedule to 22 Vic., No. 68, is perpetually re-enacted by it, and such power of re-enactment is given to the Legislature by the "*Constitution Act.*" K. was convicted by Justices as having come to Victoria illegally contrary to 18 Vic., No. 3, and it appeared that K. had been convicted of treason-felony and had been transported to Western Australia, but had received a free pardon. *Held*, that the prerogative of the Crown to pardon was subject to the enactment of the Legislature, and that the Crown by

assenting to Act No. 3 intended that such prerogative should be exercised subject to that Act. Conviction upheld. *Ryall v. Kenealy*, 6 W. W. & A'B. (L.,) 193, 200, 201, 206; N.C., 7.

S.C., *see* STATUTES—Interpretation of, and *ante column* 178.

Limitations Do Not Run Against.]—The "*Statute of Limitations*," No. 213, Part 2, does not affect the Crown. *Attorney-General v. Hoggan*, 3 V.L.R. (E.,) 111.

There is jurisdiction in Equity to entertain an information by the Attorney-General seeking a declaration of title to certain land by escheat owing to the death of person seized more than fifteen years ago without heirs, and an injunction to stay bringing land under "*Transfer of Land Statute*," No. 301, and registering another as proprietor, even though the information shows a legal title in the Crown. *Ibid.*

Nuisance—Injunction to Restrain Sale of Land—Right ad Medium Filum Viae.]—By proclamation certain Crown lands were put up for sale. The petitioner purchased one lot, which was bounded by a street called "Pall Mall." Afterwards the Board of Land and Works notified its intention of selling land upon the other side of this street, but extending sixteen feet beyond the *medium filum*, encroaching to that extent upon the portion of street fronting petitioner's land. Petition and bill against the board to restrain sale, and alleging a nuisance by obstructing petitioner's direct access to a reserve on the other side of the street. *Held* that there was no jurisdiction to prevent a nuisance on the part of the Crown, the matter not resting on a contract. Injunction granted as to the sale of the land of the half of the street fronting petitioner's land. *Pike v. The Queen*, 6 V.L.R. (E.,) 194; 2 A.L.T., 75.

On Forfeiture for Felony—Bars Right to Bring a Suit—32 and 33 Vic., Cap. 23.]—A bare right to set aside a sale or to recover property conveyed away does not pass to the Crown by forfeiture for felony. *Semble*, only that passes to Crown which is certain, immediately ascertainable, and tangible. J. was interested under a settlement to certain property and he mortgaged it to defendant, and subsequently, in April, 1870, he conveyed the equity of redemption to defendant. To a bill seeking to impeach the conveyance of the equity of redemption, defendant put in a plea that in June, 1872, plaintiff was convicted of felony and was imprisoned as a felon till July, 1877. *Held* that the bare right to set aside the conveyance, which was all that was vested in plaintiff at time of his conviction, did not pass to Crown, and plea overruled. *Quaere*, whether the "*Imperial Statute*," 32 and 33 Vic., Cap. 33 (abolition of forfeiture for felony,) extends to Victoria. *Johnston v. Kelly*, 7 V.L.R. (E.,) 97; 3 A.L.T., 41.

Leases by—Effect of.]—The Crown in this colony stands in the same relation to its tenant as an ordinary landlord to his tenant. *Kickham v. The Queen*, 8 V.L.R. (E.,) 1, 6; 3 A.L.T., 86.

Estreated Recognizance—Act No. 379—Act No. 241.]—G. entered into a recognizance which was estreated September, 1882. In October, 1882, G.'s estate was sequestrated, and in November judgment on the recognizance was signed against G. G. was arrested under *fi. fa.*, and paid the amount of the judgment and costs under a protest. *Held* that the Crown is not barred by the insolvency of a Crown debtor, nor is it debarred by Act No. 241 from enforcing its remedies against such a debtor, and that the judgment could not be set aside, or satisfaction in respect of it entered. *Regina v. Griffiths*, 9 V.L.R. (L.,) 45; 4 A.L.T., 156.

Act No. 506, Sec. 418.]—As the Crown is not named in Sec. 418 of Act No. 506, it is not bound by it; and therefore a municipality is not bound to enclose or protect a hole when situated upon unalienable Crown land, nor is the Crown bound to protect the dangerous places, or to recompense the municipality for performing that duty. *Bisp v. Mayor of Collingwood*, 9 V.L.R. (L.,) 249; 5 A.L.T., 79.

Issuing License Inconsistent with Rights of Former Lessee.]—No application lies against the Crown to prevent the issue of a license or lease inconsistent with the rights of a former lessee or owner; and proceedings cannot be taken till something be actually done. *Shire of Ballan v. The Queen*, 10 V.L.R. (E.,) 255; 6 A.L.T., 109.

Semble—The Crown is entitled by information to redress injuries to others as well as to itself from the wrongful consequences of its own mistakes. *Attorney-General v. Belson*, 4 W. W. & A'B. (E.,) 57.

For facts *see* S.C. *post under* MISTAKE.

2. ITS LIABILITIES UNDER THE "CROWN REMEDIES AND LIABILITIES STATUTE" AND OTHERWISE.

Certificate Holder Under "Land Act 1862"—"Claim or Demand" within the meaning of Sec. 27 of Act No. 241.]—A certificate holder under the "*Land Act* 1862," having paid the certificate fees to a solicitor and applied for a lease and tendered a rent which was refused, has no right to enforce his claim by petition under Sec. 27 of the Act No. 241, as such right is not founded on any "contract" with the Government. *Simson v. The Queen*, 2 W. W. & A'B. (E.,) 113.

Claim Arising Out of Contract—Selection of Land under "Land Acts."]—Where a Victorian Act, assented to by the Queen, authorises a class of persons to select defined lands and pay rent for them to a land officer, the transaction, completed by payment, constitutes a claim or demand, founded on and arising out of a contract entered into on behalf of Her Majesty, or by authority of Her Local Government within the meaning of the Act No. 241. The Court may make interlocutory orders against the Crown under that Act; such orders should not be mandatory, and should contain no penalty in case of non-compliance, nor should they describe the person who is to do the acts directed in them. *Kettle v. The Queen*, 3 W. W. & A'B. (E.,) 50.

Claim Arising Out of Contract—Right to a Grant in Fee Under the "Land Acts."]—*Held* and *affirmed per P.C.*—That a right to a grant in fee, selected under the "Land Acts," is a claim arising out of contract within the meaning of Sec. 27 of Act 241. *Ettershank v. The Queen*, 4 A.J.R., 11, 55, 132. On appeal to P.C., *sub. nom. Attorney-General v. Ettershank*, L.R., 6 P.C., 354.

For facts *see* S.C., under LAND ACTS—Selectors.

Implied Contract—Act No. 241, Secs. 20 and 27.]—Under the Act No. 241 an action for money had and received lies against the Crown in a case where between subject and subject tort would also lie. Where the plaintiffs had paid Custom duties, collected by an officer under the authority of resolutions imposing such duties, which had passed the Legislative Assembly, and it was *held* that such collection was illegal, the plaintiffs brought a petition under the Act No. 241 for the recovery of those duties. *Held* that Secs. 20 and 27 do not necessarily exclude the notion of giving a right to sue on an implied contract; that the cause of action arose out of contract—a contract implied by the law to repay that which it would be inequitable to retain. Rules *nisi* for nonsuit discharged. *Stevenson v. The Queen, Dalgety v. The Queen, Sargood v. The Queen, Matthews v. The Queen, Ecroyd v. The Queen, Banks v. The Queen, McArthur v. The Queen, McNaughton v. The Queen, Watson v. The Queen*, 2 W. W. & A'B. (L.,) 176.

Claim Arising Out of Contract, Act No. 241, Sec. 20—"Customs Act," Sec. 21.]—A person paying customs duties improperly levied cannot sue the Crown under Sec. 20 of Act No. 241 to recover them, but must sue the officer under Sec. 21 of "*Customs Act* 1857." *Sargood v. The Queen, see post* under REVENUE—Customs.

Registration Fees Wrongly Paid—Act No. 49—Petition to Recover.]—*Lorimer v. The Queen*, 1 W. & W. (L.,) 244. *See post* under REVENUE—Customs.

"Claim or Demand"—Application for a Mining Lease.]—The fulfilment of preliminaries necessary for the application of a mining lease do not give such rights against the Crown as would amount to a claim founded on contract within the meaning of Sec. 27 of Act No. 241. *Hitchins v. The Queen*, 4 W. W. & A'B. (E.,) 133.

"Claim or Demand"—Mining Lease.]—The right, if any, of a holder of miners' rights to stop the issue of a second lease inconsistent with such holder's previous rights, is not a "claim or demand," or "founded on or arising out of some contract" within the meaning of Sec. 27 of the Act No. 241. *City of Melbourne Gold Mining Company v. The Queen*, 4 W. W. & A'B. (E.,) 148.

"Claim or Demand" within "Crown Remedies and Liabilitiss Statute 1865"—Injunction to Restrain the Issue of a License Inconsistent with a Lease.]—The Crown granted in 1864, under the Act No. 148, Sec. 12, to a Road Board, a lease of a water reservoir, together with the exclusive right of collecting the stormwater falling on the watershed on which the reservoir stood, and also with liberty to cut and use all channels, races, &c., which might be necessary for the purpose of conducting the water into the reservoir, with liberty to sell the water. M. applied under the "*Mining Statute* 1865," for a license to cut a race for mining purposes from a creek which was within the area leased to the Road Board, which thereupon petitioned under the "*Crown Remedies and Liabilities Statute* 1865," for an injunction to restrain the Board of Land and Works and the Mining Department from granting a license to M. to cut the race from the creek in question. *Held, per Molesworth, J.*, following *City of Melbourne Gold Mining Company v. The Queen*, that no application would lie against the Crown to restrain the granting of a lease alleged to be inconsistent with the rights of a former lessee or owner; that proceedings cannot be taken unless something was actually being done infringing the alleged right; that in this respect there was no difference between leases and licenses, and that proceedings could not be taken till the license was issued and the licensee doing something under it inconsistent with the alleged right of the Road Board. Application refused. *Shire of Ballan v. The Queen*, 10 V.L.R. (E.,) 255; 6 A.L.T., 109.

Act No. 241, Sec. 27—Claim Arising Out of Contract.]—If an action properly brought against the Crown on a contract is defeated by a collusive and fraudulent adjustment, relief against such an adjustment is a claim arising out of a contract under Sec. 27 of Act No. 241, and in such a case a petition will lie. M. in his petition set out a contract entered into between the Crown and himself, and a collusive and fraudulent adjustment effected by trustees for him with the Crown, by which an action brought against the Crown on the contract was compromised. Demurrers overruled. *Merry v. The Queen*, 9 V.L.R. (E.,) 8; 4 A.L.T., 133.

Power to Contract.]—The Parliament of Victoria may by legislative enactment in express terms authorise the Government of Victoria representing the Crown to enter into a contract, but there is no authority to show that, in the absence of such enabling powers, the Government can contract so as to bind the State. The Government may in cases of unforseen exigencies act on the faith of the Parliament confirming its acts, but until such confirmation be given, the act done by the Government is not at law obligatory on the State. *Alcock v. Fergie*, 4 W. W. & A'B. (L.,) 285, 310.

How Far Crown Bound by Promises of its Officers.] *Per Molesworth, J.*—"I do not think the Crown bound by promises of the Queen herself, or any of her officers, though acted upon or partly performed, as to Crown lands, but only by grants under seal or conveyances exactly conformable to Acts of Parliament authorising them." *Dallimore v. The Queen*, 3 W. W. & A'B. (E.,) 19, 33.

For facts, *see* S. C., *post* under SPECIFIC PERFORMANCE—When granted or refused.

How Far Crown Bound by Acts of its Agents—Civil Service Regulations, Rule 17.]—*Adams v. The Queen, post* under PRINCIPAL AND AGENT—Rights, &c., of principal against third persons.

Crown Not Bound by Promises of its Ministers.]—*Ettershank v. The Queen, post* under LAND ACTS—Selectors, &c.

Retrospective Effect of "Crown Remedies and Liabilities Statuts," Acts Nos. 49 & 241.]—Petition under Act No. 241, and Bill by Mayor, &c., of Melbourne, praying specific performance of a contract made in 1854 to grant land for purposes of a market. *Held* by *Molesworth, J.*, that if there was a right to claim the benefit of the contract, yet it was not enforceable under the Act No. 241, as amounting to a contract subsequent to the passing of the Act No. 49 (1858.) *Held* by the *Full Court on appeal*, that if there was a right it was enforceable under the Act No. 241, although it was made before the passing of the Act No. 49, those Statutes being retrospective. *Mayor, &c., of Melbourne v. The Queen*, 4 W. W. & A'B. (E.,) 19, 34, 42.

No. 241, Sec. 2—"Prosecuting and Continuing" Petition—Appeal to Privy Council—Costs.]—A petition against the Crown under the "*Crown Remedies and Liabilities Statute* 1865," No. 241, is "prosecuted and continued" within the meaning of Sec. 2 of the Act, when on appeal before the Privy Council, so as to entitle the successful party to add the costs of the appeal to his final judgment. *Regina v. Dallimore*, 3 W. W. & A'B. (L.,) 131.

28 Vic., No. 241, Sec. 25—Judgment Against Crown by Default—"Constitution Act," 19 Vic.—"Audit Act," 22 Vic., No. 86.]—A judgment by default may be signed on behalf of the Crown consistently with the terms of Act No. 241. Sec. 25 of Act No. 241 makes it lawful for the Governor to cause to be paid out of the consolidated revenue certain damages, assessed, &c., but does not enact the method of carrying out the details, that having been done by 22 Vic., No. 86, Sec. 24, and Sch. 7. But, to render any part of the consolidated revenue legally applicable to the payment of such a judgment, Parliament must have voted and actually appropriated the money for the purpose by a general or special Appropriation Bill. Act No. 241 is not an Appropriation Bill but only a Procedure Act, and does not in any way repeal the "*Audit Act*," No. 86. A judgment signed by default is so far a valid judgment, but there are no means of satisfying such a judgment without an Appropriation Act. *Alcock v. Fergie*, 4 W. W. & A'B. (L.,) 285, 312 *et seq.*

Electric Telegraph Department—Non-Transmission of a Message—Act No. 455, Sec. 18.]—D. sent a message to a person in New Zealand containing the words "reply paid," and the department failed to transmit the reply. *Held* that under Sec. 18 the department was not liable, even although the reply was sent from a place beyond the Colony. *Dron v. The Queen*, 9 V.L.R. (L.,) 33; 4 A.L.T., 159.

Contracts With Police.]—*See* POLICE.

Contracts With Seamen.]—*See* ARMY AND NAVY.

Costs Against Crown.]—*See ante columns* 243, 244.

CROWN GRANT.

See GRANT.

CROWN LANDS.

Pastoral Runs—Gold-Field's Common Proclaimed on—When Reversion to the Crown is Not Caused by.]—Prior to and in the year 1862, a pastoral run was occupied by D. as licensee. By proclamation of January 28th, 1861, a part of the run was proclaimed a gold-field's common. No reduction of D.'s assessment or license fee was made. By proclamation of October 26th, 1863, the common was abolished and another proclaimed, which consisted of the middle third only of the former. D. claimed the other two-thirds of the original common, which no longer formed part of any common. The Crown claimed it also, as reverting to it freed from the rights of D. and the commoners, and put it up for sale as "new runs," and it was purchased by B. and N. D., however, had remained in possession alone, or with the commoners, and had paid his license fees up to the end of 1863, and he impounded B.'s and N.'s stock. The Crown recovered a verdict in ejectment against D. On motion for a nonsuit, *Held*, that under No. 117, Sec. 71, on the proclamation of a gold-field's common over lands held by a pastoral tenant of the Crown, the rights of the tenant might co-exist with those of the commoners; that, under Secs. 80, 107 and 121 of the Act, yearly licenses might be issued as theretofore; might be revoked for any of the objects set out in the 80th Section, and unless so revoked would continue up to the end of the year 1870; that the Crown was not justified in treating the two-thirds of the original common as unoccupied runs capable of being dealt with under Sec. 98 of the Act, since such dealing was not for one of the specified objects; and that as D.'s license could not have been and was not revoked, the lands had not reverted to the Crown, and rule for nonsuit made absolute. *Regina v. Dallimore*, 1 W.W. and A'B. (L.,) 153.

NOTE.—On appeal to the Privy Council, their Lordships, having discovered that the last license issued by the Crown, in respect of the Lamplough run, expired on December 31st, 1862, having been for one year only, and subject to the reserved right of the Crown to sell or proclaim any portion of such lands as a

gold-field's common, without compensation for the loss of enjoyment to the licensee, *Held*, that the Crown had at the time of the sale to B. and N., which was after the expiration of the last license, an indefeasible title to the land sold under the terms of the license, as also upon the construction of the Acts No. 117 and No. 145, notwithstanding the previous and subsequent occupation by D., and payment of rent by him, which under the circumstances did not constitute a tenancy from year to year, or give the licensee any title to the lands in question. S.C., L.R., 1 P.C., 13.

Demand of Possession—Who May Make.]—*Semble* that the district surveyor is not an authorised agent to make a demand of possession for the Crown of Crown lands. *Ibid*, 1 W. W. & A'B. (L.,) 153, 161.

Application to Public Purposes Of—What Is—Road.]—*Semble*, That as to a road over Crown land, an advertisement in the *Government Gazette* is necessary as an "application" to public purposes, within the meaning of No. 32, Sec. 4. *United Sir William Don Company v. Koh-i-noor Company*, 3 W. W. & A'B. (M.,) 63, 77.

Title to Crown Lands.]—Per *Molesworth, J.* The "*Constitution Act*," Sec. 54, has made no change in the estate of Crown lands, or the powers of the Crown to protect legal public interests in them; it merely transferred to the colonial a subordinate power of dealing with a subject previously controlled by the Imperial Government. *Attorney-General v. Belson*, 4 W. W. & A'B. (E.,) 57.

See also *Woolley v. Ironstone Hill Lead Company*, 1 V.L.R. (E.,) 237.

Power of Governor to Reserve when Held Under Miners' Rights.]—The Governor-in-Council cannot apply Crown lands previously held as a claim to public use under the "*Mining Statute* 1868," Sec. 13, but may under Sec. 14 except such lands from further occupation as a claim, and then use them without regard to the rights of the claimholders. *Wakcham v. Cobham*, 1 V.R. (M.,) 34: 1 A.J.R., 93.

Crown Lands Temporarily Reserved as a Park—Revocation of Reservation — Notice of — Suit to Restrain Sale of Land.]—Bill by plaintiff seeking to restrain Board of Land and Works from selling, or authorising sale of, certain allotments in Albert Park. Bill alleged that in 1850 Crown Lands, now named Albert Park, were by Her Majesty excepted from sale and reserved as a park under Act 5 and 6 Vic., Cap. 36; that Governor-in-Council, by order February 22nd, 1864, notified in *Gazette*, appointed defendant Board as a trustee of portion of said land; that, in 1865 certain Crown Lands separated from the Park by the St. Kilda-road were sold in building allotments by the Board; that, in 1868 plaintiff had purchased some of lots so sold in 1867 at a high price, and had laid out money on a house and offices owing to knowledge that land reserved could not be built upon; that Board had advertised land for sale, and was about to sell; that erection of buildings would obstruct view from windows of plaintiff's house, and materially affect plaintiff's comfort and lessen value of land; that a proclamation appeared in *Gazette*, August, 1862, notifying that Governor-in-Council had temporarily reserved land from sale; that a proclamation appeared in *Gazette*, March, 1875, stating a proposed revocation of temporary reservation after expiration of four weeks from publication, but that reservation was not in fact revoked at sealing of Bill, April 10th, 1875. Defendant Board demurred on following grounds—(1) want of equity, (2) no privity of contract or estate between plaintiff and defendant, (3) plaintiff had no interest in land subject matter of suit or in alleged trust, (4) defendant had no estate or interest in the land nor any power to sell same or make any title to same, (5) that land was Crown Land vested in Her Majesty, and the Attorney-General was a necessary party to suit. *Held* that the temporary reservation required a four weeks' notice to revoke it, and that the one announcement could not operate as a notice and as a revocation at its expiration, and, therefore, that sale was when Bill was sealed illegal as between Board and public. But Courts of Equity would not treat agreeable views and clear ventilation as valuable rights legally enforceable or the infringement of them as nuisances, and private persons could only sue to restrain public nuisances when they were especially injured by a breach of public trust; that unless case could be put upon footing of contract, Crown could not be sued by Bill; that Board was only agent of Crown to adjust preliminaries of sales which Governor only could effect and not Board; that Board was a mere officer of Crown, and Courts have no jurisdiction to restrain the Crown by proceedings against its servants, and that Attorney-General was a necessary party to suit. Demurrer allowed. *Palmer v. Board of Land and Works*, 1 V.L.R. (Eq.,) 80.

For a similar case, *mutatis mutandis*, *see McDonald v. Board of Land and Works*, 1 V.L.R. (Eq.,) 90.

Reservation of Crown Land From Sale—How Far Land Taken Out of Operation of Mining Acts.]—Crown land had been reserved by proclamation under the "*Sale of Crown Lands Act* 1860" No. 117, from sale. For some years before the proclamation of reservation the defendant company had occupied the land for mining purposes and had expended large sums of money on it. In a suit to restrain such mining, *Held* that the reservation being only a reservation from sale did not dedicate it to any particular purpose, and did not take the land out of the operation of the Mining Acts. Injunction refused. *Attorney-General v. Southern Freehold Company, Attorney-General v. United Hand-in-Hand and Band of Hope Company*, 4 W. W. & A'B. (E.,) 66, 78, 80, *et seq.*

Sale of Crown Lands Under "Land Act 1862," — Negligence of Agents.]— *Per Molesworth, J.* "I cannot import into Acts of Parliament conferring the means of acquiring public lands by

sale from the Crown, the doctrines of principal and agent in sales by private persons, and say that if any of a series of officials, through whom such matters pass, neglects to give a timely notice to a sub-agent, authorised to sell, of the withdrawal of his authority, that, therefore, the sale is invalid. *Kennedy v. The Queen*, 1 W. W. & A'B. (E.,) 145, 153.

When Land Deemed Crown Land for the Purpose of being Occupied as a Mining Claim.] — Land unoccupied, or land occupied, under a claim which is liable to forfeiture may be occupied as Crown land by a holder of miners' rights under "*Mining Statute*," No. 291, Sec. 5. *Kcast v. D'Angri*, 4 A.J.R., 61.

What Is Crown Land—Under Lease — "Local Government Act 1874."] — Land remains the property of the Crown under the "*Local Government Act* 1874," though under lease to a tenant for a term of years. *Blackwood v. Mayor, &c., of Essendon and Flemington*, 2 V.L.R. (L.,) 87, 90, *et seq.*

Removing Substances from—"Land Act 1869," Sec. 94.]—Quartz-tailings deposited upon Crown Lands from a mine are not within the substances, the removal of which without a license from Crown Lands is forbidden by Sec. 94 of the "*Land Act* 1869." *Potter v. Wilkins*, 2 V.L.R. (L.,) 47.

Removing Materials from Crown Land For Road Making—"Local Government Act," No. 176, Sec. 235.]—*Per Full Court*, overruling *Molesworth, J.* The words in Sec. 235 "any land" do not include Crown land, and injunction granted restraining a road board from entering Crown lands in the occupation of two boroughs, and used by them for waterworks, from entering upon such lands and quarrying for stone for road making. *Mayor of Ballarat and Ballarat East v. Bungaree Road Board*, 1 V.R. (E.,) 57, 67, 71, 72, 73; 1 A.J.R., 33.

Removal of Loam from Crown Land — Act No. 360, Sec. 94.]—A person under a contract with a shire council may, with the council's sanction, enter Crown lands and take loam therefrom for a road he is making for the shire, and is not guilty of an offence under Act No. 360, Sec. 94. *Bell v. Wade*, 9 V.L.R. (L.,) 5.

"Local Government Act," No. 506, Sec. 386.]—A municipal council is not enabled by Sec. 386 of Act No. 506, to authorise the removal of material for road making from Crown lands, whether within or without the municipality, such lands not being specially set apart for that purpose (overruling *Bell v. Wade.*) *Rotherly v. Patterson*, 10 V.L.R. (L.,) 213; 6 A.L.T., 92.

A person employed by contractors with the Crown in making a railway, may enter Crown lands and take loam therefrom without a formal license, and is not guilty of any offence under Sec. 94 of Act No. 360. *Turnbull v. Kelly*, 9 V.L.R. (L.,) 284.

Unauthorised Occupation of—Selector in Occupation of More Land than Authorised by the Act—Not in Unauthorised Occupation under Sec. 93 of "Land Act 1869."] — *M'Can v. Quinlan*, *post* under LAND ACTS—Selectors, &c.

Unauthorised Occupation of—Information—Expired License—Evidence—"Land Act 1869," Sec. 23.]—It is necessary, on an information before Justices, under Sec. 23 of the "*Land Act* 1869," for being in unauthorised occupation of Crown Lands under an expired license, to produce the license, or to prove its existence and contents. *Broadbent v. Hornbrook*, 4 V.L.R. (L.,) 415.

Without the production of the license evidence of the forfeiture in the *Gazette* is inadmissible. *Bloomfield v. Macan*, 5 A.J.R., 73.

Presumption as to Land being Crown Land.]—Until the contrary is proved, a presumption arises that land is Crown land, and that the defendant proceeded against has no title to occupy. *M'Grath v. Smith*, 2 V.L.R. (L.,) 231.

Unauthorised Occupation — Occupier of Residence Area — Evidence of Exception.] — Where the occupier of a residence area, the subject matter of which was afterwards excepted from such occupation by a notice in the *Gazette*, was summoned for being in unauthorised occupation of Crown land, *Held* that the notice in the *Gazette* determined his occupancy. *Regina v. Dowling, ex parte M'Lean*, *post* under MINING—Residence Area.

See also S.P., *Mayor of Sandhurst v. Graham*, *post* under TRESPASS—To Lands and Houses

Unauthorised Possession—Act No. 360, Secs. 4, 93.]—A person in unauthorised possession of Crown Lands cannot make such a title to the lands as to entitle her to recover for use and occupation when purporting to let the land. *Regina v. Hare, ex parte Young*, 9 V.L.R. (L.,) 38.

For facts, *See* S.C., under USE AND OCCUPATION.

For other cases, *See* under LAND ACTS.

CRUELTY.

To Animals.]—*See* ANIMALS.
Ground of Divorce.]—*See* HUSBAND AND WIFE.

CURATOR OF INTESTATE ESTATES.

STATUTES.

24 Vic., No. 99—Repealed.
"*Intestates Real Estate Act* 1864," No. 230—Partly repealed.
"*Administration Act* 1873," No. 427.

1. RIGHTS, DUTIES, POWERS AND LIABILITIES.

Duties Pending Judgment of Court as to Grant of Administration.]—Administration of an intestate's estate was granted to Curator in preference to creditors. Pending an appeal to the Full Court, an application was made to the Full Court as to the duty and right of a curator to act *pendente lite*. *Held* that he must act *pendente lite*, and do his duty. *Re Patrick Coady Buckley*, 3 A.J.R., 89.

Right to Sell Property Psnding Appsal as to Who is Entitled to Administration.]—Where an order was made by *Molesworth, J.*, granting administration to the Curator, and the order was appealed from, the Court restrained the Curator from selling or disposing of the property pending the appeal, there being, in the opinion of the Court, no case of urgent necessity or of clear utility made out, even supposing the Curator was clearly and permanently administrator. *Ibid*, p. 100.

Act No. 230, Secs. 21 and 22—Administration of Estate—Payment of Debts.]—D., a clerk in the employ of trustees of a cemetery, embezzled moneys belonging to the trustees, and died leaving £412 as the amount of his debt due, having reduced the amount before his death. The Curator obtained a rule to adminster, and the trustees applied to him for payment of the debt; this being opposed by other creditors, the Curator refused to pay. Summons under Sec. 21 calling upon the Curator to show cause why he should not pay the trustees. *Held* that the Court had no jurisdiction under Secs. 21 and 22 to make such an order; those sections apply only to misconduct on the part of executors or the Curator, and provide for a speedy remedy for such misconduct, but not a summary mode of obtaining the benefits of an administration. *In re Dixie's Estate*, 2 W. W. & A'B. (I. E. & M.,) 53.

Leave of Court Required Before Instituting Proceedings Against Curator—Act No. 230, Sec. 39.]—*Per Molesworth, J.* (in Chambers.) The sanction of the Court is by Sec. 39 of Act No. 230, required before instituting proceedings against the Curator, but the Court upon terms sanctioned the proceedings already begun *nunc pro tunc*. *Pratz v. Weigall*, 2. A.L.T., 104.

Summary Jurisdiction of Court Ovsr—Misconduct.]—*Per Molesworth*, J. (in Chambers.) The summary jurisdiction of the Court over the Curator of Intestate Estates, under Sec. 21 of the "*Intestates Real Estate Act*," is confined to cases of misconduct on the part of the Curator. *Cavanagh v. Weigall*, 1 A.L.T., 204.

An application to compel the Curator to transfer certain mining shares which stood in the name of an intestate was refused, and a subsequent suit to compel the transfer was set aside on summons by the Curator, as not having been authorised by the Court or a Judge, under Sec. 39 of the Act. *Ibid.*

2. WHEN ENTITLED TO ADMINISTRATION.

When.]—An application to substitute the Curator to take out a rule to administer the estate of a testator instead of relatives of the testator, who wished the Curator to administer, was refused, on the ground that it was made too soon after the testator's death (two months;) but the Court intimated that, if no other application were made in the meantime, the rule would be granted in two months from then. *In the goods of Hill*, 1 A.J.R., 72.

24 Vic., No. 99, Sec. 4—In What Capacity Curator Appointed.]—Where the Curator of Deceased Persons' Estates is appointed by a will as "executor," under the Act No. 99, Sec. 4, a rule will be granted, not for probate to the Curator personally as executor, but authorising him to administer the estate pursuant to the will, in which case, in the event of a change of office, the administration of the estate will pass to the new Curator. *In re Clarke*, 1 W. & W. (I. E. & M.,) 15.

Appointed Executor by Testator—Form of Order.]—Where the Curator of Intestate Estates was appointed executor by the testator, the Court made an order as follows:—"Upon reading (all the affidavits) it is ordered that the Curator of the Estates of Deceased Persons shall be administrator of all and singular the property of O'B. deceased, with the will of the said O'B. annexed." *In the Will of O'Brien*, 6 V.L.R. (I. P. & M.) 91.

Where Sole Next of Kin Infant of Weak Mind.]—Administration will be granted to the Curator in preference to a stranger nominated by the sole next of kin of an intestate, where such next of kin is an infant of weak mind. *In the Estate of McLaren*, 4 V.L.R. (I. P. & M.) 35.

No Other Person Entitled—Act No. 427, Sec. 20—Power of Sals.]—Where there is no person in the colony entitled to take out administration, and the property requires looking after, the Court will grant administration to the Curator. The Court, without inserting terms in the order preventing him from selling, intimated an opinion that he should preserve the property *in statu quo*, and not sell at present. *In the Estate of Hanna*, 7 V.L.R. (I. P. & M.,) 44.

Contsst Bstwesn Curator and Creditors.]—*See in re Coady Buckley, post* under WILL.—Practice in granting Probate and Letters of Administration.

Contest Betwesn Curator, Creditor, and a Son of the Intsstate.]—*See in re Gallogly, post* under WILL. —*Ibid.*

Act No. 99, Sec. 3.]—Where the only property in the colony of an intestate consisted of a sum of money deposited by him in a Melbourne bank, *Held* that he died "possessed or entitled to personal estate within the colony,"

and administration granted to the Curator under Act No. 99, Sec. 3. *In the goods of Rowley*, 2 W. & W. (I. E. & M.,) 115.

Curator—Act No. 230, Sec. 12.]—Where land belonging to an intestate was unfenced and uncultivated, and Curator applied for a rule to administer, *Held* it was not "liable to loss, waste or injury" within the meaning of Sec. 12 of Act No. 230; that it was no reason for granting rule that land was required for payment of debts. Rule refused. *In the real estate of Jackson*, 2 W. W. & A'B. (I. E. & M.,) 49.

CUSTODY OF CHILDREN.

See INFANT—HUSBAND AND WIFE.

CUSTOMS.

See REVENUE.

DAMAGES.

I. General Principles.

(1) *Natural and Probable Result and Remoteness of Damages, column* 336.

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II. In Particular Cases.

(1) **Liquidatsd Damages or Penalty.**] — *See* Penalty.

(2) **As Compensation for Taking Land.**]— *See* Lands Compensation Statutes.

(3) **On Acts of Negligence.**] — *See* Negligence—Way—Local Government.

(4) **On Breach of Contract Generally.**]—*See* Contract, *ante column* 205.

(5) **On Collisions at Sea.**]—*See* Shipping.

(6) **For Defamation.**]—*See* Defamation.

(7) **For Dishonouring Chsquss.**]—*See* Bankers, *ante columns* 80, 81, 82, 83.

(8) **As Grounds for New Trial.**]—*See* New Trial.

(9) **On Sale of Goods.**]—*See* Sale.

(10) **Wrongful Dismissal of Servant.**] — *See* Master and Servant, and Shipping.

(11) **On Contracts of Work and Labour.**]—*See* Work and Labour.

(12) **For Trespass.**]—*See* Trespass.

And *See* the various titles throughout the book.

I. General Principles.

(1) *Natural and Probable Result and Remoteness of Damages.*

Breach of Contract.]—Where two parties have made a contract which one has broken, the damages which the other party shall receive in respect of such breach of contract ought to be such as may fairly and reasonably be supposed to have been in the contemplation of the parties at the time the contract was made, as the probable result of its breach. *Thompson v. Marshall*, 3 W. W. & A'B. (L.,)150.

Facts in Contemplation of Both Parties—Admission of Oral Evidence.]—Plaintiffs entered into a contract to repair a ship and entered into a sub-contract with defendants for a supply of portion of the materials for repairs. Plaintiffs sued defendants on the sub-contract and recovered the amount which they had had to pay for demurrage under the principal contract. The defendants had notice of the demurrage to which plaintiffs were liable. On rule *nisi* for reduction of damages or new trial, *Held* that oral evidence was admissible to show that the parties had in contemplation the fact that, if defendants by their delay caused the plaintiffs to incur the penalty, the defendants would be liable to the extent to which they caused the plaintiffs to suffer, and that such liability on the part of the plaintiffs under the principal contract was the correct measure of damages; but under the circumstances of the case, by which it appeared that the ship's agent had been responsible for part of the delay, the rule was made absolute unless plaintiffs consented to a reduction of damages. *Wright v. Langland's Foundry Company*, 5 A.J.R., 113.

Breach of Contract—Matter in Contemplation of Both Parties—Failure of Consideration.]—P., the owner of station property, being indebted to the defendants, certain merchants, agreed to make concessions as to a past commission which he disputed, and to pay future commissions on consideration of their supplying him with necessary funds to carry on his station for twelve months. After nine months the defendants refused to make further advances, and requested him to move his account to other merchants, which he was compelled to do, incurring thereby expenses in the transfer of his account. P. sued the defendants and recovered a verdict, damages being calculated upon (1) the cost of transfer, (2) the amount of disputed commission, (3) commission on advances for the nine months. On rule *nisi* for new trial to reduce damages, *Held* that the plaintiff was entitled to the costs of the transfer, such flowing naturally from the breach, and being contemplated by both parties; that on a partial failure of consideration plaintiff was not entitled to the whole of the items for commission, a total failure only would entitle him to them, but that plaintiff was entitled apart from the value of the consideration to damages arising from the breach, and that the measure of these would be the excess of the cost necessary to procure advances for the remainder of the period beyond what he would have had to pay

defendants if they had performed their agreement, and the damages resulting from the journeys made to Melbourne, and the withdrawal of his supervision from the station property, such having been within the contemplation of the parties. The Court itself estimated the damages and reduced them accordingly. *Parker v. Cunningham*, 5 V.L.R. (L.,) 202; 1 A.L.T., 21.

Where plaintiff purchased a reaper and binder at harvest time, and the vendors knew that he was a farmer, and wrote to him expressing regret that the machine was not ready for harvest, *Held* that damages assessed on the loss of crops the plaintiff had sustained through the inefficiency of the machine were not too remote, they were in the contemplation of the parties, and the natural consequences of the breach. *Corbett v. Taylor*, 5 V.L.R. (L.,) 455.

Remoteness of Damages — Gate Across Public Road—Loss of Time—Injury to Vehicle.]—H., while travelling on a public road, came to a swing gate across the road, which was closed. He got out of the vehicle to open the gate, leaving the vehicle standing on the road, and whilst opening the gate the horses ran away and injured the vehicle and themselves. *Held* that the plaintiff would have been entitled to damages arising from the loss of time and inconvenience occasioned by turning back from the gate and going by some other way, but that the damages arising from the loss of the vehicle and horses were too remote, not flowing naturally from the unlawful act of omission by the plaintiffs, but from his own injudicious conduct in leaving his horses. *Harvey v. Shire of St. Arnaud*, 5 V.L.R. (L.,) 312; 1 A.L.T., 44.

Action for Slander—Damages for Breach of Contract.]—C. had a contract with M'P. for the purchase of sheep on credit terms. F. uttered to M'P. slanderous words concerning C., in consequence of which M'P. tried to get further security, and failing, refused to complete the contract. C. sued F. in an action of slander, and tendered evidence to show loss through breach of contract. Rule *nisi* to enter a verdict for defendant. It was contended in support of the rule that the special damages arising from the breach of contract were too remote, C. being entitled to bring two actions, one against M'P. for breach of contract, and one against F. for the slander, and recover damages twice over for the same injury. *Held* that the double remedy was no bar; that defamatory words may cause a breach of contract, and that such breach may be laid as special damages to sustain the action for slander. Rule discharged. *Carroll v. Falkiner*, 4 W.W. & A'B. (L.,) 184.

Dishonouring Cheque.—Loss of Partnership in Consequence.]—In an action for the dishonour of a cheque, the jury may consider as evidence of general damage to the plaintiff's mercantile character, the loss by him of a partnership which the intended partner refused to enter into by reason of such dishonour; but they are not to estimate the loss of such partnership as special damages, it being too remote as special damage, and evidence of the probable value of such partnership is inadmissible. *Dyson v. Union Bank of Australia*, 8 V.L.R. (L.,) 106; 3 A.L.T., 135.

For Breach of Contract—Plaintiff's Maintenance Money for Detention as a Witness may Not be Included.] — *Norton v. Williamson.* *See post* under EVIDENCE — Costs and Expenses of Witnesses, &c.

(2) *In Other Cases.*

Excessive.] — The Court will not disturb a verdict merely because the damages are too high, but only where they are excessive; and they are excessive when calculated on a wrong basis. *Donaldson v. Hutchins*, 1 A.J.R., 26.

Excessive Damages.]—The Court will not interfere unless it is found the jury have acted altogether recklessly. *Black v. Board of Land and Works*, 1 V.L.R. (L.,) 12.

Large Damages — Where Court will Reduce.]—Where K. had promised to marry H., but was unable to do so because he was at the time of entering into the contract already married, and had offered by way of *solatium* to settle £1000 on H., and the jury gave H. £1000 damages; also where a bank had dishonoured a customer's cheque, and special damage was alleged in the loss of certain customers of the plaintiff and in an illness which was alleged to be aggravated by reason of the dishonour, and the jury gave plaintiff £1000 damages, such damages being more than equal to the profits of two years of plaintiff's business, on rules *nisi* for a new trial, *Held* that, where large damages were given, the Court would not interfere, unless the damages were extravagant, or where apparently the jury had not fully considered the case, or had awarded damages without bestowing that calm attention which they ought to bestow; and that neither of the above cases called for interference by the Court; and rules discharged. *Humphry v. Kelly, Jonnes v. National Bank*, 1 A.J.R., 170.

Excessive Damages—Dishonour of a Cheque.—The Court, although of opinion that damages were excessive, in the absence of mistake of law on the part of the Judge, or a mistake in the calculation of figures, or misconduct by the jury, refused a new trial. *Bengson v. Bank of Victoria*, N.C., 13.

Measure of Damages—Interference by Court.]—Plaintiff recovered from defendant damages in an action of negligence. The plaintiff appealed on the ground that the damages were too small. *Held* that the Court would only interfere where the jury have been guilty of misconduct, or have made a mistake, or neglect to assess damages, or give only nominal damages where substantial damages are recoverable, or leave out of consideration some material element. *Archibald v. Pruden*, 7 V.L.R. (L.,) 422; 3 A.L.T., 59.

See also S.P. *Smith v. Mayor of Emerald Hill, ibid*, p. 431; *Smith v. Iffla, ibid*, p. 435.

Excessive Damages.] — The Court will not in actions of *tort* interfere with the assessment of damages except in the case of misconduct or clear mistake on the part of the jury. Where in an action for false imprisonment the jury awarded £1000 damages for a detention of a very short duration, the Court regarded the excessive amount as evidence of mistake and granted a new trial unless the plaintiff consented that the damages should be reduced. *Bailey v. Hart*, 9 V.L.R. (L.,) 66; 4 A.L.T., 161.

Excessive.]—S. hired O. in France for a term of five years from O.'s arrival in Melbourne. S. undertook to pay O.'s expenses to Melbourne and back, but on the understanding that O. would return to France at the end of her agreement; to provide O. with board and lodging and washing during the term of contract; to pay her 2000f. the first year, 3300f. for the second year, and to add to this last sum for the three following years 50c. upon each article newly made by O. O. was only to receive two-thirds of her salary till 1000f. had been retained by S., such sum to be paid into a bank to O.'s credit, and to be forfeited by O. if she left her employment before the end of the second year. O. further contracted not to enter the service of any one else in Melbourne during the year following the completion of her agreement. On arrival in Melbourne S. refused to complete the contract, and O. was unable to obtain any very remunerative employment. O. sued for damages, and recovered £250. On a rule *nisi* for a new trial, which was granted on the ground that the damages were excessive, *Held* that the measure of damages should be compensation for the time during which O. would probably be out of employment, and the cost of her passage to France; and damages reduced to £150. *Oudot v. Soulie*, 1 A.J.R., 35.

Excessive Damages.]—The Board of Land and Works invited tenders for occupation for depasturing purposes of a certain run for a year. W. tendered, and having paid a *bonus* and rent, his tender was accepted. Licensees of adjoining runs were in occupation of parts of this run, and although the Board promised to renew license and give W. full possession, they failed to do so. W. had expended large sums in improvements, and sued the Board. He obtained a verdict for £7000, which included an allowance for portion of bonus and rent, loss of run for one year, and value of improvements. On rule *nisi* for new trial on ground of excessive damages, *Held* that the Board were guilty of a censurable want of information as to the occupation of the run, and that the plaintiff was entitled to damages; but that as the plaintiff only had a contract for a license for a year, the damages must be reduced to the loss he had been subject to through not having had possession for that time. Rule absolute to reduce accordingly. *Williams v. Board of Land and Works*, 2 W. W. & A'B. (L.,) 130.

Trespass—Value of Sheep Illegally Seized.]—For circumstances under which Court refused to interfere, even though of opinion that damages were excessive, *see Brown v. Aitken*, N.C., 58.

Excessive Damages—Malicious Prosecution.]—Where a plaintiff, after instituting an action for malicious prosecution, had offered to settle for £10, which was refused, and obtained a verdict for £70, the defendant applied for a new trial on ground of excessive damages. *Held* that there was no measure of damages, the offer to settle for £10 before action not being conclusive on that point. Rule for a new trial refused. *Gould v. Wilson*, 3 A.J.R., 108.

Excessive Damages—Too Much on One Count and Too Little on Another.]—C. sued E. for trespass and trover. The jury gave him £50 on the first count and £163 on the second. The damages were conceded to be £23 too much on the second count, but it was submitted that the total was correct. The Court ordered the amount on the first count to be increased by £23, and the damages on the second to be proportionately reduced. The rule for a new trial to be discharged, plaintiff paying the costs of the rule. *Cohen v. Ekman*, 3 A.J.R., 118.

Excessive Damages — Negligence — Compensation for Death—"Statute of Wrongs," No. 251, Secs. 12, 15.]—An action was brought by a widow to recover compensation for the death of her husband, who was killed on a railway, and the jury awarded £5000 damages. In assessing the damages the jury took into account the salary of the deceased as manager of a station, and certain allowances. *Held* that the damages were excessive, that the proper measure was the amount based on what he could set apart to support his wife and children, and the actual money value of his income twelve months before his death, calculated as an annuity, subject to the contingencies of his retiring, &c. Rule absolute for a new trial, unless the plaintiff agreed to reduce the damages to a sum suggested by the Court, viz., £4000. *McLean v. Board of Land and Works*, 7 V.L.R. (L.,) 239; 3 A.L.T., 8.

And for other cases *see* cases *post* under NEW TRIAL.

Horses Shipped from England Dying on Voyage—Measure of Loss.] — Where an action was brought to recover damages for the loss of two horses shipped from England, and which had died on the voyage through neglect, the jury returned a verdict with £500 damages, taking the amount of freight into consideration, being directed to estimate the value of the horses at the port of debarkation, and not at port of shipment. On a rule *nisi* for new trial on ground of misdirection, or to reduce the damages by £130, the amount of the freight, *Held* that there was no misdirection, that the amount the shipper would have to pay for similar horses in Melbourne ought to measure his loss, and that, since plaintiff could not get similar horses in Melbourne, he should be put in a position to be able to purchase others in England. Rule discharged. *Horwood v. Stackpoole*, 6 W. W. & A'B. (L.,) 89.

On Breach of Contract—Limited Evidence as to.]—Where a Judge had made an order for plaintiff to supply particulars of loss he had sustained through a breach of contract, and plaintiff had furnished some, being by a subsequent order limited to the particulars furnished in his evidence of loss, *Held* that other evidence was inadmissible, and the damages were reduced to nominal damages. *Cakebread v. Huddart*, 3 A.J.R., 121.

On Several Breaches—Venire De Novo.]—Damages may be assessed generally on several breaches, or separately on each one; and if they be assessed generally on several breaches and one be bad, the proper remedy is by rule for a *venire de novo*, not for a new trial. *Nolan v. Chirnside*, 4 A.J.R., 68.

On Common and Special Counts.]—The damages to be awarded on a special count are not to be controlled by reference to the particulars in common counts which have been abandoned. *Ibid.*

Substantial — Breach of Agreement to Appoint Arbitrator.]—The damages on a breach of an agreement to appoint an arbitrator may be substantial and need not necessarily be nominal. *Ibid.*

Measure of Damages in Action for Misrepresentation.]—In an action for misrepresentation, where the plaintiff has advanced money under the misrepresentation, the measure of damages is the amount of the money so advanced; and it lies on the defendant to reduce such damages by evidence of payment, or any other ground of reduction. In such a case the question of remoteness of damages does not arise. *Stevenson v. Landale*, 1 V.R. (L.,) 31; 1 A.J.R., 45.

Measure of— Advance of Bank Monies at Fixed Rate by Inspector in consideration of Freedom from Partnership Liabilities—Sale of Station, the Subject of the Partnership, at a Loss.]—For *dicta* as to measure of damages in a case which was decided upon the point of the agreement being illegal, *see Degraves v. McMullen*, 5 A.J.R., 8.

Measure of Damages—Dishonouring Cheque—Excessive Damages—Previous Loss of Mercantile Character.]—*Doria v. Bank of Victoria, ante column* 82.

Measure of Damages — Dishonouring Cheque — Farmer only Entitled to Nominal Damages.]—*Bank of New South Wales v. Milvain, ante column* 82.

Measure of Damages—Invalid Sale Under Distress.]—*Davey v. Bank of New South Wales, post* under DISTRESS—Effect of, &c.

Measure of Damages—Contribution Between Co-Sureties.] — *Embling v. M'Ewan, post* under PRINCIPAL AND SURETY.

In Action for Detinue—Substantial.]—*Wilson v Thomson*, 4 V.L.R. (L.,) 281; *see* under DETINUE.

Plaintiff Failing to Establish His Title to the Subject Matter of One of the Injuries — Loss of Right to General Damages — No Distribution — Defendant Succeeding on One Issue Substantially Succeeding on All.]—*See Lee v. Melbourne and Suburban Railway Company, post* under LANDS COMPENSATION.—Procedure under.

Principal and Agent—Factor Selling After Countermand of Authority.]—*See Osborne v. Synnot, post* under PRINCIPAL AND AGENT—Rights and Liabilities of Principal to Agent and *vice versâ* —General Principles.

DEATH.

Presumption of May Be Rejected or Not.]—In a suit for ejectment evidence was given of the absence of J. from his last residence during seven years, unheard of by those who would have heard of him if he were not dead, yet the residence of these persons in the neighbourhood of the home of J.'s family, or their inquiries, did not extend over the full period of seven years from the time when J. was last heard of at or near his home. The jury found that the death of J. was not proved. Upon rule *nisi* for a new trial, *Held* that though the jury *might* on the evidence have presumed J.'s death, they were not bound to do so, but were at liberty to draw the inference of his death, or reject it according to their conclusions on the whole case, *Stawell, C. J.*, dissenting, and holding that the presumption was one of law, which the jury *ought* to draw, if according to the rule of evidence they might draw it from the facts. *Rochford v. Jackson*, 1 W. W. & A'B. (L.,) 23.

Absence for Seven Years—How Proved.]—The seven years of absence, without being heard of, from which death may be presumed, may be proved in separate definite portions of time, by different competent witnesses. *Ibid.*

Presumption of Death—Person Not Heard of for Eleven Years.]—*See Low v. Moule, post* under WILL—Devise to a class.

By Negligence.]—*See* NEGLIGENCE.

Evidence of Death.]—*See* cases under WILL.—Probate, &c.—Practice Relating to, Generally.

DEBENTURE.

See COMPANY.

DEBT.

Attachment Of.]—*See* ATTACHMENT.

See also DEBTOR AND CREDITOR.

Proof Of.]—*See* INSOLVENCY.

Merger Of.]—*See* MERGER.

DEBTOR AND CREDITOR.

1. ASSIGNMENT OF DEBTS.

Assent and Signature of Debtor to Order to Pay—Suit by Assignor Against Debtor and Payment.]—K. owed W. £56, and W. had obtained a judgment. H. owed K. money. It was agreed that H. should pay W. the amount he (H.) owed K., and that W., in consideration of H. undertaking to do so, should release his claim against K., and H. signed and assented to an order for H. to pay W. the amount owing to K. by H. K. then sued H. and received payment, and W. sued H. *Held* that the fact of K.'s having sued H. and recovered payment, did not prevent W. from suing H. on the order signed by him. *Hughes v. Warren,* 3 A.J.R., 65.

Assignment of Lease Under a Creditor's Deed—No Assent by Lessor—Assignor Liable for Rent.]—*Jackson v. Bignell, post* under LANDLORD AND TENANT—Assignment of Leases, &c.

Revocation of Assignment—When Operative.]—A shire was indebted to C., a contractor, for certain works performed by him for the shire. C. gave orders in writing to certain of his creditors upon the shire council, transferable by endorsement. The shire treasurer endorsed the orders, and said they would be paid if there was any money. Before the accounts were passed by the shire council, or were paid, C. wrote to the council countermanding both orders, and warning the council against paying them. Subsequently the accounts were passed for payment, and both orders were paid by the council. In an action by C. to recover the amount due under his contract, *Held* that the shire was not entitled, under a plea of payment, to credit for the amounts paid, since the promise of the treasurer, even if it had power to bind the council, was conditional upon there being money, and upon the council passing the accounts, and before that time arrived C. had revoked his orders. *Canty v. Shire of Stawell,* 2 V.R. (L.,) 181; 2 A.J.R., 106.

Assignment After Execution of Creditors' Deed—Costs of Rule Absolute for Payment of Dividend Under Deed to Assignee.]—*See in re Sloman, ante column* 236.

2. AGREEMENTS BETWEEN DEBTORS AND CREDITORS.

Deed of Assignment in Trust for Creditors—Execution—Interest.]—A creditor before taking any benefit of distribution under a creditor's deed of assignment must execute it, but his execution is not a condition precedent to his proving in the Master's office for his debt. *Semble,* that creditors are entitled to interest on their debts up the date of payment, the method of distribution being payment of principal and interest of all debts down to date of deed, and then the balance of interest out of the surplus, if any. *Heape v. Hawthorne,* 2 W. W. & A'B. (E.,) 76, 87, 89.

Taking Fresh Security.]—If a creditor think fit to get a new security, whatever its force, he will not in a Court of Equity be allowed to use it, and at the same time enforce all his antecedent rights. *Murphy v. Martin,* 1 W. W. & A'B. (E.,) 26.

Deed of Assignment to Trustees.]—A release to the debtor by the creditors is a sufficient consideration to him for executing a deed of assignment for the benefit of creditors. *Whitehead v. Griffith,* 1 V.R. (L.,) 18; 1 A.J.R., 29.

See S. C.—EXECUTION.

And *see* generally as to Assignment in Trust for Creditors, *post* under INSOLVENCY—Composition Deeds.

Release of Debt—Part Payment.]—L., a shareholder in a company, was sued for £146 in respect of unpaid capital on his shares, and he paid £15 in satisfaction thereof, when the company withdrew the summons, but afterwards sued for the balance. *Held,* it was not a good release, and that the company might sue for the balance. *Reeves v. Luplau,* N.C., 58.

Joint Debtors—Execution by One of a Creditor's Deed—Release of Others.]—In an action against three debtors on their joint promissory note, two of them pleaded that the third had executed a creditor's deed, which contained a release of the debtor from all his debts, and that the deed had been executed by four-fifths in number and value of the creditors including the plaintiffs. *Held* that the other two debtors were released by the plaintiffs, since the creditors, having by their own act in inserting the release released the one debtor, could not be relieved from the principle of law, that they had therefore discharged their co-debtors. The plaintiffs, however, put in a replication to the effect that there was a proviso in the deed that the execution thereof by any creditor should not prejudice or affect any claim against joint debtors. *Held* that on the whole deed, the co-debtors were not released. *Whits v. Glass,* 2 V.R. (L.,) 46.

6. *In Other Cases.*

Ancestor's Debt—Realty—54 Geo. III., Cap. 15, Sec. 4.]—It is not necessary to show that the creditor has first exhausted the personalty, in an action at law against the heir in possession of lands descended, to recover a debt due from the ancestor, for the Statute 54 Geo. III., Cap. 15, Sec. 4, gives a new and cumulative remedy at law to the simple contract creditor against the realty, without forcing him, at least at law, to first exhaust the personalty. If, in asserting his remedy, he works any injury, the injured party has a remedy on applying to a Court of Equity. *M'Ewan v. Moncur*, 1 W. W. & A'B. (L.,) 9.

Specialty Creditor—Insolvensy.] —A specialty creditor whose security consists of a mortgage of land not worth the whole of the specialty debt, has, under the Insolvency Law, no priority over simple contract creditors for the excess of the specialty debt over the value of the land mortgaged. *In re Taylor*, 1 W. & W. (I. E. & M.,) 127.

Deceased Debtor—Debt Payable Out of Realty—54 Geo. III. Cap 15, Sec. 4.]—The 54 Geo. III., Cap. 15, Sec. 4, which makes land of a deceased person liable for his simple contract debts, does not thereby change the nature of the debtor's lands, and the creditor must sue the debtor's real and not his personal representative. *a'Beckett v. Matthewson*, 1 W. & W. (L.,) 29.

Deceased Debtor—Proof of Dsbt.]—The Court always requires some corroborative evidence in support of a claim for a debt made after the death of the alleged debtor, and based upon an oral promise only. *McDonald v. Hughes*, 8 V.L.R. (L.,) 59; 3 A.L.T., 103.

Administration Suits.]—*See* ADMINISTRATION.

Insolvency, Liquidation, and Composition Arrangements.]—*See* INSOLVENCY.

Payment.]—*See* PAYMENT.

Release.]—*See* RELEASE.

Set-off.]—*See* SET-OFF.

Absconding Debtor.]—*See* INSOLVENCY.

Fraudulent Debtor.]—*See* INSOLVENCY.

Imprisonment of Debtor.]—*See* ATTACHMENT—DEBTORS ACT.

DEBTORS ACT.

STATUTES.

"*Absent Debtors Act*," 4 Vic., No. 6—Repealed and re-enacted by "*Common Law Procedure Statute*, 1865."

"*Imprisonment for Debt Act*," No. 284—Sec. 1 repealed and re-enacted by "*Imprisonment for Debt Amendment Act*," No. 292, the remainder of the Act being kept in force by the "*Imprisonment for Debt Continuation Act*," No. 320.

1. "ABSENT DEBTORS ACT."

"Absent Debtors Act"—Irregular Proceedings—Proof of Waiver of by Defendant.]—It is not sufficient proof of the waiver, by a defendant of irregularity of proceedings against him under 4 Vic., No. 6, to show that he has returned to the colony, without also showing that he had knowledge of the proceedings, or that notice was given to him. *Nicholson v. Robertson*, 1 W. & W. (L.,) 27.

"Absent Debtors Act"—Irregular Proceedings—When Defendant May Set Aside.]—To enable a defendant, when only protecting himself from the claims of others, to set aside irregular proceedings under 4 Vic., No. 6, it is not necessary that he should have complied with the requirements of the Act. *Ibid.*

2. "IMPRISONMENT FOR DEBT ACTS."

Act No. 284, Sec. 2—Summons to Debtor to Attend.]—A debtor summoned under the "*Imprisonment for Debt Act*," Sec. 2, is bound to attend, or send a satisfactory excuse for non-attendance, though no sum for his expenses has been tendered to him, and if he fail to attend or send such excuse, an order may be made against him in his absence. *Ex parte Aplin*, 4 V.L.R. (L.,) 67.

"Imprisonment for Debt Statute," Secs. 2, 3.]—The "*Imprisonment for Debt Statute*" contemplates that a separate summons under Sec. 2 should be taken out, and a separate order, under Sec. 3, made in respect of every sum of money recoverable under an order of Justices, the Statute being *quasi* criminal in its provisions, they should be strictly adhered to. *Regina v. Pritchard, ex parte Smart*, 2 A.L.T., 58.

Fraud [Summons—Examination of Debtor—No. 284, Sec.] 9.]—In proceeding upon a Fraud Summons, under the Act No. 284 ("*Imprisonment for Debt Amending Act*,") the examination of the debtor must, under Sec. 9, be reduced to writing, the words of the Section being mandatory and not directory; and if not reduced to writing, a commitment thereupon will be bad. *Regina v. Harker*, 5 W. W. & A'B. (L.,) 40.

Examination Not Taken Down in Writing—Waiver of Objection.]—At the examination of a debtor on the return of a fraud summons, his examination was not reduced to writing, but no remonstrance or objection was made by the debtor. Afterwards, however, he applied to be discharged from custody, on the ground that his examination had not been reduced to writing as required by the Act regulating imprisonment for debt. *Held* that the taking the examination down in writing was a matter of procedure only, and that the debtor by his acquiescence had waived his right to have his examination reduced to writing. *Smith v. Manby*, 1 V.R. (L.,) 168; 1 A.J.R., 135.

Fraud Summons—Act No. 284, Sec. 9—Examination of Debtor to be Taken in Writing.]—Justices made an order upon a debtor for payment upon a summons for work and labour, and a fraud summons was issued upon which an order for commitment was made. It appeared that the debtor's estate had been sequestrated previously to the fraud summons, and he informed the Justices of this upon the examination upon the fraud summons, and that no depositions in writing were taken down upon such examination. *Held* that the Legislature had made it imperative upon the Justices to take down such depositions in writing, and they were not relieved from this duty either by the silence, consent or request of the debtor. Rule absolute for prohibition. *Regina v. Shelley ex parte Jones*, 9 V.L.R. (L.,) 297; 5 A.L.T., 90.

Fraud Summons—Insolvency After Commitment on—Effect of.] — *Malcolm v. Milner*, and *in re Geary*. *See* under INSOLVENCY—EFFECT OF.—In other cases.

Non-Attendance on Fraud Summons—Insolvency of Debtor an Excuse for.]—*Hitchins v. Trumble*. *See* under INSOLVENCY — EFFECT OF. — In other cases.

Fraud Summons—Service of Order.]—A defendant ought not to be required to show cause why he should not be punished for disobedience of an order of Justices until a copy of the order to pay has been served upon him. Order for commitment quashed. *Regina v. Scott, ex parte Munro*, 5 V.L.R. (L.,) 16.

Verifying Copy of Order Served Before Applying to Quash Under Act No. 571.]—*See Regina v. Carroll, ex parte Coe, post* under JUSTICE OF THE PEACE—Quashing Orders, &c.

Act No. 284—Fraud Summons—Service of Order.] —The order directing payment must be served on the debtor before he can be summoned to show cause on a fraud summons, and the Court quashed an order made on a fraud summons where this had not been done. *Ex parte Keith*, 5 A.L.T., 18.

Fraud Summons Under Act No. 284—Service of Copy of Original Order for Payment—Waiver.]—Before a fraud summons is enforced, a copy of the original order for payment must be served, and proceedings under Act No. 284 being of a *quasi* criminal nature, objections as to want of service cannot be waived by appearance before the Justices when original order was made, or by part payment of the money comprised in or consent to the original order. *Regina v. Cookson, ex parte Collins; Regina v. Jones, ex parte De Portu*, 9 V.L.R. (L.,) 23; 4 A.L.T., 148.

Fraud Summons, When it May Issue—Reasonable Time for Payment—Refusal of Debtor.]—Where a person is served with an order of Justices for payment of a sum of money, and upon being served says that he will not pay the amount, there is no necessity for allowing him a reasonable time for payment, but a fraud summons may issue at once. *Regina v. Kirby, ex parte Deane*, 10 V.L.R. (L.,) 6; 5 A.L.T., 171.

Fraud Summons—Dismissal—Costs—Act No. 284, Secs. 2, 3.]—O'D. obtained an order from justices for payment of a debt, the amount not being paid by H. the debtor, a fraud summons was served on H., who lived at Sale, requiring him to attend Petty Sessions at St. Kilda. H. demanded his expenses as a witness. The justices dismissed the summons with costs. *Held* that the Justices were right in dismissing the summons, but not with costs. *O'Donoghue v. Hamilton*, 3 V.R. (L.,) 22; 3 A.J.R., 32.

Effect of Act No. 284, Sec. 3.] — *Per Higinbotham, J.* (in Chambers.) The Act is not intended to make debtors pay their debts. and if creditors abuse a fraud summons for the purpose of recovering payment, they must specifically prove the charges they make, and where a creditor, instead of treating a false pretence as such, trusts to the debtor's subsequent promise to pay, he cannot rely upon the fraud. *In re Levy*, 3 A.L.T., 19.

3. ORDER FOR COMMITTAL.

Verbal Order Followed by Warrant—Affidavits to Contradict — Justices' Jurisdiction.] — D. was summoned before magistrates for a debt under £20, had been ordered to pay, and had not done so. He was then summoned by a "fraud summons" under the "*Act to Amend the Law of Imprisonment for Debt*," No. 284, Sec. 2, for examination as to his means of payment and intentions to pay, and the Justices made a verbal order that he be committed to prison. A warrant of commitment was made, reciting the verbal order; and on such warrant, but before any written order or minute of order was drawn up, he was put in prison. On motion for a rule *nisi* for a *habeas corpus*, *Held* that the Court could not look at an affidavit stating facts which impugned the recitals in the warrant, and that the warrant showed a sufficient order to justify the detention of the prisoner; that the Acts No. 284 and No. 292 did not deprive the magistrates of jurisdiction to imprison for debts under £20 [overruling *Adair's case*, 3 W. W. & A'B. (L.,) 107,] and rule *nisi* discharged. *In re Devaney*, 3 W. W. & A'B. (L.,) 103.

When Warrant Bad—Prisoner Wrongly Designated.]—S. had been committed to gaol on a fraud summons. In the summons he had been named W. H. S., and had been so styled in all the proceedings under the fraud summons; but the warrant for commitment was made out in the name of W.S. *Held*, upon *habeas corpus*, that the commitment was bad. Prisoner discharged. *In re Slocombe*, 4 W. W. & A'B., (L.,) 248.

Order for Payment by Instalments — Power of Judge.]—A Judge has no jurisdiction on a fraud summons to make an order under the "*Imprisonment for Debt Act*," No. 284, for payment of a judgment debt by instalments, and in default of payment, imprisonment, though such an order may be made on consent. But it is open to the Judge to make an order for payment by instalments, and that in the event of default

being made in the payment of any one instalment, the whole debt should become payable; and for imprisonment in default of payment of the whole. *McKean v. Kavanagh*, 2 V.R. (L.,) 139; 2 A.J.R., 95.

How Set Aside When Bad.]—The proper remedy where an order for committal in default of payment, under the "*Imprisonment for Debt Act*," No. 284, is bad on its face, is by rule *nisi* to set aside the order, and not by appeal under Sec. 6. *Ibid.*

When Valid—"Imprisonment for Debt Act," No. 284, Sec. 3.]—W. had been committed under Sec. 3 of the Act on a fraud summons for not paying amount ordered by Justices, but the commitment did not specify the period of imprisonment. *Held* that as the return did not show that there had been any adjudication of the period named in the warrant it was insufficient. Prisoner discharged. *In re Williams*, 5 A.J.R., 160.

Act No. 284, Sec. 3—Act No. 379, Sec. 75—Insolvency After Commitment on Fraud Summons — Habeas Corpus Refused.]—*See in re Geary*, under INSOLVENCY—EFFECT OF—In other cases.

By Justices — Uncertain Period — Act No. 284, Sec. 3.]—An order made by Justices under the "*Imprisonment for Debt Act*," No. 284, Sec. 3, for the commitment of a contumacious debtor "after the space of four weeks" is bad. *Regina v. Bannerman, ex parte Shiels*, 6 V.L.R. (L.,) 25; 1 A.L.T., 136.

Form of Warrant—"Imprisonment for Debt Act," Sec. 5, Sch. 3.]—A warrant of commitment upon a fraud summons is good if it follows the form given in Sch. 3 of the "*Imprisonment for Debt Act*," No. 284, though it recites merely the non-payment of an amount ordered to be paid. *Re Gawne*, 6 V.L.R. (L.,) 296; 2 A.L.T., 45.

What Order Should Comprise.]—An order of commitment on a fraud summons ought to state facts disclosing jurisdiction, or from which jurisdiction to commit may reasonably be inferred. It is bad if it states merely that a former order to pay has not been obeyed. *Regina v. Lloyd, ex parte Gill*, 5 V.L.R. (L.,) 53.

What it Should Comprise.]—The order of commitment, under the Act No. 284, Sec. 3, upon a fraud summons must comprise only the sum and costs awarded in the original proceedings; if it comprise further costs, *e.g.*, the costs of ineffectual efforts to recover the sum awarded, the commitment will be bad. *Regina v. Tacke, ex parte Watson*, 8 V.L.R. (L.,) 34; 3 A.L.T., 105.

Made in Absence of Debtor.]—Owing to the unavoidable absence of the debtor the proceedings on a judgment summons were adjourned, but no notice of the day to which the proceedings were adjourned was given to the debtor, and an order was on that day made in his absence. *Held*, that the debtor should have had notice of the date to which the cause was adjourned, and order prohibited. *Ex parte Shakespeare*, 4 A.L.T., 5.

Order Drawn Up Wrongly Without Notice to Debtor of Correction of Error.]—A Judge drew up an order after judgment had been signed against a defendant, ordering defendant to pay to *plaintiff* the amount of the judgment or commitment in default, and on the same day drew up an amended order directing payment *into Court*. *Held*, that the second order could not stand, as the debtor had received no notice of the application to amend the first order. *Taylor v. Plumpton*, 9 V.L.R. (L.,) 48; 4 A.L.T., 156.

Act No. 284, Sec. 3—Informal Order—Amended Order.]—An order made under the Act was in the form of a minute stating the particulars of the claim, the amount and date of the judgment, that the proceedings were by fraud summons and the decision of the justices. By an affidavit in reply, the complainant referred to an order drawn up since the minute, but undated. On a rule *nisi* to quash the order, *Held* that the minute was defective in not specifying whether any of the offences under Sec. 3 had been committed, that the *onus* of fixing the date of the subsequent order lay upon the complainant, and that this order was defective in not specifying the offence under Sec. 3—it not being sufficient to state that the debtor still owes the money, and has since judgment recovered sufficient means to pay, without alleging that he neglected or refused to pay the same. *Quære*, whether a defective order can be amended by a subsequent order. *Regina v. Hardware, ex parte Smith*, 10 V.L.R. (L.,) 325; 6 A.L.T., 151.

Commitment under "County Court Statute 1869," Secs. 83, 84—Second Commitment for Same Debt—Jurisdiction Exhausted.]—*See Regina v. Cope, ex parte Fraser, ante column* 253.

Discharge from Commitment — Insolvency of Debtor — Ex parte Application — Jurisdiction of County Court under Sec. 89 of the "County Court Statute 1869."] — *See Rowbottom v. Hennelly, ante column* 254.

DECEIT.

Actions for.]—*See* FRAUD AND MISREPRESENTATION.

DECLARATION.

Statutory.]—*See* CRIMINAL LAW—LAND ACTS.

In Pleadings.]—*See* PRACTICE AND PLEADING.

Of Parties.]—*See* EVIDENCE.

DEED.

1. Parties to—Rights of.

Contradicting Recital Collateral to Purpose of Deed.]—A party to a deed wishing to contradict a recital in the deed, collateral to the main purpose of the deed, must aver that he was not aware of the facts at the time he executed the deed. *Withers v. Greenwood*, 4 V.L.R. (L.,) 491.

2. Form and Contents.

Conveyance — Past Words of Conveyance.] — In deeds appointing new trustees, the only operative part after the appointment of the new trustee was "hath bargained, sold, released, quitted claim, and confirmed unto the said" new trustee. *Held*, that the words in the deed were sufficient to pass the legal estate. *Mein v. Dallas*, 1 A.J.R., 89.

Covenants.] — *See* Covenants — Landlord and Tenant—Land Acts.

Proof of Execution by a Trustee of a Creditor's Deed—Attestation Clause as it Originally Stood Is Binding and Not Capable of Amendment.]—*In re Wooley*, 1 W. & W. (I. E. & M.,) 81.

3. Construction of.

Recital — Covenant.] — An indenture, dated October 16th, 1860, made between K. and C. of the one part, and B. of the other part, recited that B. had sold certain hereditaments to K. and C. for £20,000, of which only £18,000 had been paid; and that it had been agreed that £2000, the balance of purchase money, with interest, should be paid at the time and should be secured in the manner thereinafter mentioned. By the indenture the hereditaments were conveyed back to B., as mortgagee in fee, subject to redemption. It was agreed that if K. and C. should repay the £2000 on October 16th, 1862, "and, also, in the meantime, interest for the said principal sum," &c., "by four equal quarterly payments" on days named, then B. should reconvey the hereditaments free from encumbrance, and that K. and C. might pay off before-hand if they so wished. K. and C. covenanted simply that they had not encumbered. All parties agreed that in case of default in payment of principal or interest on the days provided, B. might sell; and the indenture contained the usual clauses enabling him to give title, &c.; lastly, it was agreed that till default in payment, K. and C. should remain in possession of the premises. The interest fell two quarters in arrear. On a special case stated, *Held* that the indenture contained an express covenant to pay principal and interest, on which K. and C. could be sued personally in covenant for the interest in arrear. *Bruce v. Kerr*, I W. & W. (L.,) 141.

Variance Between Recitals in a Deed and Actual Facts—Onus of Proof.]—Where there is a variance between the recitals in a deed and the actual facts, the onus of reconciling the facts with the recitals lies on those claiming under the deed. *Symons v. Williams*, 1 V.L.R. (E.,) 199, 216.

What Passes Under a Deed.] — Where a deed of assignment assigned "all that the said periodical known as the *Melbourne Punch* and the copyright thereof, and all the back numbers and bound-up volumes thereof in stock, and all the engraved blocks used since the said K. became the proprietor of the said publication in the publication of the said periodical up to the 30th of June, 1866, and goodwill, &c.," *Held* that the words, "and all the back numbers and bound-up volumes thereof in stock," were to be interpreted by the words, "up to the 30th of June, 1866," in the next sentence, and that the assignee was entitled to recover certain volumes which were in stock on June 30th, but which had been removed between that time and the day of the date and execution of the deed (July 27th.) *Wilson v. Smith*, 4 W. W. & A'B. (L.,) 131.

Creditors' Deed—Release Operating as a Covenant Not to Sue.]—A creditor's deed contained a clause permitting creditors to execute without prejudice to their securities or remedies against joint debtors, and a clause releasing the debtor without prejudice to the rights of creditors holding security, but omitting any reference to joint liability. *Held* that the omission could not overrule the former clause, and that the release only operated as a covenant not to sue. *Glass v. Higgins*, 2 V.R., (E.,) 28; 2 A.J.R., 10.

What Passes by Grant of "All Ways, &c."]—A deed granting in general words, "all ways, &c.," belonging or appertaining to the land granted, does not create a right of way. *Blyth v. Parlon*, 2 V.R. (E.,) 111; 2 A.J.R., 75.

By References to Plan in the Margin.]—S. subdivided a section of land into a number of lots, reserving streets, and sold the lots by a plan of subdivision exhibited at the time of sale. In a conveyance of certain lots, the plan of subdivision was referred to as to boundaries, and a right of way was granted over B. street, "and all other streets reserved out of the said section, and which lands and hereditaments are more clearly shown in the plan delineated in the margin of these presents." On the plan in the margin of the deed, B. street was not shown for the full length delineated on the plan of subdivision. *Held* that the grantee's right of way over B. street was limited to so much of the street as was shown on the plan in the margin. *Ibid.*

Lost Deed—Covenant for Further Assurance—Grantor Not Compelled to Execute a Duplicate After Lapse of Many Years.]—*Geraghty v. Russell*, *ante columns* 281, 282.

Vesting—Divesting.]—Trust for A. for life, and in the event of her death during the lifetime of her son B. and her two youngest daughters C. *or* D., then upon trust for the benefit and maintenance of B., C. *or* D. in equal proportions until attaining age or marriage, and then upon trust to convey in equal proportions as B., C. *or* D. shall appoint, and in event of death of either of them, B, C. *or* D. before majority or marriage then in trust for the benefit of the survivors of them and the lawful issue of either of them so dying. *Held* that the event contemplated was the death of A. during the life of the three or any of them, the property vesting on their respective marriages or majority, whichever first happened; and that A. having attained twenty-one and died a bachelor, his share became vested on his majority, and was not divested on his subsequent death unmarried. *Re "Transfer of Land Statute," ex parte Leach*, 5 A.J.R., 72.

Termination of Agreement "on Giving Notice."]—A deed contained a provision that the agreement contained in the deed might be put an end to by any party to it, *on* giving the other parties one year's notice of his *intention* so to do. *Held* that "*on*" giving had the same meaning as "*by*" giving notice, and that, notice having once been given, the agreement could not be revived by a withdrawal of the notice. *Robbins v. Robbins*, 4 V.L.R. (L.,) 128.

Merger.]—*Synnot v. Parkinson*, 4 V.L.R. (L.,) 521, *see post* under MERGER.

Construction—Boundary.]—Where, in a grant, the land granted was described as "bounded on the west by another road and reserve to the Port Phillip Bay," the grantee was *held* to have a right to insist against the grantor, that, as between them the grant gave a right to the use of the road and reserve as a highway, whether it was so in fact or not. *Webb v. Were*, 2 V.L.R., (E.,) 28.

Where, in a grant, the land granted was described as "bounded on the west by a public promenade extending in width to the high water mark of Port Phillip Bay," the grantor was *held* debarred from preventing the use by the grantee of the public promenade as a promenade. *Ibid.*

Boundary—"Margin" of Sea Shore—Question for Jury.]—In a deed (a Crown grant,) the parcels fixed a starting point which had been obliterated and was not at the water's edge, and then gave the boundaries as on the east "by the margin of Bridgwater Bay to the commencing point." The plaintiff contended that the "margin" meant the water's edge, and not the top of some cliffs a short distance therefrom. *Held*, that the word "margin" was not a legal term, so that the Judge was compelled to expound it as a matter of law, and that its meaning had been properly left to the jury. *Kennedy v. Shire of Portland*, 7 V.L.R. (L.,) 541; 3 A.L.T., 77.

False Demonstratio.]—*Per Full Court.* When there is a grant of a particular thing once sufficiently ascertained by some circumstance belonging to it, *e.g.*, by terms of plain and simple description, the addition of an allegation, mistaken or false, respecting it, will not frustrate the grant. A. by deed gave to B. certain land, "except the dwellinghouse and buildings connected therewith on the land, and also the field on which they stand, containing about 100 acres, bounded on the north by a road, on the east by (*b*,) on the south by (*c*,) and on the west by (*d*.)" The plaintiff to whom the land excepted was given, claimed to be entitled to an allotment 99, which was on the same side of the road as part of allotment 100, on which was erected the dwellinghouse, &c. Allotment 99 contained 63 acres; the part of allotment 100, contained 101 acres. *Held*, affirming *Williams, J.*, that the description by metes and bounds was the true and leading description, and as that description would include allotment 99, and part of allotment 100, the words descriptive of the area should be rejected. *Cunningham v. Platt*, 8 V.L.R. (E.,) 55, 65, 66, *et seq.*; 3 A.L.T., 126.

Parol Evidence to Explain—Intention—Parcels.]—In construing a deed of settlement, statements made by the settlor are inadmissible to show his intentions; but evidence of existing facts is admissible to show that a description of the parcels in a deed was erroneous, and to show how the mistake on which the erroneous description was founded arose. *Ibid*, p. 68.

Construction of Partnership Deed.]—*See* PARTNERSHIP.

Construction of Guarantee.]—*See* GUARANTEE.

Construction of Crown Grant.]—*See* GRANT.

3. REGISTRATION.

What Deeds Must Be Registered.]—It may be doubted whether a deed, merely transferring an estate from one trustee to another, falls within the scope or object of the Acts in force in 1861, relating to registration in this colony, as it is difficult to suppose a case in which such a deed could be executed for valuable consideration. *a'Beckett v. Matthewson*, 1 W. & W. (L.,) 29, 33.

What Requires Registration—Deed of Assignment—Registration—"Instruments and Securities Statute 1864," Sec. 56.]—A deed of assignment in favour of all such creditors as shall execute it within a certain time is not a deed of assignment for the benefit of all the creditors within the meaning of the "*Insolvency Statute* 1865;" and if any of the property comprised in such deed be allowed to remain in the apparent possession of the debtor, it must be registered under Sec. 56 of the "*Instruments and Securities Statute* 1864;" and if there be a blank in the schedule to such deed, and a similar blank in the copy filed under the section, and after filing the copy the blank in the schedule is filled up, but not that in the copy, the copy so filed is not a true copy within the meaning of the section. *Port v. London Chartered Bank*, 1 V.R. (L.,) 162; 1 A.J.R., 146.

What is an Instrument Affecting the Land Within Sec. 194 of the "Real Property Statute 1864."]—An equitable mortgagee by deposit allowed the mortgagor possession of the deed deposited for a special and temporary purpose, on his signing a receipt containing a promise to return it on demand, "it being held by them (the plaintiffs) as security for advances." *Held, per Molesworth, J.*, that this was a written evidence of the relation between them; but not in the nature of an instrument in writing for valuable consideration affecting lands within the Acts for the registration of deeds. *White v. Hunter*, 5 W. W. & A'B. (E.,) 178, 181.

Effect Of.]—Registration is only important in deciding priority between inconsistent conveyances, each of which would be effectual but for the other; but gives no increased efficacy to conveyances impugned for fraud or mistake. *Sutherland v. Peel*, 1 W. W. & A'B. (E..) 18, 23.

Priority of Registration — "Real Property Statute 1864," No. 213, Sec. 194.]—*Per Molesworth, J.* "The direct enactment in Sec. 194 is as to the priority between one deed, conveyance, or instrument in writing and another; not between such deed, &c., and a transmission of right not evidenced by writing." Therefore, where A. deposited deeds by way of equitable mortgage with B., accompanied by a memorandum duly registered, and B. transferred the deeds to C. without any memorandum, and A. afterwards executed a legal mortgage to D., which was registered, *Held* that the principle of prior registration did not apply as between C. and D. *White v. Hunter*, 5 W. W. & A'B. (E.,) 178.

Priority—"Registration Act," No. 213 — Only One Conveyance Valid.] — In 1854 H. sold and conveyed land to A. The deed of conveyance was registered August, 1867. In 1856, H. became insolvent, and S. was appointed his official assignee. By mesne conveyances in 1856 and 1857, the land was sold to T., being sold in the first instance by S, and these conveyances were registered prior to August, 1867. A. brought ejectment against T., and recovered a verdict. On rule *nisi* to enter a verdict for defendant, *Held* that the effect of the "*Registration Acts*" is to give priority to the registered owner over the unregistered owner, only in the event of two equally valid conveyances, but that H. having transferred the legal estate to A. before his insolvency, A.'s title was paramount, even though T.'s conveyance from S. was registered prior to it, the subsequent conveyance by S. being inoperative. *Andrews v. Taylor*, 6 W.W. & A'B. (L.,) 223; N.C., 22.

Priority Dependent on Registration.]—W. mortgaged certain property (*a*) to C., March, 1858, to secure £9000, and he, in July, 1858, mortgaged other property (*b*,) and the equity of redemption in (*a*) to a company. This last mortgage was defeasible on endorsement of satisfaction of certain requisitions; these requisitions were, in fact, satisfied, but no endorsement was made to that effect, and the mortgages were not registered till 1871. W., in March, 1859, mortgaged (*a*,) (*b*,) and other property to F. and C., and this mortgage was registered forthwith, and contained no reference to the previous mortgages. In February, 1860, W., with R. and N.C., his partners, conveyed all joint and separate real and personal property upon trust for creditors. March, 1874, F. and C. conveyed to G.W. and J.W., W. joining in conveyance freed from mortgage of March, 1859; no consideration was given by grantee, and there was no declaration of trusts. March, 1866, the trustees of deed of February, 1860, W. and creditors of old deed conveyed to new trustees upon trust for creditors; this deed provided for distribution of assets, and recited a report by Master respecting creditors, their debts, and outstanding assets, including (*a*,) which was described as mortgaged to C., and comprised in mortgage of March, 1859, but no mention was made of mortgage to the company, July, 1858. July, 1870, G.W. & J.W. mortgaged to the company, W. concurring, subject to mortgage to C.; no allusion was made to mortgage of July, 1858, and that mortgage was not registered till 1871. All the other deeds, including creditors' deeds, were registered shortly after execution. The trustees of the deed of March, 1866, brought a suit to redeem C.'s mortgage, the company claiming to redeem in priority to the plaintiffs. *Held*, reversing *Molesworth, J.*, that the deed of July, 1858, and the creditor's deed of March, 1866, were not inconsistent, so as to make the creditor's deed of March, 1866, take priority over the deed of July, 1868, by reason of its prior registration; that the endorsement on the deed of July, 1858, was necessary in order to make it void, and that the trustees of the deed of March, 1866, were not entitled to redeem. *Fraser v. Australian Trust Company*, 3 A.J.R., 1, 83.

Attestation.]—A memorial under the "*Registration Act*," 6 Geo. IV., No. 22, Sec. 4, having on it merely the words, "By the Court," without any seal of the Court, or signature of a Judge or any officer of the Court to verify it, is not properly attested. *Dalton v. Plevins*, 1 W. & W. (E.,) 177, 185, 186.

Grant by Deed to Defendant by Former Owner of Servient Tenement—Replication of Prior Registration of Deed on which Plaintiff Relied.]—Action by M. against B. for damages for allowing water and sewage to flow through M.'s land. Plea (1) That former owner of plaintiff's land (servient tenement) had granted permission to discharge drainage, &c., on the servient tenement. (2) On equitable grounds an agreement between former owners of tenements, and in consequence the construction of the drain and acquiescence in the use of the drain. Replication to these pleas, that deed through which plaintiff claimed was registered prior to deed under which defendant relied. *Held* that replication was sufficient and judgment for plaintiff. *Mitchell v. Burns*, 3 A.J.R., 69.

4. Setting Aside and Rectifying.

(a) Setting Aside.

(1) Voluntary Deeds.

On Ground of Mistake—No Power of Revocation —In Favour of Wife—Act No, 384, Sec. 18.]—Suit

by husband to set aside voluntary deeds made in favour of his wife. These deeds purported to assign certain hotels, and all interest in them, to tustees upon trust for his wife, on consideration of the trustees paying husband's debts, and allowing him small weekly payments, and contained no power of revocation. It appeared that plaintiff had understood that his wife was to manage the hotel business as his agent, and that he would have power to revoke these deeds in two years' time. *Held* that though these deeds were executed, in pursuance of a contract in writing with the wife, she had no separate estate at the time of such contract, and that such contract was not binding under Sec. 18 of Act No. 384; that the deeds were voluntary, and were executed by plaintiff under a mistake and misapprehension of the contents, and deeds decreed to be set aside. *Bryant v. Patten*, 3 V.L.R. (E.,) 86.

And *see* cases under FRAUDULENT CONVEYANCES—INSOLVENCY—SETTLEMENT.

(2) *In other cases.*

Foolishness—Absnce of Professional Advice.]—Where an old man, aged 70, conveyed away his house and land, which, except the furniture in the house, was all his property, without receiving any adequate consideration therefor, he being without professional advice, the Court ordered a re-conveyance of the property, and a return of the consideration money, on the grounds of the foolishness of the old man, and the absence of professional advice, but gave no costs. *Reed v. Buck*, 10 V.L.R. (E.,) 33.

Proving the Dsd.]—*Per Molesworth, J.*—"I do not think it is generally necessary for a person to prove a deed which he seeks to set aside; the litigation on the subject is based upon its existence. If there is anything in its contents affording evidence to either party, he may produce it. *Attorney-General v. Belson*, 4 W. W. & A'B. (E.,) 57, 63.

(*b*) *Rectification.*

On the Ground of Mistake.] — A husband brought a suit to rectify a marriage settlement on the ground of mutual mistake. The evidence showed a mistake upon the part of the husband, but the wife alleged in her answer, though there was no evidence to support it, that she married on the faith of the settlement as drawn, and that there was no mutual mistake. *Held, per Molesworth, J.*, that in the absence of evidence to contradict the wife, the bill should be dismissed, with costs. *Upon appeal* to the Full Court, *Held* that the decree was right, and that the *onus* of proof of mutual mistake lay on the plaintiff, and that the evidence was insufficient to support his case. *Soloman v. Soloman*, 4 V.L.R. (E.,) 40.

Voluntary Dsd—No Clause of Rsvocation—Mistake in Law.]—Voluntary deeds not containing any clause of revocation are valid and enforceable in Equity, unless executed in mistake or obtained by fraud. Where a settlor was hindered from inserting a clause of revocation on the understanding given by his attorney that it was unnecessary, as the settlement might be got rid of by a fictitious sale and re-purchase, *Held* that such was a mistake in law, against which no relief would be granted, and afforded no ground for setting aside or rectifying the deed at the instance of the settlor. *Moorhouse v. Rolfe*, 4 A.J.R., 159.

On the Ground of Mistake and Fraud.]—A lease gave the lessee an option to renew for a further term, which he exercised. The endorsement of renewal upon the old lease contained a clause that the new lease was "under and subject to covenants, clauses, and agreements in the within lease contained, and as if the same had been specifically repeated and embodied herein." Under this the lessee claimed a right of further renewal, which the lessor had distinctly, in previous conversations with the tenant's agent, refused to grant. The draft endorsement was submitted to and read over by the plaintiff, who made no objection to it, but asserted afterwards that he had mistaken the meaning. Upon bill by the lessor to have the endorsement rectified, on the ground of mutual mistake and fraud, the lessee denied mistake on his part, and the evidence was balanced on the question of fraud. *Held* that, as the plaintiff had perused the endorsement, and should have been on his guard, the effect of the words must prevail, and bill dismissed, with costs. *Johnson v. Donaldson*, 6 V.L.R. (E.,) 121; 2 A.L·T., 12.

Amendment of Mistake—"Spirits" substituted for "Spouts."]—*Ross v. Blackham*, 1 V.L.R. (E.,) 220, *post* under PRACTICE AND PLEADING—In Equity—Demurrer.

On Ground of Mistake.]—*Per Molesworth, J.*—To entitle a party to rectify a document, it must be shown distinctly what was the intent of both parties, and that there has been a mutual mistake. It is not enough to show what one party thought was the result of a conversation, unless there is something in it distinctly showing that the other party took the same view. Plaintiffs were merchants trading as partners; the defendants, M. and A., were also trading as partners. Plaintiffs became indebted to defendants and other creditors, and by mortgage under Act No. 301 mortgaged certain lands to M. as a trustee for his own firm as to one quarter, as a trustee for other creditors as to rest. Plaintiffs subsequently became insolvent, and their trustees made an arrangement by which they were entitled to buy back their estate on paying 9s. 6d in the pound, and as part of it, M. signed an agreement by which, for a certain preferential standing, he released to plaintiffs "*his share*" in the mortgage. He refused to release the interest of the firm therein, but offered to release his individual interest. *Held, per Molesworth, J.*, on a suit by plaintiffs for rectification on ground of a mutual mistake and for general relief, that there was no evidence of a mistake, and that under the agreement M. had only assigned his individual share. *Per Full Court*, that though there was no mistake proved, the Court could grant the consequent relief prayed upon the construction of the deed

itself without rectification, and that under the deed of agreement, M. assigned the firm's share in the mortgage. *McClure v. Marshall*, 9 V.L.R. (E.,) 84, 96.

On Ground of Mistake.]—A bill to rectify a deed on the ground of mistake did not show that the intention of the parties, or at all events of the defendant, was not in conformity with the deed, showed no common mistake of both parties, and no fraud by one party knowing that the other was acting in ignorance. *Held* bad on demurrer. *Harper v. Mackenzie*, 1 W. & W. (E.,) 102, 106.

And *see Sutherland v. Peel, Attorney-General v. Belson*, *post* under MISTAKE.

Rectification of Mistake in a Crown Grant.]—*See* GRANT.

DEFAMATION.

I. IN ORDINARY CASES.

1. *What is Actionable.*

(*a*) *Generally.*

Imputation of Illegitimacy Not Actionable.]—No action will lie for saying to a man, "Your children are bastards." *Smith v. Hetherton*, 5 W. W. & A'B. (L.,) 101.

Word "Bog-Trotter."]—*See O'Malley v. Elder*, *post column* 365.

Libel on Partner in Which Other Partner is Referred To.]—W. and M. were in partnership as attornies, and M. was also President of the Board of Land and Works. S. published in a newspaper certain articles reflecting on M. as President of the Board, and in such articles W. was referred to. The articles complained of were in three counts, and were as follows: 1—"He (M.) has closed the front door of the Land Office to the general public. He has opened a private entrance for his partner and clients." 2—"At a time when the Land Office was closed to the general public, A., a partner in the firm of McC., V. and Co. (clients of W. and M.,) waited upon M. at the Land's Office, in company with W., the junior partner of the learned President, and obtained from him the promise that commons would in certain instances be open for selection. Acting on this, A. proceeded at once to T., where his firm has a branch store, and, assisted by his clerk and shopman, pegged out the whole of the common on the very day that the new "*Land Act*" came into operation." 3—"M.'s good offices are more easily obtained by the friends and clients of his junior partner." The innuendoes charged as to the first and third that S. meant that W. improperly availed himself of the facilities alleged to have been afforded by M. to him and his clients; and, as to the second, that S. meant thereby, "that when the office of the Board of Land and Works was closed to the general public, W., in company with A., unduly and improperly, and with a view to obtain an unfair advantage for the said A. and his, A.'s, said firm over the general public in the selection of certain public lands of the said colony, viz., the T. common, waited upon his partner, the said M., and by such undue and improper means, and with such object obtained from him a promise that certain commons would in certain instances be open for selection, of which the T. common was one, and that the said A. availed himself of such promise by pegging out the same on the very day that the new "*Land Act*" came into operation." *Held*, on demurrer, that the matters charged in the first and third counts referred to W.'s partner as President of the Board of Land and Works, and not to W. himself, and that there was nothing actionable in the words used; that the innuendo in the second count was too large for the matters charged, and that the words used contained a charge only against M., as President, and not against W. *Wilson v. Syme*, 1 V.R. (L.,) 112; 1 A.J.R., 90.

Slander of Married Woman in Past Tense—Suit by Husband.]—A declaration in an action by a husband for slandering his wife set out the slanderous words used as "You," (plaintiff's wife) "kept a brothel, and that's how you got your money." Plaintiff sued on the ground that this alluded to the time of his wife's coverture, in which case he would be punishable for allowing her to act as the defendant stated. *Held*, that the statement being in the past tense, it did not necessarily allude to the time of coverture, and that no action would lie. *Ray. v. Wakefield*, 1 A.J.R., 162.

Criticism Upon an Actor's Performance.]—An actor sued the proprietor of a paper for a criticism on the actor's performance, which was to the following effect:—"Faust, in the hands of that slovenly and careless actor, I., was a farce. The great scene depends upon the sudden transformation of an old man into a young and brilliant young man. Now, when the gown and beard were twitched off, I. appeared dressed like an ordinary supernumerary in solid garments. Then the delivery of his speeches was so low, sulky, and lifeless, that we were really inclined to think he had some quarrel with the management about it." The jury gave the plaintiff a verdict. The Court refused a new trial. *Ireland v. King*, 5 A.J.R., 24.

Seaman's Certificate of Discharge—Filling Up Columns with a Cross — Question for Court.] — Where the master of a ship filled up the columns relating to ability, sobriety, and conduct of a seaman's certificate of discharge with a cross, *Held* that it was for the Court to say whether the matter complained of was libellous; that the mere insertion of crosses in the columns of the certificate afforded no grounds from which a libellous inference could be legitimately deduced—nothing proper to be left to a jury; and plaintiff nonsuited. *Snewin v. Doherty*, 6 V.L.R. (L.,) 305; 2 A.L.T., 59.

Shipmaster Writing "Declined" in the Certificate of Character Given on the Discharge of a Seaman.] —*See Garson v. Jacobsen*, 5 V.L.R. (L.,) 7, *post* under SHIPPING—Seamen.

Words Imputing Criminal Offence—Effect Neutralised by Contemporaneous Words and Circumstances.] —Words, *e.g.*, "You are a b——y, infamous thief," in themselves importing a criminal offence, may be shown, in an action for defamation, by evidence of the circumstances and the connection in which they were used, to be merely terms of scurrilous abuse; and will not then be actionable without proof of special damage. *Hodgson v. Bulpit*, 6 V.L.R. (L.,) 440.

In *Jamison v. Scott*, 5 A.J.R., 24, the Court *Held* that the word "thief," as applied to a plaintiff, was slanderous.

(*b*) *In Respect of Trade.*

Imputation of Insolvency—Person Libelled Not a Trader.]—F. sued E. for libel on two counts, (1) being that E. wrote of F., "What about F.; has he settled with you. I am going to make him insolvent, as I have tried fair means which I find of no use;" (2) that plaintiff was Harbour Master at X., and that the words were written in relation to his said employment. Defendant demurred to first count because it did not allege that plaintiff was a trader. Plaintiff recovered a verdict, and a rule *nisi* to enter verdict for defendant and the demurrer were argued together. *Held*, that if the words were a mere charge of insolvency urged against a non-trader, they would not be libellous, but that it was open for the jury to say that the words were libellous, as conveying a charge of dishonest insolvency, because the Court was of opinion that they were capable of such a meaning. Rule discharged. Judgment for *plaintiff* on demurrer. *Fermaner v. Emmerson*, 5 A.J.R., 146.

(*c*) *Upon Proof of Special Damage.*

Imputation of Drunkenness — Schoolmaster.] — It is not actionable to say of a schoolmaster "that he was drunk and fell on the floor," unless special damage can be shown. *Brandrick v. Johnston*, 1 V.L.R. (L.,) 306.

Trade Advertisement—Contradicting Advertisement of Another.] — An advertisement of a tradesman, which contradicts a statement in an advertisement of another tradesman, is not actionable unless special damage be stated and proved. *Nicholson v. Allen*, 2 V.L.R. (L.,) 233.

(2) *Privilege.*

(*a*) *In Discharge of a Duty.*

Privileged Occasion—Matter Between Master of a School and Board of Education—Proof of Malice.] —M., a master of a school under a Board of Education, brought an action of libel against the defendants (a minority of the local Committee of the Board.) It was based upon a letter addressed to the Central Board, and the main paragraph was to the following effect:—"That a number of children's names are entered as free pupils on the plea of pauperism, such list not being attested by either a magistrate or a clergyman of the district; in fact the list is not even laid before the committee." M. recovered a verdict. On rule *nisi* to enter a nonsuit, *Held* (1) That as the Central Board had a duty to perform, the letter was privileged. (2) That as to malice, inasmuch as the sting of the libel—that M. had lent himself to allowing pupils to be placed on the free list, when they ought not to have been free, and thus defrauding the Government—was not proved, it was competent for the jury to take that as evidence of personal malice, although a very small ground of malice. Rule discharged. *Miles v. Weber*, 6 W. W. & A'B. (L., 129.

Privileged Occasion—Master and Servant.]—The Board of Land and Works dismissed M. for insolence and insubordination, and the superintendent of traffic wrote a notice containing the libel, and at the end of which were the words, "Caution all railway servants." This notice was put up in a room appropriated for use of railway servants, but to which strangers went, although, strictly speaking, they had no right of access. On rule *nisi* to enter a verdict for plaintiff, *Held*, that the notice was privileged, and that the Board in cautioning their servants against similar misconduct acted on an occasion which rebutted the presumption of malice. Rule discharged. *McDonald v. the Board of Land and Works*, 5 A.J.R., 34.

Privileged Communication—Letter to Solicitor.]— Where a defendant wrote in answer to a demand for payment of costs by a solicitor, a letter charging him with duplicity in a matter not connected with the debt, *Held* that the letter was not privileged. *Nolan v. Connell*, 5 A.J.R., 20.

Malice—Privileged Communication—Question For Jury.]—In an action for libel upon a privileged communication by a constable to his superior officer, the jury may look at the document in question and say whether the language is stronger than necessary, so as to display actual malice. *Moran v. Lyons*, 4 V.L.R. (L.,) 379.

Privileged Communication—Malice—New Trial.] —In a privileged communication the jury found for the defendant. *Held* that the Court required a very strong case to be made out to render it incumbent upon it to take the questions of excess of privilege and of express malice out of the hands of the jury. and decide that the words used were libellous, and that the evidence of malice was so strong that the jury was not justified in finding for the defendant. *Pearson v. Slingo*, 7 V.L.R. (L.,) 9.

Question for the Jury — Privilege.] — In an action for defamatory words in the County Court, the Judge nonsuited the plaintiff on the ground that the words being privileged, it was a question of law and not of fact. On appeal, *Held* that the defence of privilege being raised, the Judge ought to have submitted it to the jury to say whether the privilege had been exceeded, and that a nonsuit was improper; and appeal allowed. *Creek v. Newlands*, 4 V.L.R. (L.,) 412.

Privileged Communication — Letter from One Director to Another Concerning a Manager—Excess of Privilege.]—M., a director of a mining company, wrote to another director a private letter concerning the conduct of the manager, and insinuating that he had been dishonest. The manager brought an action against M., and the jury found for M. *Held* that the directors having a common interest in the mining operations, the letter was privileged, and that the jury having found for the defendant, the Court would not, on the ground of excess of privilege, take the case out of their hands and disturb their verdict, except in a very strong case. *Horne v. Milne*, 7 V L.R. (L.,) 296; 3 A.L.T., 23

(*b*) *Matters of Public Interest.*

Public Appointments—Fair Comment—Imputation of Unfitness Not Based on Public Acts.]—Although the public acts or conduct of a person in a public office are the legitimate subjects of criticism, apart from those acts or conduct a public officer is no more obnoxious to criticism than a private individual. Therefore, although it is open to anyone to publish statements as to the unfitness of a person for a public office, founded on his acts in such office, it is not open to anyone to publish such statements, without stating any public acts in support of the statements, *e.g.*, to say of a person that his only qualification for the post of Government auditor is that he is an insolvent grocer. *Broadbent v. Small*, 2 V.L.R. (L.,) 121.

Member of Parliament — Fair Comment.] — A member of Parliament brought an action for libel and recovered a verdict. On rule *nisi* for a nonsuit on the ground that there was no evidence of malice, *Held* that an attack upon a public man must be founded upon public acts or conduct, which must be proved in order to justify it as fair comment. Rule *nisi* refused. *Langton v. Syme*, 3 V.L.R. (L.,) 30, 32.

To Establish a Defence of Fair Comment Facts Must Be Proved.] — The public sayings and doings of a public man are public property upon which every member of the community is entitled to offer fair comments; and so, also, proceedings in Courts of Justice may be published and commented on so soon as the particular cause has been finally disposed of; and this right, if not exceeded, constitutes a sufficient defence to any action for either publication or comments. To constitute such a defence, and so bring the case within the privilege, the report must be proved to be a fair representation of proceedings which actually took place, and not of supposed proceedings, and the comments, too, must be on actual proceedings. *Williams v. Spowers*, 8 V.L.R. (L.,) 82, 101, 102; 3 A.L.T., 113.

Per Higinbotham, J. The above right of comment is not a defence *sui generis*, but is a defence of conditional or qualified privilege, and when set up the defendant may insist that his claim to privilege shall be adjudicated upon in conformity with the rules which regulate the decision of that question at *nisi prius* in other actions for libel which involve the like claim. The privilege may appear, from admissions on the record or otherwise, that the person of whom the libel is written is a person whose position and character are of general interest to the whole country, or that the subject matter is of interest to the whole country and is relevant. The *onus probandi* is by this defence shifted to the plaintiff, who must prove actual malice, and if there be evidence, intrinsic or extrinsic, of actual malice, the question of malice must be determined by the jury, who are to find whether the libel was written in spite or ill-will, and not for the purpose which makes the occasion privileged. If there be no malice found, the verdict must be for the defendant, though the jury find upon the general issue that the publication is libellous, and upon a plea of justification that the defendant has failed to prove the substantial truth of his libel. *Ibid*, pp. 91, *et seq.*

Fair Comment — Imputation of Dishonesty in Horse-Racing — Question for Jury.] — D. sued the proprietor of a newspaper for an article imputing dishonesty in horse-racing, and the jury found that it was fair comment, and returned a verdict for defendants. On rule *nisi* for new trial, on grounds—(1) Misdirection through the Judge not telling the jury that the libel was so gross as to be malicious and outside the region of fair comment, (2) Verdict against evidence, *Held* that it was for the jury to say whether the comments were sustained by the evidence or whether the defendants had or had not exceeded their privilege. *De Mestre v. Syme*, 9 V.L.R. (L.,) 10.

(3) *Practice and Procedure.*

Form of Declaration — Particulars of Damage Alleged—Setting Out Names.]—The general rule is that the names of persons who have ceased to deal with a plaintiff which must generally be known to the plaintiff should be set forth in the declaration. But there are exceptions; and when Y. used the words, "infernal rogue and swindler," of B., a restaurant keeper, and the declaration did not set out the names of persons who had in consequence ceased to deal with B., *Held*, upon demurrer to the declaration, that the case came within the exception, and demurrer overruled. Judgment for plaintiff. *Brady v. Youlden*, 4 W. W. & A'B. (L.,) 205.

Libel—Demurrer—Words Capable of Construction Put upon them in Declaration—Meaning a Question for the Jury.]—P. brought an action for libel against S. for a letter which appeared

in S.'s paper to the following effect:—"When the northern portion of the old shire of D. was severed from ours, we hoped to have been clear of the element of jobbery and corruption, which caused so much trouble, &c. . . . but it appears as if a little of the old leaven still remains. Whether this be so or not may be judged from the following facts." The facts stated being that P. had a brother who was appointed rate collector and valuer, and that there were alterations in the ratepayers' roll; persons living within a stone's throw were omitted, while strangers were added as voters. *Held*, on demurrer to the declaration, that the words complained of were open to the interpretation that the defendant was an accomplice in improperly altering the ratepayers' roll; that it was a question for the jury. Demurrer overruled. *Plant v. Syme*, 3 A.J.R., 105.

Declaration—Words Not Actionable Per Se—No Averment that they were used touching Trade or Employment—Innuendoes.]—A declaration in an action for defamation, in which the words used were not actionable *per se*, and which contained no sufficient averments that the words were used of the plaintiff in his trade or employment, and in which the *innuendoes* put a meaning on the words which was not actionable, was held bad on demurrer. *Moulder v. Nicholson*, 4 V.L.R. (L.,) 68.

Demurrer — Innuendo — "Common Law Procedure Statute," Sec. 6.]—In an action for libel, the declaration alleged the imputation of dishonest and fraudulent practices on the part of a solicitor in a matter not strictly professional, viz., giving a promissory note payable to a company alone, and striking out the words "or order," and contained an *innuendo* that the language was used of and was meant to injure the plaintiff in his profession as an attorney. *Held*, upon demurrer to the declaration that under Sec. 6 of the "*Common Law Procedure Statute*" it is not necessary to show upon the declaration how the libel injures the plaintiff, and that it would be for the plaintiff to satisfy the jury that the article justifies the interpretation put upon it. Demurrer overruled. *Warton v. Gearing*, 1 V.L.R. (L.,) 122.

Innuendo — Proof of — Arrest of Judgment.] — A declaration containing an imputation of drunkenness to a schoolmaster contained an *innuendo* that defendant meant to convey the notion that the plaintiff was a man of intemperate habits. Plaintiff recovered a verdict. On rule *nisi* for arrest of judgment, *Held* that as there was no evidence to prove that meaning, the rule would be made absolute if plaintiff consented; otherwise, for a new trial. *Brandrick v. Johnston*, 1 V.L.R. (L.,) 306.

Innuendo—Evidence.]—A libel imputed, *inter alia*, that plaintiff was a "bog-trotter." In an action in the County Court, the Judge rejected evidence of the meaning of the word, as there was no *innuendo*, and as the word was not libellous without explanation. *Held* that the evidence was improperly rejected. *O'Malley v. Elder*, 2 V.L.R. (L.,) 39.

"Common Law Procedure Statute," No. 274, Sec. 6 — Innuendo — Demurrer.] — The plaintiff may in his declaration, by *innuendo*, put any construction he pleases upon the language used by the defendant, and it then becomes a question for the jury whether the language was used in the sense imputed and not of demurrer; the enactment in Sec. 6 of the Act shows that the form in the schedule shall be sufficient, and does away with the necessity of the old prefatory averments. *Dwyer v. Macartney*, 3 V.L.R. (L.,) 296.

Question for the Jury as to Libel or no Libel, Irrespective of Innuendo.] — Where the libel complained of was the publication of a list of notices of intention to file bills of sale under the Act No. 557, which list contained the name of the plaintiff; but the *innuendo* imputed a meaning which was not libellous, and the intended bill was not over the stock in trade of the plaintiff's business, *Held* that the question whether the publication of the list was libellous and injurious to the plaintiff as a trader, was one for the jury. *Wissing v. Coombs*, 4 V.L.R. (L.,) 70.

Plea of Justification—Demurrer—Words Set Out in Plea Not Defamatory.]—F., a medical practitioner, spoke and published of B. the following words: "I will not meet Dr. B. in consultation as he is not a properly qualified man and is an advertising man," and "I will have nothing to do with Dr. B.; he bought his votes for the hospital; he is an advertising doctor, and it is generally believed that his diploma is not good; it is from the United States; but there is a doubt cast upon it, and no regular practitioner will have anything to do with such a man as Dr. B." F. pleaded justification of the words, "Dr. B. is an advertising man," and "he is an advertising doctor." The plaintiff demurred on the ground that the plea picked out and sought to justify only words not actionable *per se*. *Held* that the part justified was not so connected with other words as to be inseparable, and that those words in themselves were not defamatory. Demurrer to plea allowed. *Beaney v. Fitzgerald*, 2 W. & W. (L.,) 184.

Plea in Justification — Interpretation of After Verdict for Defendant.]—W. published and used of U., in his business as a sheep farmer, the following words *inter alia* (*a*) "It is upwards of twelve months since U. was fined £1340 by local magistrates in requital of his efforts to acclimatise the *acarus* in the Lower Murray district;" (*b*) "By the grace of our Attorney-General, he is enabled to snap his fingers at the administrators of the law. He is a standing example to all scabby flockmasters of how easily a man may escape the penalties of the Act, in their case made and provided. In spite of law, of magistrates, of scab-inspectors, U. comes triumphantly out of his great scabbing experiment. He has achieved the object of his march from the Devil's River, and may boast of the cheap way in which he has succeeded in stocking his run on the Lower Murray." W. put in a plea to (*a*) and (*b*) justifying the words used. A verdict was given in favour of W. on the ground that the pleas were

true. On *rule nisi* to enter a verdict for plaintiff *non obstante veredicto*, *Held*, as to (*a*,) there was no suggestion of any particularly libellous meaning in the words in the plaintiff's pleadings, and it would be nonsense to suppose that the writer seriously charged U. with acclimatising the *acarus*, which was well known to exist, and that as the jury had found that the plea of a fine having been inflicted was proved, there was sufficient justification; that, as to (*b*,) the words must be taken *mitiori sensu* after verdict obtained, and the plea must be deemed a sufficient justification of the libel to which it was pleaded. Rule discharged. *Urquhart v. Wilson*, 2 W. W. & A'B. (L.,) 29.

Semble, that on demurrer, the pleas, which did not meet and cover the motive of the libels, would not have been a sufficient justification. *Ibid.*

Semble, after verdict the Court cannot look at any other part of the record beyond part covered by plea itself, or refer to any other part of libel justified for the sense in which the portion so justified is to be interpreted. *Ibid.*

Plea of Justification—Proof of—Authorship.]—In an action for libel, the declaration was for publishing in a newspaper a libel imputing that the plaintiff was the author of a certain report in another newspaper of the proceedings of a Land Board, and alleging that a certain letter in that report was tortured. Defendant pleaded justification of the article as being true. *Held* that to justify defendant in imputing the authorship to the plaintiff, it was necessary that the plaintiff should either have clearly held himself out as, or be proved to have been in fact, the author. *Tracy v. Luke*, 1 V.L.R. (L.,) 222.

Justification—How Proved.]—In an action for publication of a libel, charging the plaintiff with endeavouring to injure a company by misrepresenting its affairs, the defendants supported their plea of justification by proof of a pamphlet relating to the company, published by the plaintiff subsequently to the alleged libel. *Held* that they might so support their plea. *Crowther v. May*, 4 V.L.R. (L.,) 425.

And the jury may consider the libel as a whole, and the truth of the matters charged is a question for them. *Ibid.*

Justification—Particulars of Plea.]—*Per Stawell, C.J.* (in Chambers)—In an action for libel, particulars of a plea of justification should be asked for before pleading to it; but they may be ordered after issue joined under special circumstances at the discretion of a Judge in Chambers, on such terms as he may direct. *Wilson v. Syme*, 1 A.L.T., 185.

Amendment of Pleadings—Costs.]—In an action for libel the defendant pleaded two pleas in justification of the charges of embezzlement, which was the libel complained of in two counts. The jury found for the defendant on the first count, for the plaintiff on the second, and gave £75 damages. On a rule *nisi* to enter a verdict for defendant on the whole record, the Court directed the second count to be amended by inserting allegations to show that it referred to another embezzlement than that in the first count, the defendant to limit his pleas accordingly. Rule to be discharged on plaintiff paying costs of rule and amendment. *Clegg v. Bryant*, 3 V.R. (L.,) 210; 3 A.J.R., 108.

Striking Out Plea—Pleading Evidence—Plea of Not Guilty, with a Plea of Fair Comment.]—H. brought an action for libel against S., who pleaded—(1) Not guilty. (2) A plea of fair comment, which, in effect, pleaded evidence. *Williams, J.* (in Chambers) struck out plea 2, observing that plea 1 was sufficient; but that he would allow plea 2 if it were one of fair comment generally. *Hunt v. Syme*, 4 A.L.T., 178.

Proof of Publication.] — McD., formerly a shunter in the railway department, sued the Board for a libel which consisted of a statement in a notice posted in the guards' and shunters' rooms at the Melbourne and other stations. These rooms at Melbourne were not, strictly speaking, accessible to strangers, but if carriers wanted a shunter, they were in the habit of going to this room. *Held* there was sufficient proof of publication. *McDonald v. the Board of Land and Works*, 5 A.J.R., 34.

Evidence of Publication.]—Where a libel was alleged to be contained in a letter, and it was proved that defendant had stated in plaintiff's presence what was written in nearly the same words in a letter (the one in question) in handwriting of defendant's wife, which reached the person who had recommended plaintiff to defendant, and to whom defendant had threatened to send the message, the Court *held* there was sufficient evidence to warrant the jury in finding a publication by the defendant, or by his authority. *Johnston v. Jackson*, 5 V.L.R. (L.,) 331; 1 A.L.T., 49.

Action for Slander—Newspaper Company Registered Under Act No. 190—Unable to be Registered as Proprietor Under Act 212—Unable to Maintain Action for Slander as to its Business.]—*See Daily Telegraph Company v. Berry*, under CORPORATION, *ante column* 232.

Evidence in Mitigation of Damages.]—On a trial for slander, the defendant was allowed to put in evidence of his authority for the statement by him which was the subject of the action in mitigation of damages. *Nash v. Miller*, 1 A.J.R., 61.

Evidence in Mitigation of Damages — Previous Publication by Another Person.]—In an action for the publication of a libel, evidence of a previous publication by another person of a similar libel, which did not, however, name the plaintiff, or in any way point to the plaintiff, is not admissible in mitigation of damages. *Tracy v. Luke*, 2 V.L.R. (L.,) 64.

But where such evidence has been received, and a verdict found for the defendant, a new trial will not be granted, since in this case it could have no effect on the verdict, for evidence in mitigation of damages could not have been taken into consideration until there was a verdict for the plaintiff. *Ibid.*

Evidence—Cross-Examination of Plaintiff as to Previous Conduct, in Absence of a Plea of Justification.]—H. sued M. for libel contained in a letter written by M. to a co-director, commenting on H.'s conduct as manager, and insinuating dishonesty. There was no plea of justification. *Held*, that questions put to the plaintiff as to his previous conduct were admissible, even in the absence of such a plea. *Horne v. Milne*, 7 V.L.R. (L.,) 296; 3 A.L.T., 23.

New Trial—Verdict Against Evidence—Misdirection—Costs.]—W., the owner of a racehorse, sued G. for libel; the libel complained of consisting of articles in a newspaper commenting on a meeting at Sandhurst, at which the stewards disqualified the jockey and W. for the pulling of W.'s horse in a steeplechase. To two of the alleged libels G. pleaded "Not guilty," *i.e.*, fair comment, and to the other justification. The jury returned a verdict for the plaintiff. Rule *nisi* for new trial on grounds (1) against evidence, (2) misdirection in telling the jury not to consider the conduct of the crowd in hooting the plaintiff, (3) that plea of justification was proved. The Court made the rule absolute on the ground that it was against the weight of evidence, some members of the Bench intimating their opinion that the conduct of the crowd should have gone to the jury. Under the circumstances, costs of the rule were made costs in the cause. *Walker v. George*, 5 A.J.R., 29.

New Trial—Plagiarism—Verdict Against Evidence—Verdict for Plaintiff Where His Oral Evidence Conflicted with Documents.]—T. sued C. for a libel, which consisted in a statement in C.'s paper that T. (a former agricultural correspondent) was no longer connected with the paper, and accusing T. of plagiarism. C. justified the libel in his plea, by comparing three articles which had been written by T. with previous articles to the same effect. It appeared that T. had written these previous articles, but, as to the third, T. contended it was original, but the Court thought that it bore a very striking resemblance to the compared article previously published. The jury found for plaintiff. Rule *nisi* for a nonsuit or new trial on ground of verdict being against weight of evidence. *Held* that there was some evidence to go to jury, but that the verdict was unsatisfactory, as the plaintiff's oral testimony conflicted with a written document. Rule absolute for new trial. *Treen v. Cameron*, 5 A.J.R. 32.

See S.P., *Stephens v. Shire of Belfast*, 5 A.J.R., 79.

Trial in Absence of Defendant's Evidence—Verdict for Plaintiff—New Trial on Terms.]—The defendant in an action for libel resided in the interior of New South Wales, and shortly before the sittings negotiations, with a view to compromise, were pending. On their falling through, a commission to examine witnesses for the defendant in New South Wales was granted, but on terms which necessitated the attorney communicating with the defendant. Meanwhile the trial came on, and the jury found for plaintiff. At the trial defendant was represented by counsel, but his evidence, to be taken on commission, was not forthcoming. Under the circumstances, the Court granted a new trial on terms of the defendant admitting the publication (which was proved to the satisfaction of the Court,) withdrawing his plea of justification, and paying the costs of the trial and rule. *Johnston v. Jackson*, 5 V.L.R. (L.,) 331; 1 A.L.T., 49.

What Damages Will Carry Costs.]—In an action for slander a verdict for £10 damages will carry costs; if the verdict is for a less amount, the Judge can certify for costs. *Nash v. Miller*, 1 A.J.R., 61, 64.

Certificate for Costs—"Common Law Procedure Statute," Sec. 429—Personal Malice.]—In an action for libel plaintiff recovered a verdict with nominal damages. On application for certificate of costs, under Sec. 429 of the "*Common Law Procedure Statute*," *Held*, that the malice in Sec. 429 must be personal as distinguished from the malice which is implied by law in every libel case, and, there being no evidence of such malice, certificate refused. *Walker v. George*, 5 A.J.R., 99.

Two Counts on Same Publication—Damages.]—A declaration contained two counts for the same publication complained of as a libel; the first contained an *innuendo* that words were written of plaintiff as a member of parliament, the second as an accountant and auditor. Damages were given separately on each count. *Held*, that the damages on both counts could not stand, but the plaintiff might elect which he would retain. *Langton v. Syme*, 3 V.L.R. (L.,) 30.

Damages—Imputation of Unchastity—Jury Not Confined to Proof of Special Damage.]—In an action for slander, imputing unchastity to an unmarried woman, though the action is not maintainable without proof of special damage, the amount of damage proved is not necessarily to be the measure the jury are to adopt in awarding their damages. When they have decided to find a verdict for the plaintiff, the amount of damages to be awarded is in their discretion. *White v. Jordan*, 6 V.L.R. (L.,) 11; 1 A.L.T., 135.

Question of Privilege and Fair Comment Question for Jury.]—*See Creek v. Newlands and Horne v. Milne, ante column* 363, *and DeMestre v. Syme, ante column* 364.

(4) *Interrogatories and Discovery*—*See* DISCOVERY.

(5) *Criminal Information.*

Writing and Publishing, and Causing to be Written and Published."]—"Writing and publishing, and causing to be written and published," are not two offences, but merely the same thing stated twice, and either in an information is sufficient. *King v. The Queen*, 2 V.L.R. (L.,) 17.

Publishing Malicious Libel, Knowing it to be False—Inquiry into Truth—No Plea of Juitification.]—Upon a charge under Sec. 7 of the "*Statute of Wrongs* 1865," of maliciously publishing a defamatory libel, "knowing the same to be false," the prosecutor necessarily undertakes to prove the falsity of the libel to the knowledge of the accused, and the accused may therefore prove its truth if he can, although no plea of justification be entered upon the record. *Ibid.*

Information in the Name of Prothonotary—"Judicature Act," No. 502, Sec. 22—Trial at Bar.]—An information for libel by a private prosecutor, brought in the name of the Prothonotary of the Supreme Court, under Sec. 22 of the Act No. 502, where no warrant of *nisi prius* has been obtained, must be tried at bar. *Regina v. Trenwith*, 10 V.L.R. (L.,) 250; 6 A.L.T., 99.

Such an information, though "penal" in its consequences, is "civil" as to procedure. *Ibid.*

Complainant Obtaining a Commitment for Trial by Justices.]—*See the Queen, ex parte Farrell, v. King, ante column* 283.

II. SLANDER OF TITLE.

Evidence of Malice.]—Plaintiff was a selector of land, and was entitled to a lease from the Crown. The lease was sanctioned by the Lands Department, but before it was issued from the Titles Office, a caveat was lodged by direction of defendant, in which it was claimed that the Queen had an equitable interest in the land. It subsequently appeared that the Crown did not claim any interest in the property, and defendant stated that the only reason he knew why the caveat was lodged was that it was to protect a bank which had a claim against the land. He stated that he acted under the direction of the Minister of Lands, but could not remember the reason why the order was given. The caveat was removed in a few weeks, but plaintiff suffered damage. *Held*, in an action for slander of title, that there was evidence of malice to go to the jury. *Matthews v. Morrah*, 6 A.L.T., 9.

Trade Advertisement—Special Damage.]—*See Nicholson v. Allen, ante column* 361.

DELIVERY ORDER.

See LIEN—SALE.

DEMURRAGE.

See SHIPPING.

DEMURRER.

See PRACTICE.

DEPOSITIONS.

Taken Before Magistrates.] — *See* CRIMINAL LAW—DEBTORS ACT.

Under Commissions.]—*See* EVIDENCE.

DESIGNS.

See COPYRIGHT.

DETENTION OF PROPERTY (ILLEGAL.)

See OFFENCES (STATUTORY.)

DETINUE.

Although the action of detinue partakes both of the nature of an action founded on contract and on *tort*, yet a verdict for one of several defendants in detinue does not enure to the benefit of all, as in other actions founded wholly on contract. Plaintiffs do not stand in the same position as in actions wholly on contract, and, by parity of reasoning, the defendants do not so stand, and all are therefore not precluded by a verdict passing only against one but in favour of the others. The Board of Land and Works declared with an informal count of detinue against S., G. and T. T. treated the count as in *tort*, and pleaded (1) not guilty, (2) traverse of delivery of goods. S. and G. treated it as in contract, and pleaded (1) *non detinet*, (2) traverse of possession.

The day before the trial, S. took out a summons to stay proceedings on giving up the goods, paying one shilling damages and costs, and an order was made as upon summons, but S.'s name was not removed from record. There was a verdict for plaintiff, damages one shilling against G., and a verdict of "Not guilty" against T., but a special finding that he did detain goods but not wrongfully. Three rules *nisi* were obtained, (1) by G. to arrest judgment, (2) by plaintiffs on behalf of T., to enter a verdict for plaintiff on the second finding, and for a new trial on the first finding, (3) by plaintiffs to enter a suggestion of Judge's order to stay proceedings against S. The Court discharged the first rule, made absolute the second rule as to new trial, giving leave to amend pleadings, and discharged the third rule as being useless. *Board of Land and Works v. Glass*, 2 W. & W. (L.,) 58.

G. taxed his costs, and issued a *fi. fa.* for them. The Board did not proceed to a new trial, but signed judgment and gave notice of taxing final costs. Summons by G. to set aside the judgment signed. *Held*, that rule for new trial was not so expressed as to justify the plaintiffs in signing judgment against any of the parties, and G.'s summons granted. Summons by Board to set aside *fi. fa.* issued by G., or to set off against the costs of the action, the costs for which the *fi. fa.* was issued. *Held*, that the interlocutory costs of G. could not be set off against the final costs of the action, because it was still undetermined and the costs were unknown. Summons dismissed. *Ibid*, 2 W. & W. (L.,) 197.

Demand of Property.]—In an action of detinue for the recovery of books and other property belonging to a mining company, it appeared that the authority to the company's attorney to demand the property was not signed by a quorum of directors, or by the manager in the capacity of manager. *Held* that the evidence of authority to make the demand was insufficient. *Aladdin and Try Again Company v. Schaw*, 2 V.R. (L.,) 18; 2 A.J.R., 20.

Damages—Substantial.]—Substantial damages may be awarded for the detention, in an action of detinue, although the chattels be given up. *Wilson v. Thomson*, 4 V.L.R. (L.,) 281.

Action for Crown Grant—Title of Grantee Not in Issue—Defence.]—In an action of detinue for a Crown grant, the fact that the grant has issued in the name of the plaintiff, is *prima facie* sufficient to entitle him to recover the deed. The title to the land comprised in the deed is not in issue; and the fact that the plaintiff has not complied with the "*Land Act*" does not form a defence to such action. *Humffray v. Humffray*, 6 V.L.R. (L.,) 221.

Action for Detention of Ship.]—*See Wilson v. Holmes*, *ante column* 9, under ACTION.

Action by Executors—One Executor Pledging Property of Testator for His Own Debt—All the Executors Cannot Sue.]—*See Hartney v. Higgins*, *post* under EXECUTORS AND ADMINISTRATORS—Suits and Actions by and against.

Jurisdiction of Judge in Chambers.]—A Judge in Chambers has jurisdiction where, in an action of detinue, the plaintiff has tendered the defendant the amount of his lien on the goods, and the defendant has refused to receive it, to make an order staying further proceedings, and directing that the defendant should give up the goods on the plaintiff paying the amount due upon them. *Hellas v. Cooke*, 6 V.L.R. (L.,) 426.

DEVISE.

See WILL.

DIRECTOR.

See COMPANY.

DISCLAIMER.

See INSOLVENCY AND TRUST AND TRUSTEE.

DISCOVERY.

1. DISCOVERY, PRODUCTION, AND INSPECTION OF DOCUMENTS.

(*a*) *Application for.*

Affidavit in Support—By Whom Made—"Statute of Evidence 1864," Sec. 19.]—*Per Molesworth, J.*, (in Chambers.) The affidavit in support of an application for discovery of documents under Sec. 19 of the "*Statute of Evidence*, 1864," must be made by the party seeking the discovery, and not by his solicitor. *White v. Hoddle*, 1 A.L.T., 116.

(b) *In What Cases.*

Books of Company.]—In an action by a bank to recover a sum overdrawn by a company on cheques, the bank applied for leave to inspect the company's books, supporting their application by an affidavit that the company refused to admit the cheques, and that they could only prove the cheques by an examination of the company's books. *Held*, that the bank was entitled to the inspection applied for. *Bank of New South Wales v. Undaunted Gold Mining Company*, 1 V.R. (L.,) 99; 1 A.J.R., 90.

A Judge of the Court of Mines has No Power to Order Inspection of the Books of a Company by a Person Not a Party to the Suit.]—*Park Company v. South Hustler's Reserve Company*, 8 V.L.R. (M.,) 37, *post* under MINING—Practice and Procedure—Jurisdiction of Courts of Mines.

(c) *Of What Documents.*

Bill of Costs—Bank Pass Books — Privilege — "Statute of Evidence 1864," Sec. 19.]—A defendant inserted in his affidavit a list of documents which he objected to produce on the ground of privilege, as being communications with his solicitor in relation to long past proceedings to enforce his liability as a shareholder in a bank. A bill of costs in respect of this and other matters was one of these documents. The affidavit also admitted that the defendant had in his possession his pass-books with another bank for certain years, but alleged that they contained nothing material to the plaintiff's case. *Held, per Molesworth, J.* (in Chambers,) that the defendant was bound under Sec. 19 of the "*Statute of Evidence* 1864," as extended by English cases, to produce these documents and the pass-books, though if the defendant had alleged that he ran any risk, or would be in any manner prejudiced by permitting inspection, the matter would be differently dealt with. *White v. Hoddle*, 1 A.L.T., 147.

Report of Medical Men—Privilege.]—Plaintiff, who had been injured in a railway accident, was examined by three medical men on behalf of the defendants. It was sought to compel the defendants to allow the plaintiff to inspect the report sent in by these gentlemen. *Held, per Higinbotham, J.* (in Chambers,) that the report being privileged under the old procedure, and the action being a pending one, to be dealt with according to the procedure in force at the time it was commenced, the application could not be granted. *Bradshaw v. Victorian Railway Commissioners*, 6 A.L.T., 20.

Bankers Books—"Bankers Books Evidence Act 1878."] — The "*Bankers Books Evidence Act* 1878," does not apply to books of a bank out of the jurisdiction of the Court. *Bank of Australasia v. Pollard*, 8 V.L.R. (L.,) 66; 3 A.L.T., 103, *sub. nom*, *Bank of Australasia v. Follard.*

(d) *Against Whom.*

Solicitor of Assignor—Application of Assignee—Summary Jurisdiction.]—The Court has summary jurisdiction to order solicitors to produce documents for inspection of assignees of their clients, but the application must be made in privity with or upon notice to, or with consent of the assignors. B. and T., as solicitors for G. and W., prepared and retained deeds relating to a Government contract, in which G. and W. were interested. G. and W. assigned all their interest to H. W. and C. There was a suit pending against H. W. and C. with reference to the contract. On motion made by H. W. and C. for inspection by B. and T. the order was made after a verified consent to the application had been made by G. *In re Bennett and Taylor*, 2 W. W. & A'B. (E.,) 15.

Solicitor of Party—Summary Jurisdiction.]—The Court has summary jurisdiction to order a solicitor claiming a lien on deeds to produce them. *Jamieson v. Allen*, 2 W. & W. (E.,) 47.

S.C., *see* SOLICITOR—Costs—Lien for.

II. INTERROGATORIES.

The plaintiff bank sued on a bill of exchange. The defendant, E., pleaded a release. The bank obtained an order to exhibit interrogatories to the defendant whether the agreement for a release was made with B., late manager of the bank, who was now in England. *Held* that B. might be regarded as the bank, he having been its manager, and the fact of his being in England, and no longer a servant, did not affect the question. Order for interrogatories rescinded. *Colonial Bank of Australasia v. Ettershank*, 3 V.R. (L.,) 30; 3 A.J.R. 34.

What may be Asked—"Common Law Procedure Statute," Sec. 277.]—S. sued H. for the unpaid residue of purchase money for a station property. H. pleaded a deed of composition under the "*Insolvency Statute* 1865," Secs. 115, 117. There was no replication of fraud. The plaintiff then took out a summons under Sec. 277 of the "*Common Law Procedure Statute*" for leave to adminster interrogatories. The Court struck out such of them as referred to such particulars as seemed to point towards impeaching the deed, *e.g.*, instigation to execute the deed, and to obtain the assent of the creditors and other particulars. *Stewart v. Hogg*, 1 V.L.R. (L.,) 139.

When Interrogatories Not Necessary—Contempt of Court.]—*In re Thompson, ante column* 181.

Interrogatories as to Documents in Defendant's Possession—When Refused.]—*Learmonth v. Bailey*, 5 A.J.R., 93, *post under* PRACTICE AND PLEADING—In Equity—Answer.

Husband and Wife—Absence of Co-Plaintiff from Colony.]—An action was brought by a husband and wife as co-plaintiffs, and an order was made requiring them to answer interrogatories and staying proceedings until answered. It appeared that the wife was absent from the colony, and the husband did not know where she lived and could not find her. Summons to set aside the order refused. *Griffiths v. Victorian Permanent Building Society*, 7 V.L.R. (L.,) 177; 3 A.L.T., 7.

Wife and Husband Co-Plaintiffs.]—In an action in which the husband and wife were co-plaintiffs, the defendant obtained an order calling upon the wife to answer certain interrogatories. Summons by husband to set aside the order on the ground that the wife could not be found. *Held* that the husband must show to the Court's satisfaction that he had exhausted all reasonable means within his power of ascertainnig where his wife was. *Griffiths v. Victorian Permanent Building Society*, 9 V.L.R. (L.,) 304.

To What Discovery Plaintiff is Entitled.]—In an action for slander, *Held* that plaintiff might administer interrogatories to the defendant as to whether he uttered the words complained of, and as to whether he had been told by some person what he afterwards repeated; but, per *Stawell, C. J. (dissentiente Barry, J.,)* he might not ask who that person was. *The Daily Telegraph Company v. Berry*, 5 V.L.R. (L.,) 343, 346, 348; 1 AL.T., 51.

Party Interrogating Having Means of Knowledge.]—Although the party may have the knowledge he seeks or means of knowledge, it is no longer a good objection, for the party may wish to have this information corroborated. Unless the interrogatories are scandalous, or the party interrogated is privileged, either party may administer any interrogotary which he could ask in examination in chief if that person were in the witness box, provided such questions do not relate exclusively to the case of the party interrogated. *Daily Telegraph Company v. Berry* overruled. *James v. Davies*, 9 V.L.R. (L.,) 140; 5 A.L.T., 29.

To What Discovery a Plaintiff is Entitled.]—*Per Holroyd, J.* (in Chambers.) A defendant is not compelled to answer interrogatories as regards admitted facts, since these are not matters in question in the cause, and are therefore irrelevant. No doubt a plaintiff is entitled to discovery, not only of facts within the defendant's knowledge, or means of knowledge, which will support his own title or claim, but also of facts which will repel what he anticipates will be the case set up by the defendant. But his right does not extend to a discovery of the evidence upon which the anticipated case of the defendant is to be supported. Still less can he be allowed to extract evidence on which an argument might perhaps be founded, tending not to rebut a case, but to impugn the defendant's veracity. *Wainman v. Hansen*, 6 A.L.T., 67.

An interrogatory for the discovery of documents is not warranted by an order for interrogatories. *Ibid.*

An interrogatory which is a mere cross-examination to impeach credit is not allowable. *Ibid.*

For circumstances in which certain interrogatories were allowed and others disallowed, *see Ibid.*

Action for Libel.]—In an action against the publisher of a newspaper for damages in respect of a libellous letter, interrogatories asking the defendant if he were not the writer of the letter in question, if he knew the name and address of the writer, will not be permitted. *Smith v. Powell*, 10 V.L.R. (L.,) 79; 5 A.L.T., 194.

An objection to interrogatories that the answer might criminate the person interrogated will not be allowed, unless such person makes an affidavit to that effect. *Ibid.*

Per Higinbotham, J., (dissentientibus Stawell, C.J. and Holroyd, J.) Whichever of the specified grounds of objection might be taken by a witness, and however sincere his apprehension of conviction might seem to be, the Court should disallow the objection, and should enforce an answer to a penal, disgracing, or criminating question, if relevant and material, unless it should seem to the Court reasonably probable that the answer will lead to his prosecution, or in the event of a prosecution being instituted, materially tend to his conviction. *Ibid.*

Action for Libel—Answer.]—*Per Holroyd, J.* (in Chambers) — If, in an action for libel, interrogatories are delivered by the plaintiff as to the publication, &c., the defendant will not be permitted to insert in his answering affidavit matters which are intended as a justification for his conduct. *Roper v. Williams*, 6 A.L.T., 87.

Practice—Affidavit—Act No. 274 ("Common Law Procedure Statute,") Sec. 278.]—An attorney's clerk is not an "agent" for a corporation within the meaning of Sec. 278 of Act 274, so that an affidavit in support of a summons for interrogatories is not sufficient when made by a clerk of the plaintiff's attorney, when such plaintiff is a corporation. *Daily Telegraph Company v. Berry*, 5 V.L.R. (L.,) 343, 346, 348; 1 A.L.T., 51.

Costs.]—*Semble, per Stawell, C. J.*—It is not in the power of a Judge in Chambers to award costs on a summons to administer interrogatories. *Ibid.*

Practice Under "Judicature Act 1883"—"Supreme Court Rules 1884," Order 31, Rule 1.]—A Judge on an application for leave to deliver interrogatories, will not go into the form of them so as to allow of any objections being taken as to their nature. *Meudell v. M'Lay*, 6 A.L.T., 69.

Order 30, Rules 1 & 2 of "Supreme Court Rules 1884"—Application for Leave to Deliver.]—*Per Williams, J.*—"In all cases where leave is sought to deliver interrogatories, if the pleadings are before me, I shall be satisfied with a statement from counsel of the nature of the interrogatories, and shall not require their nature to be otherwise set out." *Holt v. Henry*, 6 A.L.T., 98.

Leave to Deliver—Order 30, Rule 3—Order 31, Rules 1, 26.] — (*Per Higinbotham, J.*) If an application for leave is made specially it should be made *ex parte*, and copies of the proposed

interrogatories need not be served; and the Judge should satisfy himself by inquiries as to the nature of the action, the issue involved, and the general scope of the interrogatories, and as to any offers made by the parties sought to be interrogated to deliver particulars, make admissions, or produce documents. An application for leave to deliver should be made under general summons for directions under Order 30, Rule 3. And where the applicant applied specially and by summons, he was made to pay the costs of the defendant's appearing on the summons. *Nixon v. Milton*, 6 A.L.T., 114.

Summons for Further and Better Answer to Interrogatories.]—On a summons for further and better answer to interrogatories, the plaintiff gave notice that he intended on the hearing of the summons to use two affidavits filed on an application under Order 14, Rule 1, for leave to enter final judgment. *Held, per Holroyd, J.* (in Chambers,) that these affidavits ought not to be used, but that the Judge should only look at the pleadings to ascertain whether the interrogatories have been sufficiently answered. *Wainman v. Hansen*, 6 A.L.T., 67.

DISMISSING SUIT OR ACTION.

See PRACTICE.

DISTRESS.

STATUTES.

"*Distress Act*," 15 Vic., No. 4, repealed and re-enacted by "*Landlord and Tenant Statute* 1864," Part 4.

"*Landlord and Tenant Statute* 1864," No. 192, Part 4.

1. WHO MAY DISTRAIN.

Agent Under Avowry Without Warrant—"Distress Act," Sec. 1.]—An agent under avowry of a landlord mortgagee, proved a warrant to the bailiff to distrain for rent, but did not prove any warrant by the landlord to himself. *Held* that notwithstanding the negative words of "*The Distress Act*," 15 Vic., No. 4, Sec. 1, the seizure was valid and the avowry good. *Harker v. Barwick*, 1 W. W. & A'B. (L.,) 165.

Some of Several Trustees.]—Since one joint tenant is at liberty to distrain on behalf of the others, though he is accountable to the others, it is not necessary that trustees, being joint tenants, should all join in a distress. Trustees are not recognised at law, and a Court of Law can only deal with them as holders of the legal estate. Where, therefore, a distress warrant was signed by two out of three trustees, *Held* sufficient. *Moore v. Lee*, 2 V.R. (L.,) 4; 2 A.J.R., 16.

Mortgagees.]—*See Moore v. Lee*, 2 V.R. (L.,) 4; 2 A.J.R., 16, *post* under MORTGAGE—Rights and Liabilities of Mortgagees, &c.

What Tenancy Will Sustain Distress.] — On 25th January, 1869, D. signed an agreement to lease an hotel to C. for five years, from 24th June, 1869, at £700 a-year, the lease to contain the usual covenants. C. entered into possession, and a dispute occurred as to what were usual covenants, and an Equity suit was instituted for specific performance. On 3rd October, 1870, D. distrained for rent in arrear up to 30th September, 1870. The lease directed by the decree in Equity was dated November 15th, 1870, and demised the premises from June 24th, 1869, and contained a covenant to pay the rent from that date. It was contended that the lease dated subsequent to the distraint did not justify D. in distraining. *Held* that a tenancy sufficient to justify a distress might be proved by possession of the premises and actual payment of rent, or an admission that rent had been paid, and that C. having entered into possession and executed a deed by which he was estopped from saying that rent had not been paid, there was evidence of a tenancy to go to the jury, and that D. was justified in distraining. *Coleman v. Dean*, 2 V.R. (L.,) 87; 2 A.J.R., 60.

"Landlord and Tenant Statute," No. 192, Sec. 81—Purchase by Landlord of Goods Distrained Within Five Days of Distress—Lien for Rent Still Good.]—M. held a bill of sale over certain chattels of his tenant, and seized them and bought them from the tenant. D. also held a bill of sale over the same chattels, and claimed them from M., but M. refused on the ground of his seizure under the bill of sale. At the trial, M. relied upon the seizure as a distress for rent due. *Held*, on appeal from County Court, that though the Act only allowed him to sell after five days, yet, as landlord, he had a right to keep the chattels until the rent due was tendered. Verdict for defendant M. *Molloy v. Dolphin*, 5 A.J.R., 84.

Mesne Landlord Whose Term is Determined.]—A landlord leased land for a term to M., who sublet to E. After the determination of M.'s term, the landlord without any notice to M, the mesne landlord, granted a lease to E. *Held* that this was a sufficient determination of M.'s tenure to disable him from distraining upon E., after the expiration of his (M.'s) lease, as upon a continuing tenancy at will, or on sufferance. *Martin v. Elsasser*, 4 V.L.R. (L.,) 481.

A married woman cannot demise land to her husband, and therefore cannot distrain upon him for rent in arrear. *Regina v. Templeton, ex parte Allen*, 4 A.J.R., 70.

2. What may be taken.

(*a*) *Goods of Person becoming Insolvent.*

Distress—Abandonment of—"Insolvency Statute 1871," No. 379, Sec, 108—Trustees' Liability.]—The provisions of Sec. 108, Act No. 379, do not apply to a case of two lessees as joint tenants where distress has been made on the goods of both, and one subsequently sequestrates his estate. *Quære*, whether goods of a tenant passing by a bill of sale are protected by Sec. 108 of Act 379, upon his subsequent insolvency. A. and B. were lessees of certain property as joint tenants, and on February 1st, 1875, owed £115 for rent. O., a trustee, urged upon H., the other trustee, to distrain. H. delayed, and O., on February 9th, distrained the goods of both. H. prior to this took by assignment a bill of sale over goods of A. and B. for his own benefit. February 15th B. sequestrated his estate, and O. abandoned the distress. *Held* that B.'s sequestration under Sec. 108, made the abandonment of distress necessary, but that beneficiaries were not on the pleadings and the frame of the suit entitled to an account for this rent as on the basis of wilful default, and that certain wheat having passed to H. to to be sold by him, and the proceeds to be applied by him as part payment of the rent, H. was liable for these proceeds. *Officer v. Haynes*, 3 V.L.R. (E.,) 115.

Goods Seized Under Bill of Sale—Distress for Rent—Insolvency—"Insolvency Statute 1871," Sec. 108.]—Sec. 108 of the "*Insolvency Statute* 1871," is for the protection of general creditors against the superior powers of landlords distraining, and does not vary the rights of landlords and mortgagees. *In re Sweeney, ex parte Diggins*, 4 V.L.R. (I. P. & M.,) 1, 6.

S., a tenant of O., gave M. a bill of sale over his goods, and M. seized them thereunder. D. subsequently distrained the same goods for rent due, and S. then voluntarily sequestrated his estate, and an arrangement was made by M. and the official assignee that the latter should sell the goods, and, after deducting his commission, should pay the surplus to M. The goods were then sold, and the assignee paid the amount of D.'s distress into a bank, under Sec. 89 of the "*Insolvency Statute* 1871," as money not claimed by him, and handed the surplus, less his commission, to M. *Held* that D. was entitled to proceed with his distress, as against M., and was entitled to be paid his rent in full out of the proceeds of the sale of the goods. *Ibid.*

Distraint Before Sequestration — Selling Goods After—"Insolvency Statute 1871," Sec. 108.]—A landlord distrained a tenant's goods for rent, and the tenant then sequestrated his estate. The landlord proceeded to sell the goods under the distress. *Held* that, under Sec. 108 of the "*Insolvency Statute* 1871," he was prohibited from so doing, and should pay to the assignee the value of the goods and costs. *In re Nichol and Payroux*, 4 V.L.R. (I. P. & M.,) 81.

See also *Davey v. Bank of New South Wales*, 9 V.L.R. (L.) 252; 5 A.L.T., 85, *post* under Insolvency — Property of Insolvent, and Assignee's Title thereto — What Property passes to Assignee.

(*b*) *In other cases.*

Cattle of Strangers on Demised Premises—"Landlord and Tenant Act," No. 192, Sec. 55.]—Under the "*Landlord and Tenant Act*," No. 192, Sec. 55, the landlord may distrain the cattle of strangers on the premises demised, as well as those of his tenant. The first four lines of the Section, which are adapted from 11 Geo. II., Cap. 19, Sec. 8, have not been carefully embodied in the section, and must be deemed to be not a restriction of the common law right of a landlord to distrain the cattle of strangers on the premises demised, but an unnecessary declaration of that part of the common law of distress which, without any statutory authority, entitles the landlord to destrain the stock of his tenant on the land demised. *Heaney v. Harper*, 3 W. W. & A'B. (L.,) 128.

Seizure of Sheep as Distress for Rent.]—Plaintiff had turned his sheep out into an unenclosed common, and they strayed from that into other land, also unenclosed, where the defendant, as agent for the owner of the land, seized them as a distress for rent. *Held*, that being distrained as distress for rent in arrear, they might be so seized at once, and it was not necessary for them to be on the ground *levant* and *couchant*, the plaintiff being to blame for having no one in charge of them. *Maguire v. Dixon*, 6 W. W. & A'B. (L.,) 227; N.C., 25.

Money—No. 267, Sec. 118.]—M., being entitled to a portion of a sum of money, which was under R.'s control, had a distress warrant issued against him at the instance of R. When the constable came to levy, R. drew a cheque in favour of M., and put the proceeds in a packet, marked with M.'s name, on his desk, and pointed it out as M.'s property to the constable, who levied on it. R. had no directions from M. to cash the cheque. *Held*, that there had been no appropriation of the money in favor of M., and that the money could not be levied on under Sec. 118 of the "*Justice of the Peace Statute* 1865," No. 267. *Reeves v. McGuinness*, 2 V.R. (L.,) 187; 2 A.J.R., 108.

Crown Property.]—The property of the Crown is not subject to distress for arrears of rent due to the landlord of the premises on which that property is found. *Regina v. Tucker*, 1 W. W. & A'B. (L.,) 193.

3. Effect of Distress and Proceedings thereon.

Illegal Distress—Seizure of Growing Plants—Liability of Principal for Agent.]—S. was C.'s tenant, and the rent being in arrear, C. instructed his agent to distrain. The agent seized and sold some growing plants and

the whole of the nursery stock, and C. received the proceeds. S. sued C. for illegal distress and recovered a verdict. On rule *nisi* for a nonsuit, *Held* that the distress was illegal, and that there was evidence of C.'s receiving the proceeds of the sale, and of his being aware of his agent's acts, sufficient to justify the jury in arriving at the conclusion that C. ratified those acts. *Sherwood v. Courtney*, N.C., 68.

Illegal Distress—Goods Seized Under—Bill of Sale Paramount to Faulty Distress.]—*Regina v. Templeton, ex parte Allen, ante column* 108.

Illegal Distress—Lisbility of Husband for Distress by Wife—Agency.]—*Douglas v. Lewis*, 5 A.J.R., 22, *post* under HUSBAND AND WIFE—Husband's rights, &c.—Liabilities for wife's acts.

Distress Warrant — Signature by Agent.]—A warrant to distrain began—"I., B., of, &c., as the duly constituted agent of the — Bank of —, do hereby authorise you to distrain, &c.;" and was signed, "The — Bank of —, by its attorney, B." *Held* that the warrant was sufficient. *Cowper v. Ninham*, 2 A.J.R., 15.

Illegal Distress — Tender of Amount Due Not Accepted]—*Barry v. Dolan*, 2 A.J.R., 114, *post* under JUSTICE OF THE PEACE — Jurisdiction and Duty—In other cases.

Excessive Distress—Damages.]—The measure of damages in an action for excessive distress is the loss sustained by the plaintiff by the deprival of the use of the goods. Where the plaintiff has not been deprived of the use of his goods, he can only have nominal damages. *Roach v. Martin*, 1 V.L.R. (L.,) 41.

Excessive Distress—Action for Does Not Survive Against Executors.]—*See Buchner v. Davis*, 5 V.L.R. (L.,) 444, *post* under EXECUTORS AND ADMINISTRATORS—Suits and Actions By and Against.

Irregular Distress — When Landlord Liable — Plaintiff Not Tenant—Special Damage.]—Where the plaintiff in an action for irregular distress is not the defendant's tenant, in order to sustain the action he must prove special damage. *Peck v. Smith*, 4 V.L.R. (L.,) 16.

Irregular Distress—When Landlord Liable.]—A landlord is not liable to a third person when in an irregular distress the goods of such third person have, by the mistake of the agent selling, been sold, though they had not been seized, unless the landlord authorised such sale, or accepted the proceeds, with full knowledge of the circumstances. *Ibid.*

Sale — Irregularity — Remedy — "Landlord and Tenant Statuts 1864," Sec. 84.]—Where goods have been duly seized by the landlord under a distress for rent actually due, as sale by private contract instead of by public auction, is an irregularity only, and does not render the seizure void, or the landlord a trespasser *ab initio*, and the only remedy available by the tenant, or where the tenant has consented to the sale, of a third person whose goods have been so disposed of, is the remedy provided by Sec. 84 of the "*Landlord and Tenant Statute* 1864," *i.e.*, a special action of trespass, or on the case at the plaintiff's election. *Stewart v. Fishley*, 6 V.L.R. (L.,) 3.

Irregular Sale—Measure of Damages.]—A bank (lessor) distrained upon a tenant's goods for arrears of rent, and put up the goods seized for sale by auction, at which sale a clerk of the bank bought as agent for the bank. The tenant became insolvent, and the bank re-sold. On action of trover by the Official Assignee, *Held, per Stawell, C. J., and Holroyd, J., (dissentiente, Higinbotham, J.)* that the sale was void, as the auctioneer as agent for the bank sold to the clerk as agent for the bank, and that the measure of damages was the value of the goods, and not the amount realised by the wrongful sale. *Davey v. Bank of New South Wales*, 9 V.L.R. (L.,) 252; 5 A.L.T., 85.

Excessive Distress—Tender—Refusal to Accept—Subsequent Demand not at once Complied with—Willingness to Pay.]—D., a tenant, when his rent became due but before demand, tendered it to the landlord's agents, who declined to receive it on the ground that their authority was stopped. Three days later he again tendered the rent, which was again refused. A written demand was subsequently made upon D., who did not at once comply with it, being at the time very busy on his farm. A distraint was a few days afterwards made upon D.'s chattels, who tendered the rent to the agents, and served a notice on them to withdraw the distress. Later on D. paid the rent to the agents, but not the expenses, and would not accept a receipt for it on account of rent and expenses. The agent then offered D. his money again, but D. would not take it. After this the landlord's bailiff stopped D. getting in a part of his crop, and a few days later got in a part of it and sold it. In an action by D. for trespass and *asportavit*, and for excessive distress, *Held* that it was for the jury to determine whether there was a *bona fide* continued readiness and willingness on D.'s part to pay his rent, and that if they so found, D. was entitled to a verdict. *Quinlivan v. Darcey*, 6 V.L.R. (L.,) 370; 2 A.L.T., 67.

Act No. 192, Sec. 72—Warrant—Signature—Excessive Damages.]—A tenant being in arrears with his rent, the landlord distrained. The warrant of distress, in the body of which the agent wrote the landlord's name, and which had no other signature, claimed rent and another sum as rent for furniture which the landlord had purchased from the tenant and then sublet to him. The tenant, though the distress was excessive, was not deprived of the use of the furniture. *Held* that the signature of the warrant was sufficient under Sec. 72 of Act No. 192, and the extra claim did not make the warrant void *ab initio* and the landlord a trespasser, and that the tenant was only entitled to nominal damages for the seizure in excess. *Nicol v. Brasher*, 9 V.L.R. (L.,) 270; 5 A.L.T., 82.

DISTRIBUTIONS, STATUTES OF.

"Intestates Act," No. 230, Sec. 4 — Married Woman—Real Estate—Husband's Share.]—D., a widow, married G., a bachelor, and died intestate, seized of real estate, leaving no issue by G., but leaving children by her former marriage. *Held* that G. was entitled under Act 230, Sec. 4, to one-third only, and not one half of D.'s real estate. Sec. 4 should be construed sensibly and not literally, and in that way it would read—"A widower shall stand in the same position with respect to the distribution of such land of his deceased wife's, regard being had to her leaving or not leaving children, as she would have stood in with respect to the distribution of his personal estate, regard being had to his leaving or not leaving children." *Martin v. Dalton*, 1 V.L.R. (E.,) 69.

"Administration Act," No. 427, Sec. 6—Death Intestate Before Act—Administrator ad Litem.]—Where an infant, T., died in 1864 or 1865, intestate and unmarried, entitled to an estate in fee, *Held* that the estate was in his heir, but would vest in his administrator under Sec. 6 of the Act. Real estate does not, under Sec. 6, vest in an administrator *ad litem*. *M'Gregor v. M'Coy*, 1 V.L.R. (E.,) 162, 173.

22 & 23 Car. II., Cap. 10, Sec. 6—1 Jac. II., Cap. 17, Sec. 6—Grandfather and Grandmother—"Married Women's Property Act" No. 384, Sec. 10.]—An infant died intestate leaving as next of kin a paternal grandfather, and paternal and maternal grandmothers. *Held*, by the Full Court, affirming *Molesworth, J.*, that Sec. 10 of No. 384 vested the share of the paternal grandmother in her as separate property, and that by the "*Statutes of Distributions*" the next of kin were each entitled to one-third of the property, they being all next of kin to the infant in equal degrees. *Skeeles v. Hughes*, 3 V.L.R. (E.,) 161.

And *see* case *ante columns* 11, 12.

DISTRINGAS.

Writ of.]—*See* PRACTICE AND PLEADING—In Equity—Writs.

DIVIDENDS.

Apportionment of.]—*See Shaw v. Wright*, 2 W. & W. (E.,) 57, 71, *post* under MINING—Mining Company—Shares.

DIVORCE.

See HUSBAND AND WIFE.

DOCUMENTS.

Construction of Contemporaneous.]—Courts of Equity so regard documents given contemporaneously, and in one transaction, that if one of them fixes a date, and thereby gives a right to a time for payment which the others do not give, the Court will give to the whole that meaning as to time which is given by the one document only. *Murphy v. Martin*, 1 W. W. & A'B. (E.,) 26, 30.

DOGS.

See ANIMALS.

DOMICIL.

Of Choice — How Acquired — Incarceration.] — Proof of a voluntary residence for a few months in Victoria, followed by incarceration there, will afford no presumption of a domicil in Victoria. Confinement in prison cannot give a domicil. *Moffatt v. Moffatt*, 3 W. W. & A'B. (I. E. & M.,) 87.

In order to constitute a domicil, there must be a residence freely chosen, and not dictated or prescribed by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be a residence fixed not for a limited time, period, or particular purpose, but general and indefinite in its future contemplation. *Buisson v. Warburton*, 4 A.J.R., 119.

Domicil—How Considered in Matrimonial Proceedings.]—*See post under* HUSBAND AND WIFE—Practice, Procedure and Pleadings.

DONATIO MORTIS CAUSA.

Delivery of Cheque—Gift of Part of Thing..]—There cannot be a good *donatio mortis causâ*, by the delivery of a cheque drawn by the donor; or by the gift of part of an entire thing. *Edwards v. Graham*, 3 W. W. & A'B. (E.,) 112.

What is—Bank Deposit Receipt.] — *Semble* a gift of a bank deposit receipt proved only by the affidavit of the donee, is a good *donatio mortis causâ*. *In the goods of Tully*, 4 W. W. & A'B. (I. E. & M.,) 15.

Deposit in Post Office Savings' Bank.]—F. had a sum of money deposited in a post-office savings' bank, and shortly before her death gave K. her depositor's book, and an order for payment to K., and at the same time sent to the savings' bank a notice of withdrawal. K. presented this order with the book, and also the Postmaster-General's warrant for payment, but F. died before payment was actually made. *Held* that F. having done all in her power to divest herself of the property in the deposit money, and to vest it in K., such a gift was a good *donatio mortis causâ*. *Per Stephen and Higinbotham, J.J.*, it was good as a gift *inter vivos*. *Curran v. Kavanagh*, 7 V.L.R. (L.,) 21; 2 A.L.T., 119.

Gift of Government Debentures — Delivery of —Certificates for Bank Shares]—N. made a will providing for application of his estate to provide medals as prizes in the Sydney and Melbourne Universities. After execution of his will, he delivered certificates of bank shares, and Government debentures issued under the "*Railway Loan Act*," 21 Vic., No. 36, to the defendant A. on February 19th, 1882, and died on 28th February, 1882. Suit by the the executors of the will against A. for delivery of the debentures and certificates of shares. *Held* that, as to the debentures, A. was entitled to them, as by the Act they were assignable by delivery, the Court not entering into the question whether they passed as a *donatio mortis causâ*, or as a gift *inter vivos*; and that as to the bank shares, the deed of settlement directing registration of the transfer, they did not pass by manual delivery, and in themselves were not such *indicia* of ownership that Courts of Equity would perfect an intention of transfer by ordering acts to complete it, and the delivery did not constitute a good *donatio mortis causâ*. *Clark v. Andrews*, 9 V.L.R. (E.,) 18; 4 A.L.T., 139.

Bank Deposit—Receipt.]—Where a person in expectation of death had a deposit receipt for certain moneys in a bank drawn up in the joint names of himself and his housekeeper, and handed it to her, saying, "Put this under lock and key, child, keep it safe;" and she locked it up in his desk and kept the key for some time, but after his decease handed the key to his executors. *Held* a good *donatio mortis causâ*, and that the giving up the key did not vary her rights. *Semble*, it could have been claimed as a gift *inter vivos*. *Tierney v. Halfpenny*, 9 V.L.R. (E.,) 152.

DOWER.

See HUSBAND AND WIFE.

DRAINAGE.

See HEALTH (PUBLIC)—MINING.

DRUNKENNESS.

Effect on Contract—Degree of Drunkenness at Law and in Equity.]—The degree of drunkenness which should make an agreement bad in equity, is less than that which should avoid it at law, and equity should not interfere for either party in enforcing or resisting the agreement. *Scales v. King*, 1 V.R. (E.,) 100; 1 A.J.R., 71.

Effect on Contract.] — In a suit for specific performance of a contract to sell to plaintiff certain land, the defence was that the defendant had signed the written agreement when in a state of incapacity through drink. *Held*, that the evidence of capacity on the day, 1st March, 1876, when contract was signed, greatly preponderating, and the defendant not proceeding with reasonable promptitude to repudiate it (October, 1877,) the defendant was bound by the contract. *Howard v. Currie*, 5 V.L.R. (E..) 87.

Effect on Capacity of Testator.] — *See in re Kerr*, 2 A.L.T., 41, *post* under WILL—Testamentary Capacity—Soundness of Mind.

DURESS.

Setting Aside a Deed Obtained by—Conveyance Executed Under Fear of Prosecution of Embezzlement—When a Deed Purporting to be Absolute is to Considered as Security Only.]—M, the plaintiff, was for many years in the employment of the defendant, P. M. appropriated some of the defendant's moneys, and after being watched for some time was cross-questioned closely and admitted having received sums which he could not account for. Under fear of prosecution for embezzlement, the plaintiff by deed conveyed all his property to defendant for several unreal considerations set out in the deed, but really in consideration of a sum of £150, and of being allowed to go to Sydney without anything further being said or done in the matter of his embezzlement. Bill by plaintiff to set aside deed as obtained under duress. *Held*, that if the defendant obtained from the plaintiff, under fear of prosecution, property of greater value than amount owing, equity would relieve, or if the amount owing were capable of ascertainment, it would be referred to Master to ascertain it and make the property assigned stand as security only; that from the evidence it did not appear that the property was of greater value than the debt, and as the method of dealing in the defendant's business had been very loose, there was no means of ascertaining the debt due except on plaintiff's evidence, which was not to be trusted; that in order to make such an assignment illegal, as amounting to compounding a felony, there must be a distinct agreement to forbear prosecuting upon the assignment being

made; and that, even if the assignment were so illegal, equity would not relieve the plaintiff. Bill dismissed. *Munro v. Perry*, 5 A.J.R., 20, 46.

What Amounts to Action of Trespass.]—*Amess v. Hanlon*, 4 A.J.R., 90, *post* under TRESPASS—To goods.

DUTIES ON THE ESTATES OF DECEASED PERSONS.

How Scale of Duty Fixed—Act No. 388, Sec. 24 — "Amending Act," No. 403 — Contingent Bequest — Remainder to More Distant Relative.] —H. by will left certain property to children of his son, to be paid on their attaining age of 25, if sons; or on attaining age of 21, or marrying under that age, if daughters, with remainder over in failure, to testator's brother. Petition by trustees of will under "*Statute of Trusts* 1864," for advice of Court, whether this came within the exception of Sec. 24 of No. 388, and Act No. 403. *Held* that the obvious policy of the Acts was to obtain payment at once of all duty with which estate might be chargeable, and that it did not deal with contingencies that might arise after many years; that the estate must pay the higher duty, the case not coming within the exceptions. *In re Hamilton*, 3 A.J.R., 95.

Under Sec. 24, where an intestate leaves children but no widow, the full rate of duty must be paid. *Graham v. Graham, post column* 393.

"Duties on the Estates of Deceased Persons Statute 1870," Sec. 24—Contingent Interest.]—Unless the whole interest in an estate be left to the widow and children, the estate is not exempt from the full payment of duty, under Sec. 24 of the "*Duties on the Estate of Deceased Persons Statute* 1870," so that the full rate is payable if a contingent interest be left to other persons. *In the will of Wilsmore*, 2 V.L.R. (I. P. & M.,) 30.

And the tax is upon the *corpus* of the estate. *Ibid.*

How Scale of Duty Fixed—Act No. 388, Sec. 24—Defeasibility of Gift to Children.]—*Per Privy Council*, overruling *Molesworth, J.*—Sec. 24 is not to be construed strictly against those who invoke its benefit, because it is an exception to a general rule. Where a testator devised and bequeathed the whole beneficial interest in his estate to a widow and children, with limitations in favour of grandchildren as the issue of such children, with a gift over to nephews and nieces, the defeasible character of the interests of the children only affecting children and grandchildren *inter se*, and not affecting the gift over, except in the event of a remote contingency, *Held, per Privy Council*, overruling *Molesworth, J.*, that duty was chargeable at the lower rate under Sec. 24, notwithstanding that additional duty might be claimed if the gift over took effect. *Armytage v. Wilkinson*, 3 V.L.R. (I. P. & M.,) 41; L.R., 3 App. Ca., 355.

How Scale of Duty Fixed — Widow — Child En Ventre—"Duties on Estates of Deceased Persons Statute 1870" Secs. 18, 24.] — A widow of an intestate, who has a child *en ventre*, may obtain a grant of letters of administration under Sec. 18 of the "*Duties on the Estates of Deceased Persons Statute* 1870," and thus become entitled to the issue of such letters upon payment of duty at one-half the full percentage, under Sec. 24, upon an affidavit verifying her pregnancy, and stating that the unborn child is the only next of kin of the intestate. *In the estate of Kershaw*, 4 V.L.R. (I. P. & M.,) 62.

Partial Intestacy—Lost Will—"Duties on the Estates of Deceased Persons Statute 1870," Secs. 8, 24.]—Where the will of a testator could not be found, but two codicils, which disposed of part only of the estate, were forthcoming, and the testator thus died partially intestate, and left only a widow and collateral relatives, and by the first codicil he gave all his estate to his widow for life, and, subject thereto, directed that it should devolve according to the terms of the will, save that any provisions of such will in the wife's favour should lapse, and appointed her sole executrix, and by the second he confirmed the first and made provision for his sister-in-law. *Held* that, under Secs. 8 and 24 of the "*Duties on the Estates of Deceased Persons Statute* 1870," duty was payable at one-half the full percentage upon the widow's life estate, and upon her moiety of the residue, and at the full percentage upon the other moiety. *In the estate of Henty*, 4 V.L.R. (I., P. & M.,) 54.

How Duty Payable—Act No. 388—Annuity.]—Upon petition by trustees for advice, *Held* that "annuity" (payable quarterly) means a series of legacies payable at quarterly intervals during life of annuitant, and that the duty payable under the Act should be deducted from such quarterly payments, and a similar deduction should be made from any funds appropriated to secure the annuities. *In the will of John Moffatt*, 3 A.J.R., 99.

Testator Dying Before Act No. 523 — Probate Granted Afterwards.]—B. died before the coming into operation of the Amending Act, No. 523, of the "*Duties on the Estates of Deceased Persons Statute* 1870;" but probate was not granted of his will till after that Act had come into force. *Held, per Molesworth, J.*, that the Act No. 523, was in some degree retrospective as to persons who died between its commencement and its passing, but that his estate was not subject to the increased duty imposed by that Act. On appeal, *Held* that the estate was subject to the increased duty. On appeal to the Privy Council, *Held*, reversing the Supreme Court, that the duty payable under the "*Duties on the Estates of Deceased Persons Statute* 1870," having been directed by Sec. 10 of that Act to be deemed a debt of the testator to Her

Majesty, accrued due at the moment of his death, at the rate prescribed by that Act, though the amount of such duty might have to be ascertained at a subsequent time. *In re Bell*, 2 V.L.R. (I. P. & M.,) 71, 87; L. R., 2 App. Cas. 560, *sub. nom. Bell v. The Master in Equity of the Supreme Court of Victoria.*

Held also, that the duty imposed by the "*Duties on the Estates of Deceased Persons Statute* 1870," is not the like English Probate Duty, a stamp duty payable upon the value of the property the subject of the probate when it is granted, but is more in the nature of a succession duty, payable whether probate be sought or not, on the value of an estate at the time of the testator's death. *Bell v. the Master in Equity of the Supreme Court of Victoria*, L. R., 2 App. Cas., 560.

Act No. 388, Sec. 3—Death of Testator Before the Act.]—P. made his will dated February 1864, and died January 1868, before Act No. 388 came into force. Administration *c.t.a.* was in May, 1877, granted to his estate. *Held*, reversing *Molesworth, J.*, that no duty was payable under the Act. *In re Powell*, 3 V.L.R. (I. P. & M.,) 117.

Succession Duty—Effect of the "Administration Act 1872," and "Duties on the Estates of Deceased Persons Statute 1870."]—The "*Administration Act* 1872," has not a retrospective effect combined with the "*Duties on the Estates of Deceased Persons Statute* 1870," as to succession duty. *In re Quinlan*, 2 V.L.R. (I. P. & M.,) 17.

Upon What Property Payable—Act No. 388, Sec. 7, Clause 2.]—Under Clause 2 of Sec. 7 of the Act No. 388, duty is not payable on real estate which the testator had not the power to devise at his discretion. *In the estate of Mater*, 4 A.J.R., 7.

Upon What Property Payable—Act No. 388, Secs. 7 (Sub-Sec. 2,) 8 — Purchase-Money of Station in N.S.W. Secured by Mortgage and Collaterally by Promissory Notes Payable in Melbourne — Testator Domiciled in Victoria.]—A testator domiciled in Victoria sold a station in N.S.W. to F., the balance of the purchase-money being secured by a mortgage of the station, and collaterally by promissory notes payable in Melbourne, and lodged in a bank there. *Held* that the purchase-money secured by the promissory notes was property in respect of which, under Sec. 7, Sub-Sec. 2, the testator's estate was liable to pay duty. *Regina v. Williamson*, 7 V.L.R. (L.,) 218; 3 A.L.T., 6.

Upon What Property Payable—Act No. 388, Sec. 7, Sub-Sec. 2—Lex Domicilii—Lex Loci.]—*Per Privy Council.*—Although the *lex domicilii* governs the foreign personal assets of a testator for the purpose of succession and enjoyment, yet those assets are for the purpose of legal representation, of collection and of administration, as distinguished from distribution amongst the successors, governed by the law of their own locality and not by the *lex domicilii*. B. died domiciled in Victoria, and possessing real and personal property in New South Wales and New Zealand. *Held*, by the Privy Council overruling the Full Court, that the statement to be made by the executor under Sub-Sec. 2 of Sec. 7, should be confined to the property which the probate entitles him to administer, *i.e.*, what comes under his control by virtue of the Victorian Probate, and that duty was payable only upon such property. *Blackwood v. the Queen*, 7 V.L.R. (L.,) 400; L.R. 8, App. Cas., 82.

Upon What Property Payable—Domicil — Personalty.]—B. was born in Ireland, but resided in Victoria for a considerable time acquiring property there, but died in Ireland, having been domiciled there for the last fourteen years of his life. It was sought to make B.'s estate pay duty upon £45,000 worth of personal property in Victoria. *Held* that his estate was not liable to pay such duty. *In the will of Bagot*, 7 V.L.R. (I. P. & M.,) 106; 3 A.L.T., 54.

Domicil—Master in Equity.]—The Master in Equity has power to and should decide questions of domicil on the materials brought before him. *In the will of Phelps*, 7 V.L.R. (I.P. & M.,) 114.

Upon What Property Payable—Act No. 388, Secs. 2, 7, 12, 13, 24—Victorian Personalty of Person Domiciled Abroad.]—M. died in England, and domiciled there leaving certain personalty in Victoria. *Held, dubitante curiâ* that the balance of the Victorian assets over the debts is liable to duty under the Act No. 388. *Regina v. Smith*, 9 V.L.R. (L.,) 404; 5 A.L.T., 124.

Finality of Master's Certificate—Secs. 12, 13.]—The certificate of the master is not final against the Crown as to the amount of the duty, and consequently cannot be final as to the balance upon which the duty is calculated, nor as to the items of which that balance is made up. S.C., 9 V.L.R. (L.,) 416.

Practice—Duty on Deceased Persons' Estates—Application to Sell—Act No. 427.]—Before the passing of the "*Administration Act* 1872," No. 427, which allows an executor to sell real estate of the testator in order to pay duty without an application to the Court, an application was before the Court for leave to sell, but was postponed, and after the passing of the Act an application for leave was made. *Held* that the application was unnecessary. *In the will of Howey*, 4 A.J.R., 6.

Insufficiency of Personal Estate to Pay Duty—Act No. 388, Sec. 10.]—The Court will not make an order for sale of the real estate under Sec. 10, in case of insufficiency of the personalty without notice to the persons beneficially interested in the real estate; but if there is an affidavit that such persons are out of the jurisdiction, an order will be made. *In re Howie*, 3 A.J.R., 127.

Power to Order Sale of Real Property—Act No. 388, Secs. 5, 9.]—*Per Molesworth, J.*—The Court has power, under Sec. 9, to order the sale of real property for the payment of duty, notwithstanding that an appeal to the Privy Council in respect of the amount of duty payable is pending. *In re Bell*, 3 V.L.R. (I. P. & M.,) 26.

Notice—Rules of November, 1876.]—*Per Full Court*—The Rules of November, 1876, are *ultra vires*, because they do not fix the length of notice after which an application should be made, under Sec. 9 of Act No. 388, and on this point an appeal against the above decision was allowed. *Ibid.*

Act No. 388, Secs. 10, 13, 23, 24—Intestate Leaving Children but No Widow—Additional Sum Found Due—Fund in Court—Whether Master in Equity a Necessary Party.]—Intestate died before Act No. 403 (Amending Act,) but after passing of Act No. 388. The defendant, as widow, obtained administration, and paid duty, as in case of an intestate leaving a widow but no children, to wit, half duty on her half share, and full duty on the other half. Afterwards sons of the intestate appeared, and a suit for administration was instituted by them in 1872, in which it was declared that defendant was not intestate's widow. Motion on behalf of Attorney-General and Master in Equity for half duty on half the share claimed by the alleged widow; there was in Court a sum of £2000, sufficient for payment of this extra duty. *Held* that under Sec. 24 of Act No. 388, the full rate was payable where intestate left children but no widow; that though under Secs. 10 and 13 the administrator or person paying duty is the person liable to pay the balance in case of too little being paid, yet Sec. 23 indicates that the previous part of the Act gave a remedy *in rem* direct, and not merely *in personam;* that the Master in Equity was not a necessary party; that this was virtually an application by a creditor to prove under a decree after a report and final decree, and as such would only be granted upon payment of costs. *Graham v. Graham*, 5 A.J.R., 100.

Practice—Act No. 388, Sec. 7—Service on Crown.]—Upon an application to the Court for its opinion where the Registrar was doubtful as to the amount payable, service upon the Crown is necessary. *In the estate of Rutherford and Aird*, 1 V.L.R. (I.P. & M.,) 19.

Practice — Master Refusing Probate Without Order of Court.]—Where the Master refuses to grant probate except upon payment of duty without an order of the Court, the proper practice is to take out a rule *nisi* calling upon him to show cause, the Crown being served. *In the will of Bagot*, 7 V.L.R. (I.P. & M.,) 106; 3 A.L.T., 54.

Mandamus to Master.]—The Supreme Court of Victoria has power to make an order in the nature of a *mandamus* upon the Master in Equity in relation to the duties under Act No. 388, whether in his capacity as an officer of the Court or as a revenue officer responsible to the Court. *Armytage v. Wilkinson*, L.R., 3 App. Cas., 355.

Rule Nisi Calling on Master to Issue Probate Without Payment of Duty—Fresh Evidence—Reference Back to Master.]—On a rule *nisi* calling on the Master in Equity to show cause why probate should not be issued without paying duty on personalty of the deceased situated outside Victoria, on the ground that the domicil of the deceased was not Victoria, evidence was adduced before the Court which was not brought before the Master, and the Court thereupon ordered a reference back to the Master for reconsideration on such additional evidence as might be adduced on either side. *In the will of Peters*, 8 V.L.R. (I.P. & M.,) 30; 4 A.L.T., 64.

EASEMENTS.

In Respect of Adjoining Lands and Houses—Flow of Drainage—Nuisance.]—To a declaration in an action for trespass, among other pleas there was pleaded an agreement between former owner of plaintiff's land and former owner of defendant's land, by which it was agreed that water from defendant's land should flow over plaintiff's land. A verdict was entered for defendant, but a rule *nisi* to enter a verdict for plaintiff was applied for on the ground that the pleas were not proved, as it appeared that houses from which water flowed were erected after the agreement. *Held* that the agreement was for water to flow from the houses as they then existed, and that did not entitle defendant to the flow of water from houses subsequently erected. *Mitchell v. Burns*, 3 A.J.R., 113.

A license to work puddling mills does not, under Sec. 15 of the "*Waterworks Statute*," No. 288, confer an easement as regards flow of sludge over Crown lands. *Regina v. M'Intyre*, 5 W. W. & A'B. (L.,) 25, *post* under WATER, WATER COMPANY, &c.

By Express Agreement—Reversioner—Obstruction by Tenant—Merger.]—Action by administratrix of the lessor against the lessees for injury to the reversion by obstructing a right of way appurtenant to the demised premises. The lease was executed after the obstruction (a permanent one) was erected, and granted the land, "together with all ways, &c." *Held* that the plaintiff was entitled to maintain her action during the continuance of the lease; that the demise of the way negatived the presumption that landlord in granting a lease of a way on which the obstruction existed intended to grant a licence for its continuance; that the fact of the unity of the defendants' title as owner of the servient tenement with their interest as owners of the dominant only suspended the easement during the lease *quoad* the defendants, and did not extinguish it; that the acceptance by a wrongdoer of a lease of property in respect of which the lessor had a previously existing cause of action at the time of the lease is not a release of that cause of action, and no bar to the Statute of Limitations, if pleaded. *M'Carthy v. Cunningham*. 3 V.L.R. (L.,) 59.

Extinction by Unity of Possession—Revivor—Registration.]—An easement was created which was afterwards destroyed by unity of possession of the dominant and servient tenements. M., the owner of the two tenements, conveyed the dominant tenement to N., who, in turn, conveyed to D. by a deed which described it as "bounded on the south by a right-of-way 12 feet wide reserved." *Held* that such reference to the right-of-way was a sufficient recognition of it in D.'s favour so as to revive it and give D. a right to it. *Semble, per Higinbotham, J.*, a registered memorial of the deed, following the deed in mentioning the right-of-way as a boundary, is sufficient registration. *Cuvet v. Davis*, 9 V.L.R. (L.,) 390.

Where in a grant the land granted was described as "bounded on the west by another road and reserve to the Port Philip Bay," the grantee was held to have a right to insist against the grantor, that as between them the grant gave a right to the use of the road and reserve as a highway, whether it was so in fact or not. *Webb v. Were*, 2 V.L.R. (E.,) 28.

Where in a grant the land granted was described as "bounded on the west by a public promenade extending in width to the high-water mark of Port Philip Bay," the grantor was held debarred from preventing the use by the grantee of the public promenade as a promenade. *Ibid.*

A deed granting in general words "all ways, &c.," belonging or appertaining to the land granted does not create a right-of-way. *Blyth v. Parlon*, 2 V.R. (E.,) 111; 2 A.J.R., 75. *See* S.C., *ante column* 352. Under DEED.

Easements under the "Transfer of Land Statute."]—*See* cases *post* under TRANSFER OF LAND—Easements.

Easements under Leases under Sec. 45 of "Land Act 1869."]—The Governor has no power, under Sec. 45, to grant leases of Crown lands with an easement over adjoining Crown lands, whether covered or not with water in the course of a river, or with a right to take water from such river. *Brooks v. The Queen*, 10 V.L.R. (E.,) 100, 109; 5 A.L.T., 199.

Creation of Public Easement.]—There is no authority to show that a public easement other than a right-of-way can be created simply by the owner dedicating the land without deed, and the public accepting it. *Webb v. Were*, 2 V.L.R. (E.,) 28. For facts *see* S.C., *post* under WAY—Highway—General Principles.

Right-of-way Passing Under Will.]—J., a testator, was owner of a block of land, and devised to his son "the yard and premises, together with the buildings erected thereon, now in his possession and occupation absolutely;" and devised to his daughter for life "my land and premises in Percy-street, together with shop and iron store and other buildings erected thereon." There was evidence that the testator had used during his life a strip of land, being part of the portion in his son's occupation as a right-of-way to the iron store. *Held* that under the will the daughter of necessity had the same right-of-way over the strip of land which the testator had exercised during his lifetime. *Campbell v. Jarrett*, 7 V.L.R. (E.,) 137; 3 A.L.T., 49.

EDUCATION.

"Common Schools Act," No. 149, Sec. 10—Regulation by Board of Education—Ultra Virss.]—Sec. 10 of the Act provides that "No new school, not being an infant school, shall receive aid from the consolidated revenue which shall be established within two miles of a school already receiving aid," unless under certain circumstances which did not happen in the case. The board framed a regulation—"The existence in any locality of a school not vested in the board shall not be regarded as a hindrance to the establishment of a vested school in that locality, should such be applied for, although the granting of aid by the board to such school should, according to Sec. 10 of Act No. 149 necessitate the withdrawal of aid from the non-vested school." *Held* that the regulation was entirely opposed to the provisions of Sec. 10, and was *ultra vires*. *Bourke v. the Board of Education*, 3 V.R. (L.,) 148; 3 A.J.R., 67.

Dismissal of Teacher — Sanction of Board of Education—"Common Schools Act" (Act No. 149,) Sec. 14.]—The committee of a common school engaged a teacher to teach till his employment should be determined by one month's notice in writing. At the foot of the agreement was written Sec. 14 of the "*Common Schools Act*," No. 149, providing that no teacher should be dismissed without the sanction of the Board of Education. The committee gave the teacher a month's notice, but the Board refused to sanction his dismissal, and the committee disconnected the school from the Board. *Held* that the contract was with the committee, and that the reference to the section at the foot of the agreement formed no part of it, but only showed the relations of the committee with the Board, and that the teacher was only entitled to one month's notice, or one month's salary on dismissal without notice. *O'Dowd v. Dogherty*, 4 A.J.R., 81.

Non-attendance at School—Certificate of Teacher—Parentage of Child—"Education Act Amendment Act 1876," Sec. 8.]—A certificate under the "*Education Act Amendment Act* 1876," No. 541, Sec. 8, of a head teacher, that a child has not been sent to school by its parents, is evidence only of what the Act requires it to contain, not of the parentage of the child. *Regina v. Learmonth, ex parte McKay*, 4 V.L.R. (L.,) 162.

Board of Education—Application of Funds—Mandamus—"Common Schools Act," No. 149, Sec. 6, iv.]—*In re Board of Education, ex parte Stevenson*, 4 W.W. & A'B. (L.,) 133, *see post* under MANDAMUS.

EJECTMENT.

Venue.]—The venue in ejectment is local, notwithstanding Act 19 Vic., No. 19, Secs. 67 and 235. *Fairbairn v. Monaghan*, 2 W. & W. (L.,) 109.

Demand of Possession—When Necessary.]—R. entered into possession of land under a contract with G. Subsequently G. mortgaged the land to a bank, who obtained a certificate of title to part, and had their mortgage registered. The bank, without giving notice to R., brought ejectment against him and succeeded. On rule *nisi* to enter a verdict for R., *Held* that the bank was bound to give R. notice, both as to the land comprised in the certificate and that not comprised in it before they could succeed in ejectment, and a nonsuit entered. *Colonial Bank v. Roache*, 1 V.R. (L.,) 165; 1 A.J.R., 136.

Who May Maintain.]—H. and P. brought ejectment for certain lands against S. H. and P. claimed under a series of mortgages, the first from one G. to C., the second from G. and C. to H., who assigned it to P. Subsequently to the mortgages G. contracted to sell the land to S., who took possession, and afterwards all his interest in the land was sold at a Sheriff's sale, under a *fi. fa.* to P. The mortgage from G. to C. contained after the *habendum* the words "subject nevertheless to a certain indenture of mortgage," dated some years prior to the mortgage from G. to C., "and made between G. and G. G. of the one part, and R. of the other part, whereby a portion of the hereditaments hereinbefore described were conveyed and assured to the said R. as security," &c. The mortgage to R. was not produced at the trial, and there was no proof whether the land included in it formed the subject of the action or not. It was submitted that the mortgage from G. to C., by referring to the mortgage to R., showed that the legal estate was outstanding in R., and that P. could not maintain the action. For P. it was submitted that the Sheriff's sale gave him a good title as against S., though it might not be good as against others. *Held* that P. was entitled to all the land not included in the mortgage to R.; but, that there being no evidence of what land was so included, P. should be nonsuited on S. undertaking to give up the land not included in the mortgage to R. *Haggetton v. Southern*, 1 A.J.R., 165.

By Heir-at-Law—"Administration Act," No. 427, Sec. 6.]—The plaintiff claimed, as heiress-at-law of an intestate who died in 1852, and administration of the estate had not been granted. *Held* that, until administration is taken out, the legal estate vests in the heir-at-law, subject to its being divested on grant of administration being made to another person. *Larkin v. Drysdale*, 1 V.L.R. (L.,) 164.

By Married Woman Having Separate Estate—Husband Need Not be Joined—Land Acquired Since Act No. 384 — Marriage Before the Act.] — *Somerville v. M'Donald*, 1 V.L.R. (L.,) 206, *post* under HUSBAND AND WIFE — Wife's Rights, &c. — Separate Estate—Actions, &c., in Respect of.

By Holder of Miners' Rights — Such Holder's Interest in Claim Not Sufficient to Support Ejectment.]—*Jennings v. Kinsella*, 1 W. W. & A'B. (L.,) 47, *post* under MINING — Interests in Mines—Claim—Generally.

Who May Maintain—Parties Entitled.]—On 31st August, 1866, an agreement was entered into by M., as agent for "the parties entitled" to let to B. and McD. a certain property, "from the 1st of October next ensuing *until the parties entitled to the said premises*, their attorney, or agent, shall require the said premises for the purpose of selling or attempting to sell the same," then followed a provision as to notice—"*and such notice shall thereupon be a termination of the tenancy created hereunder*," and the notice was only to be given when the premises were required for the purpose of selling or attempting to sell them; but the notice when given was to be absolute. The lessees were to expend a certain sum in repairs, and to pay rent till they received notice to quit; and in case of notice being given during a quarter, a proportionate amount of the rent till the expiration of the tenancy. Notice was given during a quarter by persons describing themselves as the "parties entitled," and by M. The land was settled by will on the "parties entitled," and M. was receiver by order of the Supreme Court. At the trial a verdict was returned for the plaintiffs (parties entitled,) but a nonsuit was moved for on the grounds that notice to quit was not given by the "parties entitled;" that the notice should have been a six months' notice, ending with the period at which the tenancy commenced, and that, after the expiration of the term, and before notice, an infant interested in the premises died, and the tenancy as to his share still existed, and no actual ouster was proved. *Held* that as the tenancy was a tenancy at will on the terms of the agreement, and the words, "the parties entitled," having been advisedly inserted instead of "landlord," the plaintiffs had practically proved their title, and rule for a nonsuit discharged. *Bowman v. Carnaby*, 1 A.J.R., 172.

Who May Maintain—Administrator of Crown Grantee.]—An administrator appointed under the "*Administration Act* 1872," of a person who died before that Act, and in whose name a Crown grant has been issued after his death, cannot maintain ejectment in respect of the land comprised in the grant, since he took only such title as the intestate had, and in this case he had not the fee simple. *Semble*, that the legal estate was in the heir-at-law. *Edmondson v. Macan*, 4 V.L.R. (L.,) 422.

Title of Plaintiff—Certificate of Title—Transfer of Land Statute, Sec. 159.]—The title of a plaintiff in ejectment, which is based on a certificate of title to a lease under the "*Amending Land Act* 1865," is not affected as to its conclusive character as evidence for the plaintiff, by Sec. 159 of the "*Transfer of Land Statute*;" and a plaintiff relying on such certificate alone, without going into evidence prior to the title, cannot be nonsuited. *Miller v. Moresey*, 2 V.R. (L.,) 193; 2 A.J.R., 115.

Necessary Title to Maintain—Registered Proprietor under Transfer of Land Statute but Without Legal Estate.]—M., an uncertificated insolvent, became lessee of an allotment under part II. of the "*Land Act* 1865." His official assignee was registered as proprietor under a Judge's order, made under Sec. 118 of the "*Transfer of Land Statute*," but not under the "*Land Act* 1865." The assignee sold and transferred to the plaintiff, who obtained a certificate of title, and had the transfer registered under Sec. 22 of the "*Land Act* 1865." In ejectment by the plaintiffs against M., plaintiff put in his certificate of title, and also the Judge's order and lease, with endorsement of registration of transfer under the "*Land Act*." *Held*, that if plaintiff had rested his case merely on the certificate of title, he would have succeeded, but that since he had chosen to go further and produce evidence which showed that he had not the legal estate, but that it was in somebody else, he must be nonsuited. *Ibid.*

Title—Proving Defendant's Possession.]—Where a defendant appeared to defend an action of ejectment, and the plaintiff gave as evidence of title a certificate of title under Act No. 301, *Held* that the plaintiff need not prove defendant's possession. *Vallence v. Condon*, 3 V.L.R. (L.,) 83.

Title of Plaintiff—Certificate of Title Under Act No. 140.]—An owner of land, out of possession who receives a certificate of title under the Act No. 140, subject to rights subsisting under any adverse possession, receives evidence of a good title until those rights are proved. *Murphy v. Michel*, 4 W.W. & a'B. (L.,) 13. For facts *see* S.C., *post* under LIMITATIONS STATUTES OF—Lands, &c.

Proof of Title.]—A duplicate copy of a certificate of title under the "*Transfer of Land Statute*," No. 301, is admissible as *primâ facie* evidence of title in ejectment. *Wilkinson v. Brown*, 1 V.R. (L.,) 86; 1 A.J.R., 88.

Statutory Title—Possession by Defendant as Caretaker.]—In ejectment where the plaintiff has a good conveyancing title, possession by the defendant for the statutory period as a mere caretaker will afford no defence. *M'Cracken v. Woods*, 4 V.L.R. (L.,) 222.

In County Court—Title of Plaintiff—Mortgagee.]—A mortgagee having an absolute transfer by a certificate of title under the "*Transfer of Land Statute*," with a defeasance in a separate document, the two together constituting a mortgage, must, under Order 3, Rules 90 and 96 of the "*County Court Rules*," in suing for ejectment in the County Court, state his title in the plaint summons as mortgagee, and not as holder in fee. *Delaney v. Sandhurst Building Society*. 4 V.L.R. (L.,) 270.

Annuity Deed—Estate Conveyed.]—Rule *nisi* for a nonsuit discharged, where in an action for ejectment upon an annuity deed the defendant attempted to show that the deed, which contained covenants for payment which were broken, conveyed no estate to support the action. *Gillard v. Watson*, 3 A.J.R., 29.

Title—How it may be Proved—Several Lines of Proof.]—Plaintiffs in ejectment, in support of their title, proved a Crown grant to W., but no conveyance of any estate from W. to them. They also proved possession by one plaintiff, T., and assurances from T. to the other. Plaintiffs obtained a verdict, and defendant obtained a rule *nisi* for a nonsuit. *Held*, that inconsistency, not multiplicity, forms the test by which a plaintiff's several modes of proof may or may not be deemed admissible; that the grant to W. was not inconsistent with the presumption of seisin arising from the possession of one of the plaintiffs, and rule discharged. *Thurlow v. Perks*, 1 W. W. & a'B. (L.,) 142.

Plaintiff's Title—Splitting Case.]—A plaintiff does not split his case by relying on his certificate of title, and afterwards bringing forward evidence to rebut a case made by the defendant that the certificate is subject to the defendant's occupation by virtue of the provisions of the "*Transfer of Land Statute*," or of the "*Mining Statute* 1865," since the plaintiff does not by his rebutting evidence attempt to improve the case he had made by the production of his certificate, but answers the case put forward by the defendant. *Munro v. Sutherland*, 4 A.J.R., 166.

Adverse Possession — Interruption of such Possession.]—B. brought an action of ejectment, relying on a certificate under Act No. 301. H. set up as a defence adverse possession for more han fifteen years. It was proved that S., at tenant of B's., used the land fourteen years before action brought. B. recovered a verdict. On rule *nisi* for a new trial, *held* that S.'s use might be of right or a trespass, and it was open for jury to say in what light they regarded it. Rule refused. *Bicknell v. Heymanson*, 3 A.J.R., 22.

Adverse Possession—Fence.]—To prove adverse possession, it must be shown that there has been a continuation of acts apparently of trespass, but with a desire and intention to complete the inchoate title, affording evidence that the plaintiff claiming under a documentary title was not in possession. Plaintiff, in ejectment, launched his case on a certificate of title. Defendant proved occupation by a stranger more than twenty years ago, the erection of a fence by that person, the continuation of the fence until removed, and the erection of a new one in the same position; but then a long interval, during which no occupation was proved. *Held* that such fence, in the absence of occupation, was not evidence of continuous possession, and that defendant had not established adverse possession. *Grave v. Wharton*, 5 V.L.R. (L.,) 97.

Inference to be Drawn from Fence Across Boundary—Misdirection.]—Plaintiffs held a certificate of title for an allotment of land, including the portion in dispute. Defendant's mother owned an adjoining allotment, which she had purchased a few years before. The dispute was as to the right to a small strip of ground on the boundaries of the two allotments, plaintiffs claiming the ground under the certificate of

title, and defendant as under adverse possession for more than fifteen years. A fence was proved to have been in existence within the fifteen years, over a portion of the property which marked the boundary between the two allotments. The County Court Judge told the jury that they might infer that it had been continued across the boundary between the two allotments, and the jury gave a verdict for the plaintiffs. On appeal, *Held* that the direction was wrong, and appeal allowed. *Hall v. Warburton*, 6 A.L.T., 12.

For meaning of words "adverse possession," in Sec. 49 of Act No. 301, *see* cases under TRANSFER OF LAND (STATUTORY.)

New Trial—When Granted.]—In an action of ejectment the defendants proved a conveyance for value from plaintiff's donor, and the plaintiff was nonsuited. Upon the subsequent discovery that defendants' deeds did not cover the whole land, a new trial was granted. *Hodgson v. Wellwood*, 4 A.J.R., 82.

Summary Procedure by Warrant of Justices—When Applicable.]—The summary procedure for ejectment by warrant of justices under Secs. 90 and 91 of the "*Landlord and Tenant Statute* 1864," is applicable at the expiration of a term of seven years, during the whole of which the tenant has occupied under a lease, which was void as being executed by an agent not authorised thereto in writing, for no notice to quit is necessary. *Holmes v. North*, 2 V.L.R. (L.,) 84.

One Defendant not Appearing—"Common Law Procedure Statute," Sec. 160.]—In an action for ejectment, one defendant appeared and defended, but the other defendant did not appear; the plaintiff failed to prove his title. *Held* that plaintiff could not, under Sec. 160, enter a verdict as against the non-appearing defendant. *Welsh v. Hackett*, 3 V.L.R. (L.,) 155.

Plaintiff in Ejectment put into Possession—Disseisin—Remedy.]—Where a plaintiff in ejectment obtains judgment, and is put into possession by the Sheriff, and the defendant subsequently disseises him, the proper course for the plaintiff to pursue is to obtain a rule requiring the defendant to show cause why he should not restore the land, or, in default, be attached. *M'Bride v. M'Crone*, 3 A.L.T., 101.

Action for—Writ—Several Parcels.]—Several parcels of land, held under distinct titles, may be joined in one writ of ejectment. Sec. 120 of the "*Common Law Procedure Statute* 1865," does not prohibit such a joinder, but the joinder of other kinds of actions with that of ejectment, and the causes of action in ejectment for two different pieces of land are not causes of action of a different kind. *Stewart v. Bolton*, 8 V.L.R. (L.,) 305; 4 A.L.T., 79.

Tenancy at Will, Defence of—How Set up.]—If, in an action of ejectment, the plaintiff relies on certificates of title, which he producee, and the defendant sets up as a defence a tenancy at will, and absence of any demand of possession, he must show distinctly that such tenancy at will has been created. *Ibid.*

Amendment of Writ of Habere Nunc pro tunc—Refused in Absence of Other Party.]—*Neil v. Whelan*, 5 A.J.R., 77, *post* under PRACTICE AT LAW—Amendment.

Forfeiture of Lease—Act No. 274, Sec. 181—Action for Mesne Profits.]—After the determination of a tenancy by forfeiture through breach of covenants, *mesne* profits may, under Sec. 181, be recovered in the action of ejectment. *Hume v. Dodgshun*, 9 V.L.R. (L.,) 83.

ELECTION.

Under Will and Other Instruments.]—*See* WILL.

Of Members of Corporations—Of Parliament.]—*See* CORPORATION—LOCAL GOVERNMENT—ELECTION LAW.

ELECTION LAW.

Election of Members of Parliament—Election Petition—Trial—Evidence of Qualification.]—On the trial of an election petition, the member who is sought to be unseated on the ground of an insufficient property qualification may give evidence to show that his property is of a higher value than that put upon it in the rate-books. *Harbison v. Dobson*, 2 A.J.R., 51.

Penalty under "Electoral Act 1865," Sec. 133—Who May Recover—Qui tam Action.]—*Regina v. Cope, ex parte Wilder*, 4 V.L.R. (L.,) 397, *post* under PENALTY.

Personation—Offences Against Houses of Parliament—Excepted from Jurisdiction of General Sessions.]—*Regina v. Hynes*, 6 V.L.R. (L.,) 292; 2 A.L.T., 45, *post* under SESSIONS—Jurisdiction, &c.

EMBEZZLEMENT.

See CRIMINAL LAW.

ENGRAVINGS.

See COPYRIGHT.

ENTRIES.

See EVIDENCE.

EQUITABLE ASSIGNMENT.

See ASSIGNMENT.

EQUITY.

1. JURISDICTION.

(*a*) *Mining Matters.*

Allowance of Debts by Court of Mines in the Winding-Up of a Mining Company—No Appeal.]—Where the Judge of a district Court of Mines had allowed proof of debts by shareholders in the winding-up of a mining company, and there was no appeal from such decision, *Held* that a Court of Equity had no jurisdiction to review such allowance of proof. *Smith v. Seal*, 3 A.J.R., 8.

Courts of Mines—Injunction—Act No. 291, Sec. 101—"Transfer of Land Statute"—Cancellation of Certificate of Title.]—The Supreme Court, in its equitable jurisdiction, has concurrent jurisdiction with the Courts of Mines, but will not readily interfere to restrain proceedings in the Courts of Mines unless it can grant the other relief prayed in the Bill, independently of the injunction. The Supreme Court, in its equitable jurisdiction, has no jurisdiction to order certificates of title to be cancelled, the proper relief being to order the inequitable holders to transfer. *Gunn v. Harvey*, 1 V.L.R. (E.,) 111.

For facts, *see* MINING—Jurisdiction of Court of Mines.

(*b*) *Legal Matters.*

Illegal Execution Sale.]—Certain mining plant was sold under a distress warrant at great undervalue, and, as alleged, *made* in collusion with the officer selling, after tender to him of the money recovered, and at the sale certain fixtures not properly saleable were sold. At the hearing the charge of collusion was dropped. *Held* that the remedy, if any, in respect of the illegality of the sale was at law and not in equity; that the fact of a sale of such plant in a locality where it could not be replaced without great expense and delay was no ground for equitable relief. *Perkins v. Willcock*, 2 V.R. (E.,) 222; 2 A.J.R., 127.

Partnership — Fraudulent Misrepresentation — Deceit.]—Courts of Equity have concurrent jurisdiction with Courts of Common Law as to deceit, especially where measuring damages might involve complicated calculations. In a partnership where transactions were terminated by a sale by one partner to the other of his share therein, the partner purchasing filed a bill to have the sale set aside and the partnership revived on the ground that he was induced to enter into the purchase through the fraudulent misrepresentations of the other partner (defendant) as to value. On demurrer for want of equity, *Held* by the Full Court, affirming *Molesworth, J.*, that there was equity to maintain the suit. *Longstaff v. Keogh*, 3 V.L.R. (E.,) 175.

Costs in Ejectment Suit—Injunction—Variation of Decree.]—Where A., on obtaining a decree in an equity suit declaring B. a trustee for him, obtained as incidental relief an injunction restraining proceedings under a judgment in ejectment obtained by B. for recovery of land, on motion to vary decree by inserting words in decree declaring that B. was not restrained in proceeding for his costs in ejectment, *Held* that the alteration was unnecessary, the question of costs being left to the Court of Law by the form of the decree. *Hunniford v. Horwood*, 5 V.L.R. (E.,) 250; 1 A.L.T., 65.

Administrator of Personalty—Rents of Realty—Remedy at Law.]—A creditor, in 1865, took out administration to the personalty of an intestate, who died in 1858, and entered into possession of a portion of the real estate, receiving the rents therefrom. The intestate's heir-at-law, in 1881, brought a suit for conveyance of real estate, and for an account of rents and profits, and also administration accounts of personalty. At the hearing the bill was amended by striking out relief as to personalty, owing to a difficulty arising about want of parties, the other next of kin. *Held* that plaintiff claiming under a legal title, had a complete remedy at law, and in the absence of complication of accounts, a Court of Equity would not grant relief. Bill dismissed. *M'Vea v. Aitken*, 7 V.L.R. (E.,) 178; 3 A.L.T., 71.

(*c*) *Boroughs.*

"Local Government Act 1874," No. 506, Sec. 519.]—Sec. 519 of the "*Local Government Act* 1874," which gives the minister of the Crown, as defined by the Act, power to settle disputes enumerated in that section, gives a concurrent remedy only, by reference to the minister, and does not oust the jurisdiction in equity. *Attorney-General v. Shire of Wimmera*, 6 V.L.R. (E.,) 24; 1 A.L.T., 125.

(*d*) *Insolvency.*

Accounts Against Trustee—Summary Relief under Act 7 Vic., No. 19.]—The summary relief granted by 7 Vic, No. 19, Sec. 9, to a debtor assigning his property to trustees in trust for creditors against the trustee for accounts, does not oust the jurisdiction of the Court; but where a plaintiff has commenced proceedings under the summary procedure and abandoned them, he

must show sufficient grounds for such abandonment before seeking relief in equity. *Arthur v. Moore*, 5 V.L.R. (E.,) 207; 1 A.L.T., 29.

S.C., *see* TRUST AND TRUSTEE — Rights, Powers, &c.

Suit by Mortgagees for Sale of Mortgaged Lands, and Declaration that they might rank as Specialty Creditors of Intestate Mortgagor for Deficiency—Sequestration of Estate pending Suit by Administration—Supreme Court in Equity not Deprived of Jurisdiction by 5 Vic., No. 17.]—*See Australian Trust Company v. Webster*, 1 W. & W. (E.,) 148; *Fairnbairn v. Clarke*, 1 W. & W. (E.,) 333, *post under* INSOLVENCY—Effect of.

Insolvent Estate—Overplus.]—The Court sitting in Equity has no jurisdiction to made an order dealing with the overplus of an insolvent's estate after the creditors have been paid in full. An application should be made to the Court of Insolvency. *Cohen v. Lintz*, 10 V.L.R. (E.,) 222; 6 A.L.T., 63.

(*e*) *Generally.*

A single Judge sitting in Equity, ecclesiastical jurisdiction and insolvency only, has no jurisdiction to made an order in a common law action. *Farie v. Frost*, 2 W. & W. (E.,) 56.

A single Judge sitting in Equity has no jurisdiction to discharge a prisoner from custody under an attachment for contempt granted by the Full Court *in banco* at law. *In re Burton*, 3 W.W. & A'B. (E.,) 8.

A single Judge in Equity is not bound by a decision of the Court *in banco* on a matter of law. *Dallimore v. The Queen*, 3 W.W. & A'B. (E.,) 18.

Primary Judge.]—*Semble*, The Primary Judge in Equity has power to hear a motion to turn over a prisoner in the Sheriff's custody, on a Thursday, although the Equity Appeal Court be sitting. *Sturgeon v. Murray*, 8 V.L.R. (E.,) 41.

Primary Judge.]—*Quære*, whether the Primary Judge in Equity is bound by a prior decision of the Court in Banco at law. *Per Higinbotham, J.* (Primary Judge)—He is. But *semble, per Molesworth, J.* (Full Court)—He is not. *Chun Goon v. Reform Gold Mining Company*, 8 V.L.R. (E.,) 128, 138, 139, 145; 3 A.L.T., 81.

Power of Primary Judge to Rescind Order of Full Court.]—Although the Full Court may have made an order on appeal, the Primary Judge has power to deal with subsequent proceedings and motions in the cause upon matters subsequently arising, in a way not inconsistent with its orders; and it is specially convenient that he should have such power, because the Full Court sits at long intervals. Where, therefore, in an interlocutory application in a cause the Full Court sent issues of fact to a jury, and directed the impounding of the proceeds of certain mines, but mentioned no time for the determination of the order, the Primary Judge granted an application, on motion by the successful party, to rescind so much of the order as related to the impounding of proceeds. *Learmonth v. Bailey*, 2 V.L.R. (E.,) 85.

Interpleader—Jurisdiction at Common Law under "Common Law Procedure Statute 1865," No. 274, Sec. 189.]—The established jurisdiction of the Court in Equity to make interpleader orders, is not ousted by a similar jurisdiction having been conferred upon the Court at common Law by the "*Common Law Procedure Statute* 1865," Sec. 189. *Ham v. Benjamin*, 4 A.J.R., 184.

Jurisdiction — Salvage Claims — Account.]—Where one of the co-owners of a derelict cargo recovered the greater part of it and sold it, and a suit was brought for an account deducting costs and expenses, *Held* that such a case came within the equitable jurisdiction of the Court as one for arranging contributions as in cases of average. *Melhuish v. Miller*, 3 W.W. & A'B. (E.,) 61, 66.

For facts *see* S.C. under SHIPPING—Salvage and Towage.

Jurisdiction in Cases of Mistake.]—*See* MISTAKE.

Execution of Trusts—Estate Claimed by Adverse Possession.]—*Per Molesworth, J.*, The Court will not in a suit for the execution of trusts, determine the validity of a claim to part of the estate by adverse possession, but will leave the trustees of the will to proceed by ejectment. *Tierney v. Halfpenny*, 9 V.L.R. (E.,) 152, 157.

And *see* the other titles throughout the work

ESCAPE.

See SHERIFF.

ESTOPPEL.

1. BY MATTER OF RECORD.

By Decree in Previous Suit.]—*See Taylor v. Southwood, ante column* 6.

Minutes of Consent Decree.]—The K. Company sued the B. Company in a Court of Mines for a piece of auriferous land, and to restrain registration thereof, and obtained an *interim* injunction. Pending the suit the G. Company sued both companies for the same land, and obtained an injunction against both. Pending the second suit the two defendant companies

appointed deputies to make a compromise in the first suit. The deputies signed a document reciting their appointment and its object, and agreeing to end the suit, and that each company should take half the land in manner to be pointed out and approved by their respective surveyors, the ratification of each company's right to the ground so divided to be confirmed by a decree of the Court of Mines. On this document the solicitors of the companies prepared a draft consent decree, and obtained a plan of the land from the G. Company. Both parties waived the employment of surveyors to mark the dividing line, and it was marked by the solicitors, with their approval, and in the presence of some of them, on the plan. On the plan the land was bounded by two concentric circles and two common *radii* thereof, cutting off common segments thereof; and the line of division was drawn midway between the other two. The K. Company subsequently repudiated the consent decree, alleging that the plan upon which it was based was erroneous in a very material particular. At the hearing of the second suit, all parties signed a written consent that the Court of Mines, and in case of appeal, the Appeal Court, should first decide whether the B. and K. companies were bound by the proposed consent decree, and the plan referred to by it. The Court of Mines *held* that the contract would have been effectually carried out by the decree, which was binding, and must be confirmed. The K. Company appealed. *Held* that the document in question was no more than minutes of a decree, subject to alteration by either party; that the land was not equally divided between the parties by the arrangement actually made; and the minutes of decree not carrying out the contract, were not finally binding; and appeal allowed. *Nicholas v. James*, 1 W. & W. (L.,) 255.

Certificate of Justices—Subsequent Proceedings in County Court—Act No. 267, Sec. 107.]—Where R. sued F. before Justices and they dismissed the case, R. subsequently sued F. in the County Court. The certificate of dismissal was produced as a bar to the action, but the Judge overruled that objection, and heard the case. *Held* that he was right; that by Sec. 107 of Act No. 267, a certificate of Justices is only a bar to Courts of co-ordinate jurisdiction, and not to Courts of superior jurisdiction. Rule *nisi* for a prohibition discharged. *Regina v. Skinner*, 4 W.W. & A'B. (L.,) 39.

Certificate by Justices of Dismissal of Complaint—Act No. 267, Sec. 107.]—A complaint had been dismissed by justices, and a plaint was issued to a County County Judge to hear the same cause, and the Judge, on receiving the certificate of dismissal, decided that he could not hear the case. *Held* that under Sec. 107 of Act No. 267, such certificate of dismissal was only a bar to a second proceeding in petty sessions for the same cause of complaint. Rule absolute for a *mandamus*. *Regina v. Trench, ex parte Chambers*, 9 V.L.R. (L.,) 55; 4 A.L.T., 163.

Administration Suit—Decree in Previous Probate Suit.]—A decree for the plaintiff in a suit in the probate jurisdiction, seeking to set aside a rule to administer, and obtain one for himself, and in which his relationship is in issue, is conclusive as to the plaintiff's right as against the same defendant in a suit in equity for a distributive share. *Dryden v. Dryden*, 2 V.L.R. (E.,) 74.

Applicant for Rule to Administer—Affidavit that Lands Were a Part of Estate.]—*Semble*, that where a person, seeking to obtain a rule to administer, swears that certain lands belong to the estate, he is debarred from setting up a continuous possession in himself as beneficial owner. *Ibid.*

But an inquiry was directed by the Full Court, on appeal, as to the ownership of the land. *Ibid*, p. 153.

Per Molesworth, J., "I know of no authority for saying that if a person, acting by the direction of another or a corporation, commits a trespass on land, and the owner brings an action against him, which he defends under the advice and direction of his employer, and is beaten, that the employer should be estopped by the result as if made a defendant, although it should operate as very strong evidence." *Park Company v. South Hustler's Reserve Company*, 9 V.L.R. (M.,) 4; 4 A.L.T., 135.

By Adjudication of Warden in Proceedings Between Other Parties—Res inter alios acts.]—*Critchley v. Graham*, 2 W. & W. (L.,) 211, *post* under MINING—Interests in Mines—Claim—Effect of Forfeiture, &c.

By Decree.]—Where M. and H. concluded an arrangement as to land selected by M. which the Court held to be a mortgage, and subsequently to this arrangement, M. being indebted to another person, all his interest was sold under a *fi. fa.* to B., and B. brought a suit, B. *v.* H., to redeem H., which was dismissed, and B. subsequently assigned his interest to M., *Held* that the decision in the suit, B. *v.* H., was no bar to M.'s right to redeem, B. having subsequently assigned to M. *Murphy v. Mitchell*, 5 V.L.R. (E.,) 194.

And *see* cases *post* under JUDGMENT—Conclusiveness of and Estoppel by.

Defendant Putting in Further Answer—Bound by First.]— A defendant mortgagee (a bank) by its answer in support of a plea, denied that a sale, impeached by the bill, was made by virtue of the power of sale in the mortgage. Upon argument of the plea, it was ultimately ordered that the benefit of the plea be saved to the hearing. Defendant put in a further answer, claiming that the sale should be deemed an execution of the power of sale in the mortgage. *Held*, at the hearing, that the defendant bank having disclaimed any such defence in its answer accompanying the plea, could not rely upon it. *Brougham v. Melbourne Banking Corporation*, 6 V.L.R. (E.,) 214, 226; 2 A.L.T., 81, 84.

Decree in Equity Suit in County Court—Dismissing Plaint for Specific Performance.]—A decree in the County Court dismissing a plaint for specific performance of a contract for the purchase of land, which plaint alleged the agreement for sale, payment of the purchase-money, delivery of possession to, and expenditure of money on the land by the plaintiff, is an estoppel to the plaintiff's setting up such agreement, payment of money, delivery of possession and expenditure on the land, as a defence to a subsequent action against him for trespass to the land in question. *Marks v. Aspinall*, 8 V.L.R. (L.,) 116; 4 A.L.T., 2.

Per Stawell, C.J.—All the reasons given for a judgment are not necessarily so much a part of the decision as to amount to an estoppel on the points referred to in those reasons. But, if the Judge finds that certain facts exist, every one of which separately may be necessary to his decision, his decision may then operate as an estoppel on each of such facts. *Ibid.*

Plea of—Admissibility of Evidence When Issue of Facts Taken.]—A judgment in the County Court, in a suit for specific performance of an alleged contract for the sale of land, was recorded simply as "suit dismissed." Such judgment was pleaded as an estoppel in another action to recover money alleged to have been paid under such contract, and issue of fact was taken on such plea. *Held* that evidence was admissible to show on what grounds the Judge of the County Court had dismissed the suit. *Aspinall v. Marks; Marks v. Aspinall*, 8 V.L.R. (L.,) 217.

2. By Deed.

N.G., R.G. and J.W., by deed, February, 1860, assigned all their property to trustees in trust for creditors. In this deed the parties were described as "N.G., R.G., and J.W., carrying on business at Geelong, in co-partnership under the style of N. and R.G. and Co., and the said N.G. and R.G., carrying on at Melbourne a separate business under the style of N. and R.G., of the first part." In the schedule to the deed there was a column headed "Estate;" and in this column, opposite each creditor's name, was inserted either N. and R.G. and Co., or N. and R.G. In a suit to administer the trusts of the deed, the Master certified, that in the business of a certain railway contract, N.G., R.G. and J.W. carried on such business at Geelong under the style of N. and R.G. and Co., and in Melbourne under the style of N. and R.G., and that certain debts set out in the first schedule of the report were respectively contracted in relation to the contract. Upon exceptions, the most material being that the two firms of N. and R.G. and Co., and N. and R.G. were separate and distinct firms, *Held*, by *Molesworth, J.*, that the schedule did not operate by way of estoppel, so that it could not be contradicted as to the nature of the claims of the several creditors, but that the deed afforded strong evidence that the firms were distinct; that the evidence before the Master supported this view, and exception allowed. *Held*, by the Full Court, that no part of the deed bearing on the question was so clearly and distinctly the words of a person executing as to amount to an estoppel; but that the deed afforded evidence of an admission which was more than outweighed by the other evidence, and that as regarded the creditors generally, there was only one firm. Appeal allowed, and exception overruled. *Heape v. Hawthorne*, 2 W.W. & A'B. (E.,) 76.

At Law and in Equity—Effect of Recitals.]—Where a marriage settlement recited an agreement by the fathers to settle each £500 on the marriage, and then recited the payment, which was not in fact made, in a suit by the trustees of the settlement against the executors of one of the fathers to recover his contribution, *Held* that, though the only evidence to satisfy the "*Statute of Frauds*" was the deed itself, and as it contained an assertion of the fulfilment of the agreement, its parts could not be separated at law, so as to insist upon the first and deny the second, coupling the Statute with the estoppel of the deed; yet that in equity relief could be granted, and that the trustees, by executing the deed, made themselves responsible to the *cestuis que trustent* for the £1000; and that since the deceased would be guilty of a fraud if he did not indemnify them, his executors should pay the deceased's share out of his estate. *Gordon v. Murphy*, 4 W.W. & A'B. (E.,) 120.

Recital in Bond—Crown not Estopped by.]—The Secretary of the Board of Agriculture being required to give a bond for the faithful discharge of his duties, gave one to the Queen, reciting that he had been appointed to a certain office "in the service of the Government of Victoria." On a petition by the secretary against the Queen for a retiring allowance, under Sec. 40 of the "*Civil Service Act*," No. 160, *Held* that the Crown was not concluded by the recital in the bond, or by the fact that the security was given to the Crown instead of to the Board, the secretary's employer. *Matson v. The Queen*, 2 V.R. (L.,) 233; 3 A.J.R., 27.

Surrendering Interest in Lease by Dissolution of Partnership.]—W., who was in possession of land under a lease, entered into partnership, and by the deed of partnership the land was declared to be partnership property. By the terms of dissolution of the partnership, which was dissolved during the currency of the lease, the assets devolved on a third partner, W. declaring to an incoming partner that he had no further interest in the partnership property. In an action for ejectment by W. against an assignee of his former partners, *Held* that the deed of partnership, the terms of the dissolution, and the letter did not estop W. from claiming under the lease. *Wood v. Hutchings*, 2 A.J.R., 58.

Recital that Grantor was Seised in Fee Simple in a Conveyance Upon Trust.]—G., by a deed of January, 1857, conveyed land to S. in fee. By a deed of July, 1857, which recited that G. was seised in fee, and to which S. was an executing party, G. conveyed to T. upon trust for S.'s

wife for life, and by a deed of December, 1863, T. conveyed, with the consent of S.'s wife, to S. upon certain trusts, S. executing this deed also. In an action of ejectment as to the land, plaintiff claimed as a trustee in place of S., and the defendant claimed directly from S. as beneficial owner. The jury found a verdict for defendant. Upon rule *nisi* to enter verdict for plaintiff, *Held* that S. and those claiming through him beneficially were not estopped by the recitals in the deeds of July, 1857, and December, 1863, as to G.'s being seised in fee; that such recitals might be sufficient to satisfy the "*Statute of Frauds*" in establishing a trust in S., but that they were proved to be untrue, and that plaintiff had not established a trust. Rule discharged. *Moore v. Hart*, 5 A.J.R., 177.

Creditor's Deed—5 Vic., No. 9, Secs. 33, 34, 36—Recital—Schedule—Execution by a Creditor.]—A. executed a deed of assignment in favour of creditors under 5 Vic., No. 9. The deed recited that A. was indebted to creditors in sums specified in the schedule opposite their names, and contained a release as to such debts. B., a creditor opposite to whose name in the schedule a sum of £834 appeared, executed this deed with other creditors below the schedule. B. filed a bill for payment of a dividend on a larger sum of £1300, which the bill alleged to be due to him at the date of the deed. *Held* that B. was estopped by his execution of the deed from claiming a dividend on such larger sum, and that nothing in the Act 5 Vic., No. 9, affected such estoppel. *Hermann v. French*, 5 V.L.R. (E.,) 15.

Creditors' Deed—"Insolvency Statute 1865"—Trustees not Estopped by Execution of an Invalid Deed from Paying Dividend to Creditor.]—*In re Upton and Bowes*, 2 V.R. (E.,) 117; 2 A.J.R., 68, *post* under INSOLVENCY — Composition Deeds.

Grant by Person Having no Estate—Subsequent Acquisition of Fee—Conveyance in the Meantime by Grantee.]—Where a person, who has no actual estate in land, purports to grant it by deed, and subsequently obtains the fee, though an estate may pass by way of estoppel, the subsequent acquisition, though feeding the estoppel, does not vest the estate in the grantee by relation, as from the date of the execution of such deed, so as to vest, as a matter of course, the estate in a person to whom the grantee has conveyed the property between the dates of the deed and of vesting the fee in the grantor. *McVea v. Pasquan*, 8 V.L.R. (L.,) 347, 361, 362; 4 A.L.T., 101.

Mining Lease—Provision in ultra vires—Lessee Executing Estopped from Objecting.]—*Matt v. Peel*, 2 V.R. (M.,) 27; 2 A.J.R., 133, *post* under MINING—Interests in Mines—Leases; but *see* contra, *Barwick v. Duchess of Edinburgh Company*, 8 V.L.R. (E.,) 70; 3 A.L.T., 68, 121, *post ibid.*

Recital as to Consideration.]—A mortgagee of land and a life policy compromised with an insurance company, selling the land to the company for £1170, and receiving £1293 as for the policy. The transfer of the land (an instrument under Act No. 301) stated the consideration to be £2463—the total amount received from the company. *Held* that it was not unusual in conveyances to state the whole payment as the consideration for each conveyance, notwithstanding that the parcels in each may have been separately valued, and that at most the mistake as to the consideration put upon the party making it, the burden of showing clearly what the real consideration was, and that the statement of consideration in the instrument was not conclusive. *Walpole v. Colonial Bank*, 10 V.L.R. (E.,) 315, 331; 6 A.L.T., 147.

3. By MATTER IN PAIS.

Admission of Right of Person to Goods Stored.]—C. and W. stored goods with J. C. and W. sold some of the goods to P., but the goods were not to be delivered until the price was paid. P. sold fraudulently to B., and left Victoria without paying C. and W. J. had acknowledged C. and W.'s right, and on the sale to P. signed a memorandum to the following effect:—"Received for storage from P." The goods had not been set apart, and could not be identified. B. brought an action of trover against J., and obtained a verdict. On rule *nisi* for a nonsuit, *Held* that an estoppel can only be used by the person in favour of whom the matter of estoppel arises, and that J.'s admission in P.'s favour could only be used by P. alone and not by B., to whom P. had fraudulently sold. Rule absolute. *Beckx v. Jones*, 2 W. & W. (L.,) 313.

Between an Incorporated Company and an Individual.]—As between individuals the principle of estoppel is equitable in results, but as between a company and an individual, to say that members having assented to and acted upon a rule, not binding the company and all its members because illegal or beyond its powers of law-making, should be estopped would be most unjust, as absentees and minorities themselves being free, might enforce liabilities and obligations to which majorities voting for such rule would be bound. *Nolan v. Annabella Company*, 6 W.W. & A'B. (M.,) 38; N.C., 19.

For facts, *see* S.C., *ante column* 153.

Director of Company—Assent as Director—Private Capacity.]—*Semble*, that a director of a company who has, *qua* director, knowingly assented to the company's giving a mortgage is, in his private capacity, precluded from raising objections as to the validity of such mortgage. *Commercial Bank v. M'Donald*, 2 V.R. (L.,) 211; 2 A.J.R., 120.

Director of Company—After Ceasing to Act as Such not Estopped from Getting Possession of Company's Mining Claim Through Information Received Whilst Acting as Manager.]—*Lennox v. Golden Fleece and Heales United Company*, 4 A.J.R., 154, *post* under MINING—Interest in Mines—Claim—Effect of Forfeiture, &c.

Acting on a Document as a Final Certificate.]—Where it was provided in a contract for the performance of certain public works that nothing should be deemed due to the contractor from the Board of Land and Works till the Engineer-in-Chief had presented his final certificate that the works were properly completed, and the Engineer, on the request of the contractor, sent him a document purporting to be a final certificate, but which was a mere return, and the contractor, in good faith, acted on such document, *Held* that the Engineer, as a servant of the Board, having at the contractor's request forwarded him a document purporting to be a final certificate, and the contractor having acted upon it, the Board were estopped from denying that it was a final certificate. *O'Keefe v. Board of Land and Works*, 1, A.J.R., 145.

Allowing Informal Affidavit to be Used.]—A person who has had an opportunity of objecting to an affidavit on the ground that there was an erasure in the jurat, but who does not take such objection and allows the affidavit to be used, cannot afterwards set aside a proceeding founded on the affidavit, on the ground of the defective jurat. *Ex parte Usher*, 2 V.R. (I.E. & M.,) 3; 2 A.J.R., 37.

Bill of Exchange — Acceptor Estopped from Objecting to Capacity of Drawer.]—*See Coombs v. M'Dougall, ante column* 92.

Promissory Note—Forging of Signature—Ratification.]—*See Kernan v. London Discount and Mortgage Bank, ante column* 102.

Order for Payment of Money — Person Giving When Estopped from Revoking.]—*Grice v. Johnson*, 2 A.J.R., 61, *post* under NEGOTIABLE INSTRUMENTS—Other Documents.

Party Suing to Rescind His Own Act.]—A person is not allowed, as plaintiff in a Court of Law, to rescind his own act on the ground that such act was a fraud on some other person, whether the party seeking to do this has sued in his own name only, or jointly with such other person. *Nichol v. London Chartered Bank of Australia*, 4 V.L.R. (L.,) 324, 329.

For facts, *see* S.C., *ante column* 83.

Person Taking Up Part of a Street as a Claim — Not Estopped from Setting Up Want of Jurisdiction in Warden to Adjudicate Thereupon as to Forfeiture.]—*Schonfeldt v. Beel*, 1 V.L.R. (M.,) 1, *post* under MINING—Interests in Mines—Claim—Generally.

Depriving Person of Estate on Ground of Estoppel—What the Conduct of the Person Must be.]—*Atkinson v. Slack*, 2 V.L.R. (E.,) 128, *post* under WAIVER.

Acts and Words.]—*Per Williams* and *Holroyd, J.J.*, A person may, by his acts and words, *i.e.*, by electing to take advantage of the contract, so conduct himself as to estop him from saying that a written contract is not a sufficient memorandum within the "*Statute of Frauds.*" *Ford v. Young*, 8 V.L.R. (E.,) 93, 105, 107; 3 A.L.T., 128.

Vendor Answering Requisitions and Producing Title.]—The production of the title to land, and answering "without prejudice" requisitions on the title, does not estop the vendor from afterwards disputing the validity of the contract of sale. *Per Molesworth, J. Ross v. Victorian Permanent Building Society*, 8 V.L.R. (E.,) 254, 264; 4 A.L.T., 17.

Trespass—Defendant Estopped by Admission from Disputing Plaintiff's Title.]—*See Byrne v. Bateman*, 5 A.J.R., 78, *post* under TRESPASS—To Lands and Houses.

Lease Under Seal to A.—Written Agreement to Accept B. as New Tenant, and Acceptance of Rent from B.—Lessor Estopped from Enforcing Covenants Against A.]—*Sabelberg v. Scott*, 5 V.L.R. (L.,) 414; 1 A.L.T., 101, *post* under LANDLORD AND TENANT—Termination of Contract—Surrender.

General Principles.]—*Per Full Court.* A person is bound to disclose his rights if he knows that another will be injuriously misled by their concealment. But the duty of making disclosures is particular not general. A man is not bound to disclose his rights to all the world, lest somebody should be injured by ignorance of them, nor liable if anybody is injured by such ignorance without his knowledge.

J. was owner of certain property and allowed his son, who had the same name, to possess himself of the title deeds of this property. The son mortgaged this land, representing himself as owner, to Z. and C., and J. afterwards confirmed the mortgage. The son, still representing himself to be the owner, mortgaged the property by way of second mortgage to E., which J. refused to confirm. *Held*, affirming *Molesworth, J.*, in a suit by E. against Z. and C. seeking to redeem them, that the son had really nothing to mortgage, and that E. was not really a mortgagee, and that J. was not estopped from setting up his title against E. *Ettershank v. Zeal*, 8 V.L.R. (E.,) 333, 343; 4 A.L.T., 90.

EVIDENCE.

1. *Admissions, Declarations, and Entries Against Interest.*
   - (*a*) *Admissions, column* 415.
   - (*b*) *Declarations, column* 416.
   - (*c*) *Entries Against Interest, column* 416.
2. *Presumptions, column* 417.
3. *Witnesses.*
   - (*a*) *Competency, column* 417.
   - (*b*) *Practice Relating to.*
     - (1) *Oaths and Declarations, column* 418.
     - (2) *Refusal to Answer, column* 418.
     - (3) *Cross-Examination, column* 418; and *see* also NEW TRIAL.
     - (4) *In other cases, column* 419.
4. *Commission for Examination of Witnesses, column* 419.

1. Admissions, Declarations, and Entries Against Interest.

(*a*) *Admissions.*

Of Agent—"Without Prejudice."]—Evidence cannot be excluded on the ground that the person, who was the mere conduit-pipe in the offer of compromise, has afterwards become involved in a transaction not then existing. An agent may *quâ* agent guard himself against all contingencies by making an offer of compromise "without prejudice, not only to this suit, but to all future transactions;" but where an agent makes a communication pending an action with a view to compromise, and other proceedings not then contemplated are afterwards instituted, such a communication ought not to be excluded simply because it is made "without prejudice;" that reservation of "without prejudice" being made, not with respect to the agent personally, but to the person whose interest was then affected. *Goodman v. Hughes*, 1 W. & W. (E.,) 202, 221, 222.

Admissions of a defendant may be used as evidence of a case made by the bill, though not put in issue. *Bruce v. Ligar*, 6 W.W. & A'B. (E.,) 240.

Admissions in Sworn Answer.]—*See Allen v. Lane*, 2 W. W. & A'B. (E.,) 1, 8; *and Cunningham v. Platt*, 8 V.L.R. (E.,) 55, 67; 3 A.L.T., 126, *post* under Practice and Pleading—In Equity—Answer.

Of Person Since Dead—Testimony in Person's Own Favour.]—Courts are disinclined to act upon the testimony of parties in their own favour deposing to transactions between themselves and deceased persons. In a suit to establish a resulting trust in land purchased with plaintiff's money, but conveyed in trust for his wife and children without his consent, an admission by the wife that she had received the purchase-money for the land from her husband held inadmissible after her death. *Mason v. Sawyers*, 2 V.R. (E.,) 36; 2 A.J.R., 12.

By Leaving Letter Unanswered.]—Where a person is addressed by letter on a subject that does not concern him, he is not under any legal obligation to answer any statement in that letter, and his silence is not to be taken as an admission by him against himself of the truth of the matter stated. On the other hand, if the matter do concern him, it is his duty to reply, and if he abstain from so doing, his silence affords strong evidence to go to a jury of an admission by him that he had no excuse to make, and no defence to offer to the charges. *Newcomen v. O'Grady*, 2 V.R. (L.,) 214; 2 A.J.R., 123.

O., a contractor for the formation of a railway, had a letter addressed to him as follows:—"I have been instructed by N. to inform you that your men have removed the fence from his ground, and his horses and cattle are straying about the country. Unless they are replaced he will hold you responsible for their loss, and will proceed against you for the trespass." O. did not answer this letter, as regards the injuries complained of. *Held* that since any injury done to the fence mentioned in the letter, by whomsoever committed, could not concern O., unless done by his authority or subsequent confirmation, O.'s silence did not amount to an admission against him that he was liable for the trespass complained of. *Ibid.*

As to Age.]—Admissions made by a plaintiff as to his age are inadmissible against him, when his own evidence as to his age is inadmissible for him. *In re Peebles, Hall v. Nelson*, 2 V.R. (I. E. & M.,) 52; 2 A.J.R., 38.

Voluntary Settlement—27 Eliz., Cap. 4.]—The act of executing a conveyance for value is only evidence of an admission that the settlor has parted with property under the Statute 27 Eliz., Cap. 4; and then it is only evidence against a person who, but for the voluntary settlement, would be owner of the settled property; and is not evidence against beneficiaries where the settlor has after insolvency conveyed for value. *Sugden v. Reilly*, 5 A.J.R., 36.

By Executors.]—Executors have power to make admissions respecting the liability of their testator binding on them as executors. *Morrison v. Sellar*, 4 A.L.T., 49.

Admission in Equity Suit—Ejectment at Law.]—An unqualified admission in the answer in an equity suit, in which the answer was read, that the person through whom the plaintiff claimed the land the subject of the suit, was seized in fee of such land at a certain date, is binding on the defendant, and concludes him, as a matter of fact and of law, in a subsequent action of ejectment in respect of the same land by the same plaintiff against him. *McVea v. Pasquan*, 8 V.L.R. (L.,) 347, 363; 4 A.L.T., 101.

(*b*) *Declarations.*

Where a person in possession of land as caretaker for the owner states to a third person his intention of holding the land on his own account, such statement is not against his interest, and is not therefore admissible as evidence after his death. *M'Cracken v. Woods*, 5 V.L.R. (L.,) 23.

(*c*) *Entries Against Interest.*

Of a Testator.]—In an action by executors for goods, &c., supplied by testator, a book of accounts was produced showing an account

between the testator and defendant, showing credit and debit entries. *Held* that such evidence was admissible. *Per Fellows, J.*, objections against evidence should be taken at the trial. *Williamson v. Langley*, 3 V.L.R. (L.,) 52.

Of a Deceased Trustee.]—Documents signed by a deceased trustee, comprising accounts tendered to a *cestui que trust* of interest received upon mortgages effected by such trustee with trust moneys in his own name, are admissible in evidence against persons claiming from such trustee after his death. *Chomley v. Firebrace*, 5 V.L.R. (E.,) 57.

2. Presumptions.

As to Letters.]—A letter properly addressed and posted will be presumed to have reached the person to whom it is addressed in the ordinary course of post, unless evidence to the contrary can be produced. *M'Kenzie v. Shire of Swan Hill*, 4 V.L.R. (L.,) 299.

See also *Regina v. Turner*, *ante column* 292.

Arrival of Letter at its Destination.]—Per Full Court—The presumption that a letter properly addressed, stamped, and posted, and which is not returned to the writer, arrived at its destination, is conclusive if not denied, and so strong that mere non-recollection of its receipt would be insufficient to outweigh it. *Cushing v. Lady Barkly Gold Mining Company*, 9 V.L.R. (E.,) 108, 122; 5 A.L.T., 98.

Presumption of Death.] — *See* Death, *ante column* 342.

Presumption of Marriage Ceremony Duly Performed.]—*See Regina v. Young, and Regina v. Griffin, ante columm* 287.

3. Witnesses.

(a) *Competency.*

Proof of—Lunatic Witness.]—Where an inmate of a lunatic asylum is tendered as a witness it is for the person producing him to satisfy the tribunal that his evidence is receivable. *White v. Hoddle*, 6 V.L.R. (E.,) 82, 91; 1 A.L.T., 193.

Interested Persons.]—Although the law now allows interested persons to give testimony, not much weight should be attached to their evidence. *Hasker v. Summers*, 10 V.L.R. (E.,) 204, 208.

Uncorrohorated Evidence of Interested Person.] —*Per Molesworth, J.* The evidence of a witness, deeply interested for himself as to transactions with a person since dead, should be regarded with strong distrust, but should not be rejected altogether. *Dryden v. Dryden*, 4 V.L.R. (E.,) 148, 154.

The Court is always reluctant to act upon the evidence of interested parties as to conversations between them and deceased persons. *Bennett v. Tucker*, 8 V.L.R. (E.,) 20; 3 A.L.T., 108, 111.

(b) *Practice Relating to.*

(1) *Oath and Declaration.*

Chinese—How May be Sworn.] — A Chinese witness, though not a Christian, may be sworn on the Bible, since the form of administering the oath is immaterial; the substance of the oath, the bringing of himself under a solemn obligation to tell the truth, by the witness only is essential. If a witness declare that a special form is binding on his conscience, the Court is obliged to accept it. *Regina v. McIlree*, 3 W.W. & a'B. (L.,) 32.

(2) *Refusal to Answer.*

When Answer May Criminate—Decision of Judge.] —*Per Holroyd, J.* (in Chambers)—The Judge must, when an objection is taken that to answer an interrogatory would tend to criminate the person answering, decide whether in his opinion the question may have such a tendency. *Roper v. Williams*, 6 A.L.T., 65.

Question that May Tend to Criminate—Objection on Oath.]—*Per Higinbotham, J.*, (in Chambers.) Where a party objects to answer an interrogatory on the ground that it may tend to criminate him, he must take the objection on oath. *Paterson v. Luke*, 6 A.L.T., 86.

(3) *Cross-examination.*

Evidence Given by or for One Defendant Against a Co-defendant.]—*Held, per Molesworth, J.*, that persons are in no way affected by the evidence called by other parties, but that the case as between plaintiff and each defendant should be rested upon the evidence which they have each respectively offered, but the Court allowed the co-defendant's counsel to examine a defendant, G., who was giving evidence, which it was objected was not admissible against the co-defendant. G. was then cross-examined by plaintiff's counsel, but not by counsel for co-defendant. *Held* by the *Full Court* that a defendant may cross-examine a co-defendant as he may any other witness, and that this right is necessarily based upon the assumption that the testimony of a witness (and therefore of a co-defendant) is admissible against the party desiring to cross-examine. *Meadway v. Garlick*, 4 W.W. & a'B. (E.,) 157.

Practice Upon Taking Evidence—Limits of Re-examination.]—Where in cross-examination evidence is allowed to be given which might have been successfully objected to, the right to re-examine upon it depends upon circumstances. If the evidence is wholly immaterial in any shape or form no explanation of it can be given; if it is material, then it may be explained; and much depends upon the intention with which the question in re-examination is asked. *Ireland v. Chapman*, 3 V.L.R. (L.,) 242.

If a plaintiff's witness in cross-examination makes a statement material to the issue in the case, evidence may be adduced to contradict such statement, if by such contradiction a material fact is proved, even though it has the effect of impeaching the credit of such witness. *Litton v. Thornton*, 7 V.L.R. (L.,) 4.

(4) *In other cases.*

Evidence of Witness Ordered Out of Court and Refusing to Go.]—The evidence of a witness who remains in Court after an order that all witnesses should leave the Court, cannot be rejected; but the witness may be punished for his disobedience. *Regina v. Guthridge and Brennan, ex parte Campbell,* 4 V.L.R. (L.,) 77.

4. COMMISSION FOR EXAMINATION OF WITNESSES.

When Granted or Refused.]—An application for a commission to examine witnesses should be regarded almost as of right if made *bonâ fide;* but when one of the parties makes an application for his own examination, the question of *bona fides* requires close attention. Where the defendant, who was in the jurisdiction when bill was filed, and put in an answer and then left for England, after express notice that an application to take his evidence by commission in England would be opposed, *Held,* by *Molesworth, J.,* and affirmed, that such defendant was not entitled to a commission to examine him in England as a witness on his own behalf. *Bruce v. Ligar,* 6 W.W. & A'B. (E.,) 240, 253, 263.

When Granted or Refused—Judge's Discretion.]—The Court will not interfere with the discretion of a Judge in granting a commission to examine witnesses. *Bartley v. Worthington,* 2 V.R. (L.,) 92; 2 A.J.R., 63.

When Granted or Refused—Discretion of Judge in Refusing.]—An application in Chambers by the defendant for a commission to examine witnesses in France, the place of his birth, in support of a plea of infancy, was refused. *Held, per Stawell, C J, and Stephen, J.,* that such a defence was not dishonest in the absence of fraud, and it is the duty of the Judge and the Court to consider what is conducive to the due administration of justice; *per Stawell, C.J.,* that in the absence of questions of inconvenience of whether the application was made *bonâ fide* or for the purpose of delay, the applicant is almost as of right entitled to a commission; *per curiam* that the Judge has a discretion in refusing a commission, but that the Court may review such discretion. Rule absolute for a commission. *Dé Saxe v. Schlesinger,* 7 V.L.R. (L.,) 127; 3 A.L.T., 1.

When Granted or Refused—Discretion of Judge — "Statute of Evidence 1864," Sec. 4.]—The issue of a commission under Sec. 4 of the "*Statute of Evidence* 1864," is a matter within the discretion of the Court, or the Judge to whom the application for the commission is made. Ordinarily, where the application is made *bonâ fide,* and where no other means exist by which material evidence might have been or can be procured, the application is readily granted; but the grant of a commission under the Statute is not a matter of right; still less is it a matter of course. *Merry v. the Queen,* 10 V.L.R. (E.,) 135.

See also S.C., APPEAL, *ante columns* 39, 40.

When Granted or Refused.]—*Higinbotham, J.* (in Chambers,) made an order on behalf of the plaintiff for the examination of an important witness on the day of his departure from the colony, the plaintiff paying the costs. *Forrest v. Eisert,* 2 A.L.T., 136.

Witness Within Jurisdiction—"Statute of Evidence 1864" (No. 197,) Sec. 4.]—Where a commission issued to examine a witness within the jurisdiction, *Held* that evidence given under it was admissible, inasmuch as the commission was based on an order which sufficiently complied with Sec. 4 of Act No. 197. *Hatt v. Hatt,* 3 V.L.R. (E.,) 227.

Form of Order.]—Where the order provided that signatures of witnesses should be attached, which was not done, *Held* that such a provision was merely directory, and that the proper time for taking such an objection was at the taking of evidence, and not at the hearing. *Ibid.*

Appointment of Commissioner.]—The Act No. 112, Sec. 87, authorises the appointment as commissioner of one of two persons named in the alternative in the commission. *In re Brookfield,* 1 W. & W. (E.,) 110.

Duty of Commissioner.]—It is the duty of a commissioner to use his own discretion as to the competency of witnesses examined by him, and to certify to the Court his opinion. *White v. Hoddle,* 6 V.L.R. (E.,) at p. 87.

Return of Commission—Validity.]—Upon the return of a commission for the examination of a witness abroad, it appeared that witnesses were first examined as to his sanity, and the witness, an inmate of a lunatic asylum, was then tendered, but objected to as incompetent, and his examination on the *voir dire* desired. By consent he was examined, without prejudice to objections as to his competency. Upon the hearing, objections were taken that the commission was not receivable, that the lunatic was not a competent witness, and that his evidence was inadmissible. *Held,* that as the examination had proceeded subject to all proper objections as to the competency of the witness, but not to the objection that the commissioner did not take the proper course to examine the witness, and that as the witness had stood examination and cross-examination satisfactorily, and the commissioner had furnished the Court with all the necessary materials to enable it to form an opinion of the witness's competency, the objections should be overruled and the commission held receivable. *White v. Hoddle,* 6 V.L.R. (E.,) 82; 1 A.L.T., 193.

Rules in Taking Evidence Under.]—*Per Molesworth, J.* The rules as to the examination of witnesses under a commission should be the same as in taking evidence before the Court. *Bell v. Clarke,* 10 V.L.R. (E.,) 283, 292.

Semble, that the proper time for striking inadmissible evidence out of a commission is at the hearing and not on an application to a Judge in Chambers before the hearing. *Ibid.*

Admissibility at Hearing of Objections not Noticed by Commissioners.]—Where evidence has been taken before a commissioner, and objections not noticed by the commissioner were urged at the hearing, *Held*, following an English authority, but without any definite ruling on the subject, that such objections might be heard at the hearing. *Graham v. Graham*, 3 A.J.R., 55, 56.

Objections as to Reception of Evidence—Notice to Produce.]—Where copies of letters were put in before a commissioner, the originals having been called for by notice to produce but not produced, and the notice itself was not put in or proved, *Held* that the objection as to the evidence was taken too late, and that it should have been taken at the time the copies were admitted as evidence. *Hatt v. Hatt*, 3 V.L.R. (E.,) 227.

Evidence Taken Under—Who May Use.]—Where in an inquiry before the master as to next of kin, evidence had been taken under commissions in support of the claims of certain persons, and another claimant coming in to prove subsequently thereto sought to use such evidence in support of her claim also, which was refused by the master, upon application to the Court, *Held* that such evidence could be used only by consent of the other claimants, the Court having no jurisdiction to make an order *in invitum* to that effect against them. *Attorney-General v. Huon*, 4 V.L.R. (E.,) 216.

An order was subsequently made as moved for upon terms of payment by applicant of a share of the costs and expenses of the commission. *Ibid.*

Costs.] — Certain evidence taken on commission related mainly to the matters on which a plaintiff succeeded. *Held* that the Prothonotary was right in allowing the plaintiff his costs of the commission, and disallowing those of defendant. *Urquhart v. Macpherson*, 3 V.L.R. (L.,) 159.

Abortive Commission—Injunction—"Statute of Evidence 1864," No. 197, Sec. 8—Costs.]—A commission to examine witnesses in Hamburg had failed, owing to the law of the country not allowing private persons to receive oaths, the oaths being only administered by the Court. The plaintiff had obtained an *interim* injunction. Upon application by summons for a fresh commission directed to the British Consul, the Primary Judge refused it, except upon terms of dissolving the injunction. Upon appeal, the order was made upon terms of the plaintiff paying the costs of the abortive commission, and giving an undertaking to answer damages to defendant if the injunction were dissolved at the hearing. *Wolfe v. Hart*, 5 V.L.R. (E.,) 52.

Agent's Charges—Commissioner's Fees—Taking Evidence on Commission.]—*Per Higinbotham, J.* (in Chambers)—A London agent (solicitor,) who has received instructions to take evidence on commission, is entitled to his charges on the commission, it being his duty to proceed with the commission until instructions have been sent to settle the claim unconditionally; and his charges after the time for the return of commission has expired are also to be allowed, as he has a right to assume that steps will be taken to extend the time. Commissioner's fees allowed under similar circumstances. *Anderson v. Berridge*, 3 A.L.T., 35.

Costs and Expenses—Commission not Proceeded With—Preliminary Expenses.]—It will not be laid down as a general rule that a party who has joined a commission is not justified in making preparations to take part in fulfilling the object of the commission, and in incurring costs payable between party and party, until he has received notice through the commissioner of an appointment for the examination of witnesses. And where the London agents of a party to a suit, who had joined in a commission, the moment the commission arrived took the necessary and proper steps to support his case before the commissioners, and the commission was not proceeded with, *Held, per Higinbotham, J.* (in Chambers,) that the agents were justified in not delaying to take such steps. *Austin v. Mackinnon*, 6 A.L.T., 19.

5. Affidavits and Depositions.

And *see* also Affidavit.

Deposition in Court of Insolvency—Use of in Suit in Equity.]—Depositions made by a person in the Court of Insolvency, subsequently a defendant in equity, are admissible in evidence in a suit to set aside a voluntary settlement made by the insolvent in favour of such person, and may be sufficient to establish the plaintiff's case. The whole of such deposition will be considered as in evidence, and the Court will attach such weight as it thinks fit to the different parts of it. *Davey v. Bailey*, 10 V.L.R. (E.,) 240.

6. Judicial, Official and other Documents.

Press Copies—Act No. 197, Sec. 29.] — The *"Evidence Act,"* No. 197, makes a press copy evidence without comparison and without any notice to produce the original, but does not make it primary evidence, except as to dispensing with notice to produce. *Harrison v. Smith*, 6 W.W. & A'B. (E.,) 182.

Press Copy of Letter.]—At a trial for uttering a cheque, a book was produced containing what purported to be a press copy of a letter addressed to the prisoner in due course of business by a clerk then in the employ of the drawer of the cheque. Evidence was given of the death of the clerk, and a witness, on seeing the document, said, "That's deceased's handwriting." *Held* that the copy was admissible under Sec. 29 of the *"Evidence Statute."* *Regina v. Ryan*, 1 A.J.R., 27.

Inadmissibility of Press Copy of Letter.]—A witness as to transactions between himself, a deceased plaintiff, and the defendant, produced in corroboration thereof a press copy of a letter, in which reference was made to such

transaction. The witnesses proved that it had been written and posted to the defendant, and had never been returned. *Held* inadmissible, being detached, unsought, and unexpected. *Atkinson v. Lansell*, 4 V.L.R. (E.,) 236.

Plan—Unnecessary Reference to in Deed.]—Where an unnecessary reference is made in a deed to a plan, not part of the deed, and the parcels are sufficiently described without the reference, the Court is not justified in looking at the plan merely on account of such reference. *Lee v. Melbourne and Suburban Railway Company*, 1 W. & W. (L.,) 34.

Similar Plan to a Lost One Admitted to Prove the Latter.]—To prove the lost plan of a reservoir, which had been deposited in obtaining the Act, as required by the Standing Orders, in the office of the Board of Land and Works, the Court admitted as secondary evidence, a similar plan lodged with the clerk of the Legislative Assembly. *Connolly v. The Shire of Beechworth*, 2 V.L.R. (E.,) 1.

Proof by Secondary Evidence—Lost Deed.]—Where a deed is shown to be probably in the hands of a person out of jurisdiction, that dispenses with necessity for further inquiry as to loss, and secondary evidence of its contents is admissible. *Hunniford v. Horwood*, 5 V.L.R. (E.,) 250.

Documents Verified by Affidavit.]—Such documents must be marked by the commissioner before whom the oath is sworn, and are not sufficiently identified otherwise, though referred to in the affidavit and inseparably annexed to it. *Rossiter v. O'Shanassy*, 2 W. & W. (L.,) 121.

Judicial Proceedings — What are — "Evidence Act," No. 100, Sec. 37.]—Proceedings before justices in New Zealand, sitting merely to commit for trial and not to hear and determine, acting ministerially in fact, and not judicially, are within the meaning of Sec. 37 of the "*Evidence Act*," No. 100, and may be proved in Victorian Courts in the manner prescribed by the Act. *Eastwood v. Bullock*, 1 W.W. & A'B. (L.,) 92.

Extract from a Marriage Register of a Parish in Middlesex, England—52 Geo. III., Cap. 146—Independent Evidence of the Existence or Place of Book from which Extract is Taken.]—Where the only evidence of the existence of a marriage register from which an extract was taken which was put in evidence, was an English Statute 52 Geo. III., Cap. 146, by which the existence of parish registers was enacted, such extract was admitted, though hesitatingly, as evidence. *Graham v. Graham*, 3 A.J.R., 55, 56.

Pound-Keeper's Book—Act No. 197, Sec. 25—"Pounds Act," No. 478, Sec. 21.]—Under Sec. 21 of the Act No. 478, the pound-keeper is a public official required to keep a book for special purposes, and to insert in it certain specified particulars in which the public are interested; and such book is accessible to the public, and cannot be removed from his residence without inconvenience to the public. Such a book is therefore within Sec. 25 of the "*Evidence Statute*," No. 197, and entries in it may be proved by a certified extract, giving information necessary to support an action for wrongful impounding. *Jones v. Falvey*, 5 V.L.R., (L.,) 230; 1 A.L.T., 23.

Banker's Books.]—*See ante column* 76.

Proof of Bank Charter — Copy of Supplemental Charter.]—*Regina v. Dickson, ante column* 299.

Exhibits—Notice to Admit.]—A deed admitted by the defendant's solicitor, on the usual notice to admit, if put in and marked as an exhibit, is in evidence, even if the admission itself is not put in. *Glass v. Simson*, 2 W. W. & A'B. (E.,) 67, 74.

Using.]—An exhibit put in by the plaintiffs for one purpose may be used by the defendants for all purposes. *St. George and Band of Hope Company v. Band of Hope and Albion Consols*, 2 V.R. (E.,) 206; 2 A.J.R., 81.

Exhibits—Custody of in Master's Office.]—The rule of Court (Rule 15 of Cap. 6,) requiring exhibits to be lodged in, and retained by, the Master's office, is only intended to preserve such exhibits until the hearing; and when that purpose is served, the custody should terminate. *Selwood v. Burstall*, 1 W. W. & A'B. (E.,) 96.

Return of Exhibits—Certificate of Title.] — In a suit to rectify certificates of title, these certificates of title were deposited as exhibits. *Held* that as Court had no power to correct the certificates themselves, and as the suit was concluded, these exhibits must be returned. *Campbell v. Jarrett*, 7 V.L R. (E.,) 137.

Exhibit—Application for Delivery Out of.]—Deeds were exhibited in a redemption suit by a defendant. After decree, a Bank claiming a lien on the deeds (alleged to have been lent to the defendant for another purpose, viz., bringing the land under Act No. 301, on an undertaking to return them) moved, on notice to the parties to the suit, for delivery out to the bank of the deeds. *Held* that the matter could not be dealt with on a summary application, and motion refused with costs without prejudice to the institution of a suit. *Jamieson v. Johnson*, 1 V.R. (E.,) 102.

7. Admission of Extrinsic Evidence.

(*a*) *To Explain, &c., Documents.*

To Contradict Statement of Consideration in a Deed.]—Parol evidence to contradict the statement of consideration in a deed is always admissible both at law and in equity, to sustain an allegation or to rebut a charge of fraud. *Gladstone v. Ball*, 1 W. & W. (E.,) 277, 287.

Voluntary Settlement.]—In a suit to support a settlement as against a subsequent conveyance, evidence was held admissible to show consideration for the settlement other than that expressed in the deed. *Ronalds v. Duncan*, 2 V.R. (E.,) 65, 80; 2 A.J.R., 30, 45.

To Explain Latent Ambiguity in Policy of Marine Insurance.]—*Wright v. Imperial Marine Insurance Company*, 6 V.L.R. (L.,) 334; 2 A.L.T., 65, *post* under INSURANCE—Marine—Construction of Policy.

To Explain Latent Ambiguity in a Covenant.]—*Henderson v. Woodburn*, *ante* column 281.

To Correct Mistake as to Name of Vendor in a Contract for Sale.]—Parol evidence is inadmissible to prove the name of a vendor in a contract for sale of land where the name is wrongly stated. *Ford v. Young*, 8 V.L.R., (E.,) 93; 3 A.L.T., 85, 128.

For facts, *see* S.C., *post* under VENDOR AND PURCHASER—The Contract—Statute of Frauds.

Plan Unnecessarily Referred to in Deed—When Court Will Not Look At.]—*Lee v. Melbourne and Suburban Railway Company*, *ante* column 423.

To Explain What Passed Under a Grant—Reference to Plan Showing Width of Streets.]—*Davis v. the Queen*, *post* under GRANT.

Parol Evidence to Explain Intention of Settlor, to Explain Parcels.]—*See Cunningham v. Platt*, *ante column* 354.

Mining—Inconsistent Plan—Surveyor's Evidence Inadmissible.]—Where two mining companies were bound by an agreement to which was attached a plan showing boundaries, and this plan was inconsistent with itself as to course of boundary lines in reference to certain landmarks, a surveyor's evidence to explain the discrepancy was held inadmissible in determining the true construction of the agreement and plan in a suit for an injunction to restrain an encroachment. *Semble*, it would be admissible in a suit to rectify agreement according to the intention of the parties. *The Band and Albion Company v. St. George United Company*, 3 A.J.R., 20.

(b) In Other Cases.

Against Heir-at-Law of Equitable Mortgagor.]—Where there has been a written memorandum accompanying a deposit of deeds as security by a person since deceased, parol evidence of the relative position of the parties and of the surrounding circumstances is admissible as against the heir-at-law, but not so if such verbal evidence amounts only to a promise or admission by the deceased. *Brent v. Jones*, 1 V.R. (E.,) 76, 82; 1 A.J.R., 2, 51.

To Limit Reduction of Money Payable under a Contract.]—Where under a contract between C. and B. and the Queen, the Crown put in evidence to show that a large sum of money should be deducted from that claimed by C. and B. on account of non-performance within a certain time specified, *Held* that evidence by C. and B. to show that the completion was delayed by the action of the Crown was admissible. *Bruce v. The Queen*, 2 W.W. & A'B. (L.,) 193, 216.

In a correspondence relating to the sale of certain pipes there was no identification, express or by reference, of any of the pipes. On an action brought by the vendor for goods sold and delivered, *Held* that extrinsic evidence was inadmissible to identify any particular pipes. *Wilkie v. Hunt*, 1 W.W. & A'B. (L.,) 66.

For facts *see* S.C., *post* under SALE—The Contract—Statute of Frauds.

To Prove Possession of Land.]—*Coutts v. Jay*, *post* under TRESPASS—To Lands and Houses.

Admission of Extrinsic Evidence to Prove that Parties to a Contract had Certain Facts Within Contemplation as the Probable Result of Breach of Contract.]—*Wright v. Langland's Foundry Company and Dyson v. Union Bank of Australia*, *ante columns* 336, 337, 338.

To Show of What Partnership Property Consists.]—*Per Holroyd, J.*—Where a partnership is proved to exist as an independent fact, whether by writing or by oral evidence, oral evidence may be adduced to show of what the partnership property consists, whether it be land or chattels. *Ogier v. Booth*, 9 V.L.R. (E.,) 160, 163; 5 A.L.T., 109.

8. COSTS AND EXPENSES OF EVIDENCE AND WITNESSES.

(a) Of Witnesses.

Scientific Witnesses—Taxation of Costs—Allowance.]—Where the Master, in taxing the costs, did not allow the costs of scientific witnesses qualifyir g themselves to give evidence following the English Chancery practice of 1853, *Held* that he had acted on the right principle, but, where surveyors were employed and paid for underground surveys and inspectiou, and to inspect and enlarge a map in the Mining Department on which the case turned, a reasonable allowance should have been made therefor. Review of taxation ordered. *Band of Hope and Albion Consols v. Young Band Extended Company*, 9 V.L.R. (E.,) 71; 5 A.L.T., 12.

Costs of Witnesses—Where Allowed.]—In an action on a policy of re-insurance for the amount of an original insurance, less the amounts received from other offices, the expenses of the witnesses who had been called to prove the amounts so received, were allowed on taxation. *National Marine Insurance Company of South Australia v. Halfey*, 1 A.L.T., 135.

Witnesses' Travelling Expenses—"Supreme Court Rules," Cap. 11, Rule 16—"Common Law Procedure Statute 1865," Sch. 38.]—Rule 16 of Cap. 11 of the "*Supreme Court Rules*" of February 1st, 1854, as to the travelling expenses of witnesses, does not apply to civil actions. Such expenses are now governed by the "*Common Law Procedure Statute* 1865," Sch. 38. *Cudmore v. M'Pherson, Brooks v. M'Pherson*, 8 V.L.R. (L.,) 208.

Maintenance Money for Detention as a Witness—Damages for Breach of Contract.]—In assessing damages for breach of contract, the jury are not at liberty to include in such damages, as a separate item, the plaintiff's maintenance as a witness during the time he has been awaiting the trial; and in respect of such maintenance, the Prothonotary has a discretion to make such order as he may think reasonable. *Norton v. Williamson*, 6 A.L.T., 128.

Master of Ship When Entitled to Detention Money as Witness.]—*See post* under SHIPPING—The Master.

Conduct Money of Debtor Under Debtor Summons—"County Court Statute 1869," Sec. 83.]—*Henry v. Greening, ante column* 261.

(*b*) *Of Evidence.*

Proving That of Which no Notice to Admit has been Given—Facts—"Statute of Evidence 1864," Sec. 12.]—Sec. 12 of the "*Statute of Evidence* 1864," which deprives a party of the costs of proving that of which he has given no notice to admit, does not apply to facts. *National Assurance Company of South Australia v. Halfey*, 6 V.L.R. (L.,) 12; 1 A.L.T., 135.

Subpœna Duces Tecum.]—The costs of a *subpœna duces tecum* will be allowed where the document, though not marked in evidence, has been used, though the witness has not been called. *Hardy v. Wilson*, 9 V.L.R. (E.,) 135.

And *see* cases *ante column* 421, under COMMISSION.

9. GENERALLY.

Overruling Decisions as to Admission or Rejection of Evidence.]—Decisions on matters of mercantile law, or on points affecting the established practice of conveyances, or other similar matters, should not be lightly overruled; but on such a matter as the reception or rejection of evidence (where the consequences of overruling a prior decision are comparatively trifling, and can only affect the particular case in which it happens,) the same reason does not exist. *Tracy v. Luke*, 2 V.L.R. (L.,) 64.

Appeal—Where it Lies as to Admissibility of Evidence.]—*Per Molesworth, J.*—An appeal lies to the Full Court against the ruling of the Supreme Court as to the admissibility of evidence given at the taking of evidence. *Hatt v. Hatt*, 3 V.L.R. (E.,) 227.

Statutory Declaration—Act No. 197, Sec. 34.]—A statutory declaration need not state that the declarant had conscientious scruples against taking an oath. *Regina v. Mollison, ex parte Warne*, 1 V.L.R. (L.,) 17.

Proof of Signature—Comparison.]—At a trial for forging a bill of lading it was desired to prove the handwriting of the master of a vessel to certain other documents, and a Customs officer produced a document described as the ship's manifest, which purported to be signed by the master, but which signature was not proved, and the other documents were compared with it. *Held* that the manifest was admissible in evidence as an original, since it was signed by a person (*i.e.*, the master) ostensibly performing the duty of passing entries at the Custom-house in the ordinary way of business, and that being so the comparison was admissible. *Regina v. Wright*, 2 V.R. (L.,) 204; 2 A.J.R., 119.

Comparison of Handwriting—"Evidence Act," Sec. 18.]—*Regina v. Nathan, ante column* 314.

Official Signature.]—Evidence as to the signature of the Deputy Registrar-General by a person who had never seen him sign his name, but who had seen it on many official documents known by him to be genuine is admissible. *Kozminsky v. Schurmann*, 7 V.L.R. (L.,) 474.

Signature of Deputy Registrar-General—Judicial Notice.]—The Court will not take judicial notice of the signature of the *Deputy* Registrar-General under Sec. 54 of the "*Statute of Evidence* 1864." Therefore a memorandum, signed by the *Deputy* Registrar-General, endorsed upon a stock mortgage that such mortgage has been filed, is not evidence of filing unless the signature be proved. *Teague v. Farrell*, 6 V.L.R. (L.,) 480; 2 A.L.T., 98.

Admissibility of Evidence—Judge's Discretion as to Admitting Evidence at a Certain Stage in the Proceedings.]—The Full Court will not interfere with the Primary Judge's discretion in admitting evidence in any stage of the proceedings. *In re Hodgson*, 5 A.J.R., 133.

See also S.P., *Vernon v. Mollison*, 5 A.J.R., 123.

Admissibility of Evidence—Recalling Witnesses or Calling Fresh Ones After Plaintiff's Case is closed.]—Though it is the practice of Courts to allow omissions which have occurred through mere oversight in the conduct of a case to be supplied, this does not apply where the plaintiff has closed his case and the defendant has called several witnesses to rebut it before the plaintiff thinks of recalling his witnesses. In such a case the plaintiff will not be allowed, contrary to the wish of the defendant (though if the defendant consent the Court may sometimes allow it,) to recall any of his witnesses or call fresh witnesses, and if such evidence be taken it will be inadmissible. (*In re Hodgson*, 5 A.J.R., 133 distinguished;) *Bell v. Clarke*, 10 V.L.R. (E.,) 283, 292-3.

Hearsay Evidence—When Inadmissible.]—Hearsay evidence is not admissible on cross-examination; and if admitted subject to objection a new trial will be granted. *Williams v. Spowers*, 8 V.L.R. (L.,) 82, 104; 3 A.L.T., 113.

Res Inter Alios Acta.]—Where, upon an issue to determine the value of land taken for a railway, evidence by a witness that he had offered a certain price for the land to the claimant, shortly before, was offered and rejected. *Held*, that it was properly rejected as being *res inter alios acta*. *Kilpatrick v. Board of Land and Works*, 5 V.L.R. (L.,) 122.

Admissible Evidence—Inquisition at Coroner's Inquest.]—In a suit upon the construction of a policy of life assurance—the policy being void in case of suicide by the assured—the inquisition at a coroner's inquest is admissible in evidence against the representatives of the assured. *Walpole v. Colonial Bank*, 10 V.L.R. (E.,) 315, 318, 319; 6 A.L.T., 147.

Forged Will—Admissibility of Statements of Deceased Witness to Will.]—*In re Buckley*, 5 A.J.R., 5.

Per Williams, J.—If counsel in the course of the trial seeks to get in certain evidence, not at the moment admissible, and it is admitted on an undertaking by counsel to do something to make it evidence, and he fails to carry out such undertaking, it would be the duty of the Judge to strike out such evidence from his notes, unless it would be admissible on other grounds than that on which it was tendered. *Horne v. Milne*, 7 V.L.R. (L.,) 296.

Admissibility.]—S., in order to prove his title, tendered in evidence a deed from A. to himself. The County Court Judge refused this on the ground that A's. title to the land was not established. *Held*, on appeal, that the deed was admissible. *Slack v. Terry*, 5 A.L.T., 120.

To Prove Contents of Destroyed Will.]—Statements by a testator to a witness as to the contents of a destroyed will, set up in opposition to another will, were held inadmissible. *Macoboy v. Madden*, 5 W.W. & A'B. (I.E. & M.,) 38.

Admissibility of Evidence of Conversations Showing a Fraudulent Intention.]—Where a trader being in debt made a voluntary settlement of the greater part of his property, on a suit by the official and trade assignees to set aside such settlement, *Held* that evidence was admissible of a conversation by the settlor, some time prior to the settlement, showing a fraudulent intention, though it was in respect of an intended settlement of a somewhat different character, and was not put in issue by the bill, and also evidence of other indebtedness, under a general allegation that the settlor was "also indebted to divers other persons." *Goodman v. Boulton*, 5 W.W. & A'B. (E.,) 86.

Admissibility of Conversations—To Prove Intent.]—N., a trader, being largely indebted to M. and Co., and still more largely to other creditors, by bill of sale assigned to M. and Co. all his stock in trade and available assets, to secure their antecedent debt, and an alleged present advance; evidence was tendered of a conversation about the state of N.'s property between N. and his solicitor shortly before executing the deed, and of another shortly after the execution; also of a conversation between N. and R., one of his other creditors, shortly after the execution. These conversations were offered as evidence of N.'s intent in executing the deed. *Held* that the statements made by N. to his solicitor shortly *after* executing the deed as to his intent in making it, were not admissible in evidence; but that the statements made by N. to R. were admissible. *Shaw v. Solomon*, 1 V.R. (E.,) 153; 1 A.J.R., 139.

Subsequent acts may be regarded as evidence of a previous intention. *Shaw v. Scott*, 3 A.J.R., 16, 128.

The statements of an insolvent, whether on oath or otherwise, made after the execution of the settlement, are not evidence against the trustees. *Ex parte Wright, in re Mahoney*, 2 W. & W. (I. E. & M.) 1.

Admissibility of Evidence—Deceased Witness.]—Where a witness at a former trial had died before a new trial was granted, permission was granted to the defendants to read the evidence of such witness from a certified copy of the Judge's notes at the former trial. *Polynesia Company v. Bank of N.S.W.*, 3 A.J.R., 52.

Privilege—Letters Written Without Prejudice—Use of by Defendant.]—Where a defendant had in a previous application in an action used the fact that he had offered to compromise the action, *Held* that evidence of such offer was admissible on behalf of the plaintiff at the trial, though the offer purported to be made *without prejudice*, since the previous use of the offer by the defendant divested it of the character of a privileged communication. *Johnston v. Jackson*, 6 V.L.R. (L.,) 1; 1 A.L.T., 133.

Letter to Solicitor — Privilege.] — *Nolan v. Connell, ante column* 362.

Professional Confidence.]—Papers of a testator showing rights of the executors as a class against one of the number individually, and put by that one in the hands of the solicitor for the executors, may be produced by that solicitor without breach of professional confidence in a suit by some of the executors against the executor who placed it in the solicitor's hands. *Bruce v. Ligar*, 6 W.W. & A'B. (E.,) 240, 255.

Privilege—Letters from Husband to Wife.]—A plaintiff in equity relied upon certain letters from the defendant to defendant's wife, which were set out in the bill. The defendant, in his answer, admitted these. The primary Judge overruled an objection to admit these, and admitted them as evidence. Upon appeal to the full Court—*Held*, per *Stawell, C.J.*, and *Williams, J.* (*dissentiente Molesworth, J.*,) that letters from husband to wife are privileged communications, and cannot be read against husband, but *quære* whether these letters admitted by him could on his objection at the hearing be read against him. *Larnach v. Alleyne*, 2 W. W. & A'B. (E.,) 39, 54, 64.

And *see Regina v. Dowling, ante columm* 314.

For other cases of Privilege, *see White v. Hoddle* and *Bradshaw v. Victorian Railway Commissioners, ante column* 375; and *see post* under SOLICITOR.

Onus of Proof—Offence against "Gold Fields Act," No. 32, Sec. 116.]—There are some exceptions to the general rule that onus of proof lies on the party sustaining the affirmative, one of

them being where proceedings are criminal. On an information for offence against Act No. 32, by carrying on business without a business license, such a proceeding is not criminal, and the *onus* of proof lies on the defendant to prove he has such a license, and not on the prosecutor to prove the negative. *McCormack v. Murray*, 2 W. & W. (L.,) 122.

Onus of Proof—Voluntary Conveyance—False Recitals.]—Wherever there is a variance between recitals in a deed and facts, the *onus* of reconciling the facts with the operative part of the deed lies upon those claiming under the deed. *Symonds v. Williams*, 1 V.L.R. (Eq.,) 199.

For facts, *see* S.C., UNDUE INFLUENCE.

Onus of Proof—Facts in the Knowledge of One Party.]—T. guaranteed to become responsible to S. in a certain amount, in consideration of his supplying building materials to the contractor "on completion of the house to T.'s satisfaction." S. sued on the guaranty, and proved that timber had been supplied to the contractor, that the house had been finished, and that T. lived in it. The County Court Judge nonsuited the plaintiff. *Held* that the facts were sufficient to launch the case against the defendant, and that then the *onus* of proving that the house was not completed to T.'s satisfaction lay on T. Appeal allowed; case to be re-heard. *Sharp v. Turnbull*, 5 V.L.R. (L.,) 103.

As to Age.]—The statements of a sister as to her brother having attained his majority were rejected where the sister was only two years older than her brother, and the brother's own evidence as to his age had been rejected on the ground that he was not old enough to be able to recollect facts as far back as the number of years that he stated his age to be. *In re Peebles, Hall v. Nelson*, 2 V.R. (I.E. & M.,) 52; 2 A.J.R., 38.

As to Age.]—The evidence of one person as to the age of another will not be admitted when the witness's means of knowledge are not shown. *Ibid.*

Proof of Majority.—Where the only evidence as to a person having attained his majority is the statement of the person himself, and where such person from his appearance has at the outside just attained his majority, his own statement cannot be received as evidence; but in the case of a person who is of sufficient age to recollect events for twenty-one years back, the statement of such a person as to his having attained his majority will be received. *Ibid.*

Evidence to Rebut User of Land as a Public Park.]—If the case for the Crown, *i.e.*, setting up a user, depends upon public documents and public user, the nature of the case renders minute and specific allegations by the Crown seeking an injunction against mining on such land less necessary, and comparatively vague statements are sufficient to launch the bill and throw on the defendants the burden of contradiction by special allegation and proof. And *see* also for the nature of the evidence, *Attorney-General v. Southern Freehold Company, Attorney-General v. United Hand in Hand and Band of Hope Company*, 4 W. W. & A'B. (E.,) 66, 78, 80 *et seq.*

For facts *see* S.C. under MINING—PRACTICE, &c.—In Equity—Injunctions Generally.

How Plaintiff may Prove His Case—Several Modes.]—Inconsistency, not multiplicity, forms the test by which several modes of proving the plaintiff's case may or may not be deemed admissible. *Thurlow v. Perks*, 1 W. W. & A'B. (L.,) 142.

Rebutting Case—Donatio Mortis Causa.]—A bill for an account against executors, charged them with the receipt of a sum of money standing to the testator's credit at his death. In their answer the defendants insisted that they were entitled to this sum as a *donatio mortis causâ*. *Held*, on the taking of evidence, that the plaintiffs might reserve their evidence against the *donatio* for a rebutting case. *Edwards v. Graham*, 3 W.W. & A'B. (E.,) 112.

Oath of One Witness Against Answer.]—Where notice of a fraud is denied by the answer, and directly proved by the evidence of one witness only, if there are circumstances tending to corroborate the oath of the single witness, the Court will act upon his evidence, although the answer is only directly contradicted by the one witness. *Ronalds v. Duncan*, 2 V.R. (E.,) 65, 81; 2 A.J.R., 30, 45.

Unsworn Statement of Accused Person—Act No. 197, Sec. 44.]—Sec. 44 of the Act places the unsworn statement of an accused person in this position: that if it is not inconsistent with the sworn evidence, it should be received as evidence. *Mack v. Murray*, 5 V.L.R. (L.,) 416.

Withdrawal of from Jury.]—On the trial of an action for libel, a letter written by one of the two defendants was read to the jury as evidence of malice; but the Judge, holding it inadmissible, withdrew it from the jury, and a verdict was found for plaintiff. On a motion for a new trial on behalf of defendants, *Held* that the application could not succeed, because, if the letter were evidence, the plaintiff was the person to complain of its withdrawal; and, if it were not evidence, the defendants had nothing to complain of. *O'Malley v. Elder*, 2 V.L.R. (L.,) 117.

Omitted from Judge's Notes.]—Evidence is not excluded by its being omitted from the Judge's notes if the parties and the Judge are agreed that such evidence was in fact given at the trial. *Coker v. Spence*, 2 V.L.R. (L.,) 273.

And generally as to improper admission or rejection of evidence *see* CRIMINAL LAW and NEW TRIAL.

EXECUTION.

What May be Sold Under.]—*Semble*, Mining shares may not be sold under a County Court execution. *Eddy v. Working Miners' Gold Mining Company*, 2 W.W. & A'B. (E.,) 110.

For facts *see* S.C., *ante column* 152.

County Court Judgment—When Execution May Issue—Order that Damages Were to be Reduced to Nominal Damages if Goods Sued for Were Returned.]—*Phillips v. Johnston*, *ante column* 260.

Effect of in Equity Proceedings.]—A judgment creditor has no *locus standi* to bring a suit in equity to set aside a conveyance by a judgment creditor as fraudulent under 13 Eliz., Cap. 5, until he has sued out execution at law. *Yandell v. Hector*, 4 W. W. & A'B. (E.,) 1.

See S.C., *post under* FRAUDULENT CONVEYANCE.

Improper Sale.]—*Semble*, that impropriety on the part of an officer selling under an execution at a legal sale is not a ground of relief as against the purchaser. *Perkins v. Willcock*, 2 V.R. (E.,) 222; 2 A.J.R., 127.

Duty, Liability, and Fees of Sheriff and Other Officers.]—*See* SHERIFF.

Sale of Land Under Fi. Fa.—Provisions of Act No. 301 Relating to.]—*See* cases *post* under TRANSFER OF LAND (STATUTORY)—Transfers—Under Sale by Sheriff.

Notice to Assignee—"Common Law Procedure Statute," No. 274, Sec. 285.]—S. was the assignor, by means of a bill of sale in favour of A., and gave instructions for the preparation of it by H., an attorney. H. had knowledge that the writ had been delivered to the Sheriff, and it was contended that H.'s knowledge was notice to A. *Held*, that there was no evidence that A. had made S. his agent to employ a solicitor to prepare the bill of sale, or that H. had acted as A.'s agent, and that H.'s knowledge was not notice to A. within the meaning of Sec. 285 of the Statute. *Anderson v. Maritime and General Credit Company*, 3 A.J.R., 28.

"Common Law Procedure Statute," Secs. 307, 308—Contract in N.S.W.—Judgment Obtained in N.S.W.—Execution in Victoria.]—The writ was in an action upon a contract made in N.S.W., defendant was living in Victoria, and the writ was endorsed for service out of the jurisdiction of the Supreme Court of N.S W., and judgment was in default signed in N.S.W., a memorial being duly filed in Melbourne. *Held*, that defendant could not now plead to the jurisdiction of the Court, to whom he owed implicit obedience. Ordered that execution in Victoria should issue. *Mullins v. Ditchburne*, 5 A.J.R., 119.

"Common Law Procedure Statute," Secs. 307, 308—Execution Issuing on Foreign Judgment—Corporation — Showing Cause Against.] — *Ruby Extended Tin Mining Company v. Woolcott*, 6 V.L.R. (L.,) 301, *post* under JUDGMENT—Foreign Judgment—Effect of.

What may be Enforced Under Execution—Decree in Divorce Jurisdiction of Foreign Court.] — *Fattorini v. Fattorini*, 6 V.L.R. (L.,) 454; 2 A.L.T., 87, *post Ibid.*

Entry of Satisfaction—Orders to Registrar-General.]—The Court has no power to make orders upon the Registrar-General to enter upon the register satisfaction of a registered execution. Such orders are quite unnecessary, since, when satisfaction is entered upon the judgment roll, a purchaser must know that the incumbrance has been removed. *Bear v. Race*, 2 V.L.R. (L.,) 225.

What May be Sold Under Fi. Fa.—Patent.]—A patent cannot be levied on under a *fi. fa. Brown v. Cooper*, 1 V.R. (L.,) 210; 1 A.J.R., 162.

Sale of Land Under Fi. Fa.—Advertisement—No. 19, Sec. 176.]—Land was levied on under a *fi. fa.*, and the sheriff published advertisements of his intention to sell the land—one in the local newspaper of the 1st December, 1870, stating that he would sell the land on January 3rd, 1871, and one in the *Government Gazette* of December 9th, 1870, fixing the date of the sale as January 10th, 1871. The sheriff held the sale on the 10th, and executed a transfer to the purchaser on the 31st of January. *Held* that this was a substantial compliance with the Act 19 Vic., No. 19, Sec. 176, and the land being under the "*Transfer of Land Statute*," an application to compel the Registrar-General to issue a certificate to the purchaser was granted. *In re "Transfer of Land Statute," ex parte Ross*, 2 V.R. (L.,) 10; 2 A.J.R., 19.

And, for cases of sale of land under *fi. fa.*, under the "*Transfer of Land Statute*," *see post* under TRANSFER OF LAND (STATUTORY.)

What May Not be Seized Under Fi. Fa.—Goods Assigned for the Benefit of Creditors.]—Goods assigned by deed to trustees for the benefit of creditors are protected by Sec. 285 of the "*Common Law Procedure Statute*," No. 274, and where a debtor assigned goods under such a deed to trustees for creditors, obtaining a release, and the deed was executed *bona fide* by the debtor after a writ of *fi. fa.* had been delivered to the Sheriff by a judgment creditor, but before seizure, and neither the debtor nor the trustees had knowledge or notice of the delivery of the writ, *Held* that the goods were not liable to seizure under the writ, and that the release was a sufficient consideration to the debtor for executing the deed. *Whitehead v. Griffith*, 1 V.R. (L.,) 18; 1 A.J.R., 29.

What May be Seized Under Fi. Fa.—Property Vested in Administratrix, c.t.a.]—Property which is vested in an administratrix *c.t.a.*, in trust for the use of herself and others, cannot be seized in execution for her personal debt, notwithstanding that her legal estate be coupled with a beneficial interest in herself for life. *Colonial Bank of Australasia v. Cooper*, 2 V.L.R. (L.,) 41.

What Passes Under Writ of Fi. Fa.]—At law a legal estate (whether the equitable and beneficial interest may or may not be in the legal owner) can be sold and conveyed by the Sheriff under a writ of *fi. fa.* against the legal owner. *Horwood v. Murdoch*, 3 V.L.R. (L.,) 358.

Alias Writ—Scire Facias.]—An *alias* may at any time be issued and executed without a *scire facias* where a writ of *fi. fa.* has been issued within six years after recovering judgment and returned. *Platts v. Wright*, 1 A.L.T., 131.

Equitable Execution by Appointment of a Receiver—"Judicature Act 1883," No. 761, Sec. 9, Sub-sec. 8.]—*See Ettershank v. Russell*, 6 A.L.T., 140, *post* under RECEIVER—Appointment of and Discharge.

Staying Execution Pending Criminal Proceedings.]—N. commenced an action against an insurance company on a policy of fire insurance. The company abandoned all defences except as to the amount; an order was issued from chambers referring the amount to arbitration. The arbitrators made an award in favour of plaintiff, and judgment was signed. Before execution was issued N. was committed for trial for arson, and *Barry, J.*, made two orders staying execution. Rule *nisi* granted to set aside the orders. *Nangle v. Graham*, 3 A.J.R., 53.

Staying Execution—Against a Company Where All the Directors had not Consented to the Judgment.]—*Robinson v. Melbourne Newspaper Company*, 4 A.J.R., 66, *see post* under INJUNCTION—Restraining Proceedings at Law.

EXECUTORS AND ADMINISTRATORS.

I. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

(1) *Renunciation and Disclaimer.*

Substitution of Trustees upon Executor's Application to be Relieved.]—Where an executor was placed in a troublesome position in managing a station property, and after four years of careful management, applied to be relieved, the Court made an order appointing two trustees to act in his place—the co-executor was an infant directed by the will to superintend the station and did so, though he had not obtained probate. *Farrell v. Evans*, 3 A.J.R., 71.

(2) *Power to Charge, Pledge, or Mortgage Estate.*

Administrator Entitled to Part of Property—Mortgage.]—A husband, administrator of his wife's lands, and entitled to one-third thereof, mortgaged, as administrator, to a bank, and expended the money in building on the lands; the bank subsequently entered as mortgagee in possession. Upon bill by the children, entitled to two-thirds of the land, for redemption, *Held, per Molesworth, J.*, that they were entitled to redeem two-thirds of the lands, but subject to payment of two-thirds of the increase of the value of the property by the improvements, inasmuch as the mortgage must be taken to operate as a mortgage of the administrator's own third interest, and of his claim against the entire land to be re-imbursed for buildings, &c. Affirmed on appeal, and *held*, that the administrator had power, during the minority of the children to make such a mortgage. *Droop v. Colonial Bank of Australasia*, 6 V.L.R. (E.,) 228, 233. *On appeal*, 7 V.L.R. (E.,) 71; 2 A.L.T., 90; 3 A.L.T., 13.

Administrator Holding Certificate of Title—Mortgage.]—An administrator holding a certificate of title cannot, by the joint operation of the "*Transfer of Land Statute*," and the Act No. 427 ("*Administration Act* 1872,") Sec. 7, effect mortgages which would be invalid in the case of land not under the "*Transfer of Land Statute*," and a mortgagee taking a mortgage from such executor is not protected. *Droop v. Colonial Bank of Australasia*, 6 V.L.R. (E.,) 228, 232; 2 A.L.T., 90.

Land Under "Transfer of Land Statute"—Duties of Administrator Relating to.]—Per *Stephen, J.* An administrator of land under the Act No. 301 can sell or mortgage, and is only accountable to his *cestui que trust* for what he does. *Droop v. Colonial Bank*, 7 V.L.R. (E.,) 71, 78.

See also *Swan v. Seal*, *infra* column 437.

(3) *Carrying on Testator's Trade.*

Carrying on Business Improperly—Liability for Loss Resulting.]—A testator directed that his business should be carried on by his executors, under proper management, for the support of his wife and children; and if, after sufficient trial, it were found that the business could not

be carried on without encroaching on the capital, to sell it and invest the proceeds. The executors appointed the testator's son manager, and left the entire control to him. He added other businesses not authorised by the will, and from the joint carrying on of them and the original business, loss resulted to the estate. *Held*, affirming *Stawell, C.J.*, that the executors were liable for the loss, inasmuch as it was their duty to ascertain whether the business was being carried on profitably, and if not being carried on profitably under the management of the son, whether it could be carried on profitably under any management, and if not, then to sell it and invest the proceeds. *Graham v. Gibson*, 8 V.L.R. (E.,) 43.

Affirmed, on appeal. *Ibid*, and 3 A.L.T., 106.

How Discretion to Sell or Retain Should be Exercised.]—Even though executors have a discretion given them by the testator to sell and convert the property, or retain it as it was at his death, they should wind up a business carried on by the testator as quickly as they can. *Knight v. Knight*, 10 V.L.R. (E.,) 195; 6 A.L.T., 62.

Administrator — Pledging Real Assets.]—An administrator is not warranted in carrying on trade with the deceased's assets, though he may mean to give the estate the benefit of the trade, and if he pledges any part of the real assets for the purpose of such trade to a person advancing money knowing that he means to apply it to such trade, such person cannot sustain his right to the security in a Court of Equity. *Swan v. Seal*, 10 V.L.R. (E.,) 57; 5 A.L.T., 196.

(4) *Right of Retainer.*

Quære, per Holroyd, J., whether an administrator having assets in his hands before answer and not having asserted his right of retainer before a common decree for administration has been made can assert his right in Master's Office; and whether, if he can do so, plaintiff (creditor) can then give evidence to show that defendant has waived that right although plaintiff has obtained a common decree only. *Bailey v. Wright*, 7 V.L.R. (E.,) 111; 3 A.L.T., 53.

Creditor Obtaining Administration—Member of a Firm—Debt Due to Firm—Commission.]—Where a member of a firm of creditors obtains administration to an intestate's estate he is entitled to retain out of the assets an amount equivalent to the debt owing to his firm by the intestate's estate. *Quære* whether in such a case commission would be allowed if retainer allowed. *Bailey v. Wright*, 9 V.L.R. (E.,) 67.

(5.) *Allowances and Payments to.*

(*a*) *Generally.*

Application of Capital to Maintenance.]—Where a testator directed his executors to carry on his business, under proper management, for the support of his wife and children, and if it could not be carried on at a profit, after sufficient trial, to sell it, and invest the proceeds, and, the business not beng profitable, the executors applied capital to maintenance, *Held* by *Stawell. C.J.*, and affirmed, that they could not be allowed such sums of capital. *Graham v. Gibson*, 8 V.L.R. (E.,) 43; 3 A.L.T., 106.

Payment Out of their Own Funds for Maintenance.]—Where executors had made themselves personally liable for certain sums of money for the purpose of carrying on a business directed to be carried on by the will, *Held*, by the Full Court, that they should be allowed these sums. *Graham v. Gibson*, 8 V.L.R. (E.,) 43, 53; 3 A.L.T., 106,

(*b*) *Commission.*

Before the Act No. 427—Testator Domiciled in New South Wales.]—A testator domiciled in N.S.W. left personalty in Victoria and N.S.W., and appointed B., a resident in Victoria, as his executor. At that time the rules of the Court in N.S.W. allowed a commission to executors. *Held* that B. was entitled to a commission at rate of 2½ per cent. on the personal estate collected in Victoria. *In re Chadwick's Estate*, 2 W. W. & A'B. (I. E. & M.,) 50

Allowance of Commission Before Act No. 427—15 Vic., No. 10, Sec. 16.]—The Court will not act in pursuance of Sec. 16 of 15 Vic., No. 10, allowing commission to executors and administrators, unless there are special circumstances justifying a departure from the rule that a trustee shall make nothing by his trust; on the principle that the long practice of the Court in not doing a thing which it had power to do, should have the effect of a law against doing it, unless under special and exceptional circumstances. *In re Hawkins*, 3 W. W. & A'B. (I. E. & M.,) 73.

Cases Before Act No. 427—Parol Agreement by Testator—Agreement by Beneficiaries—15 Vic., No. 10, Sec. 16.]—Suit by beneficiaries to administer trusts of a will. On further directions executors put in a claim to commission, based—(1) Upon an agreement by testator, which did not appear in the will. (2) A bargain with the beneficiaries for allowance of commission. *Held*, upon (1,) If it were not void by the "*Statute of Frauds*," as not in writing, being an agreement not to be performed within a year, the executors' duties not closing before a year after testator's death, or an agreement which partly affected an interest in lands, it was void, as contrary to the policy and letter of the "*Wills Act.*" Upon (2) That such a bargain would be contrary to public policy; but as these bargains showed some ground for remuneration, the Court would allow it under 15 Vic., No. 10, Sec. 16. A commission of 2½ per cent. for past services on *corpus* of personalty, and a future commission of 5 per cent. on the money coming to their hands and on the income allowed. *Carter v. Murphy*, 6 W. W. & A'B. (E.,) 166.

Cases Before Act No. 427—No Direction in Will—Law of New South Wales.]—A testator domiciled

in New South Wales, the owner of sheep stations in that colony, and of other property in New South Wales and Victoria, after bequeathing his property, appointed a solicitor resident in Victoria sole executor. The will contained no legacy or other provision for the remuneration of the executor. By the law of New South Wales an executor is entitled to commission on the personal estate coming to his hands. *Held, per Molesworth, J.*, that having reference to the practice in New South Wales, the executor should be allowed the same commission on the personalty in Victoria as he would have received had it been personalty in New South Wales, and there accounted for. *Held*, on appeal against the allowance of commission, that the Court has jurisdiction under 15 Vic., No. 10, Sec. 16, to grant such commission in any case; that the discretion is one properly exerciseable by the Court, and not in the Master's office; and that, as an exercise of discretion by the Primary Judge, the allowance of such commission would not in any case be reviewed on appeal. *Chadwick v. Bennett*, 1 V.R. (E.,) 109.

Cases Before Act No. 427—Zealous and Judicious Conduct of Executor.]—Although the Court has the power to give commission to an executor, testators may be assumed to have made their wills without reference to its exercise. The zealous and judicious conduct of an executor is not sufficient ground for giving commission. Commission refused to an executor whose conduct had been such, where no commission was directed by the will. *Nixon v. Goldspink*, 1 V.R. (E.,) 92; 1 A.J.R., 56.

When Commission Allowed or Refused on ex parte Applications—"Administration Act," No. 427, Sec. 25—Testator Dying Before Act in England—Executor Coming to Victoria to Wind Up a Complicated Business—Executor of Executrix.]—A testatrix died in England in 1870, appointing executors there. C., one of the executors, came to Victoria to wind up the business, which was very large and complicated. The testatrix was also executrix of J. McE. *Held* that the Act is retrospective, but the Court has a discretion. Commission allowed at rate of 2½ per cent., as compensation for C.'s pains and trouble (not as a matter of general right) over and above his expenses. No order as to J. McE.'s estate. *In re McEwan*, 5 A.J.R., 90.

A testator died in 1866, and the estate was administered in 1884. The Court allowed the executors and trustees a commission at the rate of 4 per cent. *Shevill v. Affleck*, 6 A.L.T., 131.

Act No. 427, Sec. 25—Executors Obtaining Probate in 1872—Legacy to Executors on Condition of Accepting Executorship—Real Estate Devised to Trustees Before Act No. 427.]—The testator died in December, 1871, and the executors obtained probate February, 1872; hy the will the testator gave a legacy of £100 to one of the executors, on condition of his accepting the office. *Held* that the executors were to be allowed commission at the rate of 2½ per cent. upon all personal estate received by them *after the passing of the Act;* that the circumstances under which the legacy of £100 was given did not necessarily import that it was given as a remuneration; that the Court has no jurisdiction where no suit is pending to allow commission, or to direct accounts of real estate devised to trustees before the passing of the Act No. 427. *In re Rolfe*, 5 A.J.R., 92.

Where a testator died in 1866, before the Act came into force, *Held*, following *in re Rolfe*, that in such a case the Court had no jurisdiction to make a summary reference for accounts and commission as to real estate. *In the will of Pain*, 9 V.L.R., (I. P. & M.,) 54.

Where Remuneration Given by Will—Promise of Remuneration by Testator—Inadequate Legacy.]—A testator by will appointed two executors, leaving them a legacy for their trouble. By codicil he revoked the appointment and appointed two other executors, leaving them the legacy conditionally upon their accepting the office. Before his death the testator had verbally promised that he would remunerate the executors for their trouble. The executors considered the legacy insufficient. Upon their applying to be allowed commission, *Held*, considering that the testator had verbally promised the executors compensation for their trouble, that the language of the codicil was different from that of the will, and that the "*Administration Act* 1872," No. 427, allowing the Court to grant commission (Sec. 25) had been passed, that commission should be granted. *In the will of Pender*, 4 A.J.R., 141.

Legacy Given to Executors on Condition of Accepting Executorship—No Bar to Commission.]—*In re Rolfe, ubi supra.*

"Administration Act 1872," Sec. 25.]—The "*Administration Act* 1872," Sec. 25, does not overrule the intention of testators, so that commission should be allowed contrary to their wish. *In the will of Millin*, 2 V.L.R. (I. P. & M.,) 58.

And where a testator had by a codicil to his will (both executed just before the Act) bequeathed a legacy of £100 a-piece to his executors and trustees, or to trustees appointed in substitution for the trustees originally appointed "if they should act," the Full Court, overruling *Molesworth, J.*, *Held* that it was not a clear intimation on the part of the testator that the executors were not to have commission, and referred it to the Master to allow what commission he thought proper, having regard to the fact that legacies were left. *In the will of Millin*, 2 V.L.R. (I. P. & M.,) 58, 86.

Remuneration Given by Will.]—Executors will be allowed commission, although the testator has in accordance with an intention previously expressed to them of remunerating them, given them each a legacy as an acknowledgment for the trouble of executing the trusts of the will. *In the will of Kay*, 2 V.L.R. (I. P. & M.,) 94.

The order was that the Master might allow commission without prejudice at the rate of 4 per cent. on the corpus of all principal monies and at the rate of 5 per cent. for rents and profits "which came or might come to their hands," the applicants to be deemed to have renounced their legacies, and not to charge otherwise for any costs and expenses in collecting the said rents and profits. *Ibid.*

Remuneration Given by Will for Services.]—Where a testator gives legacies to his executors in a manner clearly indicating that they are given as a remuneration for their trouble, the executors will be allowed no commission. *In the estate of Riley*, 4 V.L.R. (I. P. & M.,) 28.

That executors have had increased trouble, thereby incurring expenses which may be charged against the estate, affords no ground for granting commission. *Ibid.*

Legacy Left to Executors Proving the Will.]—Where a testator left a legacy to such of his executors as should prove his will, *Held* that this was not to be considered as to whether the commission should or should not be granted, but only as to the amount of the commission. *In the estate of Sargood*, 4 V.L.R. (I. P. & M.,) 43.

Direction that Executors Should Retain a Certain Sum to Repay themselves for Services.]—Where a testator directed that the executors should retain and divide equally between themselves a sum of £150 for the trouble they would have in the execution of the trusts, *Held*, affirming *Molesworth, J.*, that the words implied a payment for services, and the gift was not by way of bounty, and that the executors were not entitled to commission. *In the will of Fellows*, 5 V.L.R. (I. P. & M.,) 82; 1 A.L.T., 53.

Legacy to Executors for their Trouble.]—The Court cannot consider the adequacy or inadequacy of a legacy given by a testator to executors as remuneration for their trouble, and if one be given, however small, will refuse commission. *In the will of Richmond*, 8 V.L.R. (I. P. & M.,) 22.

Small Commission Fixed by Will.]—Where a will gives a small commission to executors (1 *p.c.*) as a remuneration for services, the Court will not make an order for commission. *In the will of Stanway*, 9 V.L.R. (I. P. & M.,) 36.

Commission—Executor Excluded by Will.]—The Court refused to allow commission to an executor where the testator had, by his will, bequeathed a commission to executors, excepting the applicant by name, who, moreover, took an interest under the will. *In the will of Bell*, 6 V.L.R. (I. P. & M.,) 100; 2 A.L.T., 92.

Commission—Rate—Verbal Expression of Intention of Testator.]—In allowing commission to executors the Court will not regard any verbally expressed intention of the testator as to the rate to be allowed. *In the estate of Sargood*, 4 V.L.R. (I. P. & M.,) 43.

Act No. 427, Sec. 25—Act 15 Vic., No. 10, Sec. 16.]—*Per Stephen, J.*, the Court will not grant on an *ex parte* application, permission to executors to pass accounts and retain a commission. *In the estate of Dean, In the estate of Richardson*, 7 V.L.R. (I. P. & M.,) 46; 3 A.L.T., 14.

But, *per Holroyd, J.*, the Court has jurisdiction on *ex parte* applications to make such orders, which should not be prospective. *In the estate of Swan, In the estate of Newton*, 7 V.L.R. (I. P. & M.,) 49; 3 A.L.T., 41.

"Administration Act 1872," No. 427, Sec. 25—Commission on Taking Accounts in Suit—Interest on Balances—Personalty and Rents Received Prior to Act.]—In an administration suit (reported 5 A.J.R., 25) it was referred to Master to take an account of trustees' receipts and disbursements "giving them all fair credits and allowances." The Master in his report allowed trustees, who were also executors—(1) Commission at rate of 5 per cent. on personalty received in 1865; (2) commission at rate of 5 per cent. on rents and profits of realty received prior and subsequent to Act No. 427; (3) commission at rate of 5 per cent. on interest received by trustees upon investments made by them; and (4) the Master disallowed a surcharge seeking to charge trustees with interest upon balances in their hands. On case coming before Court on exception to Master's report as to several items, the Court overruled exceptions to 1 and 2 and allowed exception to 3. Exception to 4 also was overruled because Master should not charge trustees with interest on balances unless so directed by decree. *Westwood v. Kidney*, 1 V.L.R. (Eq.,) 65.

Commission on Taking Accounts in a Suit.]—The Master, in taking the accounts in an administration suit, may allow commission to executors, without the express direction of the Court. *Pinnock v. Hull*, 2 V.L.R. (E.,) 18.

"Administration Act 1872," Sec. 25—On Taking Accounts in Suit—Power of Court to Reduce Rate Fixed by Master.]—*Per totam curiam.* The Supreme Court has jurisdiction to interfere with the amount allowed by the Master, under Sec. 25, as commission, and may reduce or take away the amount so allowed. An administrator employed a stock and station agent to sell part of the real estate. The agent deducted 1½ per cent. as commission, which was charged against the estate, but returned half per cent. to the administrator, who retained it for himself until the fact was discovered in the Master's office, when he refunded it. Under the circumstances, the 2½ per cent. allowed by the Master was reduced to two per cent. *Attorney-General v. Huon*, 7 V.L.R. (E.,) 30; 2 A.L.T., 130, 132.

Narrowing Commission — One Executor Dead—Property Out of Victoria.]—Where a large portion of the work had been done before the Act No. 427, came into force, and one of the executors who shared in that labour was dead, the Court as to property only in Victoria, allowed two per cent. on the *corpus*, and two per cent. on

the income of all property, the *corpus* of which had not borne commission. *In the will of Brown*, 1 V.L.R. (I. P. & M.,) 41.

No Commission Allowed on Property Out of Victoria.]—Where a testator dies possessed of property in this and other colonies, his executors, on passing their accounts, are only allowed commission on the property in Victoria. *In the estate of Sargood*, 4 V.L.R. (I. P. & M..) 43.

Future Commission—"Administration Act 1872"—Sec. 25.]—The Court in allowing executors to pass their accounts and receive commission, under Sec. 25 of the *"Administration Act* 1872," will not make an order for future commission on moneys to be received after passing the accounts. *In the estate of Hine*, 4 V.L.R. (I. P. & M.,) 64.

Form of Order.]—For form of order allowing executors to pass accounts and receive commission, *see In the will of Short*, 7 V.L.R. (I. P. & M.,) 25; 2 A.L.T., 114.

Contest Between Surviving Executor and Executors of a Deceased Executor.]—The executors of a deceased executor must arrange with a surviving executor as to the proportions in which the commission is to be divided; the Master will not have the additional trouble of apportioning commission put upon him. *In re Henry*, 1 A.L.T., 92.

Surviving Executor.]—F. and B., as executors, acted together till B.'s death. The Court allowed commission to F. and B.'s representative during B.'s life to be equally divided, and to F. alone a commission for assets received since B.'s death. *In the will of Wilsmore*, 3 V.L.R. (I. P. & M.,) 60.

Application for by One of the Executors.]—On an application by an executor for leave to pass accounts and for commission, the co-executrix who was entitled to all the property, did not concur in the application. The applicant had undertaken the office at the request of the testator, had done all the work, and had attempted to get the co-executrix to agree to the commission, and had sent her a letter intimating his intention to apply to the Court. The Court refused the application on the ground that an application by one executor to pass accounts without the concurrence of his co-executor should be refused; and intimated that if the applicant was entitled to a commission he should pay himself, or file a bill for administration. *In re Cameron*, 1 A.L.T., 128.

Carrying on Testator's Business—Rate Left to be Fixed by Master.] — Where executors were directed by will to carry on the testator's business, the Court granted an order for them to pass their accounts, with liberty for the Master to allow such commission as he thought fit. *In the will of Hodges*, 5 V.L.R. (I. P. & M.) 68.

Notice to Party Entitled to Surplus—Costs of Application.]—Where executors carried on the business of a testator who was in embarrassed circumstances, paid the creditors in full, and had a balance which was insufficient to pay them at the ordinary rate, and to which a person in England was entitled, *Held* that they should have given such person notice of their intention to apply for a commission, but order made for commission at rate of 5 per cent. under the circumstances. Executors must bear their own costs of passing the accounts. *In the will of Klemm*, 5 V.L.R. (I. P. & M.,) 90.

On What Property Commission Chargeable.]—The Court will not grant executors commission on income derived from investments of the *corpus*, on which *corpus* they have already received a commission. *In the estate of M'Lean*, 7 V.L.R. (L.,) 19; 2 A.L.T., 106.

See also S.P., *Westwood v. Kidney*, *ante column* 442; and *Sawyers v. Kyte*, 4 A.J.R., 144.

Allowance of Commission — When there are Unpaid Creditors.]—Where the creditor of an insolvent took out administration to his estate and paid creditors a dividend, the court made the usual order for commission and passing accounts. *In re O'Connor*, 5 V.L.R. (I. P. & M.,) 75.

But *quære*, whether the Court had power to do so when there were unpaid creditors; and where executors proved a will of an insolvent, paid the creditors 10s. in the pound, and seven months' after probate applied for commission, *held* that the Court would not sanction an *ex parte* adjustment so soon, and *quære*, whether it had power to do so at all. *In re Murdoch*, 5 V.L.R. (I. P. & M.) 77; 1 A.L.T., 19.

No Commission to Trustees—Act 15 Vic., No. 10, Sec. 16—No. 427, Sec. 25.]—The Court will not extend the power to refer to the Master to take accounts and allow commission under No. 10, Sec. 16, which relates only to executors and administrators, to trustees beyond the period of executorship under No. 427; though such trustees may be entitled under No. 427, when they are accounting under a proper proceeding. *In the will of Froomes*, 1 V.L.R. (I. P. & M.,) 17.

Commission Granted as to Original Executors Only.] — Where a testator appointed three trustees as executors, and one of them renounced and disclaimed, and another trustee was appointed in his place, on a motion by the two original and the substituted executor and trustee to pass their accounts, the Court granted the motion as to the original executors and trustees only. *In the estate of Sargood*, 4 V.L.R. (I. P. & M.,) 43.

Where an application was made for commission to an executor and a trustee, the Court granted the order as to the executor only. *In the will of Haines*, 4 A.L.T., 176.

A testator appointed two executors and an executrix; the first two were also appointed trustees. All three took probate and acted,

and then the real estate was handed over to the trustees. All three applied for liberty to account and for commission. *Held* that there was no jurisdiction to allow summary accounting by trustees. The Master was directed to take the accounts of the executor and executrix, but not of the execution of the trusts, with usual directions as to commission. *In the will of McMahon*, 9 V.L.R. (I. P. & M.,) 39; 5 A.L.T., 81.

Application for Commission by Creditor.] — An application by a creditor, who has taken out administration to the estate of his debtor for commission, should be made in the first instance to the Master in Equity. And if it be necessary to apply to the Court, the affidavit should state the amount of the debt, for the Court is adverse to the practice of small creditors taking the profitable administration of large property. The next of kin should also be informed of the application. *In the goods of Sanders*, 1 A.J.R., 2.

Trustees, Executors, and Agency Company—Act No. 644, Secs. 2, 8—Administration, c.t.a.]—*Held*, per Full Court, reversing *Molesworth, J.*, that where the Company was appointed administrator, *c.t.a.*, under power of attorney of an executor resident out of the colony, the company had power under their Act, Secs. 2 and 8, to fix the rate of commission. *In the will of H. Reynolds*, 7 V.L.R. (I. P. & M.,) 61; 2 A.L.T., 142, 156.

Commission—Of Trustees, Executors, and Agency Company—How Determined—Act No. 644, Sec. 8.]—Where a testator appointed an executor who resided in N.S.W., and the executor appointed the Trustees, Executors, and Agency Company his agent to obtain administration, *c.t.a.* in Victoria. *Molesworth, J.*, granted the application, but reserved to the Court the power to measure the rate of remuneration to be paid to the company in respect to the administration of the estate; and, according to the interpretation put upon Sec. 8 of Act No. 644 by *Molesworth, J.*, a distinction was drawn between cases in which the testator had appointed the company, and cases in which it was appointed as an attorney for an executor. Upon appeal, *Held* that the Court had no power to reserve to itself the right of fixing the amount of commission, but that the commission allowed should be that fixed by the Board of Directors, subject to the review of the Court. *In re Reynolds*, 2 A.L.T., 142, 156; 3 A.L.T., 29.

Residuary Legatee Opposing ex parte Proceedings.]—Where a residuary legatee opposed an application for passing accounts, and filed an affidavit stating his dissatisfaction with the accounts filed, *Held* that by 15 Vic., No. 10, Sec. 16, the Court had power to make an order to pass accounts, leave being given to the legatee to appear thereon, and making him bound thereby. *In the will of Wright*, 5 V.L.R., (I. P. & M.,) 61.

Accounts Not Filed in Time.]—In considering the amount of commission to be allowed executors, the Court will take into consideration the fact that they have not filed their inventory within fifteen months of the time of probate being granted. *In the estate of Sargood*, 4 V.L.R. (I. P. & M.,) 43.

Time Within Which an Application for Commission Should be Made.]—*Per Molesworth, J.* Executors should wait a year or so after taking out probate before making the application for commission. *In the estate of Allison*, 10 V.L.R. (I. P. & M.,) 93; 6 A.L.T., 143.

(6) *Payments by Executors.*

Part Payment of a Dishonoured Promissory Note Made Twice Over by Administrator Partly Through His Own Fault Party Through Default of Intestate.]—In a suit for administration against an administrator of an intestate, it appeared that the intestate had accepted a promissory note for £110 in favour of one G., from whom he had purchased land, this note being in part payment of purchase money. At time of death deceased had £90 in a bank to his credit, and the bank with whom the promissory note was deposited appropriated this amount towards part payment of promissory note. The defendant administrator afterwards paid the £110 to G., and the costs of conveyance in completiug the sale. *Held* that the loss of the double payment must fall on the defendant, and an exception against the Master's report in not giving credit to the estate for the sum of £90 so appropriated by the bank allowed. *Mulloy v. Mulloy*, 3 A.J.R., 7.

Commission paid by administrators to persons becoming sureties for the due administration of the estate will not be allowed as administratiou expenses, notwithstanding the fact that such commissiou was paid before the Rules which forbid such payments being treated as expenses were promulgated. *Attorney-General v. Huon*, 7 V.L.R. (E.,) 30, 41, 46; 2 A.L.T., 130.

Payment of Legacy to Married Woman Who had Obtained a Protection Order Under 21 and 22 Vic., Cap. 108, Sec. 6—Her Receipt an Effectual Discharge of Executors in Absence of Return to Cohabitation.] — *In re Dickason's Trusts*, 7 V.L.R. (E.,) 184; 3 A.L.T., 85, *post* under HUSBAND AND WIFE—Maintenance and Protection Orders.

(7) *Accounts by Executors.*

Filing Accounts—Regulæ Generales, June, 1873, Rule 16—Vouchers.] — An administrator filed his accounts before the Master, but had not produced vouchers. *Held* that that was sufficient compliance with Rule 16, and there was no authority to compel him to produce vouchers. *In re Benjamin Crosby*, 3 A.J.R., 117.

In Master's Office—Balance in Hands of Executors and Trustees—Interest.]—The Master should not charge the trustees with interest on balances unless so directed by the decree. *Westwood v. Kidney*, 1 V.L.R. (E.,) 65.

Power to Direct—Funds Received by Administrator, c.c a., in England—15 Vic, No. 10, Sec. 16.] —The Court has no power, under 15 Vic.,

No. 10, Sec. 16, to direct accounts as to funds received in England by an administrator, c.t.a., who acts as agent for executors in Victoria. *In the will of Kay*, 2 V.L.R. (I. P. & M.,) 94.

Liability to File Accounts—Act No. 427, Sec. 17—Rules, June 23rd, 1873, Rule 16.]—Rule 16 of the Rules of June 23rd, 1873, made under Sec. 17 of Act 427, directing executors and administrators to file accounts, is not *ultra vires*. Where, upon a rule *nisi* calling upon an administrator to show cause why he should not file an account under Rule 16, the administrator, in defence, showed a statement filed, which the Court regarded as totally insufficient, the rule was made absolute. *In the estate of Wolff*, 3 V.L.R. (I. P. & M.,) 44.

Filing Statsment of—No. 427, Sec. 17, and Rules, June 1873—Practice—Costs.]—A rule *nisi* had been obtained calling upon an administrator to file an account, and on the day before it was returnable the administrator's proctor handed to the proctor of the next of kin a statement of accounts, stating that it was to be filed forthwith, and offered to pay costs incurred up to date. *Held* that the next of kin being entitled to their costs, a tender of costs should be as nearly as possible according to the rules of law as to tender, and that a mere offer to pay was insufficient, that cash enough to cover the costs should have been tendered. The Court made an order for costs of the application to be paid by the administrator. *In the estate of Orr*, 3 V.L.R. (I. P. & M.,) 51.

Liabilty to Fils Accounts—Attachment.]—A rule *nisi* for attachment had been obtained upon materials relating to a rule to administer real estate, but the rule *nisi* referred to an order for the administration of the personal estate. In both of these the duty of filing within fifteen months was disregarded. The Court discharged the rule *nisi* without costs on the ground of the irregularity. *In re Spurling*, 5 V.L.R. (I. P. & M.,) 86; 1 A.L.T., 67.

Rule nisi for Attachment Against Administrator for Not Filing "Three Months" Inventory.]—*See In re Dowling, ante* column 66.

Executor Not Filing Accounts—Rule for Attachment—Notice.]—If an executor has not filed his accounts as required by Rule 16 of Regulæ Generales, of June 23rd, 1873, the proper course is to move for an order *nisi* for an attachment for not filing accounts. But a letter should first be written calling the attention of the executor to the fact that the application will be made forthwith, if accounts are not immediately filed. *In the will of Oliver*, 10 V.L.R. (I. P. & M.,) 28.

Semble, that a week's notice to the executor of such application is sufficient. *Ibid.*

Probate Granted in 1857—15 Vic, No. 10, Sec. 16.]—Under the rules in force in 1857 an executor is only required to file accounts when required to do so by the Court. *In the will of Lord*, 1 A.L.T., 114.

For Other Cases of Passing Accounts Before Master.]—See under COMMISSION, *ante*.

(8) *Liabilities and Duties of.*

Wilful Default.]—A testatrix appointed W.L., M., O'F., and T.L. executors and trustees. At the time of her death M. owed her £440, T.L. £400, and there was in the hands of O'F., who was her solicitor, a sum of £250 awaiting investment. T.L. left Victoria without paying the debt, and O'F. left the colony without accounting for the £250, which was lost to the estate. Bill by beneficiaries under the will against W.L. and M. charging wilful default as to O'F.'s loss and T.L.'s unpaid debt. The Bill alleged erroneously, as the evidence showed that £500 was lost to the estate through O'F. W.L., in his answer admitted this, but M. insisted in his answer that £250 only was lost to estate through O'F. *Held* that W.L. was estopped from contradicting his own answer, and as O'F. was solvent for years after the death of the testatrix, that it was the duty of W.L. to have enforced the investment of the £500, and that he was liable for its loss, and to a decree with wilful default; that M. was liable for the loss through O'F. because he allowed the misappropriation of funds coming to O'F.'s hands after the death, but that such neglect did not warrant a decree for wilful default; that T.L. was never since the death of the testatrix able to pay his debt, and so neither W.L. nor M. was chargeable with wilful default in respect of it. *Allen v. Lane*, 2 W.W. & A'B. (E.,) 1.

Chattel Real Taken by Administrator as Part of Personalty.]—G. and M. were partners in a station property. G. sold his interest to M. for £2500—£500 cash and £2000 in bills, which was further secured by a mortgage of whole property by M. to G. During partnership M. and G. applied for a Crown grant of a pre-emptive section to 640 acres. Some station agents advanced the £500 to M., and also the purchase and other moneys for the section secured by a mortgage from M. of the station, which was to have priority over G.'s mortgage. The station agents obtained the Crown grant of the section, and on M.'s making default in payment, sold the station and handed the surplus (£700) and the grant of the section to A.G., a brother of G., who had taken out administration to him, and A.G. held this as security for the £2000 still owing by M. to G.'s estate. A.G. died intestate, and Mrs. A., a sister of G., took out administration *de bonis non* to G. and administration to A.G., and entered into possession with her husband of the section. On suit by G.'s next of kin for administration, *Held* that Mrs. A., having taken possession of the section as personalty, and under no other colour of title, was bound to account for it as personalty. *Gordon v. Allan*, 3 A J.R., 95.

Duties—Administrator, c.t.a., being Attorney under Power of Trustees and Executors Rssident in England.]—A. was attorney under power of executors appointed by a will of a testator who

died in England, and A. obtained administration, *c.t.a.*, in Victoria. *Held*, that A. should send to England personal property received, and as to produce of real estate (after debts paid) he was a mere trustee under Act. 427, Sec. 9, without working duties, for the executors and trustees in England. *In the will of Ruddock*, 5 V.L.R. (E.,) 297; 1 A.L.T., 89.

Promise to Pay Debt of Intestate.]—A promise in writing by an administrator absolutely to pay a debt of his intestate with interest, one month after notice, whether such administrator were administrator at the time of the promise or not, discloses sufficient consideration, *i.e.*, a promise to forbear for one month, and will render the administrator liable to pay the debt out of his own property. *Wilson v. Luth*, 6 V.L.R. (L.,) 73; 1 A.L.T., 162.

Liabilities of Persons Dealing With.]—Persons dealing with executors who are also trustees, are not bound to enquire whether the executorship has or should be turned into a trusteeship, and consequently a person parting with assets to one of three executors also trustees, is not liable for a misappropriation made by that one without the knowledge of the other two executors and trustees. K. and D. were trustees of a marriage settlement. Pursuant to a power contained in the settlement, R.W. made a will appointing K.G. and W. executors and trustees. K. sold some bank shares, part of the property comprised in the will and settlement, and applied the proceeds to his own use. D. joined in the assignment of these shares, but K. treated them in the balance-sheet furnished to his co-executors as part of outstanding trust estate. *Held* that D. was not liable for K.'s misappropriations. *Sawyers v Kyte*, 6 W.W. & A'B. (E.,) 61, 70.

Misappropriation of Assets — Liability of Co-Executor.]—A. and B. were appointed executors, and both of them signed a cheque by which A. obtained possession of part of the trust estate, A. representing that he was going to invest it at higher interest than could be got in the banks, and A. then misappropriated it. *Held* that A. and B. were both liable, as having realised all the assets, their duty was simply to pay it to the person entitled. *Jones v. Taylor*, 2 V.R. (E.,) 15.

Mining Shares Retained.]—Where part of a testator's property at his death consisted of mining shares, and he gave his executors a discretion to sell his property or retain it as it was at his death, and the executors retained the shares, *Held* that they were not chargeable for retaining them, having regard to the will, but that mining shares are, from their fluctuation in value, inconvenient as a continuing investment, and, where property is limited distinguishing *corpus* from income, are undesirable, owing to the prolonged responsibility they cause in regard to calls, &c. *Knight v. Knight*, 10 V.L.R. (E.,) 195; 6 A.L.T., 62.

Duty to Inform Devisee of the Nature of an Application to Bring Land Devised Under the "Transfer of Land Statute."] — *See Campbell v. Jarrett, post column* 454.

Liability for Costs.]—*See* ADMINISTRATION for costs in Administration Suits, and WILL—Probate and Letters of Administration for Costs in Propounding Will or Opposing Will.

(9) *Other Powers.*

Power of an Administrator After Obtaining Administration to Disaffirm Acts Before Administration.]—J.A.S., the mortgagee of land with power of sale, died intestate in England. F.R.S., the devisee of the heir-at-law of J.A.S., appointed O. his attorney under power to take out administration in Australia to the personal estate of J.A.S. O., without taking out administration in Victoria, sold to S., who sold to H. O. absconded without accounting to F.R.S for purchase money. W., having been appointed attorney under power of F.R.S., took out administration, and in conjunction with F.R.S. brought a suit for foreclosure making H. a party to avoid his alleged title, and dispossess him. *Held* that the sale by O. to S. might be set aside by W. notwithstanding his obtaining administration, for if F.R.S. himself had sold instead of O., and afterwards taken out administration in Victoria, he would have been entitled to disaffirm his own acts and maintain this suit. *Walduck v. Corbett*, 4 W. W. & A'B. (E.,) 48.

"Administration Act," No. 427—Administration Suit—Real Estate—Sale pendente lite.]—An administration suit was instituted against the administratrix, who during the suit moved for liberty to sell the real estate. *Held* that an administration suit does not suspend an administrator's power to sell the personal estate; and, therefore, under Act No. 427, does not suspend the power to sell the real estate. An administrator has power to sell real estate *pendente lite* without applying to the Court. Motion refused, as unnecessary. *Dawson v. Dawson*, 1 V.L.R., (E.,) 182.

Power of Sale.] — A testator devised the income of real estate to certain persons during the life of one of them, and directed that the estate should be sold at the death of such person, and the proceeds divided amongst the others; but did not say by whom the sale was to be effected and the division made, and appointed executors, of whom all but one died. *Held* that the surviving executor had power to sell. *In the will of Crosby*, 6 V.L.R. (E.,) 96; 1 A.L.T., 194.

Power to Sell for Payment of Duty Under Act No. 388.]—*See ante columns* 392, 393.

Executor Reserving Right to Prove Will if Terms of Bargain Offered by Him to His Co-executor Not Acceded to.]—*Held, per* the Full Court, that a person appointed executor of a will cannot make a legal bargain with his co-executor respecting the testator's property for his own benefit, reserving to himself the right of proving the will if the co-executor refuses to accede to his terms; but, *per* Privy Council, there is not necessarily any objection to his so acting. *Clark v. Clark*, 8 V.L.R. (E.,) 303, 320; L.R., 9 App. Ca., 733, 742.

Purchase of Testator's Estate by an Executor Who Has Not Proved.]—*Held, per* the Full Court, that until a person appointed executor unmistakeably divests himself of that character, or by his solemn act puts it out of his power ever to clothe himself with it, he is as much incapacitated from purchasing from his co-executor as if he had obtained probate; but, *per* the Privy Council, a sale is not to be avoided merely because where entered upon the purchaser may at his option become the trustee of the property purchased, as, for instance, in the case above put by obtaining probate, though in point of fact he never does become such trustee. A purchaser under such circumstances is under no disability, and to avoid the sale there must be shown such a use of his power as to render it inequitable that the transaction should stand. *Clark v. Clark*, 8 V.L.R. (E.,) 303, 321; L.R., 9 App. Ca., 733, 737.

II. Administration and Distribution of Estate.

(1) *By Executors and Administrators.*

15 Vic., No. 10, Sec. 16—Act No. 112, Sec. 51.]—The law imposes upon administrators the necessity of acting upon a doubtful state of facts, and they are bound at their peril to ascertain what the facts really are. The Court will not, under 15 Vic., No. 10, Sec. 16, assume a jurisdiction to determine matters of fact. And Sec. 51 of No. 112, does not mean that the Court is to investigate facts and advise the administrator. It expressly requires the administrator to bring the facts before the Court for its opinion as to the law applicable to them. *In the goods of Holdsworth*, 2 W. & W. (I. E. & M.,) 113.

Under Direction of the Court—Executors Protected.]—Courts of Equity have established, in a series of cases, that executors will be protected in distributing assets under the direction of the Court, if they fairly give it all the information they possess; but it has never been expressly decided in a suit against a future contingent creditor that they will be so protected. *Pinnock v. Hull*, 2 V.L.R. (E.,) 18.

A testator, shareholder in a life and general insurance company, was, as such, at his death entitled to profits and liable for losses. His executors sold the shares, but refused to pay certain legatees under the will, on the ground that there might be some question as to the liability of the testator, or his assets, for contracts of the company after the assignment of the shares. They published notices under "*The Statute of Trusts* 1864," No. 234, Sec. 60, as to the distribution of assets, and protecting executors from claims not sent in in pursuance of the advertisements. On Bill by the legatees praying the Court to direct payment, and to make regulations as to bonds or undertakings for the indemnity of the trustees as might be fit, or to direct administration accounts, *Held* that the Court could only protect the executors by a decree in a suit for administration of assets; that the publication of the notice was unimportant, as to debts or liabilities of which the executors had notice. Decree made directing usual administration accounts, and advertisement for persons with claims against the testator as a shareholder; and service of the decree on the company. *Ibid.*

Mining Shares—Calls—Dividends.]—Calls paid by a testator on mining shares held by him at his death should be treated as paid out of the *corpus* of the estate, and the dividends on them be added to the income. *Knight v. Knight*, 10 V.L.R. (E.,) 195; 6 A.L.T., 62.

(2) *By the Court.*

See under Administration, as to Practice and Costs of Executors, &c., in Administration, Suits, &c.

III. Executor De Son Tort.

"Administration Act 1872," No. 427, Secs. 7, 10—Rents of Real Estate.]—A plaint in the County Court in its equitable jurisdiction alleged that A., without obtaining administration, had received rents of certain real estate to which certain infants were entitled. The infants so entitled brought the plaint against A. and B., who had subsequently obtained administration, *c.t.a.* In the County Court the Judge dismissed the plaint without taking evidence on the grounds that A. had not made himself liable as executor *de son tort*, and that the remedy was by an action at law by B. against the tenants who had paid to the wrong person. *Held*, on appeal, that by the operation of Secs. 7 and 10, of No. 427, A. was liable as executor *de son tort*, and that a suit in equity would lie against A. and B., making them joint defendants. Case to be re-heard before *Molesworth, J. Barnicoatt v. Williams*, 9 V.L.R. (E.,) 22.

Note.—A decree for administration accounts was afterwards made, A. being charged with an account of the rents received by him.

Widow of Intestate Married to a Second Husband Sued Jointly with her Husband as Executrix and Executor de son tort of Land Held by Intestate Under Residence Area License.]—*See Fitzgerald v. Elliott*, 5 A.J.R., 3, *post* under Mining — Jurisdiction, &c.—Of Warden.

IV. Suits and Actions by and Against.

Action Against Executors Generally—No Consideration.]—S. "ordered C. to put stone steps to his residence, also general repairs to the house; in fact, all that Mrs. S., who was present, required." C. began the work and S. died. The agent of his executors, without informing them, told C. that some of the work was of immediate necessity, and must be done; and, subsequently, after seeing the executors, told C. "to complete the work as originally directed by S." C. did work under these orders to the value of £622, and his work was approved of by the executors. C. did other work, which could not be regarded as work done "as originally directed by S." The executors paid on account of a larger bill a larger sum than was sufficient to cover the items not done "as originally directed by S." C. sued the executors personally, and obtained a verdict for the full amount, and leave was reserved to move for a

nonsuit. *Held, dubitante sed non dissentiente Molesworth, J.*, that the executors were not liable as executors, there having been no new consideration for any fresh contract with them, and no evidence to go to the jury of a contract between them and C. by which they ever intended to make themselves personally liable. *Cutler v. Barber*, 1 W. & W. (L.,) 128.

Plea of Plene Administravit—Evidence to Support.]—Action against executors on a bill of exchange. Plea *plene administravit*. In support of the plea the executors gave evidence that the only personal estate of the testator consisted of his share in a partnership which was not realised, and of certain furniture specifically bequeathed. *Held* that the partnership share formed assets, and that the plea was not sufficiently supported, and judgment for plaintiff. *Mooney v. Plummer*, 2 V.R. (L.,) 52.

Power to Bring Ejectment.]—Where an executor has allowed a universal legatee to remain in possession of leaseholds for more than 15 years after testator's death, he cannot maintain ejectment against her. Where a testator had granted a sub-lease for 31 years in 1847 to G., which was the whole of the original term granted to him, *Held* that the executor had no power to maintain ejectment in respect of such property. *Mills v. Mills*, 3 A.J.R., 80.

An administrator appointed under the Act No. 427 to the estate of a person who died before the Act. and in whose name a Crown grant of lands has been issued since his death, cannot bring ejectment as to such lands. *Edmondson v. Macan, see ante column* 398.

Non-Production of Probate.]—In an action against an executrix the probate to her was not produced. *Held* that it was not necessary that the probate should be produced, and that proof of acts from which the grant of probate might be inferred was sufficient; that the proof was not negatived by the production of letters of administration, and certainly could not be contradicted by production of a probate in which the defendant was named as executrix, though whether it could be negatived by production of a probate in which the defendant was not so named *quære. Buisson v. Warburton*, 4 A.J.R., 43, 119.

Contract by Testator—Liability of Executors.]—A contract, involving the exercise of a testator's personal discretion, does not bind his executors; it falls within the maxim, *actio personalis moritur cum personâ*. A testator promised an auctioneer in whose hands lands of his were placed for sale, to leave the lands always in his hands for sale, and to allow him full commission on future sales, in consideration of the auctioneer giving up half the commission already earned. *Held* that such an arrangement must be taken with the qualification "if ever the testator should determine to sell," and as such was a question involving the exercise of personal discretion, the promise did not bind the executors. *Buckland v. M'Andrew*, 5 V.L.R. (L.,) 430; 1 A.L.T., 102.

For Wrongful Act of Testator—Act No. 274, Sec. 411.]—B. sued the executors of a testator for excessive distress committed by the testator more than six months before his death. The action was commenced in testator's lifetime, and continued by entering a suggestion of his death, and that defendants were his executors. *Held* that the action did not survive against the executors, the maxim *actio personalis cum persona moritur* applying. *Buchner v. Davis*, 5 V.L.R. (L.,) 444.

Executors of Past Shareholder of a Mining Company Not Liable for Contribution on Winding-Up of Company.]—*Cooper v. Bath*, 2 V.R. (L.,) 136; 2 A.J.R., 86, *post* under MINING—Company—Winding-Up.

Action of Detinue—One Executor Pledging Testator's Property for Debt of His Own—New Trial.]—An action of detinue for property of their testator cannot be maintained by all the executors, where one of such executors has pledged the property with the defendant for a debt of his own, even though he were not executor at the time of the pledge. A new trial will be granted on this ground, though the objection was not taken at the trial. *Hartney v. Higgins*, 6 V.L.R. (L.,) 65; 1 A.L.T., 161.

"Transfer of Land Statute"—Will—Executor—Costs.]—A testator devised a portion of a block of land to his daughter, and the other portion to his son who was appointed executor. The son induced the daughter to bring the land under the Act No. 301. In a suit brought by the daughter to rectify the certificates of title issued, *Held* that the son was liable to pay plaintiff's costs because it was his duty as executor to see that plaintiff understood the application for the certificate of title. *Campbell v. Jarrett*, 7 V.L.R. (E.,) 137; 3 A.L.T., 49.

EXHUMATION.

Ordered on Behalf of Prisoner on Trial for Murder—Post Mortem Evidence.]—On the application of counsel for a prisoner committed to take his trial for murder, an order was made by a Judge of the Supreme Court permitting exhumation of the body of the person alleged to have been murdered from its grave in the Melbourne cemetery for the purpose of anatomical investigation by surgeons appointed by the Crown and the prisoner. *Regina v. Beâney*, 3 W. W. & A'B. (L.,) 73.

EXTRADITION OF CRIMINALS.

Crimes Against Insolvency Laws—Sufficiency of Warrant—6 & 7 Vic., Cap. 34, Sec. 3.]—A prisoner was committed for detention, with a view to his being sent to New Zealand, whence he had absconded, under a warrant reciting that he had been charged with felony, in that his affairs being in the course of liquidation, he did within four months of the commencement of the liquidation, "*feloniously*" quit New Zealand, and take property to the amount of, &c. *Held* that the warrant disclosed sufficient evidence of criminality to justify the detention of the prisoner under 6 and 7 Vic., Cap. 34, Sec. 3, although it did not expressly state that the property was the prisoner's or divisible among his creditors, the Court considering that the word "*feloniously*" negatived the presumption that the property was not the prisoner's or so divisible. *In re Fishenden*, 4 V.L.R. (L.,) 143.

Sufficiency of Warrant — "Fugitive Offenders' Act 1881," Sec. 5.]—A warrant from New Zealand for the apprehension of an offender against the insolvency law of that colony, stated that insolvency proceedings had been instituted in an inferior Court, and set out in general terms that the Court was competent, that the proceedings were regular, that the offender had been charged with an offence to which Part I. of the "*Fugitive Offenders' Act* 1881," was applicable, and stated the offence, though without stating that the punishment therefor was imprisonment with hard labour for twelve months. *Held* that there was sufficient evidence to comply with Sec. 5 of the Act, and that the warrant was sufficient. *In re Ryan*, 8 V.L.R. (L.,) 327; 4 A.L.T., 87.

"Fugitive Offenders' Act," 44 and 45 Vic., Cap. 69—Extradition—Illness of Prisoner.]—S. had been in the employ of a bank in New Zealand and had been transferred to a branch of the same bank in Melbourne. He was in such employ until his arrest on a charge of embezzlement. On a writ of *habeas corpus*, *Held* that he was a fugitive within the meaning of the Act, and amenable to extradition. An application made on affidavits showing that he was in bad health so that a voyage to New Zealand might endanger his life, that he might be allowed out on bail to be cared for by his friends, was granted. *In re Smyth*, 9 V.L.R. (L.,) 363; 5 A.L.T., 118.

FACTOR.

See PRINCIPAL AND AGENT.

FALSE IMPRISONMENT.

See MALICIOUS ARREST—TRESPASS.

FALSE PRETENCES.

See CRIMINAL LAW.

FALSE REPRESENTATIONS.

See FRAUD AND MISREPRESENTATION.

FEES.

Of Counsel.]—*See* COSTS.

Trespass Fees.]—*See* POUNDS AND IMPOUNDING.

Of Sheriff.]—*See* SHERIFF.

Of Medical Practitioner.]—*See* MEDICINE.

Inspection of Books in Master's Office.]—Where books are ordered to be brought into the Master's office, and either side wishes to inspect them, the Master is entitled to charge a fee for the attendance of a clerk at the inspection. *James v. Greenwood*, N.C. 23.

Extortion—"Justices of Peace Statute," No. 267, Sec. 37—Fee.]—The Justices had convicted M., a Clerk of Petty Sessions, under Sec. 37 of Act No. 267, for taking and receiving for the issue of a summons a higher fee than allowed by the Act; M. did not apply the money to his own use, but paid the whole into the Treasury. *Held* that the Act contemplated that the taking of the moneys should be wilful and for an improper purpose. Order absolute for prohibition. *Regina v. Lloyd, ex parte Munce*, 3 V.R. (L.,) 64; 3 A.J.R., 40.

FELON AND FELONY.

42 Vic., No. 627, Secs. 6, 8, 9, 11, 17—Felon's Estate—Curator.]—A., a lessee of a mining lease, was convicted of forgery March 16th, 1882, and B. was, under Sec. 8 of Act No. 627, appointed curator of his estate. August 31st, B. applied to Registrar of Titles, to be registered as proprietor of the lease. Early in September, A., being then released from imprisonment, lodged a *caveat*, and on September 13th, A. transferred to C. and D. all his estate and interest in the lease. Bill by A. C. and D. against B. and Registrar to restrain B.'s registration. *Held*, on demurrer, that A. having served his sentence became again entitled to

his former estate, and B. became a trustee for him, and that any defence B. might have on the ground of his right to be reimbursed the various charges detailed in the bill should be made by answer. *Semble*, where the curator is warranted in conveying he may become a registered proprietor in order to convey, but he must show why he should acquire this power conclusively protected against the felon's rights. *Mitchell v. M'Dougal*, 9 V.L.R. (E.,) 13; 4 A.L.T., 114.

Compounding a Felony—Assignment by Deed Through Fear of Being Prosecuted for Felony.]—*See Munro v. Perry, ante columns* 388, 389.

Defence of Forfeiture for Felony—How Pleaded.]—*M'Crae v. Isaacs*, 1 V.R. (L.,) 27; 1 A.J.R. 36, *post* under PRACTICE AND PLEADING—Pleadings at Law—Plea.

What the Crown May Forfeit on Conviction of Felony—Only What is Tangible, Not a Mere Right to Set Aside a Sale of Equity of Redemption.]—*Johnston v. Kelly*, 7 V.L.R. (E.,) 97; 3 A.L.T., 41, *ante column* 323.

Imperial Act, 33 and 34 Vic., Cap. 23—Abolition of Forfeiture for Felony.]—*Quære, per Williams, J.*, whether the Imperial Act, 33 and 34 Vic., Cap. 23, applies to the colonies. *Ibid.*

FENCES.

Replication to Plea of Breach of Agreement to Fence—When Bad—Agreement to Fence under "Fences Statute 1874"—Circuity of Action.]—A replication to a plea of damage *feasant* in an action for seizing sheep, stated that the plaintiff and the defendant were adjoining owners, that they had agreed, under the "*Fences Statute* 1874," that each should fence half the common boundary, that the plaintiff had done so, but not the defendant, and that three months had not expired from the time of the agreement, but that a reasonable time had, at the time of the trespass. *Held* bad, since it did not show that the defendant was in fault, since he had three months in which to fence under the "*Fences Statute* 1874," and there could therefore be no circuity of action to be avoided. *O'Shea v. D'Arcy*, 6 V.L.R. (L.,) 142; 1 A.L.T., 170.

A replication to such a plea, which stated an agreement (independently of the "*Fences Statute*") to fence forthwith, and that the trespass occurred through the defendant's default, was held good. *Ibid.*

Act No. 479, Secs. 7, 8—Notice to Fence.]—C., the owner of land adjoining that of R., served upon him a notice under Sec. 7 to join in the cost of fencing, and proposed that he should fence one-half between certain specified points, and that R. should fence the other half. R. agreed to that, but afterwards discovered that C. had taken the less expensive half, and refused to carry out the arrangement. Under Sec. 8 the justices ordered R. to fence his half as arranged. *Held* that Sec. 7 had been sufficiently complied with to give the justices jurisdiction, and rule *nisi* for prohibition refused. *Ex parte Ryan*, 5 V.L.R. (L.,) 173; 1 A.L.T., 11.

"Fences Statute 1874," Sec. 7—Notice to Fence—Service.]—The service of the notice to fence required by Sec. 7 of the "*Fences Statute* 1874," is personal service. It is sufficient to constitute personal service if the proper notice is either delivered to the person himself into his own hands, or so that he is enabled to obtain possession of it; or if it be sufficiently shown that it has come into his hands. *Regina v. Heron, ex parte Mulder*, 10 V.L.R. (L.,) 314, 317; 6 A.L.T., 143.

Malicious Destruction of—When Claim of Right Involved.]—*See* cases, *post* under JUSTICE OF THE PEACE—Jurisdiction and Duty—Question of Title.

What is a "Substantial Fence" under "Pounds Act," No. 478, Sec. 14—"Sufficient Fence," under "Fences Statute," No. 479, Sec. 4.]—Justices had made an order awarding trespass rates against J., finding that the complainant's fence was a "substantial fence," within Act No. 478. On a rule to prohibit, it was contended that unless complainant's fence was a "sufficient fence" within Act No. 479, it was not a "substantial fence" within Act No. 478. *Held*, it was for the Justices to decide whether the fence was a "substantial fence" within Act No. 478, and they were not governed by the meaning of a "sufficient fence" in Act No. 479. Rule discharged. *Regina v. Hutchinson, ex parte Jessell*, 10 V.L.R. (L.,) 332; 6 A.L.T., 161.

FIRE.

Insurance Against.]—*See* INSURANCE.

Careless Use Of.]—*Sheehan v. Park*, 8 V.L.R. (L.,) 25; 3 A.L.T., 98, *post* under NEGLIGENCE—Parties Liable.

Accidental.]—*Batchelor v. Smith*, 5 V.L.R. (L.,) 176; 1 A.L.T., 12, *post* under NEGLIGENCE—Parties Liable.

FISH AND FISHERY.

Taking Fish of Less Weight Than Prescribed by Law—Evidence—"Fisheries Act 1873," Sec. 34.]—T. was fined, under Sec. 34, of the "*Fisheries Act* 1873," for "taking" fish of less weight

than prescribed by that Act. The evidence was to the effect that the Market Inspector found a basket of fish in the possession of a third person in which there were fish under weight. In the basket there was an invoice purporting to be signed by T., but beyond this there was no evidence that T. did "take" the fish, or that the invoice was signed by him. *Held* that there was no evidence to support the conviction. *Ex parte Tobias*, 6 A.L.T., 10.

FIXTURES.

Determination of Tenancy at Will — Rsasonabls Time for Rsmoval.]—C. and B. were assignees of gold mining leases issued by the Crown to K. and F. C. and B. allowed the Alma Company to work the land on tribute, and on September 27th, 1866, £600 was due to them for tribute. On September 27th C. and B. required the managers of the company to pay the amount due, and on the same day wrote, instructing him to retain possession of the mine for them, holding them responsible for expenses. The manager, on the 28th September, obeyed by going through the form of discharging himself from the company's service, and entering as the servant of C. and B. The company had erected machinery on the land and made it a fixture to the soil. On September 27th some of the company's workmen had sued the company for wages, and obtained an order from magistrates for payment. On September 29th, under warrants of distress issued under this order, M., a constable, levied on the machinery and took possession. C. and B. asserted their claim, and on an interpleader summons, the magistrates decided against them. *Held*, on appeal, that the company, although being only tenants at will, should have had a reasonable time after the determination of that tenancy, to remove their fixtures; that the company had not under the circumstances abandoned their right to sever the fixtures, and that the magistrates were right. *Clarke v. Tresider*, 4 W. W. & A'B. (L.,) 164.

"Shelvss and Counters" ars Not "Fixturss," so as to bs Includsd in a Policy Against Fire.]—*Harding v. National Insurance Company*, 2 A.J.R., 67, *see post* under INSURANCE—Fire—In other cases.

Sals of—Not Intersst In Land, or Within Sec. 17 of "Statuts of Frauds."] —*See Malmsbury Confluence Gold Mining Company v. Tucker*, 3 V.L.R. (L.,) 213, *ante* column 194.

Lease of Theatrs, with Right of Using Corridor and Ornaments Attached to Wall.]—L. leased to A. a theatre, together with the right of using a corridor and appurtenances thereto. On the outer wall of the corridor, but not within the boundaries coloured on the plan nor within the parcels of the lease, were certain ornaments, amongst others a pier glass attached to the wall. L. removed the pier glass, and A. sued him for conversion. *Held* that the corridor did not pass under the demise nor any of the ornaments adorning it, and that plaintiff could not maintain his action for conversion. *Aarons v. Lewis*, 3 V.L.R. (L.,) 317.

Right to Remove Fixtures from a Resldencs Area —"Mining Statuts 1865," Sec. 5.]—*Summers v. Cooper*, 5 V.L.R. (M.,) 22; 1 A.L.T., 46, *post* under MINING—Interests in Mines—Residence Area.

Lease—Trade Fixtures.]—M. held a lease of a hotel, and he purchased from the previous tenant trade and other fixtures. A list of these, headed "Schedule of fixtures belonging to lessee," was signed by the landlord and himself. M. sub-leased, such sub-lease being in the ordinary form, comprising other fixtures than trade fixtures, and upon it was endorsed a memorandum, signed and sealed by the parties, containing a list of the fixtures, the subject matter of the action, and comprising trade fixtures, with an agreement that they were to remain on the premises during the term. *Held* that the effect of the sub-lease and memorandum was to pass the trade fixtures to the sub-tenant, subject to the condition of their remaining on the premises. *Martin v. Elsasser*, 5 V.L.R. (L.,) 85.

FORECLOSURE.

See MORTGAGE.

FOREIGN ATTACHMENT.

See ATTACHMENT.

FOREIGN LAW AND FOREIGNER.

Evidsnce of Foreign Law—Onus Probandi.]—It is for the party relying on the difference between the law of England and that of a colony to prove it by reference to acknowledged authorities or by expert witnesses. *Larnach v. Alleyne*, 1 W. & W. (E.,) 342, 368.

Evidence of Foreign Law—Scotch Confirmation of a Will.]—*In the estate of Sutherland*, 10 V.L.R. (I. P. & M.) 23; 5 A.L.T., 156, *post* under WILL—PROBATE, &c.—Practice.

Foreign Wills—What Entitled to Probate and Practice on Application For.]—*See* cases *post* under WILL.

Evidence of Foreign Law.]—*Sembls*, that the Court cannot take judicial notice of Scotch law, but will, when necessary, allow the parties to furnish evidence of it. *In re Swan*, 2 V.R. (I. E. & M.,) 47; 2 A.J.R., 5.

How Far Court Adopts the Acts of Foreign Courts in Granting Probate to Wills.]—*See post* under WILL—Probate and Letters of Administration.

Grant of Administration in New South Wales—Debt Due on Mortgage of Realty in Victoria.]—The locality of the mortgaged land overrules that of the specialty debt in the covenant to pay. Where a person was resident in New South Wales, and administration to his property was taken out there, *Held* that the administration in New South Wales did not authorise his administrator to recover a mortgage debt secured by lands in Victoria as assets in New South Wales without taking out administration in Victoria. *In re Montefiore*, 5 A.J.R. 1, *post* under TRUST AND TRUSTEE—Vesting Orders.

Effect of Discharge Under Insolvent Laws in New South Wales upon a Judgment Recovered in Victoria.] —*Glass v. Keogh*, 4 W. W. & A'B. (L.,) 189, *post* under INSOLVENCY — Discharge and Release from Sequestration—Effect of.

Evidence of Foreign Law—Judicial Notice.] — The Court can take judicial notice that Tasmania is a British colony so acquired that no previous law of succession would be operative within it, and will assume that its law is British until a change be shown. *Dryden v. Dryden*, 2 V.L.R. (E.,) 74.

Over Colonial Personalty.] — The Court will entertain a suit for an account of personal estate in another colony. *Ibid.*

Costs Against Foreigner Ignorant of English Law and Language.]—*See Chun Goon v. Reform Gold Mining Company*, 8 V.L.R. (E.,) 128, 154; 3 A.L.T., 137, *ante column* 245.

Liability of Foreigner Under Contract—Foreigner Unable to Read English.]—*Fong Gaep v. Reynolds*, 2 W. & W. (L.,) 80, *ante column* 123.

Foreign Judgments—Effect of.]—*See post* under JUDGMENTS.

Foreign Juror.]—*See Regina v. Hoctor*, 2 W. W. & A'B. (L.,) 124, *ante column* 308; and *Regina v. Ah Toon*, 3 W. W. & A'B. (L.,) 31, *post* under JURY.

FOREST.

Forest Reserve—Excision of from Pastoral Run —"Land Act 1865," Sec. 41.]—*O'Shanassy v. Littlewood*, 10 V.L.R. (L.,) 304, 312; 6 A.L.T., 145, *post* under LAND ACTS—Other Points.

FORFEITURE.

Of Property of Felon.]—*Johnston v. Kelly*, *ante column* 323.

Of Leases.]—*See* LANDLORD AND TENANT.

Of Licenses and Leases, Under "Land Acts."]—*See* LAND ACTS.

Of Publichouse Licences.]—*See* LICENSING ACTS.

Of Claims, Leases, and Interests in Mines.]—*See* MINING.

Of Benefits Under Wills.]—*See* WILLS.

Under Building Contracts.]—*See* WORK AND LABOUR.

FORGERY.

See CRIMINAL LAW.

Forged Bills of Exchange—Liability On.]—*See Kernan v. London Discount and Mortgage Bank, and Levinger v. Fitzgerald*, *ante columns* 102, 103.

Forged Will—Admissibility of Statements of Deceased Witness to Will.] — *In re Buckley*, 5 A.J.R., 5.

Forgery of Trade Mark—Offence Under "Trade Marks Statute," No. 221, Sec. 6.]—*Schemmel v. Call*, 2 V.R. (L.,) 121; 2 A.J.R., 65, *post* under TRADE MARK—Offences Against Trade Marks' Statute.

Forged Guarantee—Judgment Obtained On Set Aside.]—*Colonial Bank of Australasia v. M'Leod*, 6 A.L.T., 114, *post* under PRACTICE—At Law—Judgment—Setting Aside and Impeaching.

FRAUD AND MISREPRESENTATION.

Undue influence is only one of the instances of fraud, and undue influence is manifested in a variety of ways, but it is bottomed in fraud,

and there is no substantial difference between the two. *Symons v. Williams*, 1 V.L.R. (E.,) 199.

For facts, *see* S.C., *post* under UNDUE INFLUENCE.

Actions for — Deceit — Onus Probandi.] — *Per Higinbotham, J.*—An action for deceit cannot be based upon a mere statement of intentions, however misleading the statement may be. The *onus* of proof that the plaintiff was not led into a contract by a misrepresentation is upon the defendant; the defendant must show that, although there may be a misrepresentation, the plaintiff did not rely upon upon it. *Allan v. Gotch*, 9 V.L.R. (L.,) 371, 377.

Action for Deceit—Misrepresentations by Directors of a Company.] — In order to make directors liable in an action of deceit for misrepresentation in a balance-sheet representing the company as in a flourishing condition, it must be shown that they knew, or but for culpable negligence might have known, that the statements were false, there must in fact be moral fraud. *Paternoster v. Hackett*, 6 V.L.R. (L.,) 232; 2 A.L.T., 24.

In such a case the directors are liable if they make the statements, being indifferent or reckless as to their truth or falsity, although they may not have actually known them to be false. *Semble*, that if they made them believing them to be true, but with no reasonable grounds for such belief, they would be liable. S.C., 6 V.L.R. (L.,) 396; 2 A.L.T., 77.

Actions for Deceit—When Maintainable—Fraudulent Representation on Sale of Horse—Knowledge of Defendant.]—An admission by the defendant that he had heard that the horse had run away once when in harness was held to be sufficient evidence of his knowledge to support a verdict against him for damages occasioned by the running away of a horse when being driven that he had sold as being quiet in harness. *Green v. Messiter*, 4 A.J.R., 170.

Actions for—Pleadings—Plea of Fraud.]— A plea alleging generally that the defendant was induced to enter into the contract declared on by the fraud of the plaintiff, is good, but it must be taken to include an allegation that the defendant disaffirmed the contract, otherwise it will be bad. *M'Millan v. Sampson*, 10 V.L.R. (L.,) 74; 5 A.L.T., 193.

The defence of fraud may be pleaded in actions of contracts, in a short form, and, whenever that form is used, it imputes an allegation not of fraud only, but of all circumstances necessary to render fraud a good defence in each particular case. *Ibid.*

Pleading Under "Judicature Act 1883"—The Precise Nature of the Representation Should be Stated.]—*Desailly v. Ham*, 6 A.L.T., 21, *post* under PRACTICE AND PLEADING — Under "*Judicature Act.*"

How Fraud Alleged in Pleading—Bill Alleging Fraud and Not Alleging Facts as Evidence of Alleged Fraud.]—*Ramsay v. Board of Land and Works*, 5 W. W. & A'B. (E.,) 16, *post* under PRACTICE AND PLEADING—In Equity—Plea.

And *see* cases under PRACTICE AND PLEADING —In Equity—Bill.

Setting Aside Proceedings on Account of.]—*Per Full Court*—To set aside a proceeding on the ground of fraud, the parties must be reinstated in their original position. *United Hand and Band Company v. National Bank of Australasia*, 5 V.L.R. (E.,) 74.

There is no principle of equity by which trustees for creditors fairly making a bargain for the adjustment of complicated rights representing their *cestuisque trustent*, and acting for them as they would for themselves, are to have their bargains defeated because the person who assigned to them fraudulently induced another party to the bargain to enter into it. *Evans v. Guthridge*, 2 W. &. W. (E.,) 2, 35.

Fraud by Trustees in Inducing Cestuisque Trustent to Enter into a Disadvantageous Release.]—*Bennett v. Tucker*, 8 V.L.R. (E.,) 20; 3 A.L.T., 108, *post* under TRUST — Rights and Powers of Trustees.

Effect of on Contracts.] — A person cannot impeach a deed for the dissolution of a partnership on the ground of fraud unless he prove that the contract contained therein has been disaffirmed, and he cannot disaffirm it if he is unable to return the property assigned by it in the same state in which it was at the time of dissolution. *Urquhart v. M'Pherson*, 3 V.L.R. (L.,) 65, 75.

Per Privy Council (affirming the Full Court) —Contracts which may be impeached on the ground of fraud are not void, but voidable only at the option of the party who is or may be injured by such fraud, subject to the condition that the other party, if the contract be disaffirmed, can be remitted to his former state. *Urquhart v. M'Pherson*, L.R. 3 App. Cas., 831.

Effect of On Contracts—Partnership—Relief Refused Where One of Parties Cannot be Reinstated.] *Longstaff v. Keogh*, 3 V.L.R. (E.,) 175, *post* under PARTNERSHIP—Liabilities of Partners *inter se*.

Effect of On Contracts—Waiver of Objection to Title on Sale of Land Obtained by False Representations.]—*O'Shanassy v. Littlewood*, 10 V.L.R. (L.,) 117, *post* under VENDOR AND PURCHASER —The Contract—Conditions of Sale, &c.

Sale of Land.] — *Embling v. Whitchell*, 4 V.L.R. (E.,) 96, 98, *post* under VENDOR AND PURCHASER—ENFORCEMENT, &c. — Rescission of Contract.

Misrepresentations Made by Mortgagee to Official Assignee of Mortgagor—Admissions Made Under Seal by Official Assignee of their Truth—Onus

probandi in Suit by Mortgagor to Set Aside Release of Equity of Redemption.]—*Brougham v. Melbourne Banking Corporation*, 6 V.L.R. (E.,) 214; L R., 7, App. Ca. 307, *post* under MORTGAGE—Rights, &c., of Mortgagor, &c.

When Fraud and Misrepresentation a Defence to Suit for Specific Performance.]—*See* SPECIFIC PERFORMANCE — Matters of Defence; and VENDOR AND PURCHASER.

Untrue Representations as to Authority of Agent to Sell Land—Onus of Proof.]—*Adamson v. Morton*, 7 V.L.R. (L.,) 307; 3 A.L.T., 31, *post* under PRINCIPAL AND AGENT—Rights, &c., of Agent to Third Persons—Generally.

Liability Arising From—Consequential Damages—Sale of Racehorse.]—In an action for deceit the second count set out that defendant had deceitfully represented that the horse sold was "untried," that the plaintiff had purchased the horse for £252, and discovering the representation to be false, sold the horse afterwards for £94. The jury returned a verdict for plaintiff, assessing damages, which consisted of the difference between the prices at which plaintiff bought and resold, a certain sum paid for forfeits by plaintiff, and a sum for "keep" from the time of purchase until plaintiff discovered the deceit. *Held*, on rule for new trial, that damages must be reduced by amount of "keep," that the "forfeits" were a natural consequence of the false representation of the horse as "untried." *Jellett v. Phillips*, 3 V.L.R. (L.,) 209.

Setting Aside Deed on Ground of Fraud.]—*See* DEED—SETTLEMENT.

Fraud or Actual Deception is not Necessary to be Proved in Obtaining an Injunction in Trade Mark Cases.]—*Wolfe v. Hart*, 4 V.L.R. (E.,) 125, 134; and *Neva Stearine Company v. Mowling*, 9 V.L.R. (E.,) 98, 102; 5 A.L.T., 9, *post* under TRADE MARK—Suits to Restrain Infringement.

Certificate of Exemption from Liability to Work a Claim Obtained by False Pretences, Voidable only and Not Void.]—*Butler v. O'Keefe*, 3 W. W. & A'B. (M.,) 16, *post* under MINING—Interest in Mines—Claims—In what events a claim may be deemed forfeited, &c.

Fraud in Procuring Order for Winding-Up of a Mining Company.]—*See Colonial Bank v. Willan*, 5 L.R., P.C., 417; 43 L.J., P.C., 39; 5 A.J.R., 53, *post* under MINING—Company—Winding-up—Petition, &c.—Petitioning Creditor's Debt.

What is Fraud Within the Meaning of "Land Act 1869," Sec. 22—Effect of Fraud on the Right to a Grant.]—*Evans v. the Queen*, 6 V.L.R. (E.,) 150; 2 A.L.T., 38, *post* under LAND ACTS—Leases—Generally.

Fraud as Taking a Case Out of Sec. 97 of the "Statute of Trusts" When Trust Not in Writing.]—*Wilson v. Boyd*, 3 V.L R. (E.,) 98, *post* under TRUSTS—Creation and Declaration of Trust.

General Provisions as to Fraud Under "Transfer of Land Statute."]—*See* under TRANSFER OF LAND (STATUTORY.)

Fraudulent Representation as an Offence Under "Police Offences Act," No. 265, Sec. 36, Sub.-Sec. 3.]—*Regina v. Armstrong, ex parte M'Pherson*, 7 V.L.R. (L.,) 234; 3 A.L.T., 9, *post* under OFFENCES (STATUTORY) — Under *"Police Offences Statutes."*

Fraud by Manager of Station in Purchasing Part of the Estate for Himself—Constructive Trust.]—*Lempriere v. Ware*, 2 V.R. (E.,) 1, *post* under TRUST—Creation and Declaration of.

See Undue Influence

FRAUD SUMMONS.

See DEBTORS ACT.

FRAUDS (STATUTE OF.)

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCE AND SETTLEMENTS.

1. WHAT ARE AND WHAT ARE NOT.

Under 13 Eliz., Cap. 5—Voluntary Settlement to Defeat Person with Cause of Action.]—A voluntary settlement made for the express purpose of defeating a person who has a cause of action against the settlor, but has not issued his writ, is fraudulent within the *"Statute 13 Eliz.,"* Cap. 5, both as between the creditors and official assignee of the settlor and the trustees of the voluntary settlement, and between such creditors and assignee, and a purchaser from the trustees for value, but with notice that the cause of action had accrued before the settlement. *Goodman v. Hughes*, 1 W. & W. (E.,) 202, 219.

Under 13 Eliz., Cap. 5—Voluntary Settlement of Bills of Exchange.]—G., the settlor, was the owner of two adjoining sheep stations; the plaintiff was induced by advertisements of sale to visit and inspect them, G. representing to

the plaintiff that the sheep were looking unhealthy owing to bad shepherding. The plaintiff ultimately purchased the stations and sheep, March, 1864, and in the receipt for the property when taken possession of, G.'s guarantee as to the soundness of the sheep was inserted. On May 10th, G. voluntarily settled upon defendant as a trustee certain bills of exchange, being part of the purchase money for the stations, upon trusts in favour of G., his wife, and children. Shortly afterwards the plaintiff found that the sheep had the fluke, and recovered £2500 for damages and costs in an action for breach of warranty and deceit against G., who, besides the bills of exchange in the settlement, had no property to satisfy the judgment. On a suit by plaintiff to set aside the settlement as void against creditors, *Held* that as the settlement was executed to defeat apprehended litigation, the settlement was void under 13 Eliz., Cap. 5; that bills of exchange were not liable to execution, at the date of 13 Eliz., Cap. 5; yet the modern law making them so, the Act operated upon them. *Per Molesworth, J.*, the Court will receive evidence of the settlor's intentions, but not evidence of his statements of his motives. *Richmond v. Dick*, 2 W. W. & A'B. (E.,) 143.

13 Eliz., Cap. 5—Valuable but Inadequate Consideration.]—Post-nuptial settlement, August 13, 1858, of property worth £10,000 in consideration of a widow releasing her dower to certain property worth £950, upon trust for sale, and as to the proceeds upon trust for the wife for life, then in trust for the settlor for life, with remainder to children. The settlor at the time of the settlement was involved in various speculations on which he was a heavy loser, and under heavy liabilities, and though perhaps not in insolvent circumstances yet he was pressed by creditors, and had lost the confidence of his bankers. His estate was compulsorily sequestrated, March, 1860. On bill by official assignee to set aside the settlement as void, *Held* that the settlement was void under 13 Eliz., Cap. 5, and it was set aside; but the Court *held* that the wife was entitled to the value of her dower released, she being at the time of the settlement a *feme covert*, and without independent professional advice. *Held*, also, that the effect of an order absolute sequestrating an estate as between the official assignee and the insolvent conclusively vests property in such assignee, and makes him a representative of the insolvent, although it may be open to a third person to dispute the fact of the insolvency, and the validity of the order. *Shaw v. Salter*, 2 W. W. & A'B. (E.,) 159, 162, 170.

Under 13 Eliz., Cap. 5 — Part Payment of Purchase Money before Certificate of Discharge Under First Insolvency — Subsequent Acts of Settlor as Evidence of Intention.]—H. became insolvent in 1861, and obtained a certificate of discharge December, 1867, J. being official assignee. Under this insolvency creditors were paid 3s. in the pound. Before H.'s discharge he got assistance from his wife's family, and worked as a cabman, saving and making money. By these means he purchased land April 3rd, 1867, paying £200 in cash, and agreeing to pay £200, the balance, in one or two years at his option, the conveyance being executed in escrow to secure the vendor. J. did not interfere in these transactions. H. paid the balance of the purchase-money after obtaining his discharge from the first insolvency, and the conveyance being delivered up was cancelled, and H. voluntarily settled the land upon trustees in trust for his wife and children, remainder to H.'s heirs, April, 1868. H. spent £650 in improvements on land since April, 1869. In December, 1870, the land was brought under the "*Transfer of Land Statute*," and a certificate issued to J., subject to the rights of the beneficiaries under the settlement. H. became insolvent again in March, 1871, and S. was appointed assignee. Bill by S. against the defendant trustees, the beneficiaries under the settlement, and J., to have the settlement declared void and fraudulent as against the creditors under the second insolvency, and for a right to redeem J.'s claim on the £200 paid before his discharge. *Held*, by *Molesworth*, J., and affirmed, on appeal, that the expenditure of £650 in improvements, although made after the settlement, was evidence of a fraudulent intention, and that the settlement was void as against the creditors under the second insolvency under 13 Eliz, Cap. 5; and that J. was entitled to be paid out of the settled lands a sum not exceeding £200 towards satisfaction of debts under the first insolvency. *Held, per Molesworth, J., dubitante totâ curiâ* that the existence of creditors under the first insolvency, and the settlement being void as to them so far as regards the £200 paid before discharge, would not entitle the second assignee to impugn the settlement. *Shaw v. Scott*, 3 A.J.R., 16, 128.

Fraudulent Settlement under 13 Eliz, Cap. 5—Discharge—Second Insolvency—Surplus.] — By decree, May, 1868, a voluntary settlement was set aside as void under 13 Eliz., Cap. 5, and the settled property was conveyed to the plaintiffs, the trade, and official assignees, and it was realised, and after paying all debts there was a surplus of £750. The settlor got his certificate of discharge in 1870, and in 1871 his estate was again sequestrated, and J. appointed official assignee. Motion by trustees of settlement, settlor and *cestuisque trustent* all now *sui juris* for order that plaintiffs should be at liberty to pay over surplus to J. *Held* that decree set the settlement aside altogether, and not *pro tanto*, that the Court had no power to make an order to protect the plaintiffs against persons having a subsequent lien on the surplus, which could only be done by an application under first insolvency to vary plan of distribution. Order for plaintiffs to be at liberty to hand over surplus to J. on receiving consents of all concerned and a sufficient indemnity. *Goodman v. Boulton*, 3 V.R. (E.,) 20; 3 A.J.R., 2.

Voluntary Settlement—Evidence.]—K., a trader, and being in debt, made a voluntary settlement of all his property upon trust for his wife and children. After K.'s insolvency the official assignee brought a suit to set aside the

settlement as being fraudulent and void, the bill alleging that K. was "indebted to other persons, and that many of the debts were unpaid and still owing." *Held*, reversing *Molesworth, J.*, that a conversation which K. had had with a proposed trustee some time before the settlement, showing a fraudulent intention, was admissible, even although it was in respect of an intended settlement somewhat different in its character, and although this evidence was not put directly in issue by the bill; also that under the allegation in the bill evidence of general indebtedness was admissible to show the fraudulent intent. *Goodman v. Boulton*, 5 W. W. & A'B. (E.,) 86, 90, 95.

Under 13 Eliz., Cap. 5—Release by Official Assignee—Debts Due at Time of Settlement Remaining Owing at Time of Insolvency.]—D., on 4th March, 1863, purchased by one entire contract station and freehold property from C. and B., and mortgaged same to C. and B. to secure purchase money. D. subsequently in 1864 mortgaged other lands not in sale to C. and B. C. and B. sub-mortgaged to defendant bank. Shortly before 1st October, 1870, C. and B. had brought an action against D. on the covenant for payment, and on that date D. (married in 1840) executed a post-nuptial voluntary settlement by which he granted equity of redemption in all his lands to a defendant in trust for appointee of wife, and in default of appointment upon certain trusts in favour of his wife and children. On 1st June, 1871, D.'s estate was sequestrated, and Goodman was appointed assignee. At time of sequestration certain debts other than mortgage debts due at time of settlement were still owing. C. and B. assigned all their interest to bank, and Goodman released his right to the equity of redemption to bank, but release did not comprise certain lands set out in the bill. On 22nd March, 1874, D.'s estate was released from sequestration. *Held*, in a redemption suit by beneficiaries under settlement, that under the circumstances the settlement was void against bank as to land comprised in Goodman's release by virtue of 13 Eliz., Cap. 5. Sec. 70 of "*Insolvency Statute* 1871," is not retrospective. *Dallimore v. Oriental Bank Corporation*, 1 V.L.R. (E.,) 13.

Under 13 Eliz., Cap. 5—Post-Nuptial Settlement in Pursuance of Ante-Nuptial Agreement.]—A bill by a creditor impeached a post-nuptial settlement by a father upon his daughter and her husband as voluntary, and the answer alleged that it was executed in pursuance of an ante-nuptial agreement to settle the property in consideration of the marriage, and the bill was not amended so as to attack the ante-nuptial agreement. It appeared that the father was heavily indebted at the date of the settlement (April, 1880,) but that neither the daughter nor her husband knew of his position. The post-nuptial settlement was dated 11th January, 1881, and the father became insolvent March, 1881. In a suit by a creditor to set the settlement aside, *Held* that it was not enough that there should be a scheme against creditors by the insolvent alone; it should be shown that there was such a scheme between the father, daughter, and her husband: that the ante-nuptial settlement was good as against creditors. *Sinnott v. Hockin*, 8 V.L.R. (E.,) 205; 4 A.L.T., 10.

Mortgage by Wife to Husband of Wife's Separate Property—13 Eliz., Cap. 5.]—A wife had money as her separate property, which she lent to her husband. The husband had promised in writing to mortgage his land as a security for this, and afterwards executed a legal mortgage not strictly in compliance with the promise, but *bonâ fide* with the intention of carrying it out. *Held* that such a mortgage might be for valuable consideration, and not void as against creditors under Cap. 5 of 13 Eliz. *Smith v. Hope*, 9 V.L.R. (L.,) 217; 5 A.L.T., 75.

What is a Voluntary Deed—Consideration—When Void under 27 Eliz., Cap. 4.]—B., in August, 1852, by a post-nuptial settlement in consideration of "natural love and affection," conveyed land to trustees upon trust for his wife and children. Afterwards in February, 1855, being pressed by creditors, G. and Co., he sent a letter in which his signature appeared on the second page, and on the third page was a schedule, unsigned, of his property (including the settled property) which B. proposed to mortgage to G. and C. This agreement was carried out, except that the settled property was excluded, and the plaintiffs (G. and Co.) realised on the property, and there being a balance of £8000 due to them brought a suit to set aside the settlement as void against them under 27 Eliz., Cap. 4. Evidence was tendered that B. had received money from his wife's father on the understanding that B. was to make a settlement in favour of his wife and children. *Held* (1) that the evidence was admissible, but not sufficient to made good consideration; (2) that the "*Statute of Frauds*" was satisfied as to the agreement to mortgage; (3) that the deed of settlement as voluntary was void as against the plaintiffs, under 27 Eliz., Cap. 4. *Gladstone v. Ball*, 1 W. & W. (E.,) 277.

Who is a Purchaser Within 27 Eliz., Cap. 4.]—A creditor holding an equitable mortgage is a purchaser within the 27 Eliz., Cap. 4. *Ibid.*

Two Voluntary Conveyances — Conveysnce by Grantee under Second Voluntary Deed to a Purchaser—Application of 27 Eliz., Cap. 4.]—If there are two voluntary conveyances, and the grantee under the second conveys to a purchaser for value, such purchaser has the benefit of 27 Eliz., Cap. 4, against the first volunteer. *Moorhouse v. Rolfe*, 4 A.J.R., 159, 160.

Voluntary—Subsequent Marriage When Consideration for a Deed.]—In order to set up a voluntary settlement by reason of the subsequent marriage of a *feme cestui que trust*, it must be shown that her beneficial interest under the settlement was the inducement for such marriage. *Gladstone v. Ball*, 1 W. &. W. (E.,) 277, 290.

Family Arrangement—Reciprocal Gifts—27 Eliz., Cap. 4.]—A.R. died intestate, entitled to the equity of redemption in certain land and personal property. His heir-at-law agreed to settle the land equally between the widow and the children, and it was so settled, he taking the personal property and paying debts. Afterwards the heir purported to convey his share in the settlement to a purchaser for value, but really conveyed all the land under the settlement. On a suit by the beneficiaries under the deed other than the heir to set aside the purchase, *Held* by *Molesworth, J.*, that the settlement was voluntary, the consideration being mere reciprocal gifts, and as such void as against a purchaser for value. *Semble*, by the Full Court, that the bill might be maintained on the ground of the settlement being for value, and good as against a purchaser. *Ronalds v. Duncan*, 2 V.R. (E.,) 65, 71, 80; 2 A.J.R., 30, 45.

[NOTE.—The purchase was set aside on the ground of fraud in the purchase.]

Voluntary Settlement.]—C., in June, 1872, recovered a judgment against P.P. for £229 14s. 6d., including costs. On the 23rd November, 1871, while the action was pending, P.P. settled land in trust for his wife W.P., the consideration for the settlement being stated to be natural love and affection. On the 20th May, 1872, P.P. and W.P. conveyed the property to J.P., brother to P.P., the consideration being stated as £250, for which a receipt was professed to be given. P.P.'s estate was sequestrated on the 1st of August, 1872. The trustee of P.P.'s estate instituted a suit to have the settlement and conveyance set aside. There was no evidence that J.P. had paid the £250 alleged to have been paid. *Held* that the settlement was void, and the conveyance fraudulent, and land ordered to be given up to the trustee; also an account of the rents received by J.P., and of expenses incurred by him was directed. *Bibby v. Prendergast*, 4 A.J.R., 12.

27 Eliz., Cap. 4, Sec. 2—Sale by Settlor After Insolvency, with Concurrence of Assignee.] — In order to set aside a prior voluntary settlement in favour of a subsequent sale for value, it is necessary that the settlor must be the same person who conveys for value, and that he must stand in such a relation to the land that if all previous voluntary settlements were out of the way, he would be the owner of the land he sells for value. Where, therefore, S. settled lands in 1856 voluntarily upon trustees for his wife and family, became insolvent in 1860, and afterwards the assignee, with S.'s concurrence, conveyed the land for value, *Held* that the beneficiaries under the settlement were entitled as against the purchaser, S. being not in the position of owner of the land, even if the settlement were obliterated since in that case the land would be in his assignee. *Sugden v. Reilly*, 5 A.J.R., 36.

Voluntary Settlement—27 Eliz., Cap. 4—"Insolvency Statute," No. 379, Secs. 129, 131—"Transfer of Land Statute," No. 301, Secs. 3, 49. 139.]—W., in August, 1874, voluntarily transferred to A. and B. certain lands under Act No. 301, and by an indenture of even date A. and B. declared they held as trustees. February, 1875, W. became insolvent, but obtained his certificate of discharge in August, 1875. W., in January, 1876, being indebted to M., and requiring further advances, he executed a deed reciting that transfer of August, 1874, was voluntary, and falsely reciting that W. had agreed to sell to M. for a sum of £1700, comprising the debt due and the further advances. W. then executed a transfer of the land to M., which the registrar refused to register. On bill by M. against W. and beneficiaries and trustees under settlement, *Held* that, under 27 Eliz., Cap. 4, though a purchaser or mortgagee could set aside a settlement truly setting out a real bargain, the settlor himself could not set it aside, nor plan a scheme for another to to do so; that by Act No. 379, Secs. 129 and 131, W. having obtained his discharge, was in the same position to defeat the settlement as if no insolvency had occurred; that Court would not act upon false recitals in deed of January, 1876, but as there was then a real debt then due, the transfer of August, 1874, was void as against M. to the extent of that debt under 27 Eliz., Cap. 4; but having regard to Sec. 139 of Act 301, Court would not make M. proprietor, but directed the trustee, who was the registered proprietor, to execute a mortgage under the Statute to M. *Moss v. Williamson*, 3 V.L.R. (E.,) 221.

Voluntary—27 Eliz., Cap. 4—Volunteer Holding a Certificate under "Transfer of Land Statute," No. 301—Specific Performance by a Purchaser.]—A. was owner of land, and brought it under No. 301 the certificate of title being issued to his son B. Nine months afterwards A. contracted to sell it to C. C. filed a bill for specific performance, and to have issue of certificate to B. declared void as against him. *Held*, that transaction was void as against C. under 27 Eliz., Cap. 4, and that it was not protected under Secs. 49 and 50, the protection afforded under those sections being intended for real purchasers under the Act, and persons dealing with them, not to sons taking presents from their fathers. Specific performance decreed. *Colechin v. Wade*, 3 V.L.R. (E.,) 266.

Voluntary Settlement—Mortgage of Settled Property by Settlor—Reconveyance in Settlor's Name—Effect of.]—M. voluntarily settled property upon his wife and family, and subsequently mortgaged such property, and when paying off the mortgage obtained the reconveyance from the mortgagee in his own name; but M. did not attempt to disturb the possession of his wife and family. It was contended that M. acquired an interest adverse to the settlement under 27 Eliz. in the settled property to the extent of the mortgage. *Per Molesworth, J.*—"If he takes a reconveyance to himself and leaves those entitled under the settlement in undisturbed possession, I think he could not afterwards disturb them in his character of assignee of the mortgage." *In re McDonald*, 2 V.R. (I.E. & M.,) 12; 2 A.J.R., 131.

Voluntary Settlement—Subsequent Mortgage Defeating it pro tanto.]—A settlor by a voluntary settlement settled certain real estate, subsequently mortgaged it with other property, and died. *Held* that the mortgage only defeated the settlement *pro tanto*. *Johnston v. Brophy*, 4 V.L.R. (E.,) 77, 89.

Voluntary Settlement—27 Eliz., Cap. 4—Subsequent Mortgage.]—D. voluntarily settled land on his wife; she died, and D. took out administration to her estate, and subsequently mortgaged land to defendant bank. *Held, per Stephen, J.*, in Court of Appeal, that the mortgage *pro tanto* extinguished the settlement under 27 Eliz., Cap. 4, but when such a defence *i.e.* of the statute is raised it should be put forward on the pleadings distinctly. *Droop v. Colonial Bank*, 7 V.L.R. (E.,) 71, 77.

Under 27 Eliz., Cap. 4—Voluntary Settlsment—Consideration—Release of Dower.]—H. married C. in 1853. By deed, May, 1868, H. conveyed certain land to trustees upon trusts in favour of H. and C., in consideration of C. releasing her dower out of land of which H. then was or might be seized. H. at no time had any land save that in the settlement. H. in 1881 sold the land to A. after C.'s death, and A. applied to bring it under the Statute. Suit by C.'s heir to restrain registration and for declaration of trusts. *Held* that the release of the dower was not a valuable consideration for the settlement, and that sale to A. was protected under 27 Eliz., Cap. 4. *Conols v. Horigan*, 8 V.L.R. (E.,) 239; 4 A.L.T., 22.

Voluntary Settlsment—5 Vict. No. 17, Sec. 7.]—H. moved, under 5 Vict., No. 17, Sec. 7, to set aside a settlement by C. on his wife and children, so far as H. was thereby prevented from receiving the full amount of his debt, on the ground that the settlement was executed by C. after he had contracted the debt, or the cause thereof had arisen, and within twelve months preceding the insolvency, and without valuable consideration. The debt claimed by H. was due for a sum covenanted to be paid for rent of a hotel. Part of this rent had accrued before and part after the settlement. *Held* that rent accrued due is a debt within the meaning of the words, "whose debt was contracted," of the section, and the existence of the remedy of distress does not prevent the operation of the Statute; but that the rent of a current quarter not actually accrued due at the date of a voluntary settlement, does not come within the words, "or the cause of whose debt had arisen," so as to be a ground for setting aside a settlement "in so far as such creditor would thereby be prevented from receiving the full amount of his said debt." The words, "The cause of whose debt had arisen," have no other meaning than "cause of action;" and *Semble*, per *Chapman, J.*, that they are even narrowed to such causes of action as result in a debt. *In re Coates*, 1 W. & W. (I. E. & M.,) 122.

Assignment for Benefit of Creditors—Sequestration—Acts 5 Vic., No. 9, and 5 Vic., No. 17, Secs. 5, 6, 8.]—*See Goodman v. M'Callum*, 1 W. & W. (E.,) 135, *post* under INSOLVENCY—Fraudulent Preferences and Protected Transactions.

5 Vic., No. 17, Sec. 6—Payment of Pre-existing Debt.]—An alienation which is *pro tanto* a discharge of a pre-existing debt is not a fraudulent alienation "without valuable consideration," within the meaning of 5 Vic., No. 17, Sec. 6.

R. and Co., who had consigned goods to D. and Co., sent out to H. a power of attorney to take possession of the goods consigned. H. not only took the goods but also all the property of D. himself, leaving him "without a sixpence in the world." D. was largely indebted to R. and Co., and the transfer thus operated in payment *pro tanto* of his debt. *Held*, not a "fraudulent alienation without valuable consideration." *Downie v. Graham*, 1 W. &. W. (L.,) 195.

Compare Sec. 70 of Act No. 379.

Settlement—"Insolvency Statute 1865," No. 273, Sec. 30.]—Sec. 30 of the Act is not retrospective. Rule *nisi* to set aside a voluntary post-nuptial settlement executed by an insolvent within twelve months of his insolvency discharged, the insolvency being under Acts 5 Vic., No. 17, and 7 Vic., No. 19. *In re Mahony*, 4 W. W. & A B. (I. E. & M.,) 5.

Voluntary Settlement, No. 379, Sec. 70—13 Eliz., Cap. 5.—Subsequent Mortgage of Part of Settled Lands—Investment of Mortgage Moneys—Right of Assignee to Follow.]—K. made a voluntary settlement of lands on his wife and children, appointing S. and T. trustees on June 19th, 1871. In July, 1872, a sum of £1000 was raised by mortgage of part of settled lands, settlement being treated as voluntary and void against mortgagee. K. alone executed mortgage. The trustees received the £1000, and applied it under K.'s directions in the purchase of a part interest in a ship. On September 26th, 1873, K.'s estate was sequestrated, and plaintiff appointed assignee. In a suit by plaintiff against T., as defendant, *Held* that settlement was void as against plaintiff under Sec. 70 of Act No. 379, and under 13 Eliz., Cap. 5, and that assignee could follow mortgage moneys invested in part purchase of ship as being proceeds of the settled property which he could indentify and which were subject to the same liability as the settled property itself. *Halfey v. Tait*, 1 V.L.R. (Eq.,) 8.

"Insolvency Statute," No. 379, Sec. 70—Voluntary Settlements—Jurisdiction of Judge of a District Court.]—D. on 4th March, 1863, purchased station and freehold property and mortgaged it to vendors to secure purchase money. On October 1st, 1870, D. executed a voluntary post nuptial settlement by which he granted the equity of redemption to a defendant as trustee in favour of his wife and children. On June 1st, 1871, D.'s estate was sequestrated, and an order was made by Judge of District Court of Insolvency that settlement was void as against official assignee. *Held*, that Judge

of District Court had no jurisdiction under Sec. 70 to declare settlement void, and that Sec. 70 is not retrospective. *Dallimore v. Oriental Bank Corporation*, 1 V.L.R. (E.,) 13.

See S.C., *ante column* 469.

Voluntary Gift to a Married Woman—"Insolvency Statute 1871," No. 379, Sec. 70.]—M., in 1870, agreed to execute when requested a transfer of land to his daughter, a married woman, in return for her services in washing, cooking, &c. The land was transferred, May 26, 1877, and in August, 1878, M. became insolvent. *Held* that the agreement being void for uncertainty, and there being nothing but the land to pay debts, the transfer was void as against official assignee under Sec. 70 of Act No. 379. *Shiels v. Drysdale*, 6 V.L.R. (E.,) 126; 2 A.L.T., 14.

13 Eliz., Cap. 5—Act No. 379, Sec. 70.] — A married woman received small sums of money from her relatives, saved money out of money allowed her for household expenses and from boarders' payments. Her husband, about eight months before insolvency, invested the money saved by the wife in land, which was mortgaged to a building society, the equity of redemption being reserved to the wife. *Held* that as the money was not the wife's separate estate, the conveyance reserving the equity of redemption was fraudulent and void under 13 Eliz. and Act No. 379, Sec. 70, and that the trustee in insolvency was entitled to redeem. *Smith v. Smith*, 3 V.L.R. (L.,) 2.

Settlement on Wife—Management of Property by Husband—Land Purchased in Name of Wife with Profits.]—S., in 1862, settled real estate on his wife to her separate use without power of anticipation, remainder to himself. This settlement had never been acted on so far as the public could see, for S. gave leases of the land and received the rents, and generally treated it as his own, keeping a banking account in his own name, which he paid incomings into and outgoings out of, but, as the wife alleged, as her agent. In November, 1882, it was brought under the "*Transfer of Land Statute*," and the wife then for the first time dealt with it, conveying it for no consideration to a nephew, who leased it to S. Out of the profits of this land S. bought other land in the name of the wife in October, 1883, and a little more than two months afterwards became insolvent, and his assignee brought a suit to have her declared a trustee for the assignee of the allotments purchased in 1883. *Held* that the wife's acquiescence in her husband's dealing with the property settled in 1862 as his own disentitled her from claiming the profits as against her husband's estate, and that the trustee was entitled to the land bought with such profits. *Hasker v. Summers*, 10 V.L.R. (E.,) 204; 6 A.L.T., 80.

Settlement—Executed in Anticipation of Result of Pending Litigation.]—*Per Molesworth, J.*—A settlement executed in anticipation of the possible result of pending litigation may be as fraudulent as if executed after the result is known. *In re Solomon*, 1 W. W. & A'B. (I. E. & M.) 45.

Fraudulent Conveyance.]—M. recovered judgment against H.M. on 21st December, 1870; execution was issued, and the bailiff seized the property of H.M., and was about to sell, when L. claimed it under a bill of sale. On an interpleader summons it appeared that L. had recovered judgment against H.M., and issued execution. Instead of enforcing it, he took a bill of sale over H.M.'s property, dated 29th November 1870, and registered on the 2nd December. It recited the debt, the judgment and costs of *fi. fa.* that H.M. had applied to L. not to enforce the execution, but to grant him further time for payment, which L. agreed to on having the repayment secured, and that, in consideration of L. so agreeing, H.M. assigned the property; provided that if H.M. paid a certain sum with interest, L. covenanted to re-transfer the property. *Held* that there was nothing fraudulent in this transaction. *Lynch v. Massey*, 2 A.J.R., 17.

Conveyance to Defeat a Judgment Creditor.]—T. was sued in an action at law by G. and M., and on July 24th they recovered a verdict, and the land was shortly afterwards sold to the plaintiff at a sheriff's sale under a writ of *fi. fa.* On July 23rd T. purported to convey the land for value to his brother, which conveyance was registered July 26th. On bill by plaintiff to set aside the conveyance, *Held*, upon the evidence, that the conveyance was a sham, and that T.'s brother was a trustee for the plaintiff, who had acquired a valid interest under the sheriff's sale. *Angove v. Tregonning*, 1 A.J.R. 80.

2. Setting Aside.

How Set Aside—5 Vic., No. 17, Sec. 7.]—A voluntary settlement made by an insolvent within twelve months' of his insolvency on his wife and infant children, may be set aside as against a creditor by a rule *nisi* under 5 Vic., No. 17, Sec. 7, served on the trustees and father, and without a suit instituted for the purpose. The section is quite independent of the solvency of the settlor at the time of executing the settlement. *In re Rogers*, 1 W. & W. (I. E. & M.,) 98.

Voluntary Settlement—Summary Remedy under 5 Vic., No. 17, Sec. 7.]—Sec. 7 of Act No. 17 gives to a creditor who is entitled under it a summary remedy, and not merely a declaration of right which it would require a bill in equity to make available. In the case of a voluntary settlement executed within twelve months of insolvency, the Commissioner of Insolvent Estates was ordered to sell as much as was necessary for payment of creditor's debt; the official assignee, the trustees of the settlement, and the insolvent, were ordered to join in conveyance, and the trustees to stand in creditor's place with respect to any dividend he would be entitled to. *Ex parte Wright, in re Mahoney*, 2 W. & W. (I. E. & M.,) 1.

Who May Maintain Suit.]—A judgment creditor before he sues out execution at law has no *locus standi* to set aside a conveyance made by the judgment debtor as fraudulent under 13 Eliz., Cap. 5, even although upon the

evidence it appears that the conveyance was fraudulent as against creditors. *Yandell v. Hector*, 4 W. W. & A'B. (E.,) 1.

Who May Maintain Suit—Trustees of a Creditor's Deed under the "Insolvency Statute 1865."]—*Held*, reversing *Molesworth, J.*, trustees of a creditor's deed under the "*Insolvency Statute* 1865," executed by a majority, but not by four-fifths of the creditors, may maintain a suit to set aside, under 13 Eliz., Cap. 5, a voluntary settlement executed by the debtor at a time when he was indebted to a creditor, who continued such at the date of the creditor's deed. *Toohey v. Steains*, 1 V.R. (E.,) 49; 1 A.J.R., 51.

Defrauding Creditors under 13 Eliz., Cap. 5—Who May Sue to Set Aside.]—An execution creditor, whose judgment is unregistered, though he has not a lien upon the lands of his debtor, may, as on behalf of himself and the other creditors, maintain a suit (as an assignee in insolvency may) to set aside dealings with such lands, as being intended to defraud the general body of creditors, the true aspect of the suit not being whether judgment creditors have a lien upon the land, but that it seeks redress for an execution creditor frustrated by fraudulent conveyance of the property, the same as if the property were chattels personal. *Colonial Bank of Australasia v. Pie*, 6 V.L.R. (E.,) 38; 1 A.L.T., 156.

Parties to Suit to Set Aside.]—An equitable mortgage of a transferee with notice of such lands is not a necessary party to such suit. *Ibid.*

Voluntary Settlement—Setting Aside—Who May Sue—Assignee—Creditor.]—Suit by a creditor on behalf of himself and all other creditors to have a conveyance and two transfers of land declared void, both under 13 Eliz., Cap. 5, and under the "*Insolvency Statute* 1871." The assignee had been requested to take proceedings, but had refused. *Held, per Molesworth, J.*, that the suit could not be maintained by a creditor, that the assignee was the only person entitled to sue, and that the bill could not be amended by adding the assignee as co-plaintiff. Bill dismissed without costs. *Douglas v. M'Intyre*, 10 V.L.R. (E.,) 249; 6 A.L.T., 90.

Voluntary Settlement — Suit to Set Aside — Parties.]—In a suit by the trustee in insolvency of a deceased person whose life was insured, against the trustee and *cestuique* trust of the settlement, seeking to set aside a settlement of the policy as being voluntary, the personal representative of the deceased need not be a party, but, per *Molesworth, J.*, the next-of-kin must be parties. On appeal, affirmed by the majority of the Full Court *(Higinbotham, Williams*, and *Holroyd, J. J.) sed* per *Holroyd, J.*, that since the assurers did not raise any objections to the suit for want of parties, the Court should not consider the objection, when raised by the trustee defendant. *Davey v. Pein*, 10 V.L.R. (E.,) 306; 6 A.L.T., 131.

"Insolvency Statute 1871," No. 379, Sec. 70—Burden of Proof.]—In a suit to set aside a settlement as voluntary under Sec. 70 of Act 379, the onus of proof of valuable consideration lies on those who claim under such settlement. *Gray v. Faram*, 5 V.L.R. (E.,) 270.

Costs of Setting Aside a Voluntary Settlement Under Sec. 7 of No. 17.]—Though there has been some conflict as to the power of the Court to give costs in cases where voluntary settlements are sought to be set aside under Sec. 7 of 5 Vic., No. 17, the precedent of *M'Donogh's Case* should be followed, and costs be given to the creditor. The clause should be so construed that the creditor should be paid his debt in full, which would not be the case if he were deprived of his costs. The trustees of the settlement should, where infants are concerned, have their costs in priority out of the estate. *In re Rogers*, 1 W. & W. (I. E. & M.,) 98.

Voluntary Conveyance in Fraud of Creditors—Costs of Suit and Conveyance.]—M., in December, 1873, conveyed the equity of redemption in a mortgage to S. as in consideration for £500, but it did not appear that any consideration was in fact paid, and in February, 1874, M. became insolvent. Suit by M.'s official assignee to set aside conveyance and for reconveyance. S. did not resist the demand, but claimed the costs of conveyance. Conveyance set aside, defendant to abide his own costs of the conveyance, and to pay plaintiff's costs. *Jacomb v. Stephens*, 5 A.J.R., 96.

Property Apparently Husband's—Evidence in Support of Wife's Claim—Costs.]—As to cases made by wives as to the apparent property of their husbands' money in bank to their credit, or crops upon land apparently farmed by them, the wives should, to prevent distrust, supply accurate evidence besides their own to obtain credence. Where the Court thought that there was a possibility of its having misconceived the wife's rights, and of her being disabled by poverty from bringing forward witnesses to support them, the Court did not award costs against her. *Hasker v. Summers*, 10 V.L.R. (E.,) 204; 6 A.L.T., 80.

FREIGHT.

See SHIPPING.

FRIENDLY SOCIETY.

STATUTES.

"*Friendly Societies' Act* 1865," No. 254.
"*Friendly Societies' Act* 1877," No. 590.

"Friendly Societies' Act," No. 254, Sec. 36—Liability of Officers.]—A., the secretary of a society, made default in his accounts, and afterwards became insolvent. Under Sec. 36 of Act No. 254, an order was made by justices for double the amount. Rule *nisi* for a prohibition. The Court expressed a strong opinion that the society had a double remedy, one against the insolvent for double the amount, and the other a preferent claim from the official assignee. *Held*, there was no such want of jurisdiction on part of magistrates as to justify a prohibition. *Regina v. Call*, 4 W.W. & A'B. (L.,) 225.

"Friendly Societies' Act," No. 254, Sec. 36—Suspension of Lodge.]—A certain lodge (No. 3) of Odd Fellows was suspended by the committee of the grand lodge for violating certain rules, &c., of the grand lodge; and the trustees of the lodge No. 3 were summoned by a summons reciting that fact, and that a demand had been made for payment of money belonging to lodge No. 3 in their possession. *Held*, affirming the justices, that Sec. 36 was a penal one relating to misapplication of money, which defendants were not doing, but only holding as trustees under directions from the lodge that appointed them, and that case did not come within Sec. 36. *Darton v. Knight*, 6 W. W. & A'B., (L.) 106.

Suspension of Member—Dispute How Decided.]—Any dispute between a member of a friendly society, who has been merely suspended and not expelled, and the officers of the society in respect of such suspension, must be decided in the manner provided by the rules of the society; and there is no jurisdiction on the part of justices to hear such complaint unless in default or disobedience of the decision under the rules, as provided by Sec. 31 of the "*Friendly Societies' Statute* 1865," No. 254. *Hunter v. Barnes*, 5 W.W. & A'B. (L.,) 120.

Proof that Business is Conducted in Furtherance of Objects of Registration—Certificate of Registration.]—The certificate of registration of a Friendly Society under the "*Friendly Societies Statute*," No. 254, is merely a certificate of the registration, and is not proof of the fact that the society has conducted and continued all its operations in furtherance of the objects for which it was registered. *McEwan v. Blair*, 1 V.R. (L.,) 178; 1 A.J.R., 141.

Society not Conducting Business as a Friendly Society—Liability of Shareholders.]—A society registered for one object under the provisions of the "*Friendly Societies Statute*," No. 254, but conducting its business for another object, not being one of those mentioned in the Act, is not afforded any protection by the Act, and its shareholders may be held personally liable as co-partners. *Ibid.*

Person Holding Himself Out a Member—Liability Where Company is Illegally Trading.]—A Friendly Society was conducting business in pursuance of objects different from those mentioned in its certificate of registration, such objects being none of those mentioned in the "*Friendly Societies Statute*," No. 254. A defendant sued as a member had been appointed and acted as trustee, and was a member of the first directory. He drew one or more cheques, interfered in the business, and attempted at a public meeting of the society to move the adoption of the first report. *Held* that there was evidence that he held himself out to third persons as a member, and that such persons were at liberty to infer that as regarded his liability to them he was to be deemed a member, and that he was personally liable as a co-partner. *Ibid.*

Trustee Executing a Creditor's Deed—Officer—No. 254, Secs. 24, 27, 36.]—Sec. 36 of the "*Friendly Societies Statute*," No. 254, shows that a trustee of the society is an "officer" within the meaning of Sec. 24 of the Act, and may thus receive moneys of the society. Where, therefore, a trustee of a Friendly Society, in July, received money on behalf of the society, and in November executed a deed of assignment for creditors, and in February following the trustees of the society demanded the money from the trustees of the creditor's deed, *Held* that since it was not to be presumed that the trustee had been guilty of embezzlement he must be taken to have still had the society's money when he executed the deed of assignment, and that the trustees of the deed, as his assignees, must under Sec. 27 pay it over to the society. *Eastwood v. Scott*, 2 V.R. (L.,) 101; 2 A.J.R., 64.

"Friendly Societies Statute," No. 254, Secs. 24, 36—Construction.]—Sec. 36 of the Act No. 254, shows that a trustee is an "officer" within the meaning of Sec. 24. *Ibid.*

Action by Friendly Society on a Promissory Note—What Declaration Must State.]—In an action by the trustees of a Friendly Society on a promissory note, the declaration must state that the note is the property of the society. *Wilkie v. Wright*, 4 A.J.R., 75.

Action by Friendly Society on a Promissory Note—Who May Sue.]—The trustees of a Friendly Society may sue on a promissory note payable to the treasurer, which has been delivered to the society without endorsement by the treasurer, since by Sec. 16 of the "*Friendly Societies Statute* 1865," all the property, real and personal, of the society is vested in the trustees. *Ibid.*, p. 117.

Meetings—Duly Convened Special Meeting.]—The rules of a Friendly Society provided that the master of a lodge could call a special meeting; that it was the secretary's duty to prepare and sign all notices, &c., required by the rules; and that the trustees might be removed at a specially summoned meeting duly convened for that purpose. A meeting was called by a notice which had no reference to the master or the secretary, was signed by nobody, and which did not indicate who gave the order. *Held* not a duly convened special meeting. *King v. Fulton*, 2 V.L.R. (E.,) 100.

Appointment of Trustees—Evidence of.]—A copy of resolutions appointing trustees of a society, and registered under the "*Friendly Societies Statute* 1865," Sec. 16, is *prima facie*, but not conclusive evidence of the appointment. *Ibid.*

Power and Liability—Registered under Act No. 254, and Subsequently Incorporated under Act, No. 493.]—A Friendly Society registered under the "*Friendly Societies Statute* 1865," received deposits from persons not members, and borrowed money, and before repaying such moneys was incorporated under the "*Building Societies Act* 1874." Upon action by a bank which had lent some of the money borrowed by the society, *Held* that the limit placed upon the powers of building societies by Sec. 25 of the "*Building Societies Act* 1874," could not apply to societies before that Act, and that the society had power to borrow; that Sec. 16 of the "*Friendly Societies Statute* 1865," by allowing the trustees to sue and be sued did not take away the common law right to sue the members of the society, and that the members were liable for the moneys borrowed. *Colonial Bank of Australasia v. Curtain*, 4 V.L.R. (L.,) 38.

S.P., *see Bank of Australasia v. Pie*, 4 V.L.R. (L.,) 527.

Building Society Registered as a Friendly Society —Power to Borrow—"Friendly Societies Statute," No. 254, Secs. 4 (Sub-sec. 7,) 16—Liability of Members.]—The plaintiff bank lent money to a building society registered as a Friendly Society, and sued on the common counts for money lent to an individual member and for moneys lent to the society. *Held* that such a society had under Act No. 254 power to borrow money with proper limitations, but that a person who wishes to rely upon the fact that the proper limitations have been exceeded must specially plead that fact, and although Sec. 16 makes the trustees the persons to borrow, and therefore to be sued, yet the trustees borrow on behalf of the society, and every individual member of the society is interested in such loan, and is answerable for the debts of the society, and may be sued therefor. *Colonial Bank of Australasia v. Draper*, 4 V.L.R. (L.,) 527.

Act No. 590, Sec. 15, Sub-sec. 8—Illegal Detention of Books by Secretary.]—Sec. 15, Sub-sec. 8, of the Act enables the trustees of a society to recover from "any person" the society's property in his possession; such "pereon" includes a person claiming to be a secretary to the society as well as a stranger. *Jones v. Milne*, 7 V.L.R. (L.,) 3; 2 A.L.T., 117.

Action Against Officer for Withholding Property of Society — How Case Launched — "Friendly Societies Act 1877," Sec. 15, Sub-sec. 8]—On a complaint against an officer of a friendly society, under Sec. 15, Sub-sec. 8, of the "*Friendly Societies Act*, 1877," for withholding property of the society, *Held*, per *Stawell, C.J.*, and *Higinbotham, J.*, that to bring the case within the section, it was sufficient to prove that the officer had become possessed of the property, and had declined to give it up when required, and that it then became necessary for the officer to prove that he had a lawful reason for so withholding the property, or was unable to give it up. *Per Williams, J.* (dissenting)—The case is not launched without evidence of something in the nature of fraud, *mala fides*, or some kind of wilful misconduct. *Francis v. McDonald*, 8 V.L.R. (L.,) 237; 4 A.L.T., 42.

FUGITIVE OFFENDERS.

See EXTRADITION OF CRIMINALS.

GAME.

Trespassing in Pursuit of Game — "Police Offences Statute 1865," Sec. 17, Sub-sec. 6.]—An entry upon land to "seek" game is not within the protection of Sec. 17, Sub-sec. 6, of the "*Police Offences Statute* 1865," as to the entry upon land in "pursuit" of game. *Plier v. Trumble*, 4 A.J.R., 26.

GAMING AND WAGERING.

Betting on the Result—What is.]—M. contributed a sum towards some stakes for which two pedestrians were to compete, and deposited it with defendant. A custom was proved that the persons who found the money for a competitor, in the event of his winning, received the whole stakes on each side, but that they might make a present to the man they backed. The race resulted in a draw, and the stakes were divided between the competitors. Plaintiff sued the stakeholder for his deposit. *Held* that the contribution by the plaintiff amounted to betting on the result, and was therefore a contract by way of wagering within Sec. 51 of the "*Police Offences Statute*," and void. *Miller v. Harris*, 1 V.R. (L.,) 142; 1 A.J.R., 127.

Recovery of Deposit from Stakehold r—"Police Offences Statute," No. 265, Sec 51—Game Unfinished and Stakes Unpaid—Locus Penitentiae.]—M. had lodged a sum of money with P. to abide the event of a wager on a game of "Yankee grab." The game was unfinished, and the stake was not paid over. *Held* that M. was at liberty to demand back the money from the stakeholder before it was paid over. *Melville v. Pendreigh*, 5 A.J.R., 84.

Bill of Exchange—Arrangement to Pay Legal Debt—Consideration Not Severable.]—S. lost money to C. in January, and gave him bills for the amount, which he was unable to pay when

due. S. then arranged with C. that C. should pay off a legal debt for which S.'s creditors were pressing, and that S. should give C. bills for an amount less than that of the original bills. This was done, and one of the last mentioned bills was for an amount not greater than that of the debt paid off by C. *Held* that the whole transaction was one and could not be separated, nor could the consideration be severed, and that C. could not recover on the last mentioned bill. *Collin v. Stewart*, 4 V.L.R. (L.,) 211.

Contract Divisible—Security Not.]—If part of a contract arises upon a good consideration and part of it upon a bad one it is divisible. But it is otherwise as to the security; that being entire is bad for the whole. *Ibid.*

Cheques Given in Payment of a Gambling Debt.] —In an action by the holders of a cheque against the drawer it was proved that the defendant had signed the cheque, and it was admitted that it was given to the original payee in payment of a gambling debt. *Held* that the cheque having been given for an illegal consideration it was for the plaintiff to prove that he had given value for the cheque, not for the defendant to prove that he had not. *Carey v. Stewart*, 3 A.L.T., 105.

Money Lent for Purpose of Gambling—Action for Money Lent Will Not Lie.]—*Ritchie v. Eckroyd*, 5 W. W. & A'B. (L.,) 98, *see post* under MONEY CLAIMS—Money Lent.

Gaming and Wagering as an Offence under "Police Offences Statutes."]—*See post* under OFFENCES (STATUTORY.)

GARNISHEE.

See ATTACHMENT.

GAZETTE.

Under Sec. 15 of "*Land Act* 1865," and Sec. 26 of the "*Evidence Statute* 1864," the notice in the *Gazette* of forfeiture under the "*Land Act*" is only *prima facie* evidence of forfeiture. *M'Dowall v. Myles*, 6 W. W. & A'B. (L.,) 16.

But Sec. 101 of "*Land Act* 1869," makes the notice conclusive evidence so that as regards the public the land so gazetted as forfeited is open for selection. *Thorburn v. Buchanan*, 2 V.R. (L.,) 169; 2 A.J.R., 109.

Followed in *Regina v. Rothery, ex parte Mogg*, 4 V.L.R. (L.,) 33.

Where a license under the Act of 1869 is not produced the notice in the *Gazette* is inadmissible. *Bloomfield v. Macan*, 5 A.J.R., 73.

For general remarks upon meaning of Sec. 101 and its effect upon a lease granted under the Act of 1865, *see Ettershank v. The Queen*, 4 A.J.R., 11, 55, 132; L.R., 6 P.C., 354, *post* under LAND ACTS—Leases.

Application of Crown Lands to Public Purposes as a Road Within No. 32, Sec. 4—Whether Advertisement in "Gazette" Necessary.] — *United Sir William Don Company v. Koh-i-noor Company, ante column* 329.

Notice of Forfeiture of Mining Claim.] — Publication of notice of forfeiture in the *Gazette* of a mining claim dates from the time of its being fully printed. *Clarence United Company v. Goldsmith*, 8 V.L.R. (M.,) 14; 3 A.L.T., 147.

See post under MINING—Interest in Mines —Claim—Forfeiture.

Under Sec. 14 of the "Mining Statute 1865," No. 291, the publication in the *Gazette* of a reservation of Crown lands from mining is a sufficient determination of the interest of a holder of a residence area. *Regina v. Dowling, ex parte M'Lean*, 2 V.R. (L.,) 61; 2 A.J.R., 56.

See S.P., *Mayor of Sandhurst v. Graham*, 3 V.R. (L.,) 191; 3 A.J.R., 79, *post* under MINING—Residence area.

Forfeiture of Mining Lease.]—The proclamation in the *Gazette* of forfeiture of a mining lease does not *per se* avoid the lease without the Crown doing some definite act to determine the tenancy. *Barwick v. Duchess of Edinburgh Company*, 8 V.L.R. (E.,) 70, 85, 92.

Proof of Registration of Building Society.]—The notification in the *Gazette* is sufficient proof of the registration and incorporation of a Building Society under Sec. 8 of Act 493. *Sandhurst Building Society v. Delaney*, 3 V.L.R. (L.,) 234.

GIFT.

Imperfect—Death of Donor Before Perfecting.] —G. requested B. to break up his establishment and remove to Melbourne. B. consented, and G. requested him to select a suitable house at a price not exceeding £1000. B. selected a house subject to a mortgage, on which £540 was due, the purchaser having the option of buying, subject to the mortgage, for £309 16s. 6d., or discharged from the mortgage for £850. B. informed G. of the offer, who instructed him to buy for £850, and signed and gave to him a blank cheque, and told B. that he wished to make a gift of the house to his sister, who was B.'s wife. At the same time he handed a deposit receipt for £1000 to his brother, one of the defendants, and told him to transfer the amount of the deposit to his current account to meet the cheque which he had given B. to fill up. B., thinking it was advantageous

to do so, bought subject to the mortgage, and took a conveyance in his own name. He told G., who said, "Why did you not buy out and out? I intended the house for *Annie* (B.'s wife.) The house is *Annie's*, and we can settle the matter when we come to Melbourne." G., B., and his wife came to Melbourne, lived in the house which G. referred to as his sister's, and gave her money from time to time to meet the instalments falling due on the mortgage. After G.'s death a friendly suit was brought to determine whether the executors of his will were bound to effectuate his intention of completing the purchase of the house. *Held* that, as a gift, the transaction was incomplete, and that, as a business arrangement, the evidence did not support it, and that the executors were not bound to carry out the intention of G. *Blair v. Grant*, 1 V.R. (E.,) 130; 1 A.J.R., 121.

See also cases, *ante columns* 386, 387, under DONATIO MORTIS CAUSA.

S., a father, occupied land as caretaker for his son J., the owner. On J.'s leaving the colony he said to S.: "If I never come back you are to keep it," but there was no delivery of possession. J. did not come back. *Held* that this did not amount to a gift, and did not create a tenancy at will. *M'Cracken v. Woods*, 5 V.L.R. (L.,) 23.

Gifts from Husband to Wife.]—*See* under INSOLVENCY—Property of Insolvent, and *ante column* 475.

GOODS.

Assigning.]—*See* ASSIGNMENT and BILL OF SALE.

Detaining.]—*See* DETINUE and OFFENCES (STATUTORY.)

Selling.]—*See* SALE.

Converting.]—*See* TROVER.

GOVERNOR-IN-COUNCIL.

Proclamation of.]—*Quære*, whether a proclamation speaks from the date of making it or from the time of its publication in the *Gazette*, *Molesworth, J.*, inclining to the opinion that it speaks from its date. *Kennedy v. The Queen*, 1 W. W. & A'B. (E.,) 145.

Under Sec. 46 of "*Land Act* 1862," the Governor-in-Council has power to withdraw land from selection "on account of improvements." *Ibid.*

As to powers of Governor-in-Council generally under the "*Land Acts*" *see post* under LAND ACTS.

Power to Grant Easement.]—*Brooks v. The Queen, ante column* 395.

Powers of Governor-in-Council to Grant and to Forfeit Mining Leases under the Act No. 291.]—*See* cases *post* MINING—Interests in Mines—Leases.

Power of Governor-in-Council in Adjusting Boundaries of Shires and Road Districts under Act No. 176, Sec. 284.]—*Shire of Buninyong v. Berry*, 5 W. W. & A'B. (L.,) 175, *post* under LOCAL GOVERNMENT.

GRANT.

Crown Grant — Construction.]—In a Crown grant the land sold was described by the acreage, and by measured boundaries, and was also described as being bounded on the south by a road one chain wide. No starting point for the measurements was given in the description of the parcels, but on the ground itself the angle of the road, and the south-eastern point of the land, were marked by a peg put in by the Government surveyor. According to the position of the peg and boundary, the land was some acres less than the quantity mentioned in the grant, and the eastern boundary was one chain shorter than the grant asserted it to be. The Judge at the trial rejected evidence which was tendered by the plaintiff to show that by measuring from the starting point of an allotment north of the allotment in question, the plaintiff could only obtain the proper quantity by including the road, and directed the jury that the land conveyed was not that mentioned in the grant, but the portion actually marked out by the Government surveyor, and that this could not be controlled by the measurements in the grant. On motion for a rule for a new trial, *Held* that the question was one for the jury; that the direction to them was right; and rule refused. *Scott v. the Shires of Eltham and Heidelberg*, 2 V.L.R. (L.,) 98.

Crown Grant—By Presumption of Law—Right to Road ad medium viae filum.]—D. was Crown grantee of land purchased by him from the Crown in 1853, and described in the grant as *inter alia*, "bounded on the south by Wellington-street." In a plan exhibited at the time of the sale, Wellington-street was shown to be a street five chains wide. In 1868 the Crown advertised for sale land in the centre of Wellington-street, leaving a carriage way on either side 72 feet wide. On a petition to the Crown and bill against the Board of Land and Works by D., seeking an injunction against the Board of Land and Works selling the land, *Held by the Full Court*, reversing *Molesworth, J.*, that by presumption of law, the land forming the highway *ad medium filum viae* passed under the grant to the grantee; and to ascertain the grantee's right, the plan showing the width of the street might be

referred to, not to vary or explain the deed, but to show what land passed thereby, *i.e.*, what the words, "Wellington-street," meant. And interlocutory injunction granted, limited to the land forming the street extending for the frontage of the allotment granted, and from that frontage to the centre of the street, its width being deemed to be that shown in the plan exhibited at the time of sale. *Davis v. The Queen*, 6 W.W. & A'B. (E.,) 106.

The doctrine of *Davis v. The Queen* as to the right *ad medium filum viae* has been followed in the following cases turning upon cases of mining under a street:—*Western Freehold Company v. Great Western Company*, 4 W. W. & A'B. (E.,) 44; *Victoria United Mining Company v. Prince of Wales Company*, 5 V.L.R. (E.,) 93; *Extended Hustlers' Freehold Company v. Moore's Hustlers' Company*, 5 A.J.R., 116; *Band of Hope Company v. Williams' Freehold Company*, 5 V.L.R. (E.,) 257.

Crown Grant—Ownership of Road ad medium filum viae.]—C. was owner of land by Crown grant, abutting on a street, such land being described by metes and bounds as "bounded by" the street. The defendants were mining under the half of the street adjoining C.'s land, and C. sued them in trespass. *Held, dissentients Stephen, J.*, on rule *nisi* to enter a verdict for defendants that the doctrine of *Davis v. The Queen* applied, nothing in the Act 360 controverting this doctrine, and that the soil *ad medium filum viae* passed to the plaintiff, and that the enclosure and plantation of part of the land by the Town Council did not decrease its width as at law. Rule discharged. *Carvalho v. Black Hill South Extended Company*, 1 V.L.R. (L.,) 225.

Injunction to Restrain Sale of Street Fronting Land.]—*See Pike v. The Queen, ante column* 323.

Ownership of Road ad medium filum viae.]—*Per Higinbotham* and *Williams, J.J.* Property in the soil in a public street, road or highway in Victoria cannot be and never has been created by virtue merely of a grant by the Crown of land adjoining such street, road, or highway. *Davis v. The Queen* overruled. *Holroyd, J.*, concurred in thinking that *Davis v. The Queen* was wrongly decided. *Garibaldi Company v. Craven's New Chum Company*, 10 V.L.R. (L.,) 233.

Crown Grant—Issued in Name of Purchaser After Death—Legal Estate.]—The legal estate in Crown lands comprised in a grant issued in the name of a purchaser who died before the "*Administration Act* 1872," after his death is not in the purchaser's administrator appointed under the Act, and *semble* that the legal estate is in his heir-at-law. *Edmondson v. Macan*, 4 V.L.R. (L.,) 422.

Crown Grant — Proof of.] — Enrolment of Crown grants in this colony has no existence. The grant may be proved by production of the grant with a memorial of registration. *Ibid.*

Crown Grant—Detinue for—Who May Maintain.] —*See Humphray v. Humphray, ante column* 373.

Crown Grant—Mistake in Issuing—How Pleaded.] —Where concealment or mistake in the grant or present disposition to act is alleged in pleading, it should have reference to the mind of the Governor himself, and not to his subordinate agents, and he personally should be described as deceived or mistaken, under which averment evidence of the facts as to those through whom he acts as agents having been deceived may be given; but it would be more convenient, as preparatory to evidence, that the real actors should appear, and the fact of His Excellency having acted by their advice only be stated. *Attorney-General v. Sanderson*, 1 V.R. (E.,) 18; 1 A.J.R., 21, 24.

Crown Grant—Incorrect Description.]—A description in a Crown grant setting out and purporting to describe parcels, but which description is obviously and by demonstration incorrect, as not enclosing a space, should be rejected as wholly inoperative and incorrect. *Stephen v. the Shire of Belfast*, 1 V.R. (L.,) 59; 1 A.J.R., 118.

Crown Grant—Right or Interest of Grantee—Act No. 301, Sec. 49.]—*Alma Consols Gold Mining Company v. Alma Extended Company*, 4 A.J.R., 190, *post* under TRANSFER OF LAND (Statutory) —The Certificate—Conclusive Effect of.

Crown Grant—Under 5 and 6 Vic. Cap. 36—Does not Transfer Gold and Silver to Grantee.]—*See Woolley v. Ironstone Company, ante column* 322.

GUARANTEE OR INDEMNITY.

I. OPERATION OF STATUTE OF FRAUDS.

(1) *What Agreements Within the Statute.*

Guarantee on Separate Paper—Construction of Guarantee.]—S. borrowed on hire certain goods from D., the payment of which McE. guaranteed. McE. took the account, and wrote on a separate paper—"We hereby guarantee the goods had from you on hire, £133, and if returned, hire, £24," and signed it. The jury found that the guarantee was attached to the account by "folding the corners of both papers several times." *Held* that this annexure of the two documents made an instrument fulfilling the requirements of the Statute; and

that the guarantee was an alternative guarantee to pay for such goods as were not returned, but if all the goods were returned, then to pay for the hire; and that, as all the goods were not returned, the latter condition of the guarantee was not performed, and no liability attached in respect of it, and the guarantor had only to pay for goods not returned. *McEwan v. Dynon*, 3 V.L.R. (L.,) 271.

(2) *Consideration.*

Another Guarantee Executed at Same Meeting.]—N. gave a guarantee to McE., "in consideration of *your having executed* a guarantee to" a certain bank. There was conflicting evidence as to which guarantee was signed first, but they were both signed at same interview, and M'E.'s guarantee had not been parted with when N. signed his. *Held* that the circumstances showed that the whole was substantially one transaction, and that the consideration for N.'s guarantee was not a past consideration. *McEwan v. Newman*, 5 A.J.R., 167.

II. Construction of Contract.

Guarantee Against Losses Caused by Neglect of a Bank Manager.]—It was the duty of a manager of a branch bank to inspect weekly the accounts of the clerks under him. The manager neglected to do so, and in consequence the embezzlements of a clerk extending over a year were undiscovered, and the bank suffered loss thereby. *Held*, that the loss was covered by a guarantee policy against losses, "by reason or in consequence of the wilful default or culpable neglect" of the manager "in or arising out of his employment" in the bank. *Colonial Bank of Australasia v. European Insurance and Guarantee Society*, 1 W. W. & A. B. (L.,) 15.

Guarantee Against Misconduct of a Bank Official.]—The A. company issued a guarantee policy to a bank which provided that the company should reimburse, &c., "the full amount of any loss whatsoever," that "the funds of the company for the time being should be liable to make good any loss," &c., no member thereof being liable beyond his liability in respect of such funds, and that "immediately upon discovery the assured must forward a written notice of all particulars thereof to the board, and the policy should be void if for thirty days after such discovery such statement should not be sent." The policy was signed by B. and G. as "directors," Nov. 20, 1862. The deed of constitution was made July 1, 1862, executed by B. Jan. 1863, and by G. in Dec. 1862. A clerk's defalcations were first discovered May 11, and owing to his immediately absconding a bare statement was sent in on May 29 claiming £747. After some correspondence, details of the defalcations, and a claim for £765 were sent in Dec. 5. The jury awarded £747 damages. On rule *nisi* for a non-suit or new trial, *Held*, that the word "immediately" might embrace a period of twenty-nine days, and that the offers of compromise contained in the correspondence afforded evidence to go to a jury as to the performance of the conditions as to time and particulars of claim; that the deed reciting that G. and B. were parties was evidence that they were members, although they had not executed the deed at the time of the issue of the policy; and that the "funds for the time being" did not mean the balance after deducting existing liabilities, and that evidence as to such liabilities was properly rejected. *National Bank of Australasia v. Brock*, 1 W. W. & A'B. (L.,) 208.

Guarantee for Fidelity—New Appointment.]—A guarantee was given for the due and faithful performance by a bank clerk of the duties of his situation as clerk of a branch at Melbourne, "or of any office or other situation to which he may be appointed in the service of the said corporation at the said branch bank or elsewhere." The clerk was without the guarantor's knowledge or consent appointed manager of a branch bank at Ballarat, and while acting as such embezzled moneys of the bank. *Held* that the fact of his having been promoted to the situation of manager did not discharge the guarantor since he had undertaken to guarantee the clerk's fidelity in whatever capacity he was engaged. *London Chartered Bank v. Sutherland*, 2 A.J.R., 17.

Guarantee of Fidelity—Undertaking by Insured to Prosecute.]—In a contract of guarantee of the fidelity of a clerk the insured undertook to use due diligence in prosecuting the clerk for criminal defalcations. The clerk having become a defaulter escaped from and was captured while out of the jurisdiction. *Held* that the insured was not bound to incur the expense of bringing him back. *Dougharty v. London Guarantee and Accident Company*, 6 V.L.R. (L.,) 376; 2 A.L.T., 79.

Guarantee of Fidelity—Fraud Committed During Currency of Policy, but Discovered After its Termination.]—A policy of guarantee against losses by the frauds of an *employé* committed and discovered during the continuance of the policy, was subject to conditions endorsed thereon as conditions precedent, to the effect that on the discovery of any fraud the employer should give the company immediate notice thereof, and any claim made in respect thereof should be made in writing within three months of the discovery, and that the company should be entitled to call for particulars and proof of the correctness of such claim; also that the policy should extend to cover only such losses as might have been incurred within the period of twelve months previous to the date of claim that might be made under it. The company terminated the policy at the end of the first year, and a fraud was committed within that year, but was not discovered till after its expiration. *Held* that the company were not liable in respect of such fraud. *Fanning v. London Guarantee and Accident Company*, 10 V.L.R. (L.,) 8; 5 A.L.T., 169.

Continuing.]—F. wrote a letter of guarantee to G., an incumbent of a church, to the effect that, "In consideration that you will engage a curate for the parish of C., I undertake that he shall be paid at least £300 a-year, &c. P.S. This will bind executors." *Held* that

such guarantee was a continuing one, and was not limited to the appointment of the first curate, and that such guarantee was binding on F.'s executors, and that they were not at liberty to revoke the guarantee upon giving reasonable notice, unless such notice was given during a vacancy, and before a new appointment had been made by the incumbent. *Guinness v. Box*, 5 V.L.R. (L.,) 381; 1 A.L.T., 57.

Alteration After Execution—Immaterial Clause.]—A contract of guarantee was executed on a common printed form, and contained a clause with unfilled blanks, which clause was irrelevant and inoperative. After execution the party to whom the guarantee was given struck out the clause. *Held* that the contract was not thereby avoided, since the operation of the instrument was not thereby avoided. *Colonial Bank of Australasia v. Moodie*, 6 V.L.R. (L.,) 354; 2 A.L.T., 61.

Per Stawell, C.J. The question is really whether the altered instrument would operate differently from the original, whether to the prejudice of the other party or not. *Ibid.*

III. Discharge and Rights of Surety—*See* Principal and Surety.

IV. Other Points.

Specific Performance of Contract to Give Lettsr of Guarantss.]—*See Forbes v. Clarton*, 4 V.L.R. (E.,) 22, *post* under Specific Performance—When granted or refused—In other cases.

Illegal Guarantee—"Land Act 1869," Sec. 21.]—*Commercial Bank v. Carson*, 6 V.L.R. (L.,) 310; 2 A.L.T., 62, *post* under Land Acts—Illegal Agreements.

GUARDIAN.

Of Children.]—*See* Infant—Husband and Wife—Will.

Of Lunatics.]—*See* Lunatic.

Appointment of Guardian ad litem.]—*See* Practice and Pleading—In Equity.

Incapacity of Guardian ad litem to Purchase Part of Trust Estate—Fiduciary Position.]—*Larnach v. Alleyne*, 1 W. & W. (E.,) 342; 2 W. W. & A'B. (E.,) 39, *post* under Trust and Trustee—Powers and Rights of.

GUNPOWDER.

Storage—"Gunpowder Statute 1864," Sec. 18.—Sec. 18 of the "*Gunpowder Statute* 1864,' which prohibits the keeping of more than 2cwt. of gunpowder upon any premises does not apply to manufacturers, so that they are not liable to summary proceedings under the Act, unless in respect of imported powder on their premises. *Barclay v. Mollison*, 4 A.J.R., 171.

Manufacturer—Keeping More than the Prescribed Quantity—"Gunpowder Statute 1864," Sec. 18.]—Although there is no restriction upon a manufacturer as to the quantity of gunpowder he may keep at his own manufactory, he may not keep more than the prescribed quantity at any other place. *Dobson v. Lyons*, 2 V.L.R. (L.,) 232.

HABEAS CORPUS.

Where Granted or Refused.]—The Supreme Court will not interfere by *habeas corpus* if the person charged be properly before a Court of competent jurisdiction. Where, therefore, a prisoner was properly before the Court of General Sessions, and was convicted by a jury of whom nine had not been sworn, *Held*, that though this might be good ground on which a Court of Error could proceed, the Court had no power to interfere by *habeas corpus*. *Regina v. Cleary*, 5 W. W. & A'B. (L.,) 85.

Prisoner Wrongly Designated.]—Where a warrant for commitment designated a prisoner under a different name from that which he had borne in the prior proceedings, the prisoner was discharged. *In re Slocombe*, *see ante column* 348.

Motion for—Affidavit that Committing Justices had no Jurisdiction.]—On motion for *habeas corpus ad subjiciendum* to discharge a prisoner from custody, the Court has power to go behind the warrant of conviction, although it be admitted to be good, and to inquire into the question of the jurisdiction of the committing justices on affidavits of the prisoner that they had none. *In re Cornillac*, 1 W. & W. (L.,) 193.

Where the warrant shows a sufficient order to justify the detention of the prisoner, the Court will not look at affidavits stating facts impugning the recitals in the warrant. *In re Devaney*, *ante column* 348.

Commitment by Insolvency Court for Contempt—Supreme Court will on habeas corpus Examine the Evidence upon which Insolvent was Committed.]—*See in re Gray*, 2 V.L.R. (L.,) 241, *post* under Insolvency—Insolvent, his rights, &c.

Return to Writ.]—A return to a writ may be on paper, and need not be on parchment. *In re Rowley*, 3 V.L.R. (L.,) 8.

Return to the Writ.]—On motion for *habeas corpus*, the Court will not take into considera-

tion any arrangement between the prisoner and the Executive as to a special return on the writ, but will assume that the officer in whose custody the prisoner is will make a usual and proper return. *In re Millar*, 3 W.W. & A'B. (L.,) 41.

Return to Writ—What Objections May Not be Taken.]—A prisoner will not be allowed to show, on the return to a writ of *habeas corpus*, that the warrant set out in the return was based on a conviction made without jurisdiction. *In re Gawne*, 2 A.L.T., 45.

Where the return to the writ did not show any adjudication of the period of imprisonment named in the warrant, the prisoner was discharged. *In re Williams*, 5 A.J.R., 160, *ante* column 349.

Whsre Discharge Granted.]—*Per Williams, J.* Where a prisoner is before the Court on *habeas corpus*, though the writ was granted for another purpose, if the Court think the sentence of imprisonment illegal, it will discharge the prisoner. *In re Thompson*, 1 W. & W. (L.,) 24.

On a Writ of "habeas corpus" the Supreme Court has no Power to Review a Record of the Court of General Sessions.]—*Re Armstrong and Stewart*, 4 V.L.R. (L.,) 101.—*See* S.C. *post* under SESSIONS—Appeal from to Supreme Court.

Person Committed for Trial at General Sessions—Remand by Chairman to next Court of Assize.]—*See In re Marshall*, 7 V.L.R. (L.,) 427; 3 A.L.T., 57, *post* under SESSIONS—Jurisdiction of.

HACKNEY CARRIAGE.

Stage Carriage.]—K. held a license for a "stage carriage" carrying seven passengers, and plying between Buninyong and Dowling Forest. He took passengers from Ballarat to Dowling Forest, and was summoned for plying for hire in a hackney carriage not being licensed under the by-laws. *Held* that upon the evidence K. had not used his carriage as a hackney carriage. Appeal allowed. *Kane v. M'Cullagh*, 3 A.J.R., 39.

HARBOUR TRUST.

"Melbourne Harbour Trust Act 1876," Sec. 46—Notice of Action—Person.]—The Melbourne Harbour Trust commissioners are a "person" within the meaning of Sec. 46 of "*The Melbourne Harbour Trust Act* 1876," so as to be entitled to the one month's notice of action prescribed by that section before the commencement of an action against them for anything purporting to be done in pursuance of the Act. Affirmed on appeal to the Privy Council. *Union Steam Shipping Company of New Zealand v. Melbourne Harbour Trust Commissioners*, 8 V.L.R. (L.,) 167; 4 A.L.T., 28; L.R., 9 Ap. Ca. 365.

Appointment of Commissioners—"Melbourne Harbour Trust Act," No. 552, Sec. 16.]—The Melbourne City Council, under the powers given it by the Act, proceeded to appoint two commissioners for the first time. At such election only one commissioner was appointed by the requisite majority, and there were two candidates, M. and S., for the other post; the council failing on the day appointed for the first election, left it to the Governor, as under Sec. 16, to make the appointment, and he appointed M. *Held*, by *Stawell, C.J.* and *Fellows, J.* (*dissentiente Molesworth, J.*,) that Sec. 16 did not apply to such a case, and that the appointment was invalid. *Regina v. M'Ilwraith, ex parte Smith*, 3 V.L.R. (L.,) 166.

Election of Commissioner—Act No. 552, Sec. 6.]—A borough council empowered to elect a commissioner elected one by ballot. *Held*, that such election might be by ballot; and the circumstances excluding the possibility of fraud, the fact that no means had been provided for a scrutiny did not invalidate it. *In re Dowman and Melbourne Harbour Trust, ex parte Clark*, 3 V.L.R. (L.,) 287.

Act No. 552, Sec. 108, Sub-secs. x. and xxiii.—Licenses for Ballast Lighters—Regulations 214, 215.]—L. was convicted before justices for being in charge of a ballast lighter without a license. It appeared that L. had never been refused a license without payment of a fee, but that he had never applied for one. *Held* that though Regulations 214, 215, providing for the necessity of a license and the mode of issue, provided that a license should be issued "upon payment of the fee fixed by the regulations," and no fee was so fixed by any regulation, yet the conviction was good under the circumstances, notwithstanding that a license might have been granted without payment of a fee. *Regina v. Leigh, ex parte Lumsden*, 5 V.L.R. (L.,) 282; 1 A.L.T., 42.

Harbour Regulations at the Port of Melbourne—Act No. 255, Sec. 40—Act No. 552, Sec. 107.]—A master of a steamer was summoned and convicted for obstructing a custom-house officer in the execution of his duties, in breach of a regulation made under Act No. 255; the defendant contended that these regulations were repealed by the regulations made under Act No. 552, and therefore he could not be possibly prosecuted under the former. *Held* that the jurisdiction of the Harbour Trust Commissioners was not exclusive within the limits of the Trust in matters relating to the general government as well as in nautical matters; and that Sec. 107 of Act No. 552 did not repeal regulations made under Act No. 255, which were not inconsistent with No. 552. Conviction affirmed. *Beaver v. Justices of Williamstown ex parte Hammond*, 9 V.L.R. (L.,) 454. 5 A.L.T., 130.

HAWKERS AND PEDLERS.

Who is a Hawker—Act No. 281.]—A fruit grower who sells his fruit wholesale to a retail dealer is not a "hawker" within the meaning of Act No. 281 ("*Hawkers and Pedlars Statute* 1865"); and the mere fact that he solicited one dealer to buy, after a refusal by a prior dealer, does not constitute him such, or render him liable for hawking without a certificate. *Hanson v. Tweedale*, 1 V.R. (L.,) 30; 1 A.J.R. 36.

HEALTH (PUBLIC).

I. Powers and Jurisdiction of Local Boards.

(*a*) *Streets and Roads.*

Borough Council Acting as Local Board—Public Health Statute (No. 310), Secs. 15, 47, Act No. 184, Sec. 138—Forming Private Lane.]—It is not necessary that a special meeting of a Borough Council acting as a Board of Health, should be called to consider resolutions as to the forming of a private lane, since Sec. 138 of the "*Municipal Corporations Act* (No. 184) does not apply, and no special meeting is provided for by sec. 15 of the "*Public Health Statute*" (No. 310). It is sufficient if such resolution be agreed to at an ordinary meeting. It is not necessary, in order to enforce payment from an adjoining owner for the forming of a private lane, that the lane was in existence at the passing of the "*Public Health Statute*"; it is sufficient if it he in existence at the time of dissatisfaction expressed by such owner, for the Act is not limited to lanes in existence at the time of its passing. It is for the Board to consider what proportion should be paid for the forming of a private lane by an adjoining or abutting owner; and a private owner cannot refuse to pay his proportion of the charges for outlet works which were necessary to the lane in question, on the ground only that his property abutted on the lane, and not on any part of the outlet-works. *Gurner v. Municipal Council of St. Kilda*, 1 A.J.R., 102.

Order to Form Street—What it should state.]—An order under Sec. 47 of the "*Public Health Amendment Act*" (No. 310), by a Local Board of Health, requiring the owner of premises to "form, pave, level, drain, or make good" any street, lane, or right-of-way, should specify the manner in, and the levels at which the required works are to be executed. *Woolcott v. Richmond Local Board of Health*, 2 V.R., (L.,) 153; 2 A.J.R., 97.

Street on Private Property—Act No. 310, Secs. 47, 52—Evidence.]—Where a Local Board of Health institutes proceedings to enforce compliance under sec. 47, with an order requiring a street to be formed on private property, it is necessary for the Board to prove that the street was set out upon private property. *Semble, per Fellows*, J.,) Sec. 47 does not give the Board power to proceed for a penalty. *Regina v. Woods, ex parte Emmott*, 1 V.L.R. (L.,) 101.

Where the order *nisi* was addressed to the mayor, councillors, and burgesses, as the parties interested in maintaining the conviction, and the Local Board was the Council only of the Borough (Sec. 15), an objection against the order was overruled. *Ibid.*

Expenses of Lane set out on Private Property—Service of Notice—Subsequent Owner—Act No. 310, Secs. 47, 57, 59.]—A notice was served upon G. reciting that notice had been served upon M. (the then owner,) requiring her to execute certain works; that she had not executed them, and requiring G. to pay a proportionate part of the expenses incurred by the Board in executing them. G. was proceeded against, and ordered to pay the amount. *Held* that sec. 59 only applies where ownership changes during the execution of the works, and that the effect of the Act was that the charge was personal, and only affected the land in the event of the owner at the time being unknown, or not to be found, and that G. becoming the owner of the land after the work was executed, was not liable. *Regina v. Clarke, ex parte Gunst*, 5 V.L.R. (L.,) 412; 1 A.L.T., 101.

Formation of Private Streets—Apportionment of Expense.]—Under Sec. 47 of the "*Health Amendment Act*" (No. 310,) a Local Board of Health, when forming two communicating private streets, may apportion the whole expense amongst all owners in both streets, and is not bound to charge the expense of forming each street exclusively upon the owners in that street. *Harding v. Local Board of Health of Geelong West*, 8 V.L.R. (L.,) 6.

Expenses of Formation—Demand of Payment.]—Where the Local Board of Health of any place is constituted of the Borough Council of the place, a demand of payment of the expenses of forming a private street by that body is sufficient. *Ibid.*

Act No. 782, Sec. 131—Formation of Street upon Private Property.]—After giving notice requiring C. to pave a street, the Local Board has power to sue for the penalty, even although it has elected to execute the work, provided that the works have not been executed at the time the complaint is made. *Regina v. Alley, ex parte Clauscen*, 6 A.L.T., 150.

Act No. 310, Secs. 47, 62, 63—Ownership of Property.]—A Local Board of Health served P. with notice under Sec. 47, requiring him to form a private lane adjoining his property. A complaint was brought against H. under Secs. 62, 63, for non-compliance, but the justices held they could not go into the question of ownership. *Held* that the notice under Sec.

47 was not conclusive, and the justices should have received evidence as to ownership. *Regina v. Templeton, ex parte Peck*, 1 V.L.R. (L.,) 21.

Act No. 310, Secs. 47, 62.]—D. was informed against under Sec. 62, for an offence under Sec. 47, in not obeying the notice served upon him as owner of the land. D. objected that a non-compliance with the notice was not an offence for which a penalty could be imposed under Sec. 62, and the justices thereupon dismissed the information. On *rule nisi*, *held* that a double remedy was not intended, that sec. 47 specially provided for the punishment of an offence under its terms within the meaning of the words "not otherwise specially provided for" in Sec. 62, and that the justices were right. *In re Day, ex parte Kingston*, 3 V.L.R. (L.,) 289.

Act No. 310, secs. 47, 62—Disobedience of Notice to Pave a Lane.]—*Held* (*dissentiente Higinbotham, J.*,) following *In re Day*, that neglect of a notice to pave and level a lane is not an offence within sec. 62 of Act 310. *Per Higinbotham, J.* It is not necessary that the notice under Sec. 47 should set forth the particulars of the levels and specifications; it is sufficient if it state that they have been prepared and are open for inspection at a certain place and hour. *Fitzroy Local Board of Health v. Howell; Regina v. St. Kilda Local Board, ex parte Lamborn*, 7 V.L.R. (L.,) 47; 2 A.L.T., 125.

(*b*) *Drainage.*

Act No. 310, Sec. 38—Order to Raise Surface of Land.]—A Local Board of Health had ordered the relator to "raise the surface of the land . . to such height as will cause the surface-water off the land to flow away into S. or B. streets." And the relator was fined for non-compliance. *Held* on order *nisi* for prohibition, that the order was bad as being in the alternative, it should have told the relator definitely into which street the water was to flow. Order absolute. *Regina v. Lloyd, ex parte Godfrey*, 1 V.L.R. (L.,) 300.

(2) Taking Lands and Compensation.

"Public Health Amendment Act" (No. 310), Sec. 48—Power of General Sessions—Act No. 267, Sec. 143—Jurisdiction as to Costs.]—The Borough Council, acting as a Local Board of Health, appealed to the General Sessions under No. 310, Sec. 48, to fix the amount of compensation to be awarded to occupiers of land they wished to take for the purpose of making a drain. The justices took evidence upon the necessity of the drain, made an order stating the appeal was dismissed with costs, "subject to special case." No special case being stated a rule *nisi* was obtained for a *certiorari* to quash the order. *Held* that the order was invalid; that this was not an appeal in the proper acceptation of the term, therefore the justices were not authorised to give costs under Sec. 143 of No. 267; that the General Sessions, as arbitrators, could not inquire into the necessity for the work, but only into the amount of compensation: Rule absolute. *Regina v. Pohlman*, 6 W.W. & A'B. (L.,) 109.

Semble, that the payment of the money is a condition precedent to going on the land. *Ibid.*

(3) Proceedings for and against Local Boards.

Summons for Causing a Nuisance, in What Name—No. 310, Sec. 32.]—A summons, under Sec. 32 of the "*Public Health Statute*" (No. 310), taken out for causing a nuisance, being in the nature of a criminal proceeding for a penalty, may be taken out in anybody's name, and need not necessarily be in the name of the Local Board of Health; but at the hearing proof must be given that the complaint was laid at the instance of the Local Board of Health. *Cruikshank v. Kitchen*, 1 V.R. (L.,) 29; 1 A.J.R., 37.

(4) Offences against Public Health Statute.

Selling Improper Food—"Public Health Statute" (No. 264), Sec. 39—Coffee Adulterated with Chicory.]—Selling a compound of coffee and chicory under the name of "coffee" is a breach of Sec. 39 of the "*Public Health Statute*" (No. 264). *Fullerton v. Bergin*, 1 V.R. (L.,) 8; 1 A.J.R. 25.

Selling Improper Food—Act No. 264, Secs. 38, 39, 40—"Bakers Statute" (No. 243) Secs. 3, 4.]—A charge was brought against W. under Secs. 38 and 39 of No. 264 for selling bread in which large quantities of alum had been used. *Held* that the charge was properly brought, and that the previous passing of an Act applicable to bakers (Act No. 243) did not take them out of the general enactment in No. 264; that Sec. 40 disposes of the difficulty as to sec. 39 apparently applying only to manufacturers; that the omission of the word "knowingly" from Act No. 264 throws upon the seller the onus of proving ignorance of the adulteration, whereas by Secs. 3 and 4 of Act No. 243 it must be proved that seller had knowledge of the adulteration. *Fullerton v. Weedow*, 3 V.R. (L.,) 15; 3 A.J.R., 30.

"Public Health Statute"—Bye-law under—Night-soil.]—A bye-law under the "*Public Health Statute*" (No. 310) forbade the deposit of "night-soil, blood, offal, or other offensive matter" on any land or garden. *Held* that a person who poured drainage matter from a pig-stye on his garden had not offended against the bye-law. *Regina* v. *Templeton, ex parte Mow Sang*, 1 V.L.R. (L.,) 55.

Act No. 310—Information under Sec. 62 for Offences under Sec. 47—No Penalty can be inflicted under Sec. 62 for such offence.]—*See In re Day, ex parte Kingston, ante column* 497.

Neglect of Notice to Pave and Level a Lane is not an offence within Sec. 62 of Act No. 310.)—*See Fitzroy Local Board of Health* v. *Howell*, and *Regina* v. *St. Kilda Local Board, ex parte Lamborn, ante column* 497.

Creating a Nuisance—Jurisdiction of Justices—Adjournment of Case—"Public Health Act," Sec. 32.]—Where the hearing of a complaint under Sec. 32 of the "*Public Health Act*" (No. 310), for creating a nuisance, has been adjourned in order to allow an opportunity of abating the nuisance, the case, when it comes up on the adjourned hearing, must, under Sec. 12 of the "*Justices of*

the Peace Statute 1865," be adjudicated upon by two justices who were present throughout the whole of the proceedings. *Regina* v. *Marsden, ex parte Corbett*, 4 V.L.R. (L.,) 30.

HIGHWAY.

See LOCAL GOVERNMENT—WAY.

HIRING.

See MASTER AND SERVANT.

HOLIDAY.

See PRACTICE AND PLEADING—TIME.

HOSPITAL.

Act No. 220—Secs. 5, 6, 10—Liability for Contracts.]—The contracts and liabilities of an old institution (*i.e.*, a hospital managed by a committee prior to 1872) do not, upon its incorporation in 1872 under Act No. 220, devolve upon the new corporation under sec. 10, which merely enacts that real and personal property held in trust shall be vested in the incorporated institution. Where G. was appointed surgeon to a hospital and continued to act in that capacity till December 1871, being paid all his salary up to that time, and the hospital was incorporated early in 1872 and dismissed G. in April 1872, *Held* that the committee of the corporation was not liable for breach of contract or for salary up to 11th March, when the new committee was formed. *Gummow v. Swan Hill District Hospital*, 3 V.R. (L.,) 251; 3 A.J.R., 123.

Election to Committee—Act No. 220, Sec. 11—Term of Office.]—It is not necessarily to be implied from sec. 11 of the "*Hospitals and Charitable Institutions Act* 1864" (No. 220) that elections to committees of hospitals under that Act should be for three years. They might be for two years or other times, and the office terminates by mere effluxion of time, without applying the provisions of the section. *Logan v. Hocking*, 10 V.L.R. (E.,) 120, 126.

Although no qualification is imposed by the Act No. 220 on a candidate at a general election to a hospital committee, yet a bye-law of the hospital which imposes a qualification similar to that which the Act imposes on candidates to fill a temporary vacancy is not *ultra vires*, since the qualification is reasonable and within the power of the committee. *Ibid.*

Secretary.]—For all that appears to the contrary, the secretary of a hospital incorporated under the Act No. 220 is a mere servant of the committee, holding his place at their will, and bound to obey their commands. As such he is not a proper party to a bill impeaching the validity of an election of members of the committee. *Ibid.*

HOTEL.

See INNKEEPER—LICENSING ACTS.

HUSBAND AND WIFE.

VII. Wife's Rights, Property and Liabilities.

I. Marriage.

(1) *Validity and Proof of.*

Proof of—Registration—Acts No. 70, Sec. 17 and 16 Vict., No. 26, Sec. 20.]—Where under Sec. 20 of 16 Vict., No. 26, only one original registration form of a marriage had been filled up, instead of duplicate originals, and only a copy of the original, instead of one of the duplicate originals, had been registered, *Held* that under Sec. 17 of No. 70, the irregularly registered copy of the original and a copy of that copy, were sufficient proof of the marriage. *Crowl v. Flynn*, 1 W. W. & a'B. (L.,) 62.

Marriage within Three Months after a Decree dissolving Prior Marriage—Act No. 125, Sec. 39.]—M. and E. M., his wife, sued W. for money due for goods sold and delivered to him by E. M., while carrying on business as a *feme sole* under a protection order, and under her former name of E. F. Before trial admissions were made that E. M.—then E. F.—on 13th October, 1862, presented a petition praying that her marriage with R. F. might be dissolved, and that a decree was made as prayed, 18th December, 1862: and that the plaintiffs (M. and E. F.) were "duly married" 28th February, 1863. At the County Court an objection was taken that the marriage was invalid, as it took place before the expiration of the three months given for appeal by Act No. 125, Sec. 39, and the Judge allowed this and granted a nonsuit. *Held* on appeal affirming the Judge, that the words "duly married," in the admissions were controlled by the dates and by the legal results of a premature marriage under Sec. 39, and that the nonsuit was right. *Moore v. Widdicombe*, 4 W. W. & a'B. (L.,) 109.

Marriage of Minor without Consent—Act No. 268, Sec. 14.]—The "*Marriage and Matrimonial Causes Statute* 1864" amounts to this:—The marriage of a minor should not take place without the consent specified in Sec. 14; but, if it does take place without it, it is valid. *Regina v. Griffin*, 3 V.L.R. (L.,) 278.

Marriage of Minor without Consent.]—*Semble*, that a marriage of a female minor, whose husband was aware of her age, without the consent of her parents or guardians is valid. *Gullifer v. Gullifer*, 6 V.L.R. (I. P. & M.,) 109.

Marriage Contract when One Party a Lunatic—Lucid Interval.]—*In the estate of Doull*, 7 V.L.R. (I. P. & M.,) 70, *post* under Lunatic—Property, Powers and Contracts.

Minister Ordinarily Officiating as such—Pastor—Act No. 70, Sec. 3.]—The person who celebrated a marriage was described as pastor of a church meeting at the old Temperance Hall, Russell-street, and called "Christian Disciples." On a trial for bigamy, *Held* that this description brought him within the words "some minister of religion ordinarily officiating as such," in Sec. 3 of the Act No. 70, and that the marriage, which was the first, was valid. *Regina v. Benson*, 4 V.L.R. (L.,) 21.

(2) *Suits for Nullity.*

What is a Suit for Nullity—Jurisdiction of Single Judge.]—A suit by a husband to set aside a marriage with his deceased wife's sister is a suit for nullity, and not for dissolution; and a single Judge has jurisdiction to annul such a marriage. *Wade v. Baker*, 5 W. W. & a'B. (I. E. & M.,) 63.

Appeal.]—And an appeal on the ground of want of jurisdiction of the single Judge will lie. *Ibid.*

Evidence of Affinity.]—The relationship of the reputed wife with the deceased wife may be proved by the evidence of repute among friends and relatives, and of the manner in which both wives were treated and received by their reputed parents; and the evidence of the husband as to the latter point is also admissible. *Ibid.*

When Sustainable—Mistaken Identity.]—Marriage is a contract, and to constitute a contract both parties must know what they are entering into—no mistake of identity must exist. M., the respondent, had been convicted of a crime, and afterwards followed an industrious course of life; he was introduced to the petitioner A. (falsely called G.) as Mr. G., and represented himself as belonging to a very respectable family G., in Scotland, well known to the petitioner. The petitioner was married to him believing him to be G., and swore that had she known his proper name she would not have married him. *Held* that it was not merely a mistake of name, but of identity, and decree of nullity pronounced, the fraud having been unquestionably and distinctly proved. *Allardyce v. Mitchell*, 6 W. W. & a'B. (I. E. & M.,) 45.

Act No. 268, sec. 84.]—The Court has jurisdiction to order a suit for a decree of nullity of marriage to be tried as to questions of fact before a jury. *Bishop v. Bishop*, 5 A.J.R., 43.

Delay—Inspection.]—A woman delayed in instituting a suit for nullity of marriage on the ground of her husband's incompetence. The delay was explained by her ignorance of any means of redress, and that she had no intimate friends at hand with whom to consult. There was evidence that the parties had cohabited for nearly twenty years, and that the petitioner

was *virgo intacta*. The Court excused the delay, made a decree, and, under the circumstances, dispensed with a medical inspection of the respondent, who had left the colony. *Mulligan v. Boyce*, 3 V.L R. (I.P. & M.,) 69.

Practice—Costs of Petitioner.]—In a case where the judge was not satisfied that the means of a petitioner's wife were sufficient, he (*Higinbotham, J.*) made an order in Chambers for payment of the petitioner's costs *de die in diem* by the husband. *Hunt alias Rennie v. Rennie*, 3 A.L.T., 19.

Bigamy—No Conviction.]—The Court has jurisdiction to declare a marriage null and void on the ground of bigamy, although there has been no prosecution or conviction for the bigamy. *Armstrong* v. *Batty*, 9 V.L.R. (I.P. & M.,) 55.

(3) *Obtaining Declaration of Legitimacy of Children.*

Irregular Marriage in Scotland—Evidence of Witnesses who Knew that Husband and Wife Lived Together in Same Place and were Received as Husband and Wife—Such Evidence not Going Back to Date of Plaintiff's Birth—Baptismal Certificates.]—Suit as to right to administer real estate of an intestate, T. D. E. D., a nephew of the intestate, had administered the personal estate of the intestate, and, hearing of claims of the plaintiff and his sisters, as next-of-kin, had sent a power of attorney to them in England appointing a person here to receive their share, which was paid to such person. Plaintiff then came to Victoria to inquire after his interests in intestate's real estate, and the defendant (E. D.) required proof of his identity. The plaintiff then brought the suit, and, in the bill, alleged that he was a nephew of the intestate, which the answer denied. E. D. was a son of J. D., a brother of the intestate's, and the plaintiff and his sisters claimed to be children of W. D., another brother. It appeared that plaintiff's father (W. D.) contracted in Scotland an irregular but legal marriage, and there was the evidence of witnesses who knew and spoke of the father and mother as living for a long time in the same place, and being received as man and wife, but such evidence did not go back as far as plaintiff's birth. Baptismal certificates were produced showing plaintiff and his sisters to be children of W. D. and his wife. *Held* that the legitimacy of the plaintiff was sufficiently established from such evidence, and order made declaring plaintiff to be one of the next-of-kin of T. D. *Dryden v. Dryden*, 5 A.J.R., 27.

(4) *Bigamous—See* BIGAMY.

II. MARRIAGE SETTLEMENTS.

(1) *Agreements to Settle and Matters Relating Thereto.*

Agreement by Husband's Father—Statute of Frauds.]—A marriage settlement was executed on the marriage of O. to C. It recited an agreement by the fathers of O. and C. to settle £500 each, and then proceeded to settle the £1000. The money was not paid into the bank, as recited, but the deed was executed by the parties, their fathers and the trustees. O.'s father died without paying the £500, and the trustees of the settlement brought a bill against his executors to obtain that sum out of his estate. *Held*, that though the only writing to satisfy the "*Statute of Frauds*" was the deed, which recited that the sum had been paid, its parts could not be separated, and it would amount to an estoppel at law, but not in equity; that the trustees, in executing the settlement, made themselves liable for £1000, and the deceased would be guilty of fraud if he did not indemnify them. Decree made for payment. *Quære*, whether if a contract is partly in consideration of marriage, and partly of some other act to be done, the "*Statute of Frauds*" is applicable. *Gordon v. Murphy*, 4 W. W. & A'B. (E.,) 120.

(2) *Consideration for and Validity of.*

Impotence of Husband—Decree of Nullity.]—Suit by B. against F., the trustee of a marriage settlement of date 24th March, 1864, by which certain property was assigned to S. upon trust for B. until solemnisation of marriage, and then in trust for F. for life; remainder in trust for children of marriage, and remainder in trust for B., his executors, administrators, and assigns. B. and F. were married 30th March, 1864. On 31st July, 1873, a decree was made that marriage between B. and F. was a nullity on ground of B.'s impotence. The bill sought to establish plaintiff's rights to settled property, and for a transfer. *Held, per Molesworth, J.*, and the *Full Court*, that such a marriage is voidable only, and not void, and that there is in such a voidable marriage sufficient consideration upon its solemnisation to bring into operation the trusts in favour of wife, and that plaintiff could not enforce the prior trust in the settlement, that is in favour of himself until solemnisation of the marriage. *Bishop v. Smith*, 1 V.L.R. (E.,) 313.

(3) *Varying or Altering on Decree for Divorce or Judicial Separation.*

Restraint on Anticipation—"Marriage and Matrimonial Causes Statute," Sec. 54.]—By indenture of settlement, executed in anticipation of a marriage, real and personal property of the wife's was settled upon trust, during the joint lives of herself and husband, for her separate use, without power of anticipation. The wife subsequently obtained a decree for judicial separation, and instituted a suit against the trustees of the settlement praying a declaration that she was absolutely entitled, as a *feme sole*, to the trust property, and for a conveyance to her of such property. *Held* that the property was not acquired, and had not come to or devolved upon her since the decree within the meaning of Sec. 54 of the Act No. 268; that though a woman entitled to property, with a clause against anticipation, &c., may, whilst still unmarried, require it to be discharged of such restriction; yet a woman judicially separated is not, for all purposes, to be deemed unmarried. Suit dismissed with costs. *Mackintosh v. Clarke*, 3 W. W. & A'B. (E.,) 77; affirmed on appeal, *ibid*, p. 123.

Practice—Notice to Wife.]—When a divorce has been granted against a wife who has not appeared, and a motion is made for variation of

the settlement, she should have notice thereof. *Hickling v. Hickling and Bromfield*, 10 V.L.R. (I. P. & M.,) 44.

Variation of Settlement where Divorce Obtained at Suit of Husband.]—Where the wife's settled property brought in an income of about £980 per annum, and there were five children of the marriage, of whom one was living with the wife and four with the husband, the husband's salary being £700 per annum, the Court, after a divorce had been obtained at the suit of the husband on the ground of the wife's adultery, ordered that the trustees should pay £250 per annum to the wife for her own benefit, and £50 per annum for the maintenance and education of the child living with her, and should pay the balance of the income to the husband for the benefit of himself and the four children living with him. *Ibid.*

III. Judicial Separation and Divorce.

(1) *When Obtainable.*

Conduct Conducing to Adultery.]—In a suit against a wife for divorce on the ground of adultery, the adultery was proved. It was also proved that before the adultery the conduct of the wife had not been what it ought to have been, and that upon the husband remonstrating with her she expressed her intention to persist in that conduct, and said that if not allowed to continue visiting the places her husband disapproved of, she would not stay with him. He replied that she might "suit herself;" and, thereupon, she left him. The petitioner being asked what he thought his wife would have to do after she left him, at first said he had not thought about it, but on being further questioned, added, "No, I never thought she would misconduct herself; I never thought she would do that." *Held* that the husband had not been "guilty of such wilful neglect or misconduct as had conduced to the adultery" of the wife; and had not disentitled himself to the relief he sought. *Myles v. Myles*, 1 W. & W. (I. E. & M.) 204. *See* also *Roulston v. Roulston*, *ibid* p. 206.

Husband's Conduct Conducing to Wife's Adultery.]—Absence in the pursuit of a proper avocation should not always tell against a petitioner. A husband is not bound to be suspicious; but he ought not to put his wife in a position of temptation: and if he is aware that she has fallen into such a position and is meditating to do wrong, he is bound to take steps to prevent her from carrying out such intention, and to remove her from that position. Where a miner left his home and was for some time absent on the gold-fields, and, though hearing that his wife had opened a boarding-house and was placed in a position of temptation, made no effort to see her or to remove her from the danger; his petition for dissolution on ground of wife's adultery refused, decree for judicial separation made. *Bathgate v. Bathgate*, 2 W. & W. (I. E. & M.,) 129.

Misconduct Conducing to Adultery.]—With reference to a charge of having by his conduct conduced to his wife's adultery, it is right that the whole conduct of a husband petitioning for divorce, from the contract of marriage to the commencement of the suit, should be considered—his conduct in reference to his marital duties alone, the Court not having the power to look at any other offence of omission or commission by him. *Terry v. Terry*, 1 W. W. & A'B. (I. E. & M.,) 78.

Misconduct Conducing to Adultery.]—In a suit by a husband for divorce on the ground of adultery, the evidence showed that several acts of adultery had been committed by the wife, of which all but the last had been condoned, without reference to any penitence on the part of the wife. It also appeared that, being fully aware of the wife's tendency, the husband, when she left his house, took no measures to ascertain whither she had gone, or what she was doing; and that the act of adultery on which the petition was based, took place during such absence. *Held* that the husband had been guilty of misconduct conducing to the adultery. *Ibid.*

Adultery—What Conduces to or does not.]—A wife having obtained a decree for judicial separation against her husband on the ground of cruelty, subsequently committed adultery, and her husband filed a petition for divorce. *Held* that the decree for judicial separation had not conduced to her adultery, and divorce granted. *Bailey v. Bailey*, 3 W. W. & A'B. (I. E. & M.,) 89.

Adultery of Wife—Husband's Conduct—Marriage not Consummated.] — A husband and wife agreed before marriage that after celebration of the rite, the marriage should not be consummated for twelve months, the husband going to Adelaide to earn money to enable him to support her, and remitting her sums of money from time to time. The wife lived with her parents, and committed adultery, and the husband petitioned for a divorce before the marriage was consummated. *Held* that the husband's conduct had not conduced to her adultery, so as to disentitle him to a decree for dissolution of marriage, and that the reserved judgment of a Court of three Judges may be delivered by one of such Judges sitting alone. *Osborne v. Osborne*, 5 V.L.R. (I. P. & M.) 112.

Conduct Conducing to Adultery—"Marriage and Matrimonial Causes Statute 1864," Sec. 70.]—A wife, who was extremely jealous of her husband, but who had not misconducted herself and had received some harsh treatment, requested her husband not to go on a theatrical tour with, amongst others, a woman of whom she was jealous, threatening that if he did so, she would leave him and not return. The husband, however, went, leaving his wife with some funds and the furniture of the house. As soon as possible after her husband had left, she sold everything, and departed to live elsewhere, and would not return to her husband, though he endeavoured to persuade her. Nearly a year after this she committed adultery. *Held* that the husband's conduct had not led to her adultery, though there was very little doubt that she would not have committed it, had she lived with her husband, and that the husband's conduct was not the neglect or misconduct contemplated by

Sec. 70 of the "*Marriage and Matrimonial Causes Statute* 1864." *Maxwell v. Maxwell*, 6 V.L.R. (I. P. & M.,) 117.

Cruelty—How Considered.]—Although the acts of alleged cruelty are some of them very remote, and separated by considerable intervals, it is not so much the practice of the Court to dwell on such acts as detached charges, resting on independent grounds, as to endeavour to discover whether they are recurring instances of unjustifiable and inexcusable behaviour on the part of the husband, forming parts of a regular series of annoyances. The domestic life of each party must be examined together as a continuous whole, and the general conduct of the respondent inquired into, in order to see what light is thereby thrown on the particular transactions. *Casey v. Casey*, 1 W. & W. (I. E. & M.,) 34, 45.

Cruelty—What is Sufficient.]—Not only actual personal violence, but everything that tends to bodily hurt or peril, is a ground for judicial interposition; and a reasonable apprehension of personal violence is enough. Words of menace accompanied with threatening attitudes, and an ability to inflict injury, do amount to legal cruelty, and the wife must be protected from the peril of bodily injury, as well as from actual injury itself. What must be the extent of the injury, or what will reasonably excite the apprehension, must be deduced from various circumstances, while the complexion of individual acts may almost change their very essence in consequence of the circumstances by which they are attended, but the causes must be grave and weighty, and must be such as show an absolute impossibility that the duties of the married life can be discharged. *Ibid* p. 46.

Cruelty—What is and how Inferred.]—Mere words of abuse taken alone are not a sufficient ground for a judicial separation on the score of cruelty, but when the Court is examining a series of allegations, including direct acts of cruelty, it is entitled to look into all the circumstances, and into the whole cluster of events so to speak, which have occurred during a series of months, or perhaps of years, including those threats and expressions of abuse, whether intervening between or accompanying the different acts of violence. Again, tyrannical conduct alone, on the part of the husband, is not a ground for pronouncing a decree of judicial separation; but if it be of such a nature as to endanger the health of the wife, then separation may be granted. Where words are used not amounting to threats, but which are exceedingly abusive, and are coupled with violent and threatening demeanour, the Court will infer threats from them; and in all cases where there is direct testimony of violence, threats and abusive language may be taken into consideration to enable the Court to test whether there is likely to be a recurrence of the violence. A single act of violence alone may not be enough to found a decree for judicial separation; but where preceded by such conduct as to give a colour of cruelty to the act, that has been held sufficient. There must be some well-founded apprehension of injury; not necessarily danger to life or limb. On the principle *obsta principiis*, the Court steps in to prevent the future carrying out of threats already made *à fortiori* where there have been previous assaults. *Mackintosh v. Mackintosh*, 1 W. & W. (I. E. & M.,) 70.

Insults to the wife's relatives can form no ground for a judicial separation on the ground of cruelty. *Ibid.*

Cruelty—Provocation.]—Great provocation on the part of the wife may prevent violence on the part of the husband prevailing as a ground for separation; but slight provocation on her part is no justification for the infliction of violent injuries by the husband. *Ibid.*

Cruelty—How Considered—Provocation.]—In considering evidence of cruelty, it is all-important to view the facts charged in relation to all their surrounding circumstances, and not to look merely at those facts isolated. Individual circumstances, which in themselves seem trivial, or even comic, may, when taken in connection with others which interpret and perhaps increase their effect, become important in proof of real cruelty. The position of the two parties must be regarded. If a wife, exhibiting an utter contempt for her husband on account of his dissolute behaviour, and a determination to get rid of him, thinks herself justified in treating him in a contemptuous manner, she provokes very strong acts on his part in retaliation; and though she might deem herself morally justified in the conduct she pursued towards him, yet she is not entitled to divorce for acts which she herself, by such conduct, has to a great extent provoked. *Beck v. Beck*, 1 W. & W. (I.E. & M.,) 199.

Cruelty.]—For remarks upon the character of cruelty amounting to *sævitia*, *see Trestrail v. Trestrail*, 3 W. W. & A'B. (I. E. & M.,) 90.

Cruelty.]—Where, in a suit by a wife for divorce on the ground of adultery and cruelty, the husband had, once only, used actual violence to the wife, but had frequently used insulting language to her before her children and the servants, and threatened her with violence; and after the institution of the suit the husband departed to San Francisco, taking another woman with him, with two children by her and three of his children by his wife (taking the latter without his wife's consent and forcibly), and leaving the wife totally unprovided for, *Held* that, though the one act of violence, taken by itself, would not have been sufficient to justify a decree, yet such act taken in connection with the husband's previous and subsequent heartless conduct, afforded sufficient grounds for a decree on the grounds of adultery and cruelty. *Campbell v. Campbell*, 5 W. W. & A'B. (I. E. & M.,) 59.

Cruelty—What is.]—Mere threats or an isolated act of passion do not constitute cruelty sufficient to support a decree for a judicial separation; there must be reasonable apprehension of bodily harm. Nor will cruelty to the children be taken into consideration unless done under circumstances which amount to cruelty to the mother. Cruelty to the children should

not, except under the circumstances mentioned, be taken into consideration in a suit between husband and wife; but should, where a decree has been pronounced on other grounds for separation, be considered with reference to the question whether husband or wife should have the custody of the children. *Kennedy v. Kennedy*, 4 A.J.R., 106.

Wife's Petition — Cruelty — Evidence of.]—A wife petitioned for dissolution on ground of husband's cruelty and adultery. It was proved that the husband had been guilty of habitual drunkenness, had frequently used abusive language to his wife, and had occasionally been violent towards her, but not so as to endanger her health or safety. *Held* that cruelty must consist of some ill-treatment which endangers the life, the person, or the health, or renders cohabitation unsafe, and that there was no evidence of such in this case. Petition dismissed. *Macartney v. Macartney*, 3 V.L.R. (I. P. & M.,) 81.

Evidence that the husband has been bound over to keep the peace towards the wife is admissible in such cases. *Ibid.*

Cruelty of Wife—What is Cruelty—Act No. 268, s. 50—Costs.]—A husband petitioned for a decree of judicial separation on the ground of his wife's cruelty. *Held* that if the wife becomes the assailant and uses such violence as is likely to incite the husband to retaliate and to use violence in self-defence, that is sufficient cruelty. Decree made as prayed upon terms as to allowance to wife. Petitioner to pay costs. *Terry v. Terry*, 5 A.J.R., 50.

"Marriage and Matrimonial Causes Statute" (No. 268,) Sec. 70—Discretion of Court to Refuse Divorce when Petitioner has been Guilty of Cruelty.]—In a petition for a divorce where the wife's adultery was proved, but it appearing that the petitioner had been guilty of acts of cruelty to his wife, even where such cruelty did not, in the opinion of the Court, amount to cruelty conducing to the adultery, the Court exercised its discretion given by Sec. 70 and refused a divorce, but granted judicial separation. *Bythell v. Bythell*, 3 A.J.R., 68.

Wife's Petition—Adultery and Desertion—Proof of Adultery—Venereal Disease.]—A wife petitioned for dissolution of marriage, on the ground of husband's adultery and desertion. The desertion was proved, the only evidence of the adultery was that the wife, being perfectly chaste herself, was infected with venereal disease shortly after intercourse with her husband. *Held*, that was not sufficient proof of the husband's adultery, and the petitioner was allowed the option of taking a decree for judicial separation or of adducing additional proof of the adultery. *Dean v. Dean*, 5 V.L.R. (I. P. & M.,) 116.

Adultery and Cruelty—Venereal Disease.]—Proof by the wife that the husband was affected with venereal disease, that he knew it, and, while so affected, had sexual intercourse with her, and that she then became similarly affected, was held sufficient to entitle her to a decree for divorce on the ground of adultery and cruelty. *Davis v. Davis*, 6 V.L.R. (I. P. & M.,) 105.

The Court, for its own greater satisfaction, obtained from the petitioner a denial of any unchastity, though her chastity was not impeached on the pleadings. *Ibid.*

Desertion—What is.]—The meaning of desertion is that the husband leaves the wife contrary to her wish; it is a misconception to speak of desertion in a case where both parties separate by mutual consent. *Beck v. Beck*, 1 W. & W. (I. E. & M.,) 199.

Desertion.]—Where a husband resides away from his wife against her wish, the mere giving to the wife support which might be deemed sufficient alimony is not inconsistent with desertion. Desertion is the depriving either the husband or the wife of the society of the other by such other. Where, therefore, a husband resided away from his wife against her wish, but allowed her a sufficient sum for maintenance, she was held entitled on proof of his adultery to a decree for divorce. *Sayers v. Sayers*, 1 V.R. (I.E. & M.,) 33; 1 A.J.R., 138.

Petition by Wife—Adultery and Desertion.]—There was no doubt about the husband's adultery, and the husband had left the wife for three years, during which time he sent her comparatively large sums of money; the petitioner refused to live with him unless he prepared a home. *Held* that the wife was entitled to more than mere support; she was entitled to her husband's society, and the support must be such as would enable them to live together; that there was sufficient desertion. Decree for divorce. *Nimmo v. Nimmo*, 3 A.J.R. 132.

Separation and Neglect of Husband.]—On a petition for divorce where the adultery was proved, but the petitioner had deserted his wife (the respondent) in London shortly after the marriage, the Court refused a decree for divorce, but granted a judicial separation. *Schaefer v. Schaefer*, 3 A.J.R. 132.

Desertion — Imprisonment during the Two Years.]—The fact that a husband who has left his wife with the intention of permanently deserting her has been imprisoned before the "desertion for two years" has been completed, and has continued in prison till the commencement of the suit by the wife for a divorce, does not prevent the period from running. *Drummond v. Drummond*, 2 V.L.R. (I.P. & M.,) 78.

Desertion — Agreement to Separate a Conclusive Answer.]—An agreement to separate, unless it be procured by fraud, is a conclusive answer to a charge of desertion where the only evidence of desertion consists of the fact that the husband and wife are living apart, and their separation is in consequence of their express voluntary agreement to live apart. *Hayle v. Hayle and Henry*, 10 V.L.R. (I.P. & M.,) 59, 63.

Condonation — When Applicable.]—Condonation is only possible where both parties are aware of the acts condoned; and is not absolute,

but is granted upon the implied condition that the same injury be not repeated or any other inflicted. *Casey v. Casey*, 1 W. & W. (I. E. & M.,) 34, 48.

Condonation—How Effect of Destroyed.]—A subsequent act of cruelty after condonation of a previous one, though it be insufficient to found a legal sentence, may yet suffice to destroy the effect of condonation and to revive the right of complaint, and to entitle the injured party to connect the acts condoned but revived by the fresh injuries with the subsequent acts which are uncondoned. *Ibid.*

Condonation.]—For adultery there is only one mode of condonation—cohabitation must be renewed; whereas for cruelty, lapse of time, acts by the wife, living in the same house, may all amount to evidence of condonation of the cruelty, although these facts would not afford evidence of condonation in case of adultery. *Sutherland v. Sutherland*, 8 V.L.R. (I. P. & M.,) 49; 3 A.L.T., 133.

Evidence of Condonation—How Considered.]—*See Casey v. Casey, post* under sub-heading *Evidence.*

Adultery on Part of Petitioner and Respondent—Condonation by Respondent—Discretion of Court.]—Where both petitioner and respondent had been guilty of adultery, but the wife had condoned the petitioner's adultery, the Court, having regard to the conduct of the petitioner towards his wife, refused, in the exercise of its discretion, to grant a divorce. *Hayle v. Hayle and Henry*, 10 V.L.R. (I. P. & M.,) 59.

Adultery of Husband—Condonation by Wife—Duty and Discretion of Court.]—If the husband has committed adultery, and this is raised as a counter-charge, though the wife has condoned it, such condonation does not bind the Court or relieve it from the duty of inquiry, and the exercise of the judicial discretion which is imposed upon it by law. *Ibid*, p. 63.

Collusion—What Is or Is Not.]—In a suit for divorce, the mere fact that the respondent is not adverse is not sufficient to constitute collusion with the petitioner. *Treacy v. Treacy*, 3 W. W. & A'B. (I. E. & M.,) 85.

Collusion.]—Where a suit for divorce was partly heard and adjourned, and, pending the adjournment, the wife abandoned her defence, and wrote a letter to that effect, the Court ordered a copy of it to be sent to the Attorney-General, considering that it was not for the Court to investigate it, and adjourned the case to allow the Attorney-General time for investigation. *Dunn v. Dunn*, 1 A.J.R. 41.

Connivance.]—Where the evidence did not show that the husband desired, intended, contemplated, or winked at his wife's offence, *Held* that a charge of connivance was not established. *Terry v. Terry*, 1 W. W. & A'B. (I. E. & M.,) 78.

Connivance—What is.]—Connivance implies consent, active or passive, and an intention on the part of the person charged with conniving that guilt shall ensue. *Hayle v. Hayle and Henry*, 10 V.L.R. (I. P. & M.,) 59, 62.

Objections on the Ground of Neglect, Connivance, or Condonation—How Raised.]—The Court may itself take cognisance of objections to a petition for divorce by the husband on the ground of neglect, connivance or condonation if they appear upon the evidence; but such objections cannot be made by the respondent unless they appear upon the pleadings. *Terry v. Terry*, 1 W. W. & A'B. (I. E. & M.,) 78.

Delay.]—Where a husband proved unfaithful to the wife's knowledge in 1856, and he again left her in 1858, and refused to live with her, and the wife sued for divorce in 1869, the Court refused a decree for dissolution, but granted a decree for judicial separation. *Stone v. Stone*, N.C., 24.

Where a husband ceased cohabiting with his wife on account of her adultery in 1861, and was unable through poverty to institute proceedings for divorce until 1869, the Court under those circumstances made a decree for dissolution of marriage. *Young v. Young*, N.C., 24.

Delay by Husband—Extenuating Circumstances.]—Where a husband petitioned for a divorce in 1872, the adultery having taken place in 1854. In 1861, when the Court had jurisdiction in divorce matters, the petitioner lost his eyesight, and was unable to work, and in very poor circumstances in consequence. Shortly before petition brought the petitioner recovered his eyesight, and was able to work. *Held* that his delay, under the circumstances, was no bar to his obtaining a decree for divorce. *Daniel v. Daniel*, 3 A.J.R., 132.

Petition by Lunatic's Committee.]—The Court has no jurisdiction to decree dissolution of marriage on petition by committee of a lunatic husband, although it will grant judicial separation on such a petition. *Millar v. Annand*, 2 W. & W. (I. E. & M.,) 137.

Case must be Proved to Satisfaction of Court.]—Before a decree for dissolution of marriage can be granted, it is necessary that the Court, as well as the jury, should be satisfied that the petitioner has proved his case. *Fisher v. Fisher*, 2 V.L.R. (I. P. & M.,) 102.

Jurisdiction of Court—Marriage of Minor without Consent.]—The Court will exercise jurisdiction to dissolve a marriage on the ground of the wife's adultery, although the marriage was celebrated when the wife was a minor to the husband's knowledge, but without the knowledge or consent of her parents, and upon a false declaration. *Gullifer v. Gullifer*, 6 V.L.R. (I. P. & M.,) 109.

Jurisdiction—Husband Respondent Domiciled Abroad.]—The Court has jurisdiction under Secs. 61, 62, and 87 of the "*Marriage and Matrimonial Causes Statute* 1864" to dissolve a marriage, on the petition of the wife, celebrated in Victoria between a woman domiciled there and a foreigner who has not abandoned his

domicil of origin, though such foreigner be resident and domiciled in his domicil of origin at the commencement of and duration of the suit. *Ho-ah-Mie v. Ho-ah-Mie*, 6 V.L.R. (I.P. & M.,) 113; 2 A.L.T., 93.

Per Higinbotham, J.—The jurisdiction conferred by these sections (Secs. 61, 62, and 87 of the "*Marriage and Matrimonial Causes Statute* 1864,") is practically unlimited. But it does not follow that the Court will in all cases exercise the jurisdiction it possesses . . . . The petitioner is entitled to insist on the rule that where a Court has power conferred on it to do a judicial act, and the object of the power is to effectuate a legal right, it is imperative on the Court to exercise that authority at the instance of a party interested and having the right to make the application. *Ibid.*

Jurisdiction—Domicil.]—A husband and wife were married in England, and shortly afterwards came to Victoria, where they acquired a domicil, and while there the wife eloped with the co-respondent. The husband, not finding employment in Victoria, returned to England. Afterwards he came again to Victoria to bring his suit for dissolution of marriage, and stated he would remain in Victoria if he could get employment. There was proof of due service upon, but no appearance for respondent or co-respondent. *Held* by *Stawell, C.J.*, and *Fellows, J.* (*dubitante, Molesworth, J.*), that the service of the citation did not confer jurisdiction; that the husband had acquired no new domicil in Victoria after his return to England so as to give the Court a jurisdiction, and that these facts must be considered, even in the absence of appearance by the wife and co-respondent. Petition dismissed. *Duggan v. Duggan*, 3 V.L.R. (I. P. & M.,) 71.

Jurisdiction of Court — Domicil of Husband (Respondent).]—The Court has no jurisdiction in a suit by a wife for dissolution of marriage where the husband has never been in the colony and the wife has only come to the colony since the marriage. *Kretzschmar v. Kretzschmar*, 4 A.J.R., 131.

(2) *Procedure, Practice and Pleadings.*

(*a*) *Pleadings, Citation and Service thereof.*

Petition—Supplemental Petition—Matters of Pleading—Divorce Rule 58—Equity Rule 11.]—The petition ought not to state acts of adultery with any person not made a co-respondent unless the Court has dispensed with his being made a co-respondent. Where a respondent has committed, after service of the petition, adultery with another person not a co-respondent, the petitioner may obtain leave to file a fresh petition, in the nature of a supplemental petition, setting forth the acts of adultery and making such other person a co-respondent. *Smith v. Smith*, 3 V.L.R. (I. P. & M.,) 122.

Granting Judicial Separation at Request of Respondent in Suit for Divorce.]—On trial of the issues in a suit for divorce, the jury found that the allegations of adultery against the respondent and co-respondent had not been proved, but that counter allegations by the respondent against the petitioner of adultery and cruelty were proved. The respondent thereupon requested leave to amend her answer, by inserting a prayer for judicial separation and permanent alimony. *Held* that the Court had no power, even if the answer prayed it, to grant the request of the respondent in the same suit. *Smith v. Smith*, 4 A.J.R., 129.

Costs.]—The Court, however, dismissed the petition with costs. *Ibid.*

Petition—Omission of Co-respondent's Name from Title—Amendment—New Citation.]—Where the name of the co-respondent has been omitted from the title of the petition, but is mentioned in the body of the petition, there is no occasion to amend the petition, but a new citation must be issued and served. *Fisher v. Fisher*, 2 V.L.R. (I. P. & M.,) 102.

Amendment of Petition.]—The Court allowed an amendment of a petition for dissolution of marriage at the trial, by inserting a fresh charge of adultery, where no injustice was thereby occasioned. *Cameron v. Cameron*, 6 V.L.R. (I. P. & M.,) 105.

Second Petition disclosing facts not previously mentioned—When it will be heard.]—*See Trestrail v. Trestrail, post column* 520.

No Replication—Admissions in Answer.]—A husband in a suit against his wife and the co-respondent for divorce on the ground of adultery, did not claim damages against the co-respondent, who did not appear. The wife answered admitting some of the formal allegations in the petition, but denying the adultery, and charging adultery and cruelty against the husband. The petitioner did not put in a replication, and a Judge's order was made for trial by the Court only, without a jury. *Held* by the Full Court, that on the Judge's order the hearing should proceed, and that the admissions in the wife's answer did not need to be proved, unless the Court required it for its own express satisfaction. *Carnaby v. Carnaby*, 1 W. & W. (I. E. & M.,) 65.

Paragraph Struck Out as Scandalous and Irrelevant.]—The seventh paragraph of a petition stated that the respondent had been guilty of incest with her brother two years before marriage, and the eighth paragraph stated "that these matters," *i.e.* the matters contained in the seventh paragraph, and a statement in the eighth paragraph that the respondent had had a child before marriage, "so seriously affected the petitioner's health, &c." On a summons by the respondent to strike out the seventh paragraph as scandalous and irrelevant, *Higinbotham, J.*, ordered the seventh to be struck out, and the eighth paragraph to be amended as follows, "that this matter and further circumstances connected with the life of the respondent previous to marriage, which came to the knowledge of the petitioner while residing at ——, so seriously affected, &c.," the petitioner to have forty-eight hours to amend, and the respondent to have the same period to put in her answer. *Belcher v. Belcher*, 6 A.L.T., 21.

Service of Amended Petition.]—It is not necessary when amendments are made in a petition for the amended petition to be presented *de novo* to the Judge. *Molesworth v. Molesworth*, 2 W. & W. (I. E. & M.,) 139, 147.

Service upon Law Officer of the Crown.]—When it appeared in the course of the proceedings that the petition had not been served upon the law officer on the day of its presentation to the Court, the Court allowed the cause to stand over, the petitioner to get the consent of the Attorney-General to the proceedings in the meantime. *Carnaby v. Carnaby*, 1 W. & W. (I. E. & M.,) 65.

Service Upon Law Officer of Crown.]—Proof of due service of petition upon law officer of the Crown must be given before case is entered into upon merits. Where it appeared that the law officer received copy of petition on 12th November, and that it was presented to the Judge on the 11th of November, *Held* by *Barry and Williams, JJ.* (*diss. Stawell, C.J.*,) that that was service, although Judge did not accept service not sufficient until 14th November, and *per totam curiam* that Court will not sanction an adjournment in order to ascertain whether law officer was satisfied with service, reversing *Carnaby v. Carnaby. Molesworth v. Molesworth*, 2 W. & W. (I. E. & M.,) 139.

Act No. 268, Secs. 61, 65—Service of Petition.]—A petition is under Sec. 61 presented to the Judge if it is presented to his associate, and on the same day a copy may be served upon the Crown law officer, even although the Judge has not then endorsed his acceptance of the petition. *Gullifer v. Gullifer*, 6 V.L.R. (I. P. & M.,) 109; 1 A.L.T., 53.

Citation—Service of, Out of the Jurisdiction.]—*Semble*, that it is unnecessary to have an Order of Court for service of the citation out of the jurisdiction except in cases of substituted service, in which case an application should be made in open Court in order to give the matter publicity. *Pasmore v. Pasmore*, 1 W. & W. (I. E. & M.,) 56.

Petition—Substituted Service—Citation—Advertisement.]—A petitioner for divorce had not heard of her husband for four years, and in the last letter from him, addressed from England, he had requested that all communications as to his private affairs should be forwarded to his uncle, also resident in England. Leave was granted by the Court to make substituted service of the petition on the uncle in England, and the citation was ordered to be advertised in the *Times*, or other newspaper circulating in England, on any three occasions, and in some paper circulating in Victoria on three occasions, with intervals of a month between each advertisement. *Homer v. Homer*, 1 W. & W. (I. E. & M.,) 33.

See, also, *Wright v. Wright*, *ibid*, p. 198.

Service of citation should be proved by *viva voce* evidence, and not by affidavit. *Jewell v. Jewell*, 2 W. & W. (I. E. & M.,) 136.

Service of Citation and Petition—Substituted Service.]—In a suit by a wife for judicial separation, the respondent had absconded, and the affidavit of the petitioner stated that she had been unable, after diligent inquiries, to gain any intelligence of him, and believed from the answers to her inquiries, that he had left the colony. The Court, nevertheless, refused to dispense with service upon the respondent, but required the affidavit of some other persons stating where the respondent was supposed to be, and upon such affidavit being filed, directed substituted service by advertisements in the place where he was supposed to be. *M'Nulty v. M'Nulty*, 1 W.W. & A'B. (I.E. & M.,) 85.

Service of Citation.]—Affidavits of persons resident in England, verifying the service of the citation on the respondent there, were accepted by the Court as sufficient evidence, since the service was effected out of the jurisdiction, and the affidavits were explicit and satisfactory. The Court intimated, however, that it must not be understood as laying down a general rule that a mere formal affidavit of service abroad would satisfy the Court, or that where service is effected within the jurisdiction, or even in the adjacent colonies, it might be proved by affidavit. *Constable v. Constable*, 1 W.W. & A'B. (I. E. & M.,) 88.

Service—Personal Service out of Jurisdiction.]—Where a respondent serving a sentence in New South Wales was personally served with the petition and citation in New South Wales in proceedings for dissolution of marriage, *Held*, that this was sufficient, and that a special order for that purpose was not necessary. *Parke v. Parke*, 6 W.W. & A'B. (I.E. & M.,) 51, N.C., 28.

Service of Citation and Petition—No Appearance.]—Service of the citation may be effected in the long vacation, and when so effected, no objection can be taken to a defect in the service of petition without first entering an appearance; the objection as to service of the co-respondent is not one which the respondent can take. *Fisher v. Fisher*, 3 V.L.R. (I. P. & M.,) 86.

Petition—Service of.]—A petition may, under Reg.-Gen., 1st February, 1854, Cap. 1, Sec. 15, be served during the Long Vacation. *Fisher v. Fisher*, 3 V.L.R. (I. P. & M.,) 68.

But *see* S.C., at pages 88, 94, where the Court held that service of the petition during the Long Vacation was forbidden, and although there was nothing forbidding the service of the citation during the vacation, yet the two must be served together.

Service of Petition and Citation when Dispensed with.]—In a suit by a wife against a husband for divorce, an application was made by the wife to dispense with service of the petition and citation upon the respondent. The affidavits in support of the application set forth, in addition to the statements required by Rule 7 of the Rules of 18th September, 1861, that the petitioner was utterly unaware of the whereabouts of the respondent, and had no

means of ascertaining where he was. Under these circumstances *Holroyd, J.* (in Chambers,) dispensed with service as requested. *Lutgens v. Lutgens*, 4 A.L.T., 76.

Petition for Dissolution of Marriage—Dispensing with Service of Citation and Petition upon Respondent resident in China—Act No. 268, Sec 87—Reg-Gen. Rule 7.]—*Higinbotham, J.* (In Chambers) made an order dispensing with service of the citation and petition upon a respondent who had deserted his wife and gone to live in China, where he had married again. *Ah Nang v. Ah Nang*, 4 A.L.T., 178.

(*b*) *Trial and Practice thereon.*

Trial—No Defence by Respondent—Issues of Fact.]—Where the respondent leaves a suit for divorce undefended, there can be no issues of fact to go to a jury, as between the petitioner and respondent, there being no fact contested between them, since the respondent, by leaving the suit undefended, admits the case as against herself. *Bury v. Bury*, 1 V.R. (I. E. & M.,) 20; N.C., 29.

Issues—Adultery.]—Issues for trial by a jury need not give the times and places of commission of alleged acts of adultery, as the times and places are sufficiently stated in the petition. *Fisher v. Fisher*, 2 V.L.R. (I. P. & M.,) 102.

Order for Trial by Jury—Divorce Rules, 18, 22, 23.]—Where a cause is ready for issue by service of the citation and petition, an order for a trial by jury may be obtained before the expiration of the twenty days mentioned in rule 18. *Smith v. Smith*, 3 V.L.R. (I. P. & M.,) 122.

Verdict.]—The Court in its Matrimonial Jurisdiction will accept a three-fourths verdict upon issues sent for trial. *Fisher v. Fisher*, 3 V.L.R. (I. P. & M.,) 86, 93.

Practice on Taking Evidence—Belief.]—It is contrary to the rules of evidence to ask a witness his belief of adultery from facts he proved on the examination-in-chief, but such question may be asked on cross-examination. *Ibid.*

Undefended Suit—Trial by Jury—Act No. 268, Sec. 84.]—In an undefended suit for divorce, the Court has no jurisdiction to order a trial by jury as to facts raised in the petition. *Dowling v. Dowling*, 9 V.L.R. (I. P. & M.,) 58.

Trial of Issues—Formal Proof When Given.]—Proof of service of the petition and citation upon the Attorney-General, and all formal proofs, need not be given at the outset of a suit for dissolution where a jury has been impannelled to try issues in the suit, but should be reserved till the verdict of the jury has been given. *Belcher v. Belcher and M'Kenzie*, 10 V.L.R. (I. P. & M.,) 52.

Dispensing with Co-Respondent.]—Though a Judge's order has been obtained dispensing with a co-respondent, the petitioner must, at the trial, satisfy the Court that such order was necessary. *Kerr v. Kerr*, 2 V.L.R. (I. P. & M.,) 101.

Proving Service upon Respondent.]—An appearance for the respondent, by counsel, does not dispense with the necessity of proving service upon her. *Ibid.*

Dispensing with a Co-Respondent.]—The Court dispensed with a person as co-respondent in a suit for dissolution by a husband where the husband had already in an action for *crim. con.* in New South Wales, before a jurisdiction to dissolve marriage was established there, obtained a verdict against such person for committing adultery with his wife. *Lawrence v. Lawrence*, 6 V.L.R. (I. P. & M.,) 107.

Cause when at Issue.]—*Semble*, that upon the expiration of twenty-one days from the filing and serving of the answer, a cause is, without any replication, at issue. *Carnaby v. Carnaby*, 1 W. & W. (I. E. & M.,) 65.

Setting down for Trial—Suit for Divorce and Damages—Jury—Striking Out Claim for Damages.—In a suit by a husband against his wife and the co-respondent for divorce on the ground of adultery, and for damages against the co-respondent, the wife had entered an appearance to the citation, but put in no answer. The co-respondent did not enter an appearance to the citation. The petitioner set down the cause for trial by the Full Court without a jury, without a Judge's order giving him leave to do so. When the cause was called on, the petitioner's counsel stated that the petitioner would forego the claim for damages, and asked for leave to amend by striking out the claim for damages. *Held per Full Court*, that when damages are claimed the cause must be heard by a jury; that a petitioner claiming damages by his petition cannot forego them at the hearing, but must obtain leave from a Judge to amend the record before setting the cause down for trial; and that a cause cannot be set down for trial, whether before a jury or not, without the order of a Judge, and the cause was ordered to stand over till next sittings. *Tyers v. Tyers*, 1 W. & W. (I. E. & M.,) 63.

Trial of Issues—Rules 1861, Rule 25.]—Where the jury have found for the petitioner, the Court will not pronounce a decree until after the first four days of the next term, in order to afford the usual opportunity of a motion for a new trial. *Bathgate v. Bathgate*, 2 W. & W. (I. E. & M.,) 129.

Act No. 268—Case Not to be Heard by Jury—Setting Down for Trial.]—A cause was set down for hearing before the Court without a jury; the respondent had not entered an appearance, but an affidavit of personal service of the petition was filed. *Held* that Rule 9 did not make a Judge's order in such a case necessary where there had been personal service, and that the order was unnecessary. *Julius v. Julius*, 5 A.J.R., 131.

Setting Suit Down before at Issue—Objection—Waiver.]—If the petitioner set a suit down for hearing before it is properly at issue, the respondent should move to have such setting down set aside, otherwise any objection on that ground is waived by the respondent, and cannot be

maintained when the cause comes on for hearing. *Maxwell v. Maxwell*, 6 V.L.R. (I. P. & M.,) 117; 2 A.L.T., 93.

Setting down for Trial before Single Judge—Act No. 787—Application Unnecessary.]—*Per Higinbotham, J.* (in Chambers)—It is unnecessary under the "*Marriage and Matrimonial Causes Statute Amendment Act* 1883" (No. 787), to obtain a Judge's order for the trial of a cause before a single Judge. Causes may be set down for trial without a Judge's order, directing them to be tried by one or more Judges. *Cameron v. Cameron*, 6 A.L.T., 26.

Single Judge—Power to hear Rule nisi for New Trial—Act No. 787, Sec. 15.]—Under the combined effect of Sec. 99 of the "*Marriage and Matrimonial Causes Statute* 1864," and Sec. 15 of the "*Marriage and Matrimonial Causes Statute Amendment Act* 1883," a single Judge sitting in the divorce jurisdiction has power to hear an application for a rule *nisi* for a new trial, and to make the rule absolute. *Belcher v. Belcher* and *M'Kenzie*, 10 V.L.R. (I.P. & M.,) 52. The application for a rule should be made before the decree is pronounced. *Ibid.*

Death of Respondent—Entering Suggestion.]—A husband petitioned for dissolution of marriage on the ground of adultery. Issues were tried before a jury, and the verdict established the marriage and adultery, and gave the petitioner £25 damages against the co-respondent. On the case coming on to be heard upon the petition, an affidavit was filed, stating that respondent had died since the trial. *Held* that suggestion of death should be stated on the record, and order to be drawn up on next sittings of the Court for payment of damages and costs by the co-respondent. *Richardson v. Richardson*, 2 W.W. & A'B. (I.E. & M.,) 62.

Petition Dismissed, and Counter Petition brought by Respondent.]—A husband filed a petition for divorce, on the ground of adultery by the wife. The wife and co-respondent filed an answer denying the charges on oath, and the petition was dismissed for want of prosecution. The wife afterwards petitioned for divorce on the grounds of adultery, cruelty, and desertion, and no answer was put in by the husband, nor did he defend the suit. The Court examined the wife and the former co-respondent, who denied on oath the adulteries charged against them in the former petition, and being satisfied with their denials and explanations, made a decree for divorce. *Treacy v. Treacy*, 3 W.W. & A'B. (I.E. & M.,) 85.

Second Petition for Divorce Disclosing Facts not Previously Mentioned.]—On a petition by a wife for a divorce on the grounds of adultery and cruelty, the Court was of the opinion that the adultery was established, but that the acts of cruelty did not amount to legal cruelty, and gave the petitioner the option of having her petition dismissed or taking a decree for judicial separation. The petitioner, instead of exercising the option, presented a second petition alleging, in addition to the facts already stated, that her husband had wilfully communicated to her venereal disease, but that from motives of delicacy and ignorance that it amounted to wilful cruelty, she had omitted to mention it in the former petition. The Court, considering the exceptional circumstances of the case, and intimating that it was not to be regarded as a precedent, consented to accept the second petition on the terms of the wife paying the costs of the former suit. *Trestrail v. Trestrail*, 3 W.W.& A'B. (I.E. & M.,) 90.

Second Petition—Adultery and Desertion.]—A wife petitioned for dissolution of marriage on the ground of adultery and desertion for two years. The adultery was proved, but the two years' desertion was not then completed. On hearing the petition at the completion of the time, *Held* that a fresh petition must be presented. *Seehusen v. Seehusen*, 7 V.L.R. (I. P. & M.,) 149.

Summons—Certifying for Counsel.]—A summons in chambers in the matrimonial jurisdiction referred to the Court is not an appeal to the Full Court under Secs. 104 and 105 of Act No. 268, and may therefore be heard by two Judges sitting in Banco in the common law jurisdiction. On a summons in Chambers in the matrimonial jurisdiction, it is not necessary to certify for counsel, as it is only *ex gratiâ* that a proctor may be heard in such matters. *Smith v. Smith*, 3 V.L.R. (I. P. & M.,) 65.

Practice—Hearing Counsel.]—The rules as to practice in the Supreme Court in its matrimonial and divorce jurisdiction provide that where a jury is resorted to the proceedings shall be as at *Nisi Prius*, and that seems to limit the rule to that mode of trial. By rule 59, it is provided that where there is no jury the practice at Equity shall be followed. The hearing of counsel being a point of practice, where in a suit for judicial separation there is no jury, the Court must hear two counsel on each side if they be present, and the petitioner has the right of reply. *Mackintosh v. Mackintosh*, 1 W. & W. (I. E. & M.,) 70.

Co-respondent's Right to be Heard.]—A co-respondent who had not entered an appearance, but had by counsel addressed the jury upon the question of damages at the time of issues, has no right to be heard at the hearing. *Millar v. Annand*, 2 W. & W. (I. E. & M.,) 137.

New Trial—Witness Put Out of the Way—Discretionary Power of Court.]—On a motion for a new trial on the ground that a witness for the petitioner, whose evidence was material, was fraudulently put out of the way, it appeared that the evidence was material, but that the respondent and co-respondent were not privy to the abstraction of the witness, even if the abstraction had been shown to be fraudulent. No application had been made at the trial for the production of this witness, so the Court refused a new trial, holding that the extraordinary and discretionary powers vested in it to call for evidence were intended to prevent collusion, fraud, and deception, and not to help out a petitioner's case. *Smith v. Smith*, 4 A.J.R., 87.

Non-appearance of Petitioner.]—Where a petitioner does not appear at the hearing the Court will not dismiss the petition except upon notice to him. Rule *nisi* to dismiss granted. *Anderson v. Anderson*, 3 V.L.R. (I. P. & M.,) 128.

Taking Evidence under a Commission.]—*See post* under heading—(3) EVIDENCE.

(c) *Costs.*

Husband's Petition — Wife's Costs.]— Where there was no evidence to support the issues of husband's cruelty raised in her answer by a respondent, *Held* that in such a case she raised them at her own risk, and that she could only be allowed the costs of traversing the statements made by the petitioner. *Lewis v. Lewis*, N.C., 24.

Costs—Vexatious Issues.]—In a suit for divorce on the ground of adultery, the respondent denied the adultery, and charged her husband with desertion, neglect, and cruelty. Issues on all these points, including the wife's adultery, were found in favour of the husband. On the question of costs, *Held* that the wife was not entitled to the costs of any of the issues except those charging her with adultery, and of an issue raised by her answer of condonation, since evidence was given to support it. *Miller v. Miller*, 1 A.J.R., 41.

Wife's Costs.]—A wife, a respondent, not having separate property, is indemnified against costs unless her proceedings are vexatious. *Smith v. Smith*, 3 V.L.R. (I. P. & M.,) 122.

Payment into Court of Sum to meet Wife's Costs—Poverty of Husband—Reduction of Sum.]—In a suit for dissolution of marriage instituted by the husband, an order had been made for payment into Court of a sum to meet wife's costs. The petitioner applied on affidavit that he was not poor enough to sue *in forma pauperis*, but was earning barely enough to support himself. The Court, under the circumstances, reduced the sum to be paid in from £90 to £15. *Batch v. Batch*, 5 V.L.R. (I. P. & M.,) 120.

Payment into Court of Wife's Costs—No Order for Payment in Decree.]—A respondent had been ordered to pay into Court a sum to meet the wife's costs. The wife's petition for judicial separation had been dismissed, no mention being made of the costs, the decree containing no reference to them. *Barry, J.* (in Chambers) refused to make an order for payment of the wife's costs of that sum. *Held* on appeal, by *Stawell, C.J., and Stephens, J.* (*dissentiente Barry, J.*) that the wife, though unsuccessful, was entitled to obtain a subsequent order for payment of her costs out of such sum. *M'Mahon v. M'Mahon*, 5 V.L.R. (I. P. & M.,) 121.

Costs—Of Wife—Unfounded Countercharges.]—Where, in a suit for divorce by the husband, the wife made unfounded countercharges, which her proctor, by careful inquiry, might have discovered to be unsustainable, the Court disallowed the wife's costs in respect of such counter charges, and deducted the petitioner's costs in respect of such charges from the costs allowed to the wife. *Lawrence v. Lawrence*, 6 V.L.R. (I. P. & M.,) 107; 2 A.L.T., 64.

Costs—Wife's Costs de die in diem—Costs of Trial.]—On an application by the wife, respondent in a divorce suit, to be allowed her costs *de die in diem*, and to have a sum of money fixed for her costs at the trial, the petitioner filed an affidavit stating that he had no means. *Higinbotham, J.* (in Chambers), ordered the petitioner to pay the costs of the wife *de die in diem*, such costs to be paid within five days of taxation, and to pay £25 into Court towards the wife's costs of the suit, within one month of the application. *Hayle v. Hayle*, 6 A.L.T. 18.

Costs of Petitioner—Dismissal of Petition.]—When the time for appearance to the citation elapsed without the respondent (wife), who had been personally served with the citation, appearing, the petitioner was allowed to have his petition dismissed without costs. *Pasmore v. Pasmore*, 1 W. & W. (I. E. & M.,) 203.

Costs of Petitioner—Co-respondent ordered to pay Costs of Issue as to Adultery found against him.]—On a petition for divorce the Court found that the wife had committed adultery, but refused a dissolution because the petitioner had also committed adultery. Nevertheless the co-respondent was ordered to pay the petitioner's costs in respect of the issue as to the wife's adultery. *Hayle v. Hayle and Henry*, 10 V.L.R. (I. P. & M.,) 59, 66.

Costs of Petitioner.]—*Semble*, it being the duty of the petitioner's proctor to show what is a sufficient sum to pay into Court for the wife's costs in bringing a suit for judicial separation, the Court will not increase the amount so paid in. *Cawkwell v. Cawkwell*, 10 V.L.R. (I. P. & M.,) 69.

Respondent's Costs—Countercharges Unproved—Payment into Court.]—In a suit by a husband for divorce on the ground of adultery, the husband paid £178 into Court to meet his wife's expenses of defending the petition. She brought countercharges of desertion and connivance, the investigation of which materially lengthened the suit. Both of these charges were determined in favour of the husband, and as to the alleged desertion it was held there was no reasonable evidence that made it fairly a subject of discussion. *Held* that the respondent was answerable for any costs over and above the sum paid into Court, which was an unusually liberal sum, and order made for payment out of that sum, but order for further taxation refused. *Belcher v. Belcher* and *M'Kenzie*, 10 V.L.R. (I. P. & M.,) 52.

Costs—Of Respondent.]—Where the earnings of the petitioner were £2 15s. a week, a judge in Chambers ordered him to pay a lump sum of £25 to meet the costs incurred by the respondent in a suit against her for a divorce. *Held* that this was a reasonable sum, and as the respondent called no witnesses, the Court refused to make any order for the taxation and payment of costs, notwithstanding that the petition had been

dismissed against her. *Hayle v. Hayle* and *Henry*, 10 V.L.R. (I. P. & M.,) 59, 65.

Co-respondent's Costs.]—Where no damages can be recovered against the co-respondent, he ought not to be called upon to pay costs. *Terry v. Terry*, 1 W.W. & A'B. (I. E. & M.,) 78.

Where a husband by his conduct had disentitled himself to a decree for divorce, but obtained a decree for judicial separation, he was held entitled to damages awarded him by a jury and for his costs against the co-respondent. *Bathgate v. Bathgate*, 2 W. & W. (I. E. & M.,) 129.

Costs—Of Co-respondent.]—A divorce suit was first heard on issues between the petitioner and the co-respondent, and a verdict found for the petitioner. The suit was then heard as between the petitioner and respondent, without notice to the co-respondent, and a divorce granted. *Held* that the co-respondent should not pay the costs of the hearing of which he had no notice. *Bury v. Bury*, 1 V.R. (I. E. & M.,) 20, 29; 1 A.J.R. 2.

Co-respondent's Costs—Condoned Adultery.]—One co-respondent (R.) appeared and denied the adultery charged, the other co-respondents not appearing. The dissolution of the marriage was decreed on the ground of the wife's adultery, which had been condoned but was revived by adultery committed subsequently with other persons. *Held* that R. had to pay the costs of the issue in relation to the charge against him. *Detheridge v. Detheridge*, 7 V.L.R. (I. P. & M.,) 146; 2 A.L.T., 137.

Costs of Co-respondent.]—Where the conduct of the co-respondent has been such as to give rise to a reasonable suspicion, which induces the petitioner to engage in an attempt to procure a divorce, although no adultery is proved, the co-respondent will be left to pay his own costs. *Belcher v. Belcher* and *M'Kenzie*, 10 V.L.R. (I. P. & M.,) 52.

Costs — Of Co-respondent — Reasonable Suspicion.]—A co-respondent requested the petitioner to take his name out of the petition, and offered to pay the costs. *Held* that this was sufficient to give rise to a reasonable suspicion in the mind of the petitioner that he had committed adultery with the respondent, and the Court, in dismissing the petition as against him, did so without costs. *Pyle v. Pyle*, 10 V.L.R. (I. P. & M.,) 66.

(3) *Evidence.*

In Undefended Suit—Evidence of Condonation how Considered.]—*Per Molesworth, J.*—The Court is bound, in undefended cases, itself to consider the question of condonation before decreeing a dissolution; though not perhaps as between the parties, before sentence of judicial separation. But if it elicits for itself evidence of condonation, before acting upon it, it should definitely attract the attention of a petitioner or a petitioner's counsel to the importance of showing a revival. *Casey v. Casey*, 1 W. & W. (I. E. & M.,) 34, 41.

Per Barry, J.—Where the relation of the suitors is so different from that of ordinary litigants, and where collusion may exist, it is prudent and expedient to sift with care the acts and conduct of both parties and not to exclude evidence of condonation, or to refuse to such evidence when admitted its due force and preponderance. *Ibid*, p. 49.

In Undefended Suits — Difference between Colonial and English Law as to Admissibility of Evidence.]—*Per Molesworth, J.*—The difference between our law and that of England, as to the admission of parties' evidence, is to be much regarded as to the weight of evidence necessary to satisfy a Court in unopposed cases. *Ibid*, p. 41.

Of Wife in Unopposed Suit—What Reliance to be placed upon.]—*Per Williams, J.; accord Barry, J.*—It is unsafe for the Court, in a suit for dissolution of marriage on the ground of cruelty and adultery, to rely upon the sole testimony of the wife, whose interest, feelings, and apprehensions may so naturally warp her judgment; and although the husband or wife may be, for all the purposes of the Act in force in this colony, rendered a competent witness, the evidence of such person in most cases (that is in all not exceptional) demands corroboration, if not of witnesses upon oath, at least of facts and circumstances. And it is dangerous in a degree to allow even a judicial separation upon such testimony; and also at the outset of inquiries of this nature it is incumbent upon the Court to insist on full, substantial, and strict proof, as a guide to future proceedings, and in order to discourage ill-advised and ill-matured applications of the kind. *Ibid*, p. 47.

Evidence of Marriage–Admission of Respondent.] Where the evidence of the marriage was barely sufficient but the respondent admitted the marriage in his letters, the Court acted upon those admissions and made a decree for dissolution of marriage. *Hodgson v. Hodgson*, N.C. 24.

Per Barry, J.—The Court acted on the admission of a party to the cause made against his own interest. If it were a question between parties, not husband and wife, as in the case of title to property, the evidence could not be sufficient. *Ibid.*

Marriage Admitted on Pleadings—Need Not be Proved.]—In a suit for dissolution which is defended, and the marriage is admitted on the pleadings, it is sufficiently established as between the petitioner and respondent, and no evidence need be adduced to prove it. *Josephs v. Josephs*, 6 V.L.R. (I. P. & M.,) 112.

Of Marriage—Undefended Suit for Divorce.]—In an undefended suit, the Court will not grant a divorce if the marriage be proved by the uncorroborated evidence of the husband or wife alone. *Dowling v. Dowling*, 10 V.L.R. (I. P. & M.,) 49.

Evidence of Adultery—Venereal Disease.]—During the hearing of an undefended petition for divorce or judicial separation on the ground of the husband's adultery and cruelty, evidence

was given by the wife of a statement by the respondent to her, in which he informed her that he had contracted venereal disease, but added that he had done so accidentally and innocently, and without adulterous intercourse. *Held, per Barry and Williams, JJ.*, that, under the circumstances in which the admission was made, it was no proof of adultery. *Per Molesworth, J.*, that, under the circumstances—the respondent not having denied or explained upon oath the imputation when challenged to do so, and there being no reason to suspect collusion—this evidence sufficiently proved adultery. *Casey v. Casey*, 1 W. & W. (I. E. & M.,) 34.

Evidence of Adultery.]—Where the sole evidence of adultery is the uncorroborated statement of the petitioner, which is flatly contradicted by the respondent, it is unsafe in the highest degree to act only on the evidence of one of the parties so deeply interested in the case as the petitioner, and which evidence is insufficient to prove adultery. *Beck v. Beck*, 1 W. & W. (I. E. & M.,) 199.

Evidence of Adultery and Cruelty.]—The uncorroborated evidence of the petitioner is insufficient to support a charge of adultery or cruelty, when that charge is denied by the respondent. *Little v. Little*, 4 A.J.R. 143.

Deed of Separation—Effect of.]—The execution by a wife of a deed of separation is neither evidence of condonation of adultery, nor is it a bar to her initiating a suit for judicial separation on the ground of adultery; but, *semble*, a deed of separation would form an element of importance in a suit for judicial separation, on the ground of cruelty, and, if the petitioner got under such a deed all that she was entitled to, would be regarded in a suit for judicial separation on the ground of adultery. *Sutherland v. Sutherland*, 8 V.L.R. (I. P. & M.,) 49; 3 A.L.T., 133.

Evidence of Cruelty—Contemporaneous Statement.]—A statement made to a neighbour as to an act of cruelty two or three hours after the act, is not admissible in evidence in a suit for judicial separation, being made too long after the act. *Jeffrey v. Jeffrey*, 9 V.L.R. (I. P. & M.,) 57.

Corroborative Evidence — Undefended Suit.]—Complaints made by the wife to a third person of her husband's cruelty *recenti facto*, are admissible as corroborative evidence of the wife's statement in an undefended suit for divorce. *Gibson v. Gibson*, 4 A.L.T., 110.

On Trial of Issues — Affidavits Verifying Answer.]—The affidavits filed with and verifying the answer cannot be used as evidence on the trial of issues in a divorce suit. *Bury v. Bury* 1 V.R. (I. E. & M.,) 20, 26.

Affidavit to Verify Petition—Cannot be Used as Evidence of Necessary Facts.]—At the hearing of an undefended suit for divorce or judicial separation, the affidavit of the petitioner in divorce filed to verify the petition, cannot be used as evidence of any of the facts necessary to entitle the petitioner to a divorce or judicial separation. *Casey v. Casey*, 1 W. & W. (I. E. & M.,) 34.

Evidence of Respondent—Issues between Petitioner and Co-respondent.]—On the trial, in a divorce suit, of issues between the petitioner and co-respondent, the only evidence of adultery was that afforded by the direct statements of the respondent to the effect that she had committed adultery with the co-respondent. *Held* that such evidence was admissible as against the co-respondent, but that being the evidence of an accomplice, it required to be supported by corroborating circumstances; and that, so supported, it was sufficient to entitle the petitioner to a decree. *Bury v. Bury*, 1 V.R. (I. E. & M.,) 20, 28; 1 A.J.R., 2.

Of One Witness Uncorroborated.] — *Quære*, whether the evidence of one witness only to an act of adultery, unsupported by corroborating circumstances, would be sufficient upon which to found a decree. *Ibid.*

Of Respondent—On Issues between Petitioner and Co-respondent.]— Where the respondent leaves a suit for divorce undefended her statements are not admissible as evidence against the co-respondent on issues of fact between the petitioner and co-respondent. *Bury v. Bury*, 1 V.R. (I. E. & M.,) 20; N.C., 29.

Questions Tending to Show that Respondent has been Guilty of Adultery—Act No. 268, Sec. 88.]—*Per Barry and Williams, JJ.* (*dissentiente, Stawell, C.J.*):—Sec. 88 of the "*Marriage and Matrimonial Causes Statute*," No. 268, does not protect the wife, when respondent in a suit for divorce, from being bound to answer questions tending to show that she has been guilty of adultery. *Ibid.*

Identity of Respondent and Co-respondent.]—The evidence of the petitioner that he has effected service of the petition and citation upon the respondent and co-respondent is, where there is no appearance for respondent or co-respondent, insufficient evidence to identify them. *Russell v. Russell*, 4 A.J.R., 183.

Refusal of Petitioner to Answer General Question as to Adultery — Effect of Sec. 88 of the "Marriage and Matrimonial Causes Statute 1864."]—A petitioner for dissolution of marriage does not disentitle himself to a decree by availing himself of the protection afforded by Sec. 88 of the "*Marriage and Matrimonial Causes Statute* 1864," and refusing to answer a general question as to whether he has ever been guilty of adultery since his marriage. The effect of the section is to permit the Court to draw or decline to draw a damnatory inference from such refusal. *Cameron v. Cameron*, 6 V.L.R. (I. P. & M.,) 105.

Allegation of Date of Adultery — Evidence of Another Date Inadmissible.] — A petition for divorce fixed a precise day as the date on which the adultery alleged took place. *Held* that evidence of adultery on another day was inadmissible. *Pyle v. Pyle*, 10 V.L.R. (I. P. & M.,) 66.

Commission to Take Evidence—Domicil—Objections to Jurisdiction.]—A co-respondent in a suit for dissolution of marriage answered and objected that the Court had no jurisdiction over him as he was resident and domiciled in Queensland and most of the acts of adultery alleged took place in New South Wales. The Court granted a commission to examine a witness abroad, notwithstanding the fact that the question of domicil and the objection as to the jurisdiction might render the evidence unnecessary, petitioner to provide for co-respondent's costs of commission. *Smith v. Smith*, 3 V.L.R. (I. P. & M.,) 65.

Act No. 268, Sec. 91—Evidence Under Commission—Witness in Advanced Stage of Pregnancy.]—A witness resident in or near Melbourne, being in an advanced stage of pregnancy, was examined by commission. *Held* that the evidence so taken was not admissible as in the ordinary course of events she would recover and be able to give her evidence in the witness box. *Fisher v. Fisher*, 3 V.L.R. (I. P. & M.,) 64.

Commission to Examine Witnesses when Issued before Suit in Issue.]—*Per Higinbotham, J.* (in Chambers.)—The rule that witnesses, in a suit for divorce, are not to be examined before the suit is in issue, will be relaxed if circumstances of a special urgency require it. *Malpas v. Malpas*, 6 A.L.T. 20.

(4) *Intervention of Law Officer.*

When too Late.]—The intervention of a law-officer under Sec. 65 of the "*Marriage and Matrimonial Causes Act*," after the decree in a divorce suit has been pronounced but not drawn up, is too late. The words "obtaining a decree," in the section, refer to the pronouncing of the decree, and not the drawing up, which is merely a formal act to be done after the decree is obtained. *Bury v. Bury*, 1 V.R. (I. E. & M.,) 20, 33; 1 A.J.R., 138.

(5) *Damages.*

Co-respondent—Damages—Costs.]—Where a husband by his conduct disentitled himself to a decree for divorce, but obtained a decree for judicial separation, he was held entitled to damages awarded him by a jury, and to his costs against the co-respondent. *Bathgate v. Bathgate*, 2 W. & W. (I. E. & M.,) 129.

Striking out Claim for.]—*See Tyers v. Tyers, ante column* 518.

(6) *The Decree and its Effect.*

Postponing Registration—Prima facie Title to Alimony.]—After judgment has been given, if it is adverse to the wife, and she can establish a *primâ facie* case entitling her to alimony, she may apply to the Court to postpone the registration of the decree, and a convenient time may be fixed when the motion for alimony can be entertained; but it is absolutely essential that there should be evidence establishing a *primâ facie* title to alimony. *Terry v. Terry*, 1 W. W. & A'B. (I.E. & M.,) 78.

Decree Pronounced by Court not Consisting of Judges who Heard Issues.]—The Full Court, consisting of three Judges, may pronounce a decree for dissolution of marriage, though the Court, as then constituted, does not consist of the same Judges before whom the issues of fact were tried by a jury. *Smith v. Smith*, 4 V.L.R. (I. P. & M.,) 94.

Where the jury have found for the petitioner the Court will not pronounce a decree until after the first four days of the next term (under rule 25 of the Rules 1861), in order to afford the usual opportunity of a motion for a new trial. *Bathgate v. Bathgate*, 2 W. & W. (I. E. & M.,) 129.

(7) *Appeal.*

Matrimonial and Divorce Rules 1861, R. 59.]—In appeals to the Full Court from a single Judge, notice of the appeal should be both lodged in Court and given to opposite party, as under Act 19 Vict. No. 13. *Fowler v. Fowler*, 2 W. & W. (I. E. & M.,) 134.

The Court, sitting in Banco in Term, will not hear an appeal from an order made by a Judge in Chambers in the matrimonial jurisdiction. *Fisher v. Fisher*, 3 V.L.R. (I. P. & M.,) 68.

But a summons in Chambers in the matrimonial jurisdiction referred to the Full Court is not an appeal to the Full Court under Secs. 104 and 105 of Act No. 268, and may, therefore, be heard by two Judges sitting in Banco in the common law jurisdiction. *Smith v. Smith*, 3 V.L.R. (I. P. & M.,) 65.

Petition Not Accepted for Purposes of Appeal Only.]—The Court will not accept a petition for dissolution of marriage, for the purpose of permitting an appeal to the Privy Council, where it doubts its jurisdiction to make a decree for dissolution. *Moffatt v. Moffatt*, 3 W. W. & A'B. (I. E. & M.,) 87.

Notice Should State Grounds.]—A notice of appeal in the divorce jurisdiction should state the grounds of appeal. *Bury v. Bury*, 1 V.R. (I. E. & M.,) 20, 33; 1 A.J.R., 138.

(8) *Alimony and Maintenance.*

Maintenance—When Wife Deprives Herself of by her Conduct.]—At common law the wife's adultery would be a good plea to an action for necessaries supplied to her, because she has deprived herself of any right to bind her husband for her support; and the same rule should be followed by the Court in its matrimonial jurisdiction, save in exceptional cases, or where the wife has brought a fortune to her husband. *Carnaby v. Carnaby*, 1 W. & W. (I. E. & M.,) 195.

Alimony—When Refused.]—Where adultery is proved on the part of a wife, respondent, the granting of alimony should be a very exceptional case, and require strong facts to induce the Court to grant it. *Terry v. Terry*, 1 W. W. & A'B. (I. E. & M.,) 78.

Wife—When Entitled to Alimony.]—A wife who obtains a decree for dissolution of marriage is entitled to alimony; but a wife, against whom a decree has been pronounced on the

ground of adultery, is not entitled to alimony. When she brings property to her husband at the marriage, that is generally returned to her on its dissolution. *Maxwell v. Maxwell*, 6 V.L.R. (I. P. & M.) 117.

Alimony — When Application for Permanent Alimony may be Made.]— An application for permanent alimony may be made by a wife against whom a decree for divorce has been made, although she has filed no petition for permanent alimony, and she does not state in her answer that any such application will be made. *Carnaby v. Carnaby*, 1 W. & W. (I. E. & M.,) 195.

Petition for Permanent Alimony — Judicial Separation.]—Where a decree of judicial separation was made upon a husband's petition for dissolution of marriage, the Court granted permanent alimony, although expressing doubt as to its jurisdiction. *Jones v. Jones*, 2 W. W. & A'B. (I. E. & M.) 60.

Petition for Alimony Pendente Lite—Practice upon.] — A petition for alimony *pendente lite* need not be signed; where the wife is the respondent in the main cause and the husband is seeking for divorce, the copy of the petition need not be served personally on the husband, though personal service upon husband is necessary when he is respondent in the main cause; service of a copy of the petition two days after the petition was filed, *held* to be good service. *Fowler v. Fowler*, 2 W. & W. (I. E. & M.,) 126.

The ordinary rules of pleading are to be followed, and no case is to be heard which is not made upon the pleadings. Where children of the marriage were kept by mother, but no case to that effect was raised upon the petition, the Court kept the question of their maintenance distinct from the alimony granted to her, and the alimony was fixed upon the assumption that the father had to maintain them. *Sansom v. Sansom*, 2 W. & W. (I. E. & M.,) 147.

Alimony Pendente Lite.]—While a suit was pending by a husband against a wife for divorce on the ground of adultery, the wife presented a petition for alimony. The husband admitted that his net income was £3085 per annum, subject to little variation, and alleged that he had three children approaching an age when advances for outfit would be required, and that he had by agreement allowed and paid his wife £6 a week for maintenance, but that having incurred debts beyond her allowance, payment of them had been demanded from him. *Held*, that the husband's statement as to the past arrangement as to alimony must be rejected as irrelevant; and that the wife should be awarded alimony at the rate of £480 per annum from the date of the return of the citatiou, payable monthly, with liberty to the husband to deduct payments made by him to, and debts contracted by the wife, since that date. *Molesworth v. Molesworth*, 1 W. & W. (I. E. & M.,) 57.

Pendente Lite—Previous Order for Maintenance by Justices.]—Where an order for maintenance had been made by justices the Court refused the wife's application for alimony (she being the petitioner in a divorce suit) when she would at the most be entitled to only a few shillings per week more than allowed in the order. *Shoebridge v. Shoebridge*, 3 A.J.R., 55.

Pendente Lite—Fluctuating Income.]—For a case where Court takes an average for a fluctuating income, *see Smith* v. *Smith*, 3 A.J.R., 62.

Pendente Lite—Practice—Act No. 268—Late Application by Summons for Fuller Answer.]—Where a summons for fuller answers was taken out more than eight days after an answer to a petition by a wife for alimony *pendente lite*, the Court granted the summons upon petitioner paying the respondent's costs. *Hosie v. Hosie*, 5 A.J.R., 21.

Alimony—How Fixed.]—*Per Stawell, C.J.* The proportion of one-fifth of the husband's income is not always to be observed in allowing alimony; the sources from which his income is derived are to be considered. Where that income arises chiefly from trade profits, alimony will be granted at a lower rate. Where a husband earned as a chemist profits of £350 a year, alimony of £1 per week was granted. *Pardey v. Pardey*, 2 W.W. & A'B. (I.E. & M.,) 58.

Act No. 268, Sec. 71—Deed of Separation.]—Where a deed of separation has been executed providing for the wife, the Court refused to exercise the power of granting alimony conferred by Sec. 71, even where there was a doubt as to whether it could be enforced in case of a decree for dissolution being pronounced through the wife's adultery. *Fisher v. Fisher*, 3 V.L.R. (I. P. & M.,) 86.

Provision for Wife—Promise to Settle a Sum if She Refrained from Suing.]—A husband, a commercial traveller, who was in the habit of ill-treating his wife, left her and lived with another woman. Having a legacy of £3500 left to him, he promised to settle on her property worth £1100 if she refrained from suing for divorce; but failed to do so, and she filed a petition for dissolution of marriage. The Court granted the petition and ordered the husband to pay the wife the gross sum of £1200, or secure to her an annual sum of £85, at her option. *Johnston* v. *Johnston*, 10 V.L.R. (I. P. & M.,) 57.

An Attachment will be Granted for Non-Payment of Arrears due Under a Decree for Alimony Pendente Lite.—*Hunter v. Hunter*, 2 W. & W. (I. E. & M.,) 123.

Non-Payment of Alimony—Inability No Excuse for—Attachment How got Rid of.]—*Campbell* v. *Campbell*, *ante column* 65.

When Alimony Payable and How.]—The Court exercises a discretion as to the intervals at which alimony *pendente lite* is paid. Alimony *pendente lite* is payable from the date of service, and not from the date of return of the citation, and the Court will fix some place at which it is to be paid. *Davies v. Davies*, 2 W. & W. (I. E. & M.,) 124.

The Court has Jurisdiction to Award Alimony Pendents Lite where the Wife is the Respondent in a Suit for Dissolution of Marriage.]—*Fowler* v. *Fowler*, 2 W. & W. (I. E. & M.,) 126.

(9) *Custody and Maintenance of, and Access to Children.*

Application for Custody and Maintenance—Presumption of Wife's Innocence.]—The wife's innocence is, as in the case of applying for alimony, to be presumed for the purposes of an application for the custody and maintenance of children under Sec. 22 of the "*Divorce Act.*" *Jones v. Jones*, 1 W.W. & A'B. (I. E. & M.,) 86.

Interim Orders for Custody and Maintenance—Divorce Act, Sec. 22.]—*Interim* orders for the custody and maintenance of children may be made, where the children have no property, under Sec. 22 of the "*Divorce Act.*" *Ibid.*

A wife's petition prayed for dissolution of marriage and the custody of the children. The Court refused to decree dissolution, but granted judicial separation, and made a subsequent and separate order for the custody of the children in favour of the wife, without requiring service of notice of a motion for that purpose upon the respondent. *Dean v. Dean*, 5 V.L.R. (I. P. & M.) 116.

Evidence as to, When Heard.]—The Court will not, at the original hearing in a suit for judicial separation, hear any evidence as to the custody of the children. Application for their custody and as to alimony and costs, should be made in Chambers after the decree. *Cawkwell v. Cawkwell*, 10 V.L.R. (I. P. & M.,) 69.

Evidence of Wife's Character—Not Raised in Pleadings.]—*Semble*, that when in a suit for judicial separation the pleadings do not make any charges against the wife's character, the Court, in considering who is entitled to the custody of the children, will not hear any evidence against her character. *Ibid.*

IV. Maintenance and Protection Orders.

Order for Maintenance—Jurisdiction of Justices of the Peace—Act No. 268, Secs. 32, 33.]—Justice have jurisdiction to attach more property than will suffice for twelve months' maintenance. A wife who had obtained an order for maintenance applied for an order attaching the whole of the husband's property, consisting of mining shares to the value of several thousands of pounds, which were being sold and the proceeds of which were being sent out of the colony, and the justices refused, thinking they had no jurisdiction to attach the whole amount. Rule absolute for a *mandamus* to compel them to attach all the property. *Mitchell v. Mitchell*, 5 A.J.R. 44.

Act No. 268, Secs. 30, 31, 32—Jurisdiction of Justices—Order for Seizure of Goods of Husband.]—Justices made an order for maintenance under Secs. 30 and 31, and two months afterwards made an order under Sec. 32, authorising the defendant to seize plaintiff's goods. Defendant seized the goods and plaintiff sued him in trover. *Held* that the order for seizure of goods under Sec. 32 should have been made on their hearing of the first complaint, and not by a subsequent independent order made afterwards; the justices' power was determined by their making the first order, and the second was without jurisdiction. Judgment for plaintiff. *Mitchell* v. *Wentworth*, 1 V.L.R. (L.,) 258.

Act No. 268, Secs. 31, 34—Power of Justices to fix a Period.]—The enactments in Act No. 268 do not give justices the power to fix a period during which the wife is to be maintained. *Regina v. Smith, ex parte Smith*, 9 V.L.R. (L.,) 112; 5 A.L.T., 19.

Jurisdiction of Justices as to Enforcing Orders—Act No. 268, Sec. 39.]—Sec. 39 empowers justices to make an order for maintenance, and this order may be enforced *at any time* afterwards by other justices, and they have power to enforce an order twelve months old, and also to compel payment of the costs of enforcement. *In re James Welsh*, 9 V.L.R. (L.,) 166; 5 A.L.T., 17.

Desertion of Wife.]—So long as the husband is ready to take the wife back, she cannot be considered as deserted, even though he has been guilty of violence, so as to justify the justices in making an order for maintenance. *Mackenzie v. Mackenzie*, 3 V.R. (L.,) 248; 3 A.J.R., 121.

Act No. 268, Sec. 34—Husband Entitled to Give Evidence.]—Justices made an order for maintenance upon a complaint against a husband under Sec. 34, for deserting his wife and children; the justices refused to allow the husband to be sworn and to give evidence. *Held* that he was entitled to give evidence, and order quashed. It is for the justices in such a case to be satisfied as to the evidence of the marriage. *Reg. v. Pope, Exp. Pope*, 5 V.L.R. (L.,) 25.

Act No. 268, Sec. 34—Offer at Hearing to Take Wife Back—Cruelty.]—A complaint was made before justices of desertion by a husband, and at the hearing the husband made an offer to take wife back to his house, and support her according to her station in life. The wife complained of several acts of gross cruelty towards her by her husband, and on that account refused to go back to him. The justices made an order for maintenance. *Held* that the order was bad. *Trengrove v. Trengrove*, 5 V.L.R. (L.,) 27.

Act No. 268, Sec. 31—Offer of a Home—Bona Fides.]—It is for the justices to decide whether an offer of a home made by a husband, against whom an order of maintenance is made, is *bonâ fide*. *Jolly v. Jolly*, 5 V.L.R. (L.,) 145.

Act No. 268, Secs. 30, 31—Desertion—Offer to Take Wife Bank—Jurisdiction of Justices.]—*Per Higinbotham, J.* There are three conditions of the jurisdiction to make an order under the Act: (1) Proof of marriage or parentage; (2) The husband or father must be shown to be able to maintain the wife or children; (3) The wife or children must be proved to be without means of support. A husband and wife were living apart

by mutual consent, and the wife hearing that the husband was about to leave for Scotland, obtained an order for maintenance on the ground of the desertion. *Held* that the desertion under the circumstances was not sufficient to support the order, and that if the justices believed the *bonâ fide* willingness of the husband to take back and maintain the wife, she is no longer without means of support, and the jurisdiction to make the order is gone. *Regina v. Collins, ex parte Collins*, 7 V.L.R. (L.,) 74; 2 A.L.T. 118.

Grounds on which an Order may be Made.]—An order of justices under Sec. 31 of the "*Marriage and Matrimonial Causes Statute* 1864," for maintenance, which does not state that the husband deserted his wife, but, on the contrary, states that she left him, though for good cause, is a good order, and shows sufficient grounds for awarding maintenance. *Moncrieff v. Moncrieff*, 5 A.L.T., 192

Matrimonial Causes Statute, No. 268—Secs. 32, 39.]—Money in a bank to the credit of a customer against whom a maintenance order has been given under Sec. 31, is not goods and chattels within the meaning of Sec. 32; and a refusal of a bank manager to give up such moneys is not a disobedience of the order, and punishable under Sec. 39. *Curtayne v. Mitchell*, 5 A.J.R., 134.

Disobedience—Warrant for Commitment—Personal Service of Order.]—Personal service of an order for maintenance of a wife, and for finding sureties, is not a condition precedent to the issue of a warrant of commitment for disobeying the order. *Ex parte M'Evoy*, 6 V.L.R. (L.,) 424; 2 A.L.T., 125, *sub nom. Reg. v. M'Evoy.*

Jurisdiction of Justices—Marriage & Matrimonial Causes Statute. Secs. 30, 31, 40—Order.]—H. was summoned before a police magistrate for deserting his wife, and an order was made directing him to pay 15s. a week, and to provide sureties that he would comply with the order for twelve months, in default to be imprisoned. Under sec. 30 of the "*Marriage and Matrimonial Causes Statute*" (No. 268), justices are empowered to issue summonses against a defendant for desertion, and under Sec. 31 any two justices are empowered to inquire into the matter, and make an order of maintenance, and to require by the same, or a separate order, the defendant to find sureties for compliance, in default of surety being found, the defendant may be committed till compliance. Sec. 40 directs that when such order had been made the justices shall transmit the same to the General Sessions for confirmation, or to be quashed or varied. In H.'s case there were two orders made, one directing payment of 15s. per week, and the finding of sureties, in default imprisonment; the other directing imprisonment. Only the first order was transmitted to General Sessions:—*Held*, that since the second order might be made by one justice, and since the Act only directed the transmission of orders made by two justices, there was no necessity for the second order to be transmitted; and that, if the defendant objected, he ought to have appealed against the first order. *Ex parte Hargreaves*, 1 A.J.R., 23.

Order not Transmitted to Clerk of Peace—Conviction for Disobedience—Quashing.]—Since there is no appeal given by Sec. 40 of the "*Marriage and Matrimonial Causes Statute* 1864" to general sessions from an order of justices for maintenance, the omission to transmit the order to the Clerk of the Peace, as directed by that section, does not render the order a nullity, and the omission is not a ground for quashing a conviction for disobedience of the order. *Regina v King, ex parte King*, 6 V.L.R. (L.,) 256; A.L.T., 23.

But *see Reg. v. Justices of Central Bailiwick, ex parte M'Evoy*, 7 V.L.R. (L.,) 90, 2 A.L.T., 125, where it was held, overruling *Reg. v. King*, that under Sec. 40 there was an appeal to General Sessions.

Variance as to Name of Complainant between Minute and Order.]—In the minute of an order for maintenance, the complainant was stated to be the police; in the order itself, to be J. S. *Held*, that the justices had a right to correct the error. *Reg. v. Smith, ex parte Smith*, 9 V.L.R. (L.,) 112; 5 A.L.T., 19.

Protection Order—Wife's Receipts—Act No. 125, Sec. 7.]—Under the will of K., who left his personal property to be distributed according to the "*Statute of Distributions*," M., a married woman, one his next-of-kin, became entitled to a share. K. died on 8th January, 1861. M. had, on 28th September, 1860, obtained a protection order, under Act No. 125, Sec. 7, protecting her subsequently-acquired money and property against her husband, his creditors, and persons claiming under him. Under these circumstances the administrator of K.'s estate presented a petition, under 24 Vict. No. 112, Sec. 51, for the advice of the Court as to whether he would be justified in paying M.'s share to her personally. *Held*, that there was no necessity for any consent or release by the husband, and that the money could be paid to M. on her own receipt. *In re Kennedy*, 1 W. & W. (E.,) 248.

Affidavits should give Full Particulars and Details.]—In applications for the protection of the wife's separate property, it is not enough for the affidavits merely to follow the precise terms of the Act, but they should give particulars and details so fully that the Court may be reasonably satisfied of the facts of the case. *Pasmore v. Pasmore*, 1 W. & W. (I. E. & M.,) 56.

Executors Paying Legacy to Married Woman who has obtained a Protection Order.]—Where a testator died domiciled in Victoria, and left a legacy to his married sister, who resided in England, the legatee's husband having deserted her, and she having obtained a protection order under 21 & 22 Vict. cap. 108, Sec. 6. *Held*, on petition for advice under Sec. 61 of the "*Statute of Trusts* 1864," that the executors might effectually discharge themselves by paying the legacy to the legatee, and taking her receipt therefor without her husband's consent; pro-

vided that the woman had not returned to cohabitation with her husband, and his desertion was continuing and the order had not been discharged or varied. *In re Dickason's Trusts*, 8 V.L.R. (E.,) 238; 4 A.L.T., 22.

V. Husband's Rights and Liabilities.

(1) *Husband's Rights.*

Husband Insolvent--Protecting Wife's Interest.]—An insolvent, made a defendant only in respect of wife's property, is able to do anything in the suit to protect the wife's interest which she could do if *sui juris*, the interest not being one of a class which goes to the official assignee of the husband. On a motion by M., the insolvent, for an injunction to restrain trustees from removing certain property comprised in a will the subject matter of the suit, in which his wife was a beneficiary, *Held* that he had a right to be heard. *Waddell v. Patterson*, 2 W. & W. (E.,) 133.

Wife a Trustee.]—In equity a husband cannot purchase an interest in a trust estate from his wife—a trustee—and a co-trustee. *Hartigan v. O'Shanassy*, 3 A.J.R., 5.

Money Possessed by Wife upon her Marriage and Advanced to her Husband.]—A widow possessed of money married again, no settlement being made. She advanced her money to her husband, who expended part of it upon land, which he had verbally promised to give her before marriage. After his death she claimed upon his estate as a creditor for the balance:—*Held*, that as upon the marriage, in the absence of a settlement, the money became the husband's; the advance of it by her did not make him her debtor. *Hutchison v. Hutchison*, 6 V.L.R. (E.,) 44; 1 A.L.T., 157.

Husband Suing for Surgical Operation upon Wife.]—T. sued a surgeon in trespass for performing a surgical operation upon his wife. Defendant pleaded that the operation was performed by him with the wife's consent. Replication to the plea, that the trespass was to a greater extent than was necessary, and demurrer to the plea for not averring T.'s consent to or ratification of the wife's consent. *Held* that the plea was bad for not alleging that the surgical operations were necessary for preservation of wife's health or life, and that replication was bad, as omitting to allege that plaintiff did not sue for grievances justified in pleas. Leave to amend. *Tate v. Fisher*, 1 V.L.R. (L.,) 244.

License under "Land Act 1869."]—The interest of a woman as licensee under the "*Land Act* 1869" is personal property passing to the husband *jure mariti* on the marriage, but the inchoate right to the fee remains in the wife under the "*Married Women's Property Act*" (No. 384), Sec. 3. *M'Leod v. M'Pherson*, 8 V.L.R. (E.,) 285; 4 A.L.T., 25.

(2) *Liability for Wife's Debts, &c., Contracted during Coverture.*

Credit Given to Wife—Husband Sued Alone.]—Where a tradesman had supplied to a hotel various goods, the invoices being made out in wife's name, and separate bills were drawn upon and accepted by her, the Court held that credit had been given to wife alone, and the plaintiff who sued husband alone was nonsuited. *M'Donald v. Lloyd*, 3 A.J.R., 111.

Goods Supplied to Wife without Husband's Authority.]—A person who has supplied to a wife, without the husband's express authority, goods which are necessaries, cannot recover against the husband when the husband has supplied the wife with goods sufficient for the support of herself and household; although the husband's published notice of disclaimer of liability for debts incurred in his name did not come to the knowledge of the person so supplying the goods. *Lynch v. Bond*, 4 A.J.R., 73.

Wife Carrying on a Boarding-House in her Husband's Absence.]—Though a married woman carries on the business of lodginghouse-keeper, she is not to be charged for debts contracted by her, as having separate property, unless it be proved she has made savings; no presumption that she has accumulated savings legitimately arises from the mere fact that she received lodgers in her house. *Regina v. Smith, ex parte Couch*, 4 V.L.R. (L.,) 134.

Where the husband, in the pursuit of his calling, lives at a distance from his wife, he may still be answerable for her debts. *Ibid.*

Wife Having Separate Estate — "Married Women's Property Act," Sec. 18—Separation.]—A husband is not liable in any case for debts contracted by his wife when the wife is living apart from him, and has a separate income, though very small, under a settlement not illusory, since such income is "property for her own use," within the meaning of the "*Married Women's Property Act*" (No. 384), Sec. 18. *Wisewould v. Kerr*, 4 A.J.R., 121.

Separation—Costs of Resisting Suit for Possession of Children—Necessaries.]—A wife living separate from her husband incurred attornies' costs in resisting a proceeding by the husband for possession of the children. *Held* that the costs so incurred were not "necessaries" so as to render the husband liable for them. *Ibid.*

Wife Living Separate by Agreement—Maintenance not Paid.—Where a husband and his wife live apart by agreement on the terms that the husband shall allow his wife a periodical allowance for maintenance, the wife has power to pledge his credit if such allowance be not paid. *Morgan v. Clements*, 6 V.L.R. (L.,) 53; 1 A.L.T. 155.

Separation Agreement—Payment of Maintenance—Duty of Husband.]—Under an agreement for separation, in which one of the terms is that the husband shall allow the wife a periodical sum for maintenance, it is the duty of the husband to see that she is furnished with such means of livelihood, without any demand for the payment on her part, and to inform her when and where she may obtain payment. *Ibid.*

Act No. 384, Sec. 17—Joint Order for Work Done.]—A woman having separate estate, gave

with her husband a joint order for work to be done during coverture. *Held* that the husband and wife might, under Sec. 17 of the Act, be sued together for such work done. *Haylock v. Shannon*, 3 V.L.R. (L.,) 332.

Revocation of Wife's Authority—Must be Express.]—A revocation of the wife's authority to pledge her husband's credit, must be distinct and unequivocal; it is not sufficient to tell her that her credit is stopped at certain places, she must be forbidden to buy anything more on credit. *Moubray v. Hodgson*, 4 V.L.R. (L.,) 286.

Goods Supplied to Wife on Recommendation of Third Person.]—Supplying goods to a married woman on the faith of a recommendation from a third person does not negative that the credit was given to the husband. *Ibid.*

For Wife's Necessaries—Revocation of Authority to Pledge Credit.]—The implied authority a wife has to pledge her husband's credit may be revoked, and it is unnecessary that such revocation should be communicated to any person but the wife. *Stevens v. Sloan*, 5 V.L.R. (L.,) 83.

Wife's Authority to Pledge Husband's Credit.]—Where there was some evidence that a wife was living and carrying on a separate business apart from her husband, and justices seemed to understand the law as to the subject, and on the evidence concluded that the wife was acting as agent for her husband and had power to bind him, the Court refused to interfere with their decision. *Regina v. Panton, ex parte Patterson*, 5 V.L.R. (L.,) 153.

Wife's Retainer of an Attorney.]—A husband and wife were living apart, the deed of separation providing her with independent means. The wife retained an attorney to recover maintenance from the husband on the husband discontinuing payments under the deed. *Held* that the retainer must be regarded as the husband's under the circumstances, and order to tax costs as against wife only made upon terms of reserving the right to dispute the retainer. *Sievewright v. M'Evoy*, 7 V.L.R. (L.,) 15.

Contract made by a Wife as to a Lease—Ratification by Husband.]—*Whitesides v. Hayes*, 3 A.J.R., 32, *see post* under PRINCIPAL AND AGENT—Rights and Liabilities of Principal to Third Person, &c.—In other cases.

(3) *Liability for Wife's Acts.*

Illegal Distress by Wife.]—A husband is not in the absence of evidence of agency or confirmation of his wife's acts liable for an illegal distress made by the wife upon the husband's tenant. *Douglas v. Lewis*, 5 A.J.R., 22.

A husband is not liable for an offence against Act No. 227, *i.e.* sale of spirits by his wife in his absence, he not being licensed. *Regina v. M'Queen, ex parte Hall*, 1 V.L.R. (L.,) 18. *See* S.C. under LICENSING ACTS—Offences against.

Selling Liquor without a License—Agency of Wife.]—*See Hettenbach v. Isley*, 7 V.L.R. (L.,) 104. *Post* under LICENSING ACTS—Offences against.

Wrong Committed by Wife—No Separate Estate—No. 384, Sec. 18.]—Under Sec. 18 of the "*Married Women's Property Act*" (No. 384), a husband is not liable for a slander uttered by his wife, even though the wife have no separate property. *Lucas v. Kearney*, 4 A.J.R., 19.

VI. DEED OF SEPARATION.

Effect of on Application for Alimony.]—*See Fisher v. Fisher, ante column* 530, under (8) Alimony.

Effect of, as Evidence in a Suit for Judicial Separation on ground of Cruelty.]—*See Sutherland v. Sutherland, ante column* 525, under (3) Evidence.

VII. WIFE'S RIGHTS, PROPERTY, AND LIABILITIES.

(1) *Dower.*

When Barred or Released — Incapacity.] — Where a wife of a settlor agreed to release her dower to certain lands as a consideration for her husband executing a postnuptial settlement in which the wife took a beneficial interest, of those lands and other lands, and this settlement was set aside as void against creditors. *Held* that the wife was entitled to the value of her dower, she being at the time of the settlement a *feme covert*, and without independent professional advice. *Shaw v. Salter*, 2 W.W. & A'B. (E.,) 159.

For facts *see* S.C., *ante column* 467.

Act No. 230.]—*Semble, per Molesworth, J.*, that if a woman was married before 1st January, 1837, there is nothing in the Act No. 230 to deprive her of her right to dower; but that if married after that, then the Act does deprive her of dower, as soon as the rule under it is obtained. *English v. English*, 3 W.W. & A'B. (E.,) 170.

Separation by Mutual Consent—Consent of Husband to Sale of Contingent Right to Dower—Act No. 112, Sec. 89.]—Where a husband and wife had separated by mutual consent, and the husband was in the colony and could be served, the Court refused to grant a motion under Sec. 89 of No. 112, to dispense with his consent to a bargain made by the wife for the sale of her contingent right to dower. *Bank of Australasia v. Vans*, 1 W. & W. (E.,) 146.

Per Molesworth, J.—"Where the husband is in the country and can be served, I do not think I ought to make such an order as that asked for, merely because the husband and wife are separated from each other." *Ibid.*

Act No. 301, Secs. 66, 149—Act 353, Sec. 9—Limitation of Action against Assurance Fund.]—In an action by a widow to recover damages out of the "*Transfer of Land Statute*" assurance fund for loss of dower where the cause of action accrued within 15 years, *Held* that under Sec. 9 of No. 353, she was entitled to the damages, and that Sec. 66 of Act No. 301

did not apply to this case where the husband was seised in fee of Crown land alienated in 1851, but in respect of which he had never become the registered proprietor. *Moyle v. Gibbs*, 9 V.L.R. (L.,) 26; 4 A.L.T., 148.

Wife Joining in a Mortgage by Husband.]—If a wife joins in a mortgage by her husband to bar dower by a deed not clearly indicating her total renouncement of it in his favour, she is entitled to redeem the mortgage. *Hoyle v. Edwards*, 6 W. W. & A'B. (E.,) 48.

See S.C., *post* under VENDOR AND PURCHASER, and *see* cases *post* under TRANSFER OF LAND (STATUTORY)—Dower.

(2) *Separate Estate and Rights, and Liabilities Connected with it.*

(*a*) *What is, and how Created.*

Married Women's Property Act, Sec. 18—Having Property to Her Separate Use.]—In Sec. 18 of the "*Married Women's Property Act*" the words "property for her separate use" must be taken to include not only property which is made separate property by the Act, but also property which was before the Act recognised by a Court of Equity as held to the separate use of a married woman. *Higinbotham, J., dissentiente. Renison v. Keighran*, 10 V.L.R. (L.,) 133; 6 A.L.T., 51.

Presumption that Property is Separate Estate.]—A woman, married before the "*Married Women's Property Act*" came into operation, obtained a certificate of title to certain land after the coming into operation of that Act, and thereafter dealt with the land as though it were her separate property. *Held* that the presumption that the land was her separate property was strong enough to sustain a verdict against her in an action against her on a bill of exchange. *Bank of Victoria v. Henderson*, 8 V.L.R. (L.,) 46.

Husband and Wife Living Apart—What Acts of Husband do not Amount to a Declaration of Trust of Property for Wife.]—T. and his wife executed a deed of separation, which contained no provision for the wife's maintenance. They lived apart for six years, and during that time the wife carried on business as a lodging-house keeper, and fell into debt. The creditor's attorney wrote to T. asking him if he would pay the debt, or prefer proceedings to be taken against the wife in the first instance; and in the latter event if he would undertake not to interfere. T. replied that he had no claim on his wife, on her property, or she on him or his. B., after seeing these letters, advanced money to the wife on bill of sale, under which he eventually seized and sold her effects. T. brought an action for trover of the goods, to which B. pleaded as an equitable plea that on the facts the goods were the wife's separate property, and liable for her debts. *Held* that the mere fact of T. and his wife living apart for six years did not render the property the wife's separate property; that T.'s letter did not constitute a declaration of trust in favour of the wife, even if it were otherwise capable of being so construed, since the attorney's letter to him was not candid, and stated neither the facts nor the law on the subject properly; that T. did not take the goods subject to a lien in favour of B., since B. had not advanced the money *bonâ fide*, being aware that T. was alive and his wife living apart from him. *Tennant v. Bell*, 5 W. W. & A'B. (L.,) 46.

Act No. 384, Sec. 5—Husband Lunatic—Wife Carrying on Business.]—A husband became lunatic, and was confined in a lunatic asylum. His wife during the time he was confined in the asylum (1868—1879) carried on the business and became accountable for it, and compounded and paid off the debts which he had contracted. During this time she started a newspaper agency, which gave her ample funds to effect a policy of insurance on her own life. On her husband's recovery he never sought to interfere in the management of the business. *Held* that she might be accountable for the original stock-in-trade of the business, subject to the husband's liability to her for maintaining the family; but that the newspaper agency was her own separate business and the policy, effected out of the profits of that, was her own separate property. *In the Will of Cathery*, 7 V.L.R. (I. P. & M.,) 34.

Act No. 384, Secs. 5, 10—Husband Insolvent—Trade Carried on by Wife—Sufficient Evidence as to the Business being Earnings in Business Carried on Apart from Husband.]—*See In re Mulcahy*, 5 V.L.R. (I. P. & M.) 7, *post* under INSOLVENCY—SUMMARY JURISDICTION.

Presumption as to Woman having Accumulated Savings from the Fact that she Keeps a Boarding-House.]—No presumption that a married woman has accumulated savings so as to create separate estate arises from the fact she has kept a boarding-house, even in her husband's absence. *Regina v. Smith, ex parte Couch, see ante* col. 536.

"Married Women's Property Act" (No. 384), Sec. 5—Savings—Fraudulent Conveyance.]—Suit by official assignee of S. against S., his wife, and a society seeking a declaration that certain land belonged to plaintiff, and for redemption from the society as mortgagee. The wife received presents of money from her relatives, S. allowed her weekly money for household expenses, and the wife saved money received from labourers in S.'s employ who boarded with her. 17th October, 1874, S. entered into a contract for the purchase of land, but his wife's name appeared at one time in the contract as the purchaser. The deposit and the first three bills were claimed to have been paid by S. out of his wife's savings; buildings were erected on land, S. generally dealing with persons supplying labour and materials, though his wife contracted with some, and it was alleged that all payments were made out of her money. In October, 1875, to secure an advance of £300 by the defendant society, the vendor of the property transferred it to the society, which procured a certificate of title and executed a defeasance upon payment of the £300 by the wife. The £300 was lodged in a bank to wife's credit, but all passed through S.'s hands by means of her cheques in his favour. A fire occurred on the property, and the insurance money (£100)

was paid in part-satisfaction of the advance of £300. S. became insolvent June, 1876. *Held* that the wife's savings and moneys received from her relatives were not protected against her husband's creditors under Sec. 5 of Act No. 384; and it appearing that husband was heavily embarrassed before the fire and that wife had no property besides those savings, that the transaction of October, 1875, being in effect a conveyance of the equity of redemption to the wife as against her husband, was voluntary under 27 *Eliz.*, cap. 4, intended to defraud creditors under 13 *Eliz.*, c. 5, and void under Act No. 379, Sec. 70, as against plaintiff. *Smith v. Smith*, 3 V.L.R. (E.,) 2.

Wife's Savings and Earnings — Lease — Forfeiture.]—A married woman whose husband was still alive, but had not been living with her for six years, residing in Tasmania, and occasionally visiting her at long intervals, and not furnishing her with money or interfering with her affairs, let lodgings and afterwards took a lease of a publichouse. The Court (under power to draw inferences of fact) presumed from the evidence that by letting the lodgings and keeping the publichouse she had supported herself and her children; that she had made savings and earnings, and therefore was capable of taking a lease of the publichouse, and was liable to a condition of re-entry upon sequestrating her estate. *Poole v. Halfey*, 8 V.L.R. (L.,) 317.

Act No. 384, Sec. 5—"Savings."]—The word "savings" in Sec. 5 is not to be limited to savings out of her separate property, but means savings from all sources lawfully made by a married woman with her husband's consent, *e.g.*, receiving the rents and profits of farming operations carried on upon her husband's land without his interference or control. And, apart from the Act, the husband by such conduct would have constituted himself a trustee for her. *Smith v. Hope*, 9 V.L.R. (L.,) 217; 5 A.L.T., 75.

A married woman may acquire separate estate by savings out of house allowances made to her by her husband. *In the Estate of Beaty*, 4 A.L.T., 81.

Deposit in Savings Bank—"Married Women's Property Act," Secs. 6, 8, 12, and 18.]—The words "any deposit" in the sixth section of the Act are limited to deposits in savings banks or a post-office mentioned in the commencement of the section, and do not include deposits in a building society. Sec. 8 does not refer to deposits, and a deposit in a building society does not create a "claim upon its funds" within the meaning of that section. Sec. 12 relates to the mode of arranging disputes between husband and wife and their representatives, and not between either husband or wife and third persons. Sec. 18 relates to procedure by or against a married woman having property for her separate use, but does not confer, or purport to confer, on her any rights of property which she did not otherwise possess. *Griffiths v. Victorian Permanent Building Society*, 6 V.L.R. (L.,) 259; 2 A.L.T., 34.

Deposit in Building Society.]—A woman made a deposit at interest with a building society, and afterwards married. No agreement in the nature of a settlement to her separate use was made. *Held* that the deposit was not separate property within Sec. 6 of the "*Married Women's Property Act*," and that the husband could recover such moneys though they had been previously repaid to the wife. *Ibid.*

The same would apply to a similar deposit made by a married woman of money not her separate property. *Ibid.*

"Married Women's Property Act," Sec. 3—Land under "Land Act 1869."]—The interest of a woman as licensee under the "*Land Act* 1869" is personal property, passing to her husband on her marriage, but the inchoate right to the fee remains in the wife under the "*Married Women's Property Act*" No. 384, Sec. 3. *M'Leod v. M'Pherson*, 8 V.L.R. (E.,) 285; 4 A.L.T., 25.

Sec. 10—Lease under "Land Act 1869."]—*Semble*, that a lease obtained after her marriage by a woman who was licensee under the "*Land Act* 1869" before her marriage is property coming to her by deed during her marriage under Sec. 10 of the "*Married Women's Property Act.*" C. was before her marriage licensee of land. She married in 1877, and obtained a lease in 1880. C. quarrelled with her husband and left him, and executed a transfer of the lease to the defendant B., her brother. Bill by husband to restrain registration of transfer dismissed. *Ibid.*

Effect of Sec. 10 of Act No. 384 in Vesting Share of a Married Woman upon an Intestacy.]—*Skeeles v. Hughes*, *ante column* 385.

Act No. 384, Sec. 5—"Investment"—Purchase of Land.]—Land comprised in the will of a married woman was land purchased by her and conveyed to her previously to the passing of Act No. 384. It appeared that the purchase money was paid for partly out of her own earnings and partly by an advance from a building society, which advance was paid off by her subsequently to Act No. 384. *Held* that "investment" in Sec. 5 means laying out of money upon some security or in the purchase of land, and that paying off a debt which had accrued prior to the passing of the Act was not such an "investment," and that she had not the land as her separate property so as to acquire a disposing power over it. *In the Will of Buggy*, 7 V.L.R. (I. P. & M.,) 66.

Chose in Action—Accommodation Acceptance.]—In March, 1855, P. lent his four accommodation acceptances for £500 each to M. In May, 1855, three were torn up by M. in P.'s presence, and the fourth returned to P., who thereupon gave it to M.'s wife, saying, "Here, little woman, this is your property." Mrs. M. laughingly handed the acceptance back. P., according to M.'s evidence, said, "Keep it for yourself and children; you do not know when you may require it." Mrs. M.'s evidence was —"I was to make use of it for the benefit of myself," and, after a pause, she added, "and

for my children." In June, 1855, M. voluntarily sequestrated his estate, and neither schednled the acceptance nor handed it to his official assignee. On 4th July, 1855, the acceptance fell due, was not paid, and it did not appear that steps were taken to demand or enforce payment. On 18th July, 1855, P. died, having appointed the defendant as his executrix, and leaving the bill unpaid in the hands of M.'s wife. In December, 1855, M. obtained his certificate nnder the "*Insolvent Act.*" In 1860, M., being indebted to the plaintiffs in this suit, and likely to come under further obligation to them, indorsed the bill to them as security for the past or any future debt; and M. then incurred a further debt to the plaintiffs. In a suit by the plaintiffs against the executrix of P. to recover the amount of the bill, *Held* that P.'s words on handing over the acceptance to M.'s wife, established no separate use for the benefit of Mrs. M.; that the acceptance, being without consideration, was simply a *chose in action* in the wife of M., which might or might not become valuable to M., as P. might or might not be willing to pay it. *Clough v. Gray*, 1 W. & W. (E.,) 225.

Chose in Action—"Married Women's Property Act," sec. 8.]—*Per Molesworth J.* (in Chambers). *Choses in action* to which the wife is entitled, but which the husband has not reduced into possession, are not property to which the wife is "entitled" within the meaning of Sec. 8 of the "*Married Women's Property Act,*" so as to make them separate estate. *Griffiths v. Griffiths*, 1 A.L.T., 119.

Trustee Appointed to receive Amount of Policy on Husband's Life—"Married Women's Property Act," No. 384, Sec. 14.]—Where a husband insured his life for the benefit of his wife and children, and left a wife, but no children, the Court ordered the appointment of a trustee to receive the amount of the policy from the insurance company. *In re Ardagh*, 4 A.J.R., 24.

(*b*) *Restraint on Anticipation.*

Act No. 384, secs. 10 & 11.]—The combined effect of secs. 10 & 11 of the Act is to give to a married woman the full right of disposition over her separate estate notwithstanding any restraint on anticipation contained in the instrument of gift. *Noyes v. Glassford*, 3 V.L.R. (L.,) 77.

[NOTE, ED.—*See*, however, Sec. 6 of the Amending Act (No. 736), where the operation of a clause restraining anticipation is restored.]

A woman obtaining a decree of judicial separation cannot obtain as a *feme sole* a conveyance of trust property free from a clause restraining anticipation. *Mackintosh v. Clarke*, *ante* column 504.

(*c*) *Dealings With.*

Advances by Trustee on Security of the Estate.]—A trustee of a married woman sued her, seeking to charge her estate with certain sums advanced to her by him on the security of the trust estate. After the advances the trustee and his *cestui que trust* concurred in mortgaging the trust property, and the trustee sought to establish his claim against the equity of redemption. The bill alleged that it was agreed that the trustee was to be paid out of the rents and profits of the estate. *Held* that since the trustee was only to be paid out of the rents and profits, a sale could not be directed of the estate, and that possession of the estate was to be given up to the trustee, who was to retain the rents and profits in satisfaction of his advances, interest, and costs, subject to the rights of the mortgagee. *Michael v. Wakefield*, 1 W. W. & A'B. (E.,) 136. *Semble, per Molesworth, J.*, that in an ordinary case of a creditor establishing his claim against the separate estate of a *femme coverte* it is competent to the Court to direct a sale of her estate to satisfy the debt. *Ibid.*

Charges on Wife's Separate Estate.]—By postnuptial settlement certain land was settled upon trust to pay the rents, &c., to such person as J. D., the wife of the settlor, should appoint, but not by way of anticipation, and in default of appointment to her separate use. In 1858 J. D., after her husband's death, mortgaged her life interest to C. and W. In 1859 J. D. married again, and obtained an advance from the plaintiffs, by which she paid off the first mortgage. C. being dead, W. reconveyed to the trustees of the settlement, and in 1863 J. D. and her second husband mortgaged her life interest to the plaintiffs to secure their advance to her. J. D. repudiated this second mortgage as being opposed to the restraint on anticipation. On bill by the plaintiffs for foreclosnre, *Held* that the release of the old and the granting of the new security were, from the evidence, one transaction; that the wife purchased by the new deed a benefit to her separate estate without paying the price she stipulated to pay for it, and that she should not be allowed to do so; that the wife was bound by the second deed so far as she had been by the first. Decree made to that effect. *Webster v. Yorke*, 6 W.W. & A'B. (E.,) 294; N.C., 31.

Husband's Power over and Receipt of.]—Plaintiff married a widow with three children and considerable real and personal property. A settlement was executed by which the property was settled upon the wife and her children, with a power of appointment by deed or will, but without power of anticipation, and there was no reversionary interest given to the husband. Plaintiff and his wife had both been publicans, but on the marriage the wife gave up her business and lived apart from her husband's hotel, which he managed, and at which he took most of his meals; but he lived at the house with her and the children and another child which she had by him. Plaintiff, at his wife's request, lent her money for the expenses of her house, laid out money in improving the settled estate, and in the purchase of other property, which was conveyed on the trusts of the settlement, on the understanding that he should be repaid out of the wife's surplus income, and the conveyance contained a recital of actnal payment, though no money passed, and a receipt was endorsed. The wife died leaving a will directing payment of debts and of any liabilities to which she or her separate estate might be

alleged to be subject. On bill by plaintiff seeking repayment of the sums advanced, *Held per* Full Court (*reversing Molesworth, J.*), that plaintiff was not incapacitated from contracting with his wife in respect of her separate estate; and that he could recover from the trustees of the settlement and of the wife's will the amounts advanced by him, though there had been no contract in writing with regard to them. *Watson v. Kyte*, 5 W.W. & A'B. (E.,) 31.

Receipt of Interest by Husband—Wife's Acquiescence.]—By an indenture of settlement certain moneys were vested in trustees upon trust to invest the same and pay the annual income thereof during the joint lives of A. and her husband to them only, and for such trusts as A. should appoint with a restraint upon anticipation. The agent of the trustees and A.'s husband, the latter of whom had given a mortgage over certain property to the former, made an arrangement by which the annual income was set off against the interest on the mortgage, and this arrangement was acted on for six years, no demand being made by A. for any of the income during that time. A. sued the trustees for the income so set off. The evidence as to whether A. had or had not expressly assented to the arrangement was conflicting. *Held* that whether A. did or did not expressly assent was immaterial, since she was bound by her acquiescence in what amounted to the virtual receipt by her husband of the interest. *Woodward v. Jennings*, 1 W.W. & A'B. (E.,) 1.

Husband Receiving Rents of Wife's Settled Estate—Acquiescence.]—Where a husband or his agent received rents of property settled to wife's separate use with her consent and knowledge, and during that time she was properly maintained by her husband, and made no protest against payment to husband, or demand for payment to herself, *Held* that she was not entitled to claim for arrears against her husband's estate. *Brown v. Abbott*, 7 V.L.R. (E.,) 121; 3 A.L.T., 47.

(*d*) *Liabilities of Separate Estate for Debts, &c., and Remedies Against it in respect thereof.*

For Costs.]—The estate of a married woman settled to her separate use without power of anticipation cannot be charged in anticipation with costs. *Webster v. Yorke*, N.C. 31, 6 W. W. & A'B. (L.,) 294, 301.

Costs—Suit to Set Aside Transfer to Married Woman.]—In a suit against a married woman and her husband, to set aside a transfer to the woman of certain real estate, the husband, not being a necessary party, had the bill dismissed as against him with costs, but no costs were given against the wife, on the bill succeeding, because she had no separate estate. *Shiels v. Drysdale*, 6 V.L.R. (E.,) 126; 2 A.L.T., 14.

Property with Power to Appoint by Deed or Will.]—A., a widow and the administratrix of her deceased husband (who had died intestate), and entitled to dower as to his real estate, and to a third of his personal estate, being about to contract a second marriage, executed with her intended husband a settlement, whereby she settled the estates he was so possessed of and entitled to, to her sole and separate use, with power of appointment by deed or will, and after marriage, with her husband's consent, gave a letter instructing her bankers to keep separate accounts, and to consider any private overdraft by her on her own account secured by the administration deposits in their hands. At this time two sums of £6000 and £8000 were in deposit on such account, and subsequently various other sums were, from time to time, paid in by her to the same account, and placed at interest with the bank, who allowed her to overdraw her private account on the strength of the arrangement so made. By her will she executed the power of appointment reserved to her by the settlement, and having at the time of her death overdrawn her private account to a considerable amount, the bankers claimed, as against the parties interested under the will, to retain the sums so paid into their hands on account of the administration account, and especially the sums of £6000 and £8000, so deposited with them, in payment of the sums due to them on account of the overdrafts made by her on her private account. On a bill by the bank to enforce their claim, *Held* by the Full Court, confirming *Molesworth, J.*, that to charge a fund, subject to a general power of appointment by a married woman, with payment of her debts, it is necessary to establish actual fraud against her, and that as there was no evidence of such a concealment of the settlement as would amount to fraud, the bill must be dismissed with costs. On appeal to the Privy Council, *Held* that the property of a married woman, settled by an ante-nuptial settlement for her separate use for life, with remainder as she should by deed or will appoint, with remainder in failure of appointment to her executors or administrators, is an absolute settlement for her sole and separate use, without restraint on anticipation, and vests in equity the entire *corpus* in her for all purposes, and that, whether or not the bankers had notice of the settlement (which fact was uncertain) the letter of instruction to them by A. was a valid execution of the rights reserved by her, as regarded the two sums of £6000 and £8000 then in their hands, and in the absence of fraud gave the bankers a lien on those sums for any future overdraft that might be made in accordance with the terms of such letter. The *dictum* of Lord Justice Turner in the case of *Johnson v. Gallagher* (3 D. F. & J. 494) as to the liabilty of the separate estate of a married woman for debts contracted with reference to such estate, approved and adopted. The case of *Shattock v. Shattock* (L.R. 2 Eq. 182) dissented from. *The London Chartered Bank of Australia v. Lempriere*, 1 V.R. (E.,) 191; 1 A.J.R., 175. Appeal, L.R. 4 P.C., 572, 590, 596.

Woman Living Apart from her Husband and Having Separate Estate.]—C., a married woman living apart from her husband, and having separate estate, was sued for rent before justices, who made an order for payment. *Held*, on appeal, that the contract having been entered into after the "*Married Women's Property Act* 1870" (No. 384), it was immaterial when C. was

married, and that the Court would not interfere with the decision of the justices as to the sufficiency of the evidence. *Counsel v. Love*, 3 A.J.R., 34.

"Married Women's Porperty Act" (No. 384), Sec. 18—Liability for Contracts.]—C., a woman, was married in August, 1867, and previous to marriage a deed of settlement containing a clause restraining anticipation was executed by the husband by which certain lands were vested in trustees to secure £5000 in trust for C. Some portions of the lands were sold under a power to that effect, and with the proceeds some shares in a gold mining company were purchased. C. and her husband were sued on a bill of exchange accepted by them jointly. The creditor obtained judgment, and obtained an order under Sec. 208 of the Act No. 274 to attach the shares standing in the name of the trustees. On a rule *nisi* to set aside the order, *Held* that Sec. 18 of the Act allowing married women to sue and be sued as *femmes soles* in civil proceedings, did not impair the position of a woman married before the Act, not being retrospective, and did not apply to the present case, and that the property vested in the trustees could not be attached under Sec. 208 of the "*Common Law Procedure Statute*" (No. 274), even although the contract on the bill arose after the Act No. 384 was passed. *Hutchings v. Cunningham*, 3 A.J.R., 64.

Husband Acting as Agent for Wife with Separate Property.]—A husband purchased goods on credit for his wife, who had separate property, without disclosing whether he was buying for himself or as agent. *Held*, that the vendors might, on proving that the wife was the principal in the matter, maintain an action against her for the price of the goods. *M'Intosh v. Tonkin*, 4 V.L.R. (L.,) 127.

Contract with Husband—Act No. 384, Sec. 18.]—Where a husband agrees to transfer to wife certain property, she undertaking to manage, pay his debts, and send him small weekly payments, and the wife has no separate estate at time of the contract, this is not a contract enforceable by him against her, under Sec. 18 of "*Married Women's Property Act* 1864." *Bryant v. Patten*, 3 V.L.R. (E.,) 86.

Liability of Married Woman having Separate Estate to be made Insolvent.]—*In re Isaacs*, 1 V.L.R. (I.P. & M.,) 1, *post* under INSOLVENCY, *column* 592.

As to Evidence of Separate Property on making a Married Woman Insolvent.]—*See In re Dickson*, 5 W.W. & A'B. (I. E. & M.,) 4; *In re Willison*, 4 V.L.R. (I. P. & M.,) 67; *In re Cunningham*, 5 V.L.R. (I. P. & M.,) 60; and *In re Nelson*, 2 A.L.T. 27, *post* under INSOLVENCY, *column* 617.

Replevin—"Married Women's Property Act," Sec. 18.]—By virtue of Sec. 18 of the "*Married Women's Property Act*" a married woman having separate property is liable to an action for replevin, where the warrant of distress was signed by her daughter in her presence, and by her authority, but was not attested before a justice or attorney under Sec. 73 of the "*Landlord and Tenant Statute* 1864." *Field v. Howlett*, 4 A.J.R., 152.

(e) *Actions by and Remedies of Married Woman in Respect of.*

Act No. 384, Secs. 2, 3, 4, 18.—Ejectment.]—A married woman may maintain ejectment in her own name and without joining her husband as a co-plaintiff, in respect of land which has been acquired since the Act, even though she was married before the Act. *Somerville v. M'Donald*, 1 V.L.R. (L.,) 206.

Suit by Married Woman to Recover Separate Estate Seized by Husband's Assignee in Insolvency—"Insolvency Statute 1871," Sec. 17.]—*In re Summers, ex parte Hasker*, 10 V.L.R. (I. P. & M.,) 78; *see* under INSOLVENCY, *column* 650.

Married Woman Presenting Petition for Sequestration—It Must Appear on Face of Petition that Married Woman has Separate Property.]—*In re Ritchie*, 8 V.L.R. (I. P. & M.,) 1; 3 A.L.T., 88; *post* under INSOLVENCY, *column* 584.

Act No. 384, Sec. 18—Action for Negligence by Wife Alone.]—The effect of Sec. 18 is to make a married woman to whom it applies (*i.e.*, a married woman having separate property) a *feme sole* to all intents and purposes as regards torts and injuries as well as property, and such a married woman may sue alone in respect of injuries occasioned by negligence. *Spencer v. Board of Land and Works*, 7 V.L.R. (L.,) 448; 3 A.L.T., 61.

(*f*) *General Rights and Powers Created thereby.*

Power to Hold Publican's License—"Married Women's Property Act" (No. 384), Sec. 18.]—A woman even having separate estate is not qualified to hold a publican's license. *Regina v. Nicholson, ex parte Minogue*, 10 V.L.R. (L.,) 255; 6 A.L.T., 102—*post* under LICENSING ACTS—Licenses generally.

Capacity of Wife to Make a Will.]—*See* cases *post* under WILL—Testamentary capacity, and what instruments entitled to probate.

Power to bring Suit for Administration.]—A married woman who has obtained administration, but having no other separate estate except the subject matter of the suit, cannot bring a suit with reference to the real estate of an intestate of which she is administratrix without making her husband a party. *Howe v. Crisp*, 7 V.L.R. (E.,) 24.

Woman having no Separate Estate other than that left by Will—Inability to Obtain Probate without Husband's Consent.]—*In the Will of Swalling*, 9 V.L.R. (I. P. & M.,) 24; 4 A.L.T., 168; and *see* other cases under WILL—Probate and Letters of Administration — To whom granted.

(3) *Disabilities of Married Women generally.*

Liability for Contribution on Winding up of Company—Coverture when Pleaded.]—*In re Aus-*

tralian Submarine Working Coy. ex parte Longley, ante column 173.

Inability of Married Woman to give Evidence for or against her Husband.]—*See Regina v. Neddy Monkey, ante column* 311.

Wife a Trustee cannot Devise Trust Premises to her Husband.]—*Regina v. Templeton, ex parte Allen,* 4 A.J.R., 70. *Post* under LANDLORD AND TENANT—Parties.

Presenting a Petition de lunatico inquirendo —Wife cannot do so without next Friend.]—*In re Fulker,* 3 V.L.R. (E.,) 233; *in re Feehan,* 6 V.L.R. (E.,) 237. *Post* under LUNATIC—Practice—Commission *de lunatico inquirendo.*

Inability of Married Woman to Obtain Probate without Husband's Consent.]—*See* cases *post* under WILL—Probate and Letters of Administration—To whom granted.

Inability of Married Woman to hold Miner's Rights or to Occupy Residence Area.]—*Foley v. Norton,* 4 V.L.R. (M.,) 13. *Post* under MINING —Interests in Mines—Miners' Rights and Residence Area.

A Married Woman cannot be Appointed Guardian of an Infant.]—*In re Ronayne,* 6 A.L.T., 33.

(4) *Wife's Property other than Separate Estate.*

(*a*) *Sale, Charges, and Mortgages of Wife's Property.*

Mortgage—Deed Ineffectual as a Conveyance—Action on Covenant to Pay.]—An action may be maintained against a married woman upon a covenant to pay contained in a mortgage deed, although the deed not having been acknowledged by her in the manner prescribed by sec. 61 of the "*Transfer of Land Statute,*" and the "*Real Property Statute* 1864," sec. 71, before a commissioner, is inoperative to convey the mortgaged premises. The intention of the Legislature was not, that the prescribed formalities being omitted should render the deed void as a deed, but should render it ineffectual as a conveyance. *Trewhella v. Willison,* 4 V.L.R. (L.,) 122.

Mortgage by Married Woman—Acknowledgments to Bar Interest.]—Where a married woman seised in fee mortgages her real estate, such mortgage does not change its ownership further than investment indicates. A., a married woman so seised in fee, mortgaged part of it to B., and afterwards married C. A. and C. then mortgaged other part to D. B. and C. were paid off and conveyed to such uses as she should appoint. A. and C. then mortgaged (September 1865) the whole of the estate to E., by deed duly acknowledged by her, subject to redemption by them, or either of them, and subject to a proviso for reconveyance to her in fee, or as she or they should direct. In 1866 A. made a will referring to this deed, leaving the land to her husband, C., and appointing executors. September, 1873, E., by deed, conveyed to such uses as she should appoint, and in default to her in fee. *Held* that although she never by deed acknowledged subjected her estate to a disposal which would be invalid by her as a married woman, yet the intention to bar her interest need not be shown by recitals in the deed, but might be shown by extraneous evidence, and that deed of September 1, 1865, and the will afforded such evidence; and that devise to husband was effectual. *Dodgson v. Clare,* 5 V.L.R. (E.,) 137.

Consent of Husband—Lunatic and Living Apart —"Real Property Statute 1864," Sec. 78.]—The Court will dispense with the concurrence of a lunatic husband living apart from his wife in a conveyance by her of real estate. *In re Willcox,* 6 V.L.R. (E.,) 120.

(*b*) *Acknowledgments to Bar Wife's Interest.*

Evidence of Execution of the Deed—General Commissioners—Act No. 112, Sec. 87.]—A special commission is necessary to take the acknowledgment of a married woman under Sec. 87 of the Act No. 112, in a place where there is a perpetual commissioner of the Court; for the power of appointing general commissioners does not extend to such a case. *In re Sargood,* 1 W.W. & A'B. (E.,) 48.

"Real Property Statute 1864," Sec. 14—Two Married Women.]—On an application for a commission to take the acknowledgment of two married women to a deed, the Court will not include them in one order, but will make separate orders for each. *In re Tennent and Ritchie,* 4 V.L.R. (E.,) 60.

ILLEGALITY.

Setting Aside Transactions For.]—*See* CONTRACT—GAMING AND WAGERING—LAND ACTS.

ILLEGAL ASSOCIATION.

What is Not—Association for Returning Members to Parliament.]—The Victorian Association, as stated by its prospectus, was established for the purpose of seeking out and promoting by all lawful means in its power the return to Parliament of men of liberal and enlarged views, who, by experience, education, and character, were calculated to command the respect and enjoy the confidence of their fellow-colonists; and who would, in their political career, be guided by a tenacious regard for the public welfare rather than by a desire to obtain the temporary approbation of any section of the community. The treasurers of the society sued a member upon the latter's undertaking to subscribe to the funds of the society. Upon special case, *Held* that the mere probability that illegal means would be used to carry out the objects stated did not render the association illegal; that the member's undertaking was not void; and judgment for the plaintiffs. *Ryan v. Stephens,* 1 W.W. & A'B. (L.,) 102.

IMPRISONMENT.

For Debts.]—*See* DEBTORS ACT.

Action for False.]—*See* MALICIOUS ARREST—TRESPASS.

INDEMNITY.

See GUARANTEE.

INEBRIATES.

Committal to Asylum—"Inebriates Act 1872," Sec. 4.]—A judge of the Supreme Court will not order the release of a person who has been committed to an asylum under Sec. 4 of the "*Inebriates Act* 1872," before the period of his detention has elapsed, on the mere ground that the inebriate has changed his mind, and considers that he would be better elsewhere. If the inebriate seeks to attack the order of committal, or the means by which it was obtained, he must proceed by *habeas corpus*. *Ex parte Burt*, 4 A.L.T., 112.

INFANT.

(1) *Protection, Custody, and Education.*

Wards of Court—Withdrawal from Jurisdiction.]—Permission to take wards of Court out of the jurisdiction will not be granted without sufficient reason. *Black v. Black*, 4 A.J.R., 166.

Costs of Travelling.]—Travelling expenses of infant wards of Court will not be granted out of their estate where there is no necessity for their travelling out of the jurisdiction. *Ibid.*

Ward of Court—Elopement out of Jurisdiction—Marriage—Contempt—Attachment—Maintenance.]—Motion by the guardians of a ward of Court to bring under the notice of the Court the circumstances of her clandestine marriage with B., and her elopement with him from Victoria to New Zealand, and for an order to secure attendance of B. and protection of infant, and seeking directions as to marriage and the settlement and disposal of infant's property and income thereof, and for her maintenance and guardianship. *Held* that Court could not entertain questions as to validity of marriage, as parties were not present, or as to the settlement; but Court directed an attachment against B. for contempt, to be executed by the solicitors of the guardians when practicable, and that no further payments should be made out of funds in or towards the maintenance, clothing, or education of the infant, who had eloped from the control of a person sanctioned by the Court. *Ware v. Ware*, 1 V.L.R. (E.,) 233.

Removal of Infant Ward out of Jurisdiction.]—For circumstances in which an application by the mother of an infant ward, with the approval of the other guardian, to remove the infant out of the jurisdiction was referred to the Master, see *Cattanach v. M'Kowne*, 4 V.L.R. (E.,) 213.

Custody of an Illegitimate Infant.]—An infant, H. Ah Kee, was the illegitimate child of Ah Kee and E. W., and had been placed by its mother in the custody of H. *Habeas corpus* for the delivery up of the infant to E. W. *Held* that the Court will not interfere in transferring a child from the hands of a person with whom the applicant has deliberately placed it, unless satisfied that it would be for the child's benefit, and that the applicant is a person of good moral character. The Court thinking that the applicant's character was very doubtful upon the evidence, refused to interfere. *In re Ah Kee, Ex parte Walker*, 3 V.R. (L.,) 38; 3 A.J.R. 33.

Custody of Infant—Mother a Drunkard.]—When a mother of infant children was an habitual drunkard, the Court removed them from her custody and ordered a reference to Master to appoint a guardian. *Phair v. Powell*, 5 V.L.R. (E.,) 264.

Custody — After Father's Death — Mother.]—After the death of an infant's father the claim of the paternal grandfather to the custody of the infant is not superior to that of the mother, though the infant has been left in the custody of the grandfather for six years before the death of the father, leaving the infant in such custody not being an abandonment of the child. *Re Sanders*, 6 V.L.R. (L.,) 10.

Custody of Children on Divorce or Judicial Separation.]—*See* HUSBAND AND WIFE—JUDICIAL SEPARATION AND DIVORCE.

Sending Out of Jurisdiction for Education.]—The Master's report stated that it was desirable that W., a ward of Court, should be sent to England to one of five or six enumerated schools for education. *Held* that the Court is loth to send its wards out of the jurisdiction; but that circumstances may induce it to do so, and it appearing that W. had a fortune of only £10,000, and that there were no special circumstances to induce it to break through its

general rule, application refused. *Ware v. Ware*, 3 A.J.R. 11.

Religious Education.]—In dealing with an infant's religion Courts of Equity regard the father's more than the mother's, but in case of an adopted infant they would not interfere with the adopted father's preference, and if the adopted father furnished the means of support would prefer his discretion to wife's. The Court will regard the views of an infant of the age of 14 upon religious matters if definitely formed, but she should be placed for some time in a position where she will be free to exercise her own judgment, and free from intrusive conversations upon religious subjects, and the Master will examine her to ascertain what her views are. *In re Pennington*, 1 V.L.R. (Eq.,) 97.

Religious Education.]—When an infant states that she has a conscientious objection to attend any but a Roman Catholic establishment the Court will not yield to such an inclination on her part, if there is no strong reason, from the religion of her parents by nature or adoption, for the Courts preferring that religion to any other. Also, if trustees have a voice in the marriage of an infant they ought to have some influence as to the child's forming acquaintances during infancy. *In re Pennington*, 1 V.L.R. (Eq.,) 343.

Per the Full Court. If the religious impressions produced on an infant's mind are so strong as to make it dangerous to attempt to interfere with them, she should not be in any way coerced, or even persuaded, to alter them. The religion of a sole guardian should be *cæteris paribus* that in which the infant is to be brought up. *In re Pennington*, 2 V.L.R. (E.,) 49.

On reference to the Master to inquire as to a guardian, and a scheme for the education and maintenance of an infant, he—in deference to what he believed to be an expression of opinion by the Court, and contrary to his own judgment—reported in favour of a sole guardian and schoolmistress, both of whom were of a different religion from that in which the infant had for some years been brought up. A person at whose school the child was, and who had for some years educated her in her own religion excepted to the report, on the ground that the child was attached to her, had strong religious convictions, and had formed friendships at the school. The exceptions were overruled. On appeal to the Full Court against the scheme, but not against the guardian, *Held* under the special circumstances of the case that the order should be reversed, the report already made set aside, and the question remitted to the Master, to be dealt with under the original order. *Ibid.*

Religion—How Dealt With.]—The conduct or misconduct of those who have had the custody of an infant should in no way influence the Master or the Court in determining what is to be done for the infant's spiritual welfare. *Ibid.*

Education—Discretion of Trustees—Interference by Court.]—A testator by will directed the trustees to apply certain income for the maintenance of an infant son "at their discretion." The trustees wished the infant to be sent to a certain school, but the infant, aged 18, wished to go to another. Motion to refer to Master to settle a scheme of education refused, the Court refusing to interfere with trustees' discretion. *Flannagan v. Flannagan*, 5 V.L.R. (E.,) 272.

(2) *Maintenance and Advancement.*

Past and Future.]—On motion for maintenance where mother, who had been appointed guardian and her second husband had maintained an infant, and it appeared that the mother had no separate property and her second husband was a carpenter earning £150 a year, and that the infant's fortune consisted of certain debentures, of which the annual dividends were £14, and a sum of £69 had accumulated from the dividends, *ordered*, that the arrears of interest be paid to the mother for past maintenance, and accruing dividends be paid for future maintenance till further order. *In re Hamilton*, 4 W.W. & A'B. (E.,) 95.

Past Maintenance not Allowed out of Corpus where Funds under Control of Court.]—*Mitchell v. Tuckett*, 5 V.L.R. (E.,) 31; *post* under TRUST AND TRUSTEE—Powers and rights of trustees.

Out of Corpus.]—A testatrix by will left all her real and personal property to trustees upon trust for three infant children, the property to be converted and the proceeds paid to the children when the youngest came of age, and she directed the trustees until conversion to pay the whole of the net income towards the maintenance of the children. The will contained no advancement clause. On motion for liberty for trustees to pay out of *corpus* a sum in aid of maintenance and a sum of £50 as an apprentice fee for one of the infants, it appearing that the realty was producing a rental of £1 per week, and that each infant's share in the personalty amounted to £250, motion refused. *In re Neeson*, 6 W.W. & A'B. (E.,) 319.

Out of Corpus—To what Age Poor Children Allowed Maintenance.]—Five infants were entitled to £300 each, the income from which was insufficient to maintain them. On motion for allowance from *corpus* for past and future maintenance, *Held* that the Court would not in this motion allow the mother anything as for past maintenance out of capital; *ordered*, that such portion of the capital be allowed for future maintenance until the infants reached the age of eighteen as, with the income from each share, would make up £20 a year to each infant. *In re Moylan*, 5 A.J.R., 67.

When Estate under Management of Curator.]—Where the estate in which an infant is interested is under the management of the Curator, the Court will make an order for maintenance, and for appointment of a guardian. *In re Nimmo*, 5 A.J.R., 79.

When not Allowed out of Corpus.]—Where the share to which an infant was entitled under an intestacy was only £159 11s. 9d., the Court

refused to break in on the *corpus* to provide for maintenance. *In re Hunt*, 10 V.L.R. (E.,) 224; 6 A.L.T., 84.

Will—Accumulation till Children came of Age—No Provision for Maintenance.]—Motion for order for trustees to apply income of certain property towards the maintenance of infants. This property was left by will on trust for children on attaining majority, with a direction for accumulation of income during infancy, but with no provision for maintenance. Order made for application of income from personalty for maintenance. *In re Gardiner*, 5 A.J.R., 153.

Where a testator by his will gave to his widow a life interest in certain property producing a rental of £150 per annum, and in £2000 worth of debentures, and directed the widow to maintain and educate an infant, the Court refused to allow any sum by way of maintenance to the widow. *In re Folk's Will*, 6 W.W. & A'B. (E.,) 171.

Where not Directed in Will—Accounts.]—In a will no maintenance was directed, but property was left in an ambiguous manner, which the Court construed as giving income in equal shares to wife and children, and the *corpus* to the children in equal shares after wife's death. A., the wife, had been maintaining infants, and had advanced portions out of *corpus* to those who attained majority, keeping accounts of expenditure and receipts, which had never been objected to by children who were all of age at time of suit. *Held* that A. was liable to restore the portions of the *corpus* she had appropriated. Accounts directed as to what each was entitled to, and of what had been expended in maintenance of each. *Stevenson v. M'Intyre*, 5 V.L.R. (E.,) 142.

And *see* cases *post* under WILL—Incidents of Devises and Bequests.

Increased Allowance — Reference.]— Where, upon reference, the Master finds an annual allowance for infants, wards of Court, for a definite period, and after that time a larger sum than that fixed upon, was suspended without order, the Court, even though the income had, owing to unexpected circumstances, largely increased, refused to sanction the increased expenditure; but made a further reference to the Master to report as to future allowances. *In re M'Whae*, 6 V.L.R. (E.,) 100; 2 A.L.T. 1.

Who may Apply Income to.]—The administrator of an intestate, dying since the passing of the "*Statute of Trusts* 1864" (No. 234), is not a trustee within the meaning of Sec. 77, and, therefore, has no power by virtue thereof to apply income to the maintenance of infants. *In re Bowman's Trusts*, 6 V.L.R. (E.,) 124; 2 A.L.T., 13.

Discretion of Trustees.]—The Court will not interfere with the discretion of trustees as to amount of maintenance when such discretion is vested in them by the will. *Grant v. Grant*, 5 V.L.R. (E.,) 314. *In the Will of M'Lean*, *ibid* p. 319; *post* under TRUST AND TRUSTEE—Rights and Powers of Trustees.

Duties of Trustees as to—Maintenance not to be Applied to Payment of Past Debts.]—*Green v. Sutherland*, 3 A.J.R., 3; *post* under TRUST AND TRUSTEE—Rights and Powers of Trustees.

Decree Allowing Maintenance for Certain Period—Variation Allowed by Extending Period for Maintenance.]—*See Kearney v. Lowry*, 1 A.J.R. 95, *post* under PRACTICE AND PLEADING—IN EQUITY. Decree and Order.

Allowance for a Trousseau.]—Upon an impending marriage of a female ward of Court, whose fortune was worth £12,000, the Court referred it to the Master to inquire whether it would be proper to allow any and what sum not exceeding £250 for the purchase of a trousseau. *Ware v. Ware*, 6 W. W. & A'B. (E.,) 326.

Where a will directed the widow to maintain and educate infants, and contained a power of advancement during minority, the Court refused without evidence of special circumstances to sanction an advancement of £100 for a wedding outfit out of a daughter's share. *Sichel v. O'Shannassy*, 3 V.L.R. (E.,) 208.

Contingent Interest—Breaking into Capital—Practice.]— Where infants are entitled to contingent interests only under a will, the Court will not make an order authorising executor to break into capital, unless notice has been given and all persons interested consent; such consents should be given in open Court, a consent filed and verified by affidavit will not do. *In re Hyland*, 7 V.L.R. (E.,) 169.

(4) *Contracts and Torts, Liability for.*

(*a*) *Contracts.*

Agreement to Serve under "Military and Naval Discipline Act 1870," Sec. 2.]—An infant may, under Sec. 2 of the "*Military and Naval Discipline Act* 1870," even without his parents' consent, enter into an agreement to serve. *In re Hayes*, 4 A.J.R. 34. *See* S.C., *ante columns* 56, 57.

(*b*) *Ratification.*

What Contracts Capable of.]—An engagement by an infant to serve on board a man-of-war under the "*Military and Naval Discipline Act* 1870," is a contract for the benefit of the infant, and capable of ratification. *In re Hayes*, 4 A.J.R., 77. *See* S.C. *ante columns* 56, 57.

(*c*) *Torts.*

Trespass by Infant—Liability of Parent.]—A father is not legally responsible for his son's trespass, unless the relation of principal and agent exists between them. *Maudoit v. Ross*, 10 V.L.R. (L.,) 264, 266; 6 A.L.T., 104.

(5) *Guardians.*

Who has Better Right to be.]—In a contest between the paternal and maternal uncles of an infant for her guardianship, her property being derived from the maternal side, *Held* that the maternal uncle had the better right. *In re Johnson*, 8 V.L.R. (E.,) 211.

The jurisdiction of Courts of Equity in the appointment of guardians, arises entirely from property. *Ibid.*

Who may be—Married Woman.]—*Per Molesworth, J.*, in Chambers.—A married woman cannot be appointed guardian of an infant. *Re Ronayne*, 6 A.L.T., 33.

Appointment of.]—On an order of the Court referring to the Master to appoint a guardian, the guardian is sufficiently appointed by the Master's report being confirmed.

The order of reference to the Master should also embrace the costs of the application and reference. *In re Talbot*, 1 W. & W. (E.,) 86.

Appointment of, Without Suit.]—Guardian for infant appointed without suit, where infant's property consisted of real estate in Victoria of the value of £400, and a legacy of about £3000, the guardianship being limited to the real estate. *In re Mackay*, 1 V.R. (E.,) 17.

Motion for Appointment of Guardian of Person—Guardian "ad litem."]—Where a motion is made by trustees of an infant's property for appointing a guardian of her person, and is opposed, a guardian *ad litem* is necessary to represent the infant, and the Court will make an order for that purpose *instanter*. *In re Pennington*, 1 V.L.R. (E.,) 97.

Appointment.]—An orphan child was adopted by P., who, by his will, left property for her, with a trust for her maintenance during infancy. After the death of P. the child was taken possession of by C., a stranger, and retained against the will of the trustees. Motion by C. to be appointed guardian refused. *Held* that an infant above age of twelve years has no right to choose a guardian, nor to supersede the discretion of the trustees of her property derived under the will of her adoptive father. *Ibid.*

Guardian of Illegitimate Child.]—Guardian of an illegitimate child, nominated by the father's will, appointed guardian of person and estate by the Court without reference, and allowed commission on receipt of rent. *Nixon v. Goldspink*, 1 V.R. (E.,) 92; 1 A.J.R., 56.

Infant's Estate in the Hands of Curator.]—Order made on motion appointing mother guardian of infant whose estate was in the hands of the Curator. *In re Davey*, 3 V.L.R. (E.,) 71.

Will Directing Trustees to Apply to Court, if necessary, to be Appointed Guardians—Appointment of Mother.]—Where a will purported to appoint trustees as guardians and directed them to apply to Court, if necessary, to be appointed, the Court made on motion an order, with the consent of the trustees, appointing mother as guardian. *In re Will of M'Lean*, 5 V.L.R. (E.,) 319.

Removal of Mother for Neglect—Increased Allowance of Infant to Support Mother who had made away with her Allowance.]—Motion for removal of mother and to appoint a guardian in her place. An infant under his father's will was allowed £100 a year. It was proved that the mother had been unable to control him or to keep him attending school, and that the infant was ignorant, though thirteen years of age. The mother had an allowance of £200 a year, but she had spent it, and was dependent on what she could get out of the boy's allowance. Order made referring it to Master to approve of a proper person to be appointed guardian in the mother's place, and to inquire and report whether any and what increased allowance should be made to the infant, and having regard to the means of support of the mother, to inquire into the causes of her destitution, and to report whether any and what addition to the allowance for the infant should be made for the relief of the mother. *Punch v. Lane*, 3 A.J.R. 115.

Appointment of Guardian ad litem.]—*See* cases *post* under PRACTICE AND PLEADING—In Equity—Infants.

(6) *Rights and Powers in other cases.*

Lease of Property—Act 11 Geo. IV. and 1 Will. IV., cap. 65.]—The policy of the 11 Geo. IV. and 1 Will. IV., cap. 65, Sec. 17, is to encourage long building leases to tenants who will improve the infant's property, and at a fixed definite rent covering the entire period of the tenancy. And therefore a lease for five years, made on the following terms, viz., that the guardians should, out of the infant's estate, lay out a sum of money in improvements, and that until such improvements were made, a rent of £80, and after completion of improvements a rent of £160 should be reserved, is not within the policy or design of the Act. *In re Dight*, 1 W. & W. (E.,) 131.

The words "or other purposes," contained in the clause, ought to be construed, if not as to the powers of the Act, yet in the discretion of the Court, on the principle of *ejusdem generis* with the antecedents. *Ibid.*

Petition under Act 11 Geo. IV. and 1 Wil. IV., cap. 65, for Liberty to Lease.]—The meaning of 11 Geo. IV. and 1 Will. IV., c. 65, sec. 17, enabling the Court to authorise leases of infants' land "at the best rent that can be obtained," is that the Court shall exercise a discretion as to the amount of rent, and not delegate the discretion to arbitration. *In re Dight*, 2 W. & W. (E.,) 139.

Receiver has Power to Grant Leases of Infant's Property.]—*Brock v. M'Phail*, 1 W. & W. (E)., 12. *Post* RECEIVER—Powers, &c.

And *see* generally under RECEIVER.

Partition of Infant's Estate.]—Partition of the share of an infant tenant-in-common should be by commission, and not by a reference to the Master. *Beith v. Beith*, 2 V.R. (E.,) 110.

Leave to Bid for Desirable Property in which Infant was Interested.]—An infant had a half-interest in some property which was advertised for sale, and which was desirable property. On motion for leave for the infant to bid at the

sale, *Held* that the Court had no power to convert his uninvested personalty, which was sufficient for the purposes of the purchase into freehold, and motion refused. *Ware v. Ware*, 5 A.J.R. 4.

Release to Trustee—Infant Examining Accounts and Expressing Satisfaction Therewith.]—A testator devised property to a trustee on trust for an infant, directing him to apply part of the rents, &c., in maintenance and education of an infant, and accumulate and invest the residue upon trust for infant on attaining age. The codicil directed that in case M., the trustee, should take reasonable care of the property, and pay off a mortgage on the property, he should not be liable for back rents or otherwise. M. kept down interest on the mortgage, paid for education and maintenance, but did not pay off the mortgage. Shortly before the infant became of age, M. went through some accounts he had kept roughly and the infant expressed satisfaction with them. Two days after the infant came of age he released M. from all liability by a deed which recited the accounts, and a balance found, and by which the property was conveyed to infant. On a suit to set the release aside, *Held* that the infant was not, under the circumstances, a free agent, though there was no evidence of his being cheated or coerced; that the recitals in the deed as to accounting were stronger than the facts warranted; that the bargain was indistinct, and was actually made before he came of age. Release set aside, and accounts of rents and expenditure ordered. *O'Leary v. Mahoney*, 5 A.J.R., 41.

Release of Trustee by Cestuisque Trustent on the day of or shortly after Attaining Majority.]—*Westwood v. Kidney*, 5 A.J.R., 25. *Bennett v. Tucker*, 8 V.L.R. (E.,) 20; 3 A.L.T., 108. *See post* under TRUST AND TRUSTEE—Rights and Powers of Trustees.

Purchase of Infant's Estate by Next Friend Set Aside.]—*Larnach v. Alleyne*, 1 W. & W. (E.,) 342; *post* under TRUST AND TRUSTEE—Rights and Powers of Trustees.

Accumulation of Income—Discretion of Trustees as to Disposition—Motion for Payment of Accumulation on Attaining Majority.]—A testator left real and personal property to trustees on trust for his son, an infant, for life, with remainder to his children; the will directing application of the income to the maintenance of his son during minority, and accumulation of so much as was not needed, and investment without prejudice to the right of the trustees to apply the accumulations in the same way as if it had been just accrued due. Motion on behalf of infant son on attaining majority for payment of accumulations to him, some of the trustees only consenting, refused on the ground that all the trustees had not agreed as to discretion and as to the motion, and that the plaintiff was only contingently entitled. *Green v. Nicholson*, 5 A.J.R., 131.

Compromises—Next Friend.]—An infant's next friend has no authority to compromise an action brought by the infant by such next friend. The authority of the next friend is limited to prosecuting the action. *Glassford v. Murphy*, 4 V.L.R. (L.,) 123.

Taking Lands of Infant—Special Guardian must be Appointed—"Lands Compensation Statute 1869," Sec. 6.]—A special guardian must be appointed to treat for and convey the lands of an infant. A receiver has no power to sell or convey under Sec. 6 of the Act. *Hunter v. Hunter*, 4 A.J.R., 24, 65.

Land Taken under "The Lands Compensation Statute 1869" (No. 344), Sec. 6—No. 392 (Amending No. 344), Sec. 4—Special Guardian—Costs.]—Where land of an infant ward of Court is compulsorily taken for the construction of a Government Railway, the Court will appoint a special guardian to treat with the Board of Land and Works in respect of the land so taken; but will not in the same order provide for the costs to be incurred. A separate application with reference thereto, must be made after the receipt of the purchase money. *Smith v. Smith*, 4 V.L.R. (E.,) 233.

Sale of Infants' Property by the Court.]—An administrator of his wife's land, beneficially entitled to one-third thereof, and holding the other two-thirds for his children, mortgaged the whole property to a bank, and expended the money borrowed in improving the property. The bank advanced the money and took the mortgage with notice of the infants' claims. Upon suit by the children for redemption of two-thirds of the property, *Held* that under such circumstances, although it might be advisable to sell the property, the Court had no power to order a sale against the children's wishes. *Droop v. Colonial Bank of Australasia*, 8 V.L.R. (E.,) 7.

Appearing before Justices—Next Friend—Costs.]—An infant may appear before justices, and may obtain a Rule to prohibit the proceedings, without, in either case, the appointment of a next friend, but in such a case the Court will not allow him the costs of the Rule to prohibit, though it be made absolute. *Regina v. Little, ex parte Reynolds*, 8 V.L.R. (L.,) 124; 4 A.L.T., 4.

An infant cannot be a relator to an information. *Attorney-General v. Scholes*, 5 W.W. & A'B. (E.,) 164, 173.

(7) *Neglected and Criminal Children.*

"Neglected and Criminal Children's Act 1864" (No. 216), Sec. 16—Evidence of Age.]—A child was charged before a magistrate in October, 1865, as a "neglected child," under the Act No. 216. No evidence was given of her age; but the magistrate being of "opinion" that she was under fifteen years of age, convicted her and sentenced her to six hours' imprisonment, and in addition directed her to be sent to the Sunbury Reformatory School. She escaped from the Reformatory, was captured, convicted in July, 1866, of the escape, and sentenced to further detention. In September, 1866, *certiorari* was applied for to quash the proceedings, on the ground that she was over fifteen in

October, 1865, when she was first convicted, and that "no evidence whatsoever" of her age was taken at the first conviction. *Held* that the application was too late as to the first conviction, more than twelve months having elapsed; and of no avail as to the second, which could not be upset till after the upsetting of the first. *In re Brazenall*, 3 W.W. & A'B. (L.,) 76.

"Neglected and Criminal Children's Act 1864," Sec. 12—Evidence of Age.]—Under the Act No. 216, Sec. 12, the magistrate is not bound to take any evidence at all of the child's age, and he may form his "opinion" of the age of the child where there is no evidence at all—the words "unsatisfactory evidence" including in their scope "no evidence at all." *Ibid.*

"Neglected and Criminal Children's Act 1864," Sec. 27—Who may Proceed under—Clerk of Petty Sessions.]—The Clerk of Petty Sessions is a proper person to proceed under Sec. 27 of the "*Neglected and Criminal Children's Act* 1864" to recover arrears in respect of an order made on the complaint of a constable or school superintendent under Sec. 24. *Regina v. Justices at Richmond, ex parte Eddin*, 10 V.L.R. (L.,) 87.

"Marriage and Matrimonial Causes Statute" (No. 268), Sec. 30.]—If a child is withheld from a father who is competent and willing to receive and support it, the father is not liable to have an order for maintenance under Sec. 30 made against him. *M'Farland v. M'Farland*, 1 V.L.R. (L.,) 303.

INFORMATION.

Criminal.]—*See* CRIMINAL INFORMATION — DEFAMATION—NUISANCE.

Bill and Information.]—*See* PRACTICE AND PLEADING—In Equity.

INJUNCTION.

I. GENERAL PRINCIPLES.

Consent Order—No Provision for Sealed Writ.]—An order of Court purporting as by consent at once to restrain defendant from an act, and not providing that a writ of injunction under seal shall issue, is an injunction in itself; and to base a contempt on it, no writ under seal need issue. *Lane v. Hannah*, 1 W. & W. (E.,) 66, 71.

Liability of Principals.]—The object of the insertion in an injunction of the words "servants, agents, and workmen" is to make those persons personally liable to the Court, and the omission of those words will not diminish the responsibility of the principals for the acts of their servants, agents, and workmen. *Ibid*, p. 72.

Persons consenting to an order of Court that they shall not do an act, will not be allowed to get and retain the profit of such act when done by their servants, and yet escape liability to the Court on the plea that they gave no express directions to do the act. *Ibid.*

Injunction Against Trustees and Others—Trustees not Chargeable with Wrong Complained of.]—A bill was filed against trustees and others alleging that some of the defendants not trustees had made certain fraudulent misrepresentations by which plaintiffs had been induced to assign to another defendant all their interest in the profits of a certain railway contract, and seeking to set assignment aside, and plaintiffs had obtained an *ex parte* injunction restraining defendants from receiving any more moneys payable under contract. On motion to dissolve *ex parte* injunction, *Held*, that if representations were fraudulent as alleged, there was no ground for injunction against trustees, who were neither directly nor indirectly chargeable with the representations, and injunction dissolved. *Evans v. Guthridge*, 2 W. & W. (E.,) 2, 35.

Against Person having no Interest in Subject Matter of Suit.]—Where it appeared by an affidavit of a defendant, sought to be enjoined, that he had parted before suit with all his interest in the land in question in the suit, which assertion was not denied by the plaintiffs; motion for injunction dismissed. *Newington Freehold G. M. Coy. v. Harris*, 3 W.W. & A'B. (E.,) 174.

Interpretation of.]—An injunction is not to be interpreted retrospectively, unless its terms clearly require it. *Mulcahy v. Walhalla G.M. Coy.*, 5 W.W. & A'B. (E.,) 103, 110.

Injunctions are not granted with reference to accomplished injuries. *Bonshaw Freehold G.M. Coy. v. Prince of Wales Coy.*, 5 W.W. & A'B. (E.,) 140, 154.

Land Reserved for Public Purposes—Leased to Private Person—No title in Defendants.]—Certain land was, under the "*Land Act* 1869," reserved for public baths and the convenience of the people of Sandhurst. After being used by the municipal Corporation for such purposes for some time it was leased to M. for building purposes for his own private profit. On an information by the Attorney-General at the relation of a citizen of Sandhurst, seeking to restrain the Council and M. from permitting the land to be used for any other purpose than those for which it had been reserved, *Held*, on demurrer, that the information did not give any colour of

title in the defendants to the land, so as to render such a suit necessary, the legal estate remaining in the Crown and the Council being only its tenants at will. *Quære*, whether if a case of irreparable mischief had been made out, an information would not lie, if it were shown that such mischief could not be remedied by the Crown resuming possession. *Attorney General v. Mayor of Sandhurst*, 2 V.R. (E.,) 136; 2 A.J.R., 100.

Interlocutory Injunctions—Question of Title— Although the Court will not decide upon the validity of Crown grants for lands sold during a temporary reservation of lands for sale for public purposes upon an application for an interlocutory injunction in a mining suit, yet it will not grant an injunction at suit of a holder of a mining claim on the lands to restrain the grantees from mining on the land. *Parade G.M. Coy. v. Victorian United G.M. Coy.*, 3 V.L.R. (E.,) 24.

It does not follow, from a party having a legal right, that he may enforce it by injunction. His conduct may in many ways bar him of it, especially where the obtaining of an *exparte* injunction is stopped without having been heard. Courts of Equity are anxious to require a full disclosure of facts which may become material, and discharge with costs orders improperly obtained, although ultimately the facts disclosed may not be material. It is a question of the general policy of the Court and not of the merits between the parties. A subject upon which Courts are specially anxious for information is the precise time at which plaintiff or his agents became aware of threatened injury. Where the defendant had chartered from plaintiff a ship for use within special limits, and had concluded special negotiations with the plaintiff's agent for a special charter to another place, and the agent, the day before the proposed commencement of the special charter, broke off the negotiations, and obtained an *exparte* injunction by means of a bill and affidavit setting out the original charter, but omitting to set out negotiations, on motion *exparte* injunction dissolved with costs. *Adelaide Steamship Coy. v. Martin*, 5 V.L.R. (E.,) 45.

Delay.]—Where bill was filed in December, 1878, answer delivered 1st February, 1879, and motion for injunction brought in July, 1879, injunction refused on the ground of delay in bringing the motion. *Chinn v. Thomas*, 5 V.L.R. (E.,) 188; 1 A.L.T., 26.

Acquiescence.]—Plaintiffs sought an injunction restraining defendants from allowing water from their drive to pass into and flood that of plaintiff's. *Held* that having regard to the plaintiffs' long acquiescence in defendants' works, against which they did not seem to have remonstrated during much of their progress, and the defendants' outlay, such injunction would not be granted. *Broadbent v. Marshall*, 2 W. & W. (E.,) 115, 121.

Laches—Acquiescence—Delay.]—*Neva Stearine Coy. v. Mowling*, 9 V.L.R. (E.,) 98; 5 A.L.T., 9. *Post* under TRADE MARK.

The Court will not disregard, in considering a motion for injunction, a plaintiff's rights because the infringement is small, nor will it consider the public benefit that would accrue from the act sought to be restrained as of paramount importance. *Brooks v. The Queen*, 10 V.L.R. (E.,) 100, 110; 5 A.L.T., 199.

II. IN WHAT CASES GRANTED.

(1) *Restraining Proceedings in other Courts.*

(*a*) *At Law.*

Voluntary Settlement—Insolvency—Action at Law by Trustees.]—X. executed a voluntary settlement of his property upon trustees in favour of certain beneficiaries. In about two years after this his estate was sequestrated and S. appointed official assignee. The trustees brought an action to recover certain dividends received by the assignee from mining shares, part of the insolvent's property. A bill was filed by S. against trustees, to set aside the settlement as fraudulent, and to restrain the action. On motion for injunction, injunction *ordered*, it appearing that the value of the shares was small in comparison with the rest of the settled property. Note.—A consent decree was afterwards made, setting aside the settlement. *Shaw v. Patterson*, 6 W.W. & A'B. (E.,) 161.

Conflicting Evidence.]—Where, on a motion for an injunction to restrain proceedings at law upon a guarantee, the plaintiff alleged that the guarantee had been obtained by fraud, and the defendant denied any fraud, and the conflict of evidence was such, that even if the suit in equity were proceeded with, the main question would have had to be sent for trial to a jury, and the question could as well be tried in the common law action in the first instance, the injunction was refused. *Clarence v. The London and Australian Agency Corporation*, 1 A.J.R., 4.

Mortgage—Sale of Equity of Redemption—Action for Balance of Mortgage Money.]—S. mortgaged to a Mrs. Sawyers certain land, and sold the equity of redemption to H. Shortly afterwards Mrs. Sawyers renewed the mortgage. It was not paid off, and the property was sold by the trustees of Mrs. Sawyers' will for less than the mortgage debt. The trustees brought an action at law against S. to recover the amount of arrears. On a bill for an injunction to restrain the action at law, *interim* injunction granted. *Skinner v. Gilmour*, 3 A.J.R., 15.

To Stay Ejectment by Mortgagee after Death of Mortgagor—Mortgagor having Conveyed to Plaintiff in Trust for Himself for Life, Remainder in Trust for X.]—C. conveyed land to D. in trust for himself for life, remainder in trust for X. Six years afterwards C. mortgaged to the defendant bank. C. died intestate, owing a large sum for principal and interest. The bank served notice of sale on X., but not on D. The bank sold to T. and obtained judgment against X. in an action of ejectment. D. brought a bill to restrain execution of this judgment, alleging that the sale was collusive, T. being the bank's agent. The bank denied T.'s agency,

and that the sale was collusive; and the Court believing it, refused a motion for injunction. *Daley v. The Land Mortgage Bank*, 3 A.J.R. 71.

Ejectment — Judgment On — Execution for Costs.]—A., the defendant in an action for ejectment, not having the legal estate, defended the action, and the plaintiff (B.) obtained a judgment against him. On injunction motion by A. against B., seeking to restrain execution for costs of action, and to restrain B. from taking possession under his judgment, *Held* that A. not having the legal estate was not bound to defend the action, and the injunction was refused as to the former part, but injunction granted as to latter on A. giving security for the mesne rents from the date of the judgment in ejectment. *Foley v. Samuels*, 3 V.L.R. (E.,) 72.

To Restrain Ejectment.]—*Murphy v. Wadick.* *See post column* 566.

Cross Injunction—In Equity and at Law.]—Plaintiffs since the filing of their bill had obtained an injunction to stay execution in an action of ejectment brought against them by the defendant. Defendant then brought an action against them in respect of trespass. An equitable plea, put in by the plaintiffs, was struck out, and the defendant obtained an *interim* injunction restraining the plaintiffs from mining pending the action. The plaintiffs then applied for an injunction to restrain the defendant from proceeding with his action of trespass. The Court granted the injunction, so far as to restrain the defendant (plaintiff-at-law) from proceeding to trial of his action at law until further notice, without prejudice to his enjoying the injunction he had obtained at law, as if the order of the Court of Equity had not been made. *Australasian G. M. Coy. v. M'Culloch*, 4 A.J.R., 32.

To Restrain Execution—Execution Against Company where all the Directors had not Consented to Judgment.]—Several of the directors of a company commenced an action against it to recover certain moneys. The writ was issued on the 10th of June, and on the same day some of the directors consented to judgment being signed against the company for the amount claimed by them. There was a meeting of directors on 10th of June, but nothing was said about the issuing of the writ or signing of judgment to the other director, who was present. Upon this being brought to his knowledge he moved for an injunction to restrain execution, alleging that he was ignorant of the action being commenced, was no party to signing judgment, that the debt was less than the amount claimed, and the company's assets now exceeded its liabilities, and that the action was collusive, and a fraud on the shareholders. Injunction to restrain execution granted. *Robinson v. The Melbourne Newspaper Company*, 4 A.J.R., 66.

(*b*) *Insolvency.*

To Restrain Compulsory Sequestration.]—Although it might be disreputable to sequestrate a person's estate in order to prevent him urging his claims, there is nothing to justify the interference of a Court of Equity.—*Per Molesworth, J. Merry v. Hawthorn*, N.C., 40.

(2) *Covenants and Agreements.*

In Aid of Specific Performance.]—M. purchased from H., a tenant of defendant, the short unexpired term of his tenancy of a public-house, relying upon a verbal agreement between M. and defendant that defendant would grant M. a lease of the premises for five years from the expiration of the old lease. M. entered into possession and paid rent as under the old lease, and during the currency of the old lease, submitted for four days to the inconvenience of allowing defendant's workmen to enter and effect repairs. At the expiration of the old lease, defendant demanded possession, and being refused, served a notice of his intention to proceed to recover possession under sect. 90 of the "*Landlord and Tenant Statute* 1864." M. thereupon filed his bill for specific performance of the alleged agreement, and for an injunction to restrain the proceedings for the recovery of possession. Upon motion the injunction was granted, upon an undertaking by M. to observe the terms and covenants of the existing lease, to keep up the license, and to assign if ordered by the Court. Rents to be paid without prejudice to rights, and receipt of rents not to create a tenancy from year to year. *Murphy v. Wadick*, 4 V.L.R. (E.,) 224.

Injunction to Restrain Lessor from Granting a Second Lease Inconsistent with an Existing Lease.]—*City of Melbourne G. M. Coy. v. The Queen*, *ante column* 325, and *post* under LANDLORD AND TENANT—Lease.

(3) *Trespass.*

Removal of Bricks from Infant's Land — Digging for Clay.]—Motion for injunction to restrain removal of bricks from infant's land and to restrain digging for clay. A writ of ejectment had been served on the defendant at the plaintiff's suit. *Held* that the Court will not grant an injunction to prevent removal of bricks already made, or those in course of being made, the clay for which had been severed before notice of the motion, as the bill did not allege any insolvency; but as to digging for clay, as the application was made to protect property pending litigation, and was not properly for protection against waste or trespass, an injunction would be granted to restrain digging for clay. *Sutliff v. Jones*, 2 W.W. & A'B. (E.,) 32.

(4) *In Other Cases.*

To Prevent Consequential Damages.]—Consequential damages do not constitute a case for the interference of a Court of Equity. *Fisher v. Jacomb*, 1 W.W. & A'B. (E.,) 91.

To Restrain Sale of Goods Seized.]—A bill is not sustainable for an injunction to restrain an official assignee from selling goods seized, he alleging them to be the property of the insolvent. *Ibid.*

Interim Injunction for Protecting Property Pending Action — Digging for Clay.]—Where a writ of ejectment had been served on behalf of an infant, and the infant brought a suit to restrain digging for clay on his land for the purpose of making bricks, the Court granted an injunction to protect the property pending the ejectment action. *Sutliff v. Jones*, 2 W.W. & A'B. (E.,) 32. *See* S.C. *ante column* 566.

Interlocutory Injunction — Covenant to Account.]—If there is no allegation of the defendant's insolvency the Court will not in a suit where the question between the parties is one of account, interfere by way of interlocutory injunction. *Aarons v. Lewis*, 3 V.L R. (E.,) 79.

To Restrain Trustees of a Creditor's Deed from Disposing of Property Pending an Action—Suit by Non-Executing Creditors.]—*Per Molesworth, J.*: —"There is no equity for a person having a demand against another and bringing an action in respect of it to prevent during the pendency of the action the proper disposal of the property in order that something may be left to levy upon at the close of the action." *Lord v. Hewitt*, 2 W. & W. (E.,) 108.

For facts *see* S.C. under PRACTICE—In Equity —Demurrer.

Excavating for Brickmaking—Erection of a Fence.]—An obstruction of a street by excavating for brickmaking was proved as to a part of the street over which the plaintiff was held not entitled to a right-of-way, but an obstruction by a fence was proved as to a part of the same street over which the plaintiff was held entitled to a right-of-way. *Held* that excavation was a proper subject for injunction, but that obstructing by a fence was not, and bill to restrain excavation and obstruction in the whole of the street dismissed with costs. *Blyth v. Parlon*, 2 V.R. (E.,) 111; 2 A.J.R., 75.

Owners of Property Restraining Removal of Machinery by Occupant.]—On a motion for injunction by owners of property to restrain the removal of machinery, it appeared that T. & Co. were occupiers, and on their becoming insolvent their assignee transferred their interest to defendant. *Held* that it was doubtful whether plaintiffs could complain of removal of machinery, and if they could they must avail themselves of their remedy at law. Injunction refused. *Dickson v. Cane*, 3 A.J.R., 114.

In Action at Law after Refusal in Equity.] — An injunction had been refused in the equity side of the Court, and the plaintiff had appealed to the Full Court. While the appeal was still pending plaintiffs brought an action for trespass against the defendants, and applied to the Court in its common law jurisdiction for an injunction to restrain the defendants from mining on the land. The Court granted the injunction, pending the appeal in the Equity suit, the injunction to be dissolved in the event of the appeal being dismissed. *Alma Consols Coy. v. Alma Extended Coy.*, 4 A.J.R., 163.

Mining under Streets—Damage not clearly shown to be caused by.]—Where defendants had been carrying on mining operations under the streets of a municipality, and the surface of those streets had subsided, and application had been made to the defendants by the municipal surveyor to be permitted to inspect the workings, which they had refused, on bill by the municipality for an injunction and inspection, *Held* that the facts not clearly showing that the subsidence was due to the mining operations of defendants the plaintiffs were not entitled to an injunction, but order for inspection made. *Mayor, &c., of Ballarat East v. Victoria United G. M. Coy.*, 4 V.L.R. (E.,) 10.

Irreparable Injury.]—Damage of undefined extent to public streets, imposing an unlimited liability for repairs, will constitute irreparable injury, to restrain which an injunction may be granted. *Ibid*; and *see* under MINING.

Injunction—Sale of Ale—Misrepresentation.]—Where from evidence upon affidavits in support of motion for injunction it appeared that defendant habitually sold at the bar of his public-house ale of an inferior quality to that of plaintiff's manufacture but as plaintiff's ale, but did nothing to invite customers by announcements that he sold plaintiff's ale, or by labels or marks described his ale as plaintiff's ale, an *interim* injunction ordered. But upon the hearing, no other evidence having been adduced, bill dismissed, the Court being unable to say whether such sales were habitual or were directed by defendant, but thinking that defendant had not been sufficiently careful in preventing mistakes. *Degraves v. Whiteman*, 5 V.L.R. (E.,) 304; 1 A.L.T., 18, 90.

Partnership.] — Defendants had improperly excluded the plaintiff from participating in winding up a partnership, and had issued a circular stating the dissolution and that they intended to carry on the business, and the plaintiff moved for an injunction to restrain them. Injunction granted, but owing to a compromise being contemplated, no special order was made as to the date when it should issue. *Boyle v. Willis*, 1 A.L.T., 189.

And *see* S.C. under PARTNERSHIP.

To Restrain Claiming Exclusive Right to a Picture, the Joint Property of Two.]—The plaintiff contributed information and notes, by aid of which the defendant was enabled to paint a picture, in which they were to have a joint property. The defendant claimed the picture as his own, and exhibited it as such. Injunction granted to restrain him. *Semble*, the specific performance of such an agreement would not have been decreed. *Mitchell v. Brown*, 6 V.L.R. (E.,) 168; 2 A.L.T., 67.

Restraining Nuisances.]—*See* NUISANCE.

Infringement of Patent.]—*See* PATENT.

Infringement of Copyright.]—*See* COPYRIGHT.

Infringement of Trade Marks.]—*See* TRADE MARKS.

In Partnership Matters.]—*See* PARTNERSHIP.

To Restrain Waste.]—*See* WASTE.

To Restrain Mining on Private and Other Property.]—*See* MINING.

To Restrain Bringing Land under the "Transfer of Land Statute."]—*See* TRANSFER OF LAND (STATUTORY).

III. PRACTICE RELATING TO.

Cause Directed to Stand Over — Nuisance—Steam Hammer — Conflicting Evidence.]—On a bill for an injunction to restrain an alleged nuisance caused by defendant's steam hammer, the evidence being very conflicting, the Court at the hearing directed the cause to stand over for six months, with liberty to bring an action at law. *Lockhead v. Noble*, 3 V.L.R. (Eq.,) 131.

See S.P. *Cooper* v. *Dangerfield*, 10 V.L.R. (E.,) 29, *post* under NUISANCE—Injunction.

Motion for Injunction—Pendency of a Demurrer by some of Defendants—Position of Non-Demurring Defendants.]—Motion for injunction restraining the transfer of shares in a company by certain non-demurring defendants during the pendency of an appeal on a demurrer, an objection was taken. *Held* that this motion was an independent motion against the non-demurring defendants only and could not affect the demurring defendants, and *vice versa*, the allowance of demurrer of the demurring defendants would not affect plaintiff's rights, as against these non-demurring defendants. Objection overruled. *Learmonth v. Bailey*, 1 V.L.R. (E.,) 122.

For facts *see* S.C. PRINCIPAL AND AGENT.

Motion for After Decree.]—After decree, the Court refused to entertain a motion, in the same suit by defendants, for an injunction to restrain the plaintiffs (assignees of an insolvent), from selling the real estate recovered by them in the suit, before realising all the personal assets of the insolvent. *Goodman v. Boulton*, 5 W.W. & A'B. (E.,) 86, 101.

Service of Notice of Motion.]—Service at defendant's residence before answer of notice of motion for an injunction is sufficient, and such service need not be personal. *White v. Mayor*, 4 W.W. & A'B. (E.,) 43.

When Service of Notice of Motion for should be Made.]—Service of a notice of motion for injunction before service of the bill is irregular. Injunction on such service of notice granted *ex parte* and plaintiff ordered to pay costs of motion for motion on notice as an abandoned motion. *Lumsden v. Dullard*, 2 V.R. (E.,) 108.

Where an injunction is moved for upon notice, the Court will not grant a postponement on application of the defendant except when special reasons are alleged, as injury to the defendants or the like. *Victoria United Mining Coy. v. Prince of Wales Coy.*, 5 V.L.R. (E.,) 92.

Cross-Injunction—When Granted.—In granting an interlocutory injunction to restrain the defendants from mining on ground in dispute, the Full Court reversing *Molesworth, J.*, and thinking that the circumstances required it, granted a cross-injunction against the plaintiffs, though their title might have been endangered by not working. *Mulcahy v. The Walhalla Gold Mining Coy.*, 5 W.W. & A'B. (E.,) 103.

Ex parte Injunction.]—A bill by certain shareholders of a company against the managing body of the company, praying an injunction to restrain the company from carrying out an agreement which the bill alleged to be repugnant to the rules of the company, and *ultra vires*, and invalid and prejudicial to the shareholders of the company, was answered; but the answer did not meet the allegation that the agreement was *ultra vires* and prejudicial, and an *ex parte* injunction was granted. *Held* that this was sufficient to sustain the injunction till the hearing, provided no objection as to misjoinder, want of parties, or other insuperable irregularity lay in the way. *Lee v. Robertson*, 1 W. & W. (E.,) 374, 386.

Answering Defendants Moving for Dissolution of ex parte Injunction before All have Answered.] An objection that defendants who have answered cannot move to dissolve an *ex parte* injunction as against themselves till all the other defendants have answered will not be entertained as a preliminary objection to a motion for dissolution by the defendants who have answered; but the Court will consider upon the merits whether the injunction can with justice be dissolved as to some of the defendants until the others have answered. *Evans v. Guthridge*, 2 W. & W. (E.,) 2, 28.

Ex parte Injunction—Motion to Continue.]—*Per Molesworth, J.*:—Although the Court will on motion to dissolve *ex parte* injunctions punish want of candour in obtaining them, it will not so punish persons having obtained injunction for a time determined when applying, on notice, for a continuance of such injunctions. *Broadbent v. Marshall*, 2 W. & W. (E.,) 115, 121.

Ex parte Injunctions—Motion for Obtaining.] —*Per Molesworth, J.*:—The rule that all material facts must be brought forward on obtaining an *ex parte* injunction is a useful one; but care must be taken not to carry it too far, by which publicity would be produced. *Lavezzolo v. The Mayor, &c., of Daylesford*, 1 W.W. & A'B. (E.,) 113, 118.

Interpleader Suit—Service of Bill.]—Before an *ex parte* injunction will be granted in an interpleader suit service of the bill must be effected on the plaintiff at law whose action is sought to be restrained. *Spence v. Coker*, 1 V.L.R. (E.,) 33.

Practice—Application to Dissolve an Injunction—Questions of Fact and Law to be Tried—"Transfer of Land Statute."]—W., the manager and a director of the A. G.M. Coy. sued it for a debt not due, fraudulently prevented any defence to the action, and obtained judgment. The property of the company was sold under execution at a sheriff's sale, at which W. became the purchaser. This property comprised, *inter alia*, a

mining lease registered under the provisions of Act No. 301 ("*Transfer of Land Statute*"). W. and others were subsequently convicted of a fraudulent conspiracy to defraud the company. The lease was transferred to W. on the 20th September, 1871, and W. on the same day transferred it to I. D., one of the shareholders in the company, on behalf of himself and other shareholders, brought a bill against W., I., and other defendants, charging that I. paid no consideration for the transfer, and that he purchased with notice of W.'s fraud, and seeking to set aside the sale and I.'s title. An injunction was granted restraining I. from transferring or dealing with the lease. On motion to dissolve, *Held* that there was a question of fact to be tried in the suit as to the extent of I.'s knowledge of W.'s dealings, and questions of law as to meaning of word "fraud" in Sec. 50 of Act No. 301, and further whether dealings completed with a person before he becomes proprietor under the Act can be protected by the machinery of the Act as to his vendee by making him a proprietor, and at the same instant a transferor; and that the immense power the Act gives to a proprietor of completely barring clear equities presents a reason for Courts of Equity readily interfering by injunction. Motion refused. *Davis v. Wekey*, 3 V.R. (E.,) 1; 3 A.J.R., 1.

Notice of Motion to Dissolve an Injunction.]—A notice of motion to dissolve an injunction should be directed not only against the writ of injunction, but also against the order of the Court under which the writ was issued. *Murphy v. Martin*, 1 W.W. & A'B. (E.,) 26, 29.

Exparte Injunction — Discharge — Irreparable Injury not Proved.]—In a common law action, if an *exparte* injunction be obtained under Sec. 242 of the "*Common Law Procedure Statute* 1865," without a full and correct statement of facts, which show a probability of irreparable damage, such injunction will be set aside. *Kidd v. Chibnall*, 4 V.L.R. (L.,) 488.

Effect of Full Court Granting an Interlocutory Injunction.]—Where the Full Court has overruled a demurrer, and granted an interlocutory injunction in accordance with the relief sought, the Primary Judge has only to do perpetually what the Full Court has done temporarily. Perpetual injunction granted. *Davis v. The Queen*, 1 V.R. (E.,) 33; 1 A.J.R., 18, 22.

Parties.]—Parties named in an injunction, but not served with the notice of motion to attach for contempt by breach, are not entitled to appear to say that they have not been served. *Lane v. Hannah*, 1 W. & W. (E.,) 66, 73.

Contempt—Motion to Commit—Amendment.]—On contempt of an order by consent to restrain the defendant from an act, and not providing that a writ of injunction under seal shall issue, a motion to commit "for breach of the injunction issued in this case under the seal of this honourable Court" is wrong in form; but may be amended by substituting for the words "injunction issued in this cause, under the seal of this honourable Court," the words "Order of this Court." *Ibid.*

Attachment for Breach of Injunction.]—An injunction was granted restraining defendants from mining "under the land comprised in the plaintiff's license." The parcels described the boundary of the land in one direction as "the southern line of the Glenlyon road" and gave metes and bounds, which were inaccurate. On motion for attachment for going beyond the road as actually fenced, *Held per Molesworth, J.*, that any defect in the licensor's title might have been shown on motion for injunction, but not in this motion; that the road meant the road as actually made, and not as on the plans, and that they were liable although the road as fenced was not in accordance with the Government plan, and did not coincide with the measurements, and attachment granted. *Held by Full Court*, that the plaintiffs were bound to give the best and most accurate description of the land as to which they sought an injunction; that if an injunction order admitted of two constructions the defendants might very properly assume the responsibility of putting their own construction on it. Attachment order set aside. *Semble*, where an attachment order directs certain sums to be paid within fourteen days, and orders writ to lie in office for fourteen days, it should be read in the alternative. *Astley United G. M. Coy. v. Cosmopolitan G. M. Coy.*, 4 W.W. & A'B. (E.,) 96, 105, 117.

Breach of Injunction—Inconvenience no Excuse for.]—The fact that a complete and literal compliance with an injunction would altogether stop the defendants from working, is not an excuse from such compliance; a grave inconvenience of such a kind is a proper ground for moving the Court to modify such injunction; and such a motion may be made by a defendant in contempt for disobedience. *Bonshaw Freehold G. M. Coy. v. Prince of Wales Coy.*, 5 W.W. & A'B. (E.,) 140.

Breach—How Punished.]—Upon an injunction restraining a company from discharging drainage over plaintiffs' land, a *bona fide* attempt by defendants to carry such drainage over the land under a bargain with plaintiff's tenant of land, by means of wooden channel constructed upon it, so as to do no injury to the soil, though a breach of the injunction, was not visited by the Court with sequestration of the defendants property, but with the costs of an application for such sequestration. *Ibid.*

Liability to Attachment for Breach—To Whom it Passes.]—Where an injunction is granted against one person and his servants, and that person's interest passes to another, the liability to attachment for breach of the injunction does not pass to that other until he is made a party to the bill, and a new injunction is issued against him. *Attorney-General v. Rogers*, 1 V.R. (E.,) 132, 138; 1 A.J.R., 120, 149.

Appeal from Interim Injunction — When Granted.]—Under ordinary circumstances the Full Court will decline to interfere with an interim injunction granted by the Primary Judge, his Court being the proper tribunal to determine whether the subject matter of the trial should be protected till the hearing. But

where the bill is demurrable, the appeal will be allowed. *Band of Hope and Albion Consols v. St. George and Band of Hope United Coy.*, 1 V.R. (E.,) 183; 1 A.J.R., 174; 2 A.J.R., 127.

Injunction Granted Pending Demurrer—Appeal.]—An injunction ought not to be granted pending the reservation of the decision of the Court upon a demurrer, putting in issue the right of the plaintiff to relief, because such reservation casts a doubt upon the plaintiff's equity. If an injunction be granted in such circumstances by the Primary Judge, the Full Court will entertain an appeal from such Court, even after the injunction has been dissolved by a judgment on the demurrer. *Attorney-General v. Scholes*, 5 W.W. & A'B. (E.,) 164.

Order Protecting Appellant.]—Upon an appeal by a defendant from an interlocutory injunction the Full Court will not make an order, if the appeal is dismissed, protecting the appellant from any loss to which he would be subjected should the plaintiff not ultimately succeed in the suit. *Wolfe v. Hart*, 4 V.L.R. (E.,) 125, 137.

Delay.]—Where, in a trespass action, an injunction had been granted on 6th August, and no steps had since been taken the Court on 9th December dissolved the injunction. *Campbell v. Ah Chong*, N.C., 68.

Act No. 274, Secs. 240, 242—Claim for on Writ of Summons.]—An order had been made for an injunction, and the affidavit supporting the application did not state that a claim for an injunction was, under the provisions of Act No. 274, sec. 240, endorsed on the writ of summons. Rule absolute to discharge the order. *Fowler v. Mackenzie*, 9 V.L.R. (L.,) 231.

Costs—Of Injunction motion made Costs in the Cause.]—Costs of an injunction motion were reserved by the Primary Judge. On appeal such costs were made costs in the cause, on the ground that the interval between the sittings of the Appeal Court was too long for that Court to deal with them, and such Court ought not to depute to the Primary Judge the carrying out of its opinion. *Band of Hope and Albion Consols Coy. v. All Saints Coy.*, 2 V.R. (E.,) 83, 87; 2 A.J.R., 37, 49.

Costs—Injunction Restraining Action of Ejectment—Answer Admitting Case.]—A bill alleged the grant of a lease of certain premises to defendant, a partnership between plaintiff and defendant, which was dissolved on the terms of plaintiff taking over the assets, including the lease, and that an action of ejectment was brought by defendant against plaintiff as to the premises, and the bill prayed for an injunction restraining the action of ejectment. Defendant, in his answer, admitted that the action was commenced under a misapprehension. Perpetual injunction granted, and defendant ordered to pay costs of suit, it appearing that suit had been defended solely on a question of costs. *Miller v. Wood*, 3 A.J.R., 13.

Costs—Defendants doing Act Sought to be Enjoined—Motion Dismissed on Technical Objection.]—In a motion for an order restraining defendant from taking an infant plaintiff out of jurisdiction, where the defendant had during the pendency of the motion taken the infant plaintiff to New Zealand, and there was a fatal technical objection to the motion, the motion was dismissed, but without costs on account of the defendant's conduct. *Smith v. Blacker*, 3 V.L.R. (E.,) 1.

Costs — Apportioning.] — Where a plaintiff, seeking a twofold injunction, is clearly wrong as to part of the relief sought, but entitled to the other part, he must pay the costs of the injunction motion, costs not being in such a case apportioned. *Foley v. Samuels*, 3 V.L.R. (E.,) 72.

Costs—Of Injunction Dissolved in Part—Subsequently Made in Full.]—Where an injunction had been dissolved in part, upon the ground of suppression of material facts, and the costs were reserved, and upon the hearing the parties consented to the injunction in full, the Court left all parties to abide their own costs of the motion to dissolve. *Attorney-General v. Shire of Wimmera*, 6 V.L.R. (E.,) 162; 1 A.L.T., 125.

Under Judicature Act—Order L. Rule 6—Undertaking as to Damages.]—An action was brought to recover damages for trespass, the defendant being a tenant to a banking company of a piece of land on which was erected a hoarding. After the determination of the tenancy the place was let to the plaintiff, who posted bills on the hoarding. Application to restrain defendant from pulling down plaintiff's posters granted, the plaintiff undertaking to pay any damages under subsequent order of the Court. *Nicholson v. Roff*, 6 A.L.T., 97.

INNKEEPER.

Lien—Property not Belonging to Guest—Waiver of Lien.—M., a solicitor, being indebted to an innkeeper for entertainment, left his luggage with the innkeeper including a deed, the property of the plaintiffs. A demand was made by the plaintiff, but the innkeeper G. demanded M.'s authority, and subsequently a demand was made for the whole of the luggage with M.s' authority, when G. set up certain claims on M. for promissory notes to be collected. *Held* that G. had a lien on the plaintiff's deed enclosed in M.'s luggage, and that the lien had not been waived by the claims set up by G. as a distinct demand was not made for plaintiff's property on the second occasion. *Goodyear v. Klemm*, 5 A.J.R., 136.

Lien—When Defeated.]—H. resided at an hotel for six weeks, being supplied with board and lodging during that time. He made an agreement with the hotel-keeper to pay him at the rate of £2 per week, and paid for two weeks, but at the end of the sixth week the landlord refused to supply H. any further. There was then a sum of £8 due to the hotel-keeper, who claimed a lien on H.'s goods. The Court held that there was evidence that H. was not a guest at the hotel, but merely a lodger, and that the hotel-keeper had therefore no lien. *Regina v. Hinton, Ex parte M'Manus*, 6 A.L.T., 12.

INSOLVENCY.

STATUTES.

5 Vic., No. 9, Secs. 33—37. Repealed and Re-enacted by "*Insolvency Statute* 1865" (No. 273.)

5 Vic., No. 17. Repealed and Re-enacted by "*Insolvency Statute* 1865" (No. 273.)

7 Vic., No. 19, and its Amending Acts, 8 Vic., Nos. 6 & 15, and 10 Vic., Nos. 7 & 14. Repealed by "*Insolvency Statute* 1865" (No. 273.)

"*Insolvency Statute* 1865" (No. 273,) and its Amending Act (No. 300.) Repealed by "*Insolvency Statute* 1871" (No. 379.)

"*Insolvency Statute* 1871" (No. 379.) "*Amendment Act* 1871" (No. 411.)

The effect of the "*Judicature Act* 1883" (No. 761) upon the practice in Insolvency is that appeals from the Insolvent Court are to be heard by the Full Court (Sec. 10) and not by the Primary Judge.

I. JURISDICTION.

(1) *Generally.*

Insolvency—Primary Judge.]—The jurisdiction of the Primary Judge in Insolvency is not ousted during the sittings of the Appellate Court. *In re McManomonie*, 1 W.W. & A'B. (I.E. & M.,) 53.

Appeal from Refusal of Certificate.]—The Insolvent Court has no jurisdiction, outside that conferred upon it by Statute, to entertain an appeal from the refusal ot an insolvent's certificate by the Commissioner. *In re Bateman*, 1 W.W. & A'B. (I.E. & M.,) 35.

Insolvency—13 Eliz., Cap. 5—No. 379, Secs. 6, 7.]—Under Secs. 6 and 7 of the "*Insolvency Statute* 1871," the Judge of a Court of Insolvency has no power to set aside a settlement as fraudulent under 13 Eliz., Cap. 5. *In re Healey*, 2 V.R. (I.E. & M.,) 34; 2 A.J.R., 132. *Dallimore v. Oriental Bank*, 5 A.J.R., 38.

Insolvency—Setting Aside Settlements—"Insolvency Statute 1871," Sec. 70.]—It is doubtful whether a Court of Insolvency has, under the "*Insolvency Statute* 1871," any jurisdiction to set aside a settlement as void under Sec. 70 of that Act; but if it have such jurisdiction, it must be exercised in a *quasi* suit to which the beneficiaries under the settlement are parties. *In re Healey*, 2 V.R. (I.E. & M.,) 34; 2 A.J.R., 132, and *Dallimore v. Oriental Bank*, 1 V.L.R., (E.,) 13, 28.

To Make Order for Substituted Service of Order Nisi.]—*In re Oppenheimer, see post* under SEQUESTRATION.

To Decide Whether a Deed of Assignment Under Act No. 273 is a Good Defence to Proceedings for Sequestration under Act No. 379.]—The question whether a deed of assignment executed under section 115 of the Act No. 273 is a good defence to proceedings under the Act No. 379, to sequestrate the estate of a debtor for not satisfying a udgment, is a question cognisable only by the Supreme Court, and it is not to be transferred to the Insolvent Court so as to give the Insolvency Judge jurisdiction to deal with a summons to dismiss a debtor's summons. *In re M'Donald*, 4 A.J.R., 184. Affirmed on appeal, 5 A.J.R., 42.

Issuing Fi. Fa.]—Under Act No. 379, Sec. 18, and the "*Equity Practice Statute*," No. 242, Sec. 7, the Court of Insolvency has jurisdiction to issue a writ of *fi. fa. Slack v. Winder*, 5 A.J.R., 72.

Jurisdiction of Court under Sec. 126 to Commit for Contempt by Disobeying an Order under that Section.]—*In re Gray*, 2 V.L.R. (L.,) 241. *In re Rowley*, 3 V.L.R. (I.P. & M.,) 12; *post* under sub-heading INSOLVENT, HIS RIGHTS, &c.

Contempt of Court—Warrant of Commitment.]—The mode provided for enforcing orders by the Court of Insolvency for contempt is the same as that possessed by the Supreme Court. It is unnecessary, therefore, that a warrant of the Court of Insolvency committing for contempt should prescribe any term of imprisonment, for if it did the powers of the Court would be interfered with. *In re Slack*, 2 V.R. (L.,) 64, 135.

Insolvency—Transfer of Proceedings—"Insolvency Statute 1871," Sec. 10—Costs.]—A Judge of an Insolvent Court made an order under Sec. 10 of the "*Insolvency Statute* 1871," at the request of a majority of creditors, transferring the proceedings to another district. Subsequently he made an *ex parte* order, at the request of the assignee, directing that no further action should be taken on his former order. On appeal from the second order, *Held* bad, on the ground that the Judge had first superseded his jurisdiction, and then had assumed jurisdiction on the second order; and order reversed, with costs against the assignee *In re Cotton*, 6 V.L.R. (I.P. & M.,) 1 A.L.T., 129.

Jurisdiction of Judge as to Reviewing Order Erroneously Made Under Sec. 10 of Act No. 379.]—Where an order under Sec. 10 has been erroneously made, it is open to review by the Judge who made it. *In re Clarton*, 5 V.L.R. (I.P. & M.,) 47.

Jurisdiction of Court to Set Aside Sequestration.]—*In re Stampe*, 1 W. & W. (I.E. & M.,) 10; and *in re Rowley*, 2 V.L.R. (I.P. & M.,) 50. *post* under sub-heading SEQUESTRATION—Setting aside.

Refusal of Certificate in One District—Transfer of Proceedings—Act No. 379, Sec. 10.]—*In re Hinneberg*, 8 V.L.R., (I.P. & M.,) 7; 3 A.L.T. 133, *post* under sub-heading Certificate of Discharge—Other points of practice.

Summary Jurisdiction of Court Under Sec. 17 of Act No. 379.]—*See* cases, *post* under sub-heading, Summary jurisdiction of Court as to chattels, &c.

Act No. 379, Sec. 36—Jurisdiction of Judge of District Courts.]—The assignment of a district limits the general jurisdiction previously given to him. He has therefore jurisdiction only within the limits assigned to him, and a petition presented to a wrong Judge is therefore *coram non judice*. No clerk of another Court can have the jurisdiction specially conferred by Sec. 36. *Regina v. Poole*, 3 V.R. (L.) 181; 3 A.J.R., 79.

Act No. 379, Secs. 9, 38—Jurisdiction of Judge of District Court as to Debtor's Summons.]—*Per Noel, J.* Under Sec. 9 the Judge of a District Court has no jurisdiction to issue a debtor's summons outside the limits of his district. Sec. 9 limits the exercise of the general jurisdiction to the district in which he is appointed. *Bank of Australasia v. Portch*, 2 A.L.T., 148.

2. *Of Chief Commissioners.*

Discretion as to Plan of Distribution—Act No. 17.]—The plan of distribution does not come before the Commissioner under the Act judicially, and he cannot exercise any discretion as to the propriety of its items. *Ex parte Bank of Australasia, in re Rutledge*, 2 W. & W. (I. E. & M.,) 6.

"Insolvsnt Act," 18 Vic., No. 11—Appointment of Commissioner Not Gazetted.]—F. was appointed Commissioner of Insolvent Estates in succession to W., but before his appointment had been notified in the *Gazette* he admitted a proof of debt. *Held* by *Molesworth, J.*, and affirmed on appeal, that according to Act No. 11 F.'s appointment as soon as he was appointed vested in him full power to admit the proof, even though his appointment was not gazetted. *Ex parte Rolfe & Bailey, in re Rutledge*, 2 W. & W. (I.E. & M.,) 16.

Test of Jurisdiction—18 Vic. No. 11, Sec. 2.]—Section 2 of the Act gives exclusive jurisdiction to the Geelong Commissioner in cases within his district. *Held*, that the test of jurisdiction was the residence of the insolvent. On a motion to transfer sequestration from Chief Commissioner's Court to Geelong on ground of convenience, the creditors residing there and the insolvent's property being there, *Held*, that the circumstances would not give jurisdiction to remove the sequestration from the place of actual residence. *In re Calhoun*, 2 W. & W. (I.E. & M.,) 81.

Compare Act No. 379, Sec. 5.

Chief Commissioner — Discretion as to Indulgences—Appeal.]—The Chief Commissioner is not such an executive officer of the Court, in respect of what degree of delay and indulgence should be allowed to persons appearing before him, that his discretion may be reviewed in the same way that the discretion of the Master in Equity perhaps might. The Commissioner has judicial functions, in the exercise of which he is independent to a certain extent; and if he decides erroneously, because too hastily, an appeal is the proper remedy. Where, therefore, the commissioner received proof of a debt under circumstances amounting to a surprise upon the official assignee, admitted the debt as proved, and refused to re-open the matter, a petition by the official assignee, praying that the proof might be expunged, and a re-hearing directed, was dismissed with costs. *In re Bradley*, 1 W.W. & A'B. (I.E. & M.,) 11.

Jurisdiction in Assessment of Assignees' Compensation.]—*Ex parte Bank of Australasia, in re Rutledge, post* under sub-heading Official Assignees, &c.—Rights and Powers.

18 Vic., No. 11—"Insolvency Statute 1865"—"Supreme Court Rules," Cap. 10, Rule 26.]—An estate of an insolvent at *Ballarat* was sequestrated after the passing of the "*Insolvency Statute* 1865," No. 273, and the *Geelong* Commissioner and official assignee were named in the order for sequestration. At the date of 18 Vic., No. 11, giving jurisdiction to the special Commissioner for the "*Geelong* Circuit District," *Ballarat* formed part of that district. Between this date and the passing of the "*Insolvency Statute* 1865," *Ballarat* had been withdrawn from the district by proclamation, though the *Geelong* Commissioner retained his jurisdiction under 18 Vic., No. 11. *Held* that the "*Insolvency Statute* 1865," where it refers to the district "forming and being the *Geelong* Circuit District," must be understood as referring to that district as it existed at the date of that Statute; that the *Geelong* Commissioner had, therefore, no jurisdiction at *Ballarat*; and that the order of sequestration was void, and could not be amended under Rule 26 of "*Supreme Court Rules*," Cap. 10, that rule being confined to cases having parties, and not extending to proceedings *in rem*. *In re Barclay*, 3 W. W. & A'B. (I.E. & M.,) 23.

II. Who may be an Insolvent.

Married Woman Having Separate Property—Act No. 384, Sec. 21.]—*See in re Isaacs, post* sub-heading Sequestration—Evidence.

Uncertificated Insolvsnt.]—*See in re Love, post column* 598.

Lunatic.]—It would appear from *In re Bayldon*, 2 V.L.R. (I. P. & M.,) 85, that a lunatic may be made an insolvent.

III. The Debtor's Summons.

(1) *Who May Obtain and How Obtained.*

Secured Creditor—Act No. 379, Sec. 38.]—The words in Sec. 38 "sufficient to support a petition for adjudication" are understood to apply to the amount of the debt, irrespective of the securities held by the creditor applying for the summons, and it is not necessary for a secured creditor, in order to obtain a debtor's summons, either to realise or value his securities, or to offer to give them up, or to have them valued. *In re Portch*, 7 V.L.R. (I.P. & M.,) 126, 145; 3 A.L.T., 50.

Judge in Chambers—Waiver of Irregularity—No. 379, Sec. 38.]—Under Sec. 38 of the "*Insolvency Statute* 1871," which provides for the

granting by the *Court* of a debtor's summons, a Judge in Chambers has no power to grant such a summons, but if a summons be granted in Chambers it is not a nullity but irregular only, and the irregularity may be waived, and a debtor who had after notice of such an irregularity proceeded with an application to dismiss the summons was held to have waived the irregularity. *In re Fisher*, 2 V.R. (I. E. & M.,) 26; 2 A.J.R., 130.

NOTE.—As to the present jurisdiction of a Judge in Chambers, *see* Act No. 411. (Insolvency Amendment,) Sec. 4.

2. *Form and Requisites.*

"Insolvency Statute 1871," No. 379, Sec. 38—Affidavit of Debt.]—*Per Judge Noel.* The words in Sec. 38 referring to debtor's summons do not mean that a creditor should prove a debt by his own personal evidence. An objection that the affidavit verifying the particulars was made by a manager of the firm of creditors whilst the creditor himself had only made an affidavit as to the truth of the debt overruled. *M'Donald v. Lloyd*, 3 A.J.R., 43.

Service.]—Service of a summons for debt was made at a house alleged to be the last known place of abode of the defendant; but it appeared that the complainant, who served the summons, knew that the defendant was not then living at the house, but was in gaol. *Held*, insufficient service. *Regina v. Foster*, 1 W.W. & A'B. (L.,) 8.

What is Sufficient Service.]—Service of a compared copy of a duplicate debtor's summons is sufficient service upon which to found a rule for sequestration. *Re Lyon*, 4 A.J.R., 13.

Service.]—No precise rule can be laid down for the service of a debtor's summons. If it be effected by service of a copy the person who is served should be afforded a reasonable time to read the copy and demand to see the original. *In re Clarton*, 4 V.L.R. (I. P. & M.,) 84.

Service.]—A debtor's summons was served upon a debtor by delivering a copy and showing the original, the person serving keeping the original summons in his possession, and not lodging it according to Insolvency Rules, Rule 14. *Held* that this was no answer to the order *nisi* for sequestration for not paying, &c., and that such service was good. *In re Crisp*, 5 V.L.R. (I. P. & M.,) 1.

Act No. 379, Secs. 37, Sub-sec. 6, 47—Evidence of Service of Debtor's Summons.]—Upon an order *nisi* for sequestration based upon neglecting to pay a debtor's summons, the only evidence of service of the summons was an order of a District Court Judge refusing an application by the debtor to dismiss the summons, and the debtor's affidavit filed and used on the occasion. *Held* that this was not sufficient evidence of service within the Act. *In re Graham*, 4 A.L.T., 168.

Remedy in Respect of Grievance in Connection With Service.]—Where a person is aggrieved with a decision of the Judge of the Court of Insolvency as to the service of a copy of a debtor's summons being sufficient, his remedy is by appeal and not prohibition. *Ex parte M. J. Levy*, 1 V.L.R. (L.,) 271.

(3) *Proceedings Upon.*

Staying Proceedings—When Security Required—"Insolvency Statute, 1871," Sec. 38.]—A motion was made to dismiss a debtor's summons on the ground that no debt was owing, because the alleged debtor was a partner in Mauritius of a firm, which had become insolvent, of which the alleged creditor was aware, and had received a dividend on the estate. The Court (*Noel, J.*,) held that the question was one which should be sent to the Supreme Court for trial, and directed proceedings on the summons to be stayed under Sec. 38 of the *"Insolvency Statute* 1871," on the debtor giving security, holding that, as the probability of the debtor's succeeding did not seem so great as that of the creditors' succeeding, it was a proper case for security. *De Beer v. Desmazures*, 1 A.L.T., 120.

Action Pending—How Far a Bar to Proceedings.]—*Per Noel, J.*—An action pending between the insolvent as plaintiff and the summoning creditor is no ground for setting aside a debtor's summons. There is no irregularity in issuing a summons to an alleged debtor whose defence would not avail to stay proceedings or to lead to a dismissal. *Bank of Australasia v. Portch*, 2 A.L.T., 148.

Time Within Which Application to Dismiss Should be Made.]—*Per Noel, J.*—The time within which a debtor may avail himself of the provision of Sec. 38 of the *"Insolvency Statute* 1871," enabling him to apply to the Court to dismiss a debtor's summons, is fourteen days from the service thereof. *Re Counihan*, 4 A.L.T., 83.

Grounds for Setting Aside Summons.]—W., a solicitor, had taken out a debtor's summons against F. for money owing on a judgment for costs. F. moved to set aside the summons on the ground that during the progress of the suit in which the costs were incurred moneys had come to W. with which he neglected to credit F. *Held* that the Court could not go behind the judgment, and application refused. *Woolcott v. Farrell*, 3 A.J.R., 63.

Motion to Set Aside.]—A motion to set aside a debtor's summons will not be allowed where the only questions are as to the sufficiency of the facts upon which it was issued, and as to service being or not being effected upon the debtor. *Re Lyon*, 4 A.J.R., 13.

No objection can be taken that the materials on which the Judge acted were insufficient. *Ibid.*

Grounds for Setting Aside.]—It is a matter entirely for the discretion of the Judge of the Insolvent Court who granted the summons to say whether efforts had been made to obtain payment of the debt. Having done that and issued the summons the Judge is so far *functus*

officii, and as the summons itself is a preliminary to further inquiries, the absence of reasonable efforts is not a ground for setting it aside. *Ibid.*

Followed *in re Clarton*, 5 V.L.R. (I.P. & M.,) 47.

Application to Dismiss—Dismissal of Application—Jurisdiction.]—On an application to dismiss a debtor's summons, an order was made by the Insolvent Court directing the debtor to give security; and, if such security were given, directing a stay of proceedings on the summons; but no provision was made in the event of no security being given, nor were further directions or costs reserved. No security was given within the time limited, and the creditor, on notice to the debtor, obtained an order dismissing the application to dismiss. On appeal by the debtor, *Held* that, though it would have been well if some provision had been made for the event of no security being given, and if further directions or costs had been reserved, yet the Court had jurisdiction to make the order for dismissal, and appeal dismissed. *In re Fisher*, 2 V.R. (I.E. & M.,) 26; 2 A.J.R., 130.

Jurisdiction of District Court Judge.]—A District Court Judge has no jurisdiction to issue a debtor's summons out of his own district. *Bank of Australasia v. Portch. See ante column* 579.

No Original Summons Lodged in Insolvent Court.]—A debtor's summons was set aside by a Judge of an Insolvent Court, on an application of the debtor, made more than fourteen days after the summons was procured, on the ground that no original summons had been lodged in the Court of Insolvency according to the rules. On appeal, *Held* that it was rightly dismissed. *Semble*, that the summons was voidable only, not void. *In re Lawler*, 4 V.L.R. (I.P. & M.,) 8.

S.P., *see In re Crisp*, 5 V.L.R. (I.P. & M.,) 1.

What May be Considered on Hearing of Debtor's Summons.] — The only inquiry open is the existence of the debt; whether the sufficiency of the debt is an act of insolvency or not is to be heard at the hearing of the order *nisi*. *In re M'Donald*, 4 A.J.R., 184; 5 A.J.R., 42.

(4) *Act of Insolvency on Failure to Pay Secure or Compound for Debt.*

Act No. 379, Secs. 5, 37, Sub-sec. 6—"Insolvency Rules," 157, 158—Computation of Time—Onus of Proof.]—Rule 158 does not apply to the computation of time prescribed in Sec. 37, Sub-sec. 6, and therefore where an order *nisi* or sequestration was obtained more than fourteen days after the service of summons, but less than fourteen days, excluding two Sundays and three holidays, which occurred in the interval, the order *nisi* was made absolute. The *onus* of proving payment, security or composition for the debt lies on the insolvent; the petitioner has not to prove a negative. *In re Crisp*, 5 V.L.R. (I.P. & M.,) 1.

And *see in re Rangan, post column* 586.

As to Deed of Assignment in Favour of Creditors Being a Defence for not Satisfying Debt on a Debtor's Summons, under Sec. 115 of Act No. 273.]—*In re M'Donald*, 5 A.J.R., 45, *see post* sub-heading Composition Deeds.

IV. The Petitioning Creditor and His Debt.

(1) *Who May Petition.*

Corporation Petitioning—Affidavit of Truth of Debt—"Insolvency Statute 1865," Secs. 14, 15, and 16.] — An incorporated banking company petitioning for sequestration of the estate of a debtor presented an affidavit made by the assistant manager of the bank of the truth of their debt. *Held, per Molesworth, J.*, that an incorporated company being unable literally to comply with Secs. 14, 15, and 16 of the "*Insolvency Statute* 1865," which require an affidavit by the petitioning creditor of the truth of his debt, could not be a petitioning creditor for compulsory sequestration, and that there is nothing in the Act otherwise showing an intention that corporations should be petitioning creditors. *Held*, on appeal, that the sections of the Act in this respect were directory only; that the Judge might exercise his discretion as to whether he should accept the affidavit or not, and that having exercised his discretion the Full Court would not disturb such exercise. *In re Lecky*, 3 W. W. & A'B. (I.E. & M.,) 42.

Note.—Sec. 22 of Act No. 379, authorises the acts of an agent of any creditor whether corporate or not.

Who May Present Petition—Married Woman.]—*Quære* whether a married woman, who is not alleged on the face of the proceedings to have any separate property, can petition for the sequestration of an estate. *In re Ritchie*, 8 V.L.R. (I.P. & M.,) 1; 3 A.L.T., 88.

Who May Present Petition—Secured Creditor.]—A secured creditor, who denies that he is secured, cannot petition for sequestration. Before petitioning, a secured creditor must give up his security at the price he puts upon it. *Re M'Namara*, 10 V.L.R. (I.P. & M.,) 84; 6 A.L.T., 112.

And *see* cases *post* under Act of Insolvency—Who May Take Advantage of.

(2) *The Debt—Its Nature and Amount.*

Act No. 379, Sec. 37.]—A debt due at the time (*i.e.*, of the act of insolvency) might be assigned afterwards to petitioning creditors, so as to form a good petitioning creditor's debt. *In re H. S. Smith*, 3 A.J.R., 18.

As to Debt on Reviving Order of Sequestration.]—*See Ex parte Whits*, and *in re Butchart, post* under Sequestration—Reviving.

Debt of Firm.]—A debt of a firm (*i.e.*, an acceptance given by the firm to a creditor) is a good petitioning creditor's debt as against the separate estate of a partner. *In re Gardiner*, 4 A.J.R., 6.

Partnership as to Goods to be Remitted by Insolvent Abroad to Other Partner.]—*Adolphe O.* was a partner in a firm, who was resident in Paris, and sent goods to Melbourne to be sold by the the other member, *Adolphus O.*, resident in Melbourne. Adolphus had purchased goods in Melbourne which were not paid for, and this debt was the debt on which the creditors petitioned. *Held* by *Molesworth, J.*, that by the deed of partnership *Adolphus* was limited only to selling goods purchased by *Adolphe*, and that he had no power to purchase the goods, and sequestration refused. *Held*, on appeal, that there was evidence of *Adolphe* having ratified *Adolphus'* acts, as shewn by H., the attorney sent out by *Adolphe* to wind up the business, accepting these goods, and that there was a good creditor's debt. *In re Adolphe Oppenheimer*, 3 A.J.R., 114, 131.

Partnership — Absent Partner Complaining of Dealings Outside Scope of Authority, but Accepting Accounts Based on Them.] —Where *Adolphe* had complained of the dealings of *Adolphus* with respect to dealings in goods purchased by *Adolphus* in Victoria, but accepted what was done so far as to allow the accounts to be settled on the purchases of goods here, and treated the stock purchased as partnership stock, taking the profits of any transaction, *Held* that a debt incurred in such dealings was as against the firm a good petitioning creditor's debt. *In re Oppenheimer and Co.*, 3 A.J.R., 128.

Interest on — Judgment Debt — Act No. 379, Sec. 37.]—Interest may be included in the debt, and where a Supreme Court judgment debt was at one time less than £50, but the accumulations of interest brought it above that value, it was held to be a good petitioning creditor's debt. *In re Wilson*, 3 V.L.R. (I.P. & M.,) 95.

County Court Judgmont]—If a judgment in the County Court, although originally not for debt but only for damages, has been sued upon in the Supreme Court and execution issued, it is a good debt within Sec. 37; but a proceeding to obtain execution on a judgment recovered in the County Court on a proceeding for trespass, such judgment having been transferred to the Supreme Court under Sec. 93 of Act No. 345, is not a good debt within Sec. 37. *In re Kellacky, ibid.*, p. 96.

Loan to Partner.]—Money lent to a partner under the *"Partnership Act,"* No. 179, does not constitute a good petitioning creditor's debt. *In re Butchart*, 2 W. W. & A'B. (I.E. & M.,) 8.

Payment by Sureties.]—A., with two others, became sureties to an insolvent in a joint and several bond, and before the bond was enforced received as security a second mortgage over insolvent's real estate already over mortgaged. A. was sued upon the bond, and paid £200, and valued the security at nothing, and offered to give it up. *Held* that he was entitled so to value it, and that payment made by him constituted a good petitioning creditor's debt within Sec. 37. *In re Inglis*, 3 V.L.R. (I.P. & M.,) 100.

Guarantee to Pay a Bill of Costs—No Signed Bill —"Common Law Procedure Statute 1865," Sec. 387.]—A guarantee to pay a third person's bill of costs for over £50 is a good petitioning creditor's debt, although no signed bill has been delivered in accordance with Sec. 387 of the "*Common Law Procedure Statute* 1865." *In re Lawler*, 4 V.L.R. (I.P. & M.,) 8.

Act No. 379, Secs. 37, 75, 112—Judgment Debt—Creditor Recovering Judgment]—A creditor petitioned in respect of a judgment debt recovered in an action at law. *Held*, reversing *Molesworth, J.*, that a judgment creditor is a creditor within Sec. 37, no matter what the cause of action may be, the instant he obtains a judgment, and he is a creditor on a judgment debt then due and owing to him, which would constitute a sufficient petitioning creditor's debt; that it is immaterial whether such judgment is recovered on contract or in tort; that the creditor recovering the judgment must be the same person as the person instituting the proceedings upon which it is recovered. *In re Allen*, 5 V.L.R. (I.P. & M.,) 25.

Assignment of Debt—Non-joinder of Cestuisque trust.]—Upon an order *nisi* for sequestration, the act of insolvency alleged was failing to satisfy a judgment obtained by a petitioning creditor. It appeared that the petitioning creditor had assigned the judgment to a bank at a valuation to be agreed upon. *Held*, that the petitioning creditor had a beneficial interest, being entitled to payment of the valuation sufficient to constitute the judgment a good petitioning creditor's debt, and that it was not necessary to join the bank as beneficial owner with the creditor as trustee for it. *In re Dwyer*, 5 V.L.R. (I.P. & M.,) 98; 1 A.L.T., 92.

Endorsee of Bill of Exchange Obtaining Judgment on it.]—A creditor who is the holder and endorsee of an overdue bill of exchange at the time of a meeting of creditors at which an act of insolvency is committed, and who subsequently signs judgment in an action on the bill may present a petition. *In re John Smith*, 7 V.L.R. (I.P. & M.,) 4; 2 A.L.T., 116.

Act No. 379, Sec. 37, Sub-sec. 6—Defendant's Costs—Petitioning Creditor's Debt.]—An insolvent had brought an action in the Supreme Court against the petitioning creditor in which a verdict was returned for the defendant. *Held*, that the defendant's costs constituted a good petitioning creditor's debt, and the failure to satisfy the debtor's summons founded on that debt was an act of insolvency within Sec. 37, Sub-sec. 6. *In re Rangan*, 7 V.L.R. (I.P. & M.,) 124.

V. The Act of Insolvency.

(1) *What constitutes.*

(a) *Conveyance of Property for Benefit of Creditors.*

Act No. 379, Sec. 37, Sub-sec. 1—Bill of Sale which Debtor was Fraudulently Induced to Execute.] —B. requested L. to advance him money wherewith to pay debts that he owed, and

agreed to give him a bill of sale over his stock-in-trade. L. consulted his solicitor, who advised him not to make the advance, owing to rumours of B.'s insolvency. L. then consulted a creditor of B., and in consequence of what passed between them, L. induced B. to execute the bill of sale, but did not advance any money, and had no intention of doing so. The creditor then petitioned the Court to sequestrate B.'s estate upon the ground that he had assigned all his property to L. *Held*, that B. having been fraudulently induced to sign the bill of sale, that it was a nullity, and the order for sequestration was discharged, although B. had intended to commit an act of insolvency. *Re Bankier*, 4 A.J.R., 90.

Act No. 379, Sec. 37, Sub-sec. 1.]—It is necessary, in order to constitute an assignment by deed of an insolvent's property upon trust for creditors an act of insolvency, that it should be for the benefit of the creditors generally, and not merely for benefit of scheduled creditors. *In re Derham*, 1 V.L.R. (I.P. & M.,) 2.

Sec. 37, Sub-secs. 1 & 10.]—And even where the intention was to include all creditors, but some were alleged to have been omitted from the schedule by mistake, *held* not to constitute an act of insolvency under Sec. 37, Sub-sec. 1, though it might under Sub-sec. 10. *In re Haslam*, 3 V.L.R. (I.P. & M.,) 10.

And *see Port v. London Chartered Bank*, 1 V.R. (L.,) 162, *post* under sub-heading *Composition Deeds*, as to when a deed is for the benefit of creditors.

Act No. 379, Sec. 37, Sub-secs. 1, 2, and 10, Sec. 71—Assignment for Benefit of Scheduled Creditors and Those of Whom Trustes Approved.] — An assignment in trust for scheduled creditors, and for those whose claims the trustees approved of is not an act of insolvency under Sec. 37, Sub-sec. 1. Such a deed is unfair to creditors, but is not *prima facie* an act of insolvency under the combined effects of Sec. 37, Sub-Sec. 2 and 10, and Sec. 71. To constitute it such some evidence in addition to the mere contents of the deed is necessary; the insolvent is not to be held as having the view of doing the necessary results of his acts, for it is not necessary that the trustees' discretion should defeat or prefer any creditor. *In re Wiedeman*, 5 V.L.R. (I. P. & M.,) 32.

Deed of Assignment for the Benefit of Crediters Generally—"Insolvency Statute 1871," Ssc. 37, Sub-sec. 1.] — A deed of assignment which would enable the trustees to prefer some creditors who might thus absorb all the assets is not a deed for the benefit of creditors generally within the meaning of Sub-sec. 1 of Sec. 37 of the "*Insolvency Statute* 1871," and signing such a deed does not constitute an act of insolvency. *In re Ritchie*, 8 V.L.R. (I. P. & M.,) 1; 3 A.L.T., 88.

When Creditor Estopped from Taking Advantage of Act of Insolvency under Sub-sec. 1 by Assenting to Deed of Assignment.]—*See in re Vail, and in re Wiedeman, post column* 596.

Act No. 379, Sec. 37, Sub.-sec. 1—Partners—Deed of Assignment—Sec. 41.]—*Per Full Court*, affirming *Molesworth, J.* A petition will lie for the sequestration of the estate of joint debtors whether in partnership or not, under Sec. 37, for an act of insolvency under that section as well as under Sec. 41. Sec. 41 provides for proceedings against single members of partnerships for their acts of insolvency, and has a restriction as to those acts whereby creditors may be delayed or defeated. A firm of partners conveyed to trustees all their joint and separate property (separate furniture and clothing being excepted) upon trust to pay "so far as trustees shall think fit," all rent, wages, and preferential claims, and then to pay the debts of creditors whose names appeared in the schedule, with a proviso that the trustees might upon satisfactory evidence admit as creditors persons having reasonable claims whose names were not in the schedule upon taking the advice thereon of a meeting of creditors. *Held*, and affirmed on appeal, that though the deed was an assignment of all the property it was not for the benefit of creditors generally, and therefore did not fall within Sec. 37, Sub-sec. 1. *In re Thomas and Cowie*, 9 V.L.R. (I. P. & M.,) 2; 5 A.L.T., 95.

(*b*) *Conveyance to Defeat or Delay Crediters.*

What Is—No. 273, Sec. 13—Construction.]—The removal of property secretly by a debtor, strongly pressed by his principal creditor, to the houses of friends, addressed to other creditors, is not a "delivery" within the meaning of Sec. 13 of the "*Insolvency Statute* 1865," No. 273, which will constitute an act of insolvency. The other words ("alienation, transfer," &c.) with which "delivery" is classed, regard transactions purporting to pass property, and the word "delivery" should be similarly restricted in its meaning. *In re Johnston*, 5 W.W. & A'B. (I.E. & M.,) 10.

[NOTE.—The corresponding Sec. of Act No. 379 is Sec. 37, Sub-sec. 2.]

See in re Wiedeman, ante column 587, and *in re Rickards, post column* 589.

Assignment of Part of Propsrty—Intent to Defeat Creditors.]—*Hasker v. Moorhead, see post column* 596.

A bill of sale given by a debtor *bona fide* over all his stock, in order to obtain assistance in difficulty to secure a past debt, and for further advances, is not *per se* an act of insolvency under Sec. 37, Sub-sec. 2, although such an assignment to secure a past debt only would be an act of insolvency. *Jacomb v. Ross*, 4 A.J.R., 97.

(*c*) *Departing from Victoria or Absenting Himself.*

One of a Firm of Partnsrs.]—Where C.M., one of a firm of partners, consisting of C. and J.M., departed from his dwelling-house and evaded service, &c., the Court, upon an order *nisi* for sequestration of the estate of the firm,

sequestrated the firm's estate upon the one partner's acts of insolvency. *In re Martin*, 4 W. W. & A'B. (I.E., & M.,) 4.

Act No. 5 Vic., No. 17, Sec. 5—Person Out of Jurisdiction.]—A person out of the colony, who remains out of the colony for the purpose of defeating his creditors, commits an act of insolvency within the meaning of Sec. 5 of 5 Vic., No. 17. *In re Fox*, 2 W. & W. (I.E. & M.,) 35. *In re Smith*, 1 W.W. & A'B. (I.E. & M.,) 1.

[Sec. 37. Sub-sec. 3, of Act No. 379 follows Sec. 5 of 5 Vic., No. 17.]

Where a foreign member of a partnership firm, who had purchased the assets and liabilities of the partnership, had visited Victoria and left the colony for South Australia in a surreptitious manner, under fear of persons appointed to watch him by creditors, through fear of his absconding, *Held* to be an act of insolvency. *In re Oppenheimer and Company*, 3 A.J.R., 128.

Single Creditor—Act No. 379, Sec. 37, Sub-secs. 2, 3—"Interpretation Act," No. 22.]—Under the Act No. 22, the word "creditors" in No. 379, Sec. 37, Sub-secs. 2, 3, includes a single creditor; where, therefore, an insolvent leaves Victoria with the intent to hinder, &c., a single creditor, it is an act of insolvency. *In re Rickards*, 5 A.J.R., 103.

Departure More Than Twelve Months Before Order Nisi—"Insolvency Statute 1871," Sec. 37, Sub-sec. 3.]—A debtor left Victoria more than twelve months before the order *nisi*, and continued to remain out of Victoria, with intent to defeat and delay his creditors. *Held* that this constituted an act of insolvency under Sec. 37, Sub-sec. 3, of the "*Insolvency Statute* 1871." *In re Fyson*, 6 V.L.R., (I.P. & M.,) 19; 1 A.L.T., 124.

Act No. 379, Sec. 37, Sub-sec. 3.]—Where an insolvent came to Melbourne to see his creditors and try to arrange for a composition, but could not be afterwards found, *Held* that a man is not bound to let his attorney know where he is to be found, and that what he had done was not an act of insolvency. *In re Rocke*, 1 A.L.T., 112.

(d) Filing Declaration of Inability to Pay Debts.

Act No. 379, Sec. 37, Sub-sec. 4—Petition for Liquidation.]—A petition for liquidation followed by a confirmation passed by a statutory majority of creditors, that the affairs of the embarrassed person should be wound up by liquidation and not by insolvency, is not an act of insolvency within Sec. 37, Sub-sec. 4. *In re H. S. Smith*, 3 A.J.R., 17, 18, 19.

(e) Execution and Not Satisfying.

5 Vic., No. 17, Sec. 5.]—A judgment debtor in order to avoid committing an act of insolvency within the meaning of 5 Vic., No. 17, Sec. 5, must when called upon to satisfy the debt or point out property to satisfy it, either make such satisfaction or point out property within the circuit district of the Sheriff to whom the writ of execution is addressed. *Ex parte Staughton*, 1 W. W. & A'B. (I. E. & M.,) 15.

[The corresponding Sec. of Act No. 379 is Sec. 37, Sub-sec. 8.]

5 Vic., No. 17, Sec. 5—Pointing Out Disposable Property.]—The mere assertion by a judgment debtor required under 5 Vic., No. 17, Sec. 5, to "point out disposable property," that he has property, is not a sufficient pointing out; and the person relying upon such an assertion, must not merely prove that such an assertion was made, but must afford evidence of the truth of the assertion itself. *Ex parte White*, 1 W.W. & A'B. (I.E. & M.,) 24.

[The corresponding Sec. of Act No. 379 is Sec. 37, Sub-sec. 8.]

5 Vic., No. 17, Sec. 5—Claim of Interest in Writ of Fi. Fa.—Not Pointing Out Goods to Satisfy.]—Where upon a judgment recovered a *fi. fa.* had been issued in which a blank was left for interest from date of writ until execution, and the writ was returned endorsed *nulla bona*, and the writ and endorsement were subsequently set aside on the ground that there was no power to ask for interest, *Held*, that sheriff had demanded more than he was entitled to, and the request to point out goods to satisfy the judgment was invalid. Order *nisi* for sequestration discharged. *In re Morgan*, 2 W.W. & A'B. (I.E. & M.,) 2.

[The corresponding Sec. of No. 379 is Sec. 37, Sub-sec. 8.]

Not Pointing Out Property in Satisfaction of Debt—Joint Debt—28 Vic. No. 273, Sec. 13.]—Where execution is issued against several persons for a joint debt, and one of them is called upon to "point out sufficient disposable property" in satisfaction of the debt, on the construction of the "*Insolvency Statute* 1865," the property pointed out should be limited to the property of the person who is called upon to point out such "disposable property," and is not to be extended to that of the other joint debtors. *In re Drysdale*, 3 W.W. & A'B. (I.E. & M.,) 30.

[The corresponding Sec. of No. 379 is Sec. 37, Sub-sec. 8.]

Not Pointing Out Disposable Property—What is a Pointing Out.]—D. was called upon to point out property in satisfaction of a joint execution against himself and his two partners. D. replied that he had no property except a mining lease and certain mining shares, of which he handed a list to the officer. The sheriff made a return of *nulla bona*, and this return was held good since the Act No. 273 limits the property to that of the person upon whom the demand is made; and *semble*, that if it were shown on order *nisi* for sequestration that the mining shares and lease, if put up for sale by the sheriff with such facilities as D. could

have given to make a title to the purchaser, would have satisfied the execution, the pointing out would be sufficient. *Ibid.*

Failure to Point out Property—Who May Execute the Writ—Special Bailiff—15 Vic., No. 10.]—Where the act of insolvency relied on was a failure to point out property to satisfy an execution there was no order for the appointment of a special bailiff who executed the writ of *fi. fa.* The writ was directed to the Sheriff of B., who by a warrant under his hand directed to "I., my bailiff, and P., *pro hac vice*," authorising either of them to execute the writ. In the return to the writ P., who had attempted to execute it, described himself as a special bailiff. *Held* that the clause of 15 Vic., No. 10, "*Supreme Court Act*," for the appointment of special bailiffs only refers to cases where writs are specially directed to them, and not to the Sheriff, and that the Sheriff may appoint any one to execute the writs addressed to him. *In re Knowles*, 1 A.J.R., 105.

Tramway—Land Held under "Land Act 1869," for Building Tramways Upon.]—C. being requested to point out sufficient disposable property to satisfy an execution pointed out a tramway and some land held under the "*Land Act* 1869," under lease for the purpose of building a tramway thereon. The tramway could not be transferred without the consent of C. and of the Board of Land and Works, and C. had commenced proceedings in the Supreme Court to recover it, after the sale under the County Court execution, C. alleging that he had not consented to the sale. *Held* that whether the tramway could or could not originally be made available to satisfy an execution, C. had by his own act in taking proceedings for its recovery placed it in such a position that it could not be immediately available for that purpose, and order for sequestration made absolute against C. *In re Clark*, 1 A.J.R., 164.

Failing to Satisfy Execution—Deed of Assignment—No. 273, Part 13, Sec. 13—No. 379, Sec. 2.]—M. executed a deed of assignment under Part 13 of the "*Insolvency Statute* 1865," No. 273, and after the coming into operation of the "*Insolvency Statute* 1871," No. 379, failed to satisfy a judgment against him, giving to the officer who was charged with its execution, as his reason for not satisfying it, that he had executed the deed in question. On an order *nisi* for compulsory sequestration for not satisfying the judgment, *Held, per Molesworth, J.*, that the deed afforded no answer, and rule made absolute. On appeal, *Held* that the protection afforded by Sec. 13 of No. 273 to a debtor executing such a deed was continued by Sec. 2 of No. 379, and that M. was therefore protected, and order discharged. *In re McDonald*, 2 V.R. (I.E. & M.,) 12; 2 A.J.R., 85, 124.

Deed of Assignment Under No. 273, Sec. 115.]—A deed of assignment under No. 273, Sec. 115, is a defence to proceedings under Act No. 379 to sequestrate the estate of a debtor for not satisfying a judgment obtained against him. *In re McDonald*, 4 A.J.R., 184. Affirmed on appeal, 5 A.J.R., 42.

Act No. 379, Sec. 37, Sub-sec. 8—Demand May be Made wherever Debtor May be Found—Waiver.]—B., an attorney, had recovered a judgment for costs against W. Execution was issued, but no demand was made, the parties understanding that a demand could not be made elsewhere than at insolvent's house. Afterwards a conversation as to a negotiation took place between the sheriff's officer and the insolvent. *Held* that a demand may be made wherever debtor might be found; that there was no demand made so as to constitute the refusal to pay an act of insolvency, such demand having been subsequently waived. *In re Whitesides*, 3 A.J.R., 115.

Not Satisfying Judgment—Act No. 379, Sec. 37, Sub-sec. 8—Demand.]—Where, on a demand by sheriff's officer, the insolvent said that the transfer of some property would be completed in a day or two, and she would point out that, and the officer left her without having made a definitive demand, *i.e.*, he had not made a direct intimation that insolvency proceedings would be the consequence of not immediately satisfying the judgment. Order *nisi* for sequestration discharged. *In re Frances Hodgson*, 5 A.J.R., 49.

Act No. 379, Sec. 37, Sub-sec. 8—Demand by Sheriff's Officer—Reasonable Time for Satisfying Judgment.]—When a sheriff's officer meets a debtor in the street and demands satisfaction, and receives an answer implying that the debtor has no means, he may make his return immediately; but, if the debtor state that he has means and will pay, the officer is not justified in making a return of *nulla bona* without affording him a reasonable time for doing so. A debtor was met in the street by the officer, who demanded payment at 10 A.M., and she requested him to meet her at noon, but he declined to go. She went to the sheriff's officer, accompanied by a person who it was alleged had the money, but no tender was made. The return of *nulla bona* was made 24 hours after the demand. *Held*, that the duty of satisfying the judgment within a reasonable time was cast upon her, and that she had a reasonable time in which to satisfy it, affirming *Molesworth, J.* Order made absolute for sequestration. *In re Hodgson*, 5 A.J.R., 80, 133.

Married Woman—Act No. 384, Sec. 21.]—A married woman, having separate property, was indebted on a judgment recovered by a creditor, and a writ of *fi. fa.* was issued against the real and personal property of husband and wife, "or either of them," which was returned wholly unsatisfied. Order absolute for sequestration. *In re Clarissa Isaacs*, 1 V.L.R. (I.P. & M.,) 1.

Act No. 379, Sec. 37, Sub-sec. 8—Not Satisfying Judgment—No Evidence of Demand.]—On a petition for sequestration for not satisfying a judgment it did not appear from the evidence that there had been a distinct demand for payment by the Sheriff's officer, which had been refused by the debtor. *Held* that the order *nisi* should be discharged with costs. *In re Willison*, 4 V.L.R. (I. P. & M.,) 67.

Act No. 379, Sec. 37, Sub-sec. 8—Demand.]—Where a sheriff's officer made a demand, and then allowed time upon an indefinite promise to pay, and did not renew the demand, *Held* that there was no demand so as to constitute it an act of insolvency. *In re Fenner*, 7 V.L.R. (I.P. & M.,) 13; 2 A.L.T., 145.

"Insolvency Statute 1871," Sec. 37, Sub-sec. 8.]—The non-satisfaction of an execution on a judgment for the defendant's costs of a nonsuit is not an act of insolvency under Sec. 37, Sub-sec. 8, of the "*Insolvency Statute* 1871." A person entitled to the costs of a nonsuit is in a different position from a trade creditor, and has not the same remedies. *In re Hollowood*, 6 V.L.R. (I. P. & M.,) 78; 2 A.L.T., 56.

"Insolvency Statute 1871," Sec. 37, Sub-sec. 8—Amount of Judgment.]—It is not necessary in order to constitute an act of insolvency under Sec. 37, Sub-sec. 8, of the "*Insolvency Statute* 1871," that the judgment which the debtor has not satisfied should be for £50 or over that amount. *In re Drouhet*, 10 V.L.R. (I. P. & M.,) 4; 5 A.L.T., 203.

Act No. 379, Sec. 37, Sub-sec. 8—Execution in Supreme Court on County Court Judgment.]—A failure to satisfy an execution issued by the Supreme Court on a County Court judgment is an act of insolvency within Sub-sec. 8 of Sec. 37. *In re M'Namara*, 10 V.L.R., (I.P. & M.,) 84.

Where a judgment has been signed on a promissory note, and the failure to satisfy the judgment is relied upon as an act of insolvency, it is too late at the hearing of the order *nisi* to object to the judgment as having been procured by fraud, or that there was no consideration given for the note. *In re Lee*, 7 V.L.R. (I.P. & M.,) 117.

Status of Judgment Creditor.]—The creditor whose judgment is returned unsatisfied must be identical with the person who instituted the proceedings. *In re Allen*, 5 V.L.R. (I. P. & M.,) 25, *see* S.C., *ante column* 586.

Return to Writ.]—The return to the writ need not specify that the insolvent was called upon to satisfy the writ, under Sec. 37, Sub-sec. 8; the officer's affidavit shows that. *In re M'Conville*, 7 V.L.R. (I.P. & M.,) 17.

Return to Writ.]—*See in re White, in re Cahill, post column* 602.

Return to Writ, Sec. 37, Sub-sec. 8.]—To a writ of *fi. fa.* the return was that the defendant had no personal property in the Bailiwick that could be levied upon, but that the defendant had an interest in certain real estate in the Bailiwick, which the Sheriff accordingly advertised for sale, but was unable to sell because of a rule of Court to return the writ before the day advertised for the sale. *Held* that this was not a return of the writ unsatisfied in whole or in part, and would not support an act of insolvency under the "*Insolvency Statute* 1871," Sec. 37, Sub-sec. 8. *In re Macpherson*, 10 V.L.R. (I.P. & M.,) 1; 5 A.L.T., 156.

As to What the Affidavit or Petition Must Specify.]—*See in re Gibb, in re Chambers, in re Fisher, in re Cahill, in re Allen, in re Murray, in re White, in re Synnot, in re Symons*, and *in re Wolter, post columns* 600, 601, 602.

Act No. 379, Secs. 37 (Sub-secs. 2, 3, 8,) 41—Partnership.]—A firm of M. & Co. consisted of two members, M. resident in Victoria, M'C. resident in London. A judgment was recovered against both partners, and the sheriff called upon M. to satisfy it, which he failed to do. *Held*, that under Sec. 41 an intent to defeat and delay creditors is essential, and that a mere omission to satisfy a judgment under Sub-sec. 8 is not sufficient ground, unless it was done to defeat and defraud creditors, for an order under Sec. 41. *In re Martin*, 5 V.L.R. (I.P. & M.,) 13.

(f) Failure to Satisfy Debtor's Summons.

See under "Debtor's Summons," *ante column* 583.

(g) Consent and Failure to Sequestrate Voluntarily.

Refusal to Sequestrate Estate — "Insolvency Statute 1871," Sec. 37, Sub-sec. 9.]—All creditors, secured as well as unsecured, have a right to notice of, and to be present and take part in the proceedings at, a meeting called for the purpose of considering what shall be done with the estate of a debtor in insolvent circumstances. But though the exclusion of a secured creditor might render the meeting informal, if such exclusion be effected by an agent of the debtor, the debtor will not be allowed to take advantage of this objection to prejudice the right of other creditors to have the estate sequestrated for an act of insolvency, in refusing, at the request of the meeting, to voluntarily sequestrate his estate. *In re Clemes and Leach*, 2 V.L.R. (I.P. & M.,) 37.

Act No. 379, Sec. 37, Sub-sec. 9.]—A number of creditors met at the debtor's house, asked him to furnish a list of his creditors and their debts, and he did so, mentioning those present and one other not present. The meeting then proceeded with the appointment of a chairman, and passed resolutions, &c., indicating to the debtor the drift of the proceedings for the purposes of the Act, the debtor not objecting. *Held* to be a good meeting within Sub-sec. 9 of Sec. 37. Order absolute. *In re Inglis*, 3 V.L.R. (I.P. & M.,) 100.

Meeting of Creditors—Proxies—Act No. 379, Sec. 37, Sub-sec. 9]—The majority of creditors mentioned in Sub-sec. 9 is a majority in number and not in value. A majority of creditors in number passed a resolution that insolvent should put his estate in the Insolvent Court immediately, and the debtor refused to sequestrate. After such resolution and refusal some

of the creditors went away, and a majority of the remainder preferred an assignment, which was carried into effect. *Held* that the resolution could not be neutralised by the change of opinion. *Semble*, proxies cannot be used at such a meeting, but if they can they must be properly proved. *In re Southey*, 5 V.L.R. (I.P. & M.,) 4.

Act No. 379, Sec. 37, Sub-sec. 9.]—In order to maintain an act of insolvency under Sub-sec. 9, it must be shown clearly that before the meeting of creditors broke up there was a definite demand for the debtor to sequestrate, and a definite refusal. *In re Webster*, 5 V.L.R. (I. P. & M.,) 16.

Act No. 379, Sec. 37, Sub-sec. 9—Meeting of Creditors.]—The act of insolvency relied on was that at a meeting of creditors the debtor consented to present a petition for the sequestration of his estate, and that within 48 hours after such consent he did not present such petition. There was no chairman elected, and one creditor asked if the debtor would consent. *Held*, that all that was required was that creditors must understand that a schedule is to be filed, and that debtor must leave the meeting with the idea that he is bound to file it; that there was no need for a chairman or a resolution, and that the meeting might assent silently to a question asked by a creditor. *In re John Smith*, 7 V.L.R. (I.P. & M.,) 4; 2 A.L.T., 116.

(*h*) *Fraudulent Preference.*

Giving a Fraudulent Warrant of Attorney—What Is—No. 273, Sec. 13.]—Executing a warrant of attorney in favour of a creditor for the purpose of preventing another creditor from proceeding in an action against the insolvent, is executing a fraudulent warrant of attorney, whereby the insolvent's estate had been or might be affected within the meaning of Sec. 13 of the "*Insolvency Statute* 1865," and executing such a warrant is an act of insolvency. *In re Kerr and Gray*, 3 W.W. & A'B. (I.E. & M.,) 34.

[The corresponding Sec. of Act 379 is Sec. 37, Sub-sec. 10.]

Act No. 379, Sec. 37, Sub-sec. 10.]—*See in re Wiedeman, ante column* 587.

Act No. 379, Sec. 37, Sub-sec. 10—Omission of Creditors by Mistake From Schedule to Deed of Creditors.]—*See in re Haslam, ante column* 587.

As to Fraudulent Preferences generally, *see* FRAUDULENT PREFERENCE and CERTIFICATE OF DISCHARGE.

Assignment of Part of Property—Intent—"Insolvency Statute 1871," Sec. 37, Sub-sec. 10.]—An assignment by a man of the whole of his property, or of the whole, with a trifling exception, to one creditor, in satisfaction of, or as security for an antecedent debt, is in itself an act of insolvency, because the necessary consequence of such an assignment is to defeat or delay all the other creditors, and the debtor is deemed to have intended the necessary consequences of his act; and no question is left to the jury whether the assignment were fraudulent within Sec. 37, Sub-sec. 10, of the "*Insolvency Statute* 1871." But where the assignment does not comprise all, it is by no means a necessary consequence that the other creditors must be defeated or delayed, and the intent is not, and cannot be, presumed as a matter of law, but must be proved as a matter of fact. And even where the assignment does comprise all the property, but there is some new advance made, or agreed to be made, and afterwards made, the legal presumption does not arise, and the intent must then be proved as a matter of fact. *Hasker v. Moorhead v. Blackwood v. McMullen*, 2 V.L.R. (L.,) 160.

(2) *Who May Take Advantage of.*

Act No. 379, Secs. 37, 39, 47.]—B. and others trading as partners, attended at a meeting of creditors, and B. seconded a resolution for acceptance of an assignment to trustees for creditors; but they did not execute the deed. B. and others were the petitioning creditors. *Held* that, as the Act under Secs. 37, 39, and 46 did not expressly exclude creditors who had so assented to a deed of assignment from petitioning, and the policy of the Act being to prefer the administration by insolvency to that by trustees outside of it, the order for sequestration based upon the petition of B. and others must be made absolute. *In re Eastwood*, 5 A.J.R., 61, 62.

Held, overruling *Molesworth, J.*, that where a creditor assents to the execution of an assignment of an insolvent's estate for the benefit of creditors, even though the deed was not signed by any of the creditors, such creditor cannot petition for the sequestration of the insolvent's estate. *In re Vail*, 1 V.L.R. (I.P. & M.,) 5.

Collusion Between Non-signing Petitioning Creditor and Signing Creditor—Petitioning Creditor Present at Meeting but Not Taking Part in Proceedings—Evidence.]—An insolvent's notice of objections to order for sequestration alleged collusion between the petitioning creditor who had not signed a deed of assignment (the act of insolvency,) and other creditors who had signed it. *Quære* whether such disentitles the petitioning creditor from obtaining the order. But where a petitioning creditor was present at a meeting of creditors where it was resolved to assign the estate to trustees, he not signing the deed or assenting to or dissenting from the resolution, *held* that he was not disentitled from taking advantage of the assignment as an act of insolvency. Evidence in support of insolvent's objections is admissible. *In re Wiedeman*, 5 V.L.R. (I. P. & M.,) 32.

The execution by one member of a firm as trustee of a creditor's deed of assignment does not bind the firm as creditors as a relinquishment of the debt, and will not operate as a bar to proceedings by the firm for sequestration of the assignor's estate. *In re Crate*, 3 W.W. & A'B. (I. E. & M.,) 13.

VI. The Sequestration.

(A) *Voluntary Sequestration.*

District in Which a Petition for Voluntary Sequestration is to be Presented—Act No. 379, Sec. 36]—*Regina v. Poole*, 3 V.R. (L.,) 181, *ante column* 579.

Effect of Voluntary Sequestration of Partnership Estate on Separate Estate of Each Partner.]—*See Bates v. Loewe, in re Turnbull, post column* 599.

Official Assignee's Power to Bring an Action of Devastavit Against Executors Who Have Sequestrated the Estate of Their Testator.]—*Hasker v. M'Millan*, 5 V.L.R. (E.,) 217; 1 A.L.T., 45, *post* under sub-heading Trustees, Official Assignees, &c.

And for effect of voluntary sequestration *see post* under Effect of Insolvency.

Voluntary Sequestration of a Firm.]—*In re Yorston and Webster, post column* 599.

(B) *Compulsory Sequestration.*

(1) *When and How Made.*

How Far a Composition a Bar To—Act No. 379, Secs. 129, 151.—C. obtained an order *nisi* for sequestration of M.'s estate, January 31st, returnable February 22nd. On February 8th a meeting of creditors was held, C. not being present, when a resolution was passed to accept a composition, and this was duly confirmed at a meeting held February 19th. *Held*, that Secs. 129 and 151, did not provide for a composition being arranged, "notwithstanding proceedings in Insolvency," and order for sequestration made absolute. *In re Marie*, 3 A.J.R., 6.

The mere convening of a meeting of creditors before the order *nisi* is no bar, and order for sequestration made absolute. *In re Risk*, 3 A.J.R., 115.

In the Absence of the Debtor.]—Where there is no reasonable prospect of the debtor returning within a reasonable time, no postponement will be made of an application to make an order *nisi* for sequestration absolute. *In re Gardiner*, 4 A.J.R., 6.

Fresh Petition for Sequestration.]—A firm of creditors may file a fresh petition for sequestration on the same materials upon which an order *nisi* obtained by one of the partners was discharged. *In re Warmoll*, 4 A.J.R., 32.

Order Nisi—Hearing—Adjournment.]—Applica- for the adjournment of the hearing of orders *nisi* are looked upon with disfavour by the Court. *In re Portue*, 4 V.L.R. (I. P. & M.,) 93.

Of Estate of Uncertificated Insolvent.]—L.'s estate had been sequestrated May, 1868, and his certificate granted April, 1869, but it was never confirmed. *Held*, on petition for a second sequestration, that there was nothing to prevent a second sequestration. Order made absolute for sequestration. *In re Love*, 5 A.J.R., 157.

But *see in re Bryan, post* under sub-heading Setting Aside.

Debtor's Summons Set Aside After Making of Order Nisi.]—A debtor's summons was served on L. for the payment of £202 2s. 1d, and was neither paid nor compounded for, and no application was made to dismiss the same. Twenty days afterwards an order *nisi* was made thereon, and a time appointed for its being made absolute. Before that time, however, the summons was set aside. On the order *nisi* coming on for hearing, *Held* that there were proper materials for making the order *nisi* at its date, and that it should be made absolute, notwithstanding that the debtor's summons had been set aside. *In re Lawler*, 4 V.L.R. (I.P. & M.,) 8.

Proof of Act of Insolvency—Act No. 379, Sec. 37.]—*Per Barry, J.*—Strict proof of the act of insolvency is required, but the production of the proof is not confined to any stage of the proceedings. *In re Hodgson*, 5 A.J.R., 133.

Two Orders Nisi—Second Discharged After First Made Absolute.] — Where two orders *nisi* by different petitioning creditors against the same debtor had been obtained, and the first obtained had been made absolute, the Court refused to make the second absolute also. *In re Rigg*, 4 V.L.R. (I.P. & M.,) 20.

Valuation of Security—Sequestration of Firm's Estate—5 Vic., No. 17, Sec. 39.]—A secured creditor of the separate estate of one partner is not bound in a sequestration of the firm's estate to value his security upon the separate estate, *Ex parte Flower, Salting and Co.*, 1 W. & W. (I.E. & M.,) 143.

Affirmed on appeal to the Privy Council, *sub. nom. Rolfe v. Flower*, L.R., 1, P.C., 27.

Compare Sec. 37 of Act No. 379.

Valuation of Security—Statement in Petition—Act No. 379, Sec. 37.]—*See in re Rowley, in re Harward, in re M'Namara, post column* 605.

Second Order Nisi—Costs of Previously Discharged One Not Paid.]—The Court ordered the issue of an order absolute upon an order *nisi* to be delayed till the costs of a previous order *nisi*, by the same petitioning creditor, which order had been discharged with costs which had been taxed, were paid. *In re Harward*, 4 V.L.R. (I.P. & M.,) 65.

Subsequent Order Nisi Not Made Absolute Till Costs of Former One Paid.]—An order *nisi* obtained by a firm was dismissed with costs on the ground that the petition only showed the debt to be due to two of the members of the firm. A

fresh order *nisi* was thereupon obtained by the two members in question, and the costs of the former order were taxed the day after. After the long vacation which then intervened the second order *nisi* came on for hearing, and the respondent applied for leave to file objections *nunc pro tunc*, one of such objections being that the petitioners were indebted to him in a certain sum. *Held* that this could not be allowed to prevail as a set-off since the amount due might be on a bill not then due or payable, but that before the order *nisi* could be made absolute the costs of the former order *nisi* must be paid by the petitioners. *In re Fraser*, 6 V.L.R. (I. P. & M.,) 20; 1 A.L.T., 118.

Making Order Absolute for Sequestration—What Will be Considered.]—On an application to make absolute an order *nisi* for sequestration, the Court will not go behind the order, if it be sufficient on its face, to see whether the materials on which it was made were sufficient. *In re Fitzpatrick*, 10 V.L.R. (I. P. & M.,) 6; 5 A.L.T., 213.

Petition by Executors for Compulsory Sequestration—Who Must Join.]—In a petition for the compulsory sequestration of the estate of a debtor of a testator, all the executors must join. *Ex parte Staughton*, 1 W.W. & A'B. (I.E. & M.,) 15.

(2) *Joint and Separate and of Estate of a Firm.*

Sequestration of Partnership Estate by Majority—Separate Estate.]—*Quære*, per *Molesworth, J.*—Whether a majority of partners by voluntarily sequestrating the partnership estate sequestrate also the separate estates of the majority. *Bates v. Loewe*, 1 W. & W. (E.,) 7.

Joint—"Greater Number of Partners"—Firm of Two.]—On an application by a creditor to set aside a voluntary sequestration made by one partner only of a firm of two, on the ground that it was not made on the petition of the "greater number of the partners," *Held* that the validity of the sequestration depended upon the antecedent consent of the other partner, and could not be rendered valid by his subsequent assent. *In re Yorston and Webster*, 1 W. & W. (I. E. & M.,) 96.

Sequestration of Joint Estate is a Sequestration of Separate Estate—Administration.]—*Per Chapman, J.* On compulsory as on voluntary sequestrations, the joint sequestration of partnership estate is a sequestration of the separate estate of each partner, and there need be no separate order for sequestration of any one of the separate estates. But in administering the estates the joint and separate estates must be kept distinct as to claims on them respectively. *In re Turnbull*, 1 W. & W. (I.E. & M.,) 105.

Mode of Administering Estate When Separate Estate is Sequestrated as a Consequence of the Sequestration of Joint Estate.]—*Per Chapman, J.*, affirmed on appeal. If the sequestration of separate estates follows as a consequence from the sequestration of the joint estate, the rights of all the several parties under each estate, and the mode of administering the estates, would still be precisely the same as it would be under separate orders of sequestration. *Ex parte Flower, Salting and Co.*, 1 W. & W. (I.E. & M.,) 143.

And *see* S.C. *post* under sub-heading PROOF OF DEBTS—Debts Provable.

Joint Debt.]—A man may be made insolvent upon a debt which he and another conjointly owe, and in cases of partnership the creditor is not bound to proceed under Sec. 18 of No. 273, for sequestration of the firm's estate unless he so please. *In re Drysdale*, 3 W. W. & A'B. (I.E. & M.,) 30.

Sequestration of Separate Estate for Partnership Debt Before Sequestration of Partnership Estate.]—It is no answer to an application for the sequestration of the separate estate of a partner for a partnership debt that no attempt has been made to sequestrate the partnership estate. *Re Gardiner*, 4 A.J.R., 6.

Construction of Act No. 379, Sec. 37, Sub-sec. 1, and Sec. 41, in the Case of Sequestration of the Estate of a Firm.]—*See in re Thomas and Cowie, ante column* 588.

Construction of Sec. 37, Sub-sec. 8, and Sec. 41.]—*In re Martin, ante column* 594.

The Act of Insolvency Committed by One Partner is Sufficient on Which to Base a Petition for the Sequestration of the Firm's Estate.]—*In re Martin*, and *in re Oppenheimer, ante column* 605.

In proceedings for the sequestration of a firm's estate the names of the members of the firm should be stated in the petition and order *nisi*. *In re Martin* and *in re Oppenheimer, post column* under sub-heading PETITION.

(3.) *The Petition, Orders, Practice, Evidence and Costs.*

(*a*) *Form and Requisites of Petition, Orders, Summonses and Affidavits.*

Petition Must State Act of Insolvency.]—The petition for compulsory sequestration need not be dated; it or the summons must show that there was a return or affidavit from sheriff's officer shewing, in fact, that he could not find any disposable property, and it or the summons must show that the alleged insolvent has been required to satisfy the debt. *In re Gibb*, 2 W. & W. (I.E. & M.,) 40.

Compare Act 379, Sec. 37.

Petition—Act of Insolvency Must be Stated Fully.]—A petition for compulsory sequestration for an alleged act of insolvency must state precisely the act of insolvency alleged, for the defendant does not necessarily see the affidavit. Therefore a petition which alleged only that a person having a judgment against him has not satisfied the same, or pointed out to the officer disposable property to satisfy the same, and did not allege that he had been required to do so, was *held* bad. *In re Chambers*, 1 W. & W. (I.E & M.,) 172.

Compare Act No. 379, Sec. 37.

Petition—Setting Out Non-Payment of Judgment Debt—What Must be Alleged.]—On a rule *nisi* for compulsory sequestration, the petition, order, and summons alleged that the debtor, having the sentence of a competent Court against him, and being thereunto required by a proper officer, did not satisfy the same, or point out sufficient property to satisfy the same. None of these documents alleged that the officer failed to find sufficient property to satisfy the sentence. *Held* that the alleged act of insolvency was not sufficiently set forth; leave to amend was refused, and the order discharged without costs. *In re Fisher*, 1 W.W. & A'B. (I.E. & M.,) 31.

Statement of Act of Insolvency — No. 273, Sec. 13—What Sufficient]—A statement in an order *nisi* and petition that the debtor had property in Victoria when he failed to satisfy a judgment, or to point out sufficient disposable property to satisfy it, is a sufficient statement of an act of insolvency under Sec. 13 of the "*Insolvency Statute* 1865," No. 273. *In re Murray*, 1 V.R. (I.E. & M.,) 8; 1 A.J.R., 113.

Compare Act No. 379, Sec. 37.

Order Nisi—Sufficiency of Statement of Acts of Insolvency—Act No. 379, Secs. 31, 43.]—An order *nisi* for sequestration which stated the acts of insolvency committed within six months before the petition to be "with intent, &c., having departed out of Victoria, and with intent, &c., having remained out of Victoria, and with intent, &c., having otherwise absented himself," was held to be sufficient, though the last act of insolvency as alleged was held too vague to alone support an order absolute. *In re Wolter*, 4 V.L.R. (I. P. & M.,) 75.

Form of Petition—Date of Act of Insolvency—Affidavit.]—It is not necessary that the date of an alleged act of insolvency should appear in the petition; it is sufficient if the date appear in the affidavit verifying the petition. *Ibid.*

Form of Order Nisi—Allegation of Act of Insolvency—"Insolvency Statute 1871," Sec. 43.]—An order *nisi* for sequestration alleged that the petitioner had been informed and believed that the officer who attempted execution of a judgment, the non-satisfaction of which was the alleged act of insolvency, was the "officer charged with the execution of the judgment," and that by reason of the matters aforesaid the insolvent had committed an act of insolvency by not satisfying a judgment when called upon by the officer charged with the execution thereof to do so. *Held*, that the act of insolvency was sufficiently set out, under Sec. 43 of the "*Insolvency Statute* 1871," and that even if it were not the Court would direct an amendment. *In re Synnot*, 4 V.L.R. (I.P. & M.,) 89.

Order Nisi—Statement of Act of Insolvency—Satisfying Execution.]—An order *nisi* stated the return of a writ of execution unsatisfied, and then stated that the debtor was called upon to satisfy. An objection thereto, on the ground that the allegations were not made in proper chronological order, overruled. *In re Allen*, 5 V.L.R. (I.P. & M.,) 25.

Form of Petition—Statement of Act of Insolvency—"Insolvency Statute 1871," Sec. 37, Sub-sec. 8.]—A petition for sequestration stated that execution had been issued against the real and personal estate of the debtor, which was returned unsatisfied, the form of the return being, that "the within-named W. hath not any *goods or chattels* within any bailiwick whereof I can cause to be made the debt and interest, &c." *Held* that the return was insufficient, and an act of insolvency under Sec. 37, Sub-sec. 8, of the "*Insolvency Statute* 1871," was not proved; and order discharged, but, since it was upon a technical objection, without costs. *In re White*, 6 V.L.R. (I.P. & M.,) 50; 2 A.L.T., 43.

Order Nisi—What must Appear on Face of.]—Where an insolvent had been asked by the sheriff of the western bailiwick to satisfy a judgment, but it did not appear on the face of the order *nisi* that any demand had been made upon the insolvent in that bailiwick, or that his place of abode was in that bailiwick, *Held* that it was not necessary that the order should show that the demand was made in the western bailiwick, the principle of *omnia rite esse acta* applying. *In re Symons*, 1 A.L.T., 29.

Order Nisi—Form of—Statement of Act of Insolvency—"Insolvency Statute 1871," Sec. 37, Sub-sec. 8]—An order *nisi* for sequestration, which purported to be based on Sub-sec. 8 of Sec. 37 of the "*Insolvency Statute* 1871," did not allege execution to be returned unsatisfied in whole or in part, or that the alleged act of insolvency was committed within six months of the petition, or that the debt was unsecured. The order also stated that the petition "was presented to me," without saying to a Judge of the Court of Insolvency. *Held* bad, and discharged with costs. *In re Cahill*, 1 A.L.T., 145.

Petition—Act of Insolvency—Judgment Recovered by Two Members of a Firm—Order Nisi Obtained by Firm.]—An order *nisi* for sequestration was obtained on a petition by the individual members of a firm trading as, &c., the act of insolvency alleged being the failure to satisfy a judgment which was recovered by two members only of the firm on behalf of the firm, but it did not appear in the petition that the judgment was recovered on behalf of the firm. *Held* that the petition was irregular, and that the order *nisi* should be discharged with costs. *In re Fraser*, 6 V.L.R. (I. P. & M.,) 20; 1 A.L.T., 113.

Summons Upon Order Nisi—How Entitled.]—The summons need not be entitled either "In the Supreme Court" or "In Insolvency." *In re Fox*, 2 W. & W. (I.E. & M.,) 35.

"Insolvency Statute 1865," No. 273, Sec. 20—Heading of Summons.]—Where a summons was headed "In the Supreme Court, &c.," "In the

Matter of the Petition, &c.," but was not in the Queen's name and was addressed to no one, *Held* it was not "a process" under Sec. 20, the summons being insufficient on account of the omission. *In re Mackinnon*, 6 W.W. & A'B. (I.E. & M.,) 1.

The proceedings should be entitled, "In the Insolvency Court," and not "In the Supreme Court," but the Court allowed an amendment, and there being no other objection, made the order absolute. *In re Ryan*, 1 V.L.R. (I.P. & M.,) 4.

According to note at p. 83 of 2 V.L.R. (I.P. & M.,) this decision is incorrectly reported; all that was done was to strike out "In the Supreme Court."

Order Nisi for Sequestration—Heading.]—It is no objection to an order *nisi* for sequestration that it is not headed in any Court at all. *In re Cooper*, 2 V.L.R. (I.P. & M.,) 82.

Title of Cause—Up to Order Absolute.]—A case up to the hearing of the order *nisi* is pending between two Courts, and is not in either until the order is made absolute or discharged, and therefore the proper title is "In the '*Insolvency Statute* 1871.'" *In re Wolter*, 4 V.L.R. (I. P. & M.,) 75.

Address of Petition.]—The petition should be addressed to the Judge by whom the order *nisi* is made. *In re M'Conville*, 7 V.L.R. (I.P. & M.,) 17; 2 A.L.T., 156.

Summons—Form of.]—The summons need not recite at length the petition and the order *nisi*, and may omit the statement as to property, the meaning of a summons being to bring the person served to Court to look to documents referred to in the order *nisi*, not to accurately describe them. *In re Murray*, 1 V.R. (I. E. & M.,) 8; 1 A.J.R., 113.

Form of Summons—No Allegation of Order to Show Cause.]—At the hearing of an order *nisi* for sequestration it was objected that the summons served upon the respondent did not show sufficient materials on which to base it, reciting that the Judge and commissioner upon reading the petition and affidavits did place the estate under sequestration, and there was no allegation that the statements in the petition were true. Another objection was that there was no allegation of an order to the respondent to show cause. *Held* that the statements in the summons were sufficient, for if the Court, upon reading the petition and affidavits had not believed them to be true no order *nisi* would have been granted, and that since the order *nisi* contained an order on the insolvent to show cause the summons might be amended by inserting the recital of that order. *In re Knowles*, 1 A.J.R., 105.

Petition—Signature of—Affidavit in Support.]—A petition set forth three partners as petitioning creditors, two of whom signed, and one as attorney for the third, who was out of the jurisdiction—The affidavit stated the nature of the debt, and that the three were partners—*Held* sufficient. *In re Murray*, 1 W. & W. (I.E & M.,) 137.

Petition—Signature of Petitioning Creditor.]—A petition for compulsory sequestration, unsigned by the petitioning creditor, cannot be regarded as a petition at all; and where an order *nisi* was obtained on such a petition, the Court *held* that it was not a case for amendment, and the order was discharged as not being supported by a petition. *In re Barry*, 1 W. & W. (I.E. & M.,) 174.

Compare Sec. 31 of Act No. 379.

Objection to Signature of Petition.]—The Court will not entertain an objection to the signature of the petition where the order *nisi* for sequestration is correct. *In re Ritchie*, 8 V.L.R. (I.P. & M.,) 1; 3 A.L.T., 88.

Petition—Certificate of Security for Fees—Signature—5 Vic., No. 17, Sec. 15.]—The certificate required by Sec. 15 of 5 Vic., No. 17, that security for fees, &c., has been found, to be endorsed on a petition for compulsory sequestration must be signed by the chief commissioner personally. *In re Oliver*, 1 W. & W. (I. E. & M.,) 179.

Order Nisi—Certificate of Security for Costs.]—The order *nisi* for sequestration need not recite the commissioner's certificate of security for costs or be drawn up on reading it, it is sufficient if the certificate is endorsed on the petition. *In re Fawcett*, 2 W. & W. (I.E. & M.,) 5.

Security for Costs of Sequestration—28 Vic., No. 273, Sec. 16.]—Where the Commissioner has certified that security for the fees and charges of a sequestration, required by Sec. 16 of No. 273, has been given, the Court will not go behind his certificate to enquire by whom the security has been given. Giving security means promising it to be given, and if given on behalf of the petitioning creditors, it must be presumed to have been by their procuration. *In re Phelan*, 3 W.W. & A'B. (I.E. & M.,) 1.

Certificate of Security for Costs—Improper a Bar to Jurisdiction Under Sec. 16 of Act No. 273.]—If the certificate of security for costs endorsed on the petition for sequestration be made out in the wrong name, it is an objection to the jurisdiction, and the order *nisi* for sequestration will be discharged. *In re Sandars*, 1 V.R. (I.E. & M.,) 1; 1 A.J.R., 38.

Commissioner's Certificate of Security for Costs.]—It is no objection to a petition for compulsory sequestration that the certificate of the commissioner of security for costs bears a date earlier than that of the petition, for the document as a petition must be taken to have existed when the commissioner certified upon it, and the inference should be that one date is erroneous. *In re Murray*, 1 V.R. (I. E. & M.,) 8; 1 A.J.R., 113.

[N.B.—These provisions in 5 Vic., No. 17 and Act No. 273 do not appear to be embodied in Act No. 379.]

Form of Petition—Married Woman's Estate—Separate Property.]—*See in re Willison*, 4 V.L.R. (I. P. & M.,) 67, *post* under sub-heading Evidence.

Form of Petition and Affidavit—Act No. 273, Sec. 13—"Having Property in Victoria."]—*Held*, that on a petition for sequestration the petition and affidavit should, under Sec. 13, run "having at the time of the alleged act of insolvency and now having property in Victoria." Order *nisi* discharged where the petition did not show this. *In re Mackinnon*, 6 W.W. & A'B. (I.E. & M.,) 1.

Petition for Sequestration of Partnership Estate—Members of Firm to be Stated in Petition and Order Nisi.]—On an order *nisi* for sequestration of the estate of "A. O., trading as A. O. and Co." *Held*, that petition and order *nisi* should state, as far as is known, who are the members of the firm. Order discharged. *In re Oppenheimer*, 3 A.J.R., 91.

See S.P., *in re Martin*, 5 V.L.R. (I.P. & M.,) 13.

Form of Petition—Creditor Holding Security—Act No. 379, Sec. 37.]—The fact of a petitioning creditor not disclosing that he has security for his debt though it may be a reason against making absolute an order *nisi* for sequestration is no ground for setting aside the sequestration at the instance of the debtor when the order has been made absolute. *In re Rowley*, 2 V.L.R. (I. P. & M.,) 50.

Petition — Form of — Creditor Holding Mining Shares as Security.]—A petition for sequestration presented by a creditor who holds mining shares as a security for his debt must set a value on them, or if the shares be of no value should state so, and offer to give them up for the benefit of creditors. It is insufficient to state merely that the shares are of no marketable value. *In re Harward*, 4 V.L.R. (I. P. & M.,) 65.

Where a petitioning creditor in the petition, affidavit and order *nisi* set out a debt on which a judgment was recovered, alleging that it was not secured, and afterwards stated that he held security which he valued at 1s., *Held* that the objection as to the petition and order *nisi* not disclosing security was fatal, and order discharged with costs. *In re M'Namara*, 10 V.L.R. (I. P. & M.,) 84.

Act No. 379, Sec. 45—Petition—No Prayer for Sequsstration.]—Where an objection was taken to an order *nisi* that the order did not show jurisdiction, and there was no prayer for sequestration in the petition, *Held* that the want of the prayer was fatal; that it was included in the objection, and was not technical under Sec. 45. *In re Rickards*, 5 A.J.R., 103.

Petition—Fatal Mistake—Dismissal.]—A petition, upon which an order *nisi* was founded, prayed by mistake for the sequestration of the petitioning creditors' estate, and not of that of the alleged insolvent. *Held* a fatal error; that the objection going to the jurisdiction, it did not come within the clause in "*The Supreme Court Rules*" giving power of amendment, and that the order *nisi* must be dismissed. *In re Murray*, 1 W. & W. (I. E. & M.,) 137.

Order Nisi—Form.]—It is not a material error in the curial part of an order *nisi* if it purports to sequestrate the estate until the day when the insolvent was to show cause instead of until otherwise ordered. *In re Murray*, 1 V.R., (I.E. & M.,) 8; 1 A.J.R., 113.

Form of Order Nisi—Omission of Words.]—Where an order *nisi* stated that the estate was placed in the hands of the assignee, omitting the words "under sequestration" after the word "placed," *Held*, that the words omitted were implied, and objection to the form overruled. *In re Palmer*, 5 A.J.R., 157.

Order Nisi—Copy—By Whom Certified.]—A copy of an order *nisi* for sequestration should be certified by the chief clerk of the Judge making the order. *In re Dunne*, 2 V.L.R. (I.P. & M.,) 16.

Order Nisi for Sequestration—Informal Recital.]—An order *nisi* for sequestration recited that a petition had been presented, but did not say to whom, whether to the Insolvency Court or a Judge of the Supreme Court. The order was signed "*Robert Molesworth*," but it did not appear who he was, or that any petition had been presented to him. *Held* that since the order did not show the authority under which it was signed, that authority being a petition properly presented, in the absence of such petition the Court could not amend the order *nisi* by reciting the petition properly, and therefore must discharge it. *In re Cooper*, 2 V.L.R. (I. P. & M.,) 82.

Order Nisi—Description of Insolvent.]—Under the "*Insolvency Statute* 1871," an alleged insolvent may be properly described either by his place of bodily residence or by his place of business. *In re Bayldon*, 2 V.L.R. (I. P. & M.,) 85.

Order Nisi—Affidavits on which it is Founded.]—If there is nothing wrong on the face of an order *nisi* the Court will not go behind it to consider whether it was granted on insufficient affidavits. *In re Thompson*, 7 V.L.R. (I.P. & M.,) 146.

Order Nisi for Sequsstration—Clerical Error—Amendmsnt.] — A clerical error in an order *nisi* for sequestration, which is not a want of form or omission only, but states something which puts the petitioner out of Court, cannot be amended. *In re Reade*, 2 V.L.R. (I.P. & M.,) 83.

Where an order *nisi* omitted the word "within" in the statement "that the said act of insolvency was committed and occurred *within* six months before the presentation of the said petition," *Held*, that it could not be amended under Sec. 31 of the "*Insolvency Statute* 1871." *Ibid.*

Amendment — "Insolvency Statute 1871," Sec. 31.]—An order *nisi* for sequestration was made "upon reading the petition of T," but did not state that the petition was addressed to any person. The petition itself, however, was properly addressed and presented. On the hearing, the Court allowed the order to be amended, under Sec. 31 of the "*Insolvency Statute* 1871," subject to the costs of the amendment, holding that it was a matter not material. *In re Johnson*, 4 V.L.R. (I.P. & M.,) 69.

Statement of Petitioner's Debt—Variance—Amendment—"Insolvency Statute 1871," Sec. 31.]—A petitioning creditor's debt was alleged to be upon a judgment of the Supreme Court upon two bills of exchange, but turned out to be in fact a judgment entered up on a certificate of a judgment in the County Court. *Held*, such a variance as the Court could not amend under Sec 31 of the "*Insolvency Statute* 1871." *In re Synnott*, 4 V.L.R. (I.P. & M.,) 89.

Order Nisi—Incorrect Statement—Discharge.]—An order *nisi* for sequestration which stated that the *petitioner* had been called upon to satisfy debt, was discharged without costs, the Court refusing to amend, although the petition stated correctly that the respondent was called upon. *In re Portue*, 4 V.L.R. (I. P. & M.,) 93.

Supreme Court in Insolvency Jurisdiction — Amendment—"Supreme Court Rules 1854," Cap. 10, Rule 26.]—The Supreme Court in its insolvency jurisdiction has power to amend pleadings in insolvency under the general power of amendment conferred by the "*Supreme Court Rules* 1854," Cap. 10, Rule 26. *In re Synnot*, 4 V.L.R. (I. P. & M.,) 89.

Form of Order Nisi—Amendment.]—An order *nisi* stating that debtor called a meeting of creditors as under Part 3 of Act No. 379, and that he was requested to surrender his estate under the Statute, is not bad because it does not state under what part of the Statute the estate is to be sequestrated, or because it does state that the meeting was called under Part 3, and is capable of amendment if required. *In re Webster*, 5 V.L.R., (I.P. & M.,) 16.

Amendment of Order Absolute.]—Where an order absolute for sequestration is sought to be amended, it should be produced before the Court from the custody of the Court of Insolvency, and the amendment made by manually altering the document itself. *In re McGillivray*, 6 V.L.R. (I.P. & M.,) 40; 1 A.L.T., 202.

Supreme Court in Insolvency Jurisdiction—Amendment of Order Absolute.]—The Court has power to amend an erroneous and impossible date in an order absolute for sequestration, if the matter is entirely between the petitioning creditor and the insolvent; but where a trustee had been appointed, and other parties had acquired rights in the matter since the making of the order, the Court refused to amend, and dismissed the application without prejudice to its renewal, after serving all the parties interested or affected by the amendment. *Ibid.*

Order for Sequestration—Impossible Date.]—Where an order absolute for sequestration was dated "Thursday, 22nd July," which was an impossible date, and recited an order *nisi* of 30th July, and a petition of 26th July, *Held* that the order should be read as of no date, and that parol evidence should be admitted to prove the correct date, viz., 22nd August. *Shiels v. Drysdale*, 6 V.L.R. (E.,) 126; 2 A.L.T., 14.

Petition—Written or Printed.]—It was provided by a rule of Court that all petitions in insolvency should be partly written, partly printed, on paper or parchment. An order *nisi* for sequestration having been granted on a petition wholly written, *Held* that the rule was merely directory; and that the petition having been accepted, and the order *nisi* granted, the Court would not discharge it on this ground alone. *In re Cutter and Lever*, 1 V.R. (I.E. & M.,) 13.

Affidavit of Debt — What Must be Stated.]—It is not necessary that the affidavit of debt of a petitioning creditor should negative the existence of a security where none exists. *In re M'Manomonie*, 1 W.W. & A'B. (I.E. & M.,) 53.

Affidavits in Support of Petition—Joint Creditors — One Out of Jurisdiction.]—The affidavit required to be made by each creditor by Sec. 16 of No. 273, in support of a petition for sequestration, if made by one only of two joint creditors, of whom one is out of the jurisdiction, is insufficient; but in such a case, the affidavit of the duly authorised agent of the absent creditor is a sufficient affidavit of such creditor, and may be made on information and belief. *In re Phelan*, 3 W.W. & A'B. (I.E. & M.,) 1.

See Sec. 22 of Act No. 379.

Affidavits in Support of Petition—Numbering Folios.]—The regulation as to numbering the folios of affidavits in support of a petition for sequestration is to be regarded before making an order *nisi*, and not as cause against it. *In re M'Manomonie*, 1 W.W. & A'B. (I.E. & M.,) 53.

Affidavits to support a petition need not be filed before using them to form the basis of an order *nisi* for sequestration. *In re Trevarrow*, 2 W. & W. (I.E. & M.,) 84.

Affidavit—Unnoticed Interlineations—7 Vic., No. 19, Sec. 15.]—On an appeal from a decision making absolute an order *nisi* for compulsory sequestration, *Held, dubitante sed non, dissentiente Molesworth, J.*—that it was a sufficient ground for reversing the decision and discharging the order *nisi*, that the affidavit on which it was obtained contained interlineations which had not been "noticed in the margin opposite thereto by the officer or person taking such affidavit." *In re Stephenson*, 1 W. & W. (I. E. & M.,) 114.

Affidavits—7 Vic., No. 19, Sec. 15.]—Two of the affidavits, deposing to the act of insolvency, contained erasures which had not been initialled by the commissioner before whom they had been sworn. *Held* that the facts as to that particular were not essential, and might be found elsewhere. Objection overruled. *In re Stephenson* distinguished. *In re Gherson*, 2 W. W. & A'B. (I. E. & M.,) 14.

Affidavits—"Common Law Procedure Stat. 1865," Sec. 379.]—On an objection upon an order *nisi* for sequestration, that the petitioning creditor's affidavit of debt did not specify the abode as required by Sec. 379, but merely described him as "of Elizabeth-street," *Held* that Sec. 379 of the "*Common Law Procedure Stat.*" had no reference to affidavits filed in insolvency. *In re Haydon*, 2 W.W. & A'B. (I. E. & M.,) 34.

[Under Insolvency Rules, Rule 49, the affidavits must conform to Sec. 379 of the "*Common Law Procedure Stat.*"]

Where affidavits and other documents have been made the foundation of any curial act, an objection that they are not folioed according to "*Supreme Court Rules*," Cap. 10, Rule 7, will not be entertained. *In re Fox*, 2 W. & W. (I. E. & M.,) 35.

Affidavit.]—Where the affidavit of petitioning creditors is made by two persons, if they be named in the *jurat* as having sworn the affidavit, it is not necessary for the *jurat* to state that they swore it "severally." *In re James*, 5 W.W. & A'B. (I. E. & M.,) 1.

Affidavit of Debt.]—It is no objection to a petition for compulsory sequestration that the petitioning creditor's affidavit of debt is dated before the petition; all the "*Insolvency Statute* 1865" provides is, that the petition and affidavit are to be presented together to the Judge. *In re Murray*, 1 V.R. (I.E. & M.,) 8; 1 A.J.R., 113.

But *see* Rules (further) Rule 2, and Insolvency Rules, Rule 3.

Affidavit in Support of Debt—Bank—Attorney Under Power.]—Where a bank is the petitioning creditor the affidavit of the debt need not be made by the attorney conducting the case, but may be made by the attorney under power of the bank. *In re English*, 2 A.J.R., 9.

Affidavit—Informality.]—If a case be launched on insufficient materials it should still be heard. Where an affidavit was informal as to the *jurat*, but was not material for the jurisdiction, an objection thereto was overruled. *In re Richmond*, 3 V.L.R. (I.P. & M.,) 109.

Affidavit—Title.]—After the order *nisi*, affidavits used in an insolvency matter are properly headed in the Supreme Court. *In re Fraser*, 6 V.L.R. (I.P. & M.,) 20; 1 A.L.T., 118.

(*b*) *Service and Enlargement of Order Nisi.*

Service of Summons—"Insolvent Act," 5 Vic., No. 17, Sec. 25.]—Sec. 25 of the Act provides that service of the summons to show cause against sequestration shall be made in the same manner as is by law provided for the service of any other summons, provided that if debtor has been absent for forty days from his usual residence, copies of the summons shall be inserted in three successive publications of the *Gazette*. *Held* that this means that the summons should in all cases be served on the debtor as far as it can be, according to the usual practice of the Court as to summonses; and that if debtor has been forty days absent the *Gazette* notice shall be published. Where, after order *nisi*, an order for substituted service was obtained upon affidavit that insolvent was believed to be in the colony, but as a matter of fact he was not, *Held* that the order could not be made absolute on such substituted service, but that it should not be discharged. Order made directing substituted service with *Gazette* advertisements. *In re Fox*, 2 W. & W. (I. E. & M.,) 35.

Compare Sec. 44 of Act No. 379.

Advertising Summons—Substituted Service—5 Vic., No. 17, Sec. 25.]—On an order *nisi* for compulsory sequestration, the alleged act of insolvency was that the debtor departed from the colony, or being out of the colony, remained absent therefrom with intent to defeat or delay his creditors. From the affidavits it appeared that he was in another colony, and had probably gone there to defeat or delay his creditors; that, having been forty days absent from his usual residence, the petitioning creditor, without obtaining any order for substituted service, inserted a copy of the summons in one of the Melbourne papers, under 5 Vic., No. 17, Sec. 25. *Held* that such advertisements are only proper when the person to whom they are addressed remains in Victoria, and is evading service within the jurisdiction; and that the advertisements were in this case nugatory; and order *nisi* for sequestration enlarged, with liberty to the creditor to apply in the meantime for an order for substituted service. *In re Smith*, 1 W.W. & A'B. (I. E. & M.,) 1.

Compare Sec. 44 of Act No. 379 as to provisions concerning absence from Victoria.

Service—Act 5 Vic., No. 17, Sec. 25—How Effected Where Personal Service Impossible—"Common Law Procedure Stat."]—If an alleged insolvent cannot be served personally, he must be served under the provisions of "*The Common Law Procedure Stat.*" or a special order must be obtained. *In re Newbigging*, 1 W.W. & A'B. (I.E. & M.,) 33.

See Sec. 44 of Act No. 379.

Service of Summons—When Dispensed With.]—Where an alleged insolvent had not been served with the summons, but appeared by counsel at the hearing of the order *nisi* for sequestration, the Court dispensed with service upon him. *In re Brann*, 3 W.W. & A'B. (I.E. & M.,) 6.

Service of Order Nisi.]—Office copies of the order *nisi*, which had been served on respondent, must be certified by the clerk of the Judge of the district in which the order is made. *In re Steed*, 3 A.J.R., 62.

Order Nisi—Signature of Judge Necessary in Copy for Service—Act No. 379, Sec 44.]—The signature of the Judge who made the order is necessary in the copy for service of an order *nisi*. *In re Hang Hi*, 4 A.J.R., 43.

Order Nisi Not Personally Served—Wrong Name.]—If an order *nisi* for sequestration is not personally served on the debtor, and the debtor's name is incorrectly stated, he may appear as "A.B., wrongly described as C.D.," and take objection to it. *In re Wolter*, 4V.L.R. (I P. & M.,) 75.

Irregularity in Service—How Waived]—Irregularities in the service may be waived by the debtor's filing objections. *In re Harry*, 1 W. & W. (I.E. & M.,) 136.

But where the irregularity is relied upon as an objection, the filing of objections is no waiver. *In re Newbigging*, 1 W.W. & A'B. (I.E. & M.,) 33.

Order Nisi—Service—Proof.]—The debtor is not allowed to call *viva voce* evidence to prove that service of an order *nisi* is bad, where such service has been proved by affidavit. *In re Clarton*, 4 V.L.R. (I.P. & M.,) 84.

Service of Order Nisi where Respondent is Travelling.]—The proper method of serving an order *nisi* on a person sought to be made insolvent, who is travelling, is not to send telegrams to correspondents in towns where the respondent may happen to be, but to send a person with the order on his track, and with instructions to follow the respondent till he be served. *In re Finney*, 1 A.L.T., 129.

Affidavit of Service of Order Nisi—Mode of Authenticating Order.]—An affidavit of service of an order *nisi* for sequestration should state that the order was signed and sealed. It is not sufficient to state the signature of the Judge. *In re Passmore*, 2 A.L.T., 44.

Affidavit of Service — Substituted Service — Time for Filing Notices of Objections — Act No. 379, Secs. 44, 45]—The affidavit of service of the order *nisi* should state the means of knowledge that the place mentioned was the last known place of abode or business of the debtor. Orders for substituted service should not fix an absolute time for filing notices of objection without having regard to the time of effecting service of the order *nisi*, but where service had been effected ten days before the time fixed by the order, it was held sufficient under Sec. 45. *In re Hayes*, 3 V.L.R. (I. P. & M.,) 98.

An affidavit stating a knocking at the door and no one answering it, without stating also the inference that no adult person was there capable or willing to accept service or at all is insufficient; an affidavit of substituted service should state means of knowledge that the place is the last known place of abode or business. *In re Rook*, 3 V.L.R. (I. P. & M.,) 107.

Substituted Service—Jurisdiction of Judge of Insolvent Court.]—An order *nisi* for sequestration had been granted, and the Judge of the Insolvent Court had granted an application for leave to substitute service on the insolvent, who was sworn to have left the colony, at his last place of abode, "L. Street, Carlton." *Held*, that the Judge had jurisdiction to make the order for substituted service, but that that part of it which described the last place of abode might be treated as surplusage. *In re Adolphe Oppenheimer*, 3 A.J.R., 94, 95.

Service of Order Nisi—Substituted Service.]—Service of an order *nisi* under an order for substituted service was effected upon the officer or messenger of the official assignee, who was the only person on the premises, the last known place of business of the insolvent, and who had been resident there for a week. *Held* that it was good service. *In re Riordan*, 9 V.L.R. (I.P. & M.,) 1.

Substituted Service of Order Nisi—Motion for—Evidence in Support—"Insolvency Statute 1871," Sec. 44.] — The deposition of the sheriff's officer in support of a motion for an order for substituted service of an order *nisi*, under Sec. 44 of the "*Insolvency Statute* 1871," stated that six days after the order *nisi* was made, he went to the respondent's residence, but found him not at home, and, on making enquiries, ascertained that he was in New South Wales. *Held* not sufficient materials on which to grant an order for substituted service, the Court requiring more definite information of the respondent's absence from the colony. *In re Campbell*, 2 A.L.T., 4.

Substituted Service of Order Nisi—Affidavit—"Insolvency Statute 1871," Sec. 44.]—The affidavit of substituted service of an order *nisi*, under Sec. 44 of the "*Insolvency Statute* 1871," as to the fact that the insolvent resides on the premises where service was effected, should not be made on information, but on personal knowledge of the fact. *In re Thomson*, 1 A.L.T., 123.

Substituted Service.]—The order for substituted service must not be made part of the original order *nisi*. *In re Merriman*, 4 A.J.R., 31.

Substituted Service—"Insolvency Statute 1871," No. 379, Sec. 44.]—An order for substituted service should direct service at the last known place of abode, and not at any specified address. *In re O'Connor*, 4 A.J.R., 139.

Substituted Service — Notice of Objections.]—The order for substituted service should be on some person *residing* at and not *being* at the last known place of business. Where no time is fixed in the order of substituted service for delivery of objections, notice of objections is not necessary. *In re Rickards*, 5 A.J.R., 103.

Service of Order Nisi for Sequestration—Order for Substituted Service.] — Orders for substituted service of the order *nisi* for sequestration ought to specify a time within which notice of objections is to be given, or there should be some order doing so. *In re Stewart*, 2 V.L.R. (I.P. & M.,) 1.

Order for Substituted Service of Order Nisi—Absolute Time Fixed for Lodging Notice of Objection.]—An order for the substituted service of an order *nisi* for sequestration, which fixed an absolute time for lodging objections, is not on that ground to be discharged; but it is a matter for consideration by the Court in allowing further time to file objections. *In re Wolter*, 4 V.L.R. (I.P. & M.,) 75.

Enlargement of Order Nisi—5 Vic., No. 17, Sec. 26.]—As a rule orders *nisi* for compulsory sequestration will not be enlarged "in hopes of a settlement" where the official assignee is not in possession. Good grounds must be shown for such enlargement. *In re Keighran*, 1 W. & W. (I. E. & M.,) 8.

See also *in re Downie and Murphy, ibid.*, p. 102.

Compare Sec. 39 of Act No. 379.

Order Nisi—Enlarging.]—The Court refused to enlarge an order *nisi* for sequestration on the ground that there were accounts pending in the Master's office between the alleged insolvent and the petitioning creditor, by which, when completed, a balance would be shown due from the petitioning creditor; or in default, to allow objections to be filed *nunc pro tunc* that the alleged insolvent was not indebted to the petitioning creditor, certain judgments on which the order *nisi* was founded having been obtained by default, owing to the poverty of the alleged insolvent. *In re M'Manomonie*, 1 W.W. & A'B. (I. E. & M.,) 53.

Order Nisi Not Enlarged—When Insolvency does not Lapse.]—An order *nisi* which sequestrated an estate till a given day, or "further" order was not enlarged on that day, owing to there being no single Judge sitting. *Held*, that the order being till "further order," the insolvency did not lapse. *Ibid.*

Mistake in Order Nisi—Enlargement of Time.]—Where a wrong date was by mistake inserted in the order *nisi*, making it returnable before it was issued, the Court enlarged the order for a week to serve an amended order, petitioner paying the costs of the day. *In re Fenner*, 7 V.L.R. (I. P. & M.,) 13; 2 A.L.T., 145.

Act No. 379, Secs. 44, 45, 46.]—Where an order *nisi* was served so as not to give the respondent the four days, within which to lodge objections, allowed by Sec. 45, the Court enlarged the order for a week, directing the order *nisi* and the enlarging order to be served in the manner prescribed by Sec. 44. *In re Parsons*, 7 V.L.R. (I.P. & M.,) 118.

Service of Order Nisi—Enlargement.]—It cannot be presumed that the petitioning creditor has tried every available means to effect service; the power of enlargement is discretionary, and will only be exercised where due diligence has been used. *In re McPherson*, 1 A.L.T., 92; *in re Crofts*, 1 A.L.T., 112.

Who Should Serve—Enlargement of Order.]—Per *Molesworth, J.*—"It is not the duty of the sheriff's officer to serve the order *nisi*." Writs of *fi fa* were issued to a sheriff, who issued his warrants on them to his officer, who executed, and they were returned *nulla bona*. The petitioning creditor's solicitor forwarded to the officer an office copy of the order *nisi* for service on the insolvent, and the officer, after having failed to effect service, informed the solicitor thereof. An application for an enlargement of the order for fourteen days, in order to effect service of the petition, was refused. *In re Doyle*, 10 V L.R. (I.P. & M.,) 87.

(c) Notice of intention to oppose petition.

Objections to Order Nisi When Taken—5 Vic., No. 17, Sec. 26.]—Preliminary objections to an order *nisi*, though grave ones, cannot be taken when cause comes to be shown, if they were not taken when an enlargement of the order was, on a previous occasion, opposed. If not taken then they will be deemed waived. *In re McMurrey*, 1 W. & W. (I.E. & M.,) 103.

Compare Secs. 39, 44, and 45 of Act No. 379.

Act No. 379, Secs. 44, 45—Time within which Notice of Objections to Order Nisi must be Signed—Agent.]—The combined effect of Secs. 44 and 45 is to allow the insolvent a greater time than four days in which to sign objections to the order *nisi*. Where an order *nisi* had been granted for sequestration, and the insolvent had left the colony, and an application had been made to sign objections by his agent (H.,) who was acting under a power of attorney which had ceased to be strictly applicable, *Held* that the insolvent might sign the objections within four days after the application, and failing that, that H., who appeared to be instructed more than any one else to act on insolvent's behalf, might sign objections within the same time. *In re Adolphe Oppenheimer*, 3 A.J.R., 103.

Notice of Objections—Application to Make Nunc Pro Tunc.]—An application to receive notice of objections, which has been lodged too late, *nunc pro tunc* can only be granted when there are materials before the Court for it to act upon. *In re Clarton*, 4 V.L.R. (I.P. & M.,) 84.

Where an order *nisi* was served so as not to give the respondent the four days within which to lodge the objections allowed by Sec. 45, the Court enlarged the order for a week, directing the order *nisi* and the enlarging order to be served in the manner prescribed by Sec. 44. *In re Parsons*, 7 V.L.R. (I.P. & M.,) 118.

As to time for signing objections where an order for substituted service of order *nisi* has been obtained, *see In re Hayes, In re Rickards, In re Stewart*, and *in re Wolter, ante columns* 611, 612, 613.

Filing Objections to Order Nisi—Sunday—"Insolvency Statute 1871," Sec. 45—Enlarging Time.]—When Sunday intervenes it counts in the four days allowed by Sec. 45 of the *"Insolvency Statute* 1871," for filing objections to an order *nisi*; but where Sunday does so intervene, and the four days have been allowed to elapse without filing objections, *Semble*, that the

Court will almost, as a matter of course, allow further time for filing objections, if there are affidavits explaining the delay and showing merits. *In re Counihan*, 8 V.L.R. (I. P. & M.,) 14.

Notice of Objections—Application to File Nunc Pro Tunc—Affidavit of Truth.]—Where there is an application to file *nunc pro tunc*, a notice of objections to a petition for sequestration, there having been an omission to file such notice at the proper time, the Court requires an affidavit that the objections are true. *In re Fitzpatrick*, 10 V.L.R. (I. P. & M.,) 6; 5 A.L.T., 213.

When Notice Dispensed With.]—Where the order permitting substituted service did not fix any time within which the notice of objections was to be filed, *Molesworth, J.*, decided to hear the case in a week without requiring such notice. *In re Brown*, 3 A.J.R., 105.

For circumstances under which the Court will extend the time of filing notice of objections *see in re Frazer*, 1 A.L.T., 118.

Affidavit of no Intention to Oppose.]—On the hearing of an order *nisi* for sequestration, where no notice of intention to oppose the rule has been filed under Sec. 45 of the "*Insolvency Statute* 1871," it is unnecessary for the petitioning creditor to file an affidavit that no such notice has been filed. *In re Mowling and Dunkley*, 2 V.R. (I. E. & M.,) 7.

Filing Objections.]—The Court takes notice of objections filed or otherwise without affidavit, and there is no necessity for an affidavit of the fact that no notice of objections has been filed. *In re Klemm*, 3 V.L.R. (I. P. & M.,) 105.

Act No. 379, Sec. 45—Signature of Notice of Objections.]—The notice of objections under Sec. 45 must be signed by the insolvent personally, and not by his attorney, but on consent all technical objections were waived. *In re McDonald*, 1 A.L.T., 112.

Serving Objections Without Signature When Allowed.]—Where personal service of an order *nisi* has been dispensed with, on the ground that the alleged insolvent has departed from out the jurisdiction, leave will be given to him to serve objections without signature. *In re Brann*, 3 W. W. & A'B. (I. E. & M.,) 6.

Notice of Objection When Required—"Insolvency Statute 1871," Sec. 45.]—Sec. 45 of the "*Insolvency Statute* 1871" only requires notice of objection to be given where it is intended to dispute facts, or set up facts by way of avoidance; and does not apply to objections on the face of the proceedings. *In re Reade*, 2 V.L.R. (I. P. & M.,) 83.

An order *nisi* omitted the word "within" from the statement that the act of insolvency "occurred *within* six months before the presentation of the petition." *Held* that no notice of objection was necessary to entitle the debtor to object to the omission. *Ibid.*

Act No. 379, Sec. 45—Of What Objections Notice Required—Omission in Jurat of Affidavit.]—An objection that the jurat of the petitioning creditor's affidavit has an important date omitted is a special defence of which notice should be given in the notice of objections under Sec. 45. *In re Ryan*, 7 V.L.R. (I. P. & M.,) 122; 3 A.L.T., 52.

Summons—Objection to Improper Service—Waiver.]—On an order *nisi* for compulsory sequestration, filing other objections by the alleged insolvent, operates as a waiver of an objection that the summons has been improperly served. *In re Harry*, 1 W. & W. (I. E. & M.,) 136.

Objections for Insufficiency of Service—When not Precluded.]—An alleged insolvent is not debarred from having an order against him discharged on the ground of insufficient service, by the fact that he has filed notice of objection one of which is upon the ground of the irregularity of the proceedings. *In re Newbigging*, 1 W. W. & A'B. (I. E. & M.,) 33.

The fact that the certificate for costs endorsed on the petition is of security in the matter of an insolvent of another name, constitutes an objection to the jurisdiction, and the service by the insolvent of notice of points to be disputed is not an obstacle to his urging the objection. It is only as to objections to service that such notice has been held a waiver. *In re Sanders*, 1 V. R. (I. E. & M.,) 1; 1 A.J.R., 38.

Objections by Debtor—Act No. 375, Sec. 45.]—Where, on an order *nisi* for sequestration, the act of insolvency relied on is the non-satisfaction of an execution, the debtor will not be permitted to impeach the judgment upon which the execution issued. Such an objection should have been set up as a defence to the action at law. *In re Morris*, 2 V.R. (I. E. & M.,) 2.

Form of Order Nisi—Objection to When Sustainable—Act No. 379, Sec. 45.]—An objection that the petitioning creditor's debt is stated in the order *nisi* as "for goods sold and delivered," instead of as "for money payable for goods sold and delivered," is a mere technical objection, and cannot be sustained. *In re Wolter*, 4 V.L.R. (I. P. & M.,) 75.

For other objections as to form of petition or order *nisi*, *see in re Murray*, *ante column* 605; *in re Palmer*, *ante column* 606; and *in re Rickards*, *ante column* 605.

For objections as to form of affidavits, *see in re Fox*, *ante column* 609; *in re Stephenson* and *in re Gherson*, *ante columns* 608, 609; and *in re Richmond*, *ante column* 608.

(*d*) *Evidence.*

On Making Married Woman Insolvent Under Sec. 218 of "The Bankruptcy Act, 1861—Separate Property.]—On an application under Sec. 218 of "*The Bankruptcy Act* 1861," 24 and 25 Vic., Cap. 134, to sequestrate the estate of a married

woman who had been made insolvent in New South Wales, had afterwards married, and had come to Victoria, it is not sufficient to show that she has separate property in Victoria, without also showing that she has acquired such property before her insolvency, and before contracting the debts upon which she has been made insolvent in New South Wales. *In re Dickson*, 5 W. W. & A'B. (I. E. & M.,) 4.

Married Woman—Separate Property—Judgment Recovered.]—In a petition for sequestration against a married woman for not satisfying a judgment, the notice of objections stating she had not been asked to satisfy it, it is not necessary to allege that she has separate property. The judgment recovered against her is *prima facie* evidence that she has separate property. *In re Willison*, 4 V.L.R. (I. P. & M.,) 67.

But where the order *nisi* stated that a married woman had property to her separate use, and that execution was returned unsatisfied, and the objections were to the effect that she had not real or personal property in respect of which she could be made insolvent, *Held* that the judgment was not *prima facie* evidence, and that petitioning creditor must prove his whole case. *In re Cunningham*, 5 V.L.R. (I. P.& M.,) 60.

Order Nisi—To Sequestrate Estate of Married Woman—Judgment—Carrying on Business—Evidence of Separate Property.]—An order *nisi* to sequestrate the estate of a married woman recited that she was "possessed of property within the colony of Victoria for her separate use." The act of insolvency alleged was the not satisfying a judgment, and there was an averment that she carried on business as a licensed victualler. *Held* that the order *nisi* need not show how the property was for her separate use, or follow the words of Sec. 21 of the "*Married Women's Property Act*," since the fact that a judgment had been recovered against her, and that she carried on business, was sufficient *prima facie* evidence that she had separate property. *In re Nelson*, 2 A.L.T., 27.

Per Molesworth, J.—If it were necessary, this would be a clear case for amendment. *Ibid.*

Admissibility of Evidence in Other Proceedings—Under "Insolvency Statute 1871," Sec. 19.]—There is nothing in Sec. 19 of the "*Insolvency Statute* 1871," to render inadmissible written admissions or statements which have been used in other proceedings—*e.g.*, the examination of one of the creditors in the insolvency proceedings. *Re Maley*, 4 A.J.R., 7.

(e) *Costs.*

Petitioning Creditor's Costs—What are.]—Costs of prosecuting insolvent's son for perjury disallowed as not being petitioning creditors costs within Sec. 17 of Act No. 273. Costs of opposing certificate of investigating insolvent's conduct and dealings, and of appointment of petitioning creditor as trade assignee similarly disallowed. *In re Kingsland*, 6 W. W. & A'B. (I. E. & M.,) 25; N.C., 39.

Taxation.]—Commissioner ordered to re-tax petitioning creditor's costs in the presence of the insolvent's solicitor unless all parties agreed to their being fixed at a lump sum. *Ibid.*

Petitioning Creditor's Costs—Act No. 379.]—*Per Molesworth, J.*, "After the order *nisi* the petitioning creditor must at his own expense prosecute the proceedings, and if the order is made absolute the estate is primarily liable for them. Sec. 151 contains no provisions under which if a composition supersedes the sequestration, these costs could be enforced, so that a majority of creditors if they could act under Sec. 157 against the consent of the petitioning creditors might defeat those inchoate rights." *In re Marie*, 3 A.J.R., 6.

Of Solicitor—Should be Taxed Before Filing Plan.]—A solicitor charged an insolvent certain costs, but did not show promptitude in taxing and presenting his costs before the plan of distribution was filed, and the assignee refused to pay the balance found due on taxation after the plan was filed. The solicitor entered a *caveat* against the confirmation of the plan, and in person moved to amend the plan by the insertion of the unpaid balance of his taxed costs. *Held*, that the solicitor should have ascertained and had his costs taxed with the greatest promptitude, so that his claim should not be a clog upon the filing of the plan, and motion refused. *In re Anmer*, 1 W. & W. (I. E. & M.,)100.

[*See* now Sec. 34 of Act No. 379.]

As to costs upon applications for certificates of discharge *see post* under sub-heading Certificate of Discharge—Practice.

As to costs of setting aside settlements *see ante column 478.*

As to costs of trustees and assignees *see post* under sub-heading TRUSTEES.

Of Petitioning Creditor.]—Where a petitioning creditor had before the order *nisi* for sequestration been refused inspection of a deed of assignment (the alleged act of insolvency) the Court allowed him his costs under the circumstances, although it discharged the order. *In re Haslam*, 3 V.L.R. (I. P. & M.,) 10.

Costs of Person Taking Objections.]—An objection, though technical, if fairly taken at the proper time entitles the successful objector to costs. *In re Phelan*, 3 W. W. & A'B. (I. E. & M.,) 1.

Of Order Nisi—Creditor Obtaining With Notice of Proceedings for Composition.]—Where a creditor obtained an order *nisi* with notice that a preliminary resolution for composition under Sec. 181 of the "*Insolvency Statute* 1871," had been passed, the order *nisi* was dismissed with costs against him. *In re White*, 2 V.R. (I. E. & M.,) 42; 2 A.J.R., 132.

On discharge of an order *nisi* upon an objection taken by the Court and not by counsel, no order was made as to costs. *In re Barry*, 1 W. & W. (I. E. & M.,) 174.

Of Petition and Appeal—Partners Appearing Separately.]—Where a petition was presented for the sequestration of the property of a firm, and the members appeared separately, and offered the same defence and the same notices of opposition, the *Full Court* varied the order dismissing the petition and order *nisi* by allowing the members of the firm only one set of costs for the petition, and limited the costs of the appeal in the same way. *In re Thomas and Cowie*, 9 V.L.R. (I. P. & M.,) 2, 16; 5 A. L. T. 95.

Setting off Against Debt.]—On discharge of an order *nisi* with costs, the Court will not always set off the costs against the debt. *In re Whitesides*, 3 A.J.R., 115.

(f) Other Points of Practice.

"Supreme Court Rules," Cap. 10—"Miscellaneous."]—Cap. 10 of the "*Supreme Court Rules*," headed "*Miscellaneous*," applies to proceedings in the Insolvency Jurisdiction. *In re Stephenson*, 1 W. & W. (I. E. & M.,) 114.

Rules of Court made under the Insolvent Act, No. 273.]—There is nothing in the Act 28 Vic., No. 273, which gives to the rules made under it the effect of an Act of Parliament. They are framed to govern the general practice of the Court, but are not to be made the masters of the Court, and may be relaxed in accordance with the exigencies of the occasion. *In re Brann*, 3 W. W. & A'B. (I. E. & M.,) 6.

5 Vic., No. 17, Sec. 25.]—Where a summons was taken out four days after order *nisi* for sequestration, *Held* that that complied with word "forthwith" in Sec. 25 of the Act. *In re Trevarrow*, 2 W. & W. (I. E. & .M,) 84

[Compare Sec. 21 of Act No. 379.]

Act No. 379, Sec. 29—Signature of Judge—Judicial Notice.]—The Court in its Insolvency Jurisdiction takes judicial notice of the signature of one of its Judges to an order *nisi* for sequestration, and of the office by virtue of which he signed it. *In re Cooper*, 2 V.L.R. (I. P. & M.,) 82.

Lapse of Order Nisi—Act No. 379, Sec. 39.]—*Semble, per Molesworth, J.*, the lapse of an order *nisi* (the order not being discharged) revests the estate in the debtor subject to the right of another creditor taking the order up. *In re Ray*, 1 V.L.R. (I. P. & M.,) 56.

Order Nisi for Sequestration Abates by Death.]—An order *nisi* for sequestration abates by the death of the alleged insolvent, and cannot be revived, or otherwise carried on against his representatives, being a proceeding *in personam* and not *in rem*. *In re Mann*, 1 W. & W. (I. E. & M.,) 103.

Not Satisfying Debtor's Summons—Making Order Absolute.]—Making absolute an order *nisi* for sequestration where the act of insolvency is not satisfying a debtor's summons, does not affirm the existence of the debt, but the insolvent may afterwards dispute it in the Insolvent Court. *In re Counihan*, 8 V.L.R. (I. P. & M.,) 14.

Orders — Signing — Judge's Associate.] — An order in insolvency, signed by the associate of a Judge of the Supreme Court, other than the Judge who made the order, is not thereby bad. *In re Wolter*, 4 V.L.R. (I. P. & M.,) 75.

(4) Reviving Sequestration.

Revivor of Order Nisi—5 Vic., No. 17, Sec. 28.]—Where an order *nisi* lapses through no one appearing on either side when the case is called on it is practically *superseded* within the meaning of Sec. 28, and no express order for that purpose is necessary to enable a creditor to revive it. *In re Butchart*, 2 W. W. & A'B. (I. E. & M.,) 8.

For S.P. *see in re Von Der Heyde, ibid* p. 28.

Where a person takes up an order *nisi*, based upon sufficient materials in fact, he ought not to be defeated by a defect in the original petition, and in spite of such defect may revive the order *nisi*. *In re Butchart*, 2 W. W. & A'B. (I. E. & M.,) 8.

[Compare Sec. 49 of Act No. 379.]

Petition to Revive Sequestration—Service of.]—The original petitioning creditor need not be served with notice of an application under 5 Vic., No. 17, Sec. 28, to revive a sequestration. *Ex parte White*, 1 W. W. & A'B. (I. E. & M.,) 24.

[Compare Sec. 49 of Act No. 379.]

Petition for Revival of Sequestration—What Allegation Necesssary.]—A petition under 5 Vic., No. 171, Sec. 28, for revival of a sequestration, after setting out the debt, and act of bankruptcy, alleged that, though the insolvent appeared, the petitioning creditor colluding with him, made default in appearing, so that the order *nisi* was, in consequence, superseded, and the petition dismissed. The collusion was not proved. *Held* that proof of default alone was sufficient without collusion, and that the allegation of collusion was mere surplusage. *Ex parte Staughton*, 1 W. W. & A'B. (I. E. & M.,) 15.

[Compare Sec. 49 of Act. No. 379.]

Petition for Revival of Sequestration—What Petitioner Must Provs.]—A creditor seeking to revive a sequestration, must prove his own debt to be a good petitioning creditor's debt, and must prove the insolvency in all other respects, save that he need not prove that the original petitioning creditor's debt was a good one. *Ex parte Staughton*, 1 W. W. & A'B. (I. E. & M.,) 15.

Application to Revive Sequestration—Dismissal when no Bar to Subsequent Application.]—The dismissal of an application by two out of three executors, under 5 Vic. No. 17, Sec. 28, for a revival of a sequestration of the estate of a debt or of their testator, on the ground that

two out of three executors could not so apply, is no bar to a subsequent application by another creditor for a revival. *Ex parte White*, 1 W. W. & A'B. (I. E. & M.,) 24.

[Compare Sec. 49 of Act No. 379.]

When Creditor Seeks to Revive a Sequestration.]—Upon an application to revive a sequestration, it is not necessary that the debt owing to him should have been incurred before the act of insolvency relied on; it is enough if it be incurred prior to the order for sequestration. *Ibid.*

[Compare Sec. 49 of Act No. 379 as to provisions for reviving a sequestration.]

Nature of Dsbt—Advance to a Partner under Act No. 179.]—B. and J. entered into an agreement by deed, by which J. stipulated to become an anonymous partner, although the business was carried on in the name of B. and Co. J. advanced £500, and stipulated for a share of profits not of losses. He made further advances without any provision as to increased share of profits in reference to these advances. On a petition by J. for revivor of order *nisi* for sequestration of B.'s estate, *Held* that the transaction was one in which the original £500 and the subsequent advances could be severed, and that as to these advances he stood in the relation of any other creditor. Order absolute for revivor of sequestration. *In re Butchart*, 2 W. W. & A'B. (I. E. & M.,) 8.

(5) *Setting Aside Sequestration.*

Voluntary Sequestration — Notice.] — In an application to set aside a voluntary sequestration of a firm's estate made by one partner only of the firm, the official assignee does not represent all parties so as to dispense with the service of notice upon "all the parties," and notice to the assignee is not enough, but must be given to "all the parties" including the party voluntarily sequestrating. *In re Yorston and Webster*, 1 W. & W. (I. E. & M.,) 96.

Uncsrtificatsd Insolvent.]—In May, 1858, an insolvent's estate was sequestrated, but the insolvent was described as *James B.* instead of *John B.*, and no certificate of discharge was obtained. In April, 1865, an order for a second sequestration was made. This second sequestration was set aside on the ground that B. was an uncertificated insolvent at the time of the second sequestration. *In re Bryan*, 2 W. W. & A'B. (I. E. & M.,) 20.

On What Grounds.]—The Court refused to set aside an order of sequestration on an application alleging that the petition did not value the security, and that it had been fraudulently obtained because the petitioning creditor had only a future contingent debt, being satisfied that the proceedings had been regular, that there had been no undue attempt to catch the judgment of the Court over a party who had no opportunity of defending himself, and that the conduct of the insolvent had been such as to justify the petitioning creditor in regarding him as an absconding debtor. *In re Rowley*, 2 V.L.R. (I. P. & M.,) 50.

Quære, whether the Court has any, and, if any, in what cases jurisdiction to set aside a sequestration. *Ibid.*

VII. Composition Deeds and Deeds of Assignment.

[Note.—Deeds of assignment are no longer protective in insolvency, being made acts of insolvency under Act No. 379, Sec. 37, Sub-sec. 1, except that under Sec. 69 a certain protection is given to certain acts and things done.]

Deed of Assignmsnt—Proof of Execution by Trustess—5 Vic. No. 9, Sec. 33.]—R. W. executed a deed of assignment of all his property to trustees for the benefit of all his creditors, under 5 Vic., No. 9, Sec. 33, but it appeared that the attestation clause of the deed as it originally stood ran thus:—"Signed, sealed, and delivered by the said R. W. in the presence of and attested by *H. W. F.*, J.P.;" so that it made no mention of the execution by the trustees in *H. W. F's.* presence. Nearly a year afterwards the attestation was amended by *H. W. F.* certifying that he saw the deed executed by the trustees as well as by R. W., at one and the same time. On a rule *nisi* for compulsory sequestration against R. W. for not satisfying the sentence of a competent Court being thereunto required, the deed of assignment was shown as cause against sequestration. *Held*, that the principle of *expressio unius exclusio alterius* applied, and that the execution must be taken to have been as shown by the attestation as it originally stood; that the omission could not be subsequently corrected, and that the subsequent addition did not cure the defect; that the deed must be held not to have been executed and attested in conformity with the Act, and to be invalid, and no excuse for the alleged act of insolvency. *In re Woolley*, 1 W. & W. (I. E. & M.,) 81.

Deed of Assignmsnt in Favour of Crsditors—5 Vic., No. 9—7 Vic., No. 19, Sec. 8.]—A deed of assignment in favour of creditors has no validity under 5 Vic., No. 9, until executed by a majority of creditors in number and value, though it may be good at common law the moment it is signed by debtor, and does not protect the assignor under 7 Vic., No. 19, Sec. 8, from being made insolvent until so executed. *In re Lawrance*, 2 W. & W. (I. E. & M.,) 45.

5 Vic. No. 17, Sec. 5.]—Where such a deed contains an ultimate trust of possible surplus for the assignor, such assignor has "disposable property" within the meaning of Sec. 5 of No. 17. *Ibid.*

Deed of Assignmsnt—7 Vic., No. 12, Sec. 8—How Far a Protection Against an Act of Insolvency.]—A deed of assignment in favour of creditors, executed by a majority of creditors in number and value, but not by four-fifths, is a sufficient excuse under Sec. 8 of the Act for not pointing out property to Sheriff levying an execution, and order *nisi* for sequestration discharged; but concurrence of four-fifths of the creditors is necessary to make the release operative. *In re Hall*, 2 W. & W. (I. E. & M.,) 87.

Deed of Assignment—How Far a Protection Against an Act of Insolvency.]—A deed of assignment for the benefit of creditors is not complete until executed by a majority in number and value of the creditors. Such a deed, until so executed, will afford no protection from not pointing out property to the Sheriff levying an execution; and no protection against sequestration following on the act of insolvency will be afforded by the subsequent execution of the deed by the necessary majority. *In re Ellis*, 3 W. W. & A'B. (I. E. & M.,) 11.

Deed of Assignment—Protection Afforded By.]—A deed of assignment under the "*Insolvency Statute* 1865," if executed by a bare majority in number and value of the creditors, will afford protection against not pointing out property to satisfy an execution on a judgment obtained before or after the execution of the deed. *In re Curle*, 3 W. W. & A'B. (I. E. &M.,) 56, 63.

"Insolvency Statute 1865," No. 273, Sec. 115—Deed no Excuse for Not Satisfying Debt on Debtor's Summons.]—On an order *nisi* for sequestration, a deed of assignment in favour of creditors was relied upon as a defence. The deed contained a clause that no creditor executing should be entitled to a dividend upon a greater sum than trustees should certify to be due. *Held* that the sole power given to the trustees was bad, and that under Sec. 115 of No. 273, it was not an excuse for not satisfying a debt on a debtor's summons. Order absolute. *In re M'Donald*, 5 A.J.R., 45.

5 Vic., No. 9, Sec. 37—Where Prior Mortgage Good as Against Deed of Assignment.]—By a deed poll, T. assigned his interest in certain leasehold property to A. to secure a debt of £2000 then owing, and to secure further advances. Within 60 days afterwards T. assigned all his property upon trust for his creditors, the lease being mentioned in the schedule as subject to mortgages, and the deed providing for creditors executing without prejudice to their securities. A. executed, as a creditor, for £1250, but did not do so expressly as without prejudice to his securities. The agents for the trustees sold the property. On bill by A. and his representatives praying for an account and payment or foreclosure, *Held* that the mortgage was not fraudulent under Sec. 37 of the Act, that section relating to chattels, personal only, and that A.'s execution of the deed was sufficient to protect his security; and that any objection against the validity of the mortgage was one which the trustees could only take personally, and not purchasers from them. *Tuckett v. Alexander*, 1 W. & W. (E.,) 87.

Deed Executed by One Partner Only, How Far it Binds the Firm.]—The execution, by one member of a firm as trustee, of a deed of assignment for the benefit of creditors, does not bind the firm as creditors, as a relinquishment of the debt, and will not operate as a bar to proceedings by the firm for compulsory sequestration of the assignor's estate. *In re Crate*, 3 W. W. & A'B. (I. E. & M.,) 13.

Deed of Assignment—Not Executed by a Majority of Creditors—28 Vic., No. 273, Sec. 29.]—A deed of assignment to a trustee for the benefit of creditors, which contains a release of debts, and which is executed by some, but not by a majority of the creditors, is valid under Sec. 29 of the "*Insolvency Statute* 1865," and the release by some of the creditors is a sufficient consideration. Such a deed will give the trustee a good title to the property assigned as against the official assignee under a subsequent sequestration. *Aarons v. Board of Land and Works*, 5 W. W. & A'B. (L.,) 107.

Act No. 273.]—A deed of assignment in favour of all such creditors as might execute it within 20 days was held not to be a deed of assignment for the benefit of all the creditors within the meaning of the Act. *Port v. London Chartered Bank*, 1 V.R. (L.,) 162.

And a deed of assignment in favour of creditors is not *per se* a fraudulent preference. *Goodman v. M'Callum*, *post column* 630.

Composition Deeds—General Construction and Operation.]—Where on an order *nisi* for sequestration in consequence of failing to point out sufficient property to satisfy a judgment, a deed of assignment in favour of creditors, was set up as a defence, *Held* (1) that the deed lying in the solicitor's office from August 14th until August 25th, and the advertisements properly describing the place where it was, the "*Insolvent Act*" 5 Vic., No. 17, had been complied with; (2) that it was not necessary that the attestation by a magistrate should be dated; (3) that a provision that the trustees should retain a commission not exceeding five per cent. did not invalidate it, such being protected under Sec. 51 of No. 17 (also under Sec. 62 of No. 273;) (4) that a provision for some creditors not enumerated in the schedule, did not invalidate it under Sec. 115 of Act No. 273, Sec. 118 of the same Act showing that a wilful and material omission only would do so; (5) that a provision that after it had been signed by three-quarters in number and value of the creditors, the majority of creditors *might* allow furniture and some other payments to the debtor, did not invalidate it; (6) that a provision that after three-fourths in number and value had signed other creditors might be paid, did not invalidate it; (7) that an arbitration clause as to disputed debts coming into effect after the deed was so signed as above was good, and (8) that a provision that each signing creditor should release his debt was not invalid. Order *nisi* discharged. *In re Von Der Heyde*, 2 W. W. & A'B. (I. E. & M.,) 28.

Deed of Assignment—Setting Aside—Omission of Assets from Schedule, Act No. 273, Sec. 118.]—An insolvent executed a deed of assignment for the benefit of his creditors under Part 13 of the "*Insolvency Statute* 1865." Subsequently his estate was compulsorily sequestrated. There was an omission from the schedule to the deed of a sum of £700, which had been secreted by the insolvent. On rule *nisi* to set aside the deed, *Held*, reversing *Molesworth, J.*, that the

omission from the schedule was a wilful and material non-compliance with the Act within the meaning of Sec. 118 of the "*Insolvency Statute* 1865;" and that the Judge below should have exercised his discretion in either setting it aside, or depriving the insolvent of all benefit thereunder; and rule made absolute. *In re Brann*, 3 W. W. & A'B. (I. E. & M.,) 47.

Deed of Assignment—"Insolvency Statute 1865"—Retention of Separate Estate by Debtor.]—A deed of assignment under the "*Insolvency Statute* 1865" contained a clause, that when executed by four-fifths of the creditors, the debtors, who were partners, might retain their separate real estate, and that the trustees should convey it to them; and that the trustees should be allowed a commission of five per cent. on the gross proceeds realised under the deed. *Held*, that the insertion of these provisions did not make the deed void. *Moss v. Levy*, 1 V. R. (L.,) 94; 1 A. J. R., 92.

Deed of Assignment—What Schedule Must Contain.]—The schedule to a deed of assignment under the "*Insolvency Statute* 1865," by partners should contain all the creditors and all the property, both joint and separate; but an omission in either respect does not necessarily invalidate the deed, or prevent its affording, till set aside, protection against not pointing out property in satisfaction of an execution. *In re Curle*, 3 W. W. & A'B. (I. E. & M.,) 56.

Deed of Assignment—Wearing Apparel Should be Excepted.]—The debtor's wearing appeal is property excepted from assignment by a deed of assignment under the "*Insolvency Statute* 1865," as well as omitted from the schedule to the deed. *Ibid.*

What is a Valid Deed under Sec. 115 of "Insolvency Statute 1865," No. 273.]—In Sec. 115 of Act, No. 273, the word "or" between "conveyance" and "assignment" must be read "and," since an assignment will not pass real estate. A debtor who wishes to take advantage of a deed under that Sec. must convey all his *real* and *personal* estate, whether he knows of the property or not; it is not sufficient if an assignment is proved of personalty only, even though the debtor swear that so far as he knows he has no realty. *Caro v. Devine*, 6 W. W. & A'B. (L.,) 258; N.C., 67.

By Partners—Not Noticing Separate Estate, Invalid.]—A deed of assignment purporting to be under Part 13 of the "*Insolvency Statute* 1865," executed by partners assigning all their estate, but not noticing separate estate or creditors, is not a good deed under the Act. *In re Upton and Bowes*, 2 V.R. (E.,) 117; 2 A.J.R., 68.

Trustees of Creditor's Deed—Not Estopped by Execution of Invalid Deed] — Trustees of an insolvent who had executed a deed of assignment which was held to be invalid were held not to be estopped by the execution from availing themselves of the invalidity of the deed as against a creditor who had obtained a rule *nisi* under Sec. 121 of "*Insolvency Statute* 1865." calling upon them to pay a dividend to him under the deed, but the rule was discharged without costs. *Ibid.*

Deed of Assignment—Memorial of Registration.]—The memorial of registration of a deed of assignment under the "*Insolvency Statute* 1865" should be a copy of the entire schedule of property, both real and personal; but the Act is, in this respect, directory only, and non-compliance with its provisions does not render the deed void. But, *semble*, *per Stawell, C.J.*, that all that the Act requires is that a copy of the schedule, so far as the real estate is concerned, should be registered. *In re Curle*, 3 W. W. & A'B. (I. E. & M.,) 56, 59, 64.

Deed of Assignment—Registration—Insolvency Statute 1865, Sec. 116.]—The 116th Sec. of the "*Insolvency Statute* 1865" as to the registration of the schedules of personalty and memorials of realty to deeds of assignment is directory, and not mandatory. *Moss v. Levy*, 1 V.R. (L.,) 94; 1 A.J.R., 92.

Creditor's Deed—When Valid—Executed by Attorney Under Unregistered Power.]—*See Stacpoole v. Glass*, 1 V.R. (L.,) 195; 1 A.J.R., 154. *Post* under POWER OF ATTORNEY.

Trust Deed for Benefit of Creditors—Who May Compel Payment of Dividends Under.]—An assignee for value of a debt due on bills of exchange is an "interested party" within the meaning of the "*Insolvency Statute* 1865," Sec. 121, so as to be able to compel the trustees of a trust deed for creditors to pay him a dividend. *In re Sloman*, 1 A.J.R., 110; 1 V.R. (E.,) 129.

Act No. 273, Sec. 121—Dividend Not Payable to a Non-executing Creditor.]—Until a deed of assignment is executed by a majority of the creditors in number and value, it does not become a deed under the Act, and therefore execution of the deed is necessary. A bank was a creditor to the extent of £7000, and they refused to execute a deed of assignment because the trustees only recognised their claim to the extent of £3000. Without the bank there would not be the majority sufficient to constitute the deed a release of debts. *Held*, *per Molesworth, J.*, that the trustees need not pay the dividend unless the bank executed the deed, but that the signature by the bank should be accompanied by a memorandum limiting its effect to the £3000. *Held*, on appeal, that the bank was bound to execute, but that the execution was not to be so limited. *In re McDonald*, 3 A.J.R., 106, 130.

Assignment of Estate to Trustee under 5 Vic., No. 9—Duty of Trustee.]—By an assignment in trust for creditors it was provided that no creditor should be entitled to receive a dividend upon any greater sum than the trustee should certify to be due, and that the trustee should act under the direction of a meeting of creditors as to whether claims should be admitted or not. On rule *nisi* by a creditor for payment of a dividend on a debt claimed by him, but which the trustee refused to certify, and under direction of a meeting of creditors declined to pay a

dividend upon, *Held*, that it was the duty of the trustee to exercise such a discretion as the deed reposed in him, and rule discharged; but it appearing that its provisions came upon the applicant as a surprise, without costs. *Ex parte Nathan*, 1 W. W. & A'B. (E.,) 107.

Execution—Interest.]—A creditor before taking any benefit of distribution under a creditor's deed of assignment must execute it, but his execution is not a condition precedent to his proving in the Master's office for his debt. *Semble*, that creditors are entitled to interest on their debts up to the date of payment, the method of distribution being payment of principal and interest of all debts down to date of deed, and then the balance of interest out of the surplus if any. *Heape v. Hawthorne*, 2 W. W. & A'B. (E.,) 76, 87, 89.

Deeds of Assignment—Heading.]—Proceedings as to deeds of assignment under the "*Insolvency Statute* 1865," are to be headed as heretofore, "In Equity," not "In Insolvency." *In re Brann*, 3 W. W. & A'B. (E.,) 111.

Setting Aside Assignment—Parties.]—Where a bill is filed to set aside a deed altogether, the trustees do not represent the *cestui que trustent*. Therefore where a suit was brought by the official assignee of a debtor to set aside an assignment for the benefit of all the debtor's creditors, it was held that the trustee did not sufficiently represent the creditors who were necessary parties. *Goodman v. M'Callum*, 1 W. & W. (E.,) 135, 136.

Creditor's Deed—Not Signed by Majority—Setting Aside—No. 273, Part 13, Sec. 118—No. 379, Sec. 2]—A creditor's deed purporting to be made under Part 13 of the "*Insolvency Statute* 1865," and executed by the debtor and trustees, was not signed by a majority in number and value of the creditors as required by Part 13 of the Act. On motion to set it aside, *Held* that the Court had jurisdiction to set the deed aside under Sec. 118 of the "*Insolvency Statute* 1865," although the deed was not signed by a majority in number and value; and *semble*, that such a deed is a deed "executed under Part 13" within the meaning of the "*Insolvency Statute* 1871," Sec. 2. On appeal, *Held* that since the trustees had executed the deed, as one under Part 13, they were precluded from saying that it was not a statutory deed: and that the Act of 1871 did not repeal Part 13 of the Act of 1865 so as to deprive the Court of jurisdiction under Part 13. *In re Knowles*, 2 V. R. (I. E. & M.,) 8; 2 A. J. R., 8, 41.

Assignment for Benefit of Creditors—Subsequent Insolvency—Payment of Dividend—"Insolvency Statute 1871," Sec. 69.]—*Per Noel, J.* An assignment to trustees for the benefit of creditors generally is included in Sec. 69 of the "*Insolvency Statute* 1871," without any reservation, and is therefore void. *In re Finney*, 1 A. L. T., 187.

A debtor assigned his property to a trustee for the benefit of his creditors generally, and dividends were paid to some. Three of his creditors refused to agree to the assignment, and more than six months after the assignment sequestrated his estate. Property had been collected and dividends paid under the assignment. *Held, per Noel, J.*, that the assignment was void against the trustee in insolvency, that the undistributed property passed to him, that the trustee in insolvency was entitled to the dividends retained for, but not paid to the dissentient creditors, and to money subsequently collected for the payment of further dividends, and that the creditors who had executed the deed could prove on the estate for the balance of their debts. *Ibid.*

Deed of Assignment—How Far a Defence to Action at Law.]—To an action on a bill of exchange the defendants pleaded a deed of assignment to trustees for the benefit of creditors, in bar. The deed was executed by four-fifths in number and value of the defendant's creditors as required by the "*Insolvency Statute* 1865," and contained a clause empowering "any meeting of creditors called and convened as aforesaid to give any direction respecting the household furniture and other household effects," of each of the assignors; and "also to give any directions respecting any allowance" to the assignors out of their "property or business." *Held*, on demurrer, that though this clause might give rise to difficulties and embarrass the trustees, yet it did not invalidate the deed, and that the plea was good. *Levy v. Katzenstein*, 3 W. W. & A'B. (L.,) 80.

Assignment for Benefit of Creditors—Effect of at Law.]—A debtor who assigns all his property to trustees for the benefit of his creditors on the faith of an agreement on their part that the debts due to them should be suspended, if not extinguished, cannot afterwards be sued by those creditors for these debts. *Goldsbrough v. M'Culloch*, 6 W. W. & A'B. (L.,) 113, 124.

Deed of Assignment—Operation at Common Law—Proof.]—A deed of assignment, though not good under the "*Insolvency Statute*," may be good at common law, and sufficient to pass the property comprised in it, and such a deed, as a conveyance at common law, may be proved without producing the attesting justice. *White v. Young*, 1 V.R. (L.,) 188; 1 A.J.R., 151.

Deed of Assignment—Consideration—Construction and Operation at Law—Execution by Creditors.]—A memorandum of agreement was signed by B., by which he made S. a trustee for his creditors as set out in the document. Two of the creditors who had not signed this document brought an action to recover from S., as garnishee, the value of the money which B. had handed over to S. *Held* that the deed was not without consideration, and therefore good, and that the deed being without an express or implied condition that it should not take effect until a certain number of creditors signed it, it took effect immediately upon its execution by the debtor and the majority of the creditors who had executed it. Rule absolute to enter verdict for S. *Davey v. Schurmann*, 7 V.L.R. (L.,) 188.

And *see* cases *ante column* 344.

VIII. Fraudulent Conveyances.

See Fraudulent Conveyances and Settlements, *ante columns* 466-478.

IX. Protected Transactions and Fraudulent Preferences.

(1) *Protected Transactions.*

Execution Against Land—Who Entitled to Proceeds.]—B., a County Court bailiff, seized under execution the land of a judgment debtor. After seizure and before sale, he received information by informal notice of the sequestration of the judgment debtor's estate and of S.'s appointment as his official assignee. B. sold the property and paid out of the proceeds £32 to the landlord for rent, and paid the rest into Court. S. sued B. to recover the £32 as paid by the defendant in his own wrong. There was a verdict for B. On rule *nisi* for a new trial or to enter verdict for plaintiff, *Held* that B.'s act was not analagous to the payment of debts by an executor *de son tort*, and was not similarly protected; that B. paid the debt without due authority, and which the official assignee himself could not have paid until the landlord had taken proper proceedings under the insolvent law. Rule absolute to enter verdict for plaintiff for £32. *Simpson v. Burrowes*, 4 W. W. & A'B. (L.,) 150.

And *see* cases under Fraudulent Conveyances—*What are or are not, ante-column* 466, *et seq.*

(2) *Fraudulent Preferences.*

What Constitutes—5 Vic., No. 17, Sec. 8.]—M bought goods from Y. on "sale or return," and for shipment to O., with the understanding that, if not sold there, they might be returned to Y. within a reasonable time. M. insured the goods for the voyage to O. On the way they were totally lost, and M. recovered a verdict for their value from the insurance company. M. and Y. agreed that Y. should receive the amount of the policy from the company, in discharge of M.'s debt to him for the goods. M.'s debt to Y. would thus have been paid in full. There were then other creditors of M., who sequestrated his estate within 60 days of the arrangement, and C. was appointed his assignee. On an interpleader summons a feigned issue was tried between C. and Y. as to their right to the amount of the policy, and the Judge directed the jury that the transaction between M. and Y. was void under 5 Vic., No. 17, Sec. 8, as a preference to Y. over M.'s other then existing creditors. Upon appeal, *held* that the direction was right. *Per Stawell, C.J., and Barry, J.*—No question of intent arises under the 8th Sec; and *per Stawell, C.J.*—If the payment or delivery be within 60 days, it seems irresistible that it has the effect of preferring. *Younghusband v. Courtney*, 1 W. & W. (L.,) 55.

Fraudulent Preference—5 Vic., No. 17., Sec. 73.]—*Regina v. Wallis, see post* under Offences by Insolvent.

Assignment for Benefit of Creditors—Sequestration—Acts 5 Vic., No. 9, 5 Vic., No. 17, Secs. 5, 6, and 8.]—By indenture dated 13th July, 1861, H. assigned all his real and personal estate to trustees for the benefit of all his creditors. On the 17th July, H. became insolvent, and the plaintiff was appointed official assignee. On the latter day the requisites of 5 Vic., No. 9, as to the deed of assignment to creditors had not been complied with. The official assignee filed a bill against the trustees of the deed only, alleging it to be if valid at common law yet fraudulent and void in equity as against himself, and praying for a declaration to that effect, and a reconveyance by the trustees to himself. *Held*, on demurrer, that the deed was not a fraudulent alienation or transfer within 5 Vic., No. 17, Sec. 5; that on the facts stated in the bill it could not be inferred that the deed was either an alienation without consideration within Sec. 6, or an alienation having the effect of preferring one existing creditor to another under Sec. 8. *Goodman v. M'Callum*, 1 W. & W. (E.,) 135.

What is Not — Assignee Retaining Contract Moneys to Which Others were Entitled—Act 5 Vic., No. 17, Sec. 8.]—H. contracted to erect buildings at the Melbourne Hospital, and applied to A. and Co. for assistance in the shape of cash and materials, which A. and Co. by writing agreed to give, in consideration of H. giving orders duly acknowledged by the treasurer to receive the contract monies. H gave a note which was acted on to the treasurer to pay to A. and Co. the contract monies. H. became insolvent, and J, his official assignee, took up and finished the contracts, and received £170 more than he had expended. Action by A. and Co. against J. for money had and received. *Held*, that J. received the money and held it subject to the arrangement between H. and A. and Co., and that he was in no better position than H. would have been, and that the case did not fall under the Act 5 Vic., No. 17, Sec. 8, as a fraudulent preference. *Anderson v. Jacomb*, 2 W. & W. (L.,) 269.

[The corresponding Sec. of Act No. 379 is Sec. 71.]

Inadequate Consideration.]—When the consideration for a conveyance, executed within sixty days preceding an order for sequestration of the grantor's estate, is the release of a debt due by the grantor to the grantee, such conveyance is a "preferring" of the releasing creditor within the meaning of 5 Vic., No. 17, Sec. 8. *Jacomb v. Donovan*. 1 W. W. & A'B. (E.,) 66.

Where C. under a conveyance executed on the 17th July, 1863, conveyed his equity of redemption in real estate to D., for an inadequate consideration and under suspicious circumstances, and on the 30th day of the same month an order *nisi* was made for the sequestration of C.'s estate, and the consideration was the release of a debt due by C. to D., on bill by the official assignee of C.'s estate to set aside the conveyance, *Held*, that the conveyance was fraudulent and void, both at

common law, and under 13 Eliz., Cap. 5., the dealing showing embarrassment of the grantor, near approach of insolvency, a connection between the parties and inadequacy of price, and therefore raising a strong suspicion of fraud. *Ibid.*

[The corresponding Sec. of Act No. 379 is Sec. 71.]

Transfer of Bills of Exchange Within Sixty Days of Sequestration—Pressure—5 Vic., No. 17, Sec. 8.] —S., in 1860, borrowed £1500 from W., and gave him a warrant of attorney and bond for the amount. Judgment was never entered up on the warrant of attorney, but a writ was issued by W., and by arrangement judgment was signed in the action. W.'s agent, by dint of threats and pressure, in January 1862, obtained certain payments in cash and two bills of exchange from S., who then absconded, and within sixty days of the transaction his estate was sequestrated. His assignee sought to recover the proceeds of the bills of exchange from W., contending that the mere transfer of them was void under Sec. 8 of No. 17., by the mere fact, that it was made within sixty days next preceding the sequestration, and that W. was preferred to other then existing creditors, even though there were no question of fraud or intent. The jury found for the defendant; and found specifically that the transfer was made by S. *bona fide*. On rule *nisi* to enter a verdict for the assignee, *Held*, that the transfer not being voluntary, it was not void under Sec. 8 of 5 Vic., No. 17; and rule *nisi* discharged. *Courtney v. Wilson*, 1 W. W. & A'B (L.,) 110.

What Constitutes.]—W. assigned all his property to a creditor in consideration for a sum of money which was paid, but immediately returned to the creditor, who shortly afterwards sold nearly all the property by auction, and bought it in himself. W.'s estate was shortly afterwards compulsorily sequestrated; but the official assignee made no demand for the property assigned, nor did he, before action, indicate, in any way, an intention to treat the transaction as a fraudulent preference. On action by the official assignee in trover and upon money counts for the proceeds of the part of the property sold, *Held* that there was evidence to go to the jury of a fraudulent preference, but that the defendant (creditor) was entitled to succeed on the plea of "Not Guilty" since the transfer was made by the debtor while fully competent to make it, and it could not be affected by relation back; and that W. was entitled to be fairly informed of the assignee's intention to dispute the assignment, although a formal demand by the assignee was not essential; and judgment for the plaintiff on the count in trover without costs. *Simson v. Mitchell*, 5 W. W. & A'B. (L.,) 114.

"Insolvency Statute 1865" (No. 273,) Sec. 31 —Pre-existing Debt—Bill of Sale.]—N. and K. were traders in partnership, and on 3rd December, 1866, executed a bill of sale to plaintiff of certain scheduled chattels, to secure payment of £702 of which £150 was advanced at the time, the balance being a then existing debt. Default was made in payment, and the plaintiff D. took possession of goods comprised in the bill of sale. N. and K. voluntarily sequestrated their estate on 26th January, 1867, and the defendant S. was appointed official assignee. The defendant claimed the whole of the property taken by plaintiff, and by agreement the chattels were sold and the proceeds placed in a bank to await the issue of the suit. Suit by D. against S. to test the ownership of the proceeds, *Held* that though the bill of sale was executed *bona fide* and not to prefer D. to the other creditors, yet it was void by Sec. 31 of Act No. 273. but only so far as it was a security for a pre-existing debt, and not as to the £150 then advanced. *Bank of Australasia v. Harris* (15 Moo P.C. 97,) and *Nunes v. Carter* (L.R. 1 P.C. 342,) commented on. *Douglass v. Simson*, 6 W. W. & A'B. (E.,) 32.

[The corresponding Sec. of Act No. 379 is Sec. 71.]

"Insolvency Statute 1865" (No. 273,) Sec. 31.] —A payment within 60 days of insolvency is not void under the Statute, unless evidence of facts is adduced, showing that such a payment was fraudulent as well as preferential. W. was indebted to S. and other creditors, and, being pressed by S., gave an order to A., who was entrusted with W.'s wool for sale directing him to pay S. out of the proceeds a certain amount. W. became insolvent within 60 days, and did not contemplate insolvency when he gave the order. S. had instructed his solicitor to proceed against W. on an overdue acceptance, and under this pressure W. made the order. *Held* that the order for payment given to W. was not a fraudulent preference within Sec. 31 of the Act No. 273, although preferential. *Douglass v. Simson* overruled. *Bank of Australasia v. Harris*, 15 Moo P.C.C. 97, *Nunes v. Carter*, L.R. 1 P.C., 347, followed. *Sheldrick v. Aitken*, 6 W. W. & A'B. (L.,) 59.

What is a Fraudulent Preference.]—*Per Stawell, C. J.* "A transfer spontaneously made by a person being insolvent out of the usual course of business to secure or pay a creditor without receiving a sufficient consideration is a fraudulent preference." *Cohen v. M'Gee*, 4 V.L.R. (L.,) 543, 553.

Transfer of Goods Within Three Months of Insolvency—"Insolvency Statute 1871," Secs. 71, 72, Sub-sec. 3.] — Within four days before his insolvency, a debtor transferred all his available assets to his creditors in consideration of debts due to them upon bills of exchange. *Held, per Molesworth, J.*, that although the debts were of a class which the debtor was specially bound to pay, and (irrespectively of the Act) would be morally justified in paying preferentially, the payment was within the mischief of the first part of Sec. 71, and did not come within the protection of Sub-section 3 of Sec. 72, and an order was made for the re-payment. *In re Maley*, 4 A.J.R., 7.

Assignment of Part of Property Under Pressure.]—Where a debtor had assigned a considerable part of his property to a creditor under pressure of threats of a criminal prosecution against the debtor, *Held* that this did not invalidate the transfer, and that it would not have done so even had there been an actual agreement to stifle a prosecution, since the property had clearly passed. *Hasker v. Moorhead, v. Blackwood, v. M'Mullen*, 2 V.L.R. (L.,) 160.

A bill of sale given under the above circumstances as security for a promissory note before its maturity, the note itself having been given under the same pressure, was held not to constitute a fraudulent preference. *Ibid.*

Payment Under Pressure is Not.]—A payment resulting from pressure, as for a debt due, is not a fraudulent preference, though upon the verge of insolvency, or the person paying may be partly influenced by a wish to prefer. *In re Schlieff*, 6 V.L.R. (I.P. & M.,) 51; 2 A.L.T., 55.

Assignment Good as to Part and Bad as to Part.] A debtor executed an assignment of the greater part of his stock-in-trade to a creditor who was not pressing him in trust to sell and pay the two creditors rateably. The consideration was a trifling further advance from the creditor who was not pressing, and forbearance to sue, and obtaining forbearance to sue from the creditor who was pressing. The jury found that the assignment was a fraudulent preference as regards the creditor who was not pressing, and the Court held that the pressure by the other creditor made the assignment good as regards his debt. *Held* that the assignment could be treated as good in part and bad in part, and be upheld so far as it provided for the payment of one debt, though invalid so far as related to the other debt. *Cohen v. M'Gee*, 4 V.L.R. (L.,) 543.

Bill of Sale — Antecedent Debt and Present Advance.]—N., a trader, being indebted to M. & Co. in £946 12s., on the 30th December, 1869, assigned by bill of sale all his stock-in-trade and available assets to M. & Co., to secure their antecedent debt and a present advance of £350, of which £120 was immediately returned to one of the firm of M. & Co., in payment of of a private debt owed him by N. On the 13th January, 1870, M. & Co. took possession under their bill of sale, and sold for £1094 19s. 4d. N. was also largely indebted to other creditors. On the 14th January, 1870, N. voluntarily sequestrated his estate. On bill by the official assignee of N. to set aside the bill of sale as fraudulent, and as having the effect of preferring M. & Co., *Held*, that the bill of sale was not void, and that the transaction did not amount to a *fraudulent* preference, and bill dismissed, but without costs. *Shaw v. Solomon*, 1 V.R. (E.,) 153; 1 A.J.R., 139.

A bill of sale given by a debtor *bona fide* over all his stock in order to obtain assistance in difficulty for a past debt, and for further advances is not a fraudulent preference although it must if acted upon necessarily prevent him from carrying on his trade, the circumstances showing that it was not "spontaneous" on the part of the debtor. The true question is not whether the deed stops the trader's business, but whether it makes him insolvent and unable to pay his creditor in the ordinary way. *Jacomb v. Ross*, 4 A.J.R., 44, 97.

And *see* the same case for consideration of what is a "past debt."

And *see* S.P., *in re Mathieson*, 3 A.J.R., 92, *post* under CERTIFICATE OF DISCHARGE—When Granted or Refused.

Giving security for a debt is not to be considered fraudulent, merely because such debt is not presently payable. *Simson v. Guthrie*, 4 A.J.R., 123, 182.

M., who was indebted to G. upon bills falling due on March 3rd, on the 1st of March obtained cheques from G. to take them up, and gave in return a promissory note due on April 4th. *Held*, that G. was entitled to credit for the cheques given on March 1st, though a bill to secure the amount was then current. *Ibid.*

Deed of Assignment in Favour of Scheduled Creditors—Not Necessarily a Fraudulent Preference Under Sec. 71.]—*See in re Wiedemann, ante column* 587.

Fraudulent Warrant of Attorney—Act No 273, Secs. 13, 33.]—*See in re Kerr* and *Gray, ante column* 595, and compare Sec. 71 of Act No. 379.

Bill of Sale Given as Fraudulent Preference—Goods Sold Bona-fide Before the Insolvency.]—*See Halfey v. M'Ewan, post column* 638.

Judgment by Consent Improperly Obtained.]—A judgment improperly signed operates prejudicially against the estate of the debtor, and may be set aside. Where, therefore, H. was indebted to A. for a loan, and had promised at the time of the loan to allow A. to sign judgment against him, but before judgment was signed H. gave A. acceptances for the amount of the loan, and during the currency of the loan A. signed judgment against H., who thereupon sequestrated his estate. *Held* that, since A. took H.'s acceptance that amounted to a suspension of the promise by H. during their currency, the judgment was improperly signed and might be set aside by the assignee of H.'s estate as a fraud on the creditors' *Andrews v. Harley*, 1 V.R. (L.,) 127; 1 A.J.R., 122.

Judgment by Consent Improperly Obtained.]—K., to assist W., gave his guarantees to certain persons for the re-payment of the price of goods to be delivered to W., who, by this means, obtained goods to the value of £500. K. also advanced to W. £100. Afterwards W. requested K. to guarantee him to a further amount of £360. At this time the price of the goods delivered to W., and the £100 advanced by K., remained unpaid. K. consented to give

the further guarantee if W. consented to his obtaining a judgment against him. W. agreed, and a writ, accompanied by particulars of demand, was issued against W. and served. The particulars of demand were for money lent, money paid, money had and received, and interest. On the day the writ was issued W. signed a consent to a Judge's order for entering up judgment. K. then gave his further guarantee, and signed judgment, and issued execution. Under the execution K. received £856 10s. 6d. Twenty-five days afterwards W. voluntarily sequestrated his estate, and three months afterwards his official assignee took out a summons to set aside the judgment and execution. *Held*, that so far as the claim was for money lent, the judgment and execution were good; but that, as far as the rest of the claim was concerned, K. should refund what he had recovered to the assignee; that the judgment was good; but that the execution, so far as the excess over the amount of money lent was concerned, should be set aside, K., by retaining such excess, committing a fraud upon the general body of creditors. *Kyte v. Williams*, 1 V.R. (L.,) 129; 1 A.J.R., 122.

And *see* cases under headings Act of Insolvency, Offences and Discharge and Release from Sequestration.

X. Property of the Insolvent and the Assignee's Title Thereto.

(1.) *What Property Passes to the Assignee, and Subject to What he Takes—Generally.*

Act 5 Vic. No. 17, Sec. 8—Assignee Retaining Contract Moneys to Which Others were Entitled.]—H. had contracts for erections at the hospital, Melbourne, and applied to A. and Co. for assistance in the shape of cash and materials, which A. and Co., by writing, agreed to give on consideration of H. giving orders duly acknowledged by the treasurer to receive the contract moneys. A note directing the treasurer to pay to A. and Co. was given by H., and acted upon. H. became insolvent, and J., his official assignee took up the contracts and finished them, and he received £170 more than he had expended. Action by A. and Co. against J. for money had and received. *Held* that J. received the money under, and held it subject to the arrangement between H. and A. and Co., and he was in no better position than H. would have been, and that the case did not fall under the Act 5 Vic., No. 17, Sec. 8, as a fraudulent preference. *Anderson v Jacomb*, 2 W. & W. (L.,) 269.

[The corresponding Sec. of Act No. 379 is Sec. 71.]

Act 5 Vic., No. 17, Sec. 53—Money under a Will to Which Insolvent has a Contingent Claim.]—Where insolvent was interested in a sum of money in England under a will payable at the death of his mother, *Held* that it passed to official assignee, not so as to entitle him to sue in England for it, but so that he should notice it in the plan of distribution in such a way as to leave it open for him to say afterwards that he was mistaken as to its being an available claim. *Ex parte Bank of Australasia, in re Flower*, 2 W. & W. (I. E. & M.,) 47.

[Compare Sec. 58 of Act No. 379.]

Per Molesworth, J. An assignee of an insolvent takes his estates subject to unregistered mortgages. *Fraser v. Australian Trust Company*, 3 A.J.R., 1, 2.

Money Paid Into Court to Abide Result of Action.] *See Goodman v. Strachan*, 2 A.J.R., 63, *post* under Sub-heading Effect of Insolvency.

Summary Procedure as to Property Taken by Assignees under Sec. 17 of Act No. 379.]—*See* cases *post* under Sub-heading Summary Jurisdiction and Procedure.

Partners—Joint and Several Estate—Vesting of the Estate.] — *In re Curtain and Healey*, 5 V.L.R. (I. P. & M.,) 109; 1 A.L.T., 93, *post column* 641.

Effect of Order Absolute in Vesting Estate.]—*See* cases under Sub-heading Trustees, &c.—Their Rights and Powers.

Payment of a Dividend—Property Acquired by Insolvent Before Discharge—No Interference by First Assignee—Payment of Money to Vendor Before Discharge—Second Insolvency—Rights of First and Second Assignees.]—H. was insolvent in 1861, and J. was appointed assignee, and paid a dividend of 3s. in the £. H. saved money and paid £200 as part of the purchase money of certain land in April, 1867. H. obtained his certificate of discharge under the first insolvency. J. had not interfered. H. settled the land by voluntary settlement upon trustees on trust for wife and children, April, 1868. H. became insolvent again March, 1871, S. being appointed assignee. The settled land was brought under the Act No. 301, and a certificate issued to J. subject to the rights of the settlement, December, 1870. On bill by S. against the trustees of settlement and J. to set aside the settlement as void, and to redeem J., *Held* by *Molesworth, J.*, and affirmed by Full Court on appeal, that J. was entitled to be paid out of the settled lands, the settlement having been set aside, a sum not exceeding £200 to be spent in satisfying the creditors under first insolvency. *Shaw v. Scott*, 3 A.J.R., 16, 128; and *see Goodman v. Boulton*, *post column* 651.

Wrongful Sale by Lessor—Assignee's Remedy.]—A bank (lessor) distrained upon a tenant's goods for arrears of rent, and put up the goods seized for sale by auction at which sale a clerk bought as agent for the bank. On the next day the tenant's estate was sequestrated, and shortly afterwards the bank resold. In an action by the official assignee against the bank, *Held, per Stawell, C.J., and Holroyd, J.* (*dissentiente Higinbotham, J.*) that the sale was void, as the auctioneer as agent for the bank sold to the clerk as agent for the bank, and that the provisions of the Act No. 379 made it the duty of the assignee to distribute the insolvent's property, and therefore gave him the right of possession; that trover was the proper remedy, and the measure of damages was the value of the goods and not the amount

realised by the wrongful sale. *Davey v. Bank of New South Wales*,, 9 V.L.R. (L.,) 252; 5 A.L.T., 35.

(2) *Particular Kinds of Property.*

(*a*) *Bills of Exchange.*

Valueless Acceptances.]—An accommodation acceptance which is valueless at the date of the sequestration of the insolvent's estate does not pass to his official assignee, and the insolvent after he has obtained his certificate by transferring it for value after the death of the acceptor can confer a good title upon the transferee. *Clough v. Gray*, 1 W. &. W. (E.,) 225, 231.

(*b*) *Choses in Action.*

Policies of Life Assurance.]—A. voluntarily assigned to B. a policy of assurance on A.'s life for £1000, and B. executed a declaration of trust thereof in favour of A.'s wife and children. A., more than two years subsequently, voluntarily sequestrated his estate and afterwards died. The amount payable under the policy was £1029. *Held*, that the settlement was not protected by Sec. 37 of the "*Life Assurance Companies Act* 1873," No. 474, and that A.'s trustee in insolvency was entitled to restrain B. from suing on the policy. But A.'s personal representative would be entitled as against the trustee to £1000 of the policy money. *Davey v. Pein*, 9 V.L.R. (E.,) 169; 5 A.L.T., 128.

(*c*) *Gifts from Husband to Wife.*

Insolvency Within Two years of Gift—Act No. 379, Sec. 70.]—A husband at the time perfectly solvent made a gift of £1000 to his wife. For this gift there was meritorious but not a valuable consideration, and the matter was perfectly fair and honest, and in no sense a fraud on anybody. The wife treated the money as hers, and laid it out in the purchase of land. *Held*, that the husband becoming insolvent within two years of the gift, the gift came within Sec. 70 of Act No. 379, and was void as against the trustee who had a right to follow it into its investments. *Cohen v. Lintz*, 10 V.L.R. (E.,) 149.

And for cases of Marriage Settlements *see* under FRAUDULENT CONVEYANCES AND SETTLEMENTS, *ante columns* 466-478.

(*d*) *Other Kinds of Property.*

Assignment of Contract—Deposit Not Expressly Assigned.]—L. having a contract with a Shire Council assigned the contract to M., and shortly afterwards L. became insolvent. *Held* that the deposit not having been expressly assigned L.'s trustee in insolvency was entitled to the deposit as against M. *Shire of Benalla v. Turner*, 7 V.L.R. (L.,) 200.

Lease under "Land Act 1865."] — *Regina v. Board of Land and Works*, 2 V.R. (L.,) 151; 2 A.J.R., 87, *post* under LAND ACTS—Leases —Assignment.

(3) *Property in the Order and Disposition of the Insolvent.*

Moneys Due by Government.]—Moneys due or to become due to a contractor by the Government constitute a business debt, and accordingly fall within Sec. 68, Sub-sec. 5, of the "*Insolvency Statute* 1871," relating to property within the order and disposition of the debtor. *Board of Land and Works v. Ecroyd*, 1 V.L.R. (E.,) 304; 2 V.L.R. (E.,) 45.

For facts *see* S.C. *ante column* 58.

Goods Subject to Bill of Sale—Seized by Grantee.] —If the grantee of a bill of sale, whether rightly or wrongly, put a man into possession of the chattels conveyed by the bill, such chattels cannot be said to be in the possession, order, or disposition of the grantor (insolvent) by the consent and permission of the true owner, within Sec. 68, Sub-sec. 5, of the "*Insolvency Statute* 1871." *Cohen v. Oriental Banking Corporation*, 6 V.L.R. (L.,) 278, 285; 1 A.L.T., 198.

(4) *Property Conveyed or Assigned by Bill of Sale.*

Bill of Sale—Sale to Bona-fide Purchaser Before Appointment of Official Assignee.]—M., in May, 1874, executed a bill of sale in favour of M'E., and in June gave him written authority to take possession of the goods comprised, which M'E. did. In July M.'s estate was sequestrated, and H. was appointed official assignee. H. sued M'E., in trover and for money had and received. *Held* that M., having assigned his property in consideration of a bye-gone debt, the assignment was invalid as against H., but that the sale to M'E. before insolvency as to a *bona-fide* purchaser for value without notice gave M'E. a good title to the goods; and that, though H. failed in trover, yet he might maintain his count for money had and received, and so recover the value of the goods. *Halfey v. M'Ewan*, 5 A.J.R., 174.

And *see Cohen v. Oriental Banking Corporation, supra.*

Bill of Sale Subject to Defeasance Not Comprised Therein—Act No. 204, Secs. 56, 57, 63.]—*See Simpson v. Luth, Gane v. M'Grane*, under BILLS OF SALE, *ante column* 114.

XI. TRUSTEES, OFFICIAL ASSIGNEES, AND THEIR APPOINTMENT — RIGHTS, POWERS, DUTIES, AND LIABILITIES.

(1) *Their Appointment, Election, Removal, and Discharge.*

Assignee—Appointment of—5 Vic., No. 17, Sec. 58—7 Vic., No. 19, Sec. 12.]—Where L. was the official assignee of an estate, and M. was appointed generally as official assignee in his stead under 7 Vic., No. 19, Sec. 12, *Held* that such general appointment was inoperative under 5 Vic., No. 17, Sec. 58, and that a further order vesting the estate was necessary. *In re Bryan, ex parte Moore*, 2 W. W.& A'B. (I. E. & M.,) 23.

[Compare Sec. 56 of Act No. 379.]

Appointment of Assignee—Power to Rescind.]—The Chief Justice makes the appointment of official assignees, as the person appointed under Act. 7 Vic., No. 19, Sec. 12, and not in his judicial capacity, and it is doubtful whether the Chief Justice or the Court has power to rescind an appointment; but, at any rate, it cannot be done unless all parties concerned have been heard. *In re Bowman*, 3 V.L.R. (L.,) 27.

Appointment of Assignee—When Objection Should be Taken To.]—The due appointment of a person named as official assignee in an order *nisi* cannot be questioned in opposing a motion to make absolute the order. The matter of the appointment should be brought forward afterwards. If the order appoints an assignee not properly qualified as an assignee, it may be quashed; but the improper appointment is not a ground on which the application to make absolute the order can be opposed. *In re Brann*, 3 W. W. & A'B. (I.E. & M.,) 6.

Appointment of New Assignee——Affidavit, Who Must Make.]—The affidavit made in support of an application for the appointment of an official assignee in place of the original one who had resigned, must be made by the solicitor of the applicant; an affidavit made by his managing clerk will not do. *In re Potter*, 6 A.L.T., 90.

Appointment of New Assignee.]—A new assignee of a particular insolvent estate may be appointed in place of one deceased by any Judge sitting in Court, but not in Chambers. *In re Sinclair*, 10 V.L.R. (I. P. & M.,) 81; 6 A.L.T., 79.

Appointment of New Trustee—Application, How Made.]—An application for the appointment of a new trustee of an insolvent estate, under Sec. 57 of 5 Vic., No. 17, instead of an official assignee whose appointment was erroneous, should be made either on notice to such assignee, or with his concurrence. *In re Rucker*, 1 W. W. & A'B. (I.E. & M.,) 39.

[Compare Sec. 56 of Act No. 379.]

Confirmation of.]—The confirmation by the Court of the election of a new trustee, under 5 Vic., No. 17, Sec. 57, need not be at the next sitting of the Court. *Ibid.*

Order Confirming Appointment of Trustee—Authentication of.]—An order under Sec. 60 of the "*Insolvency Statute* 1871" is sufficiently authenticated by the seal of the Court, without proof of the signature of the chief clerk. Such an order is no proof of sequestration or of the facts of which an order of sequestration is evidence. *Regina v. Prendergast*, 4 A.J.R. 79.

And such order operates merely as an unimpeachable transfer of the estate from the assignee to the trustee. *Ibid.*

Election of Trustee—"Insolvency Statute 1871"—Secs. 55, 60—Order Confirming—Conclusive Evidence.]—An order confirming the election or appointment of a trustee in insolvency under Sec. 60, is conclusive evidence of his due appointment, although the meeting for his election was, in fact, held after the time prescribed by the rules, and although he never accepted the office as prescribed by Sec. 55 of the "*Insolvency Statute* 1871" (No. 379.) *Shiels v. Drysdale*, 6 V.L.R. (E.,) 126; 2 A.L.T., 14.

An appeal will lie from the order of a Judge of the Court of Insolvency under Sec. 55 of the Act No. 379, confirming the appointment of a trustee. *In re Mackay*, 2 V.R. (I.E. & M.,) 22; 2 A.J.R., 130.

Meeting to Elect a Trustee—Notice of—Act 5 Vic. No. 17, Sec 86.]—Where notice of a meeting under 5 Vic., No. 17, Sec. 86, fixed the date for Monday, 8th April, and Monday actually fell on the 9th, the notice was held a nullity. *In re Brown*, 3 W. W. & A'B. (I. E. & M.,) 5.

[Compare Sec. 53 of Act No. 379.]

Election of Trustee—Meeting of Creditors—Rule 57—"Insolvency Statute 1871," Secs. 13, 53.]—Rule 67 of the "*Insolvent Court Rules*," framed under the "*Insolvency Statute* 1871," Sec. 13, which specifies the time within which meetings of creditors to appoint a trustee must be held is directory only, and in certain circumstances such a meeting may be held although the time limited by the rule may have expired. *In re Cotton*, 6 V.L.R. (I. P. & M.,) 33; 1 A.L.T., 190.

A meeting of creditors was called under Sec. 53 of the "*Insolvency Statute* 1871." D. was proposed as trustee, but on the largest creditor voting against him, such creditor's proof of debt was objected to, and the meeting adjourned until the proof of debt should be decided upon. During the adjournment the Judge of the district Insolvent Court made an order transferring the proceedings to another district, and then made another order that no further proceeding should be taken on his first order, which second order was rescinded on appeal. Before the appeal the adjourned meeting was held, no trustee was appointed, and the meeting closed. After the appeal a meeting was held in the new district under Sec. 53 of the Act, and a trustee appointed. *Held*, that the last meeting was properly held. *Ibid.*

Meeting to Appoint Trustee under Sec. 53 of No. 379—Who May Vote.]—*In re Snell, see post* under Sub-heading Proof of Debts—Practice.

Meeting to Elect Trustee—Informal Proof of Debts—Adjournment—Rules of Court of Insolvency, Rule 66.]—*Per Noel, J.* Under Rule 66, of the Rules of the Court of Insolvency the chief clerk may grant an adjournment of a general meeting to enable creditors who have filed informal proofs of debt to amend their affidavits. *Re M'Inerny*, 4 A.L.T., 16.

Trustee — Removal — Appointment of Fresh Trustee—No. 379, Secs. 53, 56, 59.]—M. executed a voluntary assignment for the benefit of all his creditors, and for this act of insolvency his

estate was sequestrated, and the trustee of the deed was, under Sec. 59 of the "*Insolvency Statute* 1871," appointed trustee of the estate instead of an assignee. *Held*, on appeal against confirmation of this appointment, that the trustee could only be removed under Sec. 56 of the Act, which enumerates the grounds upon which a trustee may be removed as misconduct, &c., and that the creditors could not under Sec. 53 appoint a trustee in his place. *In re Mackay*, 2 V.R. (I. E. & M.,) 22; 2 A.J.R., 130.

[NOTE.—As to Sec. 59, *see* No. 411, Sec. 2, repealing Sec. 59.]

Removal of Trustee—Act No. 379, Sec. 56.]—If the trustee resists the wishes of the creditors properly conveyed his punishment should be his removal under Sec. 56. *In re Mackay*, 3 A.J.R., 10.

And *see* S.C., *post column* 645.

Removal of Trustee.]—*Per Noel, J.* Where a trustee was in difficulties, and had gone to England, not saying when he intended to return, *Held*, that his absence for such a time, and to such a distant place, being likely to interfere with the proper administration of the estate, this was a sufficient ground for removing him, and meeting for the election of a new trustee directed. *In re Rogers*, 1 A.L.T., 180.

Removal of Insolvent Trustee—Act No. 379, Secs. 56, 90.]—*See post* under TRUST AND TRUSTEE — Devolution and Removal from Office.

Resignation of Trustee—Act. No. 379, Sec. 57.] *Noel, J.*, made an order granting leave to a trustee to resign on the ground of ill-health and going to England, and for the election of a new trustee in his place. *In re M'Lennan*, 2 A.L.T., 112.

(2) *Their Powers and Rights.*

Sequestration—Effect of Order of as Bstwesn Assignee and Insolvent—"Insolvency Act," 5 Vic., No. 17, Sec. 53.]—The effect of an order absolute under the Act as between the official assignee and the insolvent conclusively vests the property in such assignee, and makes him a representative of the insolvent, though it may be open to third persons to dispute the fact of insolvency and the validity of the order by a defence specially directed to these points. *Shaw v. Salter*, 2 W. W. & A'B. (E.,) 159, 162.

[Compare Sec. 58 of Act No. 379.]

And *see* as to property passing to trustee or assignee, *ante column* 635.

Vesting of Estate in Assignee—Act No. 379, Secs. 53, 58, 60—Rules 62, 131—Partners—Joint and Several Estates.]—C. and H. were in partnership, and their estate was placed in sequestration in the hands of an official assignee. At a meeting of creditors E. was duly appointed trustee of the joint estate, and afterwards meetings were held as in the insolvent estates of each of the insolvents, and J. was appointed trustee of them respectively, *Held* that the joint and several estates vested in the assignee and afterwards in E., and that the order confirming J.'s appointment as trustee of the separate estates was bad. *In re Curtain and Healey*, 5 V.L.R. (I. P. & M.,) 109; 1 A.L.T., 93.

Compelling Trustees to Transfer.]—The Supreme Court sitting in Insolvency has no power to compel the trustees of a company, whose estate has been sequestrated under 11 Vic., No. 19, to transfer to the official assignee the real and personal estate of the company vested in them as such trustees. *In re the Provident Institute of Victoria*, 1 W. & W. (I. E. & M.,) 175.

Powers of Assignee—Suit Pending for Administration.]—Where a suit was pending for the administration of an estate seeking a declaration that creditors (mortgagees) were entitled to claim as specialty creditors, and the administratrix after bill filed sequestrated the estate, and a decree had been made in the suit, *Held* that the order for sequestration made the assignee a mere hand to collect the personal assets and distribute them as the Court of Equity directed him. *Australian Trust Company v. Webster*, 2 W. & W. (E.,) 99, 106.

Powers—Release of Equity of Redemption to Mortgagee—"Insolvency Statute 1865," No. 273, Secs. 27, 71.]—A release of an insolvent's equity of redemption is not *prima-facie* beyond the scope of an official assignee's authority, and Sec. 27 of Act No. 273 clearly contemplates the exercise of such authority; such a transaction is not a sale within the meaning of Sec. 71, requiring notice under that section. *Per Privy Council*, reversing *Molesworth, J.*, and the Full Court reported 3 V.L.R. (E.,) 190. *Melbourne Banking Corporation v. Brougham*, L.R., 4 App. Cases, 156.

[Act No. 379, Sec. 62, substantially follows Sec. 27 of Act. No. 273, and Sec. 67 follows Sec. 71 of Act No. 273.]

Abandoning Contracts.]—The word "abandon" in Sec. 84 of 5 Vic., No. 17, is not necessarily to be read as "rescind," and an official assignee who "abandons" a contract under that Sec. does not necessarily render invalid securities given for carrying on such contract, or payment under them; and the holder of such securities is not rendered incapable of suing on them by such "abandonment." *Ex parte Gessner*, 1 W. & W. (I.E. & M.,) 183.

[Compare Sec. 82 of Act No. 379.]

How Far One Assignee Bound by First Assignee's Allowance of Proof.]—*In re Bayldon, post column* 662.

Control by Assignee of ooks, Papers, &c., of Insolvent.]—*Molesworth, J.*, made an order directing that all the papers, &c., which came into the possession of the assignee, should be delivered to his associate, with liberty for the petitioning creditors and the insolvent to examine them. *In re Oppenheimer*, 3 A.J.R. 117.

Summary Procedure to Recover Debts—Act No. 379, Sec. 94.]—*Per Molesworth, J.*, the language of Sec. 94 is general, without exception for difficult and complex cases. Where therefore a debtor had paid £59 to a creditor to induce him to enter into a composition by means of a veiled transaction through friends, the Court held upon a subsequent insolvency of the debtor that the trustee might recover under Sec. 94 the amount so paid in fraud of the other creditors. *In re Jobson*, 5 A.J.R., 154.

Per Noel, J. "Where the trustee invokes the Court's aid to compel payment of debts due to the estate, the terms of Sec. 94 are obligatory and upon adequate materials being presented to it, the Court ought to make the order." *In re Marie*, 3 A.J.R., 63.

Assignee—Lending Part of Estate—No Right to Sue for Money Lent.]—Where an assignee lends part of the estate, a thing which he has no right to do, the money cannot be said to retain its character, forming no longer a part of the estate, and there is no privity between the estate and the borrower. An official assignee therefore cannot sue on a count in common form for money lent by him as official assignee. *Webster v. Bank of Victoria*, 1 W. & W. (L.,) 375.

Title of Assignee to Sue.]—In an action by an official assignee to recover moneys paid by way of fraudulent preference, it is not necessary for the assignee, in order to sue, to prove that no trustee has been appointed (in which case he would be superseded,) or to prove that he has obtained the sanction of a Judge or of the creditors to bring the action. *Simson v. Guthrie*, 4 A.J.R., 123.

Setting Aside Sale—Right of Assignee to Sue—Sequestration of Testator's Estate—Devastavit by Executors—"Insolvency Statute 1871" (No. 379,) Secs. 35, 69, 75, 98, 100.]—A testator M. was largely indebted at the time of his death, his executors overlooking this allowed the widow to remain in possession of a hotel belonging to the testator and the stock-in-trade which she sold off. The executors then sequestrated the estate under Sec. 35 of the Act, and plaintiff was appointed official assignee. In a suit by plaintiff against executors and widow, *Held* that an official assignee represented creditors in defeating conveyances void under Sec. 69, and that official assignee was the successor of the executors in this case, and creditors being disabled from suing executors at law under combined effect of Secs. 35, 75, and 100, the sequestration would defeat a just liability if assignee did not represent creditors; that the suit by plaintiff was maintainable and that he might recover amount of devastavit for benefit of creditors. *Hasker v. M'Millan*, 5 V.L.R. (E.,) 217, 1 A.L.T., 45.

Assignee's Remuneration—Verbal Assessment of Official Assignee's Compensation—5 Vic., No. 17, Sec. 51.]—A commissioner verbally assessed an assignee's compensation at a certain sum, and the assignee filed a plan of distribution, claiming that allowance. No objection to the plan was made on ground of allowance, though objections were made on other grounds. The commissioner afterwards made a verbal order for payment of the sum allowed. On rule *nisi* requiring assignee to pay back the sum *Held* that under Sec. 51 of the Act the commissioner had a judical discretion subject to the review of the Court, that the order being verbal was inoperative and the receipt of money under it unwarrantable. Rule made absolute. *Ex parte Bank of Australasia. In re Rutledge*, 2 W. & W. (I. E. & M.,) 6.

[Compare Sec. 54 of Act No. 379.]

The Appellate Court has jurisdiction to review the discretion of the commissioner in matters of an official assignee's compensation under Sec. 51 of the Act, and reduced the amount of compensation allowed by the commissioner. *Ibid* at p. 33.

The Court, however, pays great deference to the commissioner's views. *Ibid* at p. 41.

Petition to Review the Assessment of Assignee's Compensation.]—A petitioner presenting such a petition should allege in the *corpus* of his petition that he is a creditor and should furnish evidence of the fact. Such a petitioner need not sign the petition. *Ex parte Bank of Australasia. In re Rutledge*, 2 W. & W. (I. E. & M.,) 41.

Remuneration—Act 5 Vic., No. 17, Sec. 51—Improper Charges by Assignee.]—A sum of £1 10s. paid to the accountant of the official assignee for preparing plan of distribution charged against the estate is improper, and a fee of 1s. claimed for "filing plan of distribution" is an improper fee. *Ex parte Bank of Australasia. In re Flower*, 2 W. & W. (I. E. & M.,) 47.

Assignee's Remuneration Under Act No. 273.]—Commission at the rate of 5 per cent. allowed to official assignee, at rate of 2½ per cent. to trade assignee. *In re Kingsland*, 6 W. W. & A'B. (I. E. & M.,) 25; N.C. 39.

(3.) *Their Duties and Liabilities,*

Duties of Trustee — Act No. 379 Sec. 122 — Filing Accounts.]—Sec. 122 does not imply that trustee should file a statement of how the estate has been collected and realised, it only relates to disbursement and distribution; the application and disposal is to be shown under certain heads, costs, and charges, commission, preferential payments and dividends, and he is not required to add a negative statement that there had been no other disbursements under these heads, or that no portion of the estate remained unrealised. *In re Dallimore*, 3 A.J.R., 12.

Discretion of Assignee as to Examination of Insolvent—Act No. 273, Sec. 87.]—The exercise of the power of summoning an insolvent under Sec. 87 of the Act for the examination of the insolvent rests solely in the assignee's discretion, and the Court has no jurisdiction to compel him to summon the insolvent for examination. *In re Ireland*, 6 W. W. & A'B. (I. E. & M.,) 5.

[Compare Sec. 132 of Act No. 379.]

Duties of Trustee—Act No. 379, Sec. 67—Making Dividend and Realising the Property.]—For circumstances under which a trustee was not considered to have acted negligently in realising assets and accepting tenders, *see in re Lefebvre*, 3 A.J.R., 5.

Control of Trustee by General Meeting and Committee of Inspection—Act 379, Secs. 53, 56, 67, 78, 132.]—Secs. 78 and 132 do not give either the general meeting or the committee a voice in selecting a solicitor for the purpose of examination of the insolvent under Sec. 132, but leave it to the sole discretion of the trustee; the trustee, however, should not resist the wishes of the creditors properly conveyed, if he should do so the proper punishment should be his removal under Sec. 56. Under Sec. 67 the control of the general meeting is like that of the committee under Sec. 53, but in cases of conflict that of the committee prevails under Sec. 67. This control does not refer to the examination of insolvent. Order by District Court Judge that trustee should employ a solicitor named by creditors set aside. *In re Mackay*, 3 A.J.R., 10.

Control of Trustee by Creditors—Act No. 379, Sec. 67.]—*Per Noel, J.* Where a meeting of creditors passes a resolution which does not further the interests of the general body of creditors, the trustee is not bound to carry it out. *In re Lempriere*, 3 A.L.T., 20.

Control of Trustee by Creditors—Act No. 379, Sec. 67.]—*Per Noel, J.* Where the Court sees that there have been irregularities in the proceedings of a meeting at which a resolution was passed, it will not compel the trustee to carry out such resolution. *In re Thomson*, 2 A.L.T., 108.

Position of Trustee Under Sec. 133.]—*Per Noel, J.* Under Sec. 133 the trustee appears as agent for the creditors, and not as agent for the insolvent, and therefore a solicitor claiming a lien on insolvent's documents cannot refuse to produce them under Sec. 133. *In re M'Kay and Bell*, 3 A.J.R., 98.

Trustee's Duty as to After Acquired Property—Act No. 379, Sec. 147.]—*Per Molesworth, J.* If an insolvent becomes entitled to property which is in the hands of a third person claiming adversely to the insolvent, it is, I think, the duty of the assignee to get possession of it without regard to Sec. 147. *In re Mulcahy*, 5 V.L.R. (I.P. & M.,) 7.

For facts *see* S.C., *post column* 650.

Petition for Advice—Act No. 379, Sec. 81.]—*Noel, J.*, gave advice upon a petition under Sec. 81 to a trustee as to his duty in following the resolutions passed at a general meeting of creditors. *In re Lempriere*, 3 A.L.T., 20.

Duty of Assignee Opposing Proof of Debt—Act 5 Vic., No. 17, Secs. 56, 59.]—An official assignee opposing a proof of debt must act on his own personal and independent discretion, and not on that of others. He must exercise the same common sense and careful discretion that a man exercises in his own concerns, and must employ a solicitor on his own responsibility. When so acting and unsuccessful, he may be exonerated in some degree by a regular meeting of creditors; but if there were no regular meeting, or if the consent of the creditors were otherwise obtained, it then becomes a question simply whether he exercised a real and reasonable discretion in the litigation in which he has been unsuccessful. *In re Harper*, 1 W. & W. (I. E. & M.,) 86.

[Compare Secs. 78 and 123 of Act No. 379.]

Duty of Assignee in Realising Estate.]—The assignee should not sell in a lump the debts due to an estate for he is not to do his duties only as to what is of no trouble to him, and divest himself of all the rest by such sale, and yet to have a percentage on the whole of the sum realised. In the account and plan of distribution of an estate the assignee should state the outstanding assets, and if there be none should show that such is the case. *Ibid.*

[But *see* now Sec. 83, Sub-sec. 6 of Act No. 379.]

Liability of Assignee—Wilful Default.]—Where machinery and chemicals belonging to an insolvent were sold in lots, and at comparative undervalue, the Court *held* on the balance of the evidence that the assignees were not to be charged with wilful default. *In re Kingsland*, 6 W. W. & A'B. (I. E. & M.,) 25; N.C., 39.

Liability of Assignee in Taking out Warrant—Act No. 379, Sec. 63.]—An official assignee is only liable for the improper issue of a warrant or for anything done under a warrant improperly issued, and his position is not analogous to that of a sheriff. Where an assignee's bailiff was entrusted with a warrant to seize insolvent's goods, and seized goods belonging to the insolvent's brother, *Held* there being no evidence of ratification that the assignee was not liable. *Willett v. Turner*, 1 V.L.R. (L.,) 294.

Liability of Official Assignee of Occupant Under 6 Vic., No. 7, Sec. 67, and 8 Vic., No. 12, Sec. 19, to be Rated as the "Person Occupying."]—*See Goodman v. Mayor of Melbourne*, 1 W. & W. (L.,) 4, *post* under RATES—Persons Liable.

Protection Afforded to Assignee by Sec. 89 of the "Insolvency Statute 1871"—Costs.]—Where a landlord and a mortgagee by bill of sale claimed goods of a person who had become insolvent, the one under a distress for sale and the other under the bill of sale, and the assignee by arrangement with the claimant under the bill of sale sold the goods, and paid the amount of the landlord's distress into a bank under Sec. 89 of the "*Insolvency Statute* 1871," as money to which he made no claim, and paid the overplus, less his commission, to the claimant

under the bill of sale, on suit by the landlord for the money under Sec. 17 of the Statute a decision was given against him, but on appeal *Held* that to entitle the official assignee to the protection of Sec. 89 of the Statute he should have paid the whole of the proceeds into the bank, leaving the claimants to claim against it, instead of paying one and leaving the other to claim against a deposit representing his demand only, and the assignee was ordered to pay all the landlord's costs in the Court of Insolvency and on appeal. *In re Sweeney, ex parte Diggins*, 4 V.L.R. (I. P. & M.,) 1.

Liability of Trustss or Assignee as to Chattels Taksn by Him—Act No. 379, Sec. 17.]—*Cain v. Allen, in re Thompson, in re Acock, in re Maley, post columns* 649, 650.

Liability—Costs of Official Assignee Incurred in Opposing a Claim—Plan of Distribution—Act 5 Vic., No. 17, Secs. 56, 59.]—The official assignee of a firm having seized goods which were in a store with other goods, and apparently in the order and disposition of the firm, was sued by another firm, claiming all the goods in the store under an assignment. In the action the verdict was against him as to some of the goods, and he had to pay the costs of both parties, but he succeeded in reducing the claim of the plaintiff so as to give a balance to the advantage of the estate by his defence of the action. The plaintiffs in addition proved as creditors on the estate. The assignee having inserted in the plan of distribution the costs paid by him in the action for both sides, *Held* that the assignee as a defendant in the action and not a plaintiff was not to blame, and that he was entitled to insert such costs in the plan. *In re Yorston and Webster*, 1 W. & W. (I. E. & M.,) 133.

[Compare Sec. 78 of Act No. 379.]

Costs of Assignes Rssisting Proof of Debt—Plan of Distribution.]—A plan of distribution was filed but not confirmed, and before confirmation a fresh creditor claimed to prove, but was successfully resisted by the assignee, who incurred £12 costs in so doing. Having included all the assets in the plan of distribution, he had no fund from which to reimburse himself, and so applied to have the plan amended by inserting the costs so incurred. The Court granted the application, but intimated that it would have been better to have had the plan of distribution confirmed, and any fresh applicant should then only have been allowed to re-open the plan upon terms of paying all parties' costs, whether such applicant succeeded or not. *In re Roden*, 1 W. & W. (I. E. & M.,) 95.

Liability of Assigness—Costs of Unsuccesssful Litigation.]—Where an official assignee embarked in litigation, under circumstances which, to the Court, seemed to show that reasonable pains were taken before embarking in such litigation, in regard to a large sum (£4000), and where the assignee had not called a meeting of creditors to sanction his proceedings under Sec. 61 of the *Insolvent Act*, 5 Vic., No. 17, then in force, but it appeared that the creditors against whom proceedings were instituted would have outvoted other creditors in point of value, the assignee's costs of unsuccessful litigation were allowed. *Ex parte Bank of Australasia, in re Rutledge*, 2 W. &. W. (I. E. & M.,) 57.

[Compare provisions of Act No. 379, Sec. 78.]

When Assignees Entitled to Costs.]—Costs of an equity suit instituted by assignees to set aside a voluntary settlement as fraudulent, and assignee's costs of motions made in the suit by the insolvent, and refused with costs, were allowed to assignees. *In re Kingsland*, 6 W. W. & A'B. (I. E. & M.,) 25; N. C. 39.

And *see Woodward v Jennings, ante column* 244.

XII. Distribution of the Estate.

Duties of Assignees—Plan of Distribution—Amendment—5 Vic., No. 17, Secs. 87, 90.]—Motion under Sec. 90 of 5 Vic., No 17. A trustee (now assignee) had filed his account and plan of distribution within three months of his appointment, Sec. 87 of the Act providing that he should do so "not later than six months" after his appointment. After the account and plan were filed, but before confirmation, creditors in England filed a *caveat* against confirmation, and gave notice of motion to re-open and amend them by the insertion of their debt and dividend. The motion called upon the trustee, "and also upon the parties whose interest might be affected thereby," to show cause why the plans should not be amended. *Held* that every creditor had a right to notice and to appear; but that when the Court sees peculiar difficulties or circumstances to justify it, service may be dispensed with, and that a plan of distribution is not to be opened after the six months prescribed by the Statute for its filing unless the applicant pays every farthing of the costs. *In re Miller*, 1 W. & W. (I. E. & M.,) 77.

Note.—On a subsequent day, notice having been given, and no creditor opposing, the order was made as applied for, the costs being divided between the first applicant and others who had then entitled themselves to, and did apply.

[Compare Sec. 122 of Act No. 379, and Rule 85.]

Plan of Distribution.]—There is no authority to direct the filing of a further plan of distribution in an insolvent estate. Any subsequent distribution which may be necessary must be effected by the alteration of the plan, the Court having power to direct an alteration of an existing, but not the filing of a second, plan. *Ex parte Flower, Salting, and Company*, 3 W.W. & A'B. (I. E. & M.,) 36.

[Compare Sec. 122 of Act No. 379.]

The assignee is, under the provisions of Act No. 273, bound to insert a proved debt in the plan of distribution. *In re Kingsland*, 6 W. W. & A'B. (I. E. & M.,) 25; N. C., 39.

Status of Petitioner Reviewing Plan of Distribution—5 Vic., No. 17, Secs. 87-90.]—Objections against the *locus standi* of a creditor appearing as such on plan of distribution to impugn the right of another creditor to be placed on the plan, even though the petitioning creditor had not proved his own debt, overruled. *Ex parte Bank of Australasia. In re Rutledge*, 2 W. & W. (I. E. & M.,) 57.

[Compare Secs. 122 and 123 of Act No. 379.]

Right of Creditor to Dividend Pending Appeal.]—*Per Stawell, C. J.* The Court has, pending an appeal to the Privy Council, no power to restrain the official assignee from paying a dividend under the plan, he must act on his own judgment. *Ex parte Rolfe and Bailey, in re Rutledge*, 2 W. & W. (I. E. & M.,) 51, 56.

XIII. Summary Jurisdiction to Try Right to Chattels Taken by Assignee.

Trying the Title to the Property—"Insolvency Statute 1871," Sec. 17—Practice.]—D. applied under Sec. 17 of the "*Insolvency Statute* 1871" for the payment of the value of certain goods sold by the trustees in insolvency of A. D. omitted from his notice of motion the note in form No. 58, which states notice of opposition to be necessary, and the counsel for the trustee objected that D. could not be heard owing to this omission. D. therefore objected that the trustee could not be heard, as he had given no notice of opposition under Rule 4 of the Rules of 4th October, 1871. The Judge allowed D.'s objection, and heard the case *ex parte*, and made an order as asked by D. On appeal *Held* that, since D. also was in default, the Judge ought not to have proceeded *ex parte*, and order reversed without prejudice to a new application. *In re Acock*, 2 V. R. (I. E. & M.,) 45; 2 A.J.R., 133.

Summary Jurisdiction Under "Insolvency Statute 1871," Sec. 17.]—Shortly before his insolvency a debtor gave an order to an auctioneer to sell the debtor's furniture, and with the proceeds to pay certain creditors. The official assignee of the debtor moved under Sec. 17 of the "*Insolvency Statute* 1871," to set the transaction aside as a fraudulent preference. Sec. 17 provided that the Court might decide the right of property in any chattels upon the application of the assignee, trustee, or any person claiming to be entitled thereto. The Court held that the transaction was a fraudulent preference, and the creditors who had received the proceeds of sale appealed. Upon appeal, *Held* that Sec. 17 of the Act did not apply to such a case, and that the Court below had no summary jurisdiction in the case under that Sec, and appeal allowed. *In re Maley*, 4 A.J.R., 49.

Per Noel, J. The word "value" in Sec. 17 of the "*Insolvency Statute* 1871," which confers jurisdiction upon the Insolvent Court to order delivery up to a trustee of goods alleged to belong to the estate, provided that their value do not exceed £250, means the price which can be obtained for the goods; and in the case of pawned goods would not be determined by the amount advanced upon them. *Cain v. Allen*, 4 A.J.R., 130.

Sec. 17 of the "*Insolvency Statute* 1871" does not apply to actions of trover, and Insolvent Courts have no jurisdiction under this Sec. in actions of this nature, and a plea in an action of trover that the value of the goods sought to be recovered was less than £250, was held bad on demurrer. *Ibid.* See S.P. *In re W. R. Thompson*, 5 A.J.R., 3.

The summary jurisdiction of the Court as to property in chattels under Sec. 17 arises only where the goods remain specifically at the date of sequestration; the Sec. only applies where the assignee might have claimed the chattels, but where that is the case, the summary jurisdiction applies only as to such goods converted by the creditor before they are claimed by the assignee. *In re W. R. Thompson*, 5 A.J.R., 3, 4.

Act No. 379, Secs. 17, 147—After Acquired Property—Husband and Wife.]—An assignee by motion under Sec. 17 applied for an order for delivery up of certain stock-in-trade of an uncertificated insolvent as after acquired property. The Judge of the Court of Insolvency made an order. After the sequestration £100 was given to the wife by her sister. The husband and wife carried on the same business as before, he driving the cart, taking orders, etc., and getting no wages, she made purchases, paid rent, &c., and had her name painted over the door. *Held*, that the whole was a scheme by the insolvent to carry on business in his wife's name, and that there was not sufficient evidence to prove that it was carried on apart from her husband under Sec. 5 of the "*Married Women's Property Statute.*" Order affirmed notwithstanding that no direction was given to assignee as required by Sec. 147. *Per Molesworth, J.* "If an insolvent becomes entitled to property which is in the hands of a third person claiming adversely to the insolvent, it is, I think, the duty of the assignee to get possession of it without regard to Sec. 147." *In re Mulcahy*, 5 V.L.R. (I. P. & M.,) 7.

Married Woman—Suit by Under Sec. 17 of No. 379, to Recover Property Seized by Assignee—Next Friend—"Insolvency Rules," Rule 29—"Married Women's Property Act," Sec. 18.]—A married woman who applies, under Sec. 17 of the "*Insolvency Statute* 1871," for property seized by her husband's (an insolvent) assignee as being her separate property, need not have a next friend in making the application. By virtue of Sec. 18 of the "*Married Women's Property Act*," she is for this purpose a *feme* sole, and Rule 29 of the "*Insolvency Rules*" of April, 1871, does not apply to her. *In re Summers, ex parte Hasker*, 10 V.L.R. (I. P. & M.,) 78.

XIV. The Insolvent, His Rights and Liabilities.

Balance in the Hands of Assignee—Return to Insolvent—Indemnity—5 Vic., No. 17.] — The assets in an insolvent estate exceeded the liabilities, and all the creditors who had proved had been paid in full, but some of the scheduled creditors had not proved. Four years had elapsed, and an order was made

ordering the balance, all but a specified sum sufficient to liquidate the debts of the scheduled creditors who had not proved, to be paid to the insolvent, and this was duly advertised. No creditors came forward, and upon these facts the Court ordered the entire balance in the hands of the assignee, to be paid to the insolvent on terms of his indemnifying the assignee, and undertaking to satisfy the creditors who had not proved should they thereafter do so. *In re Milner*, 1 W. & W. (I. E. & M.,) 177.

[Compare the provisions of Sec. 103 of Act No. 379.]

5 Vic., No. 17—Payment to Insolvent of Surplus.]—A motion was made for an order on the assignee to pay over surplus after payment of scheduled debts. *Held*, that it was not conformable with the Act to make such an order, but that official assignee might file a plan disposing of the surplus, and hand it over to the insolvent if the plan were not objected to. *In re Dickson*, 2 W. & W. (I. E. & M.,) 63.

[Compare the provisions of Sec. 103 of Act No. 379.]

Settlement Set Aside to Pay Creditors—Balance Left—Second Insolvency.]—A voluntary settlement was set aside in May, 1868, and the settled property applied to paying creditors. There was a balance left, and subsequently the settlor again became insolvent. Application by assignees under second insolvency that balance should be paid to them by assignees under first insolvency. The insolvent, who had a life interest under the settlement, and all other beneficiaries consented. The Court though stating that it had no power to protect the assignees of the first insolvency against any creditor who had not proved under that insolvency, or persons having any subsequent lien on the surplus since such protection could only be afforded under an application under the first insolveny to alter the plan of distribution, ordered the balance to be paid over upon the parties concerned consenting, and upon a satisfactory indemnity being given. *Goodman v. Boulton*, 3 A.J.R., 2.

An insolvent cannot set aside verdict given after sequestration. *Kyte v. Mahoney*, 5 W. W. & A'B. (L.,) 6, *see post column* 655.

Right of Insolvent to Bring Suit to Give Effect to a Judgment Obtained Before Sequestration.]—*Solly v. Atkinson*, 5 V.L.R. (E.,) 323, *post column* 654.

Insolvent's Rights on Release From Sequestration Under Sec. 131, of Act 379.]—*See Moss v. Williamson*, and *Hodgson v. M'Caughan*, *post* under DISCHARGE AND RELEASE—Effect of.

An insolvent is not entitled to recover damages for a period prior to his insolvency in respect of a claim partly covering such a period. *Mouatt v. Saunders*, 4 V.L.R. (L.,) 439, *post column* 656.

Capacity of Insolvent to Sue.]—As regards causes of action accruing after insolvency and before the discharge the insolvent is the agent of the assignee; he contracts for his (the assignee's) benefit, and so long as the assignee does not interfere he may sue on such contracts. An attorney may sue for services rendered after insolvency and before discharge. *Madden v. Hetherington*, 3 V.R. (L.,) 68; 3 A.J.R, 41.

And *see Fancey v. North Hurdfield Company*, *post column* 656; and *Buisson v. Warburton*, *post column* 657.

The fact that a man is an uncertificated insolvent shortly before the purchase of certain land is no bar to a suit by him to have the land conveyed to him free from the trusts of a marriage settlement. *Mason v. Sawyers*, 2 V.R. (E.,) 36; 2 A.J.R., 12.

Uncertificated Insolvent Carrying on Business—5 Vic., No. 17, Sec. 100.]—B., an uncertificated insolvent in 1858, entered into a speculation with his brother J. B., and stipulated for payment to himself of a salary and payment of a part of profits to his wife and children. Subsequently the business was carried on in the same fashion in the form of a partnership between B. (the elder, father of the insolvent) and H. A creditor, the Bank of Victoria, applied for an order under Sec. 100 of Act No. 17 for B.'s imprisonment, the affidavits showing that the business was really that of insolvent and had assets to the value of £20,000, the answering affidavits alleging that the debts of the partnership amounted to £32,000, primarily chargeable on the assets. *Ordered* that B. be imprisoned until satisfaction of the debt due to the Bank, the execution of the order to be stayed provided B. paid a sum of £500 every six months' in satisfaction of the debt, the Court treating B. as a person of considerable capacity for making money, and who had succeeded in accumulating a large trading capital. Affirmed on appeal. *In re Bateman*, 6 W. W. & A'B. (I. E. & M.,) 15, N.C. 27.

After Acquired Property—Uncertificated Insolvent—Act No. 379, Sec. 73.]—The after acquired property of an uncertificated insolvent excepting only the profits of his daily labour necessary for his subsistence is vested in his assignee, but towards third parties until the official assignees intervene or displace him, he assumes with respect to such property the position of agent, and he may transfer such property so as to give a good title to the transferee in the absence of interference by his official assignees. *Sartori v. Laby*, 9 V.L.R. (L.,) 329, 5 A.L.T., 100.

Lapse of Order Nisi—Act No. 379, Sec. 39.]—*Semble per Molesworth, J.* The lapse of an order *nisi* (the order not being discharged) revests the estate in the debtor subject to the rights of another creditor taking the order up. *In re Ray*, 1 V.L.R. (I. P. & M.,) 56.

Contempt of Court—"Insolvency Statute 1871," Sec. 126—Habeas Corpus.]—Though the Court of Insolvency has jurisdiction under Sec. 126, of the "*Insolvency Statute* 1871," to commit an insolvent for contempt in disobeying an order to pay in money belonging to the estate which the insolvent has received, the Supreme

will, on *habeas corpus*, examine the evidence and receive affidavits to ascertain whether these facts, on which the warrant purports to have been based, in fact existed; and in order to enable the Court of Insolvency to commit the insolvent for breach of such an order it must be shewn that he had the money still under his control at the time he was ordered to pay it over. *Re Gray*, 2 V.L.R. (L.,) 241.

Act No. 379, Secs. 7, 126.]—Sec. 7 relates to the insolvent estate which reaches the hands of the assignees, not property in the hands of the insolvent or any other person which ought to have reached their hands. Sec. 126 provides for a summary remedy as to any property which he is known to have and withholds. A debtor left Victoria taking with him certain moneys which he spent partly in Victoria, partly elsewhere, and in his absence his estate was sequestrated. An order made by the Judge of the Court of Insolvency ordering him to repay the money to the assignees based on Sec. 7 of the Act was set aside as bad. *In re Rowley*, 3 V.L.R. (I. P. & M.,) 12.

Committing for Contempt in Not Dslivering up Goods to Assignss—Act No. 379, Sso. 126.]—*Per Noel, J.*, a rule *nisi* for commitment is the proper remedy where an insolvent refuses to deliver up possession to the official assignee, and in such a proceeding the Judge of the Court has jurisdiction to decide whether there is any evidence to support the *bona fides* of a claim set up by a third party (the insolvent's wife) to the property. *In re Mundhang*, 1 A.L.T., 56.

Arrest of Insolvent—"Insolvency Statute 1871," No. 379, Sec. 127.]—The mere pendency of an insolvency is not in general a sufficient ground for the issue of a warrant under Sec. 127 of the Act No. 379, for the arrest of the debtor; it must be shown that there is some examination or other specific proceeding, which the insolvent intends to defeat by going abroad. *In re Knarston*, 4 A.J.R., 160.

Arrest of Insolvent Undsr Sec. 127—Bail-bonds.] *Quære*, whether a Judge of a Court of Insolvency has jurisdiction to take a bail-bond from a debtor arrested under Sec. 127 of the "*Insolvency Statute* 1871." *Ibid.*

XV. Effect of Insolvency and Liquidation.

(1) *On Suits and Actions.*

How Far Sequsstration a Stay to Suits in Equity —5 Vic., No. 17, Sec. 31.]—The Act 5 Vic., No. 17, Sec. 31, providing that all proceedings in any action pending, shall, upon sequestration of the defendant's estate, be stayed, has never been held to extend to proceedings in equity; and the Court is not to be deprived of any portion of its jurisdiction by intendment merely, or by anything short of express words. *Fairbairn v. Clarke*, 1 W. & W. (E.,) 333.

T. mortgaged lands to a company, and died intestate. The widow administered, and the company brought an administration suit praying for a sale and a declaration that if the lands were insufficient they might rank as specialty creditors on the general assets for the deficiency. Pending the suit the widow sequestrated the estate under 5 Vic., No. 17. *Held* that there was nothing in Act 5 Vic., No. 17, to deprive the Supreme Court of its jurisdiction to take the accounts and nothing to transfer the suit to the Insolvent Court, although if the object of the suit had been to recover a lump sum the suit should have been stayed and the plaintiff be left to prove for his debt and costs. *Australian Trust Company v. Webster*, 1 W. & W. (E.,) 148.

Suit by Individual Mambsrs of an "Institute" for Winding Up—Insolvency of "Institute"—Suit not a "Suit or Action Pending against an Insolvent" Within Sec. 56 of Act 5 Vic., No. 17.]—*See Dodds v. Foxton, ante column* 169.

[Compare Sec. 78 of Act. No. 379.]

Where M. was made a party to a suit in respect only of his wife's property, and after suit his estate was sequestrated, *Held* that he could do anything to protect his wife's interest which she could if *sui juris*, such interest not being of a class which passed to the official assignee of her husband. *Waddell v. Patterson*, 2 W. & W. (E.,) 133.

Right of Insolvent to Sue—5 Vic, No. 17, Secs. 2, 11, 33, 53, 54—Judgmsnt Recovered in Action.]—A recovered a judgment against B., and issued execution on it. A. became insolvent under 5 Vic., No. 17, in 1858. B. purchased lands in 1863. Suit by A. to have purchase declared fraudulent and void as against him, and to have B. declared a trustee of lands so as to give effect to the judgment. *Held* that A. not having obtained his certificate could not maintain suit: that although a right of action pending does not upon sequestration pass to the assignee, yet when judgment has been recovered and the right of action turned into a debt that debt passed to the assignee under Secs. 2, 11 and 53, and issuing execution was not within the meaning of the words "continuing an action" in Sec. 33. *Solly v. Atkinson*, 5 V.L.R. (E.,) 323.

[Compare Sec. 79 of Act No. 379.]

Right to Sue—Suit to Free Land of Trusts of a Settlsment.]—The fact that a man is an uncertificated insolvent shortly before his purchase of certain land is no bar to a suit by him to have the land conveyed freed from the trusts of a marriage settlement. *Mason v. Sawyers*, 2 V.R. (E.,) 36; 2 A.J.R., 21.

"Insolvency Stat. 1871," No. 379, Sec. 77— "Actions."]—The word "actions" in Sec. 77 of the "Insolvency Stat. 1871" does not include suits in equity, so as to entitle the assignee to six weeks' notice to make his election to proceed with the suit, or have it dismissed; but the Court will not make an order without giving the assignee formal notice. *Willison v Warburton*, 4 A.J.R., 66.

Delay of Trustee of Insolvent in Electing Whether to Proceed.]—*See Smith v. Knarston*, 3 A.J.R., 82, *post* under PRACTICE AND PLEADING IN EQUITY—Bill.

Insolvency of Plaintiff—"Insolvency Stat. 1871," No. 379, Sec. 77—Motion to Dismiss.]—Where a suit becomes defective by insolvency of plaintiff the defendant should call upon assignee to elect, and, if he elect to discontinue, should then bring motion to dismiss. On application being made to assignee who did not reply, the Court ordered that bill be dismissed if assignee did not take steps to continue within eight days. *Prigg v. Johnstone*, 5 V.L.R. (Eq.,) 311.

Abatement or Continuance of Suit on Insolvency of Parties—"Insolvency Statute 1871," No. 379, Secs. 77, 78.]—Where a sole plaintiff in a suit becomes insolvent, on the analogy of Secs. 77 and 78 of the "*Insolvency Stat.* 1871," providing for action at law, a notice by the defendant, calling upon his assignee to take up or discontinue the suit, should be served at least six weeks before the motion is heard. *Wood v. Gordon*, 6 V.L.R. (E.,) 37; 1 A.L.T., 127.

Abatement or Continuance of Suit on Insolvency of Parties—Suit to Enforce a Pecuniary Liability Against Defendant—Trustee Cannot be Made a Party.]—Although trustees of insolvents may be made parties to partnership suits, pending against the insolvents, in which property is to be administered, there is no provision in the "*Insolvency Stat.* 1871," Secs. 62-65, for making a trustee party to a suit to enforce a pecuniary liability of the insolvent. Such liabilities are to be enforced by the creditors proving. *England v. Moore*, 6 V.L.R. (E.,) 48; 1 A.L.T., 158.

"Insolvency Stat. 1871" No. 379, Sec. 75—Insolvency of Defendant.]—A suit was set down as defended, and a decree was asked upon affidavits verifying bill. Before the hearing, the defendant became insolvent. *Held* that the Court could not take judicial notice of the insolvency. *Quære*, whether a suit is rendered defective by insolvency of defendant. A decree was made as prayed. *M'Carthy v. Ryan*, 7 V.L.R. (E.,) 136.

NOTE.—As to practice upon insolvency of a party to an action under the present procedure *see* Order 17 of the *Supreme Court Rules*, 1884.

Insolvent Cannot Set Aside Verdict Made After Sequestration.]—A verdict was entered in an action against an insolvent, who did not appear, and whose estate had been sequestrated three days before trial. On motion to set aside the verdict, *Held* that the insolvent had no claim to be heard, his estate having vested in the assignee. *Kyte v. Mahoney*, 5 W.W. & A'B. (L.) 6.

Insolvency of a Joint Defendant.]—If one of several joint defendants becomes insolvent after action brought, the action may proceed against the other defendants, the proceedings as to the other defendants not being stayed by Sec. 75 of the "*Insolvency Stat.* 1871." *Ex parte Welsh*, 4 V.L.R. (L.,) 52.

Action on Bill of Exchange—Payment into Court—Insolvency of Defendant After Verdict, but Before Judgment Signed.]—*See Playford v. O'Sullivan*, 5 A.J.R., 115, *ante column* 99.

Garnishee Disputing Liability — Insolvency of Debtor Since Attachment of Debt No Defence—"Common Law Procedure Stat. 1865," Sec. 204.]—*Watson v. Morrow*, 6 V.L.R. (L.,) 134; 1 A.L.T., 167; *ante column* 61.

Damages.]—A plaintiff is not entitled to recover damages for a period prior to his insolvency in respect of a claim partly covering such period. And where a jury in a County Court had given damages generally upon a claim partly covering a period before insolvency, *Held* that damages being awarded generally, the Court could not sever them; and an appeal was allowed and the case directed to be re-heard. *Mouatt v. Saunders*, 4 V.L.R. (L.,) 439.

Action of Trespass.] — *Held*, following the principle of *Madden v. Hetherington*, *post column* 657, that an uncertificated insolvent in possession of a residence area can sue for trespass in respect thereof as agent for the assignee, the insolvency being no bar to such proceedings. *Fancey v. North Hurdsfield Company*, 8 V.L.R. (M.,) 5; 3 A.L.T., 89.

Money Paid into Court to Abide Result.]—S. commenced an action against A. to recover the amount of a promissory note. On 10th March A. obtained an order to defend, on condition that he paid into Court £50 within seven days, which was duly done. S. declared in the action on 29th March, and on the 27th April signed judgment by default for want of a plea. On 1st May a summons was served on A.'s attorney to show cause why the £50 should not be paid to S. The summons was not opposed, and on 3rd May an order was made for payment, and the money taken out the same day. This was done in ignorance of the fact that on 1st May, after the summons was taken out, but before its return, A. had obtained an order for sequestration of his estate. In an action by A.'s assignee for the £50, *Held* that at the date of the sequestration the action *S. v. A.* was determined, and that, as regarded the £50, A.'s assignee had no interest in it. *Goodman v. Strachan*, 2 A.J.R., 63.

Judgment Signed After Sequestration—"Insolvency Stat. 1865," No. 273, Sec 37—Moving to Set Aside within a Reasonable Time.]—A plaintiff in an action obtained a verdict, and shortly afterwards the defendant became insolvent. After the sequestration judgment was signed, and a writ of *ca. sa.* issued. The official assignee within a week of the time he had heard of judgment being signed, applied in Chambers to set aside the judgment, which the Judge refused, although he set aside the *ca. sa.* On rule *nisi*, *Held* that the judgment, being bad under Sec. 37 of Act No. 273, must go, and that the official assignee had applied within a reasonable time. *Proudfoot v. Mackenzie*, 6 W.W. & A'B. (L.,) 144.

[Compare Sec. 75 of Act No. 379.]

Judgment Signed on Estreated Recognizance After Insolvency of Person Entering into Recognizance—Crown Not Barred by Insolvency of Crown Debtor—Act No. 241.]—*See Regina v. Griffiths*, 9 V.L.R. (L.,) 45; 4 A.L.T., 156, *ante column* 324.

Summoning Assignee to Show Cause why Action Should Not be Continued—Act No. 379, Sec. 75.]—A summons was issued calling upon the assignee of an insolvent defendant to show cause why the action should not be continued against him. The declaration was on promissory notes and for breach of agreement whereby defendant purchased plaintiff's share in a partnership business, defendant to pay the promissory notes and half the amount of profits up to a certain time; breach non-payment of the half profits. *Per Barry, J.* (in Chambers)—the amount could be proved against the estate, and it was not one of the exceptional cases provided for by the latter part of Sec. 75. Summons dismissed. *Christie v. Thomson*, 1 A.L.T., 54.

Joint Obligors on a Covenant—Insolvency of One.]—P. sued E. and his wife on a covenant. To the declaration it was pleaded that E. became insolvent, and his estate was sequestrated before the cause of action accrued. *Held* that under Sec. 144 of Act No. 379 the plea was a good plea. *Patterson v. Evans*, 5 V.L.R. (L.,) 143.

Stay of Proceedings—Act No. 379, Sec. 75.]—An appeal upon a debtor's summons is not a proceeding in a suit or action, so that a voluntary sequestration is not a bar to such an appeal under Sec. 75. *In re Portich*, 7 V.L.R. (I. P. & M.,) 126, 142; 3 A.L.T., 50.

After executors have sequestrated the estate of their testator under Sec. 35 of the Act No. 379, the creditors are barred by Sec. 75 from suing them for a devastavit. *Hasker v. MacMillan*, 5 V.L.R. (E.,) 217; 1 A.L.T., 45. *See ante column* 643.

(2.) *On Contracts.*

Insolvent Attorney—Action for Services.]—As regards causes of action arising after the insolvency and before the discharge, the insolvent is the agent of the assignee; he contracts for his benefit, and, so long as the assignee does not interfere, may sue on these contracts. To an *indebitatus assumpsit* for work and labour as an attorney it was pleaded that the work was done after the plaintiff had become insolvent, and before he got his discharge. Demurrer to plea allowed. *Madden v. Hetherington*, 3 V.R. (L.,) 68; 3 A.J.R., 41.

Insolvency Abroad — Residence — Domicil.] — Where a person resident in another colony becomes insolvent, if his residence does not amount to a domicil in that colony, his title to sue on a contract made, and to be performed out of the jurisdiction of such colony is not divested. *Buisson v. Warburton*, 4 A.J.R. 43, 119.

Insolvency of Mortgagor—Does Not Extinguish Mortgage Debt.]—*Hodgson v. Young*, 6 A.L.T., 117, *post* under MORTGAGE—Rights of Mortgagees, &c.

(3.) *In Other Cases.*

On Proceedings for Imprisonment for Debt Under Acts Nos. 284 and 292.]—*Semble*, that proceedings under the Acts Nos. 284 and 292 are so far of a civil character as to be stayed by the sequestration of a debtor's estate. *Malcolm v. Milner*, 1 V.R. (L.,) 74; 1 A.J.R., 112.

Act No. 379, Sec. 76 — Imprisonment for Debt, Act No. 284, Sec. 3—Insolvency after Commitment on Fraud Summons.]—G. was upon a fraud summons committed to prison for refusing to pay his debt. After commitment G.'s estate was sequestrated. On motion for writ of *habeas corpus*, *Held* that there are several grounds for imprisonment under Act No. 284, Sec. 3, and that G. was not imprisoned under *execution* of any judgment of the Court, but for a fraud upon his creditor, treated in a summary way under Sec. 3 of Act No. 284, and that his insolvency was no reason for his release. Writ refused. *In re Geary*, 5 A.J.R., 173.

And *see ex parte Robinson, ante column* 267.

Act No. 379, Sec. 75—Non-attendance of a Debtor at an Examination under a Fraud Summons.]—*Per Stephen, J.* (in Chambers)—The insolvency of a judgment debtor is sufficient excuse for his non-attendance at an examination under a fraud summons. *Hitchins v. Trimble*, 2 A.L.T. 147.

Discharge from Custody—"Insolvency Stat. 1871," Sec. 76—Arrears of Maintenance—"Marriage and Matrimonial Causes Stat. 1864," Sec. 39.]—An insolvent is not entitled, under Sec. 76 of the "*Insolvency Stat.* 1871," to be discharged from custody when he has been, prior to his insolvency, committed to prison by justices under Sec. 39 of the "*Marriage and Matrimonial Causes Statute* 1864," till he should pay arrears of maintenance of his wife. *Re Harris*, 6 V.L.R. (L.,) 47; 1 A.L.T., 153.

Solicitor Arrested for Contempt — Insolvency—Discharge from Arrest—5 Vic., No. 17, Secs. 36. 38.]—Where a solicitor was arrested for contempt, by non-payment of money under an order of the Court, and he voluntarily sequestrated his estate and filed his schedule, and then applied to be discharged from custody, under the "*Insolvency Stat.*," 5 Vic., No. 17, Secs. 36, 38, *Held* that he was entitled to be discharged from custody. *In re Burton*, 3 W. W. & A'B. (L.,) 3.

[Compare Secs. 74, 76, of Act No. 379.]

Person Imprisoned on Attachment for Non-Payment of Costs—Act No. 379, Sec. 76.]—*Noel, J.*, made an order for a person's discharge from imprisonment on attachment for non-payment of costs upon such person's insolvency. *In re Davis*, 1 A.L.T., 55.

"Insolvency Stat." No 379, Secs. 74 and 75—"Common Law Procedure Stat.," No. 274, Sec. 224—Foreign Attachment.]—As against the assignee of an insolvent the judgment creditor who has

obtained a writ of foreign attachment is not protected under Secs. 74 and 75 of Act No. 379 unless there has been both a levy and a sale, although a judgment creditor who has obtained an order under a writ of foreign attachment, followed by execution levied, may under Sec. 224 of the Act No. 274 resist his claims. A writ of foreign attachment was issued, and an order made attaching, under Sec. 224 of Act No. 274, the property of E., one of two joint debtors. A verdict was found for plaintiff, but E.'s estate was sequestrated before judgment signed. A suggestion under Sec. 212 of Act No. 274 was entered and judgment signed. *Held*, on summons by E. and his assignee to set aside suggestion and judgment, that, there being no evidence of facts equivalent to payment, no levy or lodging money, the property attached passed to the assignee. Summons allowed. *Lauratet v. M'Cracken*, 3 V.R. (L.,) 41; 3 A.J.R., 35.

On Execution—Winding-up Order Under Act 409 —"Insolvency Stat." No. 379, Sec. 74.]—The plaintiffs recovered a judgment against the defendant company, and execution was issued, and the sheriff sold the property of the company. Three days afterwards the company was wound up, and the clerk of the Court of Mines, in whom the property is vested under Sec. 70 of Act 409, served the sheriff with notice of his claims. *Held* on interpleader that the winding-up order was not a sequestration within the meaning of Sec. 74 of Act No. 379, and that the proceeds belonged to the plaintiffs as execution creditors. *Oriental Bank v. Wattle Gully Company*, 1 V.L.R. (L.,) 28.

Effect of Voluntary Sequestration on Proof of Debts.] Where mortgagees brought an administration suit seeking a declaration that they were entitled to rank as specialty creditors on the general assets for any deficiency in realising their security, and the administratrix sequestrated the estate after suit brought, *Held* that the sequestration did not deprive them of their right as specialty creditors. *Australian Trust Company v. Webster*, 1 W. & W. (E.,) 148.

For facts *see* S.C., *ante column* 654; and *see* S.C., 2 W. & W. (E.,) 99. *See* S.P. *Fairnbairn v. Clarke*, 1 W. & W. (E.,) 333.

5 Vic., No. 17, Sec. 30—Process Against the Person—Discharge of Writ of Attachment.]—*See Laing v. Campbell*, 1 W. & W. (E.,) 372, *ante column* 65.

[Compare Sec. 74 of Act No. 379.]

Attachment for Debt and Costs—Barred as to Costs by Liquidation.]—*See England v. Moore*, 6 V.L.R. (E.,) 48, 54; 1 A.L.T., 172, *ante column* 63.

Attachment for Non-payment of Debt and Costs Will Not be Granted after Liquidation.]—*See England v. Moore*, 6 V.L.R.,(E.,) 48; 1 A.L.T., 172, *ante column* 64.

Attachment for Non-payment of Money Will Not be Granted on ex parte Motion After Insolvency.]—*See Lane v. Loughnan*, 7 V.L.R. (E.,) 19; 2 A.L.T., 134, *ante column* 68.

XVI. Proof of Debts.

(1) *Practice on Proof.*

Proof by Corporation—5 Vic., No. 17, Sec. 39.]—Sec. 39 of the Act does not require that the affidavit should be made by the creditor himself; it is sufficient if a person appointed an attorney under power of the corporation file such affidavit. A bank whose head office was in London, appointed F. as attorney, under power to prove and appoint any person to prove in Victoria a debt due to bank from any insolvent. F. by deed appointed S. his attorney, and in his name as attorney, to prove any debt in Victoria due to bank. *Held* that S.'s proof was a good proof for the bank. *Ex parte Knox, in re Rutledge and Bank of Australasia*, 2 W. & W. (I. E. & M.,) 65.

[Note.—Secs. 22 and 104 of Act No 379 give full authority to the agent of any creditor, corporate or not.]

Judgment Debt—Judgment When Reviewed.]—The Court cannot review the judgment upon which is founded a debt which a judgment creditor seeks to prove, except upon the grounds of an equitable defence, or of collusion between the insolvent and the creditor in obtaining the judgment, the latter being a ground which it is open to a creditor to raise, but not to the insolvent himself. *Ex parte Gregory*, 1 W. W. & A'B. (I. E. & M.,) 57.

Set-Off.] — Per *Molesworth, J.*—"A proof cannot be met by way of set off by the receipt of payment of another debt by way of fraudulent preference." The case involved the consideration of circumstances under which a succession of advances and repayments had taken place between the insolvent and his mother and of other family arrangements. *In re Groves*, 6 W.W. & A'B. (I. E. & M.,) 36; N.C., 42.

See S.P., *Courtney v. King*, 1 V.R. (L.,) 70; 1 A.J.R., 86.

Set-Off—Rule 26—Costs.]—Where an insolvent wishes to set off a claim against a proof of debt, and so reduce the proof, he must give notice thereof as required by Rule 26. Upon motion in the Court of Insolvency to expunge a proof of debt, the application was dismissed with costs against the insolvent. On appeal, the Court dismissed the appeal with costs, confirming the order. *In re Hickinbotham*, 5 V.L.R. (I.P. & M.,) 101; 1 A.L.T., 84.

When Proof Rejected.]—Proof of a debt will be rejected where the claim has been presented after a delay altogether uncalled for, where the persons interested in its admission have never mentioned its existence, although their attention has at various times and places been directed to it, where such persons differ on important points as to the nature of the debt and the securities which were given for it, and where the documentary evidence contradicts the assumption of *bona fides* and reality. On the facts of this case the proof of debt was disallowed, but on appeal the Full Court took a different view of the facts and allowed the proof. *In re Georgeson*, 1 A.J.R., 114, 139.

Objection Disallowed—Appeal Not Taken in Time.] Where an objection to a proof of debt was taken before the Commissioner, viz., the interlineation in the *jurat* making the affidavit bad, which objection was a good one, but was disallowed by the Commissioner, and the insolvent did not appeal, *Held* that he would not be allowed to avail himself of the same objection as ground for a rule to expunge the proof of debt, his proper remedy being by appeal from the allowance of the proof. *Ex parte Usher*, 2 V.R. (I. E. & M.,) 3; 2 A.J.R., 37.

[*See* Rule 56 of "*Insolvency Rules.*"]

Where the assignee has allowed the proof of debt ignoring all informalities, the person whose debt is allowed is to be treated as a creditor till the proof is set aside. *In re Marie*, 3 A.J.R., 63.

Expunging Proof.]—Where a creditor at the time he proved had sold property over which he held security, and then proved for the balance of his claim, and after proof the purchaser objected to the title of part of the property, and the creditor rescinded the sale, and then advertised that part of the property for sale, *Held* that the creditor had not proved for the particular sum which was due to him, and proof expunged. *In re Mowling and Dunkley*, 2 V.R. (I. E. & M.,) 7. *Ex parte Usher*, 2 V.R. (I. E. & M.,) 3; 2 A.J.R., 37.

Expunging, Rejecting or Reducing Debt Proved—"Insolvency Rules," Rule 56.]—Under Rule 56 of the rules of the Court of Insolvency an application to vary or reverse the decision of the trustee or assignee in respect of a proof must be made to the Court of Insolvency within fourteen days of the receipt of the notice of allowance or disallowance of proof. *In re Johnston*, 3 A.L.T., 136.

Per Noel, J. The rule should be read thus, "Application may be made to the Court within fourteen days having been preceded by notice of motion." *Ibid.*

Opposing Proof.]—An insolvent is not debarred from opposing a proof of debt by the fact that there is no probability of there being a surplus in his estate. *Ex parte Usher*, 2 V.R. (I. E. & M.,) 3; 2 A.J.R., 37.

"Insolvency Stat. 1871," Sections 37, 106, 120—Rules 54, 55, 58—Forms, 10, 11—Valuation of Security—Neglect of Assignee to File Proof.]—By Sec. 37 of the "*Insolvency Stat.* 1871" the petitioning creditor is required to value his security, and Sec. 120 requires all creditors proving to value their securities. Rule 58 of the Insolvency Rules, and forms 10 and 11 of the petitioning creditor's affidavit, require the valuation to be in the proof. Where no valuation of securities or any offer to surrender them was included in the affidavit of a bank, which was a petitioning creditor, and there were several mistakes in the affidavit, *Held* that the affidavit of proof was totally wrong. By Sec. 106 of the Act the assignee should make a list of all creditors who have proved, and file the proof in Court. By Rules 54 and 55 the assignee should, with all speed, reject or admit proof, in writing, and within four days file it with the chief clerk as rejected or admitted. Where the assignee had omitted to file a proof as admitted or rejected, and had done nothing with the proof but keep it, *Held* that it did not affect the creditor. *In re Farrell*, 4 A.J.R., 101.

Petitioning Creditor—Objection to Status of When Taken.]—The objection to the *status* of the petitioning creditor must be insisted upon at the examination in the Insolvent Court, it is too late to take the objection during the subsequent proceedings in equity. *Ibid.*

One Assignee Making Arrangement as to Proof—Act No. 379, Sec. 106—How Far Second Assignee Bound.]—A creditor filed a proof of debt. This was objected to, but was "admitted subject to adjustment," an adjustment was made by the assignee as to the amount, but neither the original or amended proof was endorsed as allowed or rejected under rule 54, nor filed. Held, affirming *Molesworth, J.*, that the arrangement was nugatory, and that the subsequent assignee could impeach it. *In re Bayldon*, 5 A.J.R., 163; 1 V.L.R. (I.P. & M.,) 10.

Act No. 379, Sec. 104—Proof by Insolvent as Attorney Under Power.]—*Per Noel, J.* An insolvent cannot prove on his own estate under a power of attorney from another creditor. *In re Jansen*, 1 A.L.T., 78.

Landlord of Deceased Insolvent — Proving for Rent.]—A landlord sought to prove for, at a general meeting of creditors, three months' rent due from a deceased insolvent. *Held, per Quinlan, J.*, that the landlord had a right to appear at the meeting, and vote as a creditor, as, although he was to be paid in full, that was a matter touching the distribution of the estate, and did not deprive him of his status as a creditor, and of the right to vote at a general meeting. *Re Trump*, 6 A.L.T., 2.

Particulars must be furnished by a creditor seeking to prove a debt. *Ibid.*

Meeting Under Sec. 53 of the "Insolvency Stat., 1871"—Objection to Proof by Creditor—When Taken.]—*Per Noel, J.* An objection to the affidavit of a proof of debt of another creditor may be taken by any creditor at a meeting held under Sec. 53 of the "*Insolvency Stat.* 1871," at any time before the creditor whose proof is objected to has signed the resolution. *Re Snell*, 6 A.L.T., 61.

Per Noel, J. The object of objecting to the proof of a creditor is to prevent his voting. Voting is the signing the resolution. Therefore objections may be taken at any time before the creditor signs the resolution. *Ibid.*

The right to be present at a meeting does not include the right to vote. *Ibid.*

Principal Creditor Not Bound to Prove—Surety Not Discharged by Omission to Prove.] — *See National Bank v. Plummer*, 6 W. W. & A'B. (L.,) 165, *post* under PRINCIPAL AND SURETY —Discharge of surety.

Principal Creditor Proving—When His Acts Do Not Discharge Surety.]—*See Trust and Agency Company of Australia v. Greene*, 1 V.R. (L.,) 171; 1 A.J.R, 142, *post* under PRINCIPAL AND SURETY.—Discharge of surety.

Act. 18, Vic. No. 10—Jurisdiction of Chief Commissioner.]—*Ex parte Rolfe and Bailey*, and *in re Bradley*, *ante column* 579.

(2) *Proof by and Against Particular Persons.*

Secured Creditor—Valuation of Security—Act 5 Vic., No. 17, Sec. 39—Bargain Between Secured Creditor and Official Assignee.]—Under Sec. 39 of 5 Vic., No. 17, any affidavit to give the right of election must have been preceded by a dispute as to the value, or the creditor must have been brought to understand that he was valuing at the risk of having his valuation adopted by the assignee. O. was an insolvent. L. was a mortgagee of O.'s land. After some dispute as to the right to elect, O. valued the security at £200. The official assignee afterwards sold it for £300, and paid £200 to L. as for the security, receiving his receipt as "being payment of value of security upon proof." *Held* that as L. did not understand that the taking the money was a discharge of the security, that his acceptance thereof and his receipt therefor did not under the circumstances constitute a contract such as a Court of Equity should enforce. *Semble*, that a bargain between L. and the official assignee to the effect that if L. would value at £200 so as to give the official assignee the profits of a percentage on the excess if he sold or the option of election, the official assignee would undertake the trouble of attempting a sale, would be, if proved by the evidence, contrary to the policy of the Act. *Laing v. Laidlaw*, 1 W. & W. (E.,) 13.

Secured Creditor — Assignee's Plan of Distribution.] — In the plan of distribution filed by the assignee a creditor, M'L., holding a security, was entered among the list of creditors, and as entitled to a dividend of £968; but in a subsequent part of plan, under the heading "Unrealised Assets," there was inserted the following item:—"Dividend set aside for M'L.'s claim, for which it is supposed security is held equal to £968." *Held* that the plan must be amended by describing the dividend payable to M'L., not as payable absolutely, but only upon the contingency of her valuing her security, and proving for the balance. *Ex parte Bank of Australia, in re Rutledge*, 2 W. & W. (I. E. & M.,) 57.

Creditor Holding Security—Valuing Security—Act No. 273, Sec. 81.]—A creditor obtained the security of a bill of sale over an insolvent's furniture, and claimed a lien on deeds deposited. Afterwards the creditor and the official assignee arranged that the deeds should be given up and the furniture sold. The furniture was sold and realised £80 short of the creditor's debt, and the creditor sought to prove for this deficiency, which proof the Commissioner refused. *Held*, by *Molesworth, J.*, and affirmed on appeal, that the proof was properly rejected, that it was not competent for the creditor and the assignee to arrange between themselves, that there should be no affidavit of valuation of the debt, but that the assignee should sell by auction, and consider the price realised as the value of the security. *In re Kingsland*, 6 W. W. & A'B. (I. E. & M.,) 10; N.C., 33.

[NOTE.—Sec. 120 of Act. No. 379 does not deprive a creditor realising his security of his right to prove.]

Proof by Secured Creditor of Separate Estate Against Joint Estate.]—*Ex parte Flower, Salting and Company*, *see post column* 666.

Secured Creditor—Insolvency Rules—Rule 59—Different Securities for the Same Debt.]—A creditor held different securities, bills, and real property for the same debt. He valued them separately, and by so doing there was in the realisation found to be an excess on the one security, and a deficiency on the other, *Held* that the assignee was only entitled to the excess over the aggregate value of the security. *In re Bayldon*, 1 V.L.R. (I. P. & M.,) 10, 15, 16.

Rule 59 is not *ultra vires*. The language of the English and the Victorian Acts is not so different as to justify the Court in saying that what can be done under the one cannot also be done under the other. S.C. 5 A.J.R., 163, 1 V.L.R. (I. P. & M.,) 14, 15.

Landlord Claiming Preferentially—5 Vic., No. 17, Sec. 41.]—Sec. 41 does not mean that every landlord shall be paid six months' rent as a preferential claim, but such landlords only as the section deprives of the right of distress. *In re Brown*, 1 W. & W. (I. E. & M.,) 93.

[Compare Sec. 108 of Act No. 379.]

Landlord of Deceased Tenant Proving for Rent.]—*Re Trump*, *ante column* 662.

Payment of Rent to Landlord by Sheriff's Officer.]—Where B. a bailiff out of the proceeds of sale of a judgment debtor's land paid (after notice of sequestration) a sum of money, as rent due, to the landlord, *Held* that B.'s payment was not protected, and that the official assignee could not have paid himself till the landlord had taken proper proceedings under the insolvent law. *Simpson v Burrowes*, 4 W. W. & A'B. (L.,) 150, *see* S.C., *ante column* 629.

Act No. 379, Sec. 108—Distress.]—The provisions of Sec. 108 do not apply to a case of two lessees as joint tenants where distress has been made on the goods of both, and one subsequently sequestrates his estate. *Quære* whether goods of a tenant passing under a bill of sale are protected under Sec. 108 upon his subsequent insolvency. *Officer v. Haynes*, *ante column* 381.

Sec. 108 is for the protection of general creditors against the superior powers of landlords, and does not vary the rights of landlords and mortgagees. *In re Sweeney, ex parte Diggins*, 4 V.L.R. (I. P. & M.,) 1, 6.

For facts *see S.C.*, *ante column* 381.

Under Sec. 108 a landlord who has distrained before sequestration cannot after insolvency sell under the distress. *In re Nicol and Payroux, ante columns* 381, 382.

Act No. 379, Sec. 108—Lien of Landlord—Insolvency of Tenant.]—Where a landlord has distrained but has not sold the goods seized prior to the sequestration, he can only prove as a creditor for any excess of rent in arrear over three months; he has no lien, that being destroyed by Sec. 108, but he has a preferential claim on the insolvent estate for arrears not exceeding three months before distribution amongst the general creditors. *Davey v. Bank of New South Wales*, 9 V.L.R., 252, 262; 5 A.L.T., 85.

Specialty Creditor.]—A specialty creditor, whose security consists of a mortgage of land not worth the whole of the mortgage debt, has, under the insolvency law, no priority over simple contract creditors for the excess of the specialty debt over the value of the land mortgaged. *In re Taylor*, 1 W. & W. (I. E. & M.,) 127.

And *see* cases *ante column* 659 for effect of sequestration upon proof of special debt.

Partners—Act No. 379, Secs. 45, 110—Grant of Certificate in Joint Estate.]—Three partners had received certificates of discharge on their joint estate, but not on their separate estate. Two of the partners, A. and B., attempted to prove on the estate of C. for the sum of £4000, balance of £5000 for purchase of one half of their interest in a certain patent. *Held* that the purchase money was a recoverable debt at the time of sequestration, and that A. and B. were entitled to prove on C.'s estate for the amount, and that the application was not too late, Sec. 110 providing for proof at any time before final distribution. *In re Brown, Stansfeld and Company*, 3 A.J.R., 19.

Act No. 379, Sec. 112—Surety.]—Per *Noel, J*, Sec. 112 does not enable a surety who has not paid the debt due by the insolvent, and the principal debtor, to prove, and under such circumstances a surety cannot prove. *In re Hyams*, 5 A.L.T., 112.

Proof by Corporation—5 Vic., No. 17, Sec. 39.]—*Knox, ex parte in re Rutledge and Bank of Australasia, ante column* 660.

Creditor Not Executing Deed of Assignment.]—A creditor who has not executed a deed of assignment can take no benefit of distribution under it; but his executing it is not a condition precedent to his proving in the Master's office for his debt. *Heape v. Hawthorne*, 2 W.W. & A'B. (E.,) 76, 89.

(3) *Debts Provable and Proof of Particular Debts.*

Proof by Secured Creditor of Separate Estate Against Joint Estate—Valuation of Security.]—A secured creditor of the separate estate of a partner of a firm where there have been separate sequestrations of the joint and separate estates, upon proving against the joint estate, is not bound to value his security upon the separate estate, for if it were so there would be two cases before the Court at once, and the security required by the Act (5 Vic., No. 17, Sec. 39,) to be valued by the creditor, is only such security as he may happen to have against the estate upon which he seeks to prove. *Ex parte Flower, Salting and Co*, 1 W. & W. (I. E. & M.,) 143.

Affirmed on appeal to the Privy Council, *sub. nom. Rolfe and the Bank of Australasia v. Flower, Salting & Co.*, L.R., 1 P.C., 27.

[Compare Sec. 100 of Act No. 379.]

Per the Privy Council—The Act 5 Vic., No. 17, Sec. 39, does not destroy the distinction between the joint and separate estate of an insolvent, so as to compel a creditor holding a mortgage security on the separate estate to estimate and deduct its value before he can be allowed to prove against the joint estate. *Ibid.*

The English law of Bankruptcy, which allows a joint creditor, though holding a security on the separate estate, to prove against the joint estate without giving up his security, prevails in Victoria, and is not altered or varied by the insolvent acts of that colony. *Ibid.*

Secured Creditors.]—C. and B. proved a debt for £2662, being the unsatisfied portion of a judgment debt recovered by them. C. and B. had a mortgage over the insolvent's property to secure the debt which had been assigned to a bank, and the equity of redemption of which had been purchased from the official assignee by the bank. *Held* that the mortgage was a security for the debt and proof of debt expunged. *In re Dallimore*, 5 A.J.R., 1.

Purchase Money—Part Payment—Abandonment.]—K. agreed to buy a farm from G., to be paid for in part by K.'s acceptance. K. became insolvent, and G. claimed to prove for the amount of the acceptance. The official assignee rejected the proof on the ground, among others, that he had repudiated the agreement. *Held*, on appeal from the Chief Commissioner who allowed the proof, that the official assignee by "abandoning," under 5 Vic., No. 17, Sec. 84, an agreement made by the insolvent for the purchase of land does not destroy the consideration for a bill accepted by the insolvent as part payment, and that the drawer of such a bill is entitled to prove on the estate for the amount of the bill. *Ex parte Gessner*, 1 W. & W. (I. E. & M.,) 183.

Judgment Debt—Proof Of.]—*Ex parte Gregory*, see *ante column* 660.

Bills of Exchange.]—S. and M. drew a bill for £3000 upon P., which he accepted. S. and M. endorsed to C. and Co., who gave value for the bill. P. got the proceeds. The bill fell due 10th March, 1860, and was dishonoured, and P.'s estate was subsequently in that month

sequestrated. S. and M. paid £2145 in discharge of the bill. *Held* that under Sec. 37 of Act 5 Vic., No. 17, S. and M. were entitled to prove on P.'s estate for the £2145. *In re Pascoe*, 2 W. W. & a'B. (I. E. & M.,) 17.

Bills of Exchange—Act No. 379, Sec. 112.]—Bills lodged for collection with a bank (a creditor) should be valued as a security, not for their full value, unless it was expected they would all be paid; current bills discounted with the Bank, on which the insolvent is not primarily liable, should not be proved as debts, but as a contingent liability under Sec. 112 of the Act No. 379. *In re Bayldon*, 5 A.J.R. 163, 1 V.L.R. (I. P. & M.,) 10.

Bills of Exchange, &c.—Act No. 273, Sec. 101—Void Securities.]—C.'s estate was sequestrated, and at the time he was seeking to obtain his certificate of discharge he gave certain bills of exchange to a creditor to induce him to withdraw his opposition to the granting of the certificate. *Held*, affirming *Molesworth, J.*, that such bills were not provable on C.'s second insolvency being void under Sec. 101 as founded upon an illegal consideration. *In re Cunningham*, 3 V.L.R. (I. P. & M.) 1.

[The corresponding Sec. of Act No. 379 is Sec. 144.]

Bill of Exchange—Notice of Dishonour Not Given to the Trustees.]—L. drew and endorsed a bill of exchange in favour of A. L. afterwards assigned his estate to trustees by a creditor's deed, upon trust for his creditors. The bill was subsequently dishonoured, and A., without giving notice of dishonour to L. or the trustees, sought to prove on the estate in respect of the bill. *Held* that notice of dishonour should have been given to the trustees, and that A. could not prove. *In re Levy*, 2 V.R. (E.,) 33; 2 A.J.R., 11.

Act No. 379, Sec. 112—Preferential Payment to Creditors—Recovery by Assignee.]—W. and Co. received shortly before sequestration of an insolvent's estate a payment which the official assignee considered preferential, and for which he sued W. and Co. A verdict was recovered for £680 for damages and costs. *Judge Noel* refused to admit proof by W. and Co. of this £680 as a debt against the estate. *Held, per Molesworth, J.*, on appeal, that this sum was a "debt or liability" within the meaning of Sec. 112 of Act No. 379, and that W. and Co. were entitled to prove against the estate as for this sum of £680. *In re John Walker*, 3 A.J.R. 55, 89.

Act No. 379, Sec. 112.]—A creditor received from the debtor a sum of money to induce him to enter into a composition, and under the composition had received three bills of exchange from the debtor who became insolvent before the third bill was paid. *Held* that the creditor was not entitled to prove for this third bill. *In re Jobson*, 5 A.J.R., 154.

G. was committed for refusing to pay a debt upon a fraud summons. *Held* that such a debt was not provable in insolvency. *In re Geary*, 5 A.J.R., 173.

And *per Stawell, C. J.*, the non-compliance with an order directing payment of maintenance under the "*Marriage and Matrimonial Causes Stat.*," No. 268, is an offence and not a debt. *In re Harris*, 6 V.L.R. (L.,) 47; 1 A.L.T., 153.

Damages in Action for Breach of Contract—Act No. 379, Secs. 75, 112.]—Where A. agreed to purchase from B. his share in a certain business, A. paying certain promissory notes and half profits up to a certain time, and A. broke the agreement by failing to pay the half profits, *Held, per Barry, J.* (in Chambers) that the amount of the half profits was provable against the estate. *Christie v. Thomson*, 1 A.L.T., 54.

Act No. 379, Sec. 113—"Preferential Claim"—Wages as "Workman."]—Where R. worked as a tailor for the insolvent by the "piece," being under no stipulation to continue to work for him or to forbear to work for another, *Held* that a claim for wages by R. was not a "preferential claim" within Sec. 113 as being the wages of a "workman not exceeding four months;" "four months' wages" means payment for labour measured by the time employed. *In re Murray*, 5 A.J.R., 3.

Composition—Bargain with Creditor.]—At a meeting of creditors, which terminated without anything definite being done, a creditor S. acted as chairman. An arrangement was then made, by which S. guaranteed to pay a composition of 10s. in the £, on his being paid his own debt in full, and a deed of composition was signed by creditors other than S. The fact of S.'s being the guarantor was known to the creditors, and he, S., made no statement calculated to mislead them as to the payment of his debt in full. *Held* that S. was entitled to prove his debt in full. *In re Hickinbotham*, 5 V.L.R. (I. P. & M.,) 101; 1 A.L.T., 84.

XVII. Mutual Credit and Set-off.

Set-off—New Trial.]—M., who was indebted to G. upon bills falling due on 3rd March, obtained, on the 1st of that month, cheques from G. to take up the bills, and in return gave G. a promissory note due 4th April. On 3rd March G. gave M. a cheque for a further amount, and in return received a bill accepted by one B. On 5th March M. obtained a further sum of £500 from G., in return for which he gave G. a document whereby he transferred to him certain sheep for sale, in consideration for past advances, and the present advance of £500, the proceeds of the sale of the sheep to be applied in liquidating the past advances, and other balances between the parties. B.'s bill was, on 8th March, discovered to be a forgery, and M., on the following day, gave G. another document, ante-dated as for 5th March, whereby he transferred to G. other sheep and cattle for sale, the proceeds of the sale to be applied in liquidating the past advances, and the other balances. The proceeds of the sale were more than sufficient for the purpose, and a balance was left in favour of M., who, on the 18th of March, voluntarily sequestrated his estate.

His assignee sued G. to recover the value of the stock as having been assigned in fraudulent preference, and recovered a verdict. On rule for a new trial, or to enter a verdict for G., *Held* that G. was entitled to set-off the sum advanced on 1st March, in addition to a sum of £500 which had been allowed him on the first trial, and as this set-off was greater than the assignee's claim under a count for money received to the use of M., to which it was applicable, the damages recovered by the assignee must be reduced by the amount of such set-off, and that G. would have to prove on the estate for the balance, and rule made that unless the assignee consented to have the damages reduced accordingly, a new trial should be allowed. *Simson v. Guthrie*, 4 A.J.R., 123, 182.

Act No. 379, Sec. 119—Bank Discounting Bill Not Due at Time of Sequestration.]—A sum of £175 stood to insolvent's credit at the bank. The insolvents had accepted a bill of exchange, and the bank having discounted it, claimed a set-off against the £175 in respect of the bill, although the bill was not due at the time of sequestration. *Held* that the set-off claimed was good, being a mutual credit within the meaning of Sec. 119. *In re Morris and M'Murray*, 5 A.J.R., 157. Affirmed on appeal at page 185.

Act No. 379, Sec. 119—Set-Off—When Allowed.]—To an order *nisi* obtained for not satisfying a judgment debt, the respondent objected that the petitioner was indebted to him in a certain amount, which he claimed to set off against the judgment. *Held* that words of the objection did not preclude the possibility that the set-off might be for a bill not then due or payable, and that the objection did not properly raise the facts and could not prevail. Sec. 119 of Act No. 379 only applies to proof of debts, and no set-off against a petitioning creditor can be entertained which accrues due after the petition has been received. *In re Fraser*, 6 V.L.R. (I. P. & M.,) 20; 1 A.L.T., 123.

And *see in re Groves, Courtney v. King*, and *In re Hickinbotham, ante column* 660.

XVIII. Offences by the Insolvent or Liquidating Debtor.

For offences on account of which a certificate of discharge may be refused or suspended, and six months' imprisonment may be given, *see* cases *post* under Discharge and Release.

Act No. 379, Sec. 154, Sub-sec. 3—Non-delivery Up of Books.]—It is no excuse for an insolvent to allege as a ground for not delivering up his books to the assignee, that they are in the custody of another person. *In re Hearty*, 1 A.L.T., 160.

Act No. 379, Sec. 154, Sub-sec. 2—Non-Delivery Up of Property.]—Where a husband did not deliver up property—furniture used in his house and purchased partly with his own money and partly with his wife's—and there was evidence of an intent to make it appear that the wife was solely entitled to the property, the Court *held* that it was an offence under Sec. 154, Sub-sec. 2, but, considering the wife's colour of title, did not punish it by imprisonment. *In re Oppenheimer*, 6 V.L.R. (I. P. & M.,) 26.

Act No. 379, Sec. 154, Sub-Sec. 4—Concealment of Property.]—"His property" in Sec. 154, Sub-sec. 4 may be read as the property of the estate after sequestration, and must be taken to mean what was his property but has become the property of the assignee. T., in September, 1876, assigned to trustees in favour of creditors. On 5th October, 1877, a rule *nisi* was obtained for sequestration of his estate, which was made absolute on 18th October. On 8th October the concealment took place. *Held* that T. had been guilty of an offence under the Act, Sec. 154, Sub-sec. 4, the assignment being void as an act of insolvency at the time of the order *nisi*. Conviction affirmed. *Regina v. Tempest*, 3 V.L.R. (L.,) 329.

Act No. 379, Sec. 154, Sub-sec. 4—Concealing Property.]—*Per Noel, J.* The offence of concealing property under Sec. 154, Sub-sec. 4, means doing something, and a mere non-disclosure of assets is insufficient. *In re Dunphy*, 3 A.L.T., 28.

Act No. 379, Sec 154, Sub-sec. 6—Omission in Statement of Affairs.]—*See in re Aarons*, 6 V.L.R. (I. P. & M.,) 56, 61, *post* under Sub-heading Discharge—Certificate of Discharge.

Act No. 379, Sec. 154, Sub-sec. 10—Making False Entries in Book or Document.]—*See in re Clapham, post* under Sub-heading Discharge—Certificate of Discharge.

Act No. 379, Sec. 154, Sub-sec. 14—Obtaining Property on Credit by False Pretences.]—*Per Molesworth, J.* "It is not enough to say that a man tells his creditors lies; the lies must, I think, be to inquiries distinctly made, so that the man knows he obtains goods on credit in reliance upon the truth of his answers, the supposed truth of his answers must be the motive of the creditor parting with his goods. *In re Goldsmith*, 5 V.L.R. (I. P. & M.,) 18, 24

Act No. 379, Sec. 154, Sub-sec. 15.]—Where an insolvent within four months of sequestration of his estate bought goods on one day on credit at a long date, and then sold them clandestinely immediately afterwards at a less price, for the purpose of meeting bills which were coming due, *Held* it was an offence within the meaning of unlawfully disposing of goods otherwise than in the ordinary way of business within Sec. 154, Sub-sec. 15 of the Act. *Regina v. Morris*, 1 V.L.R. (L.,) 99.

False Representation Within "Insolvency Statute 1871," Sec. 154, Sub-sec. 16.]—A false representation of his affairs made by an insolvent whereby he induced a creditor to renew certain bills upon being paid a sum of money, does not constitute an offence by the insolvent under No. 379, Sec. 154, Sub-sec. 16, which

prohibits an insolvent making any false representation or committing any other fraud, for the purpose of obtaining the consent of his creditors, or any of them, to an agreement with reference to his affairs or his insolvency or liquidation. *In re Stocks*, 4 A.J.R., 173.

"Insolvency Statute 1871," Secs. 68, Sub-sec. 2, 154, Sub-sec. 16—Making False Representations.]—Per *Molesworth, J.*—The offence of making false representations for the purpose of obtaining the consent of his creditors to any agreement with reference to his affairs, or his insolvency or liquidation, under Sec. 154, Sub-sec. 16, of the Act 379, has reference to agreements between the insolvent and his creditors for composition, &c., not concessions of furniture, under Sec. 68, Sub-sec. 2, of the Act—such concessions are not agreements with insolvents at all. *In re Aarons*, 6 V.L.R. (I. P. & M.,) 56; 2 A.L.T., 28.

"Insolvency Stat. 1871," No. 379, Secs. 150, 156—Absconding with Property.]—R.'s estate was sequestrated on 30th September. On 23rd September R. left Melbourne, carrying with him property exceeding £20 in value, and being at that time heavily indebted, R. was convicted upon a criminal information for an offence under Sec. 156 of the Act. *Held* that Sec. 156 applied both to persons whose estates were sequestrated as well as to persons whose estates were liquidated under Sec. 150. Conviction affirmed. *Regina v. Rosenwax*, 3 A.J.R., 28.

Act No. 379, Sec. 156—Absconding with Property—Sufficiency of Warrant.]—A warrant recited that insolvent within four months of the commencement of liquidation did feloniously quit New Zealand and take property, &c., but did not state that the property was the insolvent's or divisible among his creditors. *Held* that it sufficiently disclosed an offence under Sec. 156. *In re Fishenden*, 4 V.L.R. (L.,) 143; *see* S.C., *ante column* 455.

Contracting a Debt Fraudulently by Means of a False Pretence—5 Vic., No. 17, Sec. 73.]—An insolvent had deposited with him a blank acceptance, given to another person for another purpose. He fraudulently filled up the acceptance as a bill to himself, and discounted it. *Held* that this came under the Act 5 Vic., No. 17, Sec. 73, defining acts of fraudulent insolvency, and was within the letter of the clause referring to contracting a debt fraudulently by means of a false pretence. *In re Thomas*, 1 W. W. & A'B. (I. E. & M.,) 40.

[Compare Sec. 157, Sub-sec. 1, of Act No. 379.]

Contracting Debts by Means of False Pretences.]—An objection that an insolvent has contracted debts by means of false pretences and misrepresentations ought to allege the nature of the particular false representation by which credit has been fraudulently obtained; and the evidence in support of such a charge ought to be the same as would sustain an information for obtaining goods by false pretences. Mere exaggeration of the value of property does not amount to proving the offence, nor does stating that he was doing a very good business, or that at the time when a change of management occurred in his business it had improved his prospects. A false statement made by one partner is not proof against the other, unless made with his concurrence. *In re Walters*, 3 W. W. & A'B. (I.E. & M.,) 14.

Obtaining Credit Under False Pretences—Act No. 379, Sec. 157—Refers to Others Besides Insolvent.]—The words "any person" in Sec. 157 are not necessarily limited to a person who has sequestrated his estate. P. falsely represented to H. that he had mortgage security over some land. On the faith of this he bought from H. four lots of cattle at different times, the purchase money being secured by bills; the bills for the first three lots were met, but the bills for the fourth lot were not met. P. was convicted under Sec. 157. *Held* there was evidence of the false pretences to go to a jury and conviction affirmed. *Regina v. Poole*, 3 V.R. (L.,) 181; 3 A.J.R., 79.

Obtaining Credit by False Pretences—Act No. 379, Sec. 157, Sub-sec. 1.]—Obtaining credit is not the same as "obtaining property on credit," but it is the postponement of payment that an insolvent must obtain by false pretences to constitute an offence within the Statute. *In re Hearty*, 1 A.L.T., 160.

Fraudulent Insolvency—Fraudulent Preference—5 Vic., No. 17, Sec. 73.]—The alienation and intention which Section 73 makes criminal is an alienation of property with intent to defraud the whole body of creditors, whereby the insolvent takes from the creditors generally any property which is theirs, and is in fact guilty of stealing of an aggravated kind, and is not an alienation having only the effect of preferring one creditor to another. *Regina v. Wallis*, 1 W. & W. (L.,) 315.

[This as a criminal offence is not found in Act No. 379, but only as an offence, on account of which the certificate may be refused. Sec. 138, Sub-sec. 13.]

Conviction for Fraudulent Insolvency on Information Containing Four Counts—Cumulative Sentences Amounting to Six Years with Hard Labour—Habeas Corpus.]—*In re Millar*, 3 W. W. & A'B. (L.,) 41, *ante column* 318.

Act 5 Vic., No. 17, Sec. 73—Giving False Answers and Explanations when Examined on Oath—What Constitutes.]—The offence of knowingly and wilfully giving false answers and false explanations when under examination on oath relates to answers by the insolvent to inquiries made for the discovery of assets, &c., and not to answers to protect himself from the refusal of a certificate. *In re Thomas*, 1 W. W. & A'B. (I. E. & M.,) 40.

[This section does not seem to be embodied in Act. No. 379, but compare provisions of Sec. 133.]

Fraudulent and culpably negligent conduct in an insolvent, either before or after sequestration is not an offence under the Act No. 379. If the Judge's warrant for imprisonment for several offences set out any one offence which is insufficient to warrant it, the whole warrant is bad. *In re Rowley*, 3 V.L.R. (L.,) 8.

Fraudulent Insolvency—Warrant—When Invalid.]—Where a sequestration took place under 5 Vic., No. 17, before the passing of the "*Insolvency Stat.*, 1865," No. 273, and the Chief Commissioner had deemed the insolvent guilty of fraudulent insolvency, and committed him to custody, the warrant of committal reciting the commitment to be under No. 273, *Held* that the defect was fatal, and insolvent discharged. *In re Kilby*, 2 W. W. & A'B. (I. E. & M.,) 27.

Reporting for Punishment under "Insolvency Stat. 1865," Sec. 104.]—The report of the commissioner reporting the refusal of certificate to an insolvent, and reporting the insolvent for punishment under Sec. 104 of the "*Insolvency Stat.* 1875," set out the grounds of refusal of the certificate, but did not specify the grounds on which the insolvent was reported for punishment. *Held* that the omission did not entitle the insolvent to be acquitted, but only to have the report sent back to the commissioner for further particulars. *In re Smith*, 1 V.R. (I. E. & M.,) 5.

[Compare Sec. 137 of Act No. 379.]

Commitment—Act No. 379, Secs. 15, 73, 154.]—*Per Noel, J.* Under Sec. 15 the Court of Insolvency is not controlled by Act No. 267, and notwithstanding Sec. 73 may commit an insolvent on an information charging more than one offence under Sec. 154. *In re Ah Louey*, 1 A.L.T., 77.

XIX. Discharge and Release from Sequestration.

1. *The Certificate of Discharge.*

(a) *When granted, refused, or suspended.*

When Granted or Refused—Act 28 Vic., No. 273.]—S.'s estate was sequestrated October, 1866. He engaged extensively in mining speculations, and had lost money on them. In his inventory of assets he omitted to notice scrip deposited with creditors, but he referred to its existence by describing these creditors as secured. He had paid calls on shares even when in embarrassed circumstances, and his accounts, though not kept in a regular mercantile form, showed what shares he had, when sold and acquired, at what prices, and the income and outgoings, *Held* that dealing in mining shares was not gambling; that his omission in the inventory of assets, though irregular, was, when accompanied by the reference to the existence of the scrip, not dishonest; that his dealings had not shown fraudulent preference; and that his accounts were sufficient. Certificate of Discharge allowed. *In re Schuhkrafft*, 4 W. W. & A'B. (I.E & M.,) 1

[N.B.—Compare Sub-secs. 1 and 5 of Act 379, Sec. 138.]

Ground for Refusing Certificate—Act No. 273—Not Keeping Accounts.]—The failure by an illiterate man, in a small way of business, to keep accounts is not a ground for refusing him his certificate. *In re Smith*, 1 A.J.R., 105.

[Compare Act No. 379, Sec. 138, Sub-sec. 1.]

Act No. 379, Sec. 138, Sub-sec. 1—Not Keeping Accounts.]—*Per Noel, J.* An insolvent who keeps in his books no account of a large debt due by him, and persists in such omission, is guilty under Sub-sec. 1 of failure to keep proper accounts. Certificate suspended for two years. *In re Dunphy*, 3 A.L.T., 28.

Act No. 273—Not Keeping Reasonable Accounts.]—When a retail butcher kept accounts of the goods sold by him, but not of his receipts or expenditure, *Held* that he had not kept reasonable accounts; that reasonable accounts need not be formally correct or technical, but should be such as to enable a trader, or any one entitled to know, to understand such trader's position; and that not keeping reasonable accounts, though not a ground for withholding his certificate, was a ground for its suspension. *In re Bell*, 1 V.R. (I. E. & M.,) 2; 1 A.J.R., 38, 55.

[Compare Sec. 138, Sub-sec. 1 of Act No. 379.]

Act No. 379, Sec. 138, Sub-sec. 1—Not Keeping Proper Accounts.] — *Semble*, It should be regarded as an offence under Sub-sec. 1, when an insolvent, having proper books, hands them over to trustees of a deed of assignment or purchasers from them, so as to hinder or hamper creditors wanting them in insolvency inquiries. *In re Michael*, 5 A.J.R., 64,

Not Keeping Reasonable Accounts.]—An insolvent handed his business over to his wife, compounded with his creditors, except a bank, to which he gave a bill in full for his debt, and burned his books. *Held*, per *Molesworth, J.*, that this constituted the offence of not keeping reasonable accounts of receipts and payments. *Re Farrell*, 4 A.J.R., 101.

Per Molesworth, J.—Keeping does not mean merely making reasonable entries and then destroying them, but includes preserving them so long as they may be material for creditors. *Ibid.*

Act No. 379, Sec. 138, Sub-secs. 1, 3, 9.]—An insolvent was a mining speculator and publican, and kept a register of the shares and a day book, showing the amount taken at the hotel, but no other accounts. All amounts received were paid into his bank, and all payments were by cheque. *Held* that it was not an offence under Sub-sec. 1, an insolvent not being bound to keep books which are not ordinarily kept by persons of his trade or business. *Quære*, whether putting a creditor to an unreasonable expense by a frivolous defence to the order *nisi* for sequestration comes within

Sub-sec. 3. Although Sec. 73 would avoid the payment by the debtor of a certain amount off an account to a creditor after sequestration as between such paid creditor and others unpaid, yet such payment is not a violation of any provision of the Act within Sub-sec. 9. *In re Kershaw*, 1 V.L.R. (I. P. & M.,) 44.

Act No. 379, Sec. 138, Sub-sec. 1.]—An insolvent entered into an extensive speculation of running omnibuses, which he subsequently sold. The only accounts he kept were bank passes, cheque books, receipts and vouchers. *Held* that these were not sufficient to supply the want of account books as to his stock-in-trade, payments and outgoings, his business and the sale of it. *In re Arnold*, 5 V.L.R. (I. P. & M.,) 39.

Act No. 379, Sec. 138, Sub-sec. 1 — Not Keeping Accounts.]—The offence of not keeping accounts is one which should be punished severely, since accounts operate as an important check on fraud. Where, therefore, an insolvent, a barrister, speculated in various matters, including land, and kept no accounts of such speculations, his certificate was suspended for one year. *In re Dwyer*, 6 V.L.R. (I. P. & M.,) 29.

Act No. 379, Sec. 138, Sub-sec. 1 — Not Keeping Reasonable Accounts.] — An insolvent, a merchant, who had carried on a very extensive business, kept a bookkeeper, and books well kept so far as it suited him to have them kept. Among other accounts in the books was a "private account," in which he mixed moneys, the separate property of his wife, with money of his own, but there was no account in the books showing the state of accounts between his wife and himself. The insolvent had various complicated transactions with his brother, business and accommodation bills, selling and re-selling property; but no accounts of such dealings appeared in the books. There were, moreover, no entries in the books in connection with the extensive purchases and sales of shares in an insurance company, or of a purchase of, and payment of deposit on, real estate. *Held* that the insolvent had not kept reasonable accounts or entries of his receipts and payments; that the omission was not attributable to ignorance or carelessness, so as to be sufficiently punished by suspending the insolvent's certificate, and certificate absolutely refused. *In re M'Donald*, 6 V.L.R. (I. P. & M.,) 45; 2 A.L.T., 31.

On What Grounds Suspended or Refused—Not Keeping Accounts—"Insolvency Statuts 1871," Sec. 138 Sub-sec. 1.]—The magnitude of the offence of not keeping accounts, within the meaning of Sub-sec. 1, of Sec. 138 of the "*Insolvency Stat.* 1871," consists in its probably being a concealment of fraud, and the punishment should be regulated accordingly. Where, therefore, an insolvent had omitted to make entries of two amounts, received on the winding-up of his business, but there was no evidence of any intention to conceal the receipt, *Held* that his certificate should be suspended only, not absolutely refused. *In re Schlieff*, 6 V.L.R. (I. P. & M.,) 51; 2 A.L.T., 55.

Not Keeping Accounts—"Insolvency Stat. 1871" Sec. 138, Sub-sec. 1.]—A bank account kept by a bank for a customer is not a sufficient account to comply with the provisions of Sec. 138, Sub-sec. 1, of the "*Insolvency Stat.* 1871," as to keeping reasonable accounts. *In re Monaghan*, 10 V.L.R. (I. P. &M.,) 9; 6 A.L.T., 1.

The omission to keep accounts where there is no intention of fraudulent concealment is adequately punished by suspension, not refusal, of a certificate. *Ibid.*

Frivolous and Inequitable Defence — Act No. 379, Sec. 138, Sub-sec. 3.] — L., being admittedly indebted to a large extent to the petitioning creditors, took various technical objections to the debtor summons, which were overruled in the Insolvent Court, and again upon appeal to the Supreme Court. Some of the objections were repeated by him in opposing the sequestration of his estate. *Held*, by the Judge of the Insolvent Court, that the debtor summons was a proceeding under Sec. 138, and that L. had been guilty of raising a frivolous defence thereto, putting the petitioning creditors to vexatious expense, though his conduct had not been fraudulent; but under exceptional circumstances, L. not having been fairly treated by the petitioning creditors, certificate only suspended for three months. *In re Lyon*, 4 A.J.R., 108.

Frivolous and Inequitable Defence.]—Where a creditor brought an action in breach of an agreement that the debtor should be allowed to carry on his business, and that the creditor would not sue on certain bills if a guarantee for others were given, and the debtor, in order to gain time to make further arrangements, pleaded to the actions, *Held, per Judge Noel*, that this did not constitute a frivolous and inequitable defence. *Re Mathieson*, 3 A.J.R., 92.

Per Judge Noel. Where a debtor having no honest object to attain, but solely to harass a creditor, puts in sham or useless pleas, he does that which this clause of the section is intended to prevent and punish. But not so where just exception may be taken to the proceedings of the creditor. There a pleading which gives the debtor time is not within the section, although there may be no substantial defence at law. *Ibid.*

Act No. 379, Secs. 136, 138, Sub-sec. 3—Frivolous or Inequitable Defence.]—A creditor sued an insolvent for an overdraft, claiming in all £26,000, and recovered about £24,000. *Held*, in the absence of evidence to explain the failure in recovering the whole amount claimed, and in regard to the £2000 which the creditor failed to recover being a considerable sum, this was not a frivolous or inequitable defence within the meaning of Sec. 138, Sub-sec. 3, even though the main line of defence was frivolous. *In re Wright* and *Higgins*, 7 V.L.R. (I. P. & M.,) 7; 2 A.L.T., 144.

Act No. 379, Sec. 138, Sub-sec. 3—Frivolous Defence.]—*See in re Kershaw, ante column 675.*

Frivolous and Unjustifiable Defence—"Insolvency Stat. 1871," Sec. 138, Sub-sec. 3.]—Insolvent was employed to select under the Land Acts 1862 and 1865 as a hired agent for R., who gave him the money to pay the fees, and afterwards paid the rent and for all improvements, and held possession from the time of selection. When the lease was issued R. asked insolvent to transfer for £50 in pursuance of the agreement, but insolvent refused, and raised the defence that he had selected for himself, being provided with the money by a deceased friend. *Held, per Noel, J.*, that this was a frivolous and unjustifiable defence within the meaning of Sec. 138, Sub-sec. 3, of the "*Insolvency Stat.*, 1871." *In re M'Grath*, 1 A.L.T., 132.

Good grounds of defence are not merely such grounds as would be available as a defence in a court of justice, but grounds which to an honourable man would afford a moral justification for the defence. *Ibid.*

Act No. 379, Sec. 138, Sub-sec. 4—Wilfully Delaying Sequestration.]—Per *Noel, J.*—Proof of mere sequestration or shrinking from the ordeal of the Court is not sufficient under Sub-sec. 4, nor is a foolish and ill-advised persistency in avoiding sequestration, but a designed and preconcerted postponement of sequestration is what the Sub-sec. contemplates. *In re Mathieson*, 3 A.J.R., 92.

Act 7 Vic., No. 19, Sec. 18—Gambling.]—The fact that an insolvent has been a deep, and, having regard to his position in life, an improvident rash gambler, is no ground for refusing him his certificate under 7 Vic., No. 19, Sec. 18, for having, "by habits of gambling diminished his means of payment," if he has not on the whole been a loser by his gambling. *In re Davies*, 1 W. & W. (I. E. & M.,) 5.

[Compare Act No. 379, Sec. 138, Sub-sec. 5.]

Dealing in mining shares is not the offence of gambling within Sec. 138, Sub-sec. 5, of Act No. 379. *In re Schuhkrafft, ante column* 673.

Act No. 379, Sec. 138, Sub-sec. 7—Carrying on Trade with Fictitious Capital.]—Where an insolvent, knowing the very uncertain, not to say bankrupt, state of his affairs, continued to order large consignments, and raise money on bills of lading, &c., and thus with inadequate capital, traded on speculative consignments of goods purchased on credit, and with the advances made thereon from time to time, paid for previous purchases made in a similar manner, *Held* that this did not constitute the offence of carrying on trade by means of fictitious capital. *In re Oppenheimer*, 6 V.L.R. (I. P. & M.,) 26.

Carrying on Trade by Means of Fictitious Capital.]—*Per Molesworth, J.* The offence of carrying on trade by means of fictitious capital would be committed by trading on accommodation acceptances, disposing interpreters to put upon the words in question a sense including participators in the former offences as accessories. *In re Bryant*, 4 W. W. & A'B. (I. E. & M.,) 7, 11.

Where an insolvent began business without capital and in debt; never was solvent from commencement to close; kept afloat by transactions which, while they furnished supplies from day to day, left him always in debt; had no real capital to meet his liabilities; borrowed money continually to avert difficulties as they thickened; and used his wife's money to eke out the paucity of his own, *Held, Per Judge Noel*, that he had committed the offence of carrying on trade by means of fictitious capital. *In re M'Donald*, 1 A.L.T., 185.

"Fictitious" does not mean feigned or falsely described, but unreal; that which seems, and is not. *Ibid.*

Carrying on Trade by Means of Fictitious Capital.] *Per Noel, J.* "I cannot hold that the considering of bad debts as good ones is carrying on trade by means of fictitious capital within the meaning of the "*Insolvency Stat.* 1871," Sec. 138, Sub-sec. 7. *In re Martin*, 2 A.L.T., 48.

Act No. 379, Sec. 138, Sub-sec. 7—Carrying on Trade With Fictitious Capital.]—Where the insolvent entered into a contract with the Government without funds, relying upon funds to be supplied by a bank which was to participate in the profits, receiving the payments made by the Government, *Held* that this was trading with "fictitious capital," and certificate suspended for one year. *In re Wright and Higgins*, 7 V.L.R. (I. P. & M.,) 7; 2 A.L.T., 144.

"Insolvency Stat. 1871," Sec. 138—Carrying on Trade with Fictitious Capital.]—A., an accountant and commission agent, broker, &c., carried on his business by means of fictitious capital. *Held, per Molesworth, J.*, that he was not a "trader" within the meaning of the "*Insolvency Stat.* 1871," Act No. 379, Sec. 138, Sub-sec. 7, so as to constitute this an offence against the Act. *In re Aarons*, 6 V.L.R (I. P. & M.,) 56; 2 A.L.T., 28.

Objections to Grant of—Trading with Fictitious Capital—What is—"Insolvency Stat, 1871," Sec. 138, Sub-sec. 7.]—To constitute the offence of trading with fictitious capital, within the meaning of Sec. 138, Sub-sec. 7, of the "*Insolvency Stat.* 1871," it must be shown that the insolvent has made some false statement, or acted in some way so as to produce a false opinion about his capital. *In re Monaghan*, 10 V.L.R. (I. P. & M.,) 9; 6 A.L.T., 1

Not Disclosing Property—7 Vic., No. 19, Secs. 18, 19.]—An insolvent filed his schedule, suppressing the ownership of the greater portion of his property, introducing a fictitious statement as to debts, and admitting that he owed the debt for which he was sued. When a messenger of insolvency called upon him in order to take possession of his goods, he represented that the goods belonged to a woman with whom he was co-habiting, and to whom he had made an assignment of such goods. The insolvent afterwards in the Insolvent Court disclosed what was his property fully and fairly, and confessed his dishonesty. *Held* that he had perpetrated an offence under

Sec. 18 of the Act, and was liable to punishment under Sec. 19. *In re Pogonowski*, 1 W. W. & A'B. (I. E. & M.,) 29.

[Compare Act No. 379, Sec. 138, Sub-sec. 8.]

7 Vic., No. 19, Sec. 18.]—An insolvent's non-disclosure of the acquisition of property by him when he has remained within the jurisdiction continuously from sequestration to the application for his certificate, is no ground for the refusal of such certificate; but *secus*, when he acquires property while out of the jurisdiction and does not inform the assignee. *In re Tyrer*, 4 V.L.R. (I. P. & M.,) 12.

Act No. 379, Sec. 138, Sub-sec. 8—Sec. 154, Sub-sec. 2—Full Disclosure of Property.]—An insolvent who states in his schedule that an asset is not mortgaged when in fact it is, does not thereby become liable to have his certificate refused or suspended. *In re Aarons*, 6 V.L.R. (I. P. & M.,) 56; 2 A.L.T., 28.

A. failed to set out in his schedule certain property, viz., his interest as the proprietor of a theatre in a certain agreement with a gas company. *Held* that as this was uncommon property, and it might be doubted by the insolvent whether it would pass to his trustee, the omission was not within Sub-sec. 8 a ground for suspending his certificate. *Ibid.*

Act No. 379, Sec. 138, Sub-sec. 8, Sec. 154, Sub-sec. 4.]—*Per Noel, J.* The offence of concealing property under Sec. 154, Sub-sec. 4, means doing something, and a mere non-disclosure of assets is not sufficient, and under Sec. 138, Sub-sec. 8, the mere silence of the insolvent is not sufficient, there must be inquiries made as to his property, and a non-disclosure in reference to those inquiries. *In re Dunphy*, 3 A.L.T., 28.

Act No. 379, Sec. 138, Sub-sec. 9—Wilful Violation of Provisions of Act.]—*In re Kershaw, ante column* 675.

Act 7 Vic., No. 19, Secs. 18, 19. — Contracting Debts With No Reasonable Expectation of Paying Them.] — H., being largely indebted, shortly before his insolvency paid a debt of £100 by a cheque on a bank when his account was already overdrawn. *Held*, that this was contracting a debt which he had no reasonable or probable expectation of paying. *In re Handasyde*, 1 W. & W. (I. E. & M.,) 110.

[Compare Sec. 138, Sub-sec. 10, of Act No. 379.]

Contracting Debt Without Expectation of Paying—Act No. 379, Sec. 138, Sub-sec. 10.]—Where an insolvent subsequent to a release under an assignment for benefit of creditors accepted a bill for the balance of a debt due prior to the assignment under an express agreement for indefinite renewal, and the drawer's insolvency caused a sudden demand for payment. *Held* not to be contracting a debt without intending to pay within the meaning of Sub-sec. 10 of Sec. 138 of Act No. 379. *In re Mathieson*, 3 A.J.R., 92.

Contracting Debts Without Expectation of Paying Them.]—A general inability to pay all his debts would not constitute the offence by an insolvent of contracting debts without having the means of paying them, or without any reasonable or probable expectation of having the means of paying them. *In re Walters*, 3 W. W. & A'B. (I. E. & M.,) 14.

Contracting Debts Without Expectation of Paying Them.]—To escape committing the offence of contracting a debt without reasonable or probable expectation of being able to pay it, as defined by the Act No. 273, it is not necessary that the debtor should have a good expectation of being able to pay all he owes, but only the particular debt then contracted. *In re Mason*, 3 W. W. & A'B. (I. E. & M.), 28. Followed in *in re Arnold*, 5 V.L.R. (I. P. & M.,) 39; and in *in re Goldsmith, ibid*, p. 18, on the corresponding enactment, Act. No. 379, Sec. 138, Sub-sec. 10.

"Insolvency Stat. 1871," Sec. 138—Contracting Debts Without Intending to Pay.]—*Per Molesworth, J.* An inability to pay all debts will not sustain the objection that an insolvent contracted debts without intending to, or having any reasonable expectation of paying them within the meaning of Sec. 138, Sub-sec. 10 of No. 379. *In re Aarons*, 6 V.L.R. (I. P. & M.,) 56; 2 A.L.T., 28.

Contracting Debts Without Intending to Pay—Act No. 273, Sec. 103.]—B. started in business without any capital at all, under the auspices of a firm to which he gave a bond to cover advances. The firm advanced goods to him, and he in turn gave accommodation acceptances to the firm, some of them in blank, which were filled up to a larger amount than he expected. This led to his insolvency. *Held, per Molesworth, J.*, that the question was to be regarded on the general liability of sureties relying on the solvency of their principals, and that in that aspect B. had not contracted debts "without intending to pay, &c.," within the meaning of Sec. 103, Act No. 273. On appeal *Held* that the debt of a person accepting an accommodation acceptance arises as soon as the bill is accepted, and that the solvency of the person accommodated cannot affect the ability to pay of the accommodation acceptor; and that B. had so contracted debts within the meaning of Sec. 103. Certificate refused. *In re Bryant* 4 W. W. & A'B. (I. E. & M.,) 7.

[Compare Act. No. 379, Sec. 138, Sub-sec. 10.]

When Granted or Refused.]—For circumstances in which Court held that a rectifier of spirits obtaining spirits on credit, hoping to get his licence from the Board of Trade which was accidentally delayed, was not guilty of obtaining goods on credit without reasonable expectations of paying or of reckless trading *See in re Herring*, N.C., 30.

[Compare Act No. 379, Sec. 138, Sub-sec. 10.]

Certificate When Suspended or Refused—Recklessly Contracting Debts.]—Contracting debts

without any reasonable expectation of payment under the "*Insolvency Stat.*, 1865," relates to the particular debt, and not to debts generally; when the debt is contracted the debtor must have no reasonable expectation of paying it; and he is not liable as coming under the Act in contracting debts under such circumstances that he has no reasonable expectation of paying all. In a great many cases the line of demarcation between inability to pay all debts and the inability to pay a particular debt is very fine, and a person who contracts a debt when he certainly cannot pay all his debts should be subject to some penalty as regards the grant of his certificate. When H. had contracted debts when he could not pay all his debts, but he had not purchased goods to sell at a sacrifice, and the creditors to whom he was indebted at the time of his insolvency were persons with whom he had dealt for some time, and to whom he had made payments from time to time, and no large purchases were made on the eve of insolvency, but, on the contrary, when some creditors sought orders he had refused to accept their goods; and there was no imputation that he had appropriated assets in favour of a particular creditor, and for some months preceding his insolvency there had been sickness in his family, owing to which he had incurred considerable expense; *Held* that the total refusal of H.'s certificate would be too severe a punishment, and that a suspension for six months would meet the case. *In re Hill*, 1 A.J.R., 172.

[Compare Act No. 379, Sec. 138, Sub-sec. 10.]

Incurring a Debt Without Intending to Pay—"Insolvency Stat. 1871," Sec. 138, Sub-sec. 10.]—Incurring a debt, such debt being a renewal of a former one incurred in order to buy off opposition to the grant of a certificate, the insolvent informing the creditor at the time, that he had no means to pay the debt, is not contracting a debt without intending to pay, within the meaning of Sec. 138, Sub-sec. 10, of the "*Insolvency Stat.*" 1871." *In re Cunningham*, 2 V.L.R. (I. P. & M.,) 9.

Per Noel, J.—"Sub-sec. 10 does not include debts contracted by a person who is not solvent, but does include the debts contracted by one who expects, or ought to expect, immediate stoppage of payment." *In re M'Donald*, 1 A.L.T., 185.

For circumstances under which *Noel, J.*, refused to grant a certificate on account of fraudulently contracting debts and reckless trading, *see in re Gardner*, 1 A.J.R., 47.

Unjustifiably Disposing of Goods Otherwise than Bona-fide—7 Vic., No. 19, Sec. 18.]—H., being largely embarrassed, and wishing to raise money, bought goods on credit, which he consigned to W., taking his acceptances for much less than their value, and made over the whole of the goods to W. as security for the acceptances, and continued to do so till shortly before his insolvency, *Held* that this was "unjustifiably disposing of goods otherwise than *bona-fide*" within the meaning of 7 Vic., No. 19, Sec. 18. *In re Handasyde*, 1 W. & W. (I. E. & M.] 110.

[Compare Act No. 379, Sec. 138, Sub-sec. 11.]

Unjustifiably Making Away with Property—Setting Aside a Settlement No Ground For.]—An insolvent, eleven months before his insolvency, executed a settlement, which was after his insolvency set aside under Sec. 7 of 5 Vic., No. 17. There was no other evidence of any improper conduct on the part of the insolvent, and there was evidence that at the date of executing the settlement he was solvent. *Held*, that the mere fact of the settlement having been set aside under the Act was no ground for refusing him his certificate, and that he was entitled to it. *In re Mahoney*, 1 W. & W. (I. E. & M.,) 188.

[Compare Act 379, Sec. 138, Sub-sec. 11.]

Unjustifiably Making Away with Property—Act No. 379, Sec. 138, Sub-sec. 11.]—*See in re Mathieson, post column* 686.

Charges under Sec. 138, Sub-sec. 11, of disposing of property otherwise than *bona fide* should be made emphatically and clearly. *In re Wright and Higgins*, 7 V.L.R. (I. P. & M.,) 7; 2 A.L.T., 144.

Disposing of Property, Whilst Indebted, Otherwise than bona fide, and for a Valuable Consideration.]—The insolvent was sole executrix and universal devisee and legatee of her husband, P. S., wh was at his death a partner in a firm. The insolvent sued the surviving partner for accounts, and a decree was made ordering him to pay the insolvent £2000. A few months later B. sued the insolvent as executrix of her husband to establish a sub-partnership with him in P. S's. firm, and for payment of the share of the sum recovered from the partner, and other partnership moneys received by her. Insolvent defended the suit, which was in March, 1862, registered as a *lis pendens*. On 23rd January, 1863, immediately before the marriage of her daughter, insolvent executed a settlement of all her real estate on the daughter, including that which was vested in her by her husband's will. The property was conveyed to the daughter's separate use without power of anticipation, and the husband took no interest. On 7th October, 1863, a decree was made in the suit by B. against insolvent, declaring B. entitled, as a partner in P. S's. firm, to a half share of the partnership property, and directing an account with costs against the insolvent up to the decree. There was no evidence that the trustees of the settlement had entered into possession of any part of the settled property, or that the daughter had received any of the rents, and it appeared that the insolvent had remained in possession of one of the houses settled, and had paid no rent to the trustees or the daughter. Evidence was given by the insolvent of a promise to her husband shortly before his death that she would execute a settlement on her daughter when she should marry. She admitted that she had not communicated this promise to her daughter or

her husband until the settlement was actually being prepared. On the 28th November, 1863, the insolvent voluntarily sequestrated her estate. On appeal from the Chief Commissioner granting her her certificate, *Held* by the primary Judge and confirmed on appeal, that the insolvent was indebted to B. at the date of the settlement, though proof of the debt was not then established; that under the circumstances the settlement was not *bona fide*, but colourable, and could not be supported by the consideration of marriage; and that the certificate should be refused on the ground that the insolvent being indebted had unjustifiably disposed of property otherwise than *bona fide*, and for valuable consideration. *In re Solomon*, 1 W. W. & A'B. (I. E. & M.,) 45.

[Compare Act No. 379, Sec. 138, Sub-sec. 11.]

Refusing Certificate.]—Where a commissioner had refused a certificate on evidence which showed that an insolvent had prior to insolvency settled his property on his wife to evade the payment of damages and costs in an action for slander, *Held* that commissioner was right. *In re Curley*, 2 W. W. & A'B. (I. E. & M.,) 1.

Withholding the Certificate.]—*Per Molesworth, J.* For the purpose of withholding a certificate, assignments between the members of a family on the eve of the insolvency of the assignor, not publicly visible, and the details of which are very improbable, should generally be held fraudulent, although sworn by the assignor and assignees to have been honestly effected, in such a way that no decided falsehood can be detected in their testimony. Appeal from decision of a commissioner refusing certificate dismissed. *In re Allen*, 2 W. W. & A'B. (I. E. & M.,) 3, 7.

[Compare Act No. 379, Sec. 138, Sub-sec. 11.]

Granting or Refusing—Act No. 273, Sec. 143—Fraudulent Alienation of Property.]—The word "unjustifiably" should be taken as not only illegally but dishonestly; and where insolvent had made a settlement on his wife of property of great value, and it being probable that he contemplatsd insolvency from the extent of his liabilities the Court held it was so far dishonest as to come within the meaning of the word "unjustifiably," and refused a certificate. *In re Rogers*, N.C. 41.

[N.B.—Act No. 379, Sec. 138, Sub-sec. 11, substantially follows Act No. 273, Sec. 143.]

Fraudulent Alienation of Propsrty Under Act No. 273, Sec. 143.]—*See in re Cobain*, 4 A.J.R., 31, *post column* 687.

"Insolvency Stat. 1871," No. 379, Sec. 138, Sub-sec. 11.] — Where an insolvent's sole source of income was derived from a theatre, and he leased it to a person with the design that the lessee should hold against the assignees or trustees in insolvency, and for the benefit and under the direction of the insolvent, *Held* and affirmed on appeal that this was a disposition of property punishable under No. 379, Sec. 138, Sub-sec. 11, by refusal or suspension of the insolvent's certificate. *In re Aarons*, 6 V.L.R. (I. P. & M.,) 56; 2 A.L.T., 28, 51.

See also *in re Mathieson, post column* 686.

Improperly Appropriating Moneys Deposited with Insolvent as Agent.]—In order to justify the refusal of an insolvent's certificate for having improperly appropriated moneys deposited with him as an agent, he must be an agent in the sense in which that word is used in popular parlance, or there must be a series of continuous transactions. He must come rather under the character of a trustee, if within the Act at all, than that of an agent, and the best test to distinguish between a trustee and an ordinary debtor is to inquire—was it the duty of the insolvent to have kept the moneys deposited with him so ear-marked and distinguished from his own, as that in the event of the death of the depositor his moneys could be readily recognised? or was the insolvent warranted by all the previous transactions between himself and the depositor in receiving the money, and treating himself merely as an ordinary debtor for the amount? *In re Nantes*, 1 W. & W. (I. E. & M.,) 1.

[Compare Act No. 379, Sec. 138, Sub-sec. 12.]

Appropriating Moneys Entrusted to Him as Agent—7 Vict., No. 19, Sec. 18.]—C., an insolvent, received moneys from B., and signed a receipt as follows: "Received from B. £220 sterling, to be invested at interest on good and approved securities on his account, for periods not exceeding two years from date.—C. C. lent out this money on bills, drawn by and payable to himself personally, and did not disclose his character as agent in any transaction. In his schedule also he treated the money as a loan to himself, and entered B. as an ordinary creditor. *Held*, that he had appropriated to his own use money entrusted to him as agent, and under 7 Vict., No. 19, Sec. 18, should rightly be refused his certificate. *In re Christophers*, 1 W. & W. (I. E. and M.,) 108.

[Compare Act, No. 379, Sec. 138, Sub-sec. 12.]

Appropriating Property Entrusted to the Insolvent as Agent or Trustee Only—7 Vict., No. 19, Sec. 18.]—P., an auctioneer, being entrusted by his customers with property for sale, sold it and paid the proceeds into his general banking account. Although frequently requested to do so, he neglected to render account sales, or to pay over the proceeds. In the course of his business his account gradually diminished, and he eventually became insolvent. The Commissioner held that he had "expended for his own benefit, or appropriated to his own use trust funds or other property, of which he had the charge or disposition as trustee or as an agent only," and refused his certificate. Upon appeal to a Judge, *Held* that to satisfy 7 Vict., No. 19, Sec. 18, there must be something of a special fiduciary character in the agency—some special

duty to be fulfilled—so as to take it out of the ordinary duty imposed upon every trader of meeting his engagements; that auctioneers' employers must be taken to deal with them in their general characters as traders, without relying on any fiduciary character, beyond the general duty of finally paying what is due to their employers—a duty common to all traders; and that this particular instance was not the irregularity contemplated by the Act. Upon appeal to the Full Court, *Held*, that the words "agent only" in the section mean an agent without an interest; that an auctioneer employed simply to sell is an "agent only;" that there is no material difference between his appropriation of the proceeds and his appropriation of the property; and that the decision of the Commissioner should be upheld. *In re Perry*, 1 W. & W. (I. E. & M.,) 150.

Where Refused—Misappropriation of Money—No. 379, Sec. 138, Sub-sec. 12.]—*Per Noel, J.* When an insolvent has been proved to have committed the offence of misappropriating money of which he was in charge as a trustee or agent, under Sec. 138 of the "*Insolvency Statute* 1871," the facts that the creditor has sustained but little injury, owing to the smallness of the amount, and that there has been a subsequent arrangement between them, that the money should be considered as a loan, do not relieve the insolvent so as to entitle him to his certificate. *In re Scott*, 4 A.J.R. 50, 65.

Unlawfully Expending Moneys Received as Agent—Culpably Negligent Conduct—"Insolvency Stat. 1871," Sec. 138, Sub-sec. 12.]—An insolvent, whose firm were agents for a bank to sell certain property, had to account to the firm's principal for the proceeds, and failed to pay over about £2000 owing to a mistake on the part of the bookkeeper. *Held, per Noel, J.*, that this did not amount to the offence of unlawfully expending moneys received as agents within the meaning of the "*Insolvency Stat.* 1871," Sec. 138, Sub-sec. 12, since unlawfully there means dishonestly, and there was no evidence of dishonesty, but that it did amount to culpably negligent conduct, and the certificate was ordered to be suspended for twelve months. *In re Martin*, 2 A.L.T., 48.

Ground for Refusal—Unlawfully Appropriating Money Entrustsd to Insolvent—"Insolvency Stat. 1871," Sec. 138, Sub-sec. 12.]—A broker was in the habit of effecting insurancea with various companies for the Government. Such policies were issued by the companies in exchange for the broker's I.O.U. for the premiums, which were subsequently received by him from the Government, and paid by him to the companies. He received certain premiums from the Government which he did not pay over to the companies, who, on his becoming insolvent, opposed the grant of his certificate on the ground that he had misappropriated money entrusted to him as a trustee or agent only. *Held*, that he had not charge of the premiums aa a "trustee, agent, factor, or broker," within the meaning of Sec. 138, Sub-aec. 12, of the "*Insolvency Stat.* 1871." *In re Aarons*, 6 V.L.R. (I. P. & M.,) 56.

7 Vic. No. 19, Ssc. 18—Fraudulsnt Prsfsrsncs.]—In April, 1860, H., being largely engaged in business in Melbourne, arranged with W. to manage a store for H. at P. Subsequently, his buaineaa not being prosperous, in order to raise money at once, he continued to buy goods on credit, consigned them to W., took his acceptances for much less than their value, and made over the whole stock to W. as security for the acceptances, and continued so doing till within a few weeks of his insolvency. Being indebted to his brother in a sum of £100, H. paid him thia sum on May 25th, 1860, shortly before his insolvency by a cheque on a bank, where he had already an overdraft. In his evidence H. stated that the money was his brother's, but gave no evidence that it was intrusted to him by his brother for any specific purpose. H. also admitted that, on May 21st, he "found himself surrounded by difficulties." *Held*, that the payment to his brother was an unjust preference and fraudulent as regarded the other creditors. *In re Handasyde*, 1 W. & W. (I. E. & M.,) 110.

Granting or Refusing—Act No. 273, Sec. 103—Fraudulent Prsfsrsncs.]—Where an insolvent was sued by a creditor for an overdraft, and had paid the debt, *Held* that though such a payment could not have been avoided as a fraudulent preference yet it was a sufficient fraudulent preference to sustain objections to granting the certificate of discharge under Sec. 103. Refusal affirmed. *In re White*, 6 W. W. & A'B. (I. E. & M.,) 7.

[Compare Act No. 379, Sec. 138, Sub-sec. 13.]

Disposal of Property Unjustifiably—Fraudulsnt Prsfsrsncs—Act No. 379, Ssc. 138, Sub-sscs. 11, 13.]—Where an insolvent executed a bill of sale for a debt and for future advances to enable him to tide over his difficulties, and, as the Court thought, to avoid insolvency, and in conformity with what an opposing creditor wished, *Held* not to be a fraudulent preference within Sub-sec. 13, or to be within the meaning of Sub-sec. 11. *In re Mathieson*, 3 A.J.R., 92.

Fraudulsnt Prsfsrsncs for Which Certificate Should ba Refused—What is.]—A fraudulent preference for which a certificate should be refused is not merely a preference of such a nature as would avoid payment of debts, but there should be some fraud in connection with it. *In rs Green*, 1 A.J.R., 104.

A payment resulting from pressure as for a debt due is not a fraudulent preference within the meaning of Sub-sec. 13, though the person paying may be upon the verge of insolvency, or may be partly influenced by a wish to prefer. *In re Schlieff*, 6 V.L.R. (I. P. & M.,) 51; 2 A.L.T., 55.

As for fraudulent preference generally *see ante column* 629, *et seq.*

Fraudulsnt Prsfsrsncs—"Insolvency Stat. 1865," No. 273, Sec. 103.]—J. C., being heavily indebted to a bank, on the 20th of March, 1870, gave C. a bill for £2,000. On March 23rd, J.

C. made a statement to the bank of his assets and liabilities, omitting in the latter the bill to C., and a number of debts to members of his family. On the 30th of May, 1870, J. C. made an agreement with one A. for the sale of his farm and farming-stock and plant, and took bills for £8,000 from A. He conveyed to A. on the 4th of June, 1870, but there was no change of apparent ownership. The bank and C. had executions against him, and to satisfy them he gave C. the bill before mentioned, and offered to give the bank security over the property conveyed to A., undertaking to obtain A.'s concurrence. On the 16th of July he voluntarily sequestrated his estate. The chief commissioner refused to grant J. C. his certificate, and bound him to attend for punishment if awarded. After the sequestration A. and C. gave up the farm and stock, and the bills to the official assignee. On appeal from the decision of the commissioner, *Held*, that giving an unjust preference to A. and C. was not a ground for punishment, that since the claims of A. and C. had not been paid, there was no fraudulent preference as regarded them; that the charge of fraudulent conveyance to A. and C., though verbally sustainable, was cured as to punishment by the transactions with the assignee; that making statements to mislead a creditor and obtain further credit is not a firm ground for refusing a certificate or for punishment; that filing a schedule containing untrue statements is not making a "false or fraudulent entry in any book of account or other document" within the meaning of Act No. 273, Sec. 103, and is not a ground for punishment, but appeal dismissed, with costs. *In re Cobain*, 4 A.J.R., 31.

[Compare Act No. 379, Sec. 138, Sub-sec. 13.]

Insolvent Act, 7 Vic., No. 19, Sec. 18—Fraudulent Negligence.]—Frivolous litigation is not a ground of refusing certificate of discharge, and is not within the meaning of "squandering his means" in Sec. 18—the word "squandering" signifies extravagant expenditure for selfish gratification, and not indulging a taste for litigation. *In re Brebner*, 2 W. & W. (I. E. & M.,) 12.

Fraud by an insolvent in imitating trade marks of another person is a fraud which should be punished by suspension, and not by refusal of certificate of discharge. *Ibid.*

[Compare Act No. 379, Sec. 139.]

For an instance of reckless trading considered as "culpable negligence," and a ground for refusing a certificate, *see in re Gardner*, 1 A.J.R., 47.

Misconduct—7 Vic., No. 19, Secs. 17 and 18.]—The grant of certificates of discharge to insolvent partners was opposed on the ground that the partners had been guilty of misconduct. *Held per Molesworth, J.*, that it was not necessary to bring home misconduct definitely to each partner, and that the "misconduct" referred to in the 17th section of the Act is not limited to cases enumerated in the 18th section. Certificates suspended for 12 months. On appeal *per Barry, J., and Williams, J., Stawell, C. J., dissentiente*, that "misconduct" in Sec. 17 is not to be limited to cases enumerated in Sec. 18, or necessarily to trade before insolvency, or to insolvent's conduct as a trader, and it is not absolutely necessary to show that "misconduct" produced the insolvency. Appeal dismissed. *In re Rutledge and Co.*, 2 W. & W. (I. E. & M.,) 89.

[Note.—Compare Act No. 379, Sec. 139.]

Unsatisfactory Conduct With Regard to Wife's Concealing Property.] — An insolvent's wife carried on business as a milliner, and before the insolvency of her husband concealed a portion of her stock-in-trade with a view to prevent its seizure by the assignee. The insolvent's certificate was refused, because his conduct with reference to the transaction was not satisfactorily explained; the Court at the same time intimating that it considered that a man carrying on business through a wife, agent, or servant, should, as regards the withholding of his certificate, be held responsible for their acts. *In re Soulie*, 1 V.R. (I. E. & M.,) 10; 1 A.J.R., 148.

[Compare Act No. 379, Sec. 139.]

When Granted or Refused—5 Vic., No. 17, Secs. 65, 66—7 Vic., No. 19, Sec. 17.]—In 1861 B. voluntarily sequestrated his estate, and an official assignee was appointed. B's. liabilities exceeded £300, and his assets were under £20. The first and only meeting of his creditors was convened in April, 1861; but neither the insolvent nor any creditor attended, no debts were proved on the estate, and for years afterwards nothing was done in the estate. In 1867 B's. father died in Tasmania, leaving him property worth about £6000. He went twice to Tasmania about the property, reduced some of it to money, paid such of his creditors as he knew, in full, and advertised for and discovered others, whom he also paid, without communicating with the official assignee. He then called upon the official assignee and informed him what he had done, and offered to pay him a small sum if he would assist him to get his certificate. To this the assignee agreed; but, on discovering the large amount of B's. property, put in a claim for commission on the whole, and on being refused such commission, opposed, instead of assisted, B. in obtaining his certificate. *Held*, affirming *Molesworth, J.*, that the non-attendance at the meeting of creditors by B., who "could not afford to come to Melbourne," and who was never requested definitely to attend, was not a ground for refusing or suspending his certificate within Sec. 65 of No. 17; that his going to Tasmania with intent to return was not a removing out of the jurisdiction of the Court, within Sec. 66 of No 17; that refusing to assist the assignee in realising his after acquired property did not constitute an offence; and, reversing *Molesworth, J.*, that taking upon himself the payment of his debts and administration of his own estate did not constitute general misconduct within the meaning of No. 19, Sec. 17. *In re Babtie*, 5 W. W. & A'B. (I. E. & M.,) 13.

[Compare Act No. 379, Sec. 139.]

7 Vic., No. 19, Sec. 17—Evidence of Misconduct.] —In 1854 a partnership estate was sequestrated, and at the second meeting of creditors, the partners were examined by the chief commissioner as to their dealings with the estate, and generally as to their own conduct. One of the partners, T., deposed to having removed some property of the firm for his own use without the knowledge of the others, and to the assignment by him of a lease, the property of the partnership, for no consideration. Twenty-three years afterwards T. applied for his certificate, and put in affidavits as to his conduct since the last sequestration, and was examined generally by the chief commissioner, who refused the certificate on the grounds appearing in the deposition of the partners, and the observations of the former commissioner. On appeal the decision was affirmed, but on appeal to the Full Court, *Held*, that the only evidence admissible was that of T. himself, and that the acts disclosed by his evidence did not justify a refusal of the certificate, and appeal allowed. *In re Tyrer*, 4 V.L.R. (I. P. & M.,) 12.

[Compare Sec. 139 of Act No. 379.]

Ground for Refusal—"Insolvency Stat. 1871," Sec. 139.]—Sec. 139 of the "*Insolvency Stat.* 1871," is intended to deal with misconduct not distinctly specified in the Act. The words of the Sec., "Conduct fraudulent, or culpably negligent," constitute two distinct offences, and though the same act may be both, distinct convictions should be expressed, not a conviction for both in the conjunctive. Convictions under the Sec. should state what the misconduct is, and whether fraud or culpable negligence. *In re Hearty*, 6 V.L.R., (I. P. & M.,) 37; 1 A.L.T., 191.

Culpably Negligent Conduct—Act No. 379, Sec. 139.] — Where an insolvent had allowed a debt to accumulate to the extent of £80,000 for which he only had security to the extent of £10,000, had omitted to inform himself of the state of the affairs of his firm in London, and had allowed moneys to the extent of £2000 to remain unpaid to a principal to whom he had to account, through a mistake of his bookkeeper, *Held, per Noel, J.*, that he was guilty of culpably negligent conduct, and his certificate was suspended for twelve months. *In re Martin*, 2 A.L.T., 48.

"Salting" Invoices.]—B. bought goods for considerably less than their market value, and shipped them to his agent on "sale and return," invoicing them at very nearly their market value. The invoice was as from himself, and on his own account, and did not in any way mention the vendor. On this invoice he obtained an advance upon security of the bill of lading of the goods from his bankers. B. subsequently became insolvent, and the chief commissioner refused him his certificate on the ground that he had "salted" the invoice. On appeal, *Held*, that there being no deception and no actual fraud, such "salting" was no ground for refusing the certificate. *In re Brown*, 1 W. & W. (I. E. & M.,) 180.

Leaving the Colony—7 Vic., No. 19, Sec. 18.]—The fact that the insolvent after sequestration, and without the leave of his creditors or the Court, has left the colony, and had not returned when the application for the certificate was made, is a sufficient ground for the refusal of his certificate. *In re Hewitt*, 1 W. W & A'B. (I. E. & M.,) 38.

On What Grounds Refused.]—As to the conduct for which a certificate should be withheld the Court is not limited to the enumeration in the Act 7 Vic., No. 19. *In re Thomas*, 1 W. W. & A'B. (I. E. & M.) 40.

When Granted or Refused—False Answer.]—A false answer by an insolvent in an examination in opposition to the granting of his certificate will not subject him to the refusal of the certificate. *In re Mason*, 3 W. W. & A'B. (I. E. & M.,) 28.

Ground for Refusing Certificate—28 Vic., No. 273—Untrue Statements.]—An untrue statement by an insolvent in reference to his property, which is not calculated to defraud his creditors, is not a ground for refusing his certificate. *In re Smith*, 1 A.J.R., 105.

Making False Entries in a Book or Document—"Insolvency Statute, 1871," Sec. 154, Sub-sec. 10.]—A creditor, who was dissatisfied with the position of affairs between himself and his debtor, owing to the large amount owing, requested him to furnish an account of his assets and liabilities. The debtor did so, and made out a false balance-sheet, which considerably understated his debts, in order to conceal the state of his affairs. *Held* that this balance-sheet handed to a particular creditor, was not a "document relating to the affairs" of the debtor within Sec. 154, Sub-sec. 10, of the "*Insolvency Statute*, 1871," and that on the subsequent insolvency of the debtor he is not liable to have his certificate refused under that section for having made such a balance-sheet. *In re Clapham*, 10 V.L.R. (I. P. & M.,) 18; 6 A.L.T. 15.

Per Molesworth, J. A balance-sheet so handed to a particular creditor is not a document within the section in question, which relates to account books generally representing insolvent's affairs, to which his creditors generally should be able to resort for information or evidence in the proceedings in insolvency. *Ibid.*

Grounds for Refusal—Filing Schedule—Informing Assignee of Place of Residence or Business Insolvency—Rules, Rule 6.] — The non-filing by a debtor of the schedule required by Rule 6 of the Rules of the Court of Insolvency, and the omission by him to keep the assignee informed of his place of residence or business, are not to be regarded as grounds for refusing him his certificate *In re Millikin*, 4 V.L.R. (I. P. and M.,) 71.

Neglecting to File Schedule Within a Week of Compulsory Sequestration.]—*Per Noel, J.* A previous voluntary sequestration, in which a certificate had not been granted, is not a sufficient ground for neglecting to file a schedule within a week of a subsequent compulsory sequestration as required by Rule 6, of the Rules under the "*Insolvency Statute*,1871," *Re Miller*, 4 A.J.R., 122.

Objections to—Indictable Offence—Proof.]—*Per Noel, J.* If indictable offences be charged against an insolvent as a ground of objection to his receiving his certificate, clear proof will be required of such offence. *In re Hearty*, 1 A.L.T., 160.

Suspending.]—So far as the jurisdiction of the Insolvent Court goes there is no class of cases in which a certificate may not be suspended in which there is power to refuse it. *In re Hill*, 1 A.J.R., 172.

(*b*) *Practice in Applications for.*

(1) *Dispensing with Condition of Payment of Dividend.*

Discretion of Commissioner as to the Condition of Paying a Dividend.]—Under the "*Insolvency Stat.* 1875," No. 273, the commissioner may at his discretion impose the payment of a dividend by the insolvent as a condition precedent to granting him his certificate. *In re Bowie*, 3 W. W. & A'B. (I. E. & M.,) 17.

And *see* for a similar decision, *in re Bates*, 2 A.J.R., 48.

Act No. 379, Sec. 136—Dividends Less than 7s. in the £.]—The amount available for distribution out of which the dividend is payable as sanctioned by the Court is the excess of assets over trustee's expenses and preferential claims, and where this amount was sufficient for a dividend of barely 5s. in the £, and the Court could find no extenuating circumstances in the neglect of the trustees in realising the property, the Court refused the certificate. *In re Lefebvre*, 3 A.J.R., 5.

How Dividend Calculated — "Insolvency Stat. 1871," Sec. 136.]—*Per Noel, J.* The dividend of seven shillings in the £ required by Sec. 136 of the "*Insolvency Stat.* 1871," as a condition of obtaining a certificate must be exclusive of the ordinary cost of managing the estate, though extraordinary expenditure in such management would be an excuse for paying a less dividend if the insolvent is able to show that he is not responsible for such extraordinary expenditure, and had not by his negligence or misconduct rendered it necessary. *Re Frankel*, 4 A.J.R., 134.

When Condition Dispensed With.]—If an estate, which is assigned for the benefit of creditors, be sufficient at the time of the assignment to pay seven shillings in the £, the fact that it was reduced below that amount by one of the agreeing creditors withdrawing and throwing the estate into Court, is not sufficient ground for refusing the insolvent his certificate, or for refusing to dispense with the certificate as against such creditor. *In re Stocks*, 4 A.J.R., 173.

Dispensing with Condition in Sec. 136 of No. 379.]—*Per Molesworth, J.* An affidavit disclosing depreciation to an enormous extent of an insolvent's mining stock, his inability to realise on his stock being unsaleable, forfeiture of part through non-payment of calls, and his stock being sold when the market was very low, after sequestration, affords good reasons for dispensing with the condition as to payment of 7s. in the £. *In re Kershaw*, 1 V.L.R. (I. P. & M.,) 44.

Where the causes assigned were purchases in real property which suffered severe depreciation, which insolvent could not foresee or bear up against, *Noel, J., held* them sufficient reasons for dispensing with the condition. *In re Dwyer*, 3 A.L.T., 39.

Dispensing With Payment of Dividend—Act No. 379, Secs. 129, 136.]—Where a consent by a vast majority of creditors had been given accepting a composition of 5s. in the £, *Held* that, although it might furnish good materials for an order under Sec. 129, it furnished no grounds for a Judge to dispense with the condition in Sec. 136. *In re Dixon*, 5 A.J.R., 171.

When Condition Not Dispensed With.]—An insolvent who has lived extravagantly upon his wife's means as if he himself had property, and having contracted debts, should not be relieved from paying 7s. in the £ before obtaining his certificate, although his embarrassments have arisen from having voluntarily revived old debts. *In re Cunningham*, 2 V.L.R. (I. P. & M.,) 9.

Payment of Dividend—What will not Excuse from—"Insolvency Stat. 1871," Sec. 136.]—An insolvent will not be excused from payment of the dividend of 7s. in the £ required by Sec. 136 of the "*Insolvency Stat.* 1871," before obtaining his certificate on a general allegation that his losses arose from bad debts, from losses on fixtures on several changes of his place of business, and from his store having been broken into and robbed of cash and goods. *In re Millikin*, 4 V.L.R.. (I. P. & M.,) 71.

In order to support an application for the dispensation of the payment of 7s. in the £, an affidavit stating general depreciation of property is not sufficient; it should give statements as to losses upon particular properties, and show that they were not attributable to recklessness or gross improvidence. *In re Arnold*, 5 V.L.R. (I. P. & M.,) 39.

Act Not 379, Sec. 136—When Condition not Dispensed With.]—Where a firm of insolvents entered into a Government contract relying upon a bank to provide the funds, the bank participating in the profits, and the bank afterwards failed, *Held* that the inability to pay 7s. in the £ arose from circumstances for which they should be held responsible, and uncondi-

tional certificate refused. *In re Wright and Higgins*, 7 V.L.R. (I. P. & M.,) 7; 2 A.L.T., 144.

When Condition not Dispensed with—Incurring Bad Debts and Mismanaging Business.]—Incurring bad debts or giving injudicious credit is such a management of business as to justify creditors in insisting that the condition of paying 7s. in the £ should not be dispensed with. *In re Martin*, 7 V.L.R. (I. P. & M.,) 119.

Dispensing with Dividend of 7s. in the £—"Insolvency Statute, 1871," Sec. 136] *Per Noel J.* Where there is only one creditor in the estate, and he opposes the application for a certificate, the Court will consider his conduct, *e.g.*, sleeping on his rights, as well as the insolvent's in deciding as to whether the condition of paying 7s. in the £, required by Sec. 136 of the "*Insolvency Statute*, 1871," is to be dispensed with or not. *In re Crichton*, 2 A.L.T., 24.

When Condition Not Dispensed With—Act No. 379, Secs. 69, 136.]—The fact that the insolvent had by a deed of assignment, for the benefit of all his creditors, divested himself of all his property before the sequestration, even where the creditors knew of the assignment, and gave no notice to trustees that they would treat it as an act of insolvency under Sec. 69, does not afford a reason for dispensing with the condition in Sec. 136. *In re Michael*, 5 A.J.R., 64.

Dispensing with Dividend of 7s. in the £—Fraudulent Preference.]—An insolvent, who was being sued by a creditor, disposed of all his available assets, and paid all his other creditors in full, and stopped the one suing him by voluntarily sequestrating his estate. *Held* that he had no legal excuse for not paying the dividend of 7s. in the £, and that that condition must be fulfilled before he obtained his certificate. *In re Heath*, 8 V.L.R. (I. P. & M.,) 10; 4 A.L.T., 81.

Payment of Dividend of 7s. in the £—When not Dispensed With.]—Loss on a contract from dry weather or from flood, or losses of cattle by poisoning, or loss through a bank stopping credit, will not justify the Court in dispensing with the payment of the dividend of 7s. in the £ required by Sec. 136 of the "*Insolvency Stat.* 1871," before an insolvent obtains his certificate. *In re Monaghan*, 10 V.L.R. (I. P. & M.,) 9; 6 A.L.T., 1.

Applying for Grant of Without Payment of Dividend of 7s. in the £—Onus of Proof.]—The right to a certificate without paying seven shillings in the pound is to persons who fail from circumstances for which they cannot justly be held responsible, and the *onus* of proof that he has failed from such circumstances with some accuracy as to details of losses should lie on the insolvent. *In re Dyte*, 2 V.L.R. (I. P. & M.,) 42, 47.

Insolvent Appearing for Default in Applying for Certificate—"Insolvency Statute 1871," Sec. 146.] —*Per Noel, J.* An insolvent who has been compelled to come before the Court under Sec. 146 of the "*Insolvency Stat.* 1871," and apply for a certificate in order that the Judge might either grant or refuse the certificate and punish the insolvent, is not bound to to file the same affidavit showing why his estate had not paid seven shillings in the £, as has to be filed by an insolvent who voluntarily applies for a certificate, and the Court may grant an unconditional certificate notwithstanding. *Re Frankel*, 4 A.J.R., 140.

The mere fact that an insolvent has not paid the required dividend of 7s. in the £ is not a ground for permanently refusing him a certificate; but it is for suspending it, and the insolvent may apply again for his certificate after having paid the dividend, or having discovered fresh grounds for dispensing with such payment. *In re Dwyer*, 6 V.L.R. (I. P. & M.,) 29; 1 A.L.T., 174.

(2) *Other Points of Practice.*

Application for Certificate—How Made.]—An application to the Court for a certificate of discharge under the rider to 10 Vic., No. 14, should be by rule *nisi* served on the official assignee. *In re Connell*, 1 W. & W. (I. E. & M.,) 182.

[Under Rule 35 of Rules 1871 it should be made by motion.]

Application For—What Facts Should be Verified.] —Upon motion for the grant of a certificate under the rider to 10 Vic., No. 14, the consent of the creditors, and the fact that the parties consenting are all the creditors, should be verified by the affidavit of the solicitor of the insolvent, and not by the insolvent himself. *In re Handasyde*, 1 W. W. & A'B. (I. E. & M.,) 62.

Such an application may be by rule *nisi* to the official assignee or notice to him, or there may be a consent by the official assignee duly verified, but a single day's notice to him is not sufficient. *Ibid.*

[But *see* now Sec. 135 of Act No, 379, and the Rules 91-100.]

Application for—7 Vic., No. 19.]—Under the Act 7 Vic., No 19, there is no limitation as to the time within which applications for certificates may be made. *In re Tyrer*, 4 V.L.R. (I. P. & M.,) 12, 17.

[But see Sec. 135 of Act No. 379.]

Application for—When Heard, "Insolvency Statute, 1871," Sec. 133.]—There is nothing to prevent a certificate application being heard, pending the examination of witnesses under Sec. 133. *In re Were*, 6 V.L.R. (I. P. & M.,) 43; 2 A.L.T., 30.

Application for Certificate—Renewal after Payment of Dividend.]—*Per Noel, J.* When the Court has refused to dispense with the condition of paying seven shillings in the £, required by Sec. 136 of the "*Insolvency Statute*, 1871," the insolvent may renew his application and obtain a certificate without notice to

the opposing creditors, under Sec. 135, when he has paid the requisite dividend. *Re Spencer*, 1 A.L.T., 176.

Application for—One Application Refused—"Insolvency Statute, 1871," Sec. 136.]—*Per Noel J.* Where the application of an insolvent for a certificate, alleging that the estate will pay a dividend of 7s. in the £, as required by Sec. 136 of the "*Insolvency Statute*, 1871," has been refused because the required dividend has not been proved, the decision of the Court is final, and no second application, if such dividend have not in the meantime been paid, will be entertained, but the remedy (if any) must be by appeal. *Re M'Kay*, 4 A.J.R., 131.

It is discretionary with the Judge of the Insolvent Court to decide in what order he shall take the application for the certificate under Sec. 135, and the application for dispensing with the condition under Sec. 136; but he should only make one order on the subject. *In re Dixon*, 5 A.J.R., 171.

Act No. 379, Sections 135, 136.]—*Per Noel, J.* The refusal of a certificate is final, and can only be got rid of by an appeal to the higher Court. *In re Murphy*, 1 A.L.T., 71.

Followed by *Noel*, J, as to the refusal to dispense with the condition of payment of 7s. in the £ under Sec. 136. *In re Wood, Ibid* p. 72.

Per Noel, J. The Court of Insolvency has no jurisdiction to reconsider its decision as to dispensing with the condition in Sec. 136 of Act No. 379, unless the Court of Appeal has remitted the question to it, and given the insolvent liberty to apply. *In re Hearty*, 2 A.L.T., 112.

In an appeal against a refusal of a certificate the dispensation with the payment is considered as a matter *per se*, and if the appeal is allowed on general grounds, the Court leaves the question of dispensation to a future application to the Court below. *In re Arnold*, 5 V.L.R. (I. P. & M.,) 39, 44.

Act No. 379, Sec. 136—Dispensing with Payment of 7s. in the £—Practice—Affidavits—Jurisdiction of Court of Insolvency.]—The order of proceedings should be that the Judge of the Court of Insolvency should first decide if a certificate should be granted at all, and if he decides in the affirmative he should inquire if the estate will pay 7s. in the £, and if that is answered in the negative, should inquire as to reasons to dispense. The Judge refused an application to dispense with the payment on the ground that the affidavits were insufficient without stating how they were insufficient or giving an opportunity of supplying the deficiency. *Held* that the Judge had a right to manage the routine practice of his Court, and that the Court of Appeal would not entertain further affidavits, but the order was set aside because it did not decide whether a certificate should or should not be granted, apart from dispensing with the payment of 7s. in the £, and it was declared that the affidavits disclosed no good ground for dispensing with the condition of paying 7s. in the £ without prejudice to a renewed application. *In re Gale*, 7 V.L.R. (I. P. & M.,) 1; 2 A.L.T., 115.

Per Noel, J., on a review of *in re Dixon, in re Arnold, in re Dwyer*, and *in re Gale*. "A refusal to dispense is not a refusal of the certificate notwithstanding the words at the beginning of Sec. 136: That although there is to be one order inasmuch as the application for a certificate is twofold, there must be a distinct decision on each branch of the application to be embodied in the order as two distinct decisions; the decision respecting the remission of the dividend is not final. *Semble*, that *re M'Kay, re Wood*, and *re Hearty* were wrongly decided, and I think that the jurisdiction of this Court to re-hear final decisions has not been pronounced upon, but the decision under Sec. 136 has been determined to be a different decision from that under Sec. 135 to be not final, and for that reason open to renewed application by the insolvent with further affidavits." *In re Dwyer*, 3 A.L.T., 39.

Jurisdiction to Re-hear Application for Certificate.]—Courts of insolvency have jurisdiction to re-hear application for certificate of discharge upon which they have already adjudicated. *In re Murphy*, 4 A.L.T., 93.

Insolvency—Re-hearing Application for a Certificate.]—*Held*, reversing *Molesworth*, J., that a judge of a Court of Insolvency is at liberty, if he thinks fit, to re-hear an application for a certificate. *In re Murphy*, 8 V.L.R. (I. P. & M.,) 15; 4 A.L.T, 75.

Insolvency—Postponing Application for Certificate.]—*Semble* that a Judge of an Insolvent Court has a discretion to postpone the hearing of an application for a certificate. *In re Millikin*, 4 V.L.R. (I. P. & M.,) 71.

Powers of Commissioner—Act No. 273, Sec. 102.] Although the Act gives persons interested in the granting or refusing of a certificate of discharge the right to be heard, it does not disable the commissioner from dealing with the case, if no one wishes to be heard; and in such a case he has jurisdiction to refuse a certificate, but the commissioner should state his reasons for refusal in a specific form, and give the insolvent the opportunity of answering them. The Court then expressed its concurrence with the commissioner upon the evidence, and affirmed the refusal. *In re Marshall*, 6 W. W. & A'B. (I. E. & M.,) 4.

[Compare Sec. 135 of Act No. 379.]

Refusal in one District—Transfer of Proceedings—"Insolvency Stat. 1871," Sec. 10—Jurisdiction of District to Which Proceedings Removed.]—A person's estate was sequestrated in one district, and his application for a certificate refused by the Judge of that district, but leave was given to renew the application. Pending the renewed application an order was obtained, under Sec. 10 of the "*Insolvency Stat.* 1871," by the

creditors, transferring the proceedings to another district. *Held*, that the judge of the district to which the proceedings were transferred had jurisdiction to entertain the renewed application. *In re Hinneberg*, 8 V.L.R. (I. P. & M.,) 7; 3 A.L.T., 133.

Signing the Certificate—Commissoner of Insolvent Estatss.]—It is entirely within the discretion of the commissioner of insolvent estates whether he will sign a certificate of discharge or not, and the Court cannot interfere in the matter. *In re Guthrie*, 8 V.L.R. (I. P. & M.,) 4.

Suspension—Appealing from Ultimats Grant—7 Vic., No. 19.]—The suspension of an insolvent's certificate is a decision, and the proper time for appealing against such decision, either by the insolvent contending that his certificate should not be suspended, or by the creditors against the ultimate grant of such certificate, is at the Court held next after the suspension, and if no appeal be then made the certificate will at the expiration of the period of suspension issue as of course. *In re Murray*, 2 V.R. (I. E. & M.,) 11; 2 A.J.R., 71.

[But *see* Sec. 12 of Act No. 379 as to time for appeal.]

Where Appeal Liss—From Decision Dispensing With Dividend—"Insolvency Stat. 1871," Sec. 136.] —The words "in the opinion of the Judge," in Sec. 136 of the "*Insolvency Stat.* 1871," do not exempt decisions of the Judge of an Insolvent Court dispensing with the payment of the required dividend under that section from liability to appeal. *Re Dyte*, 2 V.L.R. (I. P. & M.,) 42, 47.

Appsal—Deposit—"Insolvsncy Stat. 1871," Sec 12.]—The provision for deposit under Sec. 12 of the "*Insolvency Stat.* 1871," does not apply as to any appeal about a certificate. *In re Dyte*, 2 V.L.R. (I. P. & M.,) 42, 47.

See also S.P., *in re Goldsmith*, 5 V.L.R. (I. P. & M.,) 18, 21, where the Judge in addition to refusing the certificate sentenced to imprisonment.

Appsal to Full Court—Questions on.]—On an appeal to the Full Court from the decision of the Primary Judge, made upon appeal to him from the decision of a Court of Insolvency, granting or refusing a certificate of discharge, the Court will only entertain the questions raised by the notice of appeal, and will not allow objections taken and decided in the Court below to be opened up without notice. *In re Aarons*, 6 V.L.R. (I. P. & M.,) 56.

Appsal From Decision Disallowing—Preliminary Objsction Overruled—Court Will Not Enter into Merits.]—On an application to compel an insolvent to apply for his certificate the Court of Insolvency overruled a preliminary objection to the sufficiency of a notice of objection, and proceeded to hear the case, and, thinking the objection, of which notice had been given, was proved, refused the certificate. On appeal to the Supreme Court the preliminary objection was held well founded, and the appeal allowed, but the Court refused, on such appeal, to go into the question as to whether the certificate should be granted or not, holding that it would only place the parties in the position in which they were before the irregular notice was served, and before the insolvent was brought before the Court. *In re Caulfield*, 10 V.L.R. I. P. & M.,) 73; 6 A.L.T., 58.

Opposing Certificate Before Commissioner.]—As there are no pleadings required before the commissioner, neither the insolvent nor those who oppose the application for his certificate ought to be held very strictly to the precise form of the issues; but it ought to be required, and it is sufficient, that the insolvent be apprised substantially of the grounds for opposing his certificate. *In re Perry*, 1 W & W. (I. E. & M.,) 150.

[*See* now "*Insolvency Rules*," Rule 93.]

Practics—Notics of Opposition to Grant of Certificats—Rule 93.]—The notice of opposition in Rule 93 should be served seven clear days before the meeting of creditors, and such notice should state shortly and with reasonable certainty the grounds of opposition—a notice that insolvent had given creditors a fraudulent preference, contracted debts, &c., *held* bad. *In re Dixon*, 5 A.J.R., 171.

After service of the notice of opposition *Noel*, J., allowed an objection to be added. *In re Mathieson*, 3 A.J.R., 92.

Irregular Notice of Opposition to Certificats—Adjournmsnt — Rule 93.] — Where a creditor, under Rule 93 of the rules of the Court of Insolvency of 25th April, 1871, had filed within in the prescribed time a notice of opposition to a certificate, and the notice was improperly drawn, and did not disclose any offence, *Judge Noel* refused to adjourn the certificate, application to enable fresh notice to be given. *Re M'Grane*, 1 A.L.T., 120.

Act No. 379, Sec. 135—Grounds of Opposition.]—If the statement of grounds of opposition to a certificate are vague, the creditor should amend such statement before the Judge of the Insolvency Court, or otherwise he will not be allowed to urge such objections on appeal. *In re Kershaw*, 1 V.L.R. (I. P. & M.,) 44.

Affidavit of Opposing Creditor Against Certificate —Where Insufficient.]—Upon an appeal from the decision of a Judge of an Insolvent Court, suspending a certificate of discharge for eighteen months, and directing that it should then issue upon the payment of a certain dividend, it appeared that the affidavit of the opposing creditor, a bank, was in the wrong form, being an affidavit as for an individual instead of for a banking company, *Held*, that the affidavit was insufficient, and that the bank having no status as an opposing creditor, the certificate must issue upon payment of the dividend. *In re Farrell*, 4 A.J.R., 101.

Who May Oppose Application—Creditor Whose Debt was Incurred as the Price of not Opposing Certificate.]—An insolvent incurred a debt to a creditor in order to buy off the creditor's opposition to his certificate, and before a second insolvency renewed the debt, proof of which was not opposed on the second insolvency, *Held* that the *status* of such creditor on an application by the insolvent for a certificate could not be impeached, but that the manner in which such creditor acted might be regarded. *In re Cunningham*, 2 V.L.R. (I. P. and M.,) 9.

Who May Oppose Application.]—A creditor, who has not proved has no right to be heard against the grant of a certificate of discharge to an insolvent. *In re Ditchburne*, 2 V.L.R. (I. P. & M.,) 49.

Per Molesworth, J. "I do not think that Sec. 136 limits the provisions for creditors to those who have proved, though until they have proved they cannot get a dividend. *In re Farrell*, 4 A.J.R., 101.

Objections to Certificate.]—In objections to certificates, unless the insolvent is likely to be misled, the exactness of pleadings is not required. *In re Aarons*, 6 V.L.R. (I. P. & M.,) 56.

Objections to Grant of—Vagueness.]—It is too vague an objection to the grant of an insolvent's certificate, that the general conduct of the firm, of which he was a member, was "calculated and intended to deceive the creditors of the said firm as to the true position of the said firm." *In re Walters*, 3 W. W. & A'B. (I. E. & M.,) 14.

Objections to Grant of—Obtaining Credit by False Representations — Evidence — "Insolvency Stat. 1871," Sec. 154, Sub-sec. 13.]—In order to support an objection to a grant of a certificate, under Sec. 154, Sub-sec. 13, of the "*Insolvency Stat.* 1871," that the insolvent obtained credit by means of false representations, it must be shown distinctly that the credit was obtained by means of such false representations. *In re Clapham*, 10 V.L.R (I. P. & M.,) 18; 6 A.L.T., 15.

Objections to Grant of—Notice of Objections Must Specify Charge—"Insolvency Stat. 1871," Sec. 138, Sub-sec. 12.]—A notice of objections to the grant of an insolvent's certificate must state with reasonable certaintly what the objections are. If the objection relied on be that under Sec. 138, Sub-sec. 12, of the "*Insolvency Stat.* 1871," of unlawfully expending trust property, the notice must specify the nature of the property dealt with, the name of the owner, and the time when the act complained of was committed. It is insufficient if the notice merely states the offence in the precise words of the statute. *In re Caulfield*, 10 V.L.R. (I. P. & M.,) 73; 6 A.L.T., 58.

Compulsory Application for Certificate—Act No. 379, Sec. 146—Rules 93, 101—Objections.]—An insolvent was examined under Sec. 132 of Act No. 379, and the examination was adjourned and never concluded. He and others were examined under Sec. 133. After six months the assignee proceeded under Sec. 146 to compel him to appear for his certificate, and served him five days before the time with notice of objections. *Held*, that Rule 93, prescribing seven days' notice only applied to voluntary applications for a certificate made by the insolvent, and not to proceedings under Sec. 146, which supposes written objections to be delivered before the day of hearing, and further hearing after adjournment, and that as insolvent had not applied for an adjournment the objection as to service was properly overruled. *In re Goldsmith*, 5 V.L.R. (I. P. & M.,) 18, 23.

Objections To—Petition Presented in Wrong District.]—*Semble* that it is not a good objection to the grant of a certificate of discharge, that the order sequestrating the estate was bad, through the petition for voluntary sequestration not having been presented to the chief clerk of the proper district. *In re Heath*, 8 V.L.R. (I P & M.,) 10.

Examination of Witnesses on Oath by Commissioner—"Insolvency Stat. 1865," Sec. 102.]—The commissioner, though not expressly authorised by the "*Insolvency Stat.* 1865," has power to examine witnesses upon oath at a certificate meeting under Sec. 102 of the statute. *In re Bell*, 1 V.R. (I. E. & M.,) 2; 1 A.J.R., 38.

[Compare Sec. 135 of Act No. 379.]

"Insolvency Stat.," No. 379, Sec. 135—Examination of Insolvent.]—On an application for a certificate of discharge the Court has no power to direct the insolvent to attend for purposes of examination; he must, if necessary, be summoned to the Insolvent Court. *In re G. J. Johnson*, 5 A.J.R., 1.

Evidence — Examination of Insolvent.] — An Insolvent cannot be compelled to submit to examination, but he may be examined as a witness in an application for the grant of a certificate, and where the Judge of the Court of Insolvency refused to allow him to be examined, the Supreme Court received an affidavit of his own explaining his conduct. *In re Arnold*, 5 V.L.R. (I. P. & M.,) 39.

Examination of Witnessss—Depositions of Insolvent—Refusal of Certificate—Sentence to Imprisonment—Act No. 379, Secs. 132, 133.]—An Insolvent had been examined under Sec. 132, and he and other witnesses were examined under Sec. 133. *Held* that the insolvent's depositions under both sections were admissible in support of a refusal of certificate, but that in the criminal case (i.e., the sentence to imprisonment,) the evidence of others under Sec. 133 was not admissible. *In re Goldsmith*, 5 V.L.R. (I. P. & M.,) 18, 23.

Evidence of Insolvent's Wife—Examining Wife when Husband may not be Examined.]—*Semble*, that when, by the practice of the Insolvent Court, an insolvent cannot be examined upon

his certificate application, his wife also cannot be examined. *In re Oppenheimer*, 6 V.L.R. (I. P. & M.,) 26.

Per Barry J.—An insolvent upon his certificate application may make a statement in explanation of anything which has arisen on which a criminal charge might be founded, but he may not be examined. *In re Aarons*, 6 V.L.R. (I. P. & M.,) 56, 71, 75.

Per Higinbotham, J.—"I am inclined to think that an insolvent has a legal right to be examined on oath at his certificate meeting." *Ibid*, p. 76.

Application for Certificate—Insolvent Not to be Examined.]—*Per Noel, J.* An insolvent is not a competent witness, either for or against himself, at his certificate application. *In re Jones*, 2 A.L.T., 58.

Act No. 379, Secs. 132, 133, 135—Examination of Insolvent—Evidence on Appeal.]—In an application for a certificate the insolvent may be examined on his own behalf, but cannot be compelled to be examined. Where an insolvent refused to be examined, and then on the appeal sought to put in an affidavit, *Held* that the Court of Appeal could not hear further evidence. *In re Paterson*, 7 V.L.R. (I. P. & M.,) 14; 3 A.L.T., 4.

Lapsed Certificate—Certificate Granted in Wrong Name.]—The estate of *John B.* was sequestrated, but in the sequestration and all proceedings under it he was described as *James B.* In 1859 the commissioner granted a certificate of discharge, but this certificate lapsed through no application being made to confirm it. The insolvent subsequently applied *de novo* for a certificate, which was granted, *Held* on appeal that the lapsed certificate was inoperative to prevent the insolvent getting another certificate, *quære* as to the effect of granting a certificate in the insolvent estate of *James B.* to *John B.* by his right name. *In re Bryan, exparte Moore*, 2 W. W. & A'B. (I. E. & M.,) 23.

Confirmation—7 Vic., No. 19, Sec. 17.]—Where the chief commissioner grants a certificate under 7 Vic., No. 19, Sec. 17, he must bring it into Court for confirmation; but not so where he suspends or refuses a certificate, the bringing the matter into Court being then cast on the party dissatisfied with the decision. *In re Klein*, 1 W. & W. (I. E. & M.,) 139.

[Compare Sec. 149 of Act No. 379.]

Delay in Presenting for Confirmation—Practice.]—Where a certificate of discharge was granted November, 1861, and no application was made for its confirmation until March, 1863, the Court refused to make the order *nunc pro tunc*, but required the insolvent to apply again for his certificate. *In re Kelly*, 2 W. & W. (I. E. & M.,) 4.

Where a certificate was granted in November, 1859, but the certificate itself was never signed or confirmed, an application in May, 1865, for confirmation as of that date (1865) refused. *In re Bryan*, 2 W. W. & A'B. (I. E. & M.,) 15.

Presenting for Allowance—"Insolvency Stat. 1865," Sec. 105.]—The certificate of discharge must under Sec. 105 of the "*Insolvency Stat.* 1865," be presented for allowance at the next sitting of the Supreme Court in its insolvency jurisdiction, after its oral grant by the commissioner. *In re Usher*, 2 V.R. (I. E. & M.,) 1.

[Compare Sec. 149 of Act No. 379.]

"Insolvency Stat. 1871," No. 379, Sec. 149—Confirming Certificate Granted in 1856.]—An application was made to confirm a certificate granted in 1856, but not signed by the then commissioner, *Held* that Sec. 149 only referred to certificates which had been signed, and that the certificate must be signed by the then commissioner. *In re Maplestone*, 3 A.J.R., 127.

Absence of Assignee.]—Where a certificate had been granted many years ago, but had not been confirmed, the Court required an affidavit that assignee was absent from the colony. *In re Duncan and Morrison*, 5 A.J.R., 5.

Confirmation—Act No. 273, Sec. 105—No. 379, Sec. 149.]—Sec. 149 of Act No. 379 only applies to the confirmation of certificates granted prior to that time. Where B.'s certificate was sequestrated in 1869, and a certificate of discharge was granted after Act No. 379, and not presented for confirmation under Sec. 105 of Act No. 273, *Held* that the proper course was to obtain a new certificate, and have it duly confirmed according to the provisions of the former statute. *In re Bowman*, 3 V.L.R., (I. P. & M.,) 104.

Confirmation—Notice—"Insolvency Stat. 1871," Sec. 149.]—Notice of an application under Sec. 149 of the "*Insolvency Stat.* 1871," for the confirmation of a certificate granted under the old law, should be served upon the continuing members of the old firms who were creditors, and upon all other creditors who can be found. *In re Finlayson*, 6 V.L.R. (I. P. & M.,) 82.

Application for Confirmation of Certificate—"Insolvency Stat. 1871," Sec. 149—Service of Notice.]—On an application in 1882 under Sec. 149 of the "*Insolvency Stat.* 1871," for confirmation of a certificate granted in 1858, notice of the application was required to be served on a bank, a creditor for a large amount, but not on all the creditors. *In re Guthrie*, 8 V.L.R. (I. P. & M.,) 4.

Confirmation—Notice of Motion for—"Insolvency Statute 1871," Sec. 149.]—Notice of a motion under Sec. 149 of the "*Insolvency Stat.* 1871," for confirmation of a certificate may be given by post where the creditors reside at long distances from Melbourne. *In re Byrnes*, 10 V.L.R. (I. P. & M.,) 5.

Application for Confirmation Nunc Pro Tunc—Affidavit Explaining Delay.]—An insolvent in applying for a confirmation of his certificate *nunc pro tunc*, made an affidavit that he had not applied for confirmation before because he was advised that it was unnecessary. The Court required an affidavit stating who the adviser was. Upon this affidavit being filed

the Court directed its associate to write to the person named, who did not reply. The Court then accepted the excuse. *In re Sinclair*, 10 V.L.R. (I. P. & M.,) 81.

Application for Confirmation Nunc Pro Tunc—Notice of.]—In an application for the confirmation of a certificate *nunc pro tunc*, notice of the application must be served on the official assignee. *Ibid.*

Application for Confirmation Nunc Pro Tunc—Solicitor's Affidavit.]—On such application the affidavit of appointment of the official assignee, and of the creditors who have proved must be made by the applicant's solicitor. An affidavit by his solicitor's managing clerk is insufficient. *Ibid.*

Release from Two Sequestrations.]—An insolvent's estate had been sequestrated in November, 1861, under which he had obtained his discharge, and his estate was again sequestrated 4th May, 1864. The whole of the debts in each sequestration having been paid in full, and surplus of assets having been handed over to insolvent, who had obtained his certificate under the 2nd Insolvency, and advertisements having been duly inserted, the Court made an order releasing the estate from both sequestrations. *In re King*, 2 W. W. & A'B. (I. E. & M.,) 33.

Suspending Certificate—7 Vic., No. 19, Secs. 17, 18.]—Section 18 of Act No. 19 provides that the certificate "shall be suspended or refused where insolvent shall have taken the benefit of the Insolvent Act at any time within three years previously." A. became insolvent in 1857, and neglected to get his discharge; he embarked in trade and sequestrated his estate a second time in 1858. In March, 1863, he obtained his certificate of discharge from the first sequestration, and applied for a discharge from second sequestration, but Commissioner suspended it until three years from the obtaining of the 1st certificate. *Held* on appeal that the Commissioner might have refused or suspended, but that having suspended the suspension authorized under Sec. 17 of the Act is for one year only. Order of suspension varied accordingly. *In re Christie*, 2 W. & W. (I. E. & M.,) 31.

Compelling Insolvent to Apply for Certificate—"Insolvency Rules" 93, 103.]—Applications under Sec. 146 of the "*Insolvency Statute*, 1871," to compel an insolvent to apply for his certificate are regulated by Rule 103 of the "*Insolvency Rules" of April*, 1871, and the order of procedure prescribed by that rule must be strictly adhered to. Rule 93 has no application to these proceedings. *In re Caulfield*, 10 V.L.R. (I. P. & M.,) 73; 6 A.L.T., 58.

(2) *Release by Creditors.*

How Effected—5 Vic., No. 17—"Insolvency Stat. 1865," No. 273, Sec. 42.]—B.'s estate was sequestrated July, 1865. B. applied by petition for release of his estate from sequestration, alleging consent by the petitioning and other creditors. No attempt had been made to effect a composition under Sec. 42 of the "*Insolvency Stat.* 1865." *Held* that the "*Insolvent Act*," 5 Vic., No. 17, does not contemplate any other means of releasing an estate than that provided by Sec. 42 of Act No. 273. Application refused. *In re Barwick*, 2 W. W. & A'B. (I. E. & M.,) 35.

[Sec. 129 of Act No. 379 corresponds with Sec. 42 of Act No. 273.]

Where Granted—5 Vic., No. 17, Sec. 86.]—An estate will not be released from sequestration under Sec. 86 of 5 Vic., No. 17, where the affidavits do not show an exact compliance with the statute; and the affidavits should follow the words of the Act, and show compliance with it in fact, and not by inference. *In re Turpin*, 1 W. & W. (I. E. & M.,) 9.

See also *in re Stampe, ibid* 10.

[Compare Act No. 379, Sec, 129.]

5 Vic., No. 17, Sec. 86—Release from Sequestration.]—An application for release of estate from sequestration consequent upon a composition with creditors under Sec. 86 of the Act should be supported by the certificate of the creditors themselves accepting the composition, and a certificate of the attorney authorised to appear on their behalf is not sufficient. *In re Perry*, 2 W. & W. (I. E. & M.,) 86.

The application should further be supported by the affidavit, not only of the insolvent himself, but also of the solicitor verifying several facts to warrant the application being granted. *Ibid.*

Quære whether the provisions of this sec. are available after the refusal of a certificate. *Ibid.*

Application for under Sec. 42 of the "Insolvency Statute 1865."]—Applications under Sec. 42 of the "*Insolvency Stat* 1865," for the release of an estate from sequestration must be based upon the affidavit of a solicitor, stating all the debts proved, names of creditors and amounts, distinguishing those who have accepted the composition. *In re Scallan*, 2 V.L.R. (I. P. & M.,) 2.

[Compare Sec. 129 of Act No. 379.]

Order When Made.]—Where there had been a mistake made in advertising a meeting for the acceptance of a composition upon which it was sought to obtain a release from sequestration, the meeting having been advertised for the eighth of the month, which was a Sunday, instead of the ninth, but the meeting was held upon the ninth, the Court refused to make an order for release. *In re Brown*, 3 W. W. & A'B. (I. E. & M.,) 5.

Rule 47—Posting Letters Containing Notice o. Application to Creditors.]—*Per Noel, J.* Rule 47 of the Rules of the Court of Insolvency of 25th April, 1871, does not render the affidavit of a person who posted letters containing notices of an intention to apply for an order for the release of an estate from sequestration, a material part of the application for the order,

but when service is denied it makes it sufficient evidence of the letters having been duly posted. *In re Bailliere*, 2 A.L.T., 57.

Application for—Service of Notice upon Agent of Absent Creditor—Rule 105.]—*Per Noel, J.* Rule 105 of the Rules of the Court of Insolvency of 25th April, 1871, requires service upon the agent of a creditor absent from Victoria of a notice to apply for a release of an estate from sequestration, but the Court may dispense with service if there be no agent, and such dispensation need not be procured by a formal motion and order. The rule means that the Court may, in its discretion, release the estate without notice to the absent creditor having been given if the Court is satisfied that the creditor has no agent here. The insolvent's allegation upon oath that no such agent exists is sufficient. *Ibid.*

Who may Vote at Meetings to Release Insolvent.]—*Per Molesworth, J.*—At a meeting in an insolvent estate (at which a composition of 6d. in the £ was accepted) the votes of no creditors should be received, but of those who have proved their debts. *In re McTavish*, 2 W. W. & A'B. (I. E. & M.,) 26.

It is necessary that creditors should have proved their debts before they can accept a composition under 5 Vic., No. 17, Sec. 86, and an acceptance and confirmation by scheduled creditors, who have not proved, is ineffectual, and will not entitle the insolvent to obtain a release of his estate from sequestration. *In re Rowland*, 5 W. W. & A'B. (I. E. and M.,) 2.

Semble, that a composition may be accepted, and the estate released from sequestration, in cases where there has been but one meeting of creditors, there being expressions in the Act 5 Vic., No. 17, which refer to cases where only one such meeting is required. *Ibid.*

Insolvency Statute, 1865, Secs. 42, 130.]—Where there are no creditors, any of whose debts amount to £50, so that under Sec. 130 of the "*Insolvency Statute*, 1865," creditors cannot be reckoned in number, a majority in value is sufficient to release an estate from sequestration under Sec. 42, but such creditors must prove their debts, otherwise they are not creditors within Sec. 42. *In re Knoebel*, 1 V.R. (I. E. & M.,) 10; 1 A.J.R., 144.

[Compare Secs. 129 of Act No. 379.]

Application for—5 Vic., No. 17, Sec. 86—Evidence.]—On a motion, under Sec. 86 of 5 Vic., No 17, for the release of an insolvent's estate from sequestration, where a composition has been accepted by the creditors, the Court requires evidence that the debts of the creditors who have accepted the composition, were properly proved, i.e., at a meeting of creditors. *In re Motherwell*, 8 V.L.R. (I. P. and M.,) 6.

Majority of Creditors — Act No. 273, Sec. 129.]—Where there is a debt admitted to proof, but as to which proof there is an appeal pending, the creditors claiming such debt must be counted in the majority; but if the proof is expunged, another application must be made to the Court for the release of the estate. *In re Dallimore*, 5 A.J.R., 1.

Only those creditors who have proved can be regarded in the majority, and where only one creditor has proved, such one is not considered as a majority. *In re Curley*, 5 A.J.R., 5.

Followed in *in re Fallu*, 3 V.L.R., (I. P. & M.,) 106.

Majority—One Person Holding Proxies for two Creditors—Such Person Cannot Split Himself Into Two Capacities.]—*In re Schlieff, post column* 170.

Where Court May Grant—Act No. 273, Secs. 40, 41, 42—No Meeting of Creditors Accepting—One Dissentient Creditor.]—After sequestration the creditors held a meeting, at which debts were proved, and afterwards all the creditors, according to individual agreement, except one, signed and executed a document accepting a composition requesting the release of the estate. *Held* that there was no jurisdiction to release if any creditor dissented, the majority could only bind at a meeting, when the matter might be discussed. *In re Falla*, 5 A.J.R., 62.

Composition.]—*Per Noel, J.* The acceptance of a composition is valid, if it be a fair one for all the creditors, though the majority may wish to promote the interests of the debtor. *In re Bailliere*, 2 A.L.T., 57.

"Insolvency Stat. 1871," Sec. 121.]—Sec. 121 of the "*Insolvency Stat.* 1871" relates to the acceptance of the composition from the estate, as it is after the deduction of preferential payments. *Ibid.*

Consent of Three-fourths in Number and Value of Creditors—Preferential Creditors.]—*Per Noel, J.* With some doubt I hold that preferential payments by the assignee will not affect the validity of the consent of three-fourths in number and value of the concurrent creditors to an application for the release of an estate from sequestration. *Ibid.*

Previous Informal Composition — Consent of Creditors.]—Where an insolvent had on a prior occasion petitioned for liquidation of his affairs by composition arrangement, but the proceedings had been irregular and abortive, *Held, per Noel, J.*, that the proceedings being abortive his liability on his debts continued, and an acceptance of a composition by his creditors in insolvency was not an acceptance by three-fourths in number and value of his creditors, but that if the previous creditors had been paid the consent of three-fourths in number and value of the creditors under his insolvency was alone requisite. *In re Bailliere*, 2 A.L.T. 57.

Composition Accepted by Three-fourths of Proving Creditors—Effect on Dissentients.]—Where an insolvent has made an offer of composition embracing all the creditors who have proved, and such offer is accepted by three-fourths in number and value of such creditors, and the estate has been released from sequestration by the Court of Insolvency under Sec. 129 of the "*Insolvency Stat.* 1871," the dissentient creditors are bound by such acceptance. *Connell v. Carroll*, 10 V.L.R. (L.,) 169; 6 A.L.T., 55.

Quære, whether creditors who have not proved would be bound in such case. *Ibid.*

When Granted—Act No. 273, Sec. 42—Composition With Creditors.]—Where assets in an estate were under £100, and only one meeting had been held at which an offer of composition had been accepted, the Court made an order releasing estate from sequestration. *In re Leete*, 6 W. W. & A'B. (I. E. & M.,) 36; N.C., 42.

[Compare Sec. 129 of Act No. 379.]

"Insolvency Stat. 1871, No. 379, Secs. 39, 129, 94—Costs.]—*Per Judge Noel.* If the requirements of Sec. 129 and Rule 105 which must be read with that section have been complied with, the Court will make the order for release, and will not go into extraneous matter respecting the conduct of the insolvent or the management of the estate, but where the liquidating debtor had opposed the creditors opposing the release at every step, and put them to unnecessary expense, such creditors were allowed their full costs. *In re Marie*, 3 A.J.R., 63.

Objections on Ground of Misconduct Towards Creditors—Costs of Sequestration.]—Where, on an application for the release of an estate from sequestration under Sec. 129 of the "*Insolvency Stat.* 1871," the requirements of the Section and Rule 105 have been complied with, the insolvent is entitled to an order, and objections as to alleged misconduct on the part of the insolvent towards his creditors should not be entertained, because the Court has no discretion to refuse the application on such grounds. But where the circumstances are special, the petitioning creditor will be allowed his costs of the sequestration as a condition for granting the order, because an unconditional order of release would have the effect of depriving him of the benefit Sec. 40 of the Act gives him of getting his costs out of the estate. *Per Noel, J. Re Risk*, 4 A.J.R., 25.

Act No. 379, Sec. 129.]—*Per Noel, J.* The terms of Sec. 129 are obligatory upon a Judge to release the estate from sequestration if the provisions of the section are complied with, and the Judge has no discretion in the matter under such circumstances to refuse on the ground of the dividend not being the largest possible, or want of *bona fides* in the majority of creditors. *In re Blood*, 4 A.L.T., 184.

Who May Obtain—Executors—"Insolvency Stat. 1865," Secs. 42, 43.]—A release of an estate from sequestration cannot be obtained under Sec. 42 of the "*Insolvency Stat.* 1865," on the acceptance by the creditors of a composition, by the executors of a deceased insolvent, since Secs. 42 and 43 of the Act do not apply after the death of an insolvent. *In re Scallan*, 2 V.L.R. (I. P. & M.,) 2.

(3) *The Effect of Discharge or Release.*

Effect of Discharge under Insolvent Laws in New South Wales Upon a Judgment Recovered in Victoria.]—G. brought an action on a judgment recovered in Victoria against K. K. pleaded that he was domiciled in New South Wales, that G. caused a memorial of the judgment to be filed in the Supreme Court of New South Wales, and K's. estate was sequestrated under the insolvent laws of New South Wales; that G. held as security for his debt the licence of a station in New South Wales, and mortgage of stock thereon, and that valuing these securities he proved and received dividends on the difference between the value and the amount of the debt retaining the securities, and that K. received his certificate of discharge in New South Wales. The *locus contractus* was not stated in any of the pleadings. *Held*, on demurrer to the plea, that it could not be presumed that the contract was made in New South Wales, but that without deciding any question of international law, G. having voluntarily submitted to the laws of New South Wales, and having taken proceedings under the insolvent law of that country had discharged the defendant from the debt upon which this action was based. Judgment for defendant. *Glass v. Keogh*, 4 W. W. & A'B. (L.,) 189.

"Insolvency Stat." No. 379, Secs. 129, 131.]—Where W. made a voluntary settlement of land in August, 1874, and became insolvent in February, 1875, and obtained his certificate of discharge in August, 1875, *Held*, that the effect of Secs. 129, 131 of Act No. 379, was to put him into position of owner of the land if the voluntary settlement were out of the way. *Moss v. Williamson*, 3 V.L.R. (E.,) 221.

Effect of Release—Act No. 379, Sec. 131.]—To a declaration defendant pleaded in bar sequestration of the estate after the accrual of the cause of action, and before the date of the writ. Plaintiff replied that after the issue of the writ the estate was released from insolvency under Sec 129. *Held* that the case was in principle the same as that of an administrator, the release and letters of administration relating back when they were obtained but not before. Judgment for defendant. *Hodgson v. M'Caughan*, 3 V.L.R. (L.,) 292.

Act No. 273, Sec. 43—Effect of Release from Sequestration.]—J. became insolvent December, 1870. In June, 1872, he was convicted of felony, completing his sentence in February, 1877. In August, 1881, his estate was released from sequestration by his creditors under Sec. 42 of Act No. 273. *Quære, per Williams, J.*, how far Sec. 43 of Act No. 273 had the effect of wiping out the sequestration, so as to vest in

the Crown by relation back and under the forfeiture for felony, an interest which the Insolvent had not at the time of the felony. *Johnson v. Kelly*, 7 V.L.R. (E.,) 97; 3 A.L.T., 41.

[Compare Sec. 131 of Act No. 379.]

XX. Examination of Insolvent and Witnesses.

Insolvency Statute, No. 273, Sec. 87—Examination of Insolvent after Certificate of Discharge—Official Assignee's Discretion—Costs.]—A creditor moved for an order to compel an official assignee to apply under Sec. 87 for an order for insolvent's examination after he had obtained his certificate. *Held* that the power of discretion rested solely with the assignee, and that the Court had no jurisdiction. Motion refused, but without costs, the assignee not having answered fully enough as to his having exercised a discretion. *In re Ireland*, 6 W. W. & a'B. (I. E. & M.,) 5.

[Compare Sec. 132 of Act No. 379.]

Act No. 379, Sec. 132.]—*Per Noel, J.* Where an insolvent has been examined by the trustee, the Court will not allow him to be examined at the same sitting by individual creditors. *In re Longstaff*, 1 A.L.T., 8.

But (*per Noel, J.*) where a trustee (also a creditor) stands aloof from the examination, a creditor may examine the insolvent. *In re Marks*, 1 A.L.T., 96.

See also cases *ante columns* 700, 701.

Insolvent not Appearing at Adjourned Examination.]—*Per Noel J.* Where an insolvent does not appear at an adjourned examination, the Court will further adjourn and direct a warrant to be made out for the apprehension of the insolvent, allowing it to lie in the office until the date of the adjournment, when the insolvent must file accounts and appear in Court. *In re Young*, 1 A.L.T., 78.

Examination of Insolvent—Discretion of Trustee—Powers of General Meeting and Committee of Inspection to Appoint a Solicitor for Purpose of—Act No. 379, Secs. 53, 56, 67, 78, 132.]—Secs. 78 and 132 do not give either the general meeting, or the committee a voice in selecting a solicitor for the purposes of examination, but leave it to the sole discretion of the trustee, but the trustee should not resist the wishes of the creditors properly conveyed, if he should do so, the proper punishment should be his removal under Sec. 56. Under Sec. 67 the control of a general meeting is like that of the committee under Sec. 53, but in cases of conflict, that of the committee prevails under Sec. 67. This control does not refer to the examination of the insolvent, which is not within the meaning of Sec. 53. Order by District Court Judge that the trustee should employ a solicitor named by creditors set aside. *In re Mackay*, 3 A.J.R., 10.

"Insolvency Stat. 1871," No. 379, Sec. 133—Examination of Insolvent—Production of Documents—Solicitor's Lien.]—*Per Noel, J.* Under Sec. 133 the trustee appears as agent for the creditors, and not as agent for the insolvent, and therefore a solicitor who claims a lien on the insolvent's documents for costs in an equity suit cannot refuse to produce documents on a summons by the trustee to produce them for examination of the insolvent's dealings. *In re M'Kay and Bell*, 3 A.J.R., 98.

Fees—"Insolvency Stat. 1865," Schedule 2.]—Schedule 2 of the "*Insolvency Stat.* 1865" imposing a fee "of 4d. a folio" for every examination taken at the hearing only refers to examinations in the Insolvent Court on the hearing of a rule for the compulsory sequestration of an estate. *In re Green*, 1 V.R. (I. E. & M.,) 6; 1 A.J.R., 104.

XXI. Liquidation by Arrangement.

Act No. 379, Sec. 150, Sub-secs. 4-6, Sec. 152.]—The registration by the clerk of resolutions passed at a meeting of creditors is, under Sec. 150, Sub-secs. 4-6, and Sec. 152, conclusive evidence, in the absence of fraud, that the resolutions were duly passed, and the requisitions of the Act complied with. *In re Bateman*, 1 V.L.R. (I. P. & M.,) 52.

After resolutions were passed and a trustee appointed, a creditor gave notice to the Judge of the Court of Insolvency of a motion to set aside the registration, and, pending that motion, moved to restrain the trustee from paying a dividend; the Judge refused the motion to restrain. *Held* that he was right. *Ibid.*

Effect Of.]—*See England v. Moore, ante columns* 63, 64.

Petition for Liquidation Followed by Confirmation is Not an Act of Insolvency.]—*In re H. S. Smith, ante column* 589.

XXII. Composition with Creditors.

(1) *Proceedings Under.*

Meeting of Creditors—Majority.]—An insolvent's estate was sequestrated under the Act 5 Vic., No. 17, Sec. 86, and at a meeting of creditors held to accept a composition of 5s. in the £, one person, J., attended as a proxy for the only two creditors who had proved, and J., as representing debtor A., moved the resolution, and, as representing B., seconded it. *Held* that J. could not in this way be split into two separate capacities so as to constitute a majority. Application for release of estate refused. *In re Schlieff*, 3 V.L.R. (I. P. & M.,) 18.

How Far Resolutions Passed Under Secs. 129 and 151 of Act No. 379, a Bar to an Order Nisi for Sequestration.]—*In re Marie, ante column* 597.

Act No. 379, Secs. 151, 152.]—From Sec. 151 it appears that the statement of assets and debts by the debtor as required in Sub-division 2 is in fact the foundation of the proceedings, and so far as the Act is concerned the only material for deciding who are entitled to vote or ascertaining majorities, and such statement requires to be verified as the Act provides in order for the proceedings to be valid. *In re Dane*, 3 V.L.R. (I. P. & M.,) 19.

Objections to the validity of the proceedings at creditors' meetings may be taken by a solicitor to a creditor, even though the solicitor is not entitled to vote. *Ibid.*

Registration of Resolution.]—Registration need not be effected personally by the debtor's solicitor; it may be done by the debtor himself or by the solicitor's clerk. *Ibid.*

Registration of Resolution—Act No. 379, Sec. 152.]—Where a resolution had been registered in great haste before objections could be reasonably filed, and the debtor did not call the attention of the chief clerk to the fact that the date of verification of the statement required in Sub-section 2 of Sec. 151, was subsequent to that of the first meeting, the Court held that such amounted to fraud within the meaning of Sec. 152, and cancelled the registration. *Ibid.*

Quære, whether registration properly obtained would be conclusive so as to prevent a review by the Judge promptly sought as to the irregularity of the statement not being sworn. *Ibid.*

"Insolvency Stat. 1871," No. 379, Sec. 151—Court of Insolvency Rules 109, 110, 123—Confirmation—Registration—Filing.]—Where at a meeting of creditors a resolution was passed accepting a composition, which was filed and registered, and a week afterwards a resolution was passed confirming the previous resolution, but this second resolution, though filed with the chief clerk, was not registered by him, *Held*, on a suit by a creditor for dissolution of partnership, and accounts as against defendants who had made the composition, that such composition was invalid, and could not be set up against plaintiff who had not been entered as a creditor in the statement submitted at the first meeting of creditors. *England v. Moore*, 5 V.L.R. (E.,) 135.

Priority—Sequestration.]—On 25th October a resolution was duly passed under Sec. 151 of the "*Insolvency Statute* 1871" by three-fourths of the creditors of W., accepting a composition. On 28th October a creditor, with notice of the resolution, obtained a judgment against W., and on the same day issued a *fi. fa.*, which was returned unsatisfied, and on the 1st November obtained an order *nisi* for sequestration. On hearing the order, *Held* that the proceedings for composition had priority, and the order *nisi* discharged, and since the creditor had notice of the resolution before he obtained the order *nisi*, with costs. *In re White*, 2 V.R. (I. E. & M.,) 42; 2 A.J.R., 132.

How Far Composition a Bar to Sequestration.]—*In re Marie, ante column* 597.

(2) *Release of Estate from Sequestration by Creditors.*

See ante column 703 *et seqq.*

XXIII. Meetings of Creditors.

Question Arising at Meeting of Creditors—Duty of Chief Clerk—"Insolvency Statute, 1871," Rule 18.] —*Per Noel, J.*, Rule 18 is imperative upon the chief clerk, and he is bound to refer a question arising at a meeting of creditors to the Judge when required so to do by either party, and for that purpose should adjourn the meeting. *Re Reuter*, 4 A.J.R., 143.

Meeting of Creditors—Insolvent Consenting and Failing to Sequestrate Voluntarily—Act No. 379, Sec. 37, Sub-sec. 9.]—As to when meeting regular and requisites necessary. *See in re Clemes and Leach, In re Inglis, In re John Smith, ante columns* 594, 595.

Majority in Sec. 37, Snb-sec. 9.—Proxies.]—*In re Southey, ante column* 595.

Meetings of Creditors to Elect Trustees—Rule 67—Act No. 379, Secs. 13, 53.]—Rule 67, framed under Sec. 13 of the Act No. 379, is directory only, and in certain cases a meeting to elect a trustee may be held, although the time limited by the Rule has expired. *In re Cotton*, 6 V.L.R. (I. P. & M.,) 33, 1 A.L.T., 148, and 190.

For facts *see* S.C., *ante column* 640.

At Meetings to Elect Trustee Only Creditors who have Proved may Vote.]—*In re Snell, ante column* 662.

Adjournment of Meeting to Elect a Trustee Through Allowance of Informal Proof of Debt—"Insolvency Rules," Rule 66.]—*In re M'Inerney, ante column* 640.

Power of General Meeting and Committee of Inspection to Appoint a Solicitor for the Purpose of Examining an Insolvent—Relative Powers of General Meeting and Committee of Inspection.]—*In re Mackay, ante columns* 645, 709.

Right of Creditors to Vote at Meetings of Creditors—Proof of Debt.]—*In re Snell* and *in re Trump, ante column* 662.

Meetings of Creditors for Releasing Estate from Sequestration—Right to Vote.]—*In re M'Tavish, in re Rowland, in re Knoebel*, and *in re Motherwell, ante column* 705.

Mistake Made in Advertising Time for Such a Meeting—Meeting Fixed for a Sunday.]—*In re Brown, ante column* 704.

How Majority Calculated in Such Meetings.]—*In re Knoebel, in re Dallimore, in re Curley, in re Fallu, in re Bailliere, and Connell v. Carroll, ante columns* 705, 706.

Control of Trustee by Meetings of Creditors Under Act No. 379, Sec. 67.]—*See in re Lempriere* and *in re Thomson, ante column* 645.

Exoneration of Assignee by Resolutions of a General Meeting.]—*In re Harper* and *in re Flower, ex parte Bank of Australasia, ante columns* 646, 647

And see generally under previous headings—LIQUIDATION and COMPOSITION WITH CREDITORS.

XXIV. APPEAL.

(1) *From Chief Commissioner and Courts of Insolvency.*

From Chief Commissioner.]—There is no appeal from the Chief Commissioner of Insolvent Estates direct to the Full Court sitting as a Court of Appeal. *In re Pascoe*, 1 W. & W. (I. E. & M.,) 121.

[Compare Sec. 12 of Act No. 379.]

Where Appeal Lies—From Appointment of Trustee—No. 379, Secs. 12, 55.]—An appeal will lie to the Supreme Court from an order of a judge of a Court of Insolvency under Sec. 55 of the "*Insolvency Stat.* 1871," confirming the appointment of a trustee, since by Sec. 12 of the Act it is intended that every order of such Judge may be appealed from. *In re Mackay*, 2 V.R. (I. E. & M.,) 22; 2 A.J.R., 130.

When Appeal Lies—Transfer of Proceedings—From Order in Chambers of a District Judge.]—An order was made under Sec. 10 of No. 379 for transfer of proceedings from District Court to Melbourne Court of Insolvency. Some time afterwards the assignee applied to District Judge in Chambers to rescind the order as made upon insufficient materials, which application was refused. *Held* that an appeal lay from such order in Chambers, but appeal dismissed with costs on ground of the assignee's failing to apply within a reasonable time. *In re Clarton*, 5 V.L.R. (I. P. & M.,) 47.

Where it Lies—Act No. 379, Sec. 12—Application for Certificate—Time of Hearing.]—An irregularity in the action of the Judge of an Insolvent Court as to the time of hearing an application for a certificate is not a ground of appeal to the Supreme Court. *In re Were*, 6 V.L.R. (I. P. & M.,) 43; 2 A.L.T., 30.

Where Appeal Lies—Refusal to allow Insolvent to be Examined on Certificate Proceedings.]—An appeal lies from a refusal to allow an insolvent to be examined on certificate proceedings. *In re Aarons*, 6 V.L.R. (I. P. & M.,) 56; 2 A.L.T., 51. *In re Patterson*, 7 V.L.R. (I. P. & M.,) 14; 3 A.L.T., 4.

There is no jurisdiction to hear an appeal on a certificate except the jurisdiction created by Statute. *In re Bateman, ante column* 577.

Discretion of Judge as to Accepting Affidavit of an Insolvent.]—*Per Molesworth, J.* "Subjects of such a kind are so discretionary upon facts which cannot be satisfactorily conveyed to a Court of Appeal, that I should be slow to entertain them." *In re Michael*, 5 A.J.R., 64.

Where Appeal Lies—Act No. 379, Sec. 12—Order of Judge after Expiry of Term of Office.]—An appeal will not be entertained against an order from a Judge of the Insolvency Court unless such order be drawn up. *Semble*, no such order can be drawn by an acting Judge after his term of office has expired. *In re Murphy*, 1 V.L.R. (I. P. & M.,) 50.

Act No. 379, Sec. 38, Rule 16—Service of Debtor Summons — Appeal or Prohibition.] — Where a person is aggrieved with a decision of the Judge of the Court of Insolvency as to service of a copy of a debtor's summons being sufficient, his remedy is by appeal, and the Supreme Court will not grant a prohibition in respect of defect in the service. *Ex parte M. S. Levy*, 1 V.L.R. (L.,) 271.

From Court of Insolvency—Question of Fact.]—Where there is evidence on which the Judge of an Insolvent Court might reasonably find a certain fact, the Supreme Court will not on appeal disturb his finding. *In re Summers, ex parte Hasker*, 10 V.L.R. (I. P. & M.,) 78.

From Chief Commissioner—Refusal to Grant Certificate—When Appeal Must be Made—7 Vic., No. 19, Sec. 20.]—When the Chief Commissioner of Insolvent Estates has refused a certificate, and the insolvent desires to appeal to the Court, he must do so at its next sittings, and the Court will not allow him to appeal at a later sitting on the ground of surprise. *In re Greenlaw*, 1 W. & W. (I. E. & M.,) 7.

[Compare Sec. 12 of Act No. 379.]

Appeal from Chief Commissioner—Time—7 Vic., No. 19, Sec. 20.]—The time to which the intending appellant must look under Sec. 20 of 7 Vic., No. 19, as the one from which to date "the next sitting of the Court," in appeal, is the time when the Chief Commissioner pronounces his decision, granting, suspending or refusing the certificate; and if the appeal be not made, or saved at "the next sitting," it is lost. *In re Klein*, 1 W. & W. (I. E. & M.,) 139.

[But *see* now Sec. 12 of Act No. 379.]

From Chief Commissioner—Initiation of Appeal.]—After the refusal by the Chief Commissioner of a certificate the "next sitting of the Court" was three days after such refusal. On the day of such sitting the insolvent's counsel did not "complain or appeal," but merely mentioned the case to the Court, and obtained an enlargement till the following "next sitting of the Court." *Held*, that there being no particular mode prescribed by the Act (7 Vic., No. 19, Sec. 20) for commencing an appeal, it is a sufficient initiation of the appeal to give the Court jurisdiction, for counsel at the next sitting of the Court merely to mention the intention to appeal, and ask, and obtain an enlargement till a subsequent sitting, and, that, on such a course being taken, the Court is sufficiently seized of the "complaint or appeal" to be enabled to adjourn it to a subsequent day. *In re Wilson*, 1 W. & W. (I. E. & M.,) 141.

Time for Hearing Appeals—Rules 1871, Rule 1.]—Notices of application to the Supreme Court in its Insolvent jurisdiction should be made before 3 p.m. to make them good for the day, otherwise they will be deemed to be made on the following day. *In re Rowley*, 3 V.L.R. (I. P. & M.,) 12.

Where the notice of appeal was served upon the respondent (assignee) personally, and upon the assignee's solicitor after 3 o'clock. *Held* to be good service notwithstanding Sec. 420 of Act No. 274, for there were no provisions limiting time for service upon the respondent. *In re Goldsmith*, 5 V.L.R. (I. P. & M.,) 18, 21.

Setting Down Appeal—Rules of 10th February, 1871.]—Where an insolvent gave due notice of appeal from an order refusing his certificate, but failed from poverty to set the appeal down for hearing within seven days as required by Rule 1 of the Rules of the Supreme Court in Insolvency of 10th February, 1871. *Held* that the appeal was too late, and the Court refused to hear it. *In re M'Intyre*, 6 V.L.R. (I. P. & M.,) 80; 2 A.L.T., 76.

Per Molesworth, J.—If some notice had been given to the opposing creditor that an application to hear the appeal would be made, I should have considered it. *Ibid.*

Deposit—Refusal of Certificate and Sentence to Imprisonment—Act No. 379, Sec. 12.—The provision in Sec. 12 as to lodging a deposit upon an appeal to the Primary Judge does not apply to an order refusing a certificate, even though the Judge of the Insolvent Court, in addition to the refusal, sentence the insolvent to imprisonment. *In re Goldsmith*, 5 V.L.R., (I. P & M.,) 18, 21.

See S.P., *in re Dyte*, 2 V.L.R. (I. P. & M.,) 424, *ante column* 697.

Service of Notice of Appeal—"Insolvency Stat.," No. 379, Sec, 12.]—Service of notice of appeal to the solicitor of the opposite party who had acted for him in the Insolvent Court, is good service under Sec. 12. *In re Dallimore*, 5 A.J.R., 1.

See S.P., *in re Cotton*, 6 V.L.R. (I. P. & M.,) 24; 1 A.L.T., 129.

From Court of Insolvency—Security for Costs—"Insolvency Stat. 1871," Sec. 12.]—On appeals from a Court of Insolvency under Sec. 12 of the "*Insolvency Stat.* 1871," the £20 deposit required by way of security for costs is rightly paid into the Court of Insolvency from which the appeal is brought. *In re Nichol and Payroux*, 4 V.L.R. (I. P. & M.,) 81.

Sending Case Back for Evidence.]—In an appeal from a Court of Insolvency, the case may be sent back to such court for further evidence. *Ibid.*

The directions in Sec. 12 of Act No. 379 as to forwarding the evidence, are only applicable to cases in which there is evidence. *In re Mackay*, 2 V.L.R. (I. E. & M.,) 22; 2 A.J.R., 130.

Act No. 379, Sec. 12—Remitting Case for Restatement.]—Where a case on appeal from a District Judge was vaguely stated, *Held* that the Court of Appeal had power to remit it for re-statement. *In re Ruddock*, 5 V.L.R. (I. P. & M.,) 51.

Appeal—Practice on.]—*Semble*, that on an appeal against the refusal of an insolvent's certificate it is strictly the practice for the appellant's counsel to open, and the counsel for the respondent to reply, and for the Court then to pronounce judgment. Where the appellant's counsel had been taken by surprise the Court allowed the appellant's counsel to reply. *In re Perry*, 1 W. & W. (I. E. & M.,) 150.

Appeal from Refusal of a Certificate—Practice—Taking Evidence on Appeal.] — On an appeal from the refusal of a certificate by the Commissioner under Act No. 273, there were no notes of the evidence taken before the Commissioner in consequence of his refusing to take them, and the Court having no power to make the Commissioner take such notes, re-heard the case and took evidence, upon which the appeal was allowed, and the certificate granted. *In re Green*, 1 V.R. (I. E. & M.,) 6; 1 A.J.R., 104.

Power to take Evidence on Appeal—"Evidence Stat., 1865," Sec. 45—"Insolvency Stat., 1871."]—A certificate of discharge had been granted to an insolvent by the Judge of the Insolvent Court. At the application the Judge refused to allow the insolvent to be examined. The insolvent appealed against an order by *Molesworth, J.*, suspending the order of discharge, and asked the Court to take evidence. *Held* that the Appeal Court could not examine witnesses as it was not a Court of re-hearing *In re Aarons*, 6 V.L.R. (I. P. & M.,) 56; 2 A.L.T., 51.

And *see* S.P., *In re Patterson*, 7 V.L.R. (I. P. & M.,) 14; 3 A.L.T., 4.

Practice on Appeal—Judge of Insolvent Court not Forwarding Reasons.]—On an appeal from an order of a Judge of the Court of Insolvency rescinding a previous order whereby he directed a transfer of proceedings from one district to another, the Judge had not forwarded his reasons for his decision, though the clerk of the Court had been written to for the Judge's reasons. *Held* that the appeal could not proceed unless the Judge forwarded his reasons, and case adjourned to enable him to do so. *In re Cottenham*, 1 A.L.T., 119.

Act No. 379, Secs. 12, 13—Appeal on Debtor's Summons—Insolvency Rules 1, 48—Papers—Affidavits—Certified Copies—Act No. 197, Secs. 20, 25.]—In an appeal on a debtor's summons from a District Court of Insolvency, the summons and affidavits were not before the Appellate Court, and the hearing was in consequence adjourned.

On a summons for a *mandamus* to bring them before the Court, *Held* that, under Rule 1, the words, "papers in the estate," include all papers connected with the matter in the custody of the chief clerk, whether strictly records or not; and that therefore they may be removed without a special order as required by Rule 48. *Semble*, at any rate affidavits are not proceedings "of" the Court within the meaning of Rule 48. Papers so forwarded through the post by registered letter are still constructively in the possession of the Court of Insolvency, which is one Court through the whole colony; that under Secs. 20 and 25 of Act No. 197, the appellant is not bound to procure certified copies of the original papers. *Mandamus* granted. *In re Portch*, 7 V.L.R., (I. P. & M.,) 126; 3 A.L.T., 50.

Costs of Appeal.—Where the law and practice as to debtor's summonses seemed very vague and unsettled, and one party appealed unsuccessfully, the Court allowed for his confusion, and did not visit him with costs of the appeal. *In re Fisher*, 2 V.R. (I. E. & M.,) 26, 33; 2 A.J.R., 130.

Where an appeal against an interlocutory order was made by way of motion, in which the appellant succeeded, and after the final order was made by the Judge of the Insolvent Court, the appellant appealed against this order, which was substantially the same as the interlocutory order, the Court of Appeal only allowed the successful appellant one set of costs. *In re Healey*, 2 V.R. (I. E. & M.,) 34, 41; 2 A.J.R., 132.

Appeal Against Order Refusing to Expunge Proof of Debt.]—Appeal dismissed with costs. *In re Hickinbotham*, 5 V.L.R. (I. P. & M.,) 101; 1 A.L.T., 84., *see* S.C., *ante column* 660.

Appeal Against Refusal of Certificate.] —*Molesworth, J.*, said he thought he had no jurisdiction to grant costs; at all events he would not exercise it. *In re Stocks*, 4 A.J.R., 173.

And *see in re Clarton, ante column* 713; and, *in re Cotton, ante column* 578, for other cases where appeal was dismissed with costs.

(2) From Primary Judge.

To Full Court.]—An appeal will lie to the Full Court from a decision of the Primary Judge upon an appeal to him from a decision of a Judge of an Insolvent Court. *In re Aarons*, 6 V.L.R. (I. P. & M.,) 56.

Appeal From Primary Judge in the Matter of a Certificate—Practice.]—On appeal from the Primary Judge in the matter of an insolvent's certificate, all the grounds adduced against him before the Commissioner are open in the Court of Appeal, although all of those grounds were not relied upon before the Judge before whom the matter came in the first instance, on appeal; and the insolvent ought to hold himself prepared to meet the whole of the case made against him. *In re Perry*, 1 W. & W. (I. E. & M.,) 150.

Practice on Appeal—What Questions May be Raised.]—The Full Court as a Court of Appeal only entertains questions raised in the notice of appeal, and will not allow objections taken and decided in the Court below to be opened up without notice. *In re Aarons*, 6 V.L.R. (I. P. & M.,) 56, 59.

Notice—19 Vic., No. 13, Sec. 5.]—A notice of appeal, under 19 Vic., No. 13, Sec. 5, which stated, in the words of the Act, that the grounds on which it was intended that the appeal should be made, were those briefly and distinctly set forth in the petition for appeal, though it did not in itself specify any grounds of appeal, was held sufficient. *Ex parte Gessner*, 1 W. & W. (I. E. & M.,) 183.

INSTRUMENTS AND SECURITIES STATUTE.

Interpretation and Construction — Sec. 98 — "Specialty."]—The word "specialty" in Sec. 98 of the "*Instruments and Securities Statute*, 1864," must be read as applying merely to deeds *ejusdem generis* with conveyances and mortgages. *Stacpoole v. Glass*, 1 V.R. (L.,) 195; 1 A.J.R., 154.

For other decisions on "*Instruments and Securities Statute*," *see* BILLS OF EXCHANGE, BILLS OF SALE, INSURANCE, GUARANTEE, MORTGAGE, LIEN, LIMITATIONS, STATUTE OF, and as to sections which enact the provisions of the "*Statute of Frauds*," *see* under CONTRACT, SALE, SPECIFIC PERFORMANCE, and VENDOR AND PURCHASER.

INSURANCE.

(A) Fire.

1. *Description of Property and Interest Insured.*

Omission of Material Fact—Knowledge of Insurers' Agent.]—J. wishing to insure his premises employed as his agent D., the agent of the insurers. The agent surveyed the premises, prepared and signed the proposal, and in doing so omitted a material fact as to the premises insured. D. was aware of this fact, but he, as the agent of the insurers, accepted the proposal, received the premium, and signed and gave J. an interim receipt, upon which a policy was issued. The premises were destroyed by fire, and J. sued on the policy. *Held* that the omission was made by D. as J.'s agent, but that the fact that D. was also the insurers' agent did not remove the effect of D.'s omission as J.'s agent; but that D., being at the time he accepted the proposal and received the premium as the agent of the insurers aware of the omitted fact, the insurers were bound by his knowledge, and were liable on the policy notwithstanding the omission. *Jones v. Queen Insurance Company*, 2 V.R. (L.,) 127; 2 A.J.R., 69.

Condition to Inform Company of Change in Nature of Occupancy.] — Where a building which was insured was described as a "farm-house," and the column for the name of the occupants was left blank, and there were no occupants at the time of the insurance being effected, and from then up to the loss, *Held* that this was no breach of a condition to inform the company of any change in the nature of the occupancy. *London and Lancashire Insurance Company v. Honey*, 2 V.L.R. (L.,) 7.

Chattel—Insurable Interest.]—*Semble*, that a legal interest in a chattel is not necessary to create an insurable interest in a person insuring the chattel; an equitable assignment based upon a loan or advance being sufficient. Either "a right in the property or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party," is sufficient, according to the authorities, to constitute an insurable interest. *Johnson v. Union Fire Insurance Company of New Zealand*, 10 V.L.R. (L.,) 154, 161; 6 A.L.T., 50.

(2) *In other Cases.*

Condition in Receipt Form—By Whom to be Performed.]—A receipt for the renewal of a premium of a fire insurance given by an agent contained the following condition:—"This temporary receipt has the full force of the company's policy (and is subject to its conditions) for fourteen days only from the date of issue; but on expiry of that time none other than the head office receipt will be acknowledged by the company." *Held* that the condition referred rather to the duty of the agent than to acts to be performed by the insured, in order to enable him to recover, and having paid the premium to a duly constituted agent, the insured could not be deprived of his right to recover by the condition. *Moore v. Halfey*, 9 V.L.R. (L.,) 400; 5 A.L.T., 129.

Condition on Policy—Construction.]—A policy of fire insurance provided "that from the date of these presents and until the 28th day of February, 1871 inclusively, and *no longer*," the company should be liable to pay for damages caused by fire. A condition was endorsed on it as follows—"On bespeaking policies, all persons shall pay the premium to the next half-yearly day, and from thence for one more year, at least, or shall make a deposit for the same, and shall, so long as the managers agree to accept the same, make all future payments annually at the said office within fifteen days after the day limited by their respective policies, *upon forfeiture of the benefit thereof.*" A fire occurred after the 28th of February, but before the expiration of the fifteen days mentioned in the condition. *Held* that the expression in the condition, "*upon forfeiture of the benefit thereof*," did not imply a continuance of the risk, in the face of the express declaration in the policy that the risk should last "*no longer*" than February 28th, and that the company was not liable. *Connell v. the Scottish Commercial Insurance Company*, 4 A.J.R., 168, 185.

Condition for Forfeiture if Action Not Brought Within Three Months After Rejection of Claim.]—G. sued on a policy, the 13th clause of which provided that, if the claim were not brought within three months after fire, or if made and rejected an action were not brought within three months after rejection, all benefit should be forfeited. The company pleaded that claim was rejected, and action was not brought within the three months. Judgment for the defendant. Demurrer to plea overruled. *Grieve v. Northern Assurance Company*, 5 V.L.R. (L.,) 443.

Inserting Name of Persons for Whose Benefit Insurance is Made—"Instruments and Securities Statute 1864," Sec. 46.]—A policy of fire insurance on a personal chattel is not within Sec. 46 of the "*Instruments and Securities Statute* 1864," and need not therefore have inserted in it the name of the person for whose benefit it is made. *Johnson v. Union Fire Insurance Company of New Zealand*, 10 V.L.R. (L.,) 154, 161; 6 A.L.T., 50.

Condition that False Statement Vitiates Policy—Practice—Direction to Jury—Burden of Proof.]—An action was brought upon a fire insurance policy which contained a condition that a false statement or declaration would vitiate it. The pleas averred that the plaintiff made a declaration which was false to his knowledge. *Semble* that the Judge should have told the jury that,

notwithstanding the statement in the pleas, it was not material that the plaintiff should have known the statement to have been false; that the plaintiff should in respect of this statement be held as responsible as if he had asserted what he knew to be untrue, and the *onus* of proof that the statement is true or false is shifted on to the plaintiff. *Meagher v. London and Lancashire Fire Insurance Company*, 7 V.L.R. (L.,) 390.

Conditions Endorsed on Policy—Construction—Alteration of Premises—Degree of Risk—Reduction of Damages.]—To an action on a policy of insurance against fire on goods it was pleaded that there was an alteration by erection of a stage, scenery, &c., by which "the degree of risk" was increased, and an additional premium required, and not allowed by endorsement, and that there was an alteration in the nature of the occupation by which an additional premium was required, and not allowed by endorsement. The alteration in the occupation was that from an hotelkeeper to that of the keeper of an hotel where theatrical performances were allowed. There was a verdict for plaintiff, and part of the damages assessed were in respect of a moveable floor, which the defendant, under a policy effected by the owner of the house, had reinstated after the plaintiff's term had expired or been determined. On leave reserved to enter a verdict for defendant on either plea, or to reduce the damages by the value of the moveable floor, *Held* that the language of the conditions being ambiguous since it was the language of the company must be taken most strongly against them; that though the chances of a fire might be rendered greater by the addition (owing to the increased space) still the degree of risk was not increased; that the change in the nature of the occupation was not to a more hazardous class, and that the damages should not be reduced by the value of the moveable floor. *Zeplin v. Anderson*, 4 A.J.R., 146.

Condition — Condition Precedent to Sue.]—A policy of fire insurance contained a condition that in the event of any difference arising in the adjustment of a loss, the amount (if any,) to be paid should be referred to arbitration, as therein provided. The company did not dispute the amount due, but repudiated any liability on the ground that the policy was void, owing to the concealment of material facts on the part of the insured. *Held* that an adjustment was a condition precedent to the right to sue. *London and Lancashire Insurance Company v. Honey*, 2 V.L.R. (L.,) 7.

Alteration of Policy — Notice — Knowledge of Assured.]—A fire policy contained a clause that the assured should give notice in writing to the company previous to a loss occurring, "if anything occurred on the premises insured, or on those adjacent thereto, within the knowledge of the assured, after an assurance has been effected whereby the risk in which the company is interested shall in any way be increased, and have such alterations allowed by endorsement, and in default of such notice and endorsement the policy will be void." The insured, after the risk attached, and before loss, introduced gasoline on his premises, whereby the risk was increased; but gasoline was a new substance, the dangerous character of which was unknown to the insurers, the insured, and the general public. *Held* that the question of knowledge did not arise, and only had reference to what occurred on the adjacent premises; and that th insured could not recover for the loss. *Hillerman v. National Insurance Company*, 1 V.R. (L.,) 155; 1 A.J.R., 134.

Covsnant to Insure—"The Landlord and Tenant Statuts 1864," Sec. 15.]—It is still very material for landlords to enforce the insurance being in thiernames, although "*The Landlord and Tenant Statute* 1864," No. 192, Sec. 15, much diminishes the probability of their suffering by the opposite. *Per Molesworth, J. Gutheil v. Delaney*, 8 V.L.R. (E.,) 13; 3 A.L.T., 91.

Covenant to Insure—Name of Insurer.]—G., a lessee under covenant with his lessors, S. and D., to insure the demised premises in the name of his lessors, obtained a policy in the name of "G. as *lessor* in terms of the lease granted by S. and D. as lessees." *Held*, an insurance in the name of G., the lessee, in spite of the blunder in transposing the names of *lessor* and *lessee*, the policy showing that the insurance company understood it as in compliance with the covenant in the lease. *Ibid.*

Covenant to Insure—Relief Against Breach.]—Where a lessee under a covenant to insure the demised premises in the names of his lessors had without fraud or gross negligence insured in his own name, relief against the breach was granted under the "*Real Property Statute* 1864," No. 213, Sec. 218, on the terms of the lessee paying the cost of Police Court proceedings to evict him, and all the costs of the suit. *Ibid.*

Concealment of Material Fact.]—An omission to fill in any answer to the question in a proposal whether the insured had ever been a claimant upon any fire insurance company (the insured having, in fact, been so) is not a concealment of a material fact which would vitiate the policy. *London and Lancashire Insurance Company v. Honey*, 2 V.L.R. (E.,) 7.

Reinstatement of Partially-destroyed Premises—Second Fire—Liability of Insurer.]—S. insured his house with a company, and, during the currency of the policy a fire occurred on the premises, which were partially destroyed. The company elected to re-instate, and expended a considerable sum in so doing; but, before completion, a second fire occurred, also during the currency of the policy, and totally destroyed the house. In an action on the policy, the company claimed to deduct the amount expended in re-instatement from the value of the policy. *Held* that they were not entitled so to do, but must make good the loss occasioned by the second fire up to the amount insured by the policy. *Smith v. Colonial Mutual Fire Insurance Company*, 6 V.L.R. (L.,) 200.

Liability for Fencing Pulled Down to Prevent Fire Spreading—Fixtures.]—A policy of insurance against fire contained the following condition:—"The directors, or any other persons on behalf of the company, in case of any fire breaking out, may break into or pull down any house or building, and take or carry away any goods, merchandise, or other effects belonging to the assured, and use all their power, and all proper ways and means, for the most speedy extinguishing of such fire, and securing any house or building, goods, merchandise, and effects, the company paying the damage which shall be done thereby, or their rateable proportion thereof." H. insured his shops under the policy, and a fire having broken out and destroyed the shops, the company rebuilt them; but H. sued for further damages, on the ground that the company had, through the firemen, pulled down certain fencing for the purpose of stopping the fire from spreading, and that they were liable for shelves and counters which had been burnt, and which H. contended were fixtures, and should be included in an insurance on the buildings. *Held* that the shelves and counters were not fixtures, but merely trade fixtures, and that to entitle H. to recover for the fencing, he must show that the company had either authorised some person to pull it down, or recognised the act afterwards; and that, there being no authorisation or recognition, H. could not recover. *Harding v. National Insurance Company*, 2 A.J.R., 67.

Policy on Goods—What May be Recovered for—Moveable Floor.]—Where a moveable floor which had been supplied by the company under a policy effected by the owner of the house had been reinstated by the company after the expiration or determination of the plaintiff's term, and was burned, the plaintiff was held entitled to recover its value in an action on a policy against fire on goods in the house. *Zeplin v. Anderson*, 4 A.J.R., 146.

Person with Limited Interest in Chattel Insured—Amount Recoverable.]—A person insuring a chattel, and having only a limited interest, must, if he insure to the full value, intend to insure the entire interest at the time he effects the insurance, otherwise he would recover more than an indemnity for his own loss, and he would not be liable to the other parties for the balance. The contract being one of indemnity there is no legal principle which forbids the insured to enter into a contract to protect the insurable interests of other persons interested, provided he intends so to protect them at the time of the contract. But if even without instructions or without its being known for whom he is a trustee, or where the interests of others are contingent only, a person having a limited interest who insures for the full value intending to protect the vested or contingent interests of others, the contract will be valid, and if the chattel is wholly destroyed the value of the whole must be made good, and the insured will hold the surplus after applying so much as will cover his own interest as a trustee for those whose interest he intended to protect. *Johnson v. Union Fire Insurance Company of New Zealand*, 10 V.L.R. (L.,) 154, 161, 162; 6 A.L.T., 50.

(B) Life.

1. *Assignment Mortgage and Gifts of Policies.*

Assignment—"Life Assurance Companies Act 1873," No. 474, Secs. 39, 40, Sched. 12—Equitable Assignment Before the Act.]—D., in 1869, being indebted to the plaintiffs, deposited a policy effected on his life, and agreed to assign it to them on request as security. In July, 1874, D. signed a memorandum endorsed on the policy to the effect that he transferred all his right, title, &c., in the policy to the plaintiffs, but such memorandum was not in the form prescribed in the schedule to the Act No. 474. After D.'s death the plaintiffs applied to the insurance company for payment, which they were willing to make with the consent of D.'s administratrix, which consent she refused to give. Bill by plaintiffs. *Held* that the Act No. 474 was not retrospective, and that though the memorandum on the transfer being informal under the Act was not sufficient to pass the *quasi* legal estate in the policy, yet the equitable rights acquired by plaintiffs before the Act were not affected. *Ettershank v. Dunne*, 5 V.L.R. (E.,) 99.

Assignment—How Affected by "Life Insurance Companies Act 1873."]—Prior to the "*Life Insurance Companies Act* 1873," No. 474, policies of life insurance were regarded as *choses in action* assignable in equity, and an assignee of one took only the rights of the assignor, and was subject to all equities against him without having notice of them; and that Act does not take such policies of insurance out of the general principles applicable to *choses in action*. *Evans v. Stevenson*, 8 V.L.R. (E.,) 108; 3 A.L.T., 93, 130.

Per Molesworth, J., Semble, that Secs. 39 and 40 only provide for the protection of insurance companies from confusion of claims of ownership of moneys payable by them, but not for adjusting the rights in those moneys as between transferor and transferee. *Ibid*, at p. 115; 3 A.L.T., 93.

Mortgage of Policy—Act No. 474, Secs. 39—Death by Assured's Own Hand—Notice of Assignment.]—W. insured his life for £2000, and on the policy was endorsed the following condition:—"In the event of the assured dying by his or her own act (sane or insane) . . . . this policy shall become void and of no effect except as to the extent of any *bonâ fide* interest which at the time of such death shall be vested in any other person or persons for his, her, or their own benefit for a sufficient pecuniary or other consideration, upon satisfactory proof of the creation, existence, and extent of such interest; *provided that* notice of such interest shall have been received by the company within fourteen days of the date of its inception, and provided that such notice shall have been given before the death of the assured." W. being indebted to the defendant bank, assigned the policy by an assignment in the

statutory form given in Sch. 12 to Act No. 474, on August 16th, 1876, and the assignment was registered on September 6th, but there was evidence pointing to the fact that the policy, with the endorsed assignment, was lodged for registration on August 28th. Later in August, 1876, W. mortgaged certain land to the bank. W. was, on June 7th, 1877, found dead by a gunshot wound, the evidence pointing to the fact of suicide. Letters passed between the bank and the insurance company, the company disputing its liability to the bank on the ground of the fourteen days' notice mentioned in the condition not having been given. Subsequently the bank and company effected a compromise by which the company were to purchase the mortgaged land for £1170, and the bank was to surrender the policy for the sum of £1293—these two sums making up the whole of W.'s indebtedness to the bank. Suit by W.'s representative, seeking to make the bank liable as mortgagee for the full value of the policy (£2000,) and seeking accounts as on that basis. *Held, per Molesworth, J.*, and affirmed on appeal, that the bank was entitled to make the best of its securities, and to enforce them in such order as it might think fit, and was not bound to enter into litigation with the company to enforce the recovery of the policy moneys. *Semble, per Molesworth, J.*, that it was the bank's duty as mortgagee to take care that the fourteen days' notice was given. *Held*, per the *Full Court*, that the notice required in the condition was a notice, not of the ostensible but of the real interest, in order to avoid a forfeiture in the event of suicide, and that the statutory notice given under Sec. 39 of the Act was not such a notice; that, in fact, the notice required by the policy was not given; and that in such a case the bank as mortgagee was not under any obligation as to the mortgagor to give the notice required in the policy. *Walpole v. the Colonial Bank*, 10 V.L.R., (E.,) 315, 325, 327, 329; 6 A.L.T., 147.

2. *Actions on Policies.*

Who May Sue—Policy Payable to Third Party.]—In a policy of insurance made by deed poll, and reciting that B. had agreed to effect a policy on his life, and to pay premiums, it was witnessed that the society would pay to M. the sum assured. M. sued on the policy. *Held* that being a deed poll, and it being ambiguous with whom the society covenanted, it must be construed as being a covenant with the person to whom the money was payable, and that M. might sue upon it in his own name. *Moss v. Legal and General Life Assurance Society*, 1 V.L.R. (L.,) 315.

When Maintainable—Untrue Statement.]—In a proposal for life assurance the question, "Have any of your near relatives died of consumption, or been afflicted with insanity?" was answered, "No; all still living;" and at the end of the proposal there was a declaration by the assured that the above statements were true in every respect, and he thereby agreed that the declaration should be the basis and should form part of the contract between him and the company. It was proved that a brother of the assured had died of temporary insanity, and that the assured was aware of it when he signed the declaration. *Held, per Stawell, C. J.*, and *Barry, J.* (*dissentiente Williams, J.*) that the statement was calculated to mislead on a material matter, the statement "all still living," though not in answer to a question, being material, and having been proved to be untrue within the knowledge of the applicant, the policy was invalid. *Graham v. Wright*, 3 V.R. (L.,) 79; 3 A.J.R., 49.

3. *Persons Entitled under Policies.*

Persons Entitled under "Life Assurance Companies Act 1873," Sec. 37.]—*Semble, per Molesworth, J.* The persons entitled to the £1000 protected by Sec. 37 of the "*Life Assurance Companies Act* 1873," in the event of the insolvency of the insured, are his next of kin. *Davey v. Pein*, 10 V.L.R. (E.,) 306, 308; 6 A.L.T., 131.

(c) Marine.

I. Policies.

1. *Re-insurance.*

Action Against Re-insurer—Matters of Defence.]—The re-insurer is entitled to make the same defence to an action brought against him on the second policy as the original insurers might on the first policy. The practice of inserting a provision in policies of re-assurance that the re-assured shall only be obliged to produce evidence of payment of the loss, and the re-assurer will be bound to refund it, confirms this principle. *Universal Marine Insurance Company v. Miller*, 3 W.W. & A'B., (L.,) 139.

Followed in *National Marine Insurance Company v. Halfey*, 5 V.L.R. (L.,) 226; where the Court had brought to its notice a recent case decided otherwise by the Supreme Court of New South Wales.

Condition that Insurer should not be Liable for Total Loss unless Estimated Value of Repairs exceeds the Declared Value.]—Action on policy of re-insurance valued at £4000, with a proviso that the plaintiff company would not be liable as for a total loss unless the estimated value of ship's repairs exceeded her value in the policy, and there were general averments of total loss by perils insured against and performance of conditions precedent. The pleas by the defendant company were that there had been no total loss and no notice of abandonment. The plaintiff company recovered a verdict. *Held* that the fact that the repairs exceeded the declared value was contained in the general averment of all conditions precedent, and that this fact should have been specially traversed, and that plaintiffs were not called upon to prove it. *National Marine Insurance Company of South Australia v. Australian Alliance Insurance Company*, 5 V.L.R. (L.,) 426; 1 A.L.T., 99.

2. *Valued Policy.*

What is or is Not.]—A policy was effected on freight, and the *interim* insurance (cover) note contained the words "have this day insured

the sum of £400 on freight." No policy was drawn out, but the parties rested content with the cover note. *Held* that this was an open and not a valued policy. *Ross v. Adelaide Insurance Company*, 1 V.R. (L.,) 232; 1 A.J.R., 170.

Cost of Repairs—Position of Jury.]—In estimating the costs of repairs of a stranded ship under a valued policy only making underwriters liable when the cost of repairs exceeds the declared value, the jury alone are in a position to enter into the question of the costs, and for that purpose may accept the highest estimate of a witness for the plaintiff against the opposing evidence of defendant's witnesses if they place the greatest reliance upon the skill and judgment of such witness. *Corr v. Standard Fire and Marine Insurance Company*, 7 V.L.R. (L.,) 504, 528, 529, 531.

3. *Construction and Duration of.*

Of Re-insurance—"Valued at £6000, Insured Only for £4000."]—A company effected a re-insurance upon a vessel with A. and others. In the proposal the company stated, "valued at £6000, insured only for £4000," and also set out the amount re-insured in various other offices. The vessel had originally been insured with the company by the mortgagors of the vessel, and it eventually turned out that the mortgagee had unknown to the company insured the ship in another office. No policy was issued by the company in the original insurance with the mortgagor, or on the re-insurance with A. and others. In an action by the company upon a loss to recover from A. and others the amount reinsured by them, *Held* that the words "insured only for £4000" referred to the risk which had been taken by the company, and part of which they applied to A. and others to re-insure; that their being placed in collocation with the value was merely to show the risk the company retained, and that they were not intended as a warranty that no other insurances existed upon the vessel, and judgment for the company. *Pacific Insurance Company v. Anderson*, 5 W. W. & A'B. (L.,) 61.

Affirmed on appeal to Privy Council, N.C., 37; 21 L.T. (N.S.,) 408.

Description of Goods Insured — Specific — "Horses."]—In a policy of marine assurance on horses, the horses were insured for a bulk sum, and were warranted free of jettison and mortality and free of particular average unless occasioned by the ship being burnt, sunk, or stranded. Twenty-six of the horses died on the voyage, and the insured sued for payment on the policy. *Held* that "horses" was a specific and not a generic description, and that the insured, therefore, could not sue on the policy unless all the horses died. *Lempriere v. Miller*, 2 V.R. (L.,) 26; 2 A.J.R., 18.

On Merchandise per Ship or Ships—Election—Declaring on what Ship.]—Where a policy of insurance is made upon merchandise per ship or ships from one place to another for a certain period, it is the duty of the assured, before he can recover for a loss, to elect or determine to which of several ships the risk shall attach, if not before the ship in respect of which he seeks to recover sails, at anyrate before any loss is known. Such election must be by express words, or by an act, and under such circumstances as to show that the matter has been irrevocably determined, though such election need not be communicated to the underwriters. A usage, however, that the assured must, before loss, declare his election to the underwriters, is reasonable, and consistent with such a contract. *Anderson v. United Insurance Company*, 2 V.L.R. (L.,) 129.

Time Policy—Permission in Writing to go to an Open Roadstead—Several Visits—Ambiguity—Parol Evidence.]—A ship was insured under a time policy, which was voidable if open roadsteads should be visited without permission in writing of the insurers. The insured obtained permission in writing to visit two ports, and as to the latter of which there was a latent ambiguity in the description, it not being clear whether the permission extended only to that port or to the whole of an island near which it was situated, such port not being itself an open roadstead, though a port in the island was. The ship visited the port in question in the island, was driven away by stress of weather, came back and left again twice, once for water and once for provisions, on each occasion for the men engaged in cutting down the timber which was to form the cargo. On the visit for provisions to one of the ports mentioned in the permission she was wrecked. *Held* that parol evidence was admissible to explain the latent ambiguity in the permission as to what place was intended, and that it was competent for the insured to revisit the prohibited port if compelled to leave it before the business there was completed, and that the insured could recover. *Wright v. Imperial Marine Assurance Company*, 6 V.L.R. (L.,) 334; 2 A.L.T., 65.

Quære, whether such a permission under a time policy has the effect of excepting the port to which the permission extends from the prohibition for the remainder of the term of the policy. *Ibid.*

II. Risks Insured Against and Amount Recoverable.

Policy Under Seal—Declaration of Interest Not Under Seal Covering a Lesser Risk.]—P., by his agents, effected a floating policy of insurance under seal over goods "to be shipped at and from Melbourne to port or ports in New Zealand, as interest might appear to be declared on shipments." By an unsealed instrument P.'s agents declared as on an amount of £462 10s. per *Goldseeker* to Hokitika, sea risks only; and on another part of the instrument, unsealed, completing the agreement, it was declared that "Risk was to cease on arrival at outer anchorage." There was a lower rate of insurance to the outer anchorage at H. than at the wharf, and the "G." was lost between the anchorage and the wharf. In an action by P. against the insurance company, *Held*, in answer to the plaintiff's contention, that the

two unsealed documents, comprising the agreement as to declaration of interest, could not operate as an alteration of the policy under seal; that, unless the declaration of interest was accepted such as it was, there was no policy at all; that the plaintiff must accept the declaration as a whole; and, taken as a whole, the declaration of interest only covered the lesser risk, so that *quâcunque viâ* the plaintiff must fail. *Pizzey v. Southern Insurance Company*, 6 W.W. & A'B. (L.,) 125.

Horses and Fodder in One Policy—Consumption of Fodder Before Loss.]—Horses and fodder were insured in one policy and the horses had to be jettisoned. Before the time of the loss a large part of the fodder had been consumed. *Held* that the insurers were not liable for the amount of such fodder. *Warren v. Swiss Lloyd's Insurance Company*, 9 V.L.R. (L.,) 397; 5 A.L.T., 123.

Evidence of Usage—Deck Cargo.]—*Per Higinbotham J.* Where a usage to carry horses on deck is proved, the insured may carry any number on deck consistent with the safety of the ship. *Per Williams, J.* The evidence to rebut the *primâ facie* presumption that goods are to be carried in the hold should be very conclusive. *Ibid.*

III. Interest of Assured.

What is Sufficient Interest in a Charter Party Agreement.]—S. chartered a ship for a voyage from Melbourne to London by an agreement which provided that freight should be paid at the lump sum of £2700, £500 cash, the remainder to be secured by bills of lading to the satisfaction of the master, and in the event of the same not amounting to the required sum the balance should be paid by the plaintiff before the ship left Melbourne; and after the payment of the £500 should the amount of freight as per bills of lading exceed the balance (£2200) the master was to give to S. an order on the owners for the surplus. The £500 was paid, and the amount of freight as per bills amounted to £2809, and the master gave an order for £609. S. insured his interest in the agreement for £500 as against total loss, but the bill alleged that the defendants inserted in the policy by mistake and contrary to the terms of proposal the additional condition of "by total loss of ship only." The ship took fire on the voyage and the total freight earned was insufficient to leave any balance in plaintiff's favour. On a bill for rectification of the policy, *Held* on demurrer by the full Court, reversing *Molesworth, J.*, that the plaintiff had an insurable interest. *Solomon v. Miller*, 2 W.W. & A'B. (E.,) 135, 140.

What is Sufficient—Where Insurer has Assigned Charter-party as Security.] — W. chartered a vessel, and assigned the charter-party as security to his agent for advances made by the agent to W. Whatever was recovered on the charter-party was to be set off against the advances; if more were recovered, the balance would be paid to W.; if less, W. would still be indebted to the agent. *Held* that, as between a *quasi* mortgagor and mortgagee, W. had an insurable interest, since the property was in him absolutely in the first instance, and he had transferred it to the agent only as security, leaving in himself an interest or equity, which was insurable. *Ross v. Adelaide Insurance Company*, 1 V.R. (L.,) 232; 1 A.J.R., 170.

IV. Warranties.

Position of Ship—"At Sea."]—A ship having departed from *Grafton*, a port situated on the Clarence River, forty miles within the bar, her owner, on the 12th November, insured her from Grafton to Melbourne, and a cover note was as follows:—"F. has this day insured the sum of £200 on hull, &c., per *Sarah*, from *Grafton* to *Melbourne*, extension of time policy expiring 15th November, *vessel being at sea*, in terms of proposal." As a matter of fact the vessel did not cross the bar till December 23rd. The owner sued on the policy upon a subsequent total loss. *Held* that the words "at sea," meant that the vessel had left Grafton, and that the owner could recover on the policy. *Fisher v. Adelaide Insurance Company*, 2 V.R. (L.,) 90; 2 A.J.R., 61.

V. Abandonment.

Notice of Loss—New Trial.]—Following a *dictum* of *Lord Ellenbrough* in *Parmenter v. Todhunter* (1 Camp., 541) the Court made absolute a rule *nisi* for a new trial where it appeared that the opinion of the jury had not been taken as to whether the word "abandonment" was used or not in a verbal notice of loss given by the owners of a wrecked ship to the agents of the insurance company. *Clough v. Salier*, 1 W. & W. (L.,) 232.

Notice of Abandonment—Taking Possession—Valued Policy—Total or Partial Loss.]—Although insurers may take possession of an abandoned ship for repairs only, provided they avow the purpose for which they take her, and having repaired her properly and sufficiently may then compel the owners to take her back—notwithstanding due notice of abandonment having been given—yet they are bound to complete the repairs effectually and within a reasonable time; if they do not it is as if they had not repaired at all, and their act in taking possession would be strong evidence of an acceptance of abandonment; they cannot even by proper repairs if insufficient convert a total into a partial loss. *Corr v. Standard Fire and Marine Insurance Company*, 7 V.L.R. (L.,) 504, 530.

Notice of—Valued Policy—Repairs Exceeding Declared Value — Constructive Total Loss.]—A clause in a valued policy provided that in case of damage the insurers should not be liable as for a total loss unless the estimated cost of repairing such damage should exceed the declared value of the ship. *Held* that such clause did not affect the right of the assured to abandon in the case of a constructive total loss, the rights to abandon and to recover after abandonment being distinguishable, and the actual value of the ship when repaired and not the value in the policy is to be regarded in

considering whether abandonment is justified. *Ibid*, pp. 504, 538.

Notice of Abandonment—Who May Give—Position of Assured.]—*Semble*, the master of a ship has no power to give the underwriters notice of abandonment, but *quære*, whether an agent of the assured who effected the policy is authorised to give such notice, but the assured are allowed a reasonable time after receiving notice of the loss, and sufficient information to form a judgment to decide whether they will give notice of abandonment. *Ibid*, pp. 532, 536.

VI. Deviation.

What Is.]—An insurance was effected on goods, on a voyage from Melbourne to Java, with liberty to call in at King George's Sound, or Perth—not at both. The crew were shipped for Sumbawa, not for Java, and the ship was cleared for Java, *via* King George's Sound, having goods on board for Perth. One of the partners in the firm insuring the goods appeared on board at the Port Phillip Heads. On the pretext of having left the register behind, the master put into King George's Sound, although it was not necessary to go there for such a purpose, and on leaving Perth, the partner on board told the master to go to Tin Sing. They then touched at various places in Australia and elsewhere. *Semble*, that this was a deviation. *Moore v. Graham*, 5 W.W. & A'B. (L.,) 229.

VII. Premiums.

Interim Receipt for Premium—Where it Renders Insurer Liable.]—Where an insurance company gave an insurance broker an *interim* receipt for the premium of insurance, which receipt purported to have the effect of a policy until the policy was issued, and the premium was not, in fact, paid; but it was proved that the company was in the habit of giving credit to brokers, *Held* that the liability of the company was complete. *Moore v. Graham*, 5 W.W. & A'B. (L.,) 229.

VIII. Barratry.

When a Bar to Action on Policy.]—A barratrous abandonment of the voyage by the master, instigated by a member of the firm owning goods insured for the voyage, although the intention to commit such barratry was not manifested, and could not be determined till a date after the date of an order *nisi* sequestrating the firm's estate, will debar the official assignee of the firm from recovering the amount insured. *Moore v. Graham*, 5 W. W. & A'B. (L.,) 229.

Action for Loss by—Who May and Who May Not Maintain.]—The assignee of an insolvent firm cannot maintain an action upon a contract of insurance effected by the firm where the loss, the subject of the action, was caused by barratry of the master, who was instigated thereto by a partner in the firm. *Ibid*, p., 232.

IX. Actions on Policies.

Action—Plea—When Bad.]—A marine policy contained a clause as follows:—"Claims for losses or average to be payable by the company at three months after settlement of the same." On action by the insured the declaration averred, *inter alia*, "That all conditions had been fulfilled, and all things happened to enable the plaintiffs to be paid." The defendants pleaded "That three months after settlement of the claim of the plaintiffs for the said alleged loss had not elapsed before suit." *Held*, on demurrer, that it was bad, for not stating affirmatively the settlement, or facts dispensing with the settlement; and judgment for plaintiffs. *Clough v. Hopkins*, 1 W.W. & A'B. (L.,) 55.

Action on Policy—Declaration—Exceptions to Liability.]—If, in a policy of insurance, the exceptions to the company's liability form a substantial part of the contract, a declaration on the policy must negative the exceptions. *Osborne v. Southern Insurance Company*, 1 A.J.R, 160.

"Burning"—Question for Jury.]—In an action on a policy of insurance upon goods loaded on a ship for a voyage free from average unless general, or the ship be "burnt, sunk, or stranded," it appeared that part of the goods had been damaged by spontaneous combustion, and that part of the ship bore marks of burning. *Held* that the question whether the ship was "burnt" was one for the jury. *Service v. Mercantile Marine Insurance Company of South Australia*, 4 V.L.R. (L.,) 436.

INTEREST.

On Judgment.]—A defendant having obtained leave to appeal to the Privy Council on paying into Court the amount of the judgment and one year's interest, the appeal was kept pending for two and a-half years, and then allowed to lapse for want of prosecution. *Held* that the plaintiff was entitled to issue execution for the interest which had accrued from the expiration of the year for which it had been paid into Court till the date of the arrival of the certificate from the Privy Council that the appeal had lapsed. *Smart v. O'Callaghan*, 4 V.L.R. (L.,) 448.

On Mortgages.]—*See* Mortgage.

Amount of Policy Paid into Court in Interpleader Suit—Interest Should be Paid in as Well.]—*Australian Mutual Provident Society v. Broadbent*, 3 V.L.R. (E.,) 138, *post* under Interpleader.

Rate of When Ordersd by Court.]—When the Court orders interest to be paid, it will be at 8 per cent., and not "bank interest." *Ashley v. Cook*, 6 V.L.R., (E.,) 204; 2 A.L.T., 2.

Justices Have No Power to Allow Interest on Money Lent.] — *See Wilson v. Crawley*, 2 W. & W. (L.,) 78, under Justice of the Peace —Jurisdiction and Duty—In other cases.

In What Manner Creditors Entitled to Interest on their Debts Under Deed of Assignment—How Paid.]—*See Heape v. Hawthorne*, 2 W.W. & A'B. (E.,) 76, 87, 89, *ante column* 344.

INTERNATIONAL LAW.

As to Domicil.]—*See* DOMICIL.

Jurisdiction Over Foreign Court.]—*See* FOREIGN LAW AND FOREIGNER.

INTERPLEADER.

In What Cases—Shareholder in a Company—Suit to Compel Registration.]—The benefits of interpleader are confined to cases where actions have actually been commenced against the stakeholder, or legal proceedings have been threatened by adverse parties, and do not extend to a case where the plaintiff only has proceeded against a company, and where all that the other party claiming to interplead had done was to write to the manager of company requesting him not to deal with the shares. *Eddy v. Working Miners' Gold Mining Company*, 2 W.W. & A'B. (E.,) 110.

"Common Law Procedure Statute," Sec. 189—Defendant Taking an Indemnity From a Claimant.]—S. had goods deposited for custody in his bonded stores. The first purchasers of the goods failed, and then the vendor served upon S. a notice to stop delivery, containing also an undertaking to indemnify S. S. did not reject the indemnity within a reasonable time. An ultimate purchaser sued S. for the goods. *Held* that S. was not, under the circumstances, entitled to an interpleader order. *Smythers v. Stewart*, 5 A.J.R., 139.

Interpleader Summons—"Justices of the Peace Statute 1865," No. 267, Sec 121.]—C. obtained a justice's order, October 30th, for payment of money owing him by B., and G., a constable, seized B.'s goods under a warrant to execute the order, and sold them. B. had, on October 19th, executed a bill of sale of these goods to McG., and McG. claimed the proceeds of the goods from G. G. then took out an interpleader summons. The justices in petty sessions awarded that C. should pay McG. the value of the goods. *Held*, on appeal, that Sec. 121 makes the constable a stakeholder, but that as soon as he voluntarily parts with the goods he ceases to be a stakeholder, and that the justices should have dismissed the summons. Appeal allowed. Summons below dismissed. *Cousens v. McGee*, 4 W.W. & A'B. (L.,) 29.

Interpleader Summons Dismissed by Justices—No Notice to Plaintiff of Summons—Plaintiff Not Bound by Dismissal.]—*See Maritime General Credit Company v. Rands*, 1 A.J.R., 79; *ante column*, 253.

Summary Determination—Largeness of Amount—"Common Law Procedure Statute 1865."]—The "*Common Law Procedure Statute* 1865" is silent as to the amount on which the jurisdiction of the Judge upon an interpleader summons in Chambers to determine the matter on its merits in a summary way depends, and no definite limit is fixed. The matter is one for the discretion of the Judge, and that having been exercised the Court will not interfere unless it appears clearly that the Judge was mistaken or misled. *Carter v. Sternberg*, 10 V.L.R. (L.,) 33; 5 A.L.T, 176.

Interpleader Summons Before Justices—Nearest Court—Act No. 565, Sec. 15—How Nearness of Access Determined.]—*Regina v. Kavanagh, ex parte Comrie*, 6 V.L.R. (L.,) 179; 2 A.L.T., 7, *post* under JUSTICE OF PEACE—Procedure on Summary Jurisdiction.

Amendment—Consent Order—Mistake.]—In an interpleader summons an order was made by consent that "the Sheriff do withdraw from possession," and that J., the trustee under a deed of settlement made by the execution debtor (M.,) should be allowed his claim. It appeared that the words "that the claimant's claim be allowed" were not noticed by the town agent of W.'s solicitor—W. being the execution creditor. W. brought a bill in equity seeking to set the deed aside when the order was set up by the answer as a defence. On a summons to amend the order by striking out the words "that the claimant's claim be allowed," *Held* that as both parties saw the order and consented to it, and as a considerable time elapsed before the application was made for amendment, the application could not be allowed; that no amendment to the effect "without prejudice to any equity suit" could be allowed, as the equity suit did not appear to be in the contemplation of both parties. *Williamson v. M'Ravey*, 7 V.L.R. (L.,) 150; 3 A.L.T., 5.

Motion to Put Matter in Course of Inquiry—Payment into Court—Costs.]—B. effected an insurance on his life in the office of the plaintiff society, and deposited it with a bank to secure an overdraft, and subsequently, by indenture, assigned it to C. and D., subject to the claim of the bank. Notice of this assignment was given to the insurance society. The bank also gave notice of its claim. B. died, and the defendant (his executrix) received the policy from the bank, but the bank refused to release their claim. The defendant then brought an action on the policy against the insurance society, when the insurance society instituted an interpleader suit after paying amount of policy moneys into Court, and obtained an *ex parte* injunction. Upon motion to put matter in course of inquiry for payment of plaintiff's costs, and for leave to pay in interest on the amount of the policy moneys which had been claimed by the defendant executrix in her action, *Held* that this was the proper course, but that interest should have been paid in with the principal; and though the insurance society was entitled to its general costs, it was not under the circumstances entitled to its costs for the injunction or for the motion. *Australian Mutual Provident Society v. Broadbent*, 3 V.L.R. (E.,) 138.

Evidence — New Trial.]—H., an execution debtor, was owner of a hotel. In 1877 H. pur-

chased the furniture in it on behalf of K., and with moneys furnished by K., and gave evidence that the hotel was leased to K., and the business carried on by K. H. corroborated this, and stated in cross-examination certain facts which were inconsistent with his statements in the examination in chief as to who had managed the hotel, and was contradicted in some parts of his evidence by witnesses called for the execution creditor. In an interpleader issue, the jury found for the execution creditor. *Held*, on rule *nisi* for new trial, that the proof adduced by the execution creditor did not disturb the fact that goods in question were purchased for claimant by money given expressly for the purpose. Rule absolute. *Kroschel v. Colonial Bank*, 5 V.L.R. (L.,) 174; 1 A.L.T., 11.

Practice Under "Judicature Act"—"Supreme Court Rules, 1884," Order 57, Rules 13, 15—Sheriff's Costs.]—Under the rules a Judge has power to make provision in an interpleader order for costs and fees of Sheriff. *See* also for form of order. *Solomons v. Mackenzie*, 6 A.L.T., 69.

"INTERPRETATION ACT."

Act 21 Vic., No. 22, Sec. 6—"Real Property Statute 1864," No. 213, Sec. 98.]—*Molesworth, J.*, appeared to act on Sec. 6 of No. 22, by reading "newspapers" in Sec. 98 of Act No. 213 as "newspaper." *In re Mahood's Estate*, 4 V.L.R. (E.,) 56.

Act No 22, Sec. 6—"Common Law Procedure Statute," No. 274, Sec. 307.]—It was urged in argument that in Sec. 307 of Act No. 274, making provision for a "party" filing a memorial of a judgment the word "party," by the force of Sec. 6 of Act No. 22, included a corporation, and the Court *held* that the word "party" did include a corporation. *Ruby Extended Tin Mining Company v. Woolcott*, 6 V.L.R. (L.,) 301.

Act No. 22, Sec. 6—"Licensing Act," No. 566, Sec. 38.]—The word "owner" in Sec. 38 of Act No. 566, by virtue of Sec. 6 of Act No. 22, includes "owners." *Ex parte Slack in re Panton*, 7 V.L.R. (L.,) 28.

Act No. 22, Sec. 6—"Insolvency Statute 1871," No 379, Sec. 90.]—It would appear that Sec. 6 of Act No. 22 does not apply to Sec. 90 of Act No. 379, for it was *held* that all the "persons" entitled in possession must concur in the petition mentioned in Sec. 90 of Act No. 379. *In re Healey*, 7 V.L.R. (E.,) 1.

Act No. 22, Sec. 6—"Insolvency Statute," No. 379, Sec. 37, Sub-secs. 2, 3.]—*Per Molesworth, J.* "I think that under Act No. 22 the word 'creditors,' in Sec. 37, Sub-secs. 2 and 3, of Act No. 379, includes a single creditor." *In re Rickards*, 5 A.J.R., 103.

Act No. 22, Sec. 6—"Insolvency Statute," No. 379, Sec. 37.]—*Per Holroyd, J.* "*The Interpretation Statute*" enables us to read 'debtor or debtors' in Sec. 37 of Act No. 379 so as to admit of a petition for sequestration being presented under that section against joint debtors whether carrying on business in partnership or not." *In re Thomas and Currie*, 9 V.L.R. (I. P. & M.,) 2, 10.

Act No. 22, Sec. 8—"Weights and Measures Statute 1864," No. 215, Sec. 49.]—A forfeiture of weighing machinery under Act No. 215, Sec. 49, is not within Sec. 8 of Act No. 22, the forfeiture in Sec. 8 of No. 22 only referring to forfeiture of money. *Regina v. Caddy*, 1 V.L.R. (L.,) 38, 39.

Act No. 22, Sec. 8—Recovery of Penalties.]—*Regina v. O'Flaherty, ex parte Winter*, 9 V.L.R. (L.,) 14; 4 A.L.T., 147.

For facts *see* S.C., *post* under OFFENCES (Statutory.)

INTERROGATORIES.

See DISCOVERY.

INTOXICATING LIQUORS.

See LICENSING ACTS.

INVENTION.

See PATENT.

INVESTMENT.

By Trustees.]—*See* TRUST AND TRUSTEE.

ISSUE.

Interpleader.]—*See* INTERPLEADER.

In Matrimonial Suits.]—*See* HUSBAND AND WIFE—JUDICIAL SEPARATION AND DIVORCE.

In Equity Suits.]—*See* PRACTICE AND PLEADING—IN EQUITY.

JUDGE.

Interested in his Own Case—Rating.]—No judge should interfere in the hearing of a case involving his own interest; and the decision of a judge interested need not be accepted, even by the party in whose favour he would be likely to decide. Where, therefore, in an appeal against a valuation, two justices sat who had on a previous occasion adjudicated, each on the other's appeal—the one sitting on the case of the other, who for the time left the bench; and then the other in turn deciding on the case of the first, who in his turn left the bench, and the municipal council protested against their decision on general grounds, without assigning any motive, and in the appeal of a ratepaper objected that the justices, having reduced the assessment in their own cases, were interested in reducing it in that of other parties, but there was nothing to show that the reductions were not right, *Held*, nevertheless, that as a decision from a magistrate who was interested should not be accepted at all, a writ of *certiorari* should be granted to remove the order into the Supreme Court to be quashed. *Municipal Council of Prahran v. Clough*, 1 W. & W. (L.,) 238.

Interested in Case.]—If the objection of interest in the judge is once taken, the judge ought not to entertain the case. *Molloy v. Gunn*, 2 W. & W. (L.,) 76.

Justices when Disqualified.]—*See* under JUSTICES OF THE PEACE — Jurisdiction and Duty—When disqualified.

Altering Decision before it is Recorded.]—There is nothing contrary to law in a judge giving a decision apparently inconsistent with some remarks made by him in delivering judgment. He is not precluded from altering his decision until it is recorded. *Allen v. Ower*, 6 V.L.R. (L.,) 213; 2 A.L.T., 22.

Discretion—When Court will Overrule.]—*Per Higinbotham, J.* Where a Statute gives a discretion to a judge to do, or not to do, a particular act, it is always competent for the Court to overrule his discretion, which the Court will only do however (*a*) where there is no evidence to support his decision; (*b*) where he has been misled by false evidence; (*c*) where the judge, by a mistaken exercise of his discretion, has done an injustice to any party. *De Saxe v. Schlesinger*, 7 V.L.R. (L.,) 127; 3 A.L.T., 1.

Single Judge Sitting as Full Court in Divorce and Matrimonial Jurisdiction—Effect of Order of.]—*See Hall v. Hall*; 1 W. & W. (L.,) 333, *post* under PRACTICE AND PLEADING—AT LAW—Rules and Orders.

Judge in Chambers—May Grant an Order Absolute in the First Instance for a Certiorari.]—*See Regina v. Carr*, *ante column* 129.

Judge in Chambers—Has no Power to Grant a Rule Nisi for Certiorari in Vacation Returnable Before the Court on the First Day of Term.]—*See Regina v. M'Intyre*, *ante column* 129.

In Chambers—Reviewing Decision of Another Judge.]—*Per Higinbotham, J.* (in Chambers). A judge in Chambers has no jurisdiction to review the considered judgment of another judge. *Merry v. The Queen*, 6 A.L.T., 23.

Jurisdiction of Primary Judge in Equity.]—*See* under EQUITY, *ante column* 405.

Of County Court.]—*See* COUNTY COURT.

Of Insolvent Court.]—*See* INSOLVENCY.

Of Courts of Mines.]—*See* MINING.

JUDGMENTS.

I. *Foreign Judgments.*

(*a*) *Validity of.*

Where there is any substantial defect in the proceedings of a foreign court, not a mere technical irregularity which would be cured by the next step, but such as would put the opposite party to a disadvantage, the Court will permit the judgment or decree to be impeached by pleadings in this Court, and the defect to be shown by extrinsic evidence. *Larnach v. Alleyne*, 1 W. & W. (E.,) 342, 358. For facts *see* S.C., *post* under TRUST AND TRUSTEE.

(*b*) *Effect of.*

Memorial Filed under Sec. 307 of "Common Law Procedure Statute"—Sec. 308.]—Filing the memorial of a foreign judgment under Sec. 307 of the "*Common Law Procedure Statute*," does not give such judgment the effect of a judgment of the Supreme Court of Victoria, so as to enable the creditor to attach debts in the hands of garnishees under Sec. 200 of the Act, until the requirements of Sec. 308 of the Act have been complied with by him. And *quaere*, whether after compliance with such requirements the foreign creditor can enforce his judgment by any other means than execution. *Johnson v. Dickson*, 1 V.R. (L.,) 159; 1 A.J.R., 135.

Enforcing Foreign Judgments — Corporation Plaintiff—"Common Law Procedure Statute 1865," Secs. 307, 308.]—A corporation plaintiff is included in the provisions of Sec. 307 of the

"*Common Law Procedure Statute* 1865," which allows a "person" in whose favour a judgment has been obtained in another colony to file a memorial of it in the Court here; and such corporation may obtain leave under Sec. 308 to issue execution upon such judgment. *Ruby Extended Tin Mining Company v. Woolcott*, 6 V.L.R. (L.,) 301. *Semble*, that a defendant could show as cause against an application for leave to issue execution under Sec. 308 that the judgment had been obtained in the other colony. *Ibid.*

Enforcing Foreign Judgments — Practice — "Common Law Procedure Statute 1865," Sec. 307.]—The memorial of a decree of the Supreme Court of another colony, which is filed for the purpose of enforcing an order for payment of a sum of money, need not contain the whole decree pronounced; but it is sufficient if it contain such particulars as relate to the order for payment, that being all that is presented by Sec. 307 of the "*Common Law Procedure Statute* 1865." *Fattorini v. Fattorini*, 6 V.L.R. (L.,) 454; 2 A.L.T., 87.

Enforcing Foreign Judgments — What are Foreign Judgments—Decree in Divorce Jurisdiction.]—A decree of the Supreme Court of another colony in the Divorce and Matrimonial Causes Jurisdiction in a suit for the restitution of conjugal rights, is within sec. 307 of the "*Common Law Procedure Statute* 1865," and may be enforced by execution under Sec. 308 of that Act. *Ibid.*

County Court judges have no jurisdiction in case of judgments recovered out of the colony. *Greville v. Smith*, N.C., 67.

Enforcing Judgment Against one Partner on Behalf of All—"Common Law Procedure Statute 1865," Sec. 308.]—On 17th May, 1880, H. obtained a judgment in the Supreme Court of New South Wales in an action on contract against M., a member of a co-partnership. In accordance with the law of New South Wales, M. was sued on behalf of all the members. The memorial of the judgment was filed in the office of the Supreme Court of Victoria on 6th May, 1884. Application under Sec. 308 of the "*Common Law Procedure Statute* 1865" for an order to issue execution against M. and nine others, members of the co-partnership, as being the persons against whom the judgment was obtained. *Held, per Higinbotham, J.* (in Chambers), that a foreign judgment *in personam* when it is sought to be enforced in another country is conclusive between all the original parties to the cause, to the same extent as in the country where the judgment was obtained, and that it is not examinable in the courts of the country where it is enforced, except for defects apparent on the face of it, or upon extrinsic evidence adduced to show that the foreign court had no jurisdiction, or that the judgment was obtained by fraud or manifest injustice, and that none of these having been shown execution should issue under Sec. 308 as applied for. Order with costs. *Hogan v. Moore*, 6 A.L.T., 156.

No Notice of Proceedings—Contributory to a Company Agreeing to ex parte Proceedings for Winding up.]—A banking company in Scotland was wound-up, and the liquidators obtained in Scotland a judgment against R., a contributory, who was domiciled in Victoria, without any notice to the contributory of the proceedings. It appeared that R., while domiciled in Scotland, had signed the memorandum of association of the company, which was a company registered under the English "*Companies Act* 1862," which in Sec. 121 provided that judgment might be obtained *ex parte*, and without notice to the contributories. *Held* that R. must be taken to be aware of the law when he signed the memorandum, and by so agreeing that proceedings might be taken *ex parte* had contracted himself out of the general protection afforded to persons not knowing the law of a country, in which a judgment is obtained behind their backs. *Jamieson v. Robb*, 7 V.L.R. (L.,) 170; 3 A.L.T., 7.

(c) *Attachment on.*

When Allowed.]—*See Main v. Kirk*, 1 A.J.R. 155, *ante column* 60.

(2) *Conclusiveness of and Estoppel by Judgment.*

Estoppel.]—B. recovered in the Court of Mines a judgment for goods sold and delivered to the A. Company, and on the basis of that judgment an order was made by the Court of Mines ordering the company to be wound up, and appointing B. a liquidator. B. then sued W. for the balance of the amount of his shares and recovered a verdict. On appeal it was held that the Court of Mines had no jurisdiction, and the verdict based on B.'s appointment was set aside. B. then recovered judgment in the County Court for the same goods, and the Court of Mines upon that order appointed B. a liquidator. *Held* that the judgment in the first action in the Court of Mines was no bar to the second action in the County Court for the same debt. *Wilson v. Broadfoot*, 2 W. & W. (L.,) 96.

Verdict followed by Judgment when an Estoppel—Must be on the Same Point.]—*Per Privy Council.* A verdict followed by judgment, to be an estoppel, must be on the precise point, and a distinct finding thereon. Nor is the effect of the verdict as an estoppel to be enlarged by parol evidence showing what the discussion was or what the evidence was. *Mulcahy v. Walhalla G. M. Coy.*, 2 A.J.R., 93, 95.

County Court Judgment—When a Bar.]—A jury gave a verdict for defendant in an action in the County Court to recover commission on the ground that the action was premature, the money not yet being due. A judgment entered in accordance with the verdict is not a bar to a subsequent action by the plaintiff after the money becomes due, the cause of action not being identical. *Bishop v. Woinarski*, 1 V.L.R. (L.,) 106.

And *see* cases *ante column* 406-409, under ESTOPPEL.

Decision of Justices when a Bar.]—*See post* under JUSTICE OF THE PEACE—WHERE DECISION A BAR TO SUBSEQUENT PROCEEDINGS.

JUDGMENT SUMMONS.

See DEBTORS' ACT—INSOLVENCY.

JUDICIAL SEPARATION.

See HUSBAND AND WIFE.

JURISDICTION.

Issue sent from Probate Jurisdiction to Nisi Prius—Rule for New Trial—In what Jurisdiction.]—When an issue has been sent by the Full Court on an appeal from a suit in the Probate jurisdiction for trial at *Nisi Prius*, the rule for a new trial of each issue is properly obtainable from the Court sitting *in Banco* in Term, in its Common Law Jurisdiction. The Court so sitting *in Banco*, however, will not hear a motion for an order to issue probate, which should be made before the Primary Judge, whose decision may be considered by the Full Court on appeal. If the Court *in Banco* were to hear an application for the issue of a probate the litigants would be deprived of their right to have the subject reviewed by the Full Court. *Wilson v. Shepherd, In the Will of Wilsmore*, 2 V.L.R. (L.,) 35.

Of Court in Matrimonial Jurisdiction.]—*See* HUSBAND AND WIFE.

Of Justices.]—*See* JUSTICE OF THE PEACE.

Of Courts in Equity.]—*See* EQUITY.

Of Insolvent Court.]—*See* INSOLVENCY.

Of County Court.]—*See* COUNTY COURT.

Of General Sessions.]—*See* SESSIONS.

Of Court in Probate Jurisdiction.]—*See* WILL.

Of Courts of Mines, &c.]—*See* MINING.

JURY.

Special Jury—Trial of Issues by—21 Vict No. 19, Sec. 17.]—In granting an application under sec. 17 of 21 Vict. No. 19 (*Juries Act*), for trial of issues by a special jury of twelve, the only proof required by the Court is that a person has been committed for trial. *Regina v. Costello*, 1 W. & W. (L.,) 8.

Foreign Juror—Ignorant of the English Language.]—*See Regina v. Hoctor*, *ante column* 308.

Jury de Medietate Linguæ—"Juries Statute 1865," Secs. 37, 38.]—*Regina v. Levinger*, L.R., 2 P.C. 282; 1 A.J.R., 137, *ante column* 308.

De Medietate Linguæ—Challenge of Foreign Panel.]—A foreigner on trial by a jury *de medietate linguæ* has no right of peremptory challenge as regards the foreign panel then returned by the sheriff; but is restricted to challenging "for cause" under the 38th section of the "*Juries Statute* 1865," No. 272. *Regina v. Ah Toon*, 3 W. W. & A'B. (L.,) 31.

Challenged Juror Sitting During Trial.]—In applications for new trial on the ground of a challenged juror sitting during the trial, there should be a distinct statement that the applicant had not exhausted his challenge. *Bryens v. M'Lennan*, 1 A.J.R., 89.

Disqualified Juror not Challenged.]—If a juror who is disqualified is not challenged at the trial, the Court will not grant a new trial upon affidavits of the subsequent discovery of such disqualification. *Sinclair v. Harding*, 2 V.R. (L.,) 185; 2 A.J.R., 114.

Act 272, Sec. 41—Agreement for Remuneration.]—An agreement by the parties to a cause to pay the jurors engaged a remuneration in addition to the fees allowed them is in contravention of Act No. 272. *Glass v. Martin*, 3 W. W. & A'B. (L.,) 117.

Finding—How far Binding.]—The finding of a jury upon a specific question put to them is not binding, unless supported by the evidence. *Nichol v. London Chartered Bank of Australia*, 4 V.L.R. (L.,) 324, 329.

As to cases of setting aside verdict, *see post* under PRACTICE—At Law—Trial.

Misconduct—Evidence of Jurors as to.]—Any misconduct of a jury, even though the verdict is right, and the judge concurs with it, renders the verdict void, and a new trial is ordered. But to support an application on such a ground some other evidence than that of the jurors must be given. The jurors, being participators in the misconduct, are not permitted to say that they have been guilty of misconduct, and this principle is not altered by the evidence being tendered by one of the dissenting jurors where a three-fourths verdict has been taken. *O'Malley v. Elder*, 2 V.L.R. (L.,) 117.

Misconduct.]—The adjournment by a jury after retiring to consider their verdict, openly, and without permission of the Court, to a hotel for refreshment, in ignorance of the impropriety of the course, is not such misconduct as will necessitate the granting of a new trial. *Per Barry, J.*, even if the jury had so acted wilfully, and knowing that they were doing wrong, it would be a ground for punishing them, but not for impeaching their verdict. *Crowther v. May*, 4 V.L.R. (L.,) 425.

View—Cost of.]—Costs of a view by the whole jury are always allowed. *Young v. Ballarat Water Commissioners*, 6 V.L.R. (L.,) 14; 1 A.L.T., 133.

Challenges in Excess — Panel Exhausted — Remedy.]—The proper mode of remedying the error where, by mistake, the prisoner has been permitted to challenge three jurors in excess of the number allowed, and the panel is exhausted, is to return the three names in excess to the box and empanel the first drawn out, not to allow the prisoner to exercise his right of challenge *de novo*, or to empanel a juror whose name has, by inadvertence, not been called. *Regina v. Lee*, 6 V.L.R. (L.,) 225.

Mistake of—When Ground for New Trial.]—*See* under NEW TRIAL.

And *see ante* under CRIMINAL LAW, *columns* 308, 309.

JUSTICE OF THE PEACE.

Statutes 14 Vic. No. 45, 25 Vic. No. 29, repealed by Act No. 267. "*Justices of the Peace Statute* 1865" (No. 267), secs. 41, 65 and 106 repealed and re-enacted by Act No. 319; secs. 5, 8, 49, 135, 136, 137 and 143 repealed by Act No. 565. "*Justices of the Peace Statute* 1865, *Amendment Act* 1867" (No. 319). "*Justices of the Peace Statute* 1865, *Amendment Act* 1876" (No. 565). "*Justices of the Peace Statute* (*Prohibition*) 1877" (No. 571).

I. JURISDICTION AND DUTY.

(*a*) *When Disqualified.*

Justice—A Ratepayer not Disqualified from Adjudicating on a Complaint for Breach of Bye-laws—Act No. 267, Sec. 13.]—J. was informed against under a bye-law for encroaching on a street and fined. It was objected that the chairman and justices, being ratepayers, and interested in the application of the funds, were unfit to adjudicate. *Held* that they were not so "interested" in the result of the adjudication as to be disqualified from adjudicating. *Jewell v. Young*, 2 W. & W. (L.,) 243.

Adjudicating on a Rate When a Ratepayer—"Justices of the Peace Statute 1865," No. 267, Sec. 13—Disqualification Removed.]—A justice of the peace adjudicated in a rate case after his interest in such rates had accrued due. The "*Justices of the Peace Statute* 1865," No. 267, Sec. 13 of which removes the disqualification for such interest, was passed after the rate was due and after the justice's interest arose. *Held* that, on the point of interest, the justice was interested; but that the disqualification for such interest under the old law was removed by Sec. 13 of the Act No. 267, and that his adjudication was valid. *Regina v. Ford*, 3 W. W. & A'B. (L.,) 130. And *see Municipal Council of Prahran v. Clough*, *ante column* 737.

Being Interested—Proceedings under Public Health Act—Act No. 267, Sec. 13.]—Four out of seven justices who adjudicated in making an order under Sec. 47 of the "*Public Health Amendment Act*" were members of the Local Board of Health. *Held* that the four were disqualified from so adjudicating, and their interestedness vitiated the proceedings of the whole number. Rule absolute for prohibition. *Regina v. Lloyd, ex parte Godfrey*, 1 V.L.R. (L.,) 120.

Justices Managers of a Common.]—When justices are managers of a common they are disqualified from adjudicating upon a complaint for trespasses upon the common, although the penalties for trespass go into the consolidated revenue, and they have no pecuniary interest in the case. *Regina v. Horsfall, ex parte Husband*, 4 V.L.R. (L.,) 53.

(*b*) *Claim of Right and Questions of Title.*

Questions of Title under "Land Act 1862," No. 145.]—R. applied for land, assumed to have been declared as open for selection under the Act, got his certificate under Sec. 20, and entered into possession. It was then discovered that the land was not within the area declared open, and a commissioner sued R. for unauthorised occupation. The justices declared he was in unauthorised possession. *Held*, on appeal, that the case before the magistrates might involve title, and their jurisdiction was ousted. Appeal allowed, but without costs. *Robinson v. Carey*, 2 W. & W. (L.,) 114.

Question of Title.]—J.H. sued P.H. for trespass. J.H. produced a Crown grant for sixty acres, and P.H. a grant for ten acres adjoining. P.H. was in possession of twenty-eight acres of the sixty claimed by J.H., and

refused to leave when ordered. J.H. and one D. at one time held the whole of the land under store licenses; and it was afterwards put up to auction, and sold to D. and P.H., who agreed upon an equal division. J.H. bought D.'s share, and declined to carry out the agreement. *Held* that there being a *bonâ fide* question of title, the justices had no jurisdiction. *Hoban v. Hoban*, 2 A.J.R., 118.

Question of Title—Act No. 265, Sec. 17, Sub-sec. 1.]—On a complaint for disturbing a water-race, the defendant relied on a Crown grant of the land, and the plaintiffs on their miners' rights. *Held*, a *bonâ fide* question of title was involved, and that the question was not one to be disposed of by justices. *Regina v. Webster*, 1 V.R. (L.,) 82; 1 A.J.R., 78.

Question of Title—Act No. 265, Sec. 17, Subsec. ii.]—C. was summoned before justices for destroying a fence connected with a toll-gate. The toll-gate had been temporarily removed on to Crown land, and had obstructed C. in his usual access to a watering place. The fence C. broke was not on his own land, nor on land in which he claimed any interest. *Held* that C. had no colour of right to break the fence, and that there was no evidence to raise any claim of right to oust the jurisdiction. *Cahill v. Keilor Road Board*, 4 W. W. & A'B. (L.,) 262.

Wilful Trespass — "Police Offences Statute 1865," Sec. 17 (VI.)—Jurisdiction when Ousted.]—Merely raising a question of title does not oust the jurisdiction of the justices upon an information under Sec. 17. Sub-sec. VI. of the "*Police Offences Statute* 1865," for wilful trespass, but the justices must also be satisfied that the trespass was committed under a fair and reasonable supposition that the defendant had a right to do the act complained of. *Regina v. Reid, ex parte Brennan*, 4 V.L.R. (L.,) 133.

Duty of Justices—"Police Offences Statute 1865," Sec. 17.]—Where a defendant on an information under Sec. 17 of "*The Police Offences Statute* 1865" sets up a claim of right to do the injury complained of, the justices have, in effect, to consider not merely whether there was a defence at law, but whether the defendant had a *bonâ fide* and reasonable belief that he was justified in committing the act complained of. *Williams v. Clausen*, 6 V.L.R. (L.,) 29: 1 A.L.T., 149; followed in *Daniell v. Rowbotham*, 9 V.L.R. (L.,), 215; 5 A.L.T., 75.

Police Offences Statute, Sec. 32—Question of Title.]—Complaint for illegal detention of property. L. agreed with P. and W. to erect wire fencing, and as P. and W. had need of working bullocks to carry out the agreement, L. further agreed to purchase a team, on the condition that the purchase-money should be deducted from the payments accruing under the agreement to erect the fencing. P. and W. took possession of the bullocks, used them, but did not carry out the agreement. L., besides buying the bullocks, had paid P. and W. money for the fencing, and had in so doing overpaid them for the little they did erect. P. and W. sold the bullocks by auction, one J. purchased them, and L. sued him for illegal detention. The justices, being of opinion that a question of title was involved by the purchase at auction, thought that their jurisdiction was ousted by Sec. 32 of the "*Police Offences Statute.*" On appeal, *Held* that they had jurisdiction. *Lyon v. Jones*, 1 A.J.R., 30.

Under Pounds Statute, No. 249, Sec. 26—Question of Title.]—On a summons before justices for illegally impounding from unenclosed land, it appeared that the land in question was purchased from the Crown in 1862, and it was contended that there was no power under the *Land Acts* of 1865 and 1869 to impound from unenclosed land. *Held* that there was no jurisdiction in the justices to enter into the question, since it raised a question of title, but that they were confined to inquiring whether the requirements of the "*Pounds Statute*" had been complied with. *O'Keefe v. Behan*, 2 V.R. (L.,) 16; 2 A.J.R., 19.

[Compare Sec. 29 of Act No. 478 (*Pounds Act* 1874.)]

Maliciously Throwing Down a Fence—Claim of Title—"Criminal Law and Practice Statute 1864," Sec. 178—"Amending Act 1871," Sec. 23.]—On a complaint before justices of unlawfully and maliciously throwing down a fence, under Sec. 178 of the "*Criminal Law and Practice Statute* 1864," No. 233, though Sec. 23 of the "*Criminal Law, &c., Amendment Act* 1871," No. 399, provides that no claim of right or title shall oust the jurisdiction of the justices over complaints under Sec. 178 of No. 233, it may be shown that the defendant was removing a fence which obstructed him individually in the use of a way to which he had a right, since this is not a claim within the meaning of Sec 23, No. 399. *Regina v. Guthridge & Brennan ex parte Campbell*, 4 V.L.R. (L.,) 77.

Question for Justices—Remedy—Appeal.]—Where a question of title or a *bonâ fide* belief by the defendant of his right to do an act complained of, is set up as a defence, it is for the justices to find as a matter of fact whether the defence is *bonâ fide* raised, and even if the finding be contrary to evidence, the Court will not grant a prohibition. The proper remedy is by appeal. *Regina v. Walker, exparte Kennedy*, 4 V.L.R. (L.,) 452.

Question of Title]—S. was summoned for wilfully damaging a fence belonging to W., and put in as a defence that the land belonged to one H., and that the fence was broken down merely to try the right. W. had been in undisturbed possession for thirteen years. *Held*, that there was a question of title involved, and that the justices had no jurisdiction. *Hodgson v. Whitmore*, 2 A.J.R., 122.

Unlawfully and Maliciously Destroying a Fence—Joint Ownership—"Criminal Law and Practice Statute 1864," Sec. 178, No. 399, Sec. 23.]—The jurisdiction of the justices is ousted on an information for unlawfully and maliciously cutting or breaking down a fence if the defendant makes a *bonâ fide* claim of right or title to the fence, unless such right or title is jointly with

the person in whom the property in the fence is laid in the information; and Sec. 23 of the "*Criminal Law and Practice Statute* 1864 *Amendment Act*," No. 399, applies only to such cases of joint ownership. *Williams v. Clauscen*, 6 V.L.R. (L.,) 29; 1 A.L.T., 149; followed in *Daniell v. Robotham*, 9 V.L.R. (L.,) 215; 5 A.L.T., 75.

Question of Title.]—A borough summoned R. for displacing soil of certain land under the control of the borough. R. was working for a mining company, which claimed to occupy the land as being registered for it under the bye-laws. R. was fined. On appeal, *held*, that a question of title was involved, and the justices had, therefore, no jurisdiction. *Rowe v. Mayor of Ballarat*, 2 A.J.R., 122.

Disturbing Soil of a Street.]—A mining company, holding a mining lease from the Crown, were convicted and fined by justices for displacing and disturbing the soil of a street. *Held* that the company had no power to disturb the street, and it was for the justices to decide, as a matter of fact, whether it was a street or not. Appeal dismissed. *Koh-i-noor Mining Coy. v. Drought*, 3 V.R. (L.,) 75; 3 A.J.R., 48.

Claim of Right—Dispute as to Existence of a Highway.]—On a summary proceeding before justices, under Sec. 511 of the "*Local Government Act* 1874," for obstructing a person employed by a municipal council to remove obstructions which had been placed on a road to prevent access to a public bridge, a *bonâ fide* dispute as to the *locus in quo* being a highway will not prevent the justices from acting, and their decision on that point is conclusive for the purpose of enforcing the conviction, though the conviction will not preclude the person convicted from trying the right in an action of trespass. *Ex parte Scott, in re Strutt*, 2 V.L.R. (L.,) 70.

Interference with a Creek—Management of Municipality—Mining Claim—"Local Government Act 1876," Sec. 400.]—O. was convicted before justices, "for that he did," on a certain date, "interfere with a creek within the borough of W., after the said creek had been taken under the charge of the council of the municipality, without the authority of such council." At the trial the justices found as a matter of fact that the creek had been so taken, and the defendant showed that the municipality had managed the creek, not as a watercourse, but as a road, and had allowed others to mine on it, and raised a claim of title under a miner's right and registered claim. *Held* that raising such claim of title did not oust the jurisdiction of the justices. *Regina v. Mayor of Walhalla, ex parte O'Grady*, 4 V.L.R. (L.,) 470.

Act No. 506, Sec. 399—Obstruction of Public Road.]—An information was laid by a shire council for obstructing a public road. The defendant objected that he claimed part of the road as his private property and that this question of title ousted the justices' jurisdiction. The justices thought they had no jurisdiction, and dismissed the information. *Held* that they had, and rule absolute for them to hear the information. *Regina v. Foster, ex parte Molyneux*, 7 V.L.R. (L.,) 294; 3 A.L.T., 23.

(c) *Limitation in the Jurisdiction.*

11 & 12 Vict., Cap. 43, Sec. 11—Defence—Act No. 29.]—Sec. 11 of "*Jervis's Act*" (11 & 12 Vict., cap. 43) is not merely in restriction of the plaintiff's right of procedure, but is also in limitation and definition of the jurisdiction of the magistrates; and such jurisdiction has been conferred on magistrates under that section to make orders for payment of debts and costs only where the complaint is made within the time named in the section; and if facts displacing the jurisdiction under that section appear on the plaintiff's pleadings, it is not necessary to plead them under Sec. 38 of 21 Vict. No. 29. *In re Prince, ex parte Binge*, 1 W.W. & A'B. (L.,) 12.

N.B.—The sections in the "*Justices of the Peace Statute* 1865" corresponding to those above mentioned are Secs. 47, 51.

Period of Limitation for Unpaid Calls on the Winding-up of a Mining Company.]—*See Melville v. Higgins*, 1 W. & W. (L.,) 306; *post* under MINING — MINING COMPANIES — Winding-up—Calls—Enforcement of.

Period of Limitation for Capital Subscribed but not Paid (not including Calls).]—*See Broadfoot v. O'Farrell*, 2 W. & W. (L.,) 102. *Post* under MINING — MINING COMPANIES—Winding-up—Official Agents and Liquidators.

"Justices of the Peace Statute 1865," No. 267, Sec. 51—Part Payment of an Old Debt.]—Where K. owed W. £25, and paid off £12 within twelve months before proceedings before the justices, *Held* that the part payment of the debt made the remainder a new debt which arose within the twelve months, and that the justices had jurisdiction under sec. 51. Rule *nisi* for prohibition discharged. *Regina v. Wells*, 4 W.W. & A'B. (L.,) 31. *See also* S.P. *Mountford v. Paton*, 5 A.J.R., 164.

Limitation in Case of Complaint for Non-Payment of Rates—Time Runs from Expiration of 14 days after Demand in Writing.]—*See Mayor of Sandhurst v. Broderick*, 3 W.W. & A'B. (L.,) 108. *Post* under RATES AND RATING.

Act No. 267, Sec. 51—Cross-demand.—A complaint dated July, 1875, was for goods supplied. The particulars of demand gave credit to the defendant for salary due as on 10th July, 1875, but the affidavit of the relator showed that such salary was due on 10th July, 1874, and that he had not consented to such appropriation of his salary. *Held* that the complainant could not treat the cross-debt to the defendant as part payment without his consent. Order absolute for prohibition. *Regina v. Webster, ex parte Prentice*, 1 V.L.R. (L.,) 199.

Act No. 267, Sec. 51—Limit of Time.]—S. had been summoned before the justices, and had been fined for disobedience of an order to maintain an illegitimate child, under Sec. 39 of the

Act No. 268 (*Marriage and Matrimonial Causes Act*); the fine was imposed for disobedience in respect of payments due more than twelve months previously. *Held* that the case did not come within Sec. 51 of Act No. 267, and that the justices had jurisdiction. *Regina v. Panton, ex parte Sutterby*, 1 V.L.R. (L.,) 264.

Limitation of Actions—Part Payment—Justice of the Peace Statute 1860, Sec. 51.]—Under Sec. 51 of the "*Justices of the Peace Statute* 1860," a complaint must (in the absence of special enactment) be brought before justices within twelve months from the time when the matter of complaint arose; but although the complaint be not brought within the twelve months, a part payment after such period, and within twelve months of the bringing of the complaint, will give the justices jurisdiction, since it affords proof of a new promise to pay, and does not merely constitute an account stated. *Ex parte Forsman*, 4 V.L.R. (L.,) 55.

(*d*) *In other Cases.*

Work and Labour Done—"Justices of the Peace Statute," Sec. 41.]—Where a complaint before justices was for £7 for work and labour done, and the complainant had entered into a contract in writing to do the work, which contract he had not complied with; but the defendant had accepted the work and taken the benefit of it, *Held* that since the defendant had accepted the work, he could be sued for work and labour done, and that the justices had jurisdiction under Sec. 41 of the "*Justices of the Peace Statute* 1865." *Regina v. Lloyd*, 1 A.J.R. 78.

Note.—Sec. 41 of Act No. 267 is repealed, and a new provision is substituted for it by Sec. 1 of Act No. 319.

Special Contract—Work and Labour—"Amending Act" (No. 319), Sec. 1.]—T. on 20th January, 1871, gave a written order for the insertion of an advertisement in a paper for six months for £30, payable monthly. On the 20th February T. wrote—"My advertisement month up to-day; discontinue insertion of same, and I shall draw you one up in another form to-night, and see you to-morrow." The advertisement was discontinued, no other one was inserted, and the newspaper proprietors sued T. for the month's insertion as work and labour done. The justices made an order against T. for £7 10s. On order *nisi* for a prohibition, *Held* that it was a question of fact rather than of law for the justices to determine, they being at liberty to decide on the evidence that the special contract was rescinded by the parties, and if that were so the complainant could sue for work done. Order discharged. *Regina v. Call, ex parte Thomson*, 2 A.J.R. 106.

Money Lent—Interest—Act No. 319, Sec. 1.]—Justices sitting in Petty Sessions have no jurisdiction to allow anything beyond the principal of money lent either as interest or bonus. *Wilson v. Crawley*, 2 W. & W. (L.,) 78.

Claim for Money not Exceeding £20—"Justices of the Peace Statute 1865," Sec. 41.]—When the cause of action exceeds £20, the plaintiff cannot bring the matter within the jurisdiction of the justices under the "*Justices of the Peace Statute* 1868," Sec. 41, by giving credit for more than the excess. *Regina v. Clarkson, ex parte Haylock*, 4 A.J.R. 116.

Claim for Money Paid—Amendment.]—A claim for "money paid" is not within the jurisdiction of justices; and where justices had made an order comprising a sum due for "money paid," their order was amended by deducting the sum so comprised. *Regina v. Williams*, 5 W.W. & A'B. (L.,) 5.

Expenses of Witnesses.]—On an order *nisi* for prohibition to justices to restrain them from enforcing an order for the payment of expenses to witnesses, it appeared that the justices had considered the witnesses entitled to a certain sum, but had stultified themselves by allowing them more. The Court refused the prohibition, but on the terms of the order being amended so as to allow the witnesses only the sum the justices had considered them entitled to. *Regina v. Adams, ex parte Ewart*, 1 A.J.R., 160.

Act No. 267, Sec. 41—Use and Occupation of Land.]—Where plaintiff leased land to defendant for two years at a yearly rental of £28, payable half-yearly, and summoned defendant for use and occupation for six months, claiming £14, *Held* that it was within the justices' jurisdiction, as the yearly rent was not the subject of inquiry, the only inquiry being as to use and occupation for half-a-year. *Laven v. Flower*, 5 A.J.R., 71.

Note.—This same test of jurisdiction in the case of the County Court was affirmed in *Cavanagh v. Sach*, *see ante column* 250.

Act No. 267, Sec. 41—Assault—Person Suing for must be the Person Assaulted.]—Under this section the person suing in respect of an assault must be the person who has been assaulted; therefore a father cannot sue for an assault committed on his infant son, such a grievance not being one cognisable by the justices. *Regina v. Charles*, 3 W.W. & A'B. (L.,) 52.

Under £20—Act No. 267, Sec. 44—Allowance of Discount.]—On a complaint before justices for the price of seven hogsheads of beer at £4 per hogshead; £1 4s. was allowed for returns, and £1 per hogshead was allowed as discount, according to the course of dealing between the parties, leaving a balance of £19 16s. The justices made an order for the amount, and an order *nisi* for prohibition was obtained on the ground that the allowance of discount was really a set-off, which the defendant had not agreed to, and that the matter was therefore beyond the jurisdiction of the justices. *Held* that the discount, not being for cash, but being a trade allowance by arrangement was not a set-off, but a reduction in the price, and order *nisi* discharged. *Regina v. Morgan, ex parte Dehnert*, 2 V.L.R. (L.,) 102.

Under £20—Cross Claim Disputed—Set-off.]—On a complaint for goods sold and delivered, the particulars of demand showed the amount due to be £29 10s. 1d., and credit was allowed

for £2 cash, and £8 for a horse sold by defendant to the plaintiff, leaving a balance sued for of £19 10s. 1d. The defendant proved that he had sold a horse to plaintiff for £11, and another for £9 (the one for which credit was given), in respect of which sums a defence of set-off was entered, that no balance had ever been agreed upon, and that the credit of £8 had never been admitted. *Held* that the complainant's allowing one of the items of the defendant's set-off could not give jurisdiction, though, *semble*, that if he had admitted the whole of the defendant's set-off it would have given jurisdiction. *Regina v. Panton, ex parte Wilson*, 6 V.L.R. (L.,) 33; 1 A.L.T., 149.

Act No. 267, Secs. 41. 44—Claim Reduced by Payments.]—In a complaint before justices for work and labour done, the claim was for £61, less cash payments, £43; balance, £18. *Held* that justices had jurisdiction. *Regina v. Mollison, ex parte Warne*, 1 V.L.R. (L.,) 17.

Under £20—Abandonment of Excess—"Justices of the Peace Statute 1865," Sec. 44.]—Where a claim is over £20, giving credit as on a contra account for the excess is not equivalent to an abandonment of the excess so as to give the justices jurisdiction. *Regina v. Cahill, ex parte Patton*, 4 V.L.R. (L.,) 194.

"Justices of the Peace Statute 1865," Sec. 44—Severing Causes.]—In an action to recover the amount of a running account, where the sum sought to be recovered is outside of the justices' jurisdiction, the plaintiff may not separate his claim so as to bring each of the parts thus severed within the jurisdiction; but if he wish to sue before justices must abandon the excess under Sec. 44 of the "*Justices of the Peace Statute* 1865." *Regina v. Daly*, 1 A.J.R., 26.

Dividing Cause of Action—Running Account—"Justices of the Peace Statute 1865," Sec. 44.]—By Sec. 44 of the "*Justices of the Peace Statute* 1865," where there is a running account between a tradesman and a customer the former cannot split up the amount due into separate causes of complaint. *Ex parte Victor*, 2 A.L.T., 6.

Set-off—Under "Justices of the Peace Statute 1865," Secs. 41, 47, 48—Of What Nature it Must be.]—A set-off under the "*Justices of the Peace Statute* 1865," No. 267, Secs. 47, 48, must be one of the causes of action mentioned in Sec. 41 of the Act; in other words, of such a nature that, if made the subject of an original complaint, the justices would have jurisdiction to entertain it *Wynne v. Barnard*, 5 W. W. & A'B. (L.,) 35.

Set-off.]—Where items claimed in a set-off are in excess of jurisdiction, such set-off cannot be allowed, although the balance on an adjustment of the amount claimed and the set-off is a sum within the jurisdiction. *Regina v. Bond, ex parte Woodhead*, 5 V.L.R. (L.,) 130; 1 A.L.T., 1.

Set-off.]—To a complaint before justices, a set-off was pleaded to an amount exceeding their jurisdiction. They disregarded the set-off, and made an order for the amount sought in the plaint. Rule absolute to prohibit, subject to the filing of the copy of the minute. *Regina v. Heron, ex parte Burnip*, 9 V.L.R. (L.,) 186; 5 A.L.T., 66.

Stranger about to Leave the Colony—Act No. 565, Sec. 12.]—Justices have no jurisdiction to make an order for payment of a debt upon an *ex parte* application under Sec 12. *Ex parte Rice*, 3 A.L.T., 67.

Jurisdiction as to Forfeiture of Goods Exposed for Sale in Street—Act No. 265 ("Police Offences Statute"), Sec. 8—"Interpretation Act," (No. 52), Sec. 8.]—*Regina v. O'Flaherty, ex parte Winter.* *Post* under OFFENCES (STATUTORY)—Punishment of offences, &c.

Summons Heard by other Justice than the one who Granted It—"Police Offences Statute 1865," Sec. 32—"Justices of the Peace Statute 1865," Sec. 11.]—By virtue of Sec. 11 of the "*Justices of the Peace Statute* 1865" a summons for illegal detention of property under Sec. 32 of the "*Police Offences Statute* 1865" may be heard, and an order made thereon by a justice other than the justice who granted such summons. *Regina v. Lloyd, ex parte Allen*, 2 V.L.R. (L.,) 1.

To Enforce Payment of Calls in a Mining Company.]—*See Regina v. M'Gregor, ex parte Wilkinson*, and other cases. *Post* under MINING—MINING COMPANIES—CALLS and WINDING-UP—Petition and Practice on—Calls.

Rates—"Municipal Institutions Act 1852," (No. 18), Sec. 31.]—Under Sec. 31 of the Act, justices have jurisdiction only as to amount of assessment, and cannot go into the question of rateability. Where they adjudicate simply that an appellant was not aggrieved by the amount of assessment they keep within their jurisdiction. *Blair v. Municipal Council of Ballarat*, 2 W. & W. (L.,) 245.

And *see also* cases under RATES AND RATING.

Information for Being in Unauthorised Occupation of Crown Land—Expired License—"Land Act 1869," Sec. 23.]—Justices have no jurisdiction to hear an information under Sec. 23 of the "*Land Act* 1869" for being in unauthorised occupation of Crown Land under an expired license, unless the license be produced, or its existence and contents proved. *Broadbent v. Hornbrook*, 4 V.L.R. (L.,) 415.

Injury to a Boat on Hobson's Bay—"Town and Country Police Act" (18 Vict. No. 14), Sec. 15.]—Hobson's Bay may for the purpose of the Act be considered an inland lake, and magistrates have jurisdiction in cases of injury done to a boat thereon. *Webb v. Andrews*, 2 W. & W. (L.,) 128.

Enforcing Bye-Laws—Entertaining Objections to Validity of Bye-Law—"Local Government Act 1874," Sec. 225.]—Justices of the Peace who are called upon to enforce any bye-law under the "*Local Government Act* 1874," are deprived by Sec. 225 of that Act of any jurisdiction to entertain objections to the validity of the bye-law. *Rider v. Phillips*, 10 V.L.R. (L.,) 147; 6 A.L.T. 37.

"Dog Act 1864" (No. 229), Sec. 15.]—The justices have no jurisdiction under Sec. 15 of No. 229, to assess damages in respect of sheep being worried by a dog. *Hazelhurst v. Kerr*, 6 W.W. & A'B. (L.,) 244.

Damage for Injuries Caused by Dogs—"Dog Act 1864," Sec. 16.]—Under Sec. 16 of the "*Dog Act* 1864," justices in Petty Sessions have jurisdiction toward damages not exceeding £20 for injuries to sheep done by dogs. *Ex parte Hilliard*, 2 V.L.R. (L.,) 2.

Summons to Find Surety to Keep the Peace—Fine.]—Justices have no jurisdiction, upon a summons to find sureties to keep the peace, to impose a fine, even though an assault had been committed. *Regina v. Turner, ex parte James*, 4 V.L.R. (L.,) 61.

To Inflict a Whipping—"Criminal Law Amendment" (No. 399), Sec. 33—Act No. 265, Sec. 36, Subsec. v.]—A single justice, not being a police magistrate, has no power when adjudicating under Sec. 36, subsec. v. of No. 265, to inflict a whipping under No. 399, Sec. 33. *Purcell v. Nimmo*, 3 V.R. (L.,) 233; 3 A.J.R., 112.

Sentence for Unlawful Assault.]—Justices under Act No. 233, Sec. 38, have power to sentence a person convicted of an unlawful assault to an imprisonment of three months, in default of payment of a fine of £10, notwithstanding Sec. 15 of Act No. 265. *Morrison v. Clarke*, 2 V.R. (L.,) 9; 2 A.J.R., 17.

Jurisdiction and Duty of Justices as to Warrants of Ejectment under "Landlord and Tenant Statute."]—*See* cases *post* under LANDLORD AND TENANT.

Jurisdiction and Duty as to Order of Forfeiture under "Customs Act" (No. 13), Sec. 238.]—*See Regina v. Call, ex parte Callaghan*, 5 A.J.R., 91. *Post* under REVENUE.

Jurisdiction of Justices under "Pawnbrokers Statute 1865," Sec. 5.]—*Ex parte Nyberg, in re Nicholson*, 8 V.L.R. (L.,) 292; 4 A.L.T., 78. *Post* under PAWNBROKERS.

Under "Ponnds Statute 1865," Sec. 26.]—*See Rowe v. Middleton*, 2 V.R. (L.,) 59; 2 A.J.R., 54. *Post* under POUNDS AND IMPOUNDING.

Jurisdiction and Duty as to Hearing Evidence under Sec. 15 of the "Ponnds Statute 1874" (No. 478).]—*Schneider v. Wright*, 4 V.L.R. (L.,) 62; *Regina v. Heron, ex parte Jones*, 8 V.L.R. (L.,) 140; 4 A.L.T., 6. *See post* under POUNDS.

Jurisdiction Generally under "Police Offences Statutes."]—*See* OFFENCES (STATUTORY).

Jurisdiction and Duty under Sec. 16 of "Master and Servant Statute" (No. 198)—Complaint not Stated to have been on Oath.]—*Regina v. Pearson, ex parte Hall*, 5 V.L.R. (L.,) 289; 1 A.L.T., 42. *Post* under MASTER AND SERVANT.

Jurisdiction and Duty as to Issuing a Distress Warrant under Sec. 38 of the "Mining Companies Statute" (No. 228).]—*Regina v. Gaunt*, 1 A.J.R., 36. *Post* under MINING COMPANY—Winding up—Enforcement of Contribution.

Jurisdiction and Duty as to Imposing Penalty for Breach of Bye-laws of Government Railways.]—*Regina v. Nicholson, ex parte Puffett*, 8 V.L.R. (L.,) 44. *Post* under PUBLIC WORKS.

(e) Compelling Justices to do their Duty.

Mandatory Order—"Justices of the Peace Statute," Sec. 138.]—A mandatory order *nisi* issued under Sec. 138 of the "*Justices of the Peace Statute*" (No. 267) need not refer to that Section. *Regina v. Pohlman, ex parte Nickless*, 5 W. W. & A'B. (L.,) 31.

Licensing Justices—Not Included in Sec. 138.]—Sec. 138 does not apply to licensing justices. The proper remedy in their case is by mandamus. *Regina v. Sturt, ex parte Lalor*, 4 A.J.R., 20.

Act No. 267, Sec. 138—Refusal of Publican's Licence—Mandamus Proper Remedy not Mandatory Order under Sec. 128.]—*See ex parte Mendellsohn*, 2 A.L.T., 45. *Post* under MANDAMUS.

Justices Dismissing Case on Preliminary Objection, having Refused Leave to Amend—Proper Remedy under Sec. 138, since no Appeal will Lie.]—*See Regina v. Cogdon, ex parte Wilkinson*, 2 V.R. (L.,) 134; 2 A.J.R., 84. *Post* under APPEAL *column* 764.

Hearing and Determining—What is.]—Hearing and determining a case can only be after evidence is taken, not by allowing an objection in the nature of a special demurrer. *Regina v. Cogdon, ex parte Wilkinson*, 2 V.R. (L.,) 134; 2 A.J.R., 84.

Forcible Entry and Detainer.]—Where a person was charged with a forcible entry and detainer under 5 Vict. II., Stat. I., cap. 7, and there was no force used at the time of the entry, but it did not appear that there might not have been an offence within the Statute, the Court granted a *mandamus* to compel the justices to hear the case, and give their decision on that part of the case. *Regina v. Templeton, ex parte Moore*, 4 A.J.R., 20.

Mandamus to Compel a Justice to Endorse a Warrant Issued in Another Colony—Act No. 267, Sec. 63—Extra Territorial Jurisdiction.]—A warrant had been issued by a justice in New South Wales for the apprehension of a person charged with sheep-stealing. The warrant was produced to a Victorian justice for him to endorse it. On an application for a *mandamus*, *Held* that the power given by Sec. 63 of Act No. 267 to a justice to endorse a warrant, "whether issued in Victoria or elsewhere," was not *ultra vires*, but that the schedule No. 13 referred to in the margin of Sec. 63, and the words "execute the same" in Sec. 63, do not authorise the constable to take the offender into New South Wales to the justices issuing the warrant, but only authorise the arrest and conveyance to the Victorian boundary; *per Higinbotham, J.*, that the constable was authorised to take the offender into New South Wales

Mandamus issued. *Regina v. Call, ex parte Murphy*, 7 V.L.R. (L.,) 113; 2 A.L.T., 124.

Act No. 267, Sec. 138—Criminal Prosecution — Larceny — Previous Proceedings in Civil Court.]—C. was arrested on a warrant for larceny, and on his being brought before the justices his attorney objected to their hearing the charge, on the ground that the informant had obtained a debtor's summons for the amount mentioned in the charge, and had obtained an order to sequestrate C.'s estate. Rule absolute for justices to hear and determine the criminal charge. *Regina v. Call, ex parte Miller*, 9 V.L.R. (L.,) 120.

Mandamus to compel justice to grant a Pawnbroker's License.]—*Ex parte Nybery, re Nicholson*, 8 V.L.R. (L.,) 292; 4 A.L.T., 78. *Post* under PAWNBROKER.

Duty to Hear Complaint for Nuisance.]—Justices have no discretion to refuse to hear a complaint for a nuisance at common law; but must hear the case. *Regina v. Balcombe*, 1 A.J.R., 152.

Mandamus—Appearance of Counsel—Costs.]—If there is no opposite party to be served with a rule, and if questions of law are involved, justices may appear by counsel, and are entitled to costs. *Regina v. Alley, ex parte Guess*, 9 V.L.R. (L.,) 19; 4 A.L.T., 150; *See* also S.P., *Ex parte Minogue*, 4 A.L.T., 149.

Order to Hear Case—Costs—Defendant not Appearing to Defend.]—The Court on making absolute an order to justices to hear a complaint, which they had erroneously declined to hear, on the ground of want of jurisdiction, refused to award costs against the defendant, who had not appeared before the justices, or resisted the complainant's claim. *Regina v. Daley, ex parte Hansford*, 6 V.L.R. (L.,) 28; 1 A.L.T., 151.

Costs—Act No. 267, Sec. 138—Person Obtaining an Order Nisi to Compel Justices to Hear and Determine a Case.]—Where a person obtained an order *nisi*, calling upon justices to hear and determine a complaint, and the order absolute was simply to hear the case, and was therefore different from the order *nisi*, no costs were allowed the complainant. *Regina v. Balcombe*, 1 A.J.R., 152.

And *see* under LICENSING ACTS AND MANDAMUS.

Compelling Justices to State Special Case on Appeal.]—*See post* under sub-heading APPEAL.

II. MATTERS PRELIMINARY TO EXAMINATION OR HEARING.

Issuing Warrant—Act No. 267, Sec. 57.]—A justice has power under Sec. 57 to issue a warrant on a Sunday, only for an indictable offence. *Graham v. Haig*, 6 A.L.T., 158.

Act No. 267, Sec. 67—Non-appearance of Defendant.]—Defendant was summoned for a breach of by-laws of the Board of L. and W., and, not appearing, was convicted in his absence, and ordered to pay a certain fine, "in default distress, in default seven days." Defendant received no notice of the minute of conviction, and was served with a warrant of distress, and afterwards with a warrant of commitment. *Held* that it was not necessary to serve defendant with a copy of the minute of conviction before issuing the warrants. Prohibition refused. *Regina v. Koch, ex parte Wilks*, 9 V.L.R. (L.,) 121; 5 A.L.T., 20.

Defendant Brought Irregularly before Justices—No Objection Taken at the Time.]—M. was brought before justices, charged with an offence without a warrant or a summons, and, making no objection to the mode of procedure, was convicted. *Held* that the conviction would not be quashed on an affidavit showing the irregularity of the proceedings, that objection then being taken for the first time. *Regina v. Gascoigne, ex parte Millidge*, 9 V.L.R. (L.,) 108; 5 A.L.T., 8.

Rehearing by Justices—Necessity of Fresh Summons.]—Where O. was summoned for calls by the official agent of a wound-up company, and notice was served on him by a solicitor that the case was to be reheard, being remitted for that purpose on appeal, but no fresh summons was served on O., *Held* that the notice was insufficient, that a fresh summons or some intimation from the Court was necessary. *Osborne v. Gaunt*, 3 A.J.R., 47.

Variance Between Name of Plaintiff and that Given in the Summons—Act No. 267, secs. 69, 70.]—In the certificate of registration of a company the company was called the "Union Quartz Mining Company" (Registered,) and in the summons it appeared as "The Union Quartz Mining Company" (Registered.) *Held* that the variance was immaterial, and that the justices ought not to dismiss a case on the ground of variance. *Reeves v. Forbes*, 1 A.J.R., 154.

Amending Summons—"Justices of Peace Statute" (No. 267) Sec. 69—Insufficiency of Summons.]—C. was summoned under Sec. 26 of No. 265 ("*Police Offences Statute*") for using abusive language which "might have" provoked a breach of the peace, and an objection taken at the trial before the justices that the summons as so worded did not disclose an offence was overruled, and she was fined. The justices refused to state a special case. Rule *nisi* for a *mandamus*. *Held* that there was no power of amendment under Sec. 69 of Act No. 267 in cases where the summons disclosed no offence on the face of it. Rule absolute for a *mandamus* to state special case. *Regina v. Call, ex parte Clarson*, 3 A.J.R., 45.

Power to Adjourn—Act No. 267, Sec. 69.]—Sec. 69 comprises all informations, whether for indictable offences or summary convictions, and the power of adjournment therein given in case of insufficient information applies to all such informations. *Pyrke v. Nettleton*, 3 V.R. (L.,) 6; 3 A.J.R., 27.

Act No. 267, Secs. 69, 70—Error in Summons—Amendment—Costs.]—Where a summons contained a date as the 2nd of February, instead of the 12th, and the justices dismissed it, regarding this as a fatal error, a rule absolute for a *mandamus* was granted, as the justices had power to amend the summons, but *without costs*, as a fresh summons would have been a simpler remedy. *Regina v. Cogdon, re Sistron*, 5 A.J.R., 20.

Error in Summons—Amendment.]—Where a complaint was improperly taken out in the name of the Queen, and it was sought on the return of a rule *nisi* for a prohibition to amend by adding the names of others as complainants, the Court thought the amendment too large, and made the rule absolute without costs. *Regina v. Rowe*, 1 V.R. (L.,) 83.

Two Inconsistent Offences Included in one Summons—Matter for Amendment under Sec. 69 of Act No. 267.]—Where a person was summoned under the "*Waterworks Statute*," for "causing" and "permitting" injury to be done to a reservoir, and it was objected that the two offences were inconsistent, and the magistrate refused to allow an amendment, and dismissed the case. *Held, per Barry, A.C.J.*, that the amendment should have been permitted under Sec. 69, and if the defendant had been in any way deceived or misled by the amendment, the case could have been adjourned. *Regina v. Cogdon, ex parte Wilkinson*, 2 V.R. (L.,) 134.

Adjournment to Amend Defective Summons—Particulars of Demand—"Justices of the Peace Statute 1865," Sec. 69.]—Justices may, under Sec. 69 of the "*Justices of the Peace Statute* 1865," adjourn the hearing of a complaint, in which particulars of demand have not been endorsed on the summons in compliance with Sec. 16 of the "*Amending Act*" (No. 565), in order to allow the complainant to remedy the defect. *Ex parte Forsman*, 4 V.L.R. (L.,) 55.

Summons for one Offence and Conviction for Another—Act No. 267, Sec. 69.]—Although a charge in which justices have primary jurisdiction, may be entertained against a person, when he is actually before justices, without any previous summons, yet, if such person has been summoned for an offence, the justices, after hearing the evidence, have no power to proceed to convict him of a different offence, unless they inform him that they have acquitted him of the former charge, and that they intend to entertain the other. *Regina v. Wharton, ex parte Brilly*, 4 V.L.R. (L.,) 160.

Summons Containing More than One Matter of Complaint.]—A summons containing more than one matter of complaint is, by virtue of Sec. 73 of the "*Justices of the Peace Statute* 1865," bad as to all or any of them. *Regina v. Mollison, ex parte Borough of Sandridge*, 2 V.L.R. (L.,) 51.

Complaint for Rates.]—A complaint before justices for rates due, comprised several rates, some due under Acts prior to the Act under which the complaint was laid. *Held* that the justices were right in declining to hear it, on the ground that it contained more than one matter of complaint. *Ibid.*

A criminal information should not include several distinct offences. Where, therefore, L. was summoned for infringing the regulations of a common on three different days. *Held* that it was bad. *Lloyd v. Gibb*, 1 A.J.R., 134.

Act No. 267, Sec. 73—Several Acts Charged in one Summons—Disobedience to a Master.]—A summons was taken out under Act No. 198, Sec. 11, for the one offence of disobedience, setting out three instances of such disobedience. *Held* that the summons was not bad under Sec. 73 of Act No. 267, and rule to quash conviction discharged. *Regina v. Turnley, ex parte Gleeson*, 9 V.L.R. (L.,) 114.

Act No. 267, Sec. 73—Complaint for Calls.]—The Court *held* that there must be a separate complaint for each call. *Ogier v. Ballarat Pyrites Company*, 4 W.W. & A'B. (L.,) 245.

But *see contra Guthrie v. Gippsland G.M. Company*, 5 A.J.R., 161; *Regina v. M'Gregor, ex parte Wilkinson*, 6 V.L.R. (L.,) 167; 2 A.L.T., 4, where the Court *held* that a company might sue for several calls under one complaint.

Preliminary Examination on Charge of Indictable Offence—Adjournment for More than Eight Days—Act No. 267, Sec. 88.]—G. was committed for trial by justices on a charge of larceny, and he swore an information against the prosecutor, H., for perjury in that very matter. As such information would have to be tried at the Court of Assize, which did not sit till after the sitting of the Court at which the charge of larceny was to be tried, the justices, thinking that it would needlessly prejudice the trial for larceny if H., the principal witness, were under committal for trial for perjury at the time when he would have to give his evidence, adjourned the hearing of the information for perjury till after the trial for larceny. *Held* on an application by G. that the justices had a discretion in the matter, and that the Court would not compel them to proceed with the examination on the charge of perjury. *Regina v. Smythe, ex parte Godfrey*, 8 V.L.R. (L.,) 141.

No Personal Service of Summons—Affidavit of Service.]—Under Sec. 2 of the "*Justices of the Peace Statute Amendment Act*" (No. 319), where there has not been a personal service of the summons the justices have no jurisdiction to hear the case upon an affidavit of service. *Regina v. Gaunt, ex parte Vallins*, 2 V.L.R. (L.,) 283.

Amendment of Conviction—Service on Right Party under Wrong Name—Act No. 267, Secs. 64, 65.]—On an information for an offence against a certain Statute, A.Y., the right defendant, was summoned under the name of S.C.Y. The summons was served, and A.Y. appeared and was convicted. The Court refused to prohibit the conviction, but ordered the conviction to be amended. *Regina v. Carr, ex parte Ah Ying*, 5 V.L.R. (L.,) 391; 1 A.L.T., 97.

Sufficiency—Determination of Justices—"Justices of the Peace Amending Act," No. 319, Sec. 2.]—It is a matter entirely for the determination of the justices whether a summons has been sufficiently served under Sec. 2 of the "*Justices of the Peace Amending Act*" (No. 319.) Service at the place of abode of the defendant, and in his absence, is sufficient, if the justices be satisfied, though he have had no knowledge of the summons until after an order has been made upon it. *Ex parte M'Evoy*, 6 V.L.R. (L.,) 424; 2 A.L.T., 125; *sub nom. Regina v. M'Evoy.*

Service of Summons.]—Where a summons was served only half-an-hour before the hearing, but the affidavits showed that the defendant was in attendance at the hearing, having a cross summons against the complainant, *Held* that the justices had jurisdiction to hear it at once. *Regina v. Cantwell, ex parte Costelloe*, 7 V.L.R. (L.,) 475.

Service on Manager of Company—No Appearance—Adjournment—Application to Quash.]—A summons to appear before justices was served on the manager of a mining company two days after the day fixed for appearance, but he took no steps to ascertain what had been done at the hearing of the summons, which had been in fact adjourned, but no notice was given to the company of the adjournment. *Held* that there was no sufficient reason for quashing the order made at the adjourned hearing. *Regina v. Lawlor, ex parte Lone Hand Q.M. Coy.*, 8 V.L.R. (L.,) 207.

Affidavit in Support of Service—Act No. 319, Sec. 2—Affidavit "Made and Signed."]—The *jurat* of an affidavit in proof of the service of the summons required by the Act No. 319, Sec. 2, was in the form "sworn before me," &c. *Held* that this was insufficient, since the words did not show that the affidavit was, or purported to be, "signed" as well as "made" before the justices as required by the terms of the section. *Regina v. Howitt, ex parte Walker*, 10 V.L.R. (L.,) 320; 6 A.L.T., 150.

Quashing Order—Summons Improperly Filled Up—Duty of Clerk of Petty Sessions—Costs.]—The Court quashed an order on a summons, where the summons had been altered so clumsily that it was uncertain on what day the defendant ought to appear; but did not allow costs against the complainant, since the responsibility for the correctness of the proceedings rested, not on the parties, but on the clerk of Petty Sessions, whose duty it was to fill in the summons properly, but, the clerk not being before the Court, costs were not given against him, but were left to abide the event. *Regina v. Harrigan, ex parte Allen*, 8 V.L.R. (L.,) 22; 3 A.L.T., 101.

Interpleader Summons—Admission of Evidence as to Bill of Sale being Fraudulent.]—*See Dunlop v. Tutty, ante column* 109.

III. Procedure in Summary Jurisdiction.

Remand Warrant—What Sufficient Materials on which to Grant—"Justices of the Peace Statute 1865," Sce. 101.]—The police received a telegram from England directing them to arrest a passenger by steamer who was alleged to be guilty of forgery; and, on the arrival of the steamer, the passenger was arrested, and brought before the City Bench, but no warrant or sworn information was produced. Upon the application of the police, the prisoner was remanded until a date, by which it was anticipated a police officer would arrive from England with all the necessary documents. *Held*, that these were sufficient materials for granting the remand warrant. *In re Davis*, 1 A.J.R., 1.

Act No. 263, Sec. 12—Justice Adjudicating on Part of the Case—Waiver.]—A complaint was heard before three justices; of these, one came on the bench after part of the evidence had been taken, but he took part in the adjudication. *Held*, that all the justices adjudicating upon a case ought to have been present during the entire hearing. A justice, by merely sitting upon the bench, takes part in the adjudication, and if he does so after the hearing has begun the previous witnesses ought to be re-sworn and re-examined, but that such an objection not being taken at once will be deemed to be waived, and cannot be subsequently taken. *Regina v. Browne, ex parte Sandilands*, 4 V.L.R. (L.,) 138.

Practice—Court most Easy of Access—"Justices of the Peace Act 1876" (No. 565), Sec. 13.]—For the purposes of determining, under Sec. 13 of the "*Justices of the Peace Act* 1876" (No. 565), which is the Court nearest, or *most easy of access*, both the execution creditor and the claimant, on an interpleader summons by a constable who has executed a distress warrant issued by justices, must be considered as defendants, one as much as the other. Distance is not always to be the ruling element considered in determining which Court is the most easy of access. *Regina v. Kavanagh, ex parte Comrie*, 6 V.L.R. (L.,) 179; 2 A.L.T., 7; *sub nom. ex parte Comrie.*

Nearest Court—Act No. 565, Sec. 13.]—On a rule *nisi* for prohibition on the ground of proceedings being had at the Court nearest of access, under Act No. 565, Sec. 13, the Supreme Court will not interfere upon insufficient evidence, and the burden of proof lies upon the person wishing to disturb the order. *Regina v. Panton, ex parte Winstone*, 7 V.L.R. (L.,) 303; 3 A.L.T., 22.

Warrant for Commitment—Service of Summons—No. 267, Sec. 117.]—W. was convicted before T., a police magistrate, and other justices, on a summons under Sec. 38 of the "*Scab Act* 1870" for being the owner of scabby sheep, and fined. In default of payment of fine, the amount was to be recovered by distress, and, in default of distress, to be imprisoned. The amount was not paid, a distress warrant was issued, and a return of *nulla bona* was made, after which a summons was signed by T. calling upon W. to show cause why a warrant of commitment should not be issued. This was not served, as W. had left the colony. T. subsequently signed a warrant for W.'s arrest. W. sued T. for false imprisonment. The jury gave a verdict for T. On rule *nisi* for new trial, *Held* that the

words of Sec. 117 of No. 267 were mandatory, and the act of the justices ministerial, and that before signing the warrant of commitment it was not necessary for a summons to show cause to be served. *Warr v. Templeton*, 3 V.R. (L.,) 56; 3 A.J.R., 37.

See S.P., *Bradley v. Creeth*, 4 A.J.R., 92.

Warrant of Distress—Issue before Service of Copy of Minute of Order—"Justices of the Peace Statute 1865," Sec. 117.]—Justices may, under Sec. 117 of the "*Justices of the Peace Statute* 1865," issue a warrant of distress on default of payment of money without any prior service of a copy of the minute of the order, and before the order itself is drawn up, if the defendant has been present when the order for payment of the money was made. *Regina v. Bradshaw, ex parte Berry*, 6 V.L.R. (L.,) 197; 2 A.L.T., 20; *sub nom. in re Bradshaw.*

When Commitment Bad—Act No. 267, Sec. 122.]—Justices had made an order for payment of a certain sum of money, in default of payment distress, in default of distress imprisonment. The defendant was committed to gaol. Upon return of a writ of *habeas corpus*, it appeared in the warrant of commitment that there was no sufficient distress. *Held* that there was no order recited of an adjudicating magistrate to the effect that there was no sufficient distress, but only a recital to that effect by the committing magistrate; that a definite adjudication was necessary, and that commitment was bad. Prisoner discharged. *In re Maver*, 4 W.W. & A'B. (L.,) 213.

Adjudication of Commitment in Default of Distress—Sufficiency of Warrant.]—On an adjudication of commitment, in default of satisfying a distress, the justices have no jurisdiction to entertain an objection to the sufficiency of the distress warrant. *M'Eachren v. Shaw*, 4 A.J.R. 72.

"Licensing Act 1876," Sec. 54—'Justices of the Peace Statute 1865," Secs. 111, 125—Conviction Ordering Payment, Distress, or Imprisonment.]—Justices have no power, under a conviction imposing a penalty under Sec. 54 of the "*Licensing Act* 1876," which statute provides no means of enforcing payment, to order, under Secs. 111-125 of the "*Justices of the Peace Statute* 1865," in default of payment distress, and in default of sufficient distress imprisonment. *Regina v. M'Cormick, ex parte M'Monigle*, 10 V.L.R. (L.,) 268; 6 A.L.T., 105.

Per Higinbotham, J. Section 123 of the "*Justices of the Peace Statute* 1865" is only applicable to cases where the Act on which the conviction is based authorises a warrant of distress to issue; and does not, therefore, apply to a a conviction under Sec. 84 of the "*Licensing Act* 1876." If it did apply, the justices would have power under such a conviction to order imprisonment in default of distress in their original adjudication. *Sed per Williams and Holroyd, JJ.* Sec. 123 of the "*Justices of the Peace Statute* 1865" applies to all cases where the statute which authorises the conviction provides no means of enforcing payment; and applies, therefore, to a conviction under Sec. 54 of the "*Licensing Act* 1876." But Sec. 123 does not empower the convicting justices to order, in their original adjudication, imprisonment in default of distress. *Ibid.*

Where, therefore, convictions under Sec. 84 of the "*Licensing Act* 1876," for selling liquor without licenses, ordered payment of a fine of £25, in default distress, and in default of sufficient distress imprisonment for one month, *Held* by the whole Court, though on different grounds, that the convictions were bad. *Ibid.*

And *see* under LICENSING ACTS.

Jurisdiction under the "Masters and Servants Statute 1864," Sec. 11.]—*See Regina v. Bayne, ex parte Rea*, 4 V.L.R. (L.,) 89; *post* under MASTER AND SERVANT—Rights and duties, &c.

Punishment on Convictions of Offences under "Police Offences Statutes."]—*See post* under OFFENCES (STATUTORY.)

Conviction—Venue.—The *venue* in the margin of a conviction was "colony of Victoria to wit," and in the body of the conviction it was stated that the appellant "is convicted before the undersigned Police Magistrate in and for the said colony," and that the offence was committed "at Ballarat in the said colony." *Held* that the description of Victoria as the place in which the offence was committed, with the other evidence on the face of the document, would suffice to show jurisdiction, and that the conviction was valid. *Batchelder v. Corden*, 5 V.L.R. (L.,) 45.

Amending Information—Act No. 319, Sec. 3.]—It is open to justices at any time before final determination on a conviction, either by appeal, *certiorari*, or otherwise, and before it has been made a record, at the General Sessions, to amend that originally drawn up, or to substitute for that first drawn up another in a different or amended form, provided the amendment be in accordance with the facts proved. *Regina v. Puckle, ex parte M'Intosh*, 4 A.J.R., 21.

Amending Conviction.]—Justices may amend a conviction imposing a penalty where the penalty is a matter of computation, and a mistake has been made in the amount as stated on the minute of conviction. *Regina v. Akehurst, ex parte Gavel*, 3 A.J.R., 119.

Conviction—Sentence to Commence at the Expiration of Another Sentence—"Justices of the Peace Statute 1865," Sec. 127.]—Justices sentenced a prisoner under Sec. 127 of the "*Justices of the Peace Statute* 1865," on four charges of indecent exposure. On three charges he received sentences. On the fourth the sentence was for six months, with hard labour, the sentence to commence "at the expiration of three other sentences passed upon the prisoner this day" for indecent exposure. On special case, *Held* that the conviction was sufficient, and was not bad for uncertainty. *Regina v. Hodges*, 10 V.L.R. (L.,) 319; 6 A.L.T., 144.

Verbal Order Followed by a Warrant for Conviction—Effect of Acts, Nos. 284, 292 upon Justices' Power to Convict.]—*In re Devaney, ante column* 348.

Awarding Costs—Act No. 267, Sec. 115.]—Magistrates can only award costs in cases where they have a summary jurisdiction. Therefore, in a case of perjury which justices had dismissed with costs, a rule *nisi* for a prohibition against the order for costs was made absolute. *Regina v. Daly*, 6 W.W. & A'B. (L.,) 76.

Fraud Summons—Dismissal—Magistrates Cannot give Costs.]—*See O'Donoghue v. Hamilton, ante* column 348.

"Under Companies Statute 1864," Secs. 25, 63—"Justices of the Peace Statute 1865," Sec. 114—Power to Award Costs to Informer.]—justices of the peace may award the costs of a conviction, under Sec. 25 of the "*Companies Statute* 1864," to the informer independently of Sec. 63 of the Act, since Sec. 114 of the "*Justices of the Peace Statute* 1865" extends to a conviction under Sec. 25 of the former Act. *In re Bishop*, 4 V.L.R. (L.,) 287.

Distress Warrant—Tender of Part of Amount Ordered—"Justices of the Peace Statute 1865," Sec. 117.]—B. recovered a judgment against D. in Petty Sessions. D. went to B.'s house and tendered a part of the amount recovered, which tender B. refused to accept, and obtained a distress warrant. D. brought an action before the justices for illegal distress, and recovered a verdict. On appeal, *Held* that the verdict should be set aside, D. not having accepted the tender. *Barry v. Dolan*, 2 A.J.R., 114.

IV. Appeal and Reviewing Decision.

(a) *Where Appeal Lies and Conditions Precedent to be Observed.*

Power of Appeal Conferred by Act No. 159, Sec. 14—Stating a Case.]—The power conferred by the Act No. 159 on both parties to a proceeding before justices to appeal is limited to cases in which the determination of the justices is erroneous in point of law; and in those instances in which it is sought to compel the justices to state a case, it lies on the intending appellant to show that the justices have arrived at an erroneous conclusion in point of law. *Ex parte Matt*, 1 W. & W. (L.,) 234.

[Compare Sec. 153 of the "*Justices of the Peace Statute* 1865" (No. 267.)]

Appeal upon a Point not Determined On—Stating Case—Act No. 159, Sec. 11.]—Sec. 11 of the Act only gives justices power to state a case where, "after a determination by a justice of any matter which he has power to determine," either party aggrieved appeals against "such determination" as erroneous in point of law. Justices therefore cannot state a case upon rateability, a matter in which they have no jurisdiction. *Blair v. Municipal Council of Ballarat*, 2 W. & W. (L.,) 245.

[Compare Sec. 150 of Act No. 267.]

Act No. 267, Sec. 150—Decisions in Rate Cases.]—Appeal cases under Sec. 150 of the Act No. 267 are allowed from decisions of Petty Sessions in rate cases. *Mayor of Fitzroy v. Collingwood Gas Coy.*, 6 W.W. & A'B. (L.,) 72; 1 A.J.R., 82.

Where Appeal Lies—Act No. 159, Sec. 11—Determination.]—A decision of justices in rejecting evidence, which if admitted, might have left the ultimate decision of the case the same, is not such a determination of the matter before the justices as is contemplated by the Act No. 159, Sec. 11, which gives the right of appeal to a person aggrieved by such determination as being erroneous in point of law; and no appeal will lie where evidence is rejected which would not affect the principle of the case, but might possibly go to lessen damages. *Peachment v. Conlon*, 1 W.W. & A'B. (L.,) 74.

[Compare Sec. 11 of Act No. 159 with Sec. 150 of Act No. 267.]

Where Appeal Lies—Hearing and Determining—Act No. 267, Sec. 138.]—Upon a case at Petty Sessions coming on for hearing a preliminary objection was taken that the summons being for "causing and permitting" injury to be done to a reservoir was informal, since the two offences were inconsistent. The magistrate refused leave to amend, and dismissed the case without hearing it. On a rule calling on the magistrate to show cause why he should not hear and determine the case, *Held* that the case had not been "heard and determined," so that an appeal would lie; and rule to compel the magistrate to hear and determine the case made absolute. *Regina v. Cogdon, ex parte Wilkinson*, 2 V.R. (L.,) 134; 2 A.J.R., 84.

Where Appeal Lies—Prisoner Sentenced to a Whipping for an Offence under Sec. 36 of Act No. 265—Under the Age of Sixteen—Appeal, not Rule to Quash, the Remedy.]—*See Regina v. Benson, ex parte Tubby*, 8 V.L.R. (L.,) 2. *Post* under Sessions—Appeal to, &c.

Appeal—Where it Lies.]—No appeal will lie from a decision of justices refusing to entertain an objection as to the sufficiency of a distress warrant on an adjudication for commitment in default of satisfying a distress, since the justices had nothing to determine. If the warrant on which the defendant was committed is bad, his remedy is by *habeas corpus*. *M'Eachern v. Shaw*, 4 A.J.R., 72.

Decision on Facts.]—Although the Court is unwilling to interfere with a decision of justices upon facts, nevertheless the Court will interfere with such a decision, where the conclusion or inference of the justices is not warranted by the facts. *Regina v. Mollison, ex parte Crichton*, 2 V.L.R. (L.,) 144.

Practice—Act No. 565, Sec. 11—Question of Fact.]—Where there is evidence upon which justices were at liberty to act, the Court will not review their decision in matters of fact; though the Court might arrive at a different conclusion upon the evidence. *Regina v. Taylor, ex parte Lewis*, 5 V.L.R. (L.,) 108.

Decision on Facts.]—Where justices had decided on facts before them, a summons for a breach of regulations prohibiting "processions," that there had been a procession, the Court refused to review this decision, not being satisfied that the justices were clearly wrong. *Bannon v. Barker*, 10 V.L.R. (L.,) 200.

Application to State a Case need not be in Writing—"Justices of the Peace Statute," Sec. 150.]—The application by the appellant, under Sec. 150 of the "*Justices of the Peace Statute* 1865," to the justices to state a case need not be in writing. If the justices choose to state a case on a verbal application it is entirely in their discretion to do so. *Lloyd v. Gibb*, 1 A.J.R., 134.

Conditions Precedent.]—The transmission of an appeal case from justices, under the Act 25 Vict., No. 159, within the time—seven days—allowed by the Act, and giving the notice of appeal required by the Act, are conditions precedent to the appellate jurisdiction of the Supreme Court; and where they have been omitted, the Court will order the case to be struck out of the list. *Williams v. Row*, 1 W. & W. (L.,) 376.

[Compare Sec. 150 of Act No. 267.]

Time for Transmitting Case—Act No. 159, Sec. 11.]—Under Sec. 11 of the Act No. 159, which enacts that the appellant shall "within one week after receiving such case, transmit the same" to the Supreme Court, the case must be in the hands of the officer of the Supreme Court within the seven days, or there will be no jurisdiction in the Supreme Court to hear the case. *Stirling v. Hamilton*, 1 W.W. & A'B. (L.,) 14.

[Compare Sec. 11 of Act No. 159 with Sec. 150 of Act No. 267.]

Transmission of Case—"Justices of the Peace Statute 1865" (No. 267), Sec. 150.]—A preliminary objection was raised that the case had not been transmitted in time under Sec. 150 of Act 267. The case bore an endorsement by the Clerk of Petty Sessions to the effect that he "posted the statement, at the request of the attorney's solicitor, on 24th May, 1867, and that, in the ordinary course of postal arrangements, with one day added, the document would arrive at its destination on or before 26th May, 1867." The date of its arrival at Court was such that, if 24th May were to be deemed the day on which it was "received" by the appellant's solicitor, it was not "transmitted" within the "fourteen days," *sed aliter*, if 26th May were the day of its receipt. *Held*, by *Barry* and *Williams, JJ.* (*dissentiente Stawell, C.J.*,) that as the case was received by the Clerk of Petty Sessions for and on account of the appellant, the time should run from the day on which it was so received by him. Objection upheld. *Ross v. Pyke*, 4 W.W. & A'B. (L.,) 145.

On an appeal from justices, the special case was returned to the appellant's attorney more than fourteen days before it was filed with the Prothonotary. On the special case, however, appeared the initials of the magistrate, and a date, within the fourteen days before filing, as if the case had been delivered to the appellant's attorney and then taken back by the magistrate and redelivered at the late date. *Held* that the Court was bound to assume that the magistrate acted correctly in taking back the case, and that the explanation of the retention of it by the magistrate lay upon the party seeking to strike the case out. *Middleton v. Rowe*, 2 A.J.R., 54.

Practice—Transmission of Special Case—Time—Act No. 267, Sec. 150.]—An appellant, on receiving the case, was dissatisfied with it; took it back to the justices, who declined to amend it on a material statement, but amended it on technical grounds. The fourteen days had elapsed if they were to be reckoned from the time it first left the justices; but not so if time was to be reckoned from the date when it was last received. *Held* that the days in Sec. 150 were to be counted from the time it was last received since the justices amended it. *M'Callum v. M'Vean*, 3 V.R. (L.,) 98; 3 A.J.R., 52.

Notice of Appeal—Act No. 267, Sec. 150.]—Where it did not appear on the notice of appeal given under Sec. 150 of the Act that the person appealing was a "person feeling himself aggrieved" by the magistrates' determination, *Held* that the respondent was, by the notice, put in full possession of what he should know. Rule *nisi* to strike out appeal refused. *Henley v. Hart*, 4 W.W. & A'B. (L.,) 162.

Notice—Notice in Writing—No. 159, Sec. 11.]—Where it did not appear on the face of a case that "notice in writing," as required by Sec. 11 of the Act No. 159 (*see* now Sec. 150 of Act No. 267), had been given to the defendant, but it only appeared that "notice" had been given, *Held* that the point could not be raised by way of preliminary objection. *M'Cormack v. Murray*, 2 W. & W. (L.,) 122.

Appeal by Special Case—Notice of Appeal—"Justices of the Peace Statute 1865," Sec. 150.]—On appeal by special case, under Sec. 150 of the "*Justices of the Peace Statute* 1865," the special case must be served on the respondent before it is filed with the Prothonotary. *Kett v. The Queen*, 2 V.R. (L.,) 1; 2 A.J.R., 15. *Moroney v. Purkis*, 5 A.J.R., 127.

Act No. 267, Sec 50.]—Notice of appeal must be given in writing. *Mallett v. Tuff*, N.C. 63. *See* S.P. *Moroney v. Purkis*, 5 A.J.R., 127.

Beechworth Waterworks Act No. 105, Sec. 84—Notice of Appeal.]—Under Sec. 84 of the Act No. 105, a notice of appeal from a conviction under the Act need not show the time or place of the conviction, and need not state that the appeal was made within four months. *Shire of Beechworth v. Spencer*, 5 A.J.R., 160.

Recognisances—Act No. 267, Sec. 151.]—On an appeal from justices, the recognisance should not include the costs, and where the amount awarded is under £20, the recognisance should not be for more than £20. *Anderson v. Luth*, 1 A.J.R., 78. *See* S.P. *Powell v. Taylor*, 1 A.J.R., 78.

Recognisance in Excess of Amount Recovered—Act No. 267, Sec. 151.]—Where justices made an award against a defendant for a sum under £20, and on appeal the appellant entered into a recognisance for over £20, *Held* a fatal objection to the appeal. *Perkins v. O'Toole*, 1 V.R. (L.,) 81; 1 A.J.R., 78. Followed in *Reynolds v. Reynolds*, 9 V.L.R. (L.,) 82.

Recognisances.]—C. was fined £212 15s. and 5s. costs for possessing a larger quantity of gunpowder than was allowed by law. The recognisance entered into was for £426, double the amount of the penalty, and costs. A preliminary objection that the recognisance was bad as including costs, was held fatal, and the appeal dismissed with costs. *Cook v. M'Cullagh*, 1 A.J.R., 153.

Time for Entering into.]—It is sufficient if a recognisance for an appeal is entered into at any time before the special case is delivered. *Regina v. Wyatt, ex parte Rutherford*, 3 V.L.R. (L.,) 126.

Recognisances—Act No. 267, Sec. 151.]—Justices made an order for payment of 15s. a week for maintenance of a wife for twelve months, and a recognisance of £20 was entered into. *Held* that the amount actually "adjudged to be paid" was 15s. a week, and not a certain sum by weekly instalments, and that the recognisance was sufficient. *Mackenzie v. Mackenzie*, 3 V.R. (L.,) 248; 3 A.J.R., 121.

Recognisance for too Large an Amount.]—Where the amount of an order of justices appealed from is under £20, and the recognisance is entered into for more than £20, the recognisance is bad, and the practice is to strike out the appeal without costs. *Heenan v. Layley*, 6 V.L.R. (L.,) 301; 2 A.L.T., 46.

Entering into by Incorporated Company—Manager.]—An incorporated mining company has no power to enter into recognisances by its manager; but the recognisance must be under seal. *Pride and Stringer's Company v. Conisbee*, 2 A.J.R., 57.

Entered into by Corporation—Secretary.]—In an appeal under Act No. 267, Sec. 151, by L. and others, the president, councillors, and ratepayers of a shire entered into a recognisance to prosecute the appeal, a copy was attached to the case, and it purported to be entered into by the secretary of the shire. *Held* that the recognisance was entered into by the wrong person, and was insufficient. *Logan v. Stevens*, 3 V.R.(L.,) 144; 3 A.J.R., 65.

Deposit—Act No. 159, Sec. 12.]—Under Sec. 12 a deposit is a condition precedent to the jurisdiction of stating a case, and where deposit was too small. Case struck out. *O'Dea v. Clayton*, 2 W. & W. (L.,) 252.

[Compare Sec. 12 of Act No. 159 with Sec. 151 of Act No. 267.]

(*b*) *Form of Special Case.*

Appeal on Case Stated—Act No. 237, Sec. 151.]—It need not appear on the face of a case stated by justices under the Act No. 267, that the appellant has either entered into the recognisance, or paid the deposit required by Sec. 151 of No. 267; and such a defect, even if existing, although it might be sufficient to sustain an application supported by affidavits to strike the case out of the list, yet affords no ground for the Court declining to hear the matter. *Woolley v. Carver*, 3 W.W. & A'B. (L.,) 1.

"Justices of the Peace Statute" (No. 267)—Form of Case.]—An objection that the special case did not state that security was given, or that appellant was aggrieved, is not an objection appearing on the face of the case, and cannot be taken by way of preliminary objection; the respondent should in such a case apply to strike case off the list. *Woolcott v. Kelly*, 3 A.J.R., 39, 40; 3 V.R. (L.,) 62.

Amendment of Special Case.]—The proper practice to obtain an amendment of the special case by the insertion of evidence not referred to in the case, is to make application for amendment when the case is called on. Rule *nisi* for the purpose refused. *McCallum v. McVean*, 3 V.R. (L.,) 157; 3 A.J.R., 68.

The justice who stated the case has power to amend it. S.C. 3 V.R. (L.,) 98.

Signature.]—An appeal case is sufficiently signed when signed by one only of the justices who adjudicated upon it. *Skene v. Allen*, 5 V.L.R. (L.,) 179; 1 A.L.T., 12.

It is the duty of magistrates in Petty Sessions stating a case for appeal under the Act to state the case carefully, and the Court will not, except on distinct evidence of an omission, send back the case to be restated. *Wilson v. Crawley*, 2 W. & W. (L.,) 78.

See also S.P. *Webb v. Andrews*, 2 W. & W. (L.,) 128.

Appeal Case not Distinctly Setting Out Grounds on which Case was Decided.]—Where the precise grounds on which the magistrates decided the case were not easily discovered from the appeal case, the Court did not send the case back for restatement, but directed the prothonotary to communicate with the magistrates and obtain their answers to certain questions, and intimated that the appeal would be allowed or dismissed according to the answers given. *King v. Robinson*, 2 W. & W. (L.,) 5.

Remitting Case for Amendment—Proof.]—Justices determined that the evidence, viz., a single sale of spirits, did not constitute sufficient proof of a breach of Act No. 147, Sec. 136, and dismissed information. *Held* that it being uncertain whether the difficulty was one of fact, *i.e.*, whether the evidence "did not" constitute such proof, or one of law, *i.e.*, whether it "could not," the case must be remitted. On amendment it appeared that the evidence "could not" constitute such proof. *Held* that there was evidence to go to a jury, and that the evidence "could" constitute such proof, and case remitted for justices to readjudicate having regard to such evidence. *Moody v. Penny*, 2 W. & W. (L.,) 247.

(c) *Compelling Justices to State a Special Case.*

Where Justices Refuse to State a Case as Frivolous—Act No. 267, Sec. 152.]—C., in 1863, entered into an agreement to lease land for five years, and entered into possession and paid rent, but as the agreement was not under seal he was merely a tenant from year to year. He paid rent after the expiration of the five years, and remained in possession till September, 1870, when he became insolvent. M., his landlord, thereupon served him with notice of ejectment, on the ground that the tenancy had been determined by the insolvency, and as C. refused to quit a warrant was applied for to eject him. The magistrates granted the warrant, and refused to state a case on C.'s application, as they considered it frivolous and only meant for delay. M.'s affidavit could not be used, as it was sworn before his attorney, and the case stood over from Friday to allow it to be resworn. This was not done, but an affidavit was produced from one of the justices detailing the grounds upon which they had acted. *Held* that the application was not frivolous, and order to compel justices to state case made absolute, with costs. *Regina v. Panton, ex parte Connor*, 1 A.J.R., 155.

A justice is not bound to state a special case where only questions of fact are involved, and no question of law. *Regina v. Wyatt, ex parte Rutherford*, 3 V.L.R. (L.,) 127.

Refusal to State a Case—Two Convictions and One Appeal.]—H. was convicted and fined by the justices for breach of a bye-law before the case was stated. A decision of the Supreme Court in another special case, upon a conviction for the same offence by H., was made known, in which the bye-law was declared to be invalid, and the justices, holding that one case ruled the other, and was a mere matter of costs, declined to state a case. *Held* that the justices must state a case upon the second conviction also. *Ex parte Higgins*, 3 V.L.R. (L.,) 286.

Refusal to State a Case—Certificate of Refusal—Postponement—Mandatory Order—Costs.]—It is the duty of justices to state a case when so asked, or to give a certificate of refusal without hesitation. Where an application to state a case was made in Court to one of three justices who had heard the case, and he refused it, *Held*, on order *nisi* to give a certificate of refusal, that the justice had no right to postpone giving such certificate till he had consulted the other justices, but that the order should be made absolute, without costs, since the order *nisi* was obtained precipitately. *Regina v. Dixon, ex parte Richardson*, 8 V.L.R. (L.,) 303; 4 A.L.T., 78.

Affidavits by Justices on Stating a Case—Act No. 565, Sec. 10.]—A justice is not to make an affidavit on one side or the other on disputed facts. The Act No. 565, Sec. 10, authorises him, where his decision is called in question, to make an affidavit setting forth the grounds of the decision, and any facts which he may consider to have a material bearing on the question at issue. *Regina v. Mairs, ex parte Vansuylen*, 7 V.L.R. (L.,) 43.

Refusal to State Case—Frivolous Application—Act No. 267, Sec. 152—Act No. 565, Sec. 11—Affidavits.]—Justices are allowed to refuse to state a case only where the grounds of the objection to their decision are "frivolous"—*i.e.*, the objections taken do not raise a fairly debatable point. Where justices make affidavits they should do so as neutral parties. *Regina v. Dixon, ex parte Richardson*, 9 V.L.R. (L.,) 2; 4 A.L.T., 146.

Costs.]—Costs are given against justices only in exceptional circumstances. *Ibid.*

Affidavits by Justices.]—Justices are required in their affidavits to send a statement of the facts to the Court, and should not make an affidavit on one side or the other. *Ex parte Minogue*, 4 A.L.T., 149.

(*d*) *Practice.*

Practice on Appeal—Right to Begin.]—The party supporting the first proceeding below—information or complaint—has the right to begin in the Supreme Court. *Gurner v. Municipal Council of St. Kilda*, 2 W. & W. (L.,) 124.

Practice on Appeal—Who Begins.]—On an appeal case to the Supreme Court, stated by justices under the Act No. 267, Sec. 150, the party supporting the first proceeding below—information or complaint—should begin. *Shaw v. Phillips*, 3 W.W. & A'B. (L.,) 155.

Petty Sessions—Practice on Appeal from.]—On the hearing of an appeal from Petty Sessions the practice is for the complainant below to begin. *Niall v. Page*, 5 W.W. & A'B. (L.,) 38.

Practice—Right to Begin.]—The party supporting the proceedings below—information or complaint—begins. *Bank of Victoria v. M'Hutchison*, 7 V.L.R. (L.,) 452.

Appearance on Appeal.]—Justices of the peace are not entitled to appear at the hearing of an appeal to the Supreme Court from their decision. *Woodward v. Davey*, 5 W.W. & A'B. (L.,) 4.

Appearance by Justices, Act No. 565, Sec. 11.]—Where the question involved is merely one of fact the justices may file an affidavit explaining the grounds of their decision, and bringing material facts before the Court without appearing by counsel; but where questions of law are involved they may appear by counsel, and will be entitled to costs. *Regina v. Taylor, ex parte Lewis*, 5 V.L.R. (L.,) 108.

Per Stawell, C.J. After giving their decision the magistrates ought not to interfere by making affidavits or otherwise. *Regina v. Panton, ex parte Connor*, 1 A.J.R., 155.

Practice—Respondent not Delivering Copies of Special Case—Appeal Case not Distinctly Setting out Grounds on which Case was Decided.]—Where a respondent in an appeal from Petty Sessions had failed to deliver his copies of special case to the judges and appellant had delivered them for him, there is no rule of Court requiring the re-

spondent to pay to the appellant the costs of such copies before he can be heard. *King v. Robinson*, 2 W. & W. (L.,) 5.

Appeal Case—Fee Stamps—Copies—Costs.]—Where fee stamps had not been affixed to the papers in connection with a special case by way of appeal from a magistrate, and copies of the case had not been supplied to the judges by either party, *Held* that both parties were in the wrong, it being the duty of the respondent to furnish copies if the appellant neglected to do so, and the appellant was ordered to pay the costs of the day, and the case was adjourned to allow the stamps to be affixed, and an intimation was given that no further costs would be allowed to either party, no matter which succeeded. *Cameron v. Thomson*, 3 A.L.T., 104.

Special Case—Fees—"Justices of the Peace Statute 1865," Sec. 150.]—The fee imposed in respect of a case stated by way of appeal from justices, under Sec. 150 of the "*Justices of the Peace Statute* 1865," must be paid, though the solicitors for the appellant have prepared the case and copy at their own expense. *Bruce v. Garnett, in re Riedle*, 10 V.L.R. (L.,) 126.

Practice on Appeal—Drawing up Rule.]—It is not necessary in drawing up the rule allowing an appeal from Petty Sessions, to insert a clause stating that it was allowed on reading an affidavit of service upon the respondent. *Cadden v. Osborne*, 4 A.J.R. 165.

Costs.]—Where nothing is said about costs, on an appeal from Petty Sessions being dismissed, the successful party may draw up his rule with costs, and there will be no necessity to apply to Court for an express order. *M'Kenzie v. Jones, Riley v. M'Cawley*, 2 W.W. & A'B. (L.,) 20.

Costs.]—Where an appeal case from Petty Sessions had been abandoned by the appellant on notice, and the respondent appeared and claimed full costs, *Held*, he was so entitled. *Cranbourne Road Board v. Wedge*, 2 W.W. & A'B. (L.,) 87.

Costs.]—Where the respondent gives notice that he abandons an order appealed from, the appellant is entitled to set down the appeal to appear upon it, but is only entitled to costs before notice, and those after notice which are simply attendant on verifying the consent, and to those of his appearance. *Henley v. Hart*, 4 W.W. & A'B. (L.,) 162.

Costs.]—Where an objection, not taken in the trial before the justices, was held fatal to an appeal, the appeal was dismissed without costs. *Ogier v. Ballarat Pyrites Company*, 4 W.W. & A'B. (L.,) 245.

Costs.]—On an appeal from justices the party who shows cause in the first instance against striking the case out of the list ought not, if successful, to receive costs; but the party who applies for the rule to strike out, if successful, ought to receive them. *Kett v. The Queen*, 2 V.R. (L.,) 1; 2 A.J.R., 15.

V. Prohibitions to and Quashing Convictions and Orders.

(i.) *What Convictions and Orders may be Prohibited or Quashed.*

(a) *Generally.*

Undsr Act No. 159.]—A determination by justices to enforce a rate by warrant is not an order or conviction within the meaning of Act No. 159, and therefore a prohibition against such a determination does not lie. *Regina v. Fraser*, 2 W.W. & A'B. (L.,) 3.

Compare Act No. 267, Sec. 136.

Act No. 571, Sec. 1—Order made under Licensing Act, No. 566, Sec. 103.]—C. being in occupation of certain premises as a licensed publican was bound over to keep the peace towards his wife, and being unable to find sureties was committed. The owner then obtained an order from justices, under Sec. 103 of No. 566, authorising his agent to carry on the business. *Held* that such order was not an "order" within Sec. 1 of Act 571, so as to entitle C. to a writ of prohibition, since the proceeding sought to be prohibited must be a conviction *in invitum*. *Regina v. Webster, ex parte Collins*, 5 V.L.R. (L.,) 101.

Conviction for Selling Liquor without License.]—*See post* under Licensing Acts—Offences against.

Certificate of License — Power of Court to Quash.]—The Court has only power to quash judicial proceedings, and though a license itself is not a judicial proceeding, yet the certificate of license is under the "*Licensing Act*" (No. 566,) since there must have been evidence of some kind taken before it can be granted. Rule absolute to quash the certificate of license. *Regina v. Hamilton, ex parte Attorney-General*, 7 V.L.R. (L.,) 194; 3 A.L.T., 11.

Prisoner Sentenced to be Whipped for Offence under Sec. 36 of "Police Offences Statute 1865"—Defence that he was under Sixteen—Appeal not Rule to Quash the Remedy.]—*Regina v. Benson, ex parte Tubby*, 8 V.L.R. (L.,) 2. *Post* under Sessions—Appeal to, &c.

Effect of Prohibition—What may be Prohibited—Act No. 267, Sec. 136.]—The issue of an order to prohibit stays all proceedings not only from time of its service, but from the time of issue. A warrant of ejectment is not "a conviction or order" within the meaning of Act No. 267, Sec. 136, and rule *nisi* for a prohibition against such warrant discharged. *Regina v. Carr*, 6 W.W. & A'B. (L.,) 245; 1 A.J.R., 1.

See also ex parte Shaw, 4 A.L.T., 5.

Act No. 571—Warrant of Ejectmsnt.]—A warrant of ejectment under Act No. 192, "*Landlord and Tenant Statute*," is not an order within the meaning of the particular sections of Act No. 571, which enable the Court to grant rules to prohibit. *Regina v. Taylor, ex*

parte Blackburn, 3 A.L.T., 67. *See also ex parte Carey*, 4 V.L.R. (L.,) 408.

Where Certiorari the Remedy not Rule to Prohibit.]—*Ex parte Scott, ante columns* 127, 128.

Quashing Order—Irregularity of Notices to Justices to Eject under Act No. 192, Sec. 90.]—There was an irregularity in a notice of intention to apply under Act 192 for a warrant of possession, but the justices made an order for the issue of the warrant. *Held* that the Court would not, under Sec. 4 of Act No. 571, quash such order, as the tenant had his redress under the Act No. 192. *Regina v. Snowball, ex parte Gawne*, 5 V.L.R. (L.,) 409; 1 A.L.T., 100.

Warrant of Commitment on Fraud Summons—Act No. 571, Sec. 4.]—A warrant of commitment on a fraud summons issued under Sec. 5 of Act No. 284 by the Prothonotary or a Clerk of Petty Sessions, is not a warrant which may be quashed under Sec. 4 of Act No. 571. *Regina v. Tope, ex parte Smith*, 9 V.L.R. (L.,) 187; 5 A.L.T., 70.

What may be Quashed—Adjudication under "Fences Statute 1874," Sec. 8—No. 571, Sec. 4.]—An adjudication under Sec. 8 of the "*Fences Statute* 1874," directing the description of fence to be erected between adjoining owners and the portion to be erected by each, is not an "order" within the technical meaning of Sec. 4 of the Act No. 571, and cannot therefore be quashed under that section. *Regina v. Kerr, ex parte Palmer*, 8 V.L.R. (L.,) 235; 4 A.L.T., 41.

Warrant of Distress.]—*Semble*, that a warrant of distress is included in the word "warrant" in Sec. 4 of the Act No. 571, and may be quashed under that section. *Regina v. Bradshaw, ex parte Berry*, 6 V.L.R. (L.,) 197.

What may be Quashed—Determination under "Masters and Apprentices Statute 1864," Sec. 17—Act No. 571, Sec. 4.]—A determination of justices, under Sec. 17 of the "*Masters and Apprentices Statute* 1864," as to the satisfaction which an apprentice is to render to his master for absenting himself from his service, is not a "conviction," "order," or "warrant" within Sec. 4 of the Act No. 571, and cannot therefore be quashed under that Act. *Regina v. Pickles, ex parte Fickel*, 8 V.L.R. (L.,) 126; 4 A.L.T., 3.

What may be Quashed—Order on Interpleader Summons.]—*Semble*, that an order of adjudication upon an interpleader summons is a proceeding subject to be brought up to be quashed under Sec. 4 of the "*Justices of the Peace Amendment Act*" (No. 571). *Regina v. Kavanagh, ex parte Comrie*, 6 V.L.R. (L.,) 179; 2 A.L.T. 7; *sub nom. ex parte Comrie.*

When Granted—Costs.]—An applicant for a prohibition to an order of justices is not disentitled to the writ because he has appealed to the General Sessions in the first instance; but having made such an appeal is a ground for refusing him his costs of the rule of prohibition. *Regina v. Skinner*, 1 A.J.R., 151.

And for cases of *certiorari* to quash orders, *see cases ante columns* 127, 128.

(*b*) *On Account of Defect in the Conviction, want of Jurisdiction, or Error and Mistake on part of the Justices.*

Prohibition—Mistake or Error—14 Vict. No. 43, Secs. 12, 13.]—Under 14 Vict. No. 43, Secs. 12, 13, prohibition should not be granted against the execution of an order of justices on the ground of "mistake or error on the part of the justice or justices," unless the mistake or error has been brought before the adjudicating justices. *In re Mackenzie*, 1 W. & W. (L.,) 135.

Act No. 571, Sec. 1—Error or Mistake.]—*Semble*, that "mistake" in Sec. 1 includes a total want of jurisdiction. *Regina v. Panton, ex parte Winstone*, 7 V.L.R. (L.,) 303.

For cases of prohibition and quashing convictions and orders made under "*Police Offences Statute*"—*See* OFFENCES (STATUTORY).

Act No. 571, Sec. 2—Prohibitions—Wrong Conclusion of Law from the Facts.]—The Court will by prohibition interfere with an order made by justices where they have arrived at a wrong conclusion of law from the facts. *Regina v. Panton, ex parte Shea*, 7 V.L.R. (L.,) 301.

Act No. 571, Sec. 2—Act No. 565, Sec. 13—Jurisdiction—Court Nearest of Access.]—A complaint was heard before justices in Melbourne as to goods bought and delivered at Fitzroy, and an objection was taken under Sec. 13 of Act No. 565 that there was a Court nearer of access. *Held* that the Court would not interfere by statutory prohibition where the evidence of there being a Court nearer of access was very insufficient, and the burden of proof in such a case rests upon the person wishing to disturb the decision. *Regina v. Panton, ex parte Winstone; ibid*, p. 303; 3 A.L.T., 22.

Act No. 571, Sec. 2—Decision on Facts.]—The Court is not at liberty to prohibit the enforcement of an order made by justices merely on the ground of the insufficiency of the evidence given to sustain it; if there is any evidence to support the decision the decision will not be reviewed by the Court. *Regina v. Grover, ex parte Parsons*, 7 V.L.R. (L.,) 334; 3 A.L.T., 31.

Per Curiam.]—The words, "conviction or order cannot be supported," in Sec. 2 of the Act No. 571 mean supported "at law," and the Court is not at liberty to prohibit the enforcement of an order made by justices within the limits of their jurisdiction merely on the ground of the insufficiency of the evidence given to sustain it.—*Ibid.*

Insufficient Evidence—Objection not Taken.]—Execution of an order made by justices for payment of calls to the "official agent" of a mining company in process of winding up, registered under the Act No. 109, should not be prohibited on the ground that there was no proper evidence before the justices of publication of the company's registration in the newspapers if such objection has not been taken before the justices. *In re Mackenzie*, W. & W. (L.,) 135.

Practice—Question of Title—Production of Depositions.]—On a rule *nisi* for a prohibition

where affidavits showed that a question of title was involved which ousted the jurisdiction of the justices, a preliminary objection was taken that applicant ought to have brought up depositions taken before justices, or affidavits stating that no depositions were taken. *Held* that where depositions are in fact taken they should be produced, but that the fair inference to be made in the case was that no such depositions were taken. Rule absolute for prohibition on ground disclosed in the affidavit. *Regina v. Napier*, 6 W.W. & A'B. (L.,) 105.

For cases generally as to claims of right or questions of title *see ante columns* 744, 745, 746.

Under Dog Act, No. 229.]—On a rule *nisi* for prohibition to restrain justices from enforcing a fine under the "*Dog Act*," No. 229, where no depositions were brought up from the Court below and when there was no statement in the affidavit that there were no depositions, the Court refused to make absolute the rule for prohibition. *Regina v. Taylor*, 1 V.R. (L.,) 5; 1 A.J.R., 24.

Where the evidence which was taken before the justices is not sufficiently before the Court it is impossible to grant a prohibition. *Regina v. Langford, ex parte Luth*, 1 A.J.R., 159.

Prohibition of Conviction—Costs.]—Where justices had granted a conviction "hastily" and "arbitrarily" the Court refused to grant a prohibition, but marked their sense of the justices' conduct by refusing them costs. *In re Balcombe*, 1 W. & W. (L.,) 49.

Costs of Justices Opposing.]—Where a case was nearly heard and there were four justices present, an application for adjournment was made which was refused. Upon an order *nisi* for a prohibition, *Held* that as the application was made when the case was partly heard, and it might have been hard to get the four justices together again, there was no hardship in the refusal, and that the justices should be allowed their costs of opposing the prohibition. *Ex parte Beilbey*, 1 W. & W. (L.,) 281.

"Justices of the Peace Statute 1865," Sec. 12—Complaint Adjudicated upon by two Justices, neither of whom had been present throughout the Proceedings.]—A prohibition was granted to restrain further proceedings on a conviction, under Sec. 32 of the "*Public Health Act*," (No. 310,) made at an adjourned hearing by justices, neither of whom had been present throughout the whole of the proceedings, there having been adjourned hearings of the complaint at which neither of the justices committing were present. *Regina v. Marsden, ex parte Corbett*, 4 V.L.R. (L.,) 30.

Affidavits.]—On an application for prohibition to justices, the affidavits were objected to as entitled in a cause, where there was no cause before the Court. *Held* that the words objected to might be rejected as surplusage. *Regina v. Webster, ex parte Farquhar*, 1 V.R. (L.,) 189; 1 A.J.R.,153.

Conviction.]—M.P. was convicted of aiding and abetting a prisoner in escaping from gaol, and it was adjudged that he should be imprisoned for two years and six months. The conviction did not mention any statute. *Held* that the conviction was valid under Act No. 265, Sec. 37, Subsec. 1, and No. 267, Sec. 50. Rule *nisi* to quash conviction discharged. *Regina v. Richards, ex parte M'Donald*, 5 V.L.R. (L.,) 9.

Act No. 265, Sec. 30—Sunday Trading—Conviction Negativing Exemptions.]—Where an Act makes certain Acts illegal and imposes a penalty therefor, any exemption must in the conviction be distinctly negatived; but if the exemptions are made by words of reference to other Statutes, they may be sufficiently negatived in the words of the Statute under which the conviction is made. A. was convicted under Sec. 30 of Act No. 265 of Sunday trading, the conviction specifically negativing certain exemptions, and following the words of the Act in negativing by a general reference to other Statutes certain other exemptions within them, but not setting out and specifically negativing the latter class of exemptions. *Held* that the conviction was good. *Regina v. Montford, ex parte Schuh*, 7 V.L.R. (L.,) 12; 2 A.L.T., 120.

Quashing Conviction—Act No. 506, Sec. 398—Superfluous Words in a Conviction.]—A person was convicted for that he "did displace, take up, and remove soil from a street," &c., and an order *nisi* was obtained to quash the conviction on the ground that it was for more than one offence. *Held* that the conviction was sufficient, and that the justices purporting to convict of what is not an offence, may be regarded as surplusage so long as a valid offence aptly laid still remains. Order discharged. *Regina v. Walker, ex parte Trudgeon*, 7 V.L.R. (L.,) 137; 3 A.L.T. 2.

Conviction under "Licensing Act" (No. 566,) Sec. 54—No Venue—Costs in Blank.]—*See ex parte Tribble*, under LICENSING ACTS.

And generally as to convictions under the LICENSING ACTS.—*See* under LICENSING ACTS.

What may be Quashed under No. 571, Sec. 4.]—To be such as may be quashed under the Act No. 571, Sec. 4, an order should be a command addressed to another person founded on a complaint, and requiring him to pay a sum of money, or do a specified act. *Regina v. Justices at Richmond, ex parte Edlin*, 10 V.L.R. (L.,) 87.

A decision of justices recorded in their cause book as follows:—"Order for payment to be obeyed, default distress, one month's imprisonment," is not an order or conviction which can be quashed under Sec. 4 of the Act No. 571. *Ibid.*

Conviction Quashed on Ground of Justices being Interested.]—*See Regina v. Horsfall, ex parte Husband, ante column* 744.

The Court ought to be satisfied that there has been an error in law before it exercises the jurisdiction to quash under Sec. 4. *Regina v. Rothery, ex parte Mogg*, 4 V.L.R. (L.,) 33.

Copy of Order Served on Defendant Bad—Costs.]—An order made by justices upon a judgment summons was good, but the defendant was served with a copy which was bad. Rule *nisi* to quash order discharged without costs. *Ex parte Vail*, 3 A.L.T., 60.

Act No. 571, Sec. 4—Verifying Copy of Order Served.]—A defective copy of an order on a fraud summons was served on a defendant, who obtained an order *nisi* to quash it. *Held* that the defendant was not at liberty to act on the presumption that the copy served was a correct copy, and before applying to quash it he must verify it with the actual order. *Regina v. Carroll, ex parte Coe*, 9 V.L.R. (L.,) 134.

Warrant—Quashing—Technical Objection—Act No. 571, Sec. 4.]—A justices' warrant may, under Sec. 4 of the "*Justices of the Peace Amendment Act*" (No. 571,) be quashed for mere technical objections, *e.g.*, for misreciting the conviction on which the warrant issued. *Regina v. Browne, ex parte Sandilands*, 4 V.L.R. (L.,) 138.

Act No. 571, Secs. 2, 4.]—Where the objection to an order is that there is no evidence to support the justices the proper remedy is not to apply to quash the order. *Regina v. Gleeson, ex parte Reggiani*, 5 A.L.T., 29.

Refusing to hear Evidence.]—Where justices have rejected the evidence of a witness who remained in Court after all witnesses were ordered to withdraw, the Court will prohibit all proceedings on, or quash a conviction made by the justices, even though the justices make an affidavit that the evidence, which such witness swears he was ready to give, could not have affected their decision. *Regina v. Guthridge & Brennan, ex parte Campbell*, 4 V.L.R. (L.,) 77.

Act No. 571, Secs. 1 & 2.]—*Per Higinbotham, J.* "If a *primâ facie* case of error or mistake in law or on facts is shown by affidavit, it is the duty of the Court to consider the evidence adduced before the justice, and to make the Rule or Order for prohibition absolute only in case the Court shall think that the error or mistake, if any, cannot be amended, and that, if it be not amended, the conviction or order cannot be supported." *Regina v. Shuter, ex parte Walker*, 9 V.L.R (L.,) 204.

Act No. 571, Sec. 4—When Order may be Quashed Under.]—*Per Higinbotham, J.* (*in Chambers.*) An order of justices cannot be quashed under Sec. 4 of the Act No. 571, unless it be shown that the justices had no jurisdiction, or exceeded their jurisdiction, or unless the order is bad on its face, or ought not in law to have been made. The erroneous admission of evidence by the justices, or an alleged deficiency of proof, is not a ground for quashing an order. *Regina v. Littleton, ex parte Kirk*, 6 A.L.T., 21.

Prosecution for Assisting in and Managing a Lottery—Name of Prosecutor not Disclosed.]—On a prosecution for assisting in and managing a lottery the name of the prosecutor was not disclosed in the summons, and the Crown Solicitor refused to disclose it, when asked, at the hearing. *Held*, on order *nisi* for a prohibition agains enforcing the conviction, that the objection that the name of the prosecutor was not disclosed was fatal; and order for prohibition made absolute. *Regina v. Sturt, ex parte Ah Tack*, 2 V.L.R. (L.,) 103.

The Court will not grant an application to quash because of an addition made to the order at the party's own instance and made *ex parte*. *Regina v. Miller, ex parte Hassall*, 9 V.L.R. (L.,) 177.

(ii.) *Practice in Applications to Prohibit or Quash.*

"Justices of Peace Statute" (No. 267,) Secs. 136, 106—Conviction for an Offence under No. 227, Sec. 45—Production of Order.]—Rule *nisi* under Sec. 136, of No. 267, to prohibit further proceedings in respect of a conviction against L. for a breach of Sec. 45 of Act No. 227. The affidavits set forth no "minute or memorandum" as required by Sec. 106 of Act No. 267, and there was no conviction drawn up by the justices. *Held*, that there being no conviction drawn up in proper form, and no "minute or memorandum" of such conviction, there was nothing to prohibit. Rule discharged. *In re Lewis*, 6 W.W. & A'B. (L.,) 1.

Prohibition—Act No. 267, Sec. 106—Amending Act (319,) Sec. 3—Conviction.]—Prohibition will not be granted where the conviction is not brought up, or a minute or a memo. thereof; a copy of the entry in justices' book of conviction verified by relator's affidavit is not such a minute or memo. *Regina v. Templeton, ex parte Peck*, 1 V.L.R. (L.,) 21.

Prohibition—Production of Conviction.]—It is sufficient if a copy of the conviction be produced upon the hearing of an argument upon a rule *nisi* for prohibition, although no conviction had been produced when the rule *nisi* was obtained. *Regina v. Woods, ex parte Emmott*, 1 V.L.R. (L.,) 101.

No Copy of Conviction.]—Where a conviction is of a nature capable of amendment, if the conviction, or a copy of it, be not produced at the argument of a rule for a prohibition, the rule *nisi* will be discharged. But where the case turns upon the construction of a Statute, and not upon the form of the proceedings, and the conviction appears to be altogether wrong and incapable of amendment, and the party supporting the order does not require production of the conviction, its absence will not prevent the case being proceeded with until it becomes apparent that the conviction, or a copy of it, should have been produced. *Regina v. Smart, ex parte Kellett*, 2 V.L.R. (L.,) 106.

Order not Drawn up—"Justices of the Peace Amendment Act" (No. 571,) Secs. 1, 4.]—An order of justices which has not yet been drawn up cannot be quashed under Sec. 4 of the Act No. 571, nor will a prohibition to it be granted under Sec. 1 unless a memorandum of the decision, or a copy of the entry made in the justices' book, be brought before the Court. *Regina v. O'Regan, ex parte Kane*, 4 V.L.R. (L.,) 451.

Conviction—Production of Copy of Minute.]—On a rule for prohibition to a conviction it is sufficient to produce a copy of the minute of the conviction before the Court, if the minute will enable the Court to ascertain whether the conviction is capable of amendment. *Regina v. Pearson, ex parte Smith*, 6 V.L.R. (L.,) 329; 2 A.L.T., 63.

Quashing—Production of Order Drawn Up.]—In proceedings to quash an order of justices already drawn up, it is necessary that the order or a true copy thereof be produced; a copy of the minute is insufficient. *Regina v. Druce, ex parte Frost*, 5 V.L.R. (L.,) 156; 1 A.L.T., 9.

Quashing—Process or Copy thereof must be Produced—Act No. 571, Sec. 4.]—On an application to quash an order of justices, under Sec. 4 of the Act No. 571, the process sought to be quashed, or a copy thereof, must be produced to the Court. *Ex parte Freeman*, 2 A.L.T., 6.

Order to Prohibit—No Order Drawn Up—Act No. 571, Secs. 1, 2.]—If no order has been drawn up it is sufficient to bring a verified copy of the entry in the justices' book before the Court upon a rule or order to prohibit, under Secs. 1 and 2 of the Act No. 571. *Regina v. Taylor, ex parte Hailes*, 8 V.L.R. (L.,) 149; 4 A.L.T., 11. Overruling *In re* Lewis, *Regina v. Templeton, ex parte Peck; Regina v. O'Regan, ex parte Kane, supra.*

Quashing—Where no Order Drawn Up—Affidavit.]—Where it is sought to quash an order of justices, and no order has been drawn up, but a minute only, an affidavit that no order has been drawn up must be filed by the applicant. *Regina v. Nicholson, ex parte Pufflett*, 8 V.L.R. (L.,) 44.

Quashing Convictions.]—It is not necessary, when it is sought to quash a proceeding under Sec. 4, to bring such proceeding before the Court by *certiorari* or otherwise before quashing. *Regina v. Browne, ex parte Sandilands*, 4 V.L.R. (L.,) 138.

Quashing under Sec. 4 of Act No. 571.]—The procedure under Sec. 4 of Act No. 571 is not in the nature of a prohibition, but is a summary mode of quashing in lieu of the old procedure by *certiorari*. *Regina v. Benson, ex parte Tubby*, 8 V.L.R. (L.,) 2.

The procedure under Sec. 4 affords a distinct and not a cumulative remedy, and ought only to be applied to the cases for which it is intended. *Regina v. Grover, ex parte Parsons*, 7 V.L.R. (L.,) 334, 336.

S.P. *see Regina v. Pickles, ex parte Fickel*, 8 V.L.R. (L.,) 126.

Order Nisi to Prohibit—Application to Quash—Act No. 571, Sec. 4.]—Where an order *nisi* has been obtained, under Sec. 4 of the Act No. 571, to prohibit an order of justices, the Court will not, on the return of the order, allow the procedure to be changed, and make the order absolute to quash. *Regina v. May, ex parte M'Gee*, 3 A.L.T., 98.

Court will not Entertain two Applications, one to Prohibit, and another to Quash.]—Where two orders *nisi*, one under Sec. 1 for prohibition, and the other under Sec. 4 to quash, had been obtained in respect of the same conviction, the Court declined to entertain both, and allowed the relator to elect which should be made absolute, he paying the costs of the other. *Regina v. Guthridge and Brennan, ex parte Campbell*, 4 V.L.R. (L.,) 77.

Nothing to Prohibit—Altering Order to Prohibit into Rule to Quash.]—Where the act sought to be prohibited has been actually done there is nothing to prohibit, and the Court will not change an order to prohibit into a rule to quash. *Regina v. Call, ex parte Braun*, 10 V.L.R. (L.,) 359.

Act No. 571, Sec. 4—Discretion of Judge.]—*Per Higinbotham, J.* (In Chambers.)—Under the Act No. 571, a judge has power in his discretion to grant one form of relief or the other, *i.e.*, either to quash or prohibit an order of justice; and he ought in the exercise of his discretion to grant that relief which will not disturb the adjudication of the justices, while it corrects their mistake. *Regina v. Littleton, ex parte Kirk*, 6 A.L.T., 21.

Writ of Prohibition Made by Vacation Judge—15 Vict. No. 10, Sec. 19.]—An order for writ of prohibition made by a vacation judge must purport to be made under Sec. 19, and the judge should show that he intends to exercise the statutable jurisdiction. *In re Brewer, ex parte Baker*, 2 W. & W. (L.,) 136.

Such an order should be made absolute during vacation, and not returnable next term. *Ibid*, S.P. *Reg. v. Strutt, ex parte Chatty*, 4 A.J.R., 73.

But the judge has no power in vacation to make an order absolute in the first instance for the issue of a writ of prohibition. *Scott v. Riddock*, 2 W. & W. (L.,) 138.

Application for Writ — When Sustainable — Vacation—15 Vict. No. 10, Sec. 19.]—A rule for prohibition may be obtained in vacation from a Judge in Chambers, under the statutory jurisdiction at law, given by 15 Vict., No. 10, Sec. 19, when a Court of Equity is sitting. *Dennis v. Vivian*, 1 W.W. & A'B. (L.,) 201.

Practice—Prohibition—Emergency Clause.]—Where a judge sees that an application made under the emergency clause for a prohibition has no ground, he may direct the application to be moulded into one under the Act No. 571, and then cause is shown before the Court as required by the Statute. *Regina v. Mairs, ex parte Vansuylen*, 7 V.L.R. (L.,) 43; 2 A.L.T., 126.

Prohibition—Time for Application—Act No. 571, Sec. 1.]—The month within which, under Sec. 1 of the "*Justices of the Peace Amendment Act*" (No. 571,) an application for a prohibition to an order or conviction of justices must be made, runs from the day on which the order or conviction was made, and not from the day on which it was drawn up. *Regina v. Edney, ex parte Skinner*, 8 V.L.R. (L.,) 1.

Conviction — Application to Quash—Time — "Justice of the Peace Amendment Act," Sec. 4.]—An application under Sec. 4 of the "*Justices of the Peace Amendment Act*" (No. 571,) for an order *nisi* to quash an order or conviction must be made within one month from the making of the order or conviction; not from the time when it was drawn up. *Regina v. Bayne, ex parte Mau*, 4 V.L.R. (L.,) 190.

Order Nisi to Quash Conviction—"Justice of the Peace Amendment Act," Sec. 4.]—It is not sufficient that an application for an order *nisi* to quash a conviction under Sec. 4 of the "*Justices of the Peace Amendment Act*" (No. 571,) should be made within the month, but the order must be drawn up and signed by the judge who quashes it within the month, otherwise it will be too late, unless where the judge has postponed the application for consideration. *Regina v. Broderick, ex parte M'Millan*, 4 V.L.R. (L.,) 158.

Quashing Warrant of Commitment after Time for Application has Expired.]—Under Sec. 4 of the Act No. 572 ("*Justices of the Peace Amendment Act,*") a warrant of commitment may be quashed on the ground of the invalidity of the order upon which it is based, although the time for applying to grant or prohibit the order itself (one month) has expired. *Regina v. Deely, ex parte Wilson*, 6 V.L.R. (L.,) 27; 1 A.L.T., 149.

Quashing—Act No. 571, Sec. 4 — Practice.]—Where an application made to a Judge in Chambers to quash a conviction is refused, and an application for the same purpose is made to the Full Court, this is to be regarded as an appeal from Chambers, and does not require to be made under Sec. 4 of the Act No. 571 within a month. *Regina v. Armstrong, ex parte M'Pherson*, 7 V.L.R. (L.,) 234; 3 A.L.T., 9.

Act No. 571, Sec. 4—Adjournment beyond the Month in Consequence of a Defect in the Materials.]—Upon an order *nisi* to quash a conviction the application was made to a Judge in Vacation within a month, but was adjourned to supply a defect in the necessary materials. *Held* that it was under those circumstances too late, that the application must be made with all necessary materials ready within the month. *Regina v. Mackenzie, ex parte Balloch*, 7 V.L.R. (L.,) 328; 3 A.L.T., 33.

Court has no Power to Remit the Order—No. 571, Sec. 2.]—On an order *nisi* for a prohibition to justices under the "*Justices of the Peace Amendment Act*" (No. 571), the Court cannot under Sec. 2 of the Act remit the justices' order for amendment, but must either discharge the order *nisi* for prohibition, or make it absolute. *Regina v. Burroughs, ex parte Blackwell*, 4 V.L.R. (L.,) 136.

Amendment.]—The power of amendment is apparently negatived by Act No. 571. *Regina v. M'Cormick, ex parte Brennan*, 4 V.L.R. (L.,) 36.

Amendment.]—The Court cannot amend on an application to quash under Act No. 571. *Regina v. Synnot, ex parte Main*, 6 V.L.R. (L.,) 35.

Where justices had not been made parties to an order *nisi* to prohibit an order made by them, the Court allowed an adjournment and granted leave to amend by serving the justices. *Regina v. May, ex parte M'Gee*, 3 A.L.T., 98.

Act No. 267, Sec. 136—Practice.]—On an order *nisi* under the "*Justices of the Peace Statute* 1865," Sec. 136, for prohibition to justices, the practice as to what objection may be raised to the validity of the proceeding before the justices, is the same as on a case stated where the Court confines itself to the points raised, to the intent that objections not raised before the justices cannot be raised in support of the prohibition. *Regina v. O'Brien*, 3 W.W. & A'B. (L.,) 54.

Act No. 571—Applications in Term Time.]—The intervention of the Court under Act No. 571 in Term time, should be sought by means of an application to the Court for a rule *nisi*, and not by an application to a Judge in Chambers for an order *nisi*. *Regina v. Cantwell, ex parte Costelloe*, 7 V.L.R. (L.,) 475.

Order Nisi not Set Down for Hearing—Order for Dismissal, how made.]—An application for the discharge of an order *nisi* for prohibition to justices made in Chambers, but not set down for argument, should be made to the judge who granted the order, with an affidavit that it had not been set down, and not by motion to the Court. *Regina v. Hackett, ex parte Wardrop*, 5 W.W. & A'B. (L.,) 5.

Act No. 571, Sec. 1—Rule Nisi not Stating Grounds.]—The Court overruled an objection that a rule *nisi* for prohibition under Act No. 571 did not state any grounds. *Regina v. Taylor, ex parte Blain*, 5 V.L.R. (L.,) 271; 1 A.L.T., 39.

Order Nisi to Quash—No Appearance to Move Absolute—Act No. 571, Sec. 4.]—The Court will not discharge an order *nisi* to quash under No. 571, Sec. 4, when there is no appearance to move it absolute, but will hear the party showing cause, and decide the question on its merits. *Regina v. Pritchard, ex parte Smart*, 2 A.L.T., 58.

Rule to Quash—What may be Considered on.]—On a rule to quash an order made by justices for payment of arrears alleged to be due in respect of a previous order made by them, the question whether the previous order was properly made and served, and whether the arrears were really due, cannot be considered. *Regina v. Justices at Richmond, ex parte Edlin*, 10 V.L.R. (L.,) 87.

Order Without Jurisdiction—Offer to Abandon Order—Rule to Quash—Costs.—Where justices made an order without jurisdiction, and the defendant obtained a rule *nisi* to quash it, and after such rule had been obtained the complainant offered to abandon the order, but made no offer to pay the costs incurred, *Held*, on rule *nisi* to quash, that the defendant was entitled to go on with his proceedings to quash, and to obtain his costs of so doing, and rule absolute, with costs. *Regina v. M'Phail, ex parte Ludlow*, 6 V.L.R. (L.,) 19.

Quashing Warrant for Commitment—Costs.]—The costs will be given of a rule absolute to quash a warrant, if an intimation that the warrant would not be executed was not accompanied with an offer to pay the costs up to that time. *Regina v. Bannerman, ex parte Shiels*, 6 V.L.R. (L.,) 25.

Costs Where Bad Copy of a Good Order has been Served.]—*See ex parte Vail, ante column* 777.

Summons Improperly Filled Up—Duty of Clerk of Petty Sessions—Costs.]—*See Regina v. Harrigan, ex parte Allen*, 8 V.L.R. (L.,) 22; 3 A.L.T., 101, *ante column* 759.

Applicant for Writ of Prohibition having Appealed to the General Sessions in the First Instance—Costs.]—*See Regina v. Skinner, ante column* 773.

Costs of Order Nisi to Quash—Matter Debatable.]—As a rule, the costs of orders to quash follow the event, but where the matter is fairly debatable the Court, in dismissing such an order, will not allow costs. *Regina v. Pickles, ex parte Fickel*, 8 V.L.R. (L.,) 126; 4 A.L.T., 3.

Amendment of Order—Costs.]—Where the order which is sought to be prohibited is amended as a concession to the respondent, he will be ordered to pay the costs of the prohibition. *Ex parte Dreher*, 4 A.L.T., 12.

Conviction Quashed—Prosecutor a Police Officer—Costs.]—Where a conviction was quashed, and the person who had obtained the conviction was a police-officer acting in the discharge of his duty, the Court, nevertheless, did not depart from the usual rule that costs follow the decision, and gave costs against the prosecutor. *Ex parte Norbo*, 5 A.L.T., 167.

VI. Where Decision a Bar to Subsequent Proceedings.

Order for Payment—Second Complaint and Order for Part Payment of Same Amount.]—Where justices made one order for the payment of an amount, but no part of it had been paid, and no steps had been taken for its enforcement, such order is no bar to a second complaint and order for payment of part of the same amount. *Ex parte Shire of Alexandra, in re M'Nee*, 5 V.L.R. (L.,) 134; 1 A.L.T., 2.

Certificate of Dismissal of Complaint Under Act No. 267, Sec. 107—Where a Bar.]—Under Sec. 107 of Act 267 the certificate of dismissal is only a bar to Courts of co-ordinate jurisdiction, and not to Courts of superior jurisdiction. *Regina v. Skinner*, 4 W.W. & A'B. (L.,) 39.

For facts *see* S.C. *ante column* 407.

S.P. *See Regina v. Trench, ex parte Chalmers*, 9 V.L.R. (L.,) 55; 4 A.L.T., 163, *ante column* 407.

VII. Actions By and Against Justices.

Action of Replevin—"Justices of the Peace Statute 1865," Secs. 164, 170.]—A justice of the peace, who is in the position of defendant in an action of replevin, is in a different position from a justice who is sued for an act of his own as justice. A justice in the position of such defendant is not entitled to the protection given him by the "*Justices of the Peace Statute* 1865," and is not entitled to a month's notice under Sec. 170; and where the action is not based on the order of the justice at all, he is not entitled under Sec. 164 to have the order quashed before proceedings can be taken against him. *Smith v. Cogdon*, 4 A.J.R., 76.

C., a justice, issued a distress warrant, under the "*Mining Companies Act*" (No. 228,) Sec. 38, for part of a call, without previously issuing a summons to show cause. The person distrained upon replevied the goods and sued C. *Held* that C. was not entitled to the protection of Secs. 164 and 170 of the Act. *Ibid.*

Action for False Imprisonment.]—*See Smith v. O'Brien*, 1 W. & W. (L.,) 386; *Hunter v. Sherwin*, 6 W.W. & A'B. (L.,) 26; *post* under Trespass—To the person.

LACHES.

Laches—What is.]—Where two parties are bargaining, and one makes to the other a statement on a material point, and on the faith of that representation the other contracts with him, that other party is not bound to make inquiry, although inquiry would have shown him that it was false. Time will not run against him through his neglect to inquire until he learns something which ought to arouse his suspicions. *Clark v. Clark*, 8 V.L.R. (E.,) 303, 327, 328.

Where there is nothing to put a man upon inquiry he is not responsible for not inquiring. *Ibid.*

Delay of Twelve Years in Instituting a Suit against a Trustee to Set Aside a Release Obtained by Trustee—No Bar to Relief only Material to Costs.]—*Bennett v. Tucker*, 8 V.L.R. (E.,) 20; 3 A.L.T., 108; *post* under Trust and Trustee—Rights, &c., of Trustee.

Where Laches of Cestui que Trust disentitles to Relief.]—*Shaw v. Gorman*, 2 W.W. & A'B. (E.,) 18; *post* under Trust and Trustee—Rights, &c., of.

When Long Delay of a Creditor under a Creditor's Deed Bars his Right.]—*Arthur v. Moore*, 5 V.L.R. (E.,) 207; 1 A.L.T., 29, *post.* Trust and Trustee.

Effect of Laches on Mortgagor's Rights in Setting Aside Wrongful Sale of Mortgaged Mining Shares.]—*Hicks v. Commercial Bank*, 5 V.L.R. (E.,) 228; 1 A.L.T., 60; *post* under Mortgage—Rights, &c., of Mortgagee, &c.

Where Right to Redeem Barred by Laches.]—*Port v. Bain*, 2 V.R. (E.,) 177; 2 A.J.R., 129;

and *Bryant v. Saunders*, 2 V.L.R. (E.,) 225; *post* under MORTGAGE—Redemption—Right to Redeem.

Shareholder Lying Idle for Six Years Barred by Laches from Bringing Suit to Set Aside Forfeiture of Shares.]—*Cushing v. Lady Barkly G.M. Coy.*, 9 V.L.R. (E.,) 108, 116, 122; 5 A.L.T., 10, 98. *See post* under WAIVER.

And for examples of acquiescence *see post* under WAIVER AND ACQUIESCENCE.

LAND ACTS.

STATUTES.

"*Sale of Crown Lands Act* 1860" (*No.* 117,) *repealed by Act No.* 145.
"*Land Act* 1862" (*No.* 145,) *repealed by Act No.* 360.
"*Amending Land Act* 1865" (*No.* 237,) *repealed by Act No.* 360.
"*Land Act* 1869" (*No.* 360.)
"*Land Act* 1875" (*No.* 515.)
"*Land Act* 1878" (*No.* 634.)
"*Land Acts Amendment Act* 1880" (*No.* 653.)
"*Land Act* 1880" (*No.* 681.)

1. *Selectors and Selections.*

"The Land Act 1862," Sec. 23—"The Land Act 1865," Sec. 47—Selections under—Certificate Holders under.]—Holders of certificates issued under Sec. 23 of the "*Land Act* 1862" were not entitled to preferential selection, but had to select at the same time and place as other selectors, and in case of two applications on the same day, priority of selection was decided by lot, but in other cases priority of selection was decided by priority of application. The "*Land Act* 1865" collects all the applicants for land in any area at one place at one hour, and directs lots to be drawn as to priority of choice, and includes applicants under new and old rights in one system of selection prescribed by that Act. The words "exercise the right of selection," in Sec. 47 of the Act of 1865, do not mean more than to obtain recognition of the right of selection, and that after the recognition of that right the holders of certificates should select before a Land Officer, and at the same place and time as other selectors under the Act of 1865. *Simson v. The Queen*, 2 W.W. & A'B. (E.,) 113, 121, 123, 124.

"Land Acts 1862 and 1865"—Penalty for Non-Compliance with Provisions.]—*Per Full Court*: The penalty imposed by Sec. 126 of Act No. 145 for non-compliance with conditions imposed by Sec. 36 of that Act is confined to selectors under that Act, and cannot be enforced against a selector under Acts No. 145 and No. 237 conjointly. *Kettle v. The Queen*, 3 W.W. & A'B. (E.,) 141.

Per Privy Council. Persons entitled to exercise rights of selection under the Act No. 237 are liable to the penalty imposed by Sec. 126 of the Act No. 145. *Attorney-General v. Ettershank*, L.R. 6, P.C. 354.

"Land Acts 1862 and 1865"—Regulations of Board of Land and Works—Ultra vires.]—*Per Molesworth, J.* The regulations issued by the Board of Land and Works under the "*Lands Acts* 1862 and 1865," requiring declaration that applicants are not selecting as agents or trustees for other persons, as regards certificate-holders, exceed the powers which the Board possess under the conjoint operation of the two Acts; and their requiring certificate-holders to make such a declaration is illegal; and a person making it untruly is not deprived of the rights which he possesses as a selector. *Kettle v. The Queen*, 3 W.W. & A'B. (E.,) 50, 56.

[But now *see* latter part of Sec. 20 of Act No. 360.]

Selection—"Land Act 1862"—Where Selector a Trustee.]—R., by his agent M., employed G. to select land under the "*Land Act* 1862," and furnished him with the necessary money and a certificate issued under Sec. 23, which R. procured to be assigned to G., but for which assignment G. gave no consideration. G. selected under this certificate, and paid the first year's rent of the land with the money given him by M. A lease of the land selected having been issued to G., he repudiated his agreement with R., and refused to execute a transfer to him of the lease, but offered to repay with interest the money given him by M. *Held* that inasmuch as R. procured the certificate and advanced the money by which G. obtained the lease, G. was a trustee of the lease for R.; and transfer by G. to R. decreed with costs. *Raleigh v. Glover*, 3 W.W. & A'B. (E.,) 163.

Agreement to Select—"Land Act 1862," Secs. 23 & 24—"Land Act 1865"—Illegal Contract.]—The plaintiff purchased a certificate under "*Land Act* 1862," Secs. 23 and 24, enabling the holder to select land, and had it transferred to defendant, no consideration passing between plaintiff and defendant. Defendant agreed to select land for plaintiff's benefit, and to transfer it as plaintiff should direct. Plaintiff selected land under the "*Amending Land Act* 1865," with plaintiff's money; plaintiff paid the rent, and defendant obtained the lease and became registered proprietor under the "*Transfer of Land Statute.*" Bill for specific performance of contract and for transfer. *Held* that there was nothing illegal in the transaction, and transfer ordered. *Glass v. Fowler*, 4 W.W. & A'B. (E.,) 122.

"Land Act 1862" (No. 145,) Secs. 23, 24—"Amending Act 1865" (No. 237,) Sec. 7—"Statute of Trusts" (No. 224,) Sec. 97—Selection—Trustee.]—A. was entitled under Secs. 23, 24 of Act No. 145 and Sec. 7 of Act No. 237 to select land. A. employed, through his agent B., C. to select on his behalf under a verbal agreement, A. furnishing all necessary documents and moneys. C. selected and paid the first year's rent out of A.'s moneys, A. receiving the receipt therefor. C. paid subsequent rents, taking receipts in A.'s name. A lease was issued to C., who then denied agreement and refused to transfer lease. *Held*, following *Raleigh v. Glover*, *ubi supra*, that a declaration of trust in writing was not necessary under No. 224, Sec. 97, and that C. was trustee for A., and transfer of lease decreed. *Raleigh v. McGrath*, 3 V.L.R. (E.,) 250.

"Land Act 1869" (No. 360,) Secs. 19, 21, 22—Licensee Selecting as Agent for Another—Fraud.]—The Board of Land and Works issued to a licensee under the "*Land Act* 1869," (No. 360,) Sec. 19, a certificate of compliance with the Act, and he applied for a lease, and paid rent as under it for eighteen months. Subsequently the Crown agent refused to receive any more rent, and some time afterwards the lease was refused, the certificate of compliance was cancelled by the Board, and a forfeiture of the lease gazetted, upon the ground that he had selected as an agent for another. Upon petition by the licensee to compel issue of the lease, the Court was of opinion that he had selected as agent for another, and *Held* that there being therefore fraud under Secs. 21 and 22 of the Act No. 360, the petitioner could not maintain proceedings in Equity to compel the grant of the lease. *Evans v. The Queen*, 6 V.L.R. (E.,) 150; 2 A.L.T., 38.

Power of Governor-in-Council to Withdraw Land from Selection—"Land Act 1862," Sec. 46—On Account of Improvements.]—The Governor-in-Council is warranted in withdrawing from selection "on account of improvements," land declared open for selection, and a proclamation giving effect to such withdrawal dates from the time of its being made, and not from the date of its publication. *Kennedy v. The Queen*, 1 W.W. & A'B. (E.,) 145.

(Compare *Sec.* 102 of Act No. 360.)

"Land Act 1865" (No. 237,) Secs. 10, 14, 21.]—Under Secs. 10 and 21 of Act No. 237, land may be proclaimed by a notice in the *Gazette* by the Governor-in-Council open for selection after a certain date, not more than three months after the publication in the *Gazette*, and after such date the land may be selected. Where land was gazetted as open for selection on 29th September, and P. selected on 30th September, *Held* that P.'s title was good. *Russell v. Parkinson*, 6 W.W. & A'B. (L.), 264; N.C. 73.

"Land Act 1869" (No. 360), Secs. 4, 17, 19, 100, 110—Refusal by Local Land Board of Application to Select—Allowance of Selection, Receipt of Rent and Promise of Issue of License by Minister of Lands and Board of Lands and Works by an ex parte Application and not by an Appeal in accordance with Regulations prescribed.]—R. attempted to select land under the Act No. 360, paid the half-year's rent and costs of license fee and received a conditional receipt. The local land board recommended the refusal of his application for a selection. R. did not appeal to the Board of Land and Works under the regulations of 26th September, 1870, but saw the Minister of Lands and informed the Board *ex parte* that his application was a *bona fide* one. The Board then gave him permission in writing to occupy pending the issue to him of a license which was promised. R. occupied and improved; but no license was issued. In June, 1872, there was a change of Ministry, and R. received a notice from the Land's Office acquainting him that the Board would hear his case at a public hearing, in accordance with the regulations, and ultimately R. was, after the hearing, dispossessed on payment of compensation for his improvements. R. brought a petition to be confirmed in the possession of the land. *Held* by *Molesworth*, J., and *affirmed* on appeal, that the Crown was not bound and the petition refused; that the words in Sec. 19, "may if he think fit" gave an arbitrary discretion of refusal to the Governor: that by Sec. 4 the Governor, subject to the Act, has power to grant or convey land; and that Sec. 100 or the regulations of the Governor under Sec. 110 did not authorise the delegation of his (the Governor's) power under Sec. 4 to the Board of Land and Works, so that any step taken by the Board would be paramount to the Governor's power of rejection and disallowance; that it was doubtful whether the Governor had power by regulations to legalize any occupation prior to the issue of a license, and that if such regulations gave to any permission to occupy, the effect of binding the land in case the Governor refused the license, they were inconsistent with the Act. *Ryan v. The Queen*, 3 A.J.R., 61, 86.

"Land Act 1869"—Selector in Occupation of More Land than Allowed by Act—Notice to Quit under Sec. 93—Penalty.]—A selector who is in possession of more land than is allowed by the "*Land Act* 1869" under an occupation, is not, even after he has received notice to quit under Sec. 93 of the Act, liable to a penalty for being in unauthorised occupation of Crown lands, he having obtained possession of the land properly, though he might be treated as a trespasser in a civil suit. *M'Can v. Quinlan*, 4 A.J.R., 117.

2. *Leases and Licenses.*

(*a*) *Generally.*

24 Vict. No. 117, Sec. 68.]—The words "such other purposes as may appear to the said board to be for the public advantage or convenience," contained in Sec. 68 of No. 117, mean purposes *ejusdem generis* with those set forth in the same section; and a license for "residence and cultivation" is not *ejusdem generis*, and is, therefore, not valid. *Fenton v. Skinner*, 1 W. & W. (L.,) 65.

License for Pastoral Occupation—Proclamation of Common over Part—Rights of Commoners and Licensees—Right of Crown to Sell—Act No. 117,

Secs. 71, 80, 107, 121, Act No. 145.]—*See Regina v. Dallimore, ante column* 326.

Authority to Assistant-Surveyor-General to Grant—"Land Act 1869," Sec. 47.]—A regulation that all licenses, &c., "may be signed by the Assistant-Surveyor-General, who alone shall be the licensing agent," is sufficient authority to the Assistant Surveyor-General to grant licenses under Sec. 47 of the "*Land Act* 1869." *Coutts v. Jay*, 4 V.L.R. (L.,) 10, 15.

Lease under "Land Acts 1862 and 1865"—Covenant by Lessee.]—*Held*, overruling *Molesworth, J.*, that a covenant by the lessee that he will within one year from the date of the lease cultivate at least one out of ten, or erect a habitable dwelling on the land, or enclose it with a substantial fence, may properly be inserted in a lease of land selected under the conjoint operation of the "*Land Acts* 1862 and 1865." *Kettle v. The Queen*, 3 W.W. & A'B. (E.,) 141.

(Compare Act No. 360, Sec. 20, Subsec. iii.)

Board of Land and Works—Disallowance is Non-revocable—Act No. 237.]—Under the provisions of the "*Amending Land Act* 1865," (No. 237,) when the Board of Land and Works has once disallowed an application for a lease by an applicant, who has duly complied with the requirements of the Act, it has no power to revoke such disallowance; but the publication of the disallowance deprives the Board of all power in the matter until a fresh application has been made. *Webster v. Johnson*, 5 W.W. & A'B. (L.,) 67.

"Land Act 1869," Sec. 22—Effect of Fraud on Right to Lease.]—Where a fraud, under the "*Land Act* 1869" (No. 360,) Sec. 22, is shown, the right of the licensee to a lease may, after the expiry of the license, be revoked. *Evans v. The Queen*, 6 V.L.R. (E.,) 150; 2 A.L.T., 38.

"Land Act 1869," Sec. 20 (v)—Granting Certificate of Compliance—Effect of.]—*Per Molesworth, J.*—"*The Land Act* 1869" (No. 360,) makes the granting of the certificate of compliance with the terms of the Act, and not the truth of its contents, the test of the right to the lease; though a licensee had, in fact, performed his duties, he could not get a lease unless he got a certificate, and on the other hand should get his lease if he gets an untrue favourable certificate. A certificate of compliance under the "*Land Act* 1869" (No. 360,) Sec. 20 (v), though untrue, gives the licensee a right to a lease; and the cancellation by the Board of Land and Works of such certificate, on the ground of its falsity, cannot destroy its effect. *Ibid*, pp. 150, 157.

"Land Act 1869," Sec. 20 (v)—Meaning of Covenant to Improve under Analogous Section (Sec. 14) of "Land Act 1865."]—*Russell v. Parkinson*, 6 W.W. & A'B. (L.,) 264; N.C. 73; *post column* 795.

Covenant to Improve is a Personal One, and does not Run with the Land.]—*Ettershank v. The Queen; Glass v. The Queen; post column* 794.

"Land Act 1869," Sec. 45—What Leases of Crown Lands may be Granted—Easement over Adjoining Lands—Right to Take Water.]—The Governor has no power under Sec. 45 of the "*Land Act* 1869," which section empowers him to grant leases of Crown lands "for sites for tanneries, or factories, or paper-mills," to grant a lease of Crown lands with an easement over adjoining Crown lands, whether covered or not with water, in the course of a river, or with a right to take water from such river. *Brooks v. The Queen*, 10 V.L.R. (E.,) 100, 109; 5 A.L.T., 199.

(*b*) *Assignment.*

By Operation or Law—"Land Act 1865," Sec. 22—"Insolvency Statute 1865," Sec. 25.]—Where the requirements of the "*Land Act* 1865" have been complied with, the Board must recognise the claim of an official assignee of an insolvent lessee to be registered, who applies more than three years after the granting of a lease under Secs. 13 and 14; such official assignee has a right to be registered as assignee by operation of law. *Regina v. Board of Land and Works*, 6 W.W. & A'B. (L.,) 38.

(Compare Sec. 28 of Act No. 360, in which however assignments are made absolutely void, and not merely void, for want of registration.)

By Operation of Law—"Land Act 1865," Sec. 22.]—M., an uncertificated insolvent, became lessee of an allotment under Part II. of the "*Land Act* 1865," and S., his official assignee, was registered as proprietor under a judge's order made under Sec. 110 of the "*Transfer of Land Statute*." S. sold and transferred to plaintiff, who obtained a certificate of title under the "*Transfer of Land Statute*." The transfer from S. to plaintiff was registered, under Sec. 22 of the "*Land Act* 1865." The transfer to S., by operation of law, was not registered. Action for ejectment by plaintiff against M. At the trial plaintiff put in his certificate of title, and also the judge's order and lease, with endorsement of registration of transfer under the "*Land Act*." Defendant moved for a nonsuit on the ground of non-registration of the transfer by operation of law to S. A verdict was entered for plaintiff with leave to defendant to move to enter a nonsuit. Rule *nisi* for a nonsuit on the ground that there was no evidence of registration of any transfer from defendant to S., and the order under which S. was registered as proprietor was *ultra vires*. *Held* that if plaintiff had rested his case merely on the certificate of title he must have succeeded; but that, having chosen to go further, and produced evidence which showed that he had not the legal estate, he must be nonsuited. Rule absolute. *Miller v. Moresey*, 2 V.R. (L.,) 39.

[Note: The case came before the Court again, and the plaintiff then relied merely on his certificate of title and the defendant went into the evidence prior thereto. *Held, per Barry, J.*, that plaintiff must succeed. S.C., 2 A.J.R., 115.]

Where a lessee permits another person to run stock on the land, that is not an agreement for a lease or a breach of the covenant not to assign, but only a license to *agist* stock. *Russell v. Parkinson*, 6 W.W. & A'B. (L.,) 264; N.C., 73.

"Land Act 1865," Sec. 22—Assignment of Lease.]—A bargain and sale by the Sheriff of the lease of an execution debtor under the "*Land Act* 1865" is an assignment by operation of law, which the Board of Land and Works is bound to register under Sec. 22 of the Act. *Regina v. Board of Land and Works*, 2 V.R. (L.,) 151; 2 A.J.R., 87.

Act No. 360, Sec. 20, Subsec. 5—Lease containing Condition not to Assign—Whether it Applies to Involuntary Assignments.]—S. was a lessee of Crown lands under Sec. 20, subsec. 5, the lease containing a condition not to assign without the sanction of the Governor-in-Council. The sheriff sold S.'s interest under a *fi. fa.* and the Registrar refused to register the transfer under Sec. 106 of Act No. 301 on the ground of the said condition. *Held* that the condition only referred to voluntary assignments and not to involuntary assignments as the sale under a *fi. fa.* Ordered that Registrar register the *fi. fa.* and sale. *In re "Transfer of Land Statute," ex parte Ellison*, 5 V.L.R. (L.,) 59.

Condition against Assignment—"Land Act 1869," Secs. 20, 110.]—No power is given under Sec. 110 of the "*Land Act* 1869," to insert in leases under Sec. 20 of the Act a condition against assignment or transfer of such leases. Such a condition, if inserted, is inoperative. *In re "Transfer of Land Statute," ex parte Bond*, 6 V.L.R. (L.,) 458; 2 A.L.T., 94.

And *see also* under *Illegal Agreements under "Land Acts," post.*

Action against Board of Land and Works for not Registering a Transfer of a Lease under Act No. 237—Board Liable in Tort not in Contract.]—*M'Kinnon v. Board of Land and Works, ante column* 116.

(c) *Forfeiture.*

Government "Gazette"—Forfeitures under "Land Act" (No. 237,) Sec. 15—"Evidence Statute 1864" (No. 197,) Sec. 26.]—Sec. 26 of Act No. 197 only makes a notification of forfeiture in the *Gazette prima facie* evidence that all requisites of forms have been complied with; but does not render the notification of an act having been done, any evidence whatever that all the facts and circumstances necessary to authorize the doing that act really existed and have been complied with; and is not therefore evidence of forfeiture under Sec. 15 of No. 237 so as to enable justices without other evidence to make an order to dispossess. *McDowall v. Myles*, 6 W.W. & A'B. (L.,) 16. *See also Tomkins v. Fleming*, N.C., 13.

But *see* now Sec. 101 of the "*Land Act* 1869."

Notice of—"Land Act 1869," Sec. 101.]—A notice of forfeiture, under Sec. 101 of the "*Land Act* 1869" (No. 360,) instead of being, as was the notice under the "*Land Act* 1865," *prima facie* evidence of the intention of the Government to enforce forfeiture, is as between the landlord and tenant, conclusive evidence, not only that the formal acts of the Board of Land and Works have been regular and legal, but that the forfeiture has been committed, and that the Board has elected to revoke the lease; and, as regards the public, that the land is again open for selection. And having once given the notice, the Board cannot waive the forfeiture by receipt of rent from the former lessee or otherwise. *Thorburn v. Buchanan*, 2 V.R. (L.,) 169; 2 A.J.R., 109.

Per Molesworth, J. Sec. 101 of the "*Land Act* 1869" as to evidence of forfeiture does not apply to a lease which was not issued till after the coming into operation of the Act, but was ante-dated to a period prior to the Act. (*Quære*, whether it applied to a forfeiture gazetted between the passing and coming into operation of the Act). *Per* the Full Court, that Sec. 101 does not apply to leases under the "*Land Act* 1862." *Ettershank v. The Queen*, 4 A.J.R., 11, 55, 132.

Held, per the Privy Council, that Sec. 101 of the "*Land Act* 1869" must not be construed so as to make a notice in the Government *Gazette* evidence not only of forfeiture, but also of the right to make such forfeiture, in cases where the Governor had been previously given no substantive power to declare a forfeiture, nor any corresponding provision made to enable lessees to show cause against the exercise of such power. *Quære*, whether the section applies to leases issued after the Act came into operation. *Attorney-General v. Ettershank*, L.R. 6 P.C., 354.

Held also that a Government *Gazette* notice of forfeiture of land of which a lease has been granted under Act No. 145 to a person who had selected under Sec. 7 of Act 237 is not sufficient to determine the lease in cases where Sec. 101 of Act No. 360 does not apply; nor, as regards a lessee in possession, will it prevent a Court of Equity from relieving against the forfeiture, if the lessee be entitled to relief on other grounds. *Ibid.*

"Land Act 1869" (No. 360,) Sec. 23—Notice of—Forfeiture in "Gazette"—How Far Evidence.]—An information was laid against B. for being in unauthorised possession of Crown lands held under a license which had been forfeited. The justices ordered that a warrant to dispossess should issue. No license was produced, and it was urged for the appeal that no license having been produced, evidence of its forfeiture in the *Gazette* was inadmissible. Appeal allowed. *Bloomfield v. Macan*, 5 A.J.R., 73.

So, too, where the license has expired it must be produced, or its existence and contents proved. *Broadbent v. Hornbrook*, 4 V.L.R. (L.,) 415.

"Land Acts 1862" (No. 145,) Secs. 21, 22, 36, 126; "1865" (No. 237,) Secs. 7, 13, 14; "1869" (No. 360,) Sec. 101—Leases—Forfeiture—Relief—Waiver—"Transfer of Land Statute"—Specific Performance of Obligation to issue Grant-in-Fee.]—Under the joint operation of the "*Land Acts*" (No. 145 and No. 237,) selectors obtained leases from the Crown, registered under the "*Transfer of Land Statute*," containing covenants for payment of rent and for effecting the prescribed improvements, with right of re-entry in default. They did not effect the improvements, and let the rent fall in arrear, but

rent had been received on behalf of the Crown after the report of an inspector that the improvements had not been effected within the prescribed time. E. and G., the petitioners in two suits for specific performance of the obligation to issue a grant-in-fee, obtained assignments of the leases. In E.'s case the assignment was from an attorney under power of the selector; a declaration of forfeiture had been gazetted before the issue of the lease, before the "*Land Act* 1869," and before the assignment; but E. had taken the assignment after taking a promise of the Minister of Lands that the lease should issue on payment of arrears of rent, and the lease issued accordingly in the name of the selector, and was antedated. E. registered the assignment, and obtained a certificate of title under the "*Transfer of Land Statute.*" In G.'s case the lease issued to the selector, and was assigned by him to G., who also obtained a certificate of title. The declaration of forfeiture in his case was gazetted between the passing and the date assigned for the coming into operation of "*Land Act* 1869" (No. 360.) *Held, per Molesworth, J.*, that the Court might relieve from forfeiture for non-payment of rent, but could not do so for the breach of the covenant to improve; that the Crown could forfeit such leases without actual re-entry, and that the election to forfeit could be shown sufficiently by bringing ejectment or by a declaration in the Government *Gazette;* that leaving the land unimproved after the time prescribed for improving had elapsed did not constitute a continuing breach of covenant; that subsequent receipt of rent by the Crown waived the forfeiture, and that it was not necessary to show that the officer who received the rent was personally aware of the previous forfeiture, provided the forfeiture was known to the Crown's agents in the matter; that the declaration which appeared, subsequently to the forfeiture, in the Government *Gazette* did not revive that forfeiture, but might be referred to the non-payment of rent, from which, therefore, the Court could relieve; that Sec. 101 of the "*Land Act* 1869" (No. 360,) as to evidence of forfeiture, did not apply to a lease which was not issued till after the coming into operation of that Act, but was ante-dated to a period prior to the Act (*quære*, whether it applied to a forfeiture gazetted between the passing and coming into operation of the Act); that the actual issue of the lease completely waived all previous breaches of its conditions; that promises of a Minister do not bind the Crown, and the issue of a grant-in-fee directed to be made to G., on payment of arrears of rent, with interest at 8 per cent. E.'s title from his assignor being doubtful on the ground that he had proved no conveyance from, or dealing with him, and had not proved that he was alive at the time of the conveyance from his attorney under power, his petition was dismissed. Upon appeal, *Held* that E. was entitled to a grant, as under Sec. 37 of the "*Transfer of Land Statute*" (No. 301) the memorial of transfer upon the duplicate lease was conclusive evidence that he was entitled thereto; and that the decree in both cases should be for the issue of a grant in fee-simple upon payment of the arrears of rent, with interest at 8 per cent., and the amount of the penalty for not improving. *Held* also, that the obligation to make improvements within the time prescribed by the Act was a personal one, and did not run with the land; that the forfeiture was incurred by the terms of the lease, and not by the Act No. 145 ("*Land Act* 1862"), otherwise relief could not have been granted; that Sec. 101 of the "*Land Act* 1869" (No. 360,) does not apply to leases in the name of the Crown under "*Land Act* 1862," and that the obligation to issue a grant in fee simple sufficiently arose out of a contract within Sec. 27 of the "*Crown Remedies and Liabilities Statute* 1865" to warrant a decree for specific performance. On appeal to the Privy Council, *Held*, affirming the decision of the Supreme Court, that having regard to Sec. 22 of the "*Land Act* 1862," the forfeiture was capable of being waived, and was waived by the subsequent acceptance of rent and issuing of the lease to E.'s assignor; that although such lease was, under Sec. 11 of the above Act, dated before the forfeiture occurred, it operated to affirm the tenancy, of which it waived the forfeiture, and also affirmed all interests springing therefrom, including the right to a grant in fee. In any case, even had there been no waiver, the lessee in possession was entitled, both under the Act and the terms of the lease, to relief in equity against the forfeiture for non-payment of rent, and to a decree for specific performance, upon proper terms, of the statutory contract. *Ettershank v. The Queen*, 4 A.J.R., 11, 55, 132; *Glass v. The Queen*, 4 A.J.R., 17, 57, 133. On appeal to the Privy Council, L.R. 6, P.C. 354, 375.

Held also that the claims arose out of contracts with the Crown within the meaning of Sec. 27 of the "*Crown Remedies and Liabilities Statute* 1865," since the right to the grant in fee, though a creation of the *Land Acts*, is conferred upon the holder of a lease, as a statutory right annexed to the lease, and an implied term of the contract. *Ibid.*

Held also that the non-fulfilment of the obligation to improve so far as it depends on the *Land Acts* does not avoid the lease, but merely renders the lessee liable to pay a penalty. And so far as the obligations to improve and pay rent and the liability to forfeiture depend on the lease, any breach of these obligations would render the lease voidable only, and not void. *Attorney-General v. Ettershank*, L.R. 6, P.C. 354, 368.

Acceptance of Rent does not Waive a Forfeiture.] —The acceptance of rent, as under a lease under "*The Land Act* 1869" (No. 360,) from a licensee applying for his lease will not operate as a waiver of the forfeiture, or bar the Crown from refusing to issue the lease, there being no evidence that the officer receiving the rent had notice of the illegality; and *quære*, even if notice was proved, whether there was power to condone the forfeiture. *Evans v. The Queen*, 6 V.L.R. (E.,) 150, 158; 2 A.L.T., 38.

What will Prevent—Tender of Rent.]—If an assignee, by purchase at a sheriff's sale, tender the rent of land held under the "*Land Acts*"

before a re-entry is made for default in payment of rent, that is sufficient to prevent forfeiture if such tender by the original lessee would have prevented forfeiture. *Kickham v. The Queen*, 8 V.L.R. (E.,) 1, 250; 3 A.L.T., 86.

Who may Protect Land from—Purchase at Sheriff's Sale.]—An assignee, by purchase at a sheriff's sale of a leasehold estate from the Crown, whose transfer has not been registered, has a sufficient interest to come into a Court of Equity to protect the land from forfeiture, provided that an actual re-entry has not taken place. *Ibid.*

Improvements—Waiver of Breach of Covenants—Act No. 237, Sec. 14.]—The meaning of the Act is that, if improvements are not made in two years, the lease will be forfeited unless the board waives the forfeiture, which it may do; if the lessee does not make the improvements he cannot assign until he does; and if he never makes them he does not get the Crown grant. The covenant in Sec. 14, paragraph 4, is, do a certain act—*i.e.*, make improvements—within a certain time, and it is impossible to do so after that time. *Russell v. Parkinson*, 6 W.W. & A'B. (L.,) 264; N.C., 73.

Note.—The section of the "*Land Act* 1869" (No. 360) corresponding to Sec. 14 of the "*Land Act* 1865" is Sec. 20 (v).

Forfeiture—Validity—Ten Days' Notice—Condition Precedent—"Land Act 1869," Sec. 100.]—The ten days' notice of proceedings before the Minister of Lands to forfeit a license, provided for by Sec. 100 of the "*Land Act* 1869," is not a condition precedent to the validity of such forfeiture when gazetted, since the Act makes the *Gazette* notice conclusive evidence of forfeiture. *Regina v. Rothery, ex parte Mogg*, 4 V.L.R. (L.,) 33.

3. *Right to Grant in Fee and Conditions Precedent to be Observed.*

Penalties—Acts No. 117 and 145—Recovery of Penalties Prevented by Repeal of Former.]—Act No. 117 having been repealed by Act No. 145 ("*Land Act* 1862,") before the penalties under Secs. 44 and 45 of the former Act could accrue, and the latter Act only saving penalties actually accrued; no penalties can now be recovered under the above sections of the repealed Act. *Adair v. Simson*, 1 W.W. & A'B. (L.,) 13.

"Land Acts 1862" Sec. 126, and "1869" Secs. 2, 98—Petition for Issue of Crown Grant—Penalty.]—Sec. 98 of the "*Land Act* 1869" provides that whenever a penalty has been incurred under Sec. 126 of the "*Land Act* 1862," no Crown grant of the allotment in respect of which it has been incurred shall be issued without payment of a penalty of five shillings an acre. Sec. 2 of the "*Land Act* 1869," repealing the "*Land Acts* 1862 and 1865," provides that no suit pending before the passing of the Act shall be prejudiced or affected, but shall be proceeded with, heard, and determined as if the said Acts of 1862 and 1865 were still in force. On a suit commenced before, but heard after the passing of the Act of 1869, seeking the issue of Crown grants of allotments as to which penalties had been incurred under Sec. 126 of the Act of 1862, without payment of the penalty imposed by Sec. 98 of the Act of 1869, *Held* that the petitioners were entitled to such grants without payment of the penalties under Sec. 98; Sec. 2 creating an exception to the retrospective operation of that section in the case of a suit instituted before the passing of the Act. In construing Acts of Parliament the intention to be retrospective can only be effectuated by clear and distinct words, and exceptions from the retrospective operation should be construed liberally for the exception. *Nash v. The Queen*, 1 V.R. (E.,) 118; 1 A.J.R., 103.

For circumstances in which lessees were held entitled to the issue of a grant in fee, *see Ettershank v. The Queen; Glass v. The Queen, ante columns* 792, 793, 794.

"Land Acts 1862" (No. 145,) Secs. 23, 36, 126, "1869" (No. 360,) Sec. 98—Assignee of Selector must Pay Forfeiture.]—Sections 126 and 36 of No. 145 apply not merely to selectors under Sec. 23, but to all selectors under that Act, and where a penalty for forfeiture has been incurred it must, under No. 360, Sec. 98, be paid by the assignee of the selector's lease, before issue of a grant in fee simple. *Glass v. The Queen*, 4 A.J.R., 133.

"Land Acts 1862 (No. 145,) Secs. 36, 126, "1865" (No. 237,) Sec. 7, "1869" (No. 360,) Sec. 98—Habitable Dwelling—Certificate of Board of Land and Works under Sec. 98 of No. 360—Burden of Proof that Penalty has been Incurred.]—Certain certificate-holders took up land under the "*Land Acts* 1862 and 1865" before Act No. 360 was passed. They improved within a year and relied upon such improvements to satisfy the requirements of Sec. 36 of Act No. 237. The improvements were ordinary slab-huts erected by a squatter, and about three-quarters-of-a-mile of fencing. In one case the hut was a two-roomed hut with a room on each of two allotments, but each room was inhabited separately. The Crown opposed the issue of a grant upon the ground that these were not "habitable dwellings" within the meaning of Sec. 36 of the Act No. 145, and that under Sec. 98 of No. 360, a certificate of the Board of Land and Works expressing satisfaction with the improvements was a necessary condition to the right of the certificate-holders to the issue of a grant. *Held, per Molesworth, J.*, that the huts were "habitable dwellings," and having been erected within the year satisfied Sec. 36; that the two-roomed hut should be considered as two "habitable dwellings;" that the certificate of the Board required by Sec. 98 of No. 360 is only required when the improvements have not been made within the year, but afterwards. Upon appeal by the Crown, *Held* that the term "habitable dwelling" should be interpreted relatively to the means and social position of the selector, and should not be required to approximate in cost to the cost of fencing or cultivation (alternative requirements of the Act No. 145, Sec. 36); that the burden of proof to show that a penalty has been incurred by the selector is upon the Crown; that the Board of Land and Works is the tribunal to decide whether or not a "habitable dwelling" has been

erected; and that its certificate that the requirements of the Land Acts have been satisfied, is necessary under Sec. 98 of the Act No. 360 before a grant can be issued without payment of the penalty of five shillings an acre imposed by the Acts. Decree reversed. *Winter v. The Queen*, 4 A.J.R., 178—On appeal, 5 A.J.R., 44.

On appeal to the Privy Council the decision of the Supreme Court was reversed and that of *Molesworth, J.*, upheld. L.R. 6 P.C., 378, *sub nom. Winter v. Attorney-General of Victoria.*

Held, per Privy Council, that Sec. 98 of the "*Land Act* 1869," applies only to cases where a penalty has been incurred, and that its proper construction is that whenever a penalty has been incurred the Governor may demand it before issuing a grant of the fee, but that he is not obliged to demand such penalty; provided that no grant is to be issued when a penalty has once been incurred, unless the applicant obtain a certificate of the Board that the provisions referred to in the section have at some time previous been fulfilled, or failing that the applicant has paid the penalty. *Ibid.*

"Land Act 1862" (No. 145,) Sec. 22—Selector Dying—Rights of Representatives—"Intestacy Act" (No. 230)—"Administration Act 1872" (No. 427,) Secs. 6, 7, 9.]—D. obtained a Crown grant of one selection, and got a lease of another selection under No. 145, paid one year's rent, and died intestate in 1863. In 1878, A. obtained administration, and brought a petition of right, seeking a grant of the selection leased. *Held* that D.'s personal representatives were entitled to the lease, but not to the right of grant in fee, which would be in the heir under Sec. 22; that D. having died before Act No. 230, this right remained in heir until A. obtained administration, and that under Act 427, Sec. 6, this right was vested in A., which under Sec. 9 he would hold in trust for heir, and that duties and fees in Sec. 7 were payable by petitioner. Declared that A. was entitled. *Samuel v. The Queen*, 5 V.L.R. (E.,) 299; 1 A.L.T., 89.

"Land Act 1862," Secs. 22, 23, 24—Right to Grant in Fee of Land Selected and held under Lease—Real Representative.]—The right to a grant in fee of land selected under Secs. 23 and 24 of the "*Land Act* 1862," and held under lease under Sec. 22 of that Act, passes not to the personal, but to the real representative of the lessee. *Robertson v. The Queen*, 10 V.L.R. (E.,) 111; 5 A.L.T., 211.

4. *Illegal Agreements under Land Acts.*

Act No. 237, Secs. 14, 15, 22—Sale of Interest by Selector within Three Years.]—B. selected land under Act No. 237, and got a lease and improved the land within three years. B. agreed with M. to sell his interest for a certain sum, and at any time afterwards to transfer his interest. M. entered, paid rent, and effected improvements. The Crown grant was issued to B., who refused to transfer to M., and mortgaged to other people. On bill by B. to enforce the agreement, *Held* that Sec. 14 made the agreement not absolutely void, but voidable at the option of the Crown; that by Sec. 15 it was absolutely void, as being a contract which but for the prohibition would in equity be a transfer within the three years; that Sec. 22 does not by implication legalise assignments executed within three years, or warrant their registration afterwards, it merely directs there shall be no registry. Bill dismissed. *Mars v. Bohan*, 3 A.J.R., 60.

(Secs. 20 and 21 of Act No. 360 correspond with Secs. 14 and 15 of Act No. 237.)

"Land Act 1865" (No. 237), Secs. 15, 22—Lease from Board of Land and Works—Deposit as Security for Loan—Re-delivered to Lessee to obtain New Lease under "Land Act 1869" on Condition of Deposit of New Lease—Lessee Frandulently Omitting to Deposit New Lease, and Getting a Crown Grant in Lieu thereof to Himself—Bill to Enforce Equitable Mortgage.]—Defendant obtained under the Act No. 237 a lease from the Board of Land and Works, and deposited this as security for a loan from plaintiff. Plaintiff delivered it up to defendant to enable him to get a new lease in substitution for it under the Act No. 360, defendant promising to deposit the new lease when obtained. The defendant fraudulently omitted to do this, and obtained a Crown grant for himself. The bill sought an account of the debt, payment, in default foreclosure and conveyance, or for an order directing the defendant to execute a legal mortgage. *Held*, on demurrer, that as the bill did not state the date of the lease, the fact should be taken against the pleader, and that the equitable mortgage was an assignment within the meaning of the Act No. 237, and was illegal as being made within three years of the date of the lease under Sec. 15; that even if not made within three years, it was void under Sec. 22, as there was no allegation of registration or payment of registration fees under that section. Demurrer allowed with costs. *M'Nicholl v. Fergusson*, 5 A.J.R., 67, 68.

"Land Act 1865," Sec. 15—Selection—Partnership—Illegal Agreement.]—Suit by plaintiff against defendant for adjustment of partnership disputes. In 1864 the partnership began. In March, 1866, defendant selected land under "*Land Act*," which was afterwards treated as to payments and receipts as partnership property for grazing. In December, 1866, plaintiff similarly selected land, which was similarly treated. A partnership deed was executed 1st June, 1868, by which a partnership between plaintiff and defendant as sheep farmers, was arranged for five years from date. Schedule to deed contained land held in 1864, also land selected by defendant, but not land selected by plaintiff. Plaintiff selected land in May, 1869, which was treated similarly to former selections. The principal dispute was whether land selected by plaintiff was partnership property. There was no agreement in writing as to selected land being partnership property, but partnership funds were applied to rent, improvements, &c., as to selection, and possession was taken as part performance. *Held*, that though merits of case went to show there was an agreement as to selected lands being partnership property, yet

that such an agreement was illegal under Sec. 15 of Act No. 237, and therefore invalid. *Porteous v. Oddie*, 1 V.L.R. (E.,) 148.

The "Land Act 1865," Secs. 13, 14, 15—Lease—Illegal Contract—Specific Performance—Demurrer—Fraud.]—An agreement by a selector and lessee, under Act No. 237, Sec. 12, to transfer a portion of his selection on consideration of the transferee paying part of the rent and making advances for improvements, even if the agreement is to be executed three years after the granting of the lease, is illegal and void, as contrary to the policy of Act No. 237, Secs. 13, 14, and 15. S., in February, 1867, obtained a lease from the Crown, under Act No. 237, of certain land, T. paying certain arrears of rent and making advances for improvements, S. agreeing with T. verbally to transfer part of land to T. when required. T. went into possession of the portion of the land in January, 1869, and fenced it off. In August, 1870, T. sold his portion to M., S. knowing of the sale, and M. entered into possession undisturbed till an ejectment brought by Mrs. S., who claimed by mesne conveyances from her husband, S., who had obtained the Crown grant in November, 1870. M. had spent money on improvements. M. and T. instituted a suit for specific performance of S.'s contract to transfer, and to restrain ejectment. *Held*, on demurrer, that S.'s agreement was illegal and void under Act No. 237, and specific performance refused. Also, it not being alleged that S. had notice of M.'s improvements, his mere knowledge of sale to S., and allowing him to enter and improve, would not amount to such fraud or acquiescence as would subject him to be compelled to confirm M.'s title, as M.'s improvements were in no way connected with a contract with S. Demurrer allowed. *Tozer v. Somerville*, 1 V.L.R. (E.,) 262.

"Land Act 1869," Sec. 20—Partnership.]—An agreement between a licensee under the "*Land Act* 1869," Sec. 20, and his brother that the latter should pay half the rent and farm the land in partnership with the licensee, and that, when the licensee should acquire an interest which he could lawfully dispose of under the Act, he would allow his brother to acquire one-half of it on payment of half the rent and fees, is illegal, and there is no ground of distinction between the Acts Nos. 237 and 360 as to the illegality of such bargains. *Porteous v. Oddie*, 1 V.L.R. (E.,) 148, decided under the Act No. 237, followed. *Chambers v. Chambers*, 2 V.L.R. (E.,) 179.

Under "Land Act 1869," Sec. 21—What are.]—Sec. 21 of No. 360, avoiding all agreements for transfer in any way of land under license, is confined in its operation to agreements made during the period of three years from the commencement of the license. But if an agreement of the kind prohibited, made after such period, and as such unobjectionable, can in any way be connected with a similar previous agreement made during the three years, such later agreement is void, and part performance will not validate it. *Ibid.*

"Land Act 1869"—Sale of Crops.]—The "*Land Act*" forbids the alienation of any part of the estate in the land itself, but does not prevent a selector from selling a growing crop or from selling the timber. *Lorenz v. Heffernan*, 3 V.L.R. (L.,) 129.

"Land Act 1862," Sec. 11—"Land Act 1865," Secs. 12, 14, 15, 22—Transfer of Land Selected.]—B. supplied A., his servant, with money to pay rent and make improvements upon land selected by A. upon B.'s run. B. denied any agreement to select by A. as agent, but alleged that he had an "expectation" of obtaining a transfer of the land when A.'s title was complete. *Held* an illegal transaction, as contrary to the provisions of the "*Land Act* 1865," and to the public policy thereby declared. *M'Cahill v. Henty*, 4 V.L.R. (E.,) 68.

And *see* cases *ante columns* 786, 787, as to agreements to select.

"Land Act 1869," Secs. 20, 21.]—In 1874, C., D. and W. selected and took up, under "*Land Act* 1869" Sec. 20, adjoining allotments of land, obtained licenses for them, and fenced and improved them. W. took up lot 115, C. lots 116 and 117, and D. lot 114. All the license fees were paid by D., who also supplied all moneys for materials, &c. On 1st August, 1877, leases were issued to the three selectors, and it was agreed that accounts between D. and the other two should be adjusted by W. transferring to D. the lease of his allotment, and in consideration therefor C. and W. agreed that W. should have an equal share in C.'s selection, and that they should carry on a farming business thereon in partnership. *Held* that the agreement between C. and W. was illegal under Sec. 21 of the "*Land Act* 1869." *Wisbey v. Churchman*, 10 V.L.R. (E.,) 214; 6 A.L.T., 82.

"Amending Land Act 1865" (No. 237,) Sec. 42—Condition against Assignment.]—A condition in a license under the "*Amending Land Act* 1865" (No. 237), Sec. 42, that the licensee will not assign his interest without the consent of the Board of Land and Works does not make an assignment without such consent illegal, it merely subjects the licensee assigning to a forfeiture of his license. *Darcy v. Ryan*, 8 V.L.R. (E.,) 36; 3 A.L.T., 108.

Licensee under "Land Act 1869," Secs. 19, 20—Dealing with Land before Issue of Lease.]—A person in occupation of Crown lands as a licensee under Secs. 19 and 20 of the "*Land Act* 1869," who has fulfilled all the conditions of his license, may deal with his allotment at any time after the expiration of the three years of the license, although a lease may not have issued to him. *Pyle v. Taylor*, 8 V.L.R. (L.,) 51; 3 A.L.T., 101.

Agreement made Within Thirty Days of Issue of Lease—"Land Act 1869," Secs. 20, 21.]—Since Sec. 20 of the "*Land Act* 1869" allows a licensee thirty days after the expiration of the three years of his license to demand and obtain a lease, the fact that an agreement respecting the land bears date within thirty days before the date of the lease, affords no presumption that such agreement was made before the end of the three years, so as to be within the mischief of the last proviso of Sec. 21 of the Act.—*Ibid.*

"Land Act 1869," Sec. 21—Illegal Gnaranty.]—A guaranty as follows—"In consideration of your refraining from taking immediate action against H., for the amount of his indebtedness to your bank, now about £700, I hereby undertake that, within twelve months of this date, he shall deposit with you as security for his indebtedness to your bank, a Crown lease to himself of 320 acres of land at Warragul, and make arrangements to your satisfaction for the gradual liquidation of the balance of the debt that may then be standing in your books against him. In the event of his failing to hand you the lease as such security, before the 1st September, 1879, I hereby undertake and agree to pay you the amount that may then be due by him to your bank, on demand, with interest"—was held to be within the prohibition of Sec. 21 of the "*Land Act* 1869" as to contracts relating to an allotment made before or after the issue of a license, and to take effect before, at, or after three years from the commencement of the license, and to be therefore illegal and void. *Commercial Bank of Australia v. Carson*, 6 V.L.R. (L.,) 310; 2 A.L.T., 62.

Act No. 360, Sec. 21—Security—Promissory Note—Transfer of Lease.]—A. and B. were selectors of adjoining allotments under the "*Land Act*" No. 360, and during the currency of the license A. agreed to transfer or deposit his lease when issued as a security for advances made to B. to enable him to effect improvements, &c., and as security for the deposit of the lease A. gave B. his promissory note. *Held*, in an action on the note, that the note having been given to secure the performance of a contract which was void under Sec. 21, was void itself as a security under Sec. 21, even although the agreement to deposit the lease was void as not being in writing under the "*Statute of Frauds*." *Howat v. Herrick*, 7 V.L.R. (L.,) 79; 2 A.L.T., 123. *See* also *Plant v. Johnson*, *ibid*, p. 457; 3 A.L.T., 74.

6. *Commons.*

Act No. 117—Construction—Cattle and Horses.]—The words in the Act No. 117 "cattle and horses" do not include sheep. *In re Clow*, 1 W. & W. (L.,) 43.

Summary Jurisdiction.]—*Quære*, whether any persons but commoners under the Act No. 117 are subject to the summary jurisdiction given by the Act. *Ibid.*

Act No. 117, Secs. 71, 80, 107, 121—Proclamation of Goldfields Common on Lands held by Pastoral Tenant.]—Under Sec. 71 of the Act No. 117, on the proclamation of a goldfield common over lands held by a pastoral tenant of the Crown, the rights of the tenant could co-exist with those of the commoners, and under Secs. 80, 107, and 121 of the Act, yearly licenses could be issued as theretofore. *Regina v. Dallimore*, 1 W.W. & A'B. (L.,) 153.

For facts *see* S.C. *ante column* 326.

[Note.—Sec. 80 of Act No. 117 corresponds with Sec. 63 of Act No. 360.]

Goldfields Common—Town Common—"Land Acts 1862 and 1869."]—A tract of land was proclaimed as a "goldfield common" under the "*Land Act* 1862," and was subsequently proclaimed as a "town common" under the "*Land Act* 1869." *Held* that it had then to all intents and purposes the same character as if originally proclaimed under the later Act. *Sanderson v. Fotheringham*, 10 V.L.R. (L.,) 289, 294.

Impounding Animals Trespassing on Commons.]—*See* cases collected *post* under POUND AND IMPOUNDING.

7. *Offences against Land Acts.*

"Land Act 1862," Sec. 123—Trespasser.]—The Court reversed a decision of the justices who had convicted T. of trespassing on Crown lands. It appeared that T. had trespassed on lands held by S. under a license from the Crown. *Semble*, in a case of trespass on Crown lands the informant must be "a person authorised by the Governor-in-Council in that behalf." *Taylor v. The Queen*, 1 W. & W. (L.,) 301. Followed in *Proctor v. The Queen*, 2 W. & W. (L.,) 115.

[By Sec. 91 of Act No. 360 bailiffs are to be appointed by the Governor-in-Council.]

"Land Act 1862," Secs. 26, 31, 125, Schedule 2—Purchase of Land by Trustees—Conspiracy—False Statement.]—Sec. 26 enacts that certain persons—infants and married women—may not select land, either by trustees or directly. Such persons as are not expressly forbidden to select by trustees may select by trustees to the extent of land permitted. Sec. 31 does not give the Sheriff's jury any power of ascertaining whether the applicant is a trustee or not. Schedule 2, by imposing a prohibition not contained in the Act is inconsistent with and repugnant to the enactment, and as it is of inferior force must yield. T. and C. were charged with conspiracy to defeat the Act by selecting land by means of other persons as "trustees" for them, with conspiracy to procure other persons to make false statements and declarations. *Held* that as the conspiracy was based upon an act supposed to be unlawful, but which was not, in fact, unlawful, the charge could not be sustained, that a false statement in a declaration under Schedule 2 is not a misdemeanour under Sec. 125. Conviction quashed. *Regina v. Taylor*, 2 W. & W. (L.,) 23.

"Land Act 1869," Sec. 93—Person Summoned for being in Unauthorised Possession of Crown Lands—Miner's Right.]—M. was summoned under Sec. 93 of the "*Land Act* 1869" for being in unauthorised occupation of Crown lands. M. produced a miner's right allowing him to use the land for a site for a dam for domestic use. *Held* that the miner's right afforded a defence, and that if M. dammed the water in an unauthorised way he might be subject to an application by others to get the water. *M'Lean v. Wearn*, 1 A.J.R., 152.

Selector in Occupation of More Land than Allowed by Act—Notice to Quit—Penalty—"Land

Act 1869," Sec. 93.]—A selector who is in possession of more than the legitimate quantity of land under the "*Land Act* 1869" is not, after he has received notice to quit, liable to a penalty under Sec. 93 for being in unauthorised occupation of Crown lands, he having obtained possession properly, though he might be treated as a trespasser in a civil suit. *M'Can v. Quinlan*, 4 A.J.R., 117.

Unauthorised Occupation—Presumption that Land is Crown Land.]—In a complaint on behalf of the Crown for being in unauthorised occupation of Crown lands, the presumption is, until the defendant proves the contrary, that the land is Crown land, and that the defendant has no title to occupy. *M'Grath v. Smith*, 2 V.L.R. (L.,) 231.

Unauthorised Occupation—Question of Title Ousting Jurisdiction of Justices.]—*See Robinson v. Carey, ante column* 744.

"Land Act 1869" (No. 360), Sec. 94—Trespass on Crown Lands.]—It is not necessary under Sec. 94 for a bailiff prosecuting for taking timber from Crown lands without a license to show his appointment. *Regina v. Mollison, ex parte Reed*, 5 A.J.R., 119.

"Land Act 1869," Sec. 94—Removing Substances from Crown Lands.]—Quartz-tailings deposited upon Crown lands from a mine are not substances the removal of which from Crown lands without a license is forbidden by Sec. 94 of the Act. *Potter v. Wilkins*, 2 V.L.R. (L.,) 47.

Act No. 360, Sec. 94—Timber—Fern Tree.]—B. had been convicted under Sec. 94 of cutting timber from Crown lands without a license. The evidence showed that he had cut fern trees. *Semble*, that fern trees are not timber within the meaning of Sec. 94. *Regina v. Rodd, ex parte Bucknall*, 7 V.L.R. (L.,) 447; 3 A.L.T., 62.

Act No. 360, Sec. 94—Removing Loam from Crown Land.]—K. was employed by contractors who were making a railway for the Crown, and, with their authority, he removed loam from Crown land within half-a-mile of the railway line for the purpose of the construction of the line. *Held* that he was not liable under Sec. 94 of Act No. 360, although he had not a formal license. *Turnbull v. Kelly*, 9 V.L.R. (L.,) 284.

Act No. 360, Sec. 94—Removing Loam from Crown Lands—Sanction from Shire Council.]—It is not an offence for a person, under a contract with a shire council, to enter into Crown lands and take loam therefrom when he is authorised by the council to procure materials for the road he is making. *Bell v. Wade*, 9 V.L.R. (L.,) 5.

Overruled in *Rotherly v. Patterson*, 10 V.L.R. (L.,) 213. *See* under CROWN—*ante column* 331.

Making False Declarations under "Land Acts 1865 and 1869."]—*See Regina v. Mungovan* and *Regina v. Greaney, ante columns* 303, 304.

8. *Other Points.*

"Land Act 1862," Secs. 29-32 — Cases which Sheriff may Try by Virtue of.]—The only question which can be tried before a sheriff, under the "*Land Act* 1862," between two persons, when notice has been given to a land officer objecting to a declaration by him that a person is the lawful selector of an allotment, is the question whether such selector is "the first selector in point of time." Where, therefore, A. and B. had applied for land, under the "*Land Act* 1862," on the first day open for selection, and the land officer had decided between them by lot, and a third applicant, on a subsequent day, objected to the issue of a grant to him on the grounds that he was not the first selector in point of time; that he did not make a written application for, nor pay the purchase-money for the whole of the allotment; and upon other grounds, the question as to priority being conceded,—*Held* that the only question which could be tried before the sheriff being conceded he had no jurisdiction. *Ex parte Briggs*, 1 W. & W. (L.,) 377; S.P., *ex parte Taylor*, 2 W. & W. (L.,) 19.

Licenses for Pastoral Occupation—"Land Act 1862" (No. 145,) Secs. 83, 86, 91.]—Sec. 91 must be read together with and subject to Sec. 86, and the words "higher and lower" used in Sec. 91 must be restricted by Sec. 86; Sec. 86 being read in connection with Sec. 83 refers to arbitrators. Where therefore awards stated by arbitrators in the form of a case for the opinion of the Court recited the number of sheep depasturing in 1861, and the assessment of the Board, and stated that arbitrators awarded a certain sum as rent, based upon the assessment of 1861, and a lower sum if they had power to award less,—*Held* that the amount of rent must be the higher one. *In re "Land Act* 1862," *Kelsall & Forlonge*, 2 W. & W. (L.,) 140.

In the argument of such a case counsel for the occupants appealing against the Board's assessment have the right to begin. *Ibid.*

"Land Act 1862" (No. 145,) Sec. 78—"Traveller."]—D., a bullock driver, lived eight miles from Malmsbury borough common. He drove his bullocks and dray from Malmsbury to Spring Hill, distant eight more miles, and in the evening of that day returned to M., *i.e.*, eight miles on his homewards journey. He put his bullocks on the common for the night. *Held*, that he was a "traveller" within the meaning of Sec. 78. *Toe v. Day*, 2 W.W. & A'B. (L.) 21.

[Compare Sec. 103 of Act No. 360.]

"Land Act 1862 (No. 145,) Sec. 78—"Proclamation of Road."]—A notice signed by a Minister of the Crown, but not by the Governor or any one by the Governor's command and not under seal, purporting to proclaim a road over lands under the "*Land Act* 1869," Sec. 38, is not a valid proclamation of such road. *Mayor of Melbourne v. The Queen*, 2 V.R. (E.,) 183, 204, 205; 2 A.J.R., 76, 125.

"Land Act 1869," Sec. 35—Sale of Land—Power of Board of Land and Works.]—*See Palmer v. Board of Land and Works, ante column* 330.

Forest Reserve—Excision from Pastoral Run—"Land Act 1865," Sec. 41.]—The proclamation under Sec. 418 of the "*Land Act* 1865," of a part of a pastoral run as a forest reserve unavailable for pastoral purposes, does not *per se*

and without any subsequent notice given or act done by the Board of Land and Works or by the pastoral occupier excise the reserve from the run so as to deprive the occupier of the right of occupation, or the Crown of the right to the full assessed rent. *O'Shanassy v. Littlewood*, 10 V.L.R. (L.,) 304, 312; 6 A.L.T., 145.

LANDLORD AND TENANT.

I. Parties.

By Trustees.]—Trustees who were in possession of land for church purposes, leased it to W., but were not gazetted as trustees till after the date of the lease. In an action for ejectment by W. against a third person in possession, *Held* that this afforded no defence to such third person. *Wood v. Hutchings*, 2 A.J.R., 58.

By Trustees Leasing in Excess of their Powers.]—In the above case it was doubtful whether the parties could make a valid lease to W. *Held* that this was beside the question, and did not affect the rights of W. as to third parties. *Ibid.*

Married Woman — Husband.] — A married woman cannot demise premises to her husband, otherwise the husband and wife would have to sue the husband for rent. *Regina v. Templeton, ex parte Allen*, 4 A.J.R., 70.

A woman, who had been previously married, was appointed by her first husband trustee of a house, and on her second marriage she and her husband lived in the house, and upon his not paying the rent, she distrained. *Held* that the distress was invalid, since she could not demise to her husband. *Ibid.*

II. Subject Matter of Leases.

Lease of Theatre—Ornaments Attached to Outer Wall of Corridor do not pass under.]—*See Aarons v. Lewis*, under *Trover* and *Conversion.*

III. Agreements for Leases, Specific Performance, Proceedings for Breach of Agreement.

(1) *Agreements for Leases.*

Ejectment—Subsequent Agreement for Tenancy—Evidence.]—A purchaser of premises commenced an action of ejectment against a tenant of the vendor who was overholding, and thus determined the tenancy. Subsequently to the action of ejectment, in which no further steps were taken after service of the writ, the purchaser distrained for rent, and sold the tenant's chattels. Afterwards he again distrained and the tenant brought an action of replevin. *Held*, that the tenant's submitting to the previous distress without taking proceedings to obtain redress was evidence from which a subsequent agreement between the parties for a new tenancy might be inferred; and the tenant was nonsuited. *Bond v. Vaughan*, 6 V.L.R. (L.,) 172; 2 A.L.T., 6.

Agreements between Landlord and Tenant.]—In agreements between landlord and tenant in Victoria, words should be held to have the same meaning that the same words have in England; and the great difference between the mother-country and Victoria in this respect—that there landlords generally dislike, whereas here they generally like, the removal of timber from land—makes it only the more necessary that the intention of the parties should be plainly stated and carried out by express stipulation, and not left to mere legal intendment from loose and vague provisions. *Bruce v. Atkins*, 1 W. & W. (E.,) 141, 144.

(2) *Specific Performance and Proceedings for Breach of Agreement.*

Tenancy with Option of Renewal for Two Years and of Purchase on Written Notice—Indefinite Notice.]—M., the defendant, entered into an agreement, August, 1871, under seal with L., the plaintiff, to grant to L. a lease of certain land held by her on business license, and of buildings thereon, for a year, with an option on L.'s part to take a renewed lease for two years on same terms, after giving one month's notice of such intention, and with an option on L.'s part to purchase the business license, and the buildings thereon, for a certain sum during

the one year or the two years, if lease were renewed, on giving a like notice. L. entered into possession, and served a notice, July, 1872, in the following terms:—"I hereby give yon notice of my intention of remaining in your shop for a further term." In October, 1872, the defendant purchased the fee, and in that month plaintiff tendered a draft lease as for two years for her to execnte, which she refused. In Jannary, 1874, he again tendered a lease, and gave notice of his intention to purchase the inheritance of the premises (the premises comprising other property than freehold). *Held*, in a suit for specific performance of the agreement, that the vagueness in the first notice, and the partial omission in the second, did not deprive plaintiff of his rights. Specific performance decreed. *Lonergan v. M'Arthur*, 5 A.J.R., 172.

Lease with Option to Lessee to Purchase at any Time during Term and Agreement to Purchase at End of It.]—Plaintiff leased land in April, 1869, to defendant for three years, with a clause that defendant should and would purchase at the end of or during the continuance of that term. At the expiration of the lease, plaintiff asked defendant to purchase at the price previonsly agreed upon. Defendant refused. Bill to compel specific performance. *Held* that the contract meant that defendant must purchase at the expiration of the term, and had the option during the currency of the term. Specific performance decreed. *Morgan v. Savage*, 3 A.J.R., 53.

Option of Purchase.]—Where a lease contained an option of purchase to the lessee during the term, and the lessee gave notice of his intention to exercise the option, but neither tendered the purchase-money nor a transfer of the land to the lessors, bill by the lessee for specific performance of the covenant giving the option, dismissed, with costs. *Richardson v. Kearton*, 8 V.L.R. (E.,) 201.

Where a lessee commits waste, and neglects to pay rent, the Court will not enforce specific performance of a covenant giving him a right of purchase during the term. *Ibid.*

Option of Purchase.]—A bank took a lease of part of premises with power "to signify to the lessor or leave at his usual or last known place of abode a notice in writing stating its desire to purchase" the whole of the premises. *Held* that the option of purchase could be exercised by personal verbal notice. *Colonial Bank of Australasia v. Buckland*, 9 V.L.R. (E.,) 29; 4 A.L.T., 143.

Of Agreement to Grant a Further Lease—Part Performance.]—P. was tenant of G. of an hotel for three years. Four months before the expiration of the term, P. verbally agreed with G. for a further tenancy; G. being permitted to enter to paint and repair for the preservation of the property. G. entered, and by his workmen continued for one month to repair. G.'s men entered and painted, causing P. inconvenience. G. refused to grant a further lease, and P. brought a suit for specific performance, alleging that he suffered great inconvenience and damage by G. working, to which, as G. knew, he would not have submitted but for the agreement to renew. *Held* that the inconvenience suffered by P. amounted to a part performance, as this was not compensated by the improvement of the premises during the two or three months of the remaining old tenure, and demurrer by G. overruled. *Polleykett v. Georgeson*, 4 V.L.R. (E.,) 207.

Action for Breach of Agreement to Grant a Lease—Tender of Lease.]—In an action for breach of an agreement to execute a lease, the plaintiff, the intending lessee, is not called upon to prove that he tendered a lease for execution, if the defence, by not traversing such tender, does not put the point in issue. *Brown v. Hardy*, 5 W.W. & A'B (L.,) 245.

A plea to a declaration for not granting a lease, that the applicant for the lease did not tender a lease for execution, is a complete answer to the declaration. *Pinn v. Barbour*, 1 V.R. (L.,) 136; 1 A.J.R., 127.

IV. Lease.

(1) *What Constitutes a Lease.*

A written agreement was drawn up between C. & D. by which it appeared that "D. agreed to rent to C. the rooms, concert hall, 113½ Bourke-street East, of the A. hotel (to be called the Alhambra Assembly Rooms). This rent in consideration of 1s. a week and the payment by C. of the amount of gas to be consumed, &c. (this to be payable weekly); the use of the above rooms will belong to C. from noon till midnight every day for six months from 24th April, 1862, except two nights a week when they can be appropriated to the use of the Oddfellows' Association." D. evicted C. and C. brought trespass and got a verdict. On rule *nisi* for nonsuit, *Held* that there was no demise for six months and rule made absolute. *De la Chapelle* v. *Downie*, 2 W.W. & A'B. (L.,) 99.

In a deed which was a conveyance of land to M. during the life of T., M. covenanted to pay a certain weekly sum into J. the grantor so long as *M.* should continue to hold the land. The weekly sum being in arrear J. distrained upon the goods of M.'s assignees and was sued for wrongful seizure of the goods by M.'s assignees. *Held*, that the deed did not amount to a lease and that the covenant was merely to pay a certain amount weekly, and that J. was not entitled to distrain. Verdict for defendant set aside. *Drysdale v. Johnston*, 3 V.R. (L.,) 153.

(2) *Underlease.*

M. a lessee gives H. a sub-lease expiring before the end of his own term, and the sub-tenancy continued after the expiration of the sub-lease. The superior landlord sold the fee subject to the lease to one P., and P. required H. to attorn to him after the termination of M.'s lease. *Held*, that no sub-tenancy could exist between M. and H. after the expiration of M.'s lease, and that the acceptance by P. of rent paid to M. by H. for a period overlapping by nine days M.'s term did not constitute a tenancy in M. so as to enable him to sue for rent. *Hefter v. Martin*, 3 V.L.R. (L.,) 96.

(3) *Other Points.*

Second Lease Inconsistent with First Lease—Injunction.]—There is no equity for a lessee or a tenant from year to year to restrain his lessor from executing a lease to another tenant inconsistent with the rights of the first lessee or tenant. But *semble* that the first tenant, if he had an equitable title only, which a second lease would endanger, mght file a bill to have the equitable turned into a legal title, and have an *interim* injunction to prevent the objectionable act. *City of Melbourne Gold Mining Coy. v. The Queen*, 4 W.W. & A'B. (E.,) 148, 155, 156.

Void—A lease executed under a power, and containing a covenant in excess of that power, is altogether void, and not the covenant only. *Blake v. Lane*, 2 V.L.R. (L.,) 54.

V. Yearly Tenancies.

Two Years Certain and so on from Year to Year—Notice to Determine.]—By an agreement under seal B. let and L. took a tenement for two years certain and so on from year to year until either party should give the other six months' notice to determine the said agreement. *Held* that insertion of the word "certain" in the agreement rendered the tenancy one for two years certain, and that no tenancy from year to year could commence if either party gave the notice required, determining at the end of the two years certain. *Beaumont v. Love*, 1 V.R. (L.,) 227; 1 A.J.R., 167.

Tenancy to Continue until Six Months, Notice in Writing given—But to Continue at least Three Years—Option to Renew.]—G. by lease under seal leased premises to N. until six months' notice in writing should be given, and for at least three years with option of renewal. *Held* that it was a yearly tenancy to last at least three years; and as notice was not given within the three years it remained a tenancy from year to year except that the six months' notice in writing did not terminate the contract at the end of that period, but only at the end of the year in which it was given. *Garbutt v. Naughton*, 5 A.J.R., 70.

Per Barry, J. The notice to renew created no legal estate; the tenant would merely have a right of action for breach of the agreement, or a suit for specific performance; until consent by the landlord, no estate was created, and the tenant might be ejected at the end of some year. *Ibid.*

Original Tenancy for a Year at Weekly Rent—Subsequent Increased Rent.]—A tenancy for the year was created at a weekly rent of thirty shillings. After the expiration of the first year it was allowed to continue, but in the course of a month the rent was raised to forty shillings per week. *Held* that the landlord receiving rent under the new arrangement, it must be presumed that the yearly tenancy continued notwithstanding the increase of rent and that a proper notice to quit must be given. *Bank of Victoria v. McHutchison*, 7 V.L.R. (L.,) 452.

Lease for "7, 14 or 21 Years at the Option of the Lessee, such Election to be made in Writing before the Expiration of the First Six Years."]—Under such a lease A. occupied for sixteen years but without exercising his election within the first six years and then gave six months notice to quit at the end of the current year. T., the lessor, disregarded this and sued A. for rent after he had given up possession of the land. *Held* that after the first seven years it was only a tenancy from year to year and that the notice so given was good. *Tucker v. Allen*, 5 A.J.R., 139.

Effect of Receiving Rent—Tenancy under Void Lease.]—Q. mortgaged land to M. M. granted a lease to Q. for ten years containing a proviso for re-entry on non-payment of rent, which was void as not being under seal. In 1874, Q. conveyed the equity of redemption to M. and shortly afterwards died. The rent being in arrears M. sued Q.'s wife who was in possession in ejectment. *Held* that the condition for re-entry was not inconsistent with a tenancy from year to year, which tenancy was created by Q. paying rent to M; and that M. was entitled to eject Q.'s wife. *Mourant v. Quenault*, 1 V.L.R. (L.,) 35.

Breach of Covenant and Ejectment — Stay of Action—Second Breach—Position of Parties— *Parker v. Eve, post columns* 813, 814.

Tenancy from Year to Year.]—A person was let into occupation of land, under a parol agreement, for an indefinite time, and was directed to pay to the Crown a yearly rent due by his immediate landlord the Crown lessee. *Held* that the payment of such rent for more than a year afforded evidence from which a tenancy from year to year between the parties might be inferred. *Pyle v. Taylor*, 8 V.L.R. (L.,) 51; 3 A.L.T., 101.

Lessor Holding Over after Expiration of Term—Interest how Determined.]—A grant by the head landlord of a lease to a sub-tenant without notice to the mesne landlord, after the expiration of the mesne landlord's term, is a determination of the interest of the mesne landlord as a tenant at will or tenant at sufferance. *Martin v. Elsasser*, 4 V.L.R. (L.,) 481.

VI. Termination of Contracts.

(1) *Notice to Quit.*

Notice to Quit—Weekly Tenancy.]—A mortgagor had become a weekly tenant of the mortgagee, and a notice to quit was proved, which fixed a day to quit more than a week distant, but not being the day of termination of any week of the tenancy. *Held* that notice to quit was not necessary in the case of a weekly tenancy. Rule absolute to set aside verdict for defendant (mortgagor), and enter verdict for plaintiff (mortgagee). *Calvert v. Turner*, 2 W.W. & A'B. (L.,) 174.

By Whom Given—"Parties Entitled"—What Length Notice should be.]—*See Bowman v. Carnaby, ante column* 398.

"On or Before" the Last Day of the Term Granted.]—A tenancy from year to year was granted and the notice to quit required the tenant to quit "on or before 1st February, 1883." The tenancy commenced on 1st February, 1881. *Held* that the notice was sufficient, the proper construction being that the

tenant was to leave at the earliest moment the landlord would be entitled to possession. *Story v. Madders*, 9 V.L.R. (L.,) 150; 5 A.L.T., 31.

See also cases *ante* under heading YEARLY TENANCIES.

(2) *Warrant of Possession under "Landlord and Tenant Statute* 1864."

"Landlord and Tenant Statute 1864" (No. 192,) Sec. 90—Two Notices.]—M., a landlord, gave K., his tenant, on the 5th of August, notice to quit the premises, and to deliver possession to his "lawfully authorised agent" on the 22nd of August. B., the authorised agent, duly applied for possession and was refused. On 31st August M. gave K. notice of his intention to apply under Sec. 90 of No. 192 for an order for possession, unless peaceable possession of the premises and "also goods, chattels, &c., contained" was given "to me, M." This was not proceeded with, and was struck out. On 25th September M. gave a similar notice of intention to apply, except that it required possession to be given to M. or B., and it was not preceded by a fresh notice to quit. *Held*, on appeal from magistrates who had made an order for possession, that there was no need of a second order to quit to support the notice of 25th September, for a second notice to quit would have been an admission of a second tenancy; that the notice of 25th September was not defective by reason of its requiring possession of chattels, &c., or by reason of its requiring possession to be given to M. or B. Appeal dismissed. *Kennedy v. Miller*, 4 W.W. & A'B. (L.,) 255.

Act No. 192, Sec. 90—Notice of Intention to Recover Possession.]—McC. had obtained a lease of a hotel, one of the covenants of which was that if she failed to obtain a license, the lease was to be forfeited. The landlord, in consequence of her failure to obtain a license, obtained under Sec. 91 of the Act a warrant for possession. On rule *nisi* for a prohibition, *Held* that the words "or otherwise" in Sec. 90 are not limited so as to be *ejusdem generis* with "notice to quit," but that they include a determination by forfeiture. Rule discharged. *Regina v. Puckle, ex parte McCallum*, 3 V.R. (L.,) 23; 3 A.J.R. 30.

Act No. 192, Sec. 90—Notice of Intention to Recover Possession—Breach of Covenant.]—A tenant committed a breach of a covenant in his lease and the landlord served him with a notice under Sec. 90 of the Act, and obtained a warrant under Sec. 91 for ejectment from the justices, without having done anything to determine the tenancy. *Held* that the mere breach of covenant was not a determination of the tenancy, and that the serving of notice under Sec. 90 was not evidence of an intention to determine the tenancy, and that the tenancy must be determined before the notice could be served. *M'Callum v. M'Vean*, 3 V.R. (L.,) 157; 3 A.J.R., 68.

Form of Notice—Act No. 192, Secs. 90, 97—Technical Objections.]—Sec. 90 does not require the form given in the Schedule as to notice of intention to apply for a warrant of possession to be strictly followed. The Court is not disposed to look favourably upon technical objections to these proceedings, as Sec. 97 provides a remedy for any irregularity. *Regina v. Cleveland, ex parte Edwards*, 5 V.L.R. (L.,) 147; 1 A.L.T., 9.

Act No. 192, Secs. 90, 93—Notice—Service.]—After the expiration of a term of years the lessee continued to occupy the premises at the same rent as before without any fresh agreement, and paid rent; he did not reside upon the premises but used them as his shop. The landlord served a notice to quit, and then served a notice of intention to apply to justices for a warrant of possession under Sec. 90 upon a young man sworn to be "in the appellant's employment and apparently in charge of the premises." *Held* that the service of notice was insufficient under Sec. 93, the person served not "apparently residing on the premises" necessarily; and such defect of service was not waived by the lessee's appearance and defence before the justices. *Andrews v. Daish*, 1 V.L.R. (L.,) 188.

When Procedure under Secs. 90 and 91 Applicable—Expiration of Term of Seven Years under Void Lease.]—*See Holmes v. North, ante column* 401.

Warrant of Possession—Notice to Quit—Weekly Tenancy—"Landlord and Tenant Statute 1864," Sec. 90.]—In the case of a weekly tenancy, though no formal notice to quit is necessary, there must be some demand of possession before service of a notice of intention to apply to justices, under Sec. 90 of the "*Landlord and Tenant Statute* 1864" for a warrant of possession. *Regina v. Sutcliffe, ex parte Brooks*, 4 V.L.R. (L.,) 150.

"Landlord and Tenant Statute" (No. 192,) Secs. 90, 91, 97—Warrant of Ejectment.]—A notice to quit had been given eighteen months ago and a warrant issued thereon, and a bond entered into under Sec. 97 by the tenant to try the owner's right. Pending the trial the warrant was suspended; but the action having been decided against the tenant the landlord applied on the same original notice to quit for a second warrant. *Held* that there was no impropriety or illegality in the issue of the second warrant. The warrant need not be issued at a specified time, but must be executed within a specific time after its issue, which time had not expired. *In re Smith, ex parte Hunter*, 4 W.W. & A'B. (L.,) 276.

Mandamus to Compel Issue of Warrant—"Landlord and Tenant Statute," Sec. 91.]—H. summoned N. to show cause why a warrant of ejectment should not be issued against him under Sec. 91 of the "*Landlord and Tenant Statute*." The justices decided that the warrant should be issued, and N. intimated that he would give sureties, and bring trespass in accordance with the Statute, which required the warrant to be issued within thirty days of its date. No attempt was made to take out the warrant till long after the expiration of the thirty days, and the magistrate then refused to sign it, and a *mandamus* was sought to compel

him. The rule was made absolute, and the Court decided that N. should be allowed his costs of it, if he were successful in the action H. *v.* N. about to be brought. *Regina v. Panton, ex parte Hendy*, 4 A.J.R., 150.

Warrant of Possession Issued by Justices without Jurisdiction — Remedy — Prohibition — "Landlord and Tenant Statute 1864," Secs. 96, 97.]—The proper remedy of a tenant where justices have issued a warrant of possession when they had no jurisdiction to do so, is not by prohibition, but by the remedy provided by Secs. 96 and 97 of the "*Landlord and Tenant Statute* 1864," *i.e.*, to procure a stay of execution of the warrant by giving security to prosecute an action of trespass against the person who obtained the warrant. *Ex parte Carey*, 4 V.L.R. (L.,) 408. *See* also S.P. *Regina v. Carr*, 6 W. & W. A'B. (L.,) 245. *Regina v. Taylor, ex parte Blackburn*, 3 A.L.T., 67. *Ex parte Shaw*, 4 A.L.T., 5.

Quashing Order for Warrant of Possession—Irregularity in Notice of Intention to Apply.]—Where there is an irregularity in the notice of intention to apply for recovery of possession, and the justices, disregarding the irregularity, make a warrant under Sec. 91, the Court will not under Sec. 4 of Act No. 501 quash such an order, as the tenant has his remedy under the Act No. 192. *Regina v. Snowball, ex parte Gawne*. 5 V.L.R. (2) 409; 1 A.L.T. 100.

(3) *Forfeiture.*

What Amounts to.]—W. leased land from church trustees, and, during the currency of the lease, entered into partnership, and by the partnership deed the land was declared to be partnership property. The firm was dissolved, and the assets devolved on one of the partners, who subsequently sold the land for the rest of the lease to defendant. The trustees received rent from the firm, and from defendant. *Held* that the mere receipt of rent did not amount to evidence that the trustees no longer recognised W. as lessee, or had forfeited his lease. *Wood v. Hutchings*, 2 A.J.R. 58.

Forfeiture.]—The true construction to be put upon a condition or proviso regulating forfeiture is, that it is void at the option of the lessor; and accordingly if he exercise the option that it shall continue, the lease, up to that period voidable, is rendered valid. If he elect that it shall be put an end to, the lease must be determined. *Thorburn v. Buchanan*, 2 V.R. (L.,) 169; 2 A.J.R., 109.

Breach of Covenant—Waiver.]—P., on 2nd November 1857, demised from the date of the day preceding, premises to K. for twenty-one years at a certain rent. The lease contained a covenant that K. would within the first seven years, erect thereon certain buildings. K. failed to perform the covenant, and P. shortly after the expiration of the seven years, brought an action of ejectment against K. and signed judgment. Shortly after judgment was signed, K. entered into a bond to P. which recited the lease, the covenant, the breach, and that the action had been brought and judgment recovered, and that P. at K.'s request had consented to stay proceedings in the action on K.'s undertaking to perform the covenant within a period of seven years, or to pay to P. the sum of £4000 by way of liquidated damages. K. paid rent under this agreement, and so did his assigns. The second covenant was broken, and P. brought another action of ejectment. *Held* that the first action of ejectment was an absolute election by P. to determine the lease; that the fresh agreement and bond did not revive it, nor did the acceptance of rent, since that was under the new agreement; and that, under the new agreement, K. and his assignees, at law, only held as tenants from year to year subject to the express agreement, though in equity he could have successfully resisted an attempt to evict him during the second period of seven years. *Parker v. Eve*, 4 A.J.R., 97.

Waiver.]—Receipt by the landlord after a forfeiture of rent due previously to the forfeiture, but payable in advance for a period which terminates after the forfeiture, will not operate as a waiver of the forfeiture. *Balls-Headley v. Ambler*, 6 V.L.R. (L.,) 360.

Per Higinbotham, J. It has been held that receipt of an amount including rent due both before and after the accrual of a forfeiture, would not amount to a waiver. *Ibid.*

Covenant for Re-entry on Insolvency of Lessee —Transfer.]—Under a covenant or condition for re-entry should the estate of a lessee or his transferees become sequestrated, the insolvency of the lessee, after a transfer by him of the lease, will operate as a forfeiture even as against the transferee.—*Ibid.*

Waiver—By Receipt of Rent.]—*Per Higinbotham, J.*—The receipt of rent by a landlord who is acquainted with an existing cause of forfeiture is an unequivocal act on his part, indicating his intention that the lease shall continue in force; and, like an unequivocal act, indicating an intention to avail himself of a forfeiture, is irrevocable; but the receipt of rent is not a waiver of continuing forfeiture. It does not operate beyond the time up to which the rent was accepted. *Barwick v. Duchess of Edinburgh Coy.*, 8 V.L.R. (E.,) 70, 79; 3 A.L.T., 68.

(4) *Surrender.*

By Operation of Law — Acceptance of New Lease.]—The acceptance by a lessee of a lease which is void, as having been executed in excess of the powers of the lessor's attorney under power, cannot be a surrender by operation of law of a prior lease then subsisting to the same lessee. *Blake v. Lane*, 2 V.L.R. (L.,) 54.

Lease under Seal—Written Agreement to Accept New Tenants and Acceptance of Rent from them—Estoppel in Pais.]—S. granted a lease, under seal, to Sabelberg. S. signed a document by which she acknowledged a third person as tenant, and the receipt of rent from such third person. S. then sued Sabelberg on the covenants in the lease. *Held* that the document operated as a surrender, and that S. was estopped from holding Sabelberg to his obligations in the lease. *Sabelberg v. Scott*, 5 V.L.R. (L.,) 414; 1 A.L.T., 101.

VII. Renewal of Lease.

Notice of Right to Renewal.]– *Per Molesworth, J.*—Where tenants who, under a lease with a covenant for renewal on their request, have requested a renewal, their possession as tenants is constructive notice of their equitable rights to renewal to all purchasers, as putting them upon inquiry; and is also constructive notice of the request to renew having been made. *Blackwell v. Smyly*, 3 W.W. & a'B. (E.,) 1, 7.

Right to Renewal—When Saved—Notice.]—By indenture of lease, F., mortgagee of the demised premises, by W., his attorney, and H., the mortgagor, demised certain premises to tenants for one year; the lease contained a covenant by F. and H. that they would, if so requested by the tenants, one month before the expiration of the demise, renew the lease for a further term. Within the prescribed time, the tenants served a written notice on W., who was still F.'s attorney, requiring a renewal. No renewal was granted, but the tenants continued in possession, expended money upon them, and paid rent as before to H. On bill by the tenants against purchasers from the lessors for specific performance of the covenant for renewal, *Held* that the request made to W. saved the right of renewal in equity as against both H. and F., and that H. must have been aware that the tenants regarded the right of renewal as recognised, since he continued without fresh bargain to receive the rent after the year had expired; that, as against the purchasers, the tenants' possession was constructive notice both of the right to renewal, and of the request to renew; and specific performance of the covenant decreed. *Ibid.*

VIII. Obligations with Respect to Preservation of Property and Rights, Powers, and Liability of Tenant with Respect Thereto.

(1) *Repairs.*

Covenant to Repair—Ordinary Wear and Tear.]—A tenant is not required, under a covenant in a lease requiring him to keep the premises in substantial repair, to repair ordinary wear and tear. *Jeffray v. Buckland*, 4 A.J.R., 163.

Covenant by Landlord to Repair—Construction.]—A covenant by a landlord to repair implies a condition that he shall have notice that repairs are needed before he becomes liable on the covenant. *Kreitmayer v. Kennedy*, 4 V.L.R. (L.,) 215.

Covenant to Repair—Breach of, What is Not.]—*See Polleykett v. Georgeson, ante column 282.*

Covenant to Repair—Whether it Runs with Land.]—*See Rankin v. Danby, ante column 282.*

(2) *In Other Cases.*

Badly-Constructed Drain—Liability for Injury Caused by.]—When defendant, the tenant and occupier of premises, allowed water to flow from a badly-constructed drain and accumulate on plaintiff's adjoining property, and plaintiff was nonsuited in the County Court on the ground that the defendant was only a tenant, and it was not proved that he made the drain or used it negligently. Upon appeal, *Held* that the tenant in occupation was the person primarily responsible for the nuisance caused by the use of the premises, and nonsuit set aside. *Braine v. Summers*, 3 A.L.T., 57.

Power to Give Permission to Third Person to do Certain Acts upon the Demised Premises.]—A tenant of land may give permission, effectual as against the landlord, during the tenancy, to a third person to construct a wooden drain or flume in a channel already existing and little disturbing the soil; such permission upon an express bargain would not afford evidence of a right in such third person as against the reversioner after the termination of the tenancy. *Bonshaw Freehold G.M. Coy. v. Prince of Wales Coy.*, 5 W.W. & a'B. (E.,) 140, 154.

IX. Covenants Relating to Other Matters.

(1) *Usual.*

Assignment or Sub-Letting without Consent.]—The defendant agreed to let to the plaintiff an hotel for five years, "at the present rental of £700 a year—lease to contain all the usual clauses." At the time of the agreement the plaintiff was in possession under an existing lease to another person, containing a covenant for payment of the rent weekly. The plaintiff continued in possession, and subsequently the lessor tendered him a lease whereby the rent was made payable monthly, and which contained a covenant by the lessee not to transfer the license, or to assign, or to underlet, without the consent in writing of the lessor, and with a proviso for re-entry in the event of the lessee becoming insolvent, or assigning for the benefit of his creditors. The plaintiff objected to this, and the lessor insisting upon granting no other lease brought an action of ejectment against the plaintiff. On bill by the plaintiff against the lessor to restrain the action, *Held* that the agreement referring to the "present rental," plaintiff was only entitled to a lease reserving the rent payable weekly; and that the covenant prohibiting assignment or sub-letting without consent could not be inserted as a usual covenant. *Coleman v. Dean*, 1 V.R. (E.,) 142; 1 A.J.R., 147.

What are—Question for the Jury.]—It is generally a question for the jury whether a covenant is usual and reasonable. *Blake v. Lane*, 2 V.L.R. (L.,) 54.

(2) *Quiet Enjoyment.*

Action for Breach of—When Maintainable.]—Where an agreement to grant a lease did not contain any words which amounted to a present demise, and the person entering under the agreement was ejected, and brought an action for a breach of implied covenant for quiet enjoyment, *Held* that, there being no words of present demise from which the implied covenant could arise, no action would lie. *Pinn v. Barbour*, 1 V.R. (L.,) 136; 1 A.J.R., 127.

Breach of—Sublease—Damages—Duty of Judge in Directing Jury upon.]—C. was tenant of certain premises and sublet them to L. covenanting for quiet enjoyment and to indemnify him

against claims of superior landlord. The breaches laid were distress by superior landlord, L. not at the time owing rent to C. at the first distress. The jury at the County Court returned a verdict for £30 being directed by the Judge that it was a question of damages only. *Held* that the matter should not have been left to the jury to assess damages indiscriminately; that the Judge should have directed the jury (1) that there was a breach by the first distress; (2) that the second distress (when plaintiff owed C. a few shillings which he paid) and its duration were an independent ground of damages; (3) that the loss to the plaintiff's credit and reputation (plaintiff being a school master) was a subject for damages. Case remitted. *Liddle v. Cunningham*, 5 A.J.R., 120.

(3) *Restrictive.*

Not to Fell Growing or Living Timber or Timber-like Trees.]—A lease, under the "*Transfer of Land Statute*," contained a covenant by the lessee not to fell growing or living timber, or timber-like trees, and a condition for re-entry upon breach. Upon a motion by lessor for an injunction to restrain the lessee from felling, &c., any growing or living red-gum trees or other timber or timber-like trees, an *interim* injunction granted but confined to the cutting down or destroying any growing or living red-gum trees. *Munday v. Prowse*, 4 V.L.R. (E.,) 101.

(4) *Against Assignment and Subletting.*

Against Assigning and Subletting without Consent.]—Restrictions against assigning or subletting without consent are generally inconsistent with ownership, and should not be inferred; and their introduction should not be implied as to the execution of contracts to grant leases. *Coleman v. Dean*, 1 V.R. (E.,) 142; A.J.R., 147.

Breach—What Amounts to.]—W. in possession of land, under a lease from church-trustees, entered into partnership, and by the deed of partnership the land was obliged to be partnership property. The partnership was dissolved during the currency of the lease, and the assets devolved on another partner, who continued the business with a third person on the land, and subsequently such third person bought all the assets, and afterwards sold to the defendant the land for the remainder of the lease. W. paid no more rent himself after executing the deed of partnership, and when he retired from the partnership he wrote to the incoming partner that he had no more interest in the partnership property, and the trustees accepted rent from the firm and from defendant and his vendee. *Held* that the partnership agreement was not an assignment of W.'s interest, but merely an agreement between the parties, and that the letter written by W. to the incoming party did not amount to an estoppel. *Wood v. Hutchings*, 2 A.J.R., 58.

Agreement to Sublease without Authority—Action for Breach of Agreement.]—H., a lessee under a lease which forbade assignment or subletting without landlord's authority, agreed to sublease to J. and tendered a sublease to which J. objected, not on the ground of want of authority but because of onerous covenants. H. sued J. for breach of agreement, without procuring authority to sublease. *Held* that to maintain the action H. should have before bringing it have been in a position to execute a valid sublease, and should have tendered the sublease accompanied by the requisite assent of his landlord. *Haimes v. Johnston*, 5 V.L.R. (L.,) 398; 1 A.L.T., 99.

Allowing Sub-tenant to hold over without Consent.]—A covenant in a lease forbade the assignment of the lease and also subletting for a period more than three years (less one day) without the landlord's consent. A tenant with the landlord's consent sublet for the period allowed and allowed the sub-tenant to hold over without obtaining a further consent. *Held* that there was a breach of the covenant. *Hume v. Dodgshun*, 9 V.L.R. (L.,) 83.

Waiver of Breach.]—If the lessor execute a lease, commencing from a date prior to its actual execution, such execution acts as a waiver by the lessor of all breaches of a covenant to sublet of which the lessor has knowledge when he executes such lease, although he so executes it in pursuance of a previous written agreement for such lease specially mentioning the covenant broken. *Carson v. Wood*, 10 V.L.R. (L.,) 223; 6 A.L.T., 92.

To constitute a waiver by a lessor of breaches of a covenant against subletting it is unnecessary that the lessor should have, at the time of the alleged waiver, knowledge of the details or terms of the subleases. It is enough if he be aware of the fact that there are such subleases. *Ibid.*

(5) *In Other Cases.*

To Erect Boundary Fence.]—A. leased land to M. for ten years, the lease containing a covenant by lessor to erect a boundary fence within first five years, or in default that lessee might erect, and deduct costs from half-yearly rent, next accruing. Just before the expiration of the five years, A. verbally agreed with M. that M. should erect fence, and deduct the expenses in the same way as he might have done had he erected the fence after the five years. A. became insolvent, and his trustees in insolvency sued M. for rent so deducted. The County Court Judge held that trustees were bound by verbal agreement, and nonsuited them. *Held*, on appeal, that lessee was not released from covenants by the verbal arrangement. Nonsuit set aside, and new trial ordered. *Wright v. Motherwell*, 2 W. & W. (L.,) 111.

Semble, that had there been evidence that A., after he was aware of the mode in which the fence had been erected, accepted it in satisfaction of the rent, the trustees would have been bound by such acceptance. *Ibid.*

Covenant by Tenant to Pay Land Tax is Void.]—*Trenery v. Stewart*, 5 V.L.R. (L.,) 247; 1 A.L.T. 37; *post* under REVENUE—LAND TAX.

Covenant to Insure—Act No. 192, Sec. 15—Name of Insurer—Relief against Breach—Act No. 213, Sec. 218.]—*Gutheil v. Delaney*, *ante column* 722.

X. RENT.

Liability of Landlord in Possession to Account for.]—A lessor in possession of the demised premises under a forfeiture for non-payment of rent is liable to account for the rents and profits with wilful default. *M'Ewan v. Clarke*, 1 W.W. & A'B. (E.,) 85.

Suspension of—Eviction.]—*Per Molesworth, J.* Eviction by a landlord, in order to operate as a suspension of the rent, must amount to the expulsion or amotion of the tenant. A trespass by the lessor will be no suspension of the rent, and eviction must be an amotion of a permanent character, done by the landlord in order to deprive, and which has the effect of depriving the tenant of the use of the thing demised, or of part of it. *Jell v. Bradshaw*, 6 A.L.T., 110.

Distraining for.]—*See* Cases under DISTRESS.

XI. ASSIGNMENT OF LEASES AND LIABILITIES OF ASSIGNEES.

Assignment for Benefit of Creditor's Rent.]—B., the holder of an unexpired term of land under lease from D., assigned his estate for the benefit of his creditors by an instrument under 5 Vict. No. 9, and in the schedule to the deed entered the residue of the term as part of his property, and the rent due was entered as due to D.'s firm, R. D. & Co. Neither D. nor R. D. & Co. executed the deed of assignment, nor did they in any way assent to the assignment. *Held*, upon appeal from the County Court, that B. was still liable for the rent, there being in fact no assent to the assignment by D. *Jackson v. Bignell*, 1 W. & W. (L.,) 84.

XII. ACTIONS BETWEEN UNDER "LANDLORD AND TENANT STATUTE."

Secs. 91, 100—Special Damage.]—Mau sued Mack in trespass and in a count, alleging that plaintiff was a tenant of the defendant, and was served by defendant with notice of a warrant of possession, and that the complaint was heard before two justices, but that the warrant of possession was signed by another justice, and that the plaintiff was compelled to enter into a bond under Sec. 97 in order to stay execution. *Held* that the above-mentioned facts did not allege any special damage sufficient to maintain an action under Sec. 100. Judgment for defendant. *Mau v. Mack*, 1 V.L.R. (L.,) 76.

"Landlord and Tenant Statute" (No. 192,) Secs. 90, 91, 96—Constructive Trespass under Sec. 96.]—The landlord alone, and not the agent, can be guilty of the constructive trespass created by Sec. 96. Where H. sued S. in trespass, alleging in the declaration that S. caused a notice under Sec. 90 to be served on H., and obtained a warrant from the justices directed to a constable, it not appearing in the declaration in what character the notice under Sec. 90, or the warrant under Sec. 91, were respectively given or obtained, *Held*, on demurrer, that the declaration was bad. Judgment for defendant. *Hunter v. Smith*, 4 W.W. & A'B. (L.,) 32.

Irregular Sale under Distress—Remedy under Act No. 192, Sec. 84.]—*Stewart v. Fishley, ante columns* 383, 384.

Fraudulently Removing Chattels to Prevent Distress — Summons — Service — "Landlord and Tenant Statute 1864," Sec. 66.]—A summons under Sec. 66 of the "*Landlord and Tenant Statute* 1864," for fraudulently removing chattels to prevent distraint, is not properly served by leaving it at a house to which the chattels have been fraudulently removed if such house is not the place of abode of the tenant at the time of service, though he and his family have been seen there whilst the chattels remained there. *Regina v. Ellis, ex parte O'Brien*, 4 V.L.R. (L.,) 149.

LANDS COMPENSATION AND LANDS CLAUSES CONSOLIDATION STATUTES.

Statutes.]—
"*Lands Clauses Consolidation Act* 1845."
"*Lands Compensation Statute* 1869" (*No.* 344.)
"*Lands Compensation Statute Amendment Act*" (*No.* 392.)

(1) *Construction.*

"Lands Clauses Consolidation Act 1845"—What Land Applicable to—Owner—Clause 69—Payment into Court.]—Land, the subject of an Equity suit, having been taken by a railway company under the "*Lands Clauses Consolidation Act* 1845," and the sum of £914 having been awarded by arbitrators for the purchase of the land and compensation for severance, the plaintiffs gave notice of a motion that this money be paid into Court to the credit of "the suit," and after service of the notice, but before the action could be heard, the company, without the privity of the Master, paid the money into the Savings Bank in the Master's name.

Held that the clauses of the "*Lands Clauses Act*" are not applicable to lands the subject of a suit in Equity; that neither "the Court" nor "the suit" nor "the parties to the suit" can be deemed "the owner;" and that clause 69 contemplates some assignable person or persons who happen to be under disability, and even then the money can only be paid into Court with the privity of the Master.

Ordered that the money be transferred from the bank into Court at the cost of the company, and that the company pay the costs of the application, and of the arbitration; and also some of the costs of prior litigation. *Williamson v. Courtney*, 1 W. & W. (E.,) 161.

"Adjoining Land"—"Lands Compensation Statute 1869" (No. 344,) Sec. 35.]—*Per Stawell*, C.J. and *Williams, J.*, (*dissentiente Higinbotham, J.*):—Land separated from other land of the

same owner by a public road, the property of the Crown, is not "adjoining land" within "*Lands Compensation Statute* 1869," Sec. 35. *Harding v. Board of Land and Works*, 8 V.L.R. (L.,) 402; 4 A.L.T., 97.

(2) *Compensation — When Awarded and how Determined.*

"Lands Compensation Statute 1869," Sec. 35—Severance—What is—Compensation.]—A railway was constructed through land situate on the north side of and abutting upon a public highway. This land was held in fee simple, and it was conceded that it was severed. On the north side of and abutting upon the same highway, and exactly opposite to the land on the north side, was a parcel of land held by the plaintiff for a term of years. The homestead from which both parcels of land were worked was on the north side of the line. *Held* that the leasehold land was severed, that its being leasehold did not affect the question except as to the amount of compensation to be awarded; and that the existence of the highway made no difference since the land comprised in a highway belonged to the owners of land abutting upon it, *usque ad medium filum*. *Smith v. Board of Land and Works*, 4 A.J.R., 139.

But as to the doctrine *ad medium filum viæ*, *See Garibaldi Company v. Craven's New Chum Company*, *ante column* 487.

"Lands Compensation Statute 1869," Sec. 35—Compensation—How Determined.]—In estimating the value of land taken under powers conferred by an Act a reasonable percentage may be added to the actual market value of the land, on the ground of the sale being compulsory on the part of the owner. *Leslie v. Board of Land and Works*, 2 V.L.R. (L.,) 21.

Compensation—How Determined—"Lands Compensation Statute 1869," Sec. 35.]—In assessing compensation to be awarded for the taking of land for railway purposes, under Sec. 35 of the "*Lands Compensation Statute* 1869," though the damage must arise from the construction and not the user of the line. yet, when part of land has been taken, probable injury to adjoining parts, lessening their value, although to arise subsequent to the formation of the line, may form a subject for compensation, and evidence of such risk must, if tendered, be received. The measure of such damages is not, however, the cost of ploughing a strip of land to prevent fire, since that would include risk arising from a negligent use of the railway, which is not to be presumed, or in this mode insured against, since it would be a ground of action whenever it occurred. *Harding v. Board of Land and Works*, 6 V.L.R. (L.,) 389; 2 A.L.T., 80.

Act No. 344, Sec. 35—Cost of Fencing.]—In an action for land taken by the defendants, the jury divided their damages under different heads, and gave one sum for damage occasioned by severance, and another for cost of fencing a tramway line. *Held* that, although the company might be compelled by the Board of Land and Works to fence the land, even if the company paid plaintiff a fair amount for the cost of fencing, yet the damages were correctly assessed. *Anderson v. Western Port Coal Coy.*, 3 V.L.R. (L.,) 276.

Compensation — How Ascertained — Enhancement of Value.]—In assessing the compensation to be awarded in respect of land affected by the taking of part of it for a railway, the jury must estimate the enhancement of value, as well as the injury to such land. *Harding v. Board of Land and Works*, 8 V.L.R. (L.,) 402; 4 A.L.T., 97.

Compensation—Injury from Subsequent Use of Railway.]—Injury from the subsequent use of a railway is not a ground for compensation in respect of land, part of which has been taken for a railway. *Ibid.*

Compensation—Direction to Jury—"Adjoining."]—It is incumbent upon the Judge, on an issue for assessing the compensation to be awarded for lands taken for a railway, to assist the jury as to the assessment of the enhancement in value of "*adjoining* land belonging to the person to whom compensation is to made," by giving them a definition of "adjoining land" sufficient to enable them rightly to determine the matter before them, though there is no special legal meaning of the word "adjoining." *Ibid.*

Act No. 344, Sec. 35—Enhancement in Value of Adjoining Land—"Compensation."]—In estimating the value of lands compulsorily taken for the purposes of a railway, Sec. 35 provides that all advantages accruing to the owner, either by increase in the value of his adjacent or neighbouring land from the user as well as the construction of the line, shall be taken into consideration, and set off against the "compensation" recovered by the owner. Such "compensation" includes both the value of the land and the amount to be allowed as damages for the compulsory taking and severance. *Harding v. Board of Land and Works*, 9 V.L.R. (L.,) 448, 450; 5 A.L.T., 135, 136.

(3) *Proceedings to Enforce Compensation.*

(*a*) *Practice Generally.*

Notice Claiming—What it Must State.]—A notice under the "*Lands Clauses Consolidation Act*," claiming compensation for injury to land, should state the nature of the claimant's interest in the land, as well as the amount of compensation; and the description, "his land and premises," is insufficient. *Lee v. Melbourne and Suburban Railway Coy.*, 1 W. & W. (L.,) 34.

Plaintiff's Right—Defendant may Question after Verdict and Judgment.]—The defendant is not precluded by the verdict and judgment, on an inquisition, from questioning, in an action by plaintiff to enforce such judgment, the plaintiff's right to any damages awarded by the judgment, though he may not question the validity of the judgment. *Ibid.*

General Damages — No Distribution can be Made.]—Where a jury, upon an inquisition, returned a general verdict awarding one sum as compensation for several distinct injuries, occasioned by the formation of a railway, and to an action to enforce payment of the sum awarded the defendant pleaded that the plaintiff had no interest in the subject of one of the injuries, and the plaintiff failed to prove his

title, *Held* that the plaintiff's failure to establish his claim to the subject matter of any one of the injuries necessarily deprived him of his right to recover the general damages, as those damages might have been awarded as compensation for the identical injury to the subject matter of which the plaintiff had failed to prove his title, and no distribution could then be made. *Ibid.*

Defendant Succeeding on One Issue Succeeding Substantially on All.]—To a declaration for the amount awarded, on an inquisition, for injury to plaintiff's land, by stopping his way and watercourse by the formation of a railway, the defendant pleaded a denial of plaintiff's seisin, and his right to a way or watercourse. A verdict for plaintiff was given on all issues, and an amount awarded as compensation for the several injuries. Defendant, on leave reserved, moved to enter verdict for himself, on the ground that no right of watercourse was proved. *Held* that, no watercourse being proved, a verdict must be entered for the defendant on that issue; and, since the Court could not apportion the damages, the defendant must substantially succeed. *Ibid.*

Decree for Sale of Lands—Motion by Railway Company for Liberty to Lay Proposals for Purchase before the Master—Contempt—"Lands Clauses Consolidation Act 1845," Sec. 85.]—Under a decree in a suit for sale of lands with the approbation of the Master, a motion by a railway company, on notice to all parties in the suit, that the company might be at liberty to lay proposals for purchase before the Master, and that in case the parties should not agree as to the compensation the Master should elect for the parties to the suit whether such compensation should be determined by arbitration or by a jury, and that the company might be at liberty to pay into court the amount of such compensation when ascertained, dismissed with costs as unsustained by authority or principle. A receiver of the Court having been appointed of land, the subject-matter of a suit, a railway company having obtained liberty from the Court, notwithstanding the appointment of the receiver, "to proceed in pursuance of the '*Lands Clauses Consolidation Act* 1845,' incorporated in the company's Act, to take and occupy the land required," and such company having proceeded to enter on the land *not* "in pursuance" of the requirements of the "*Lands Clauses Consolidation Act*," *Held* that a proceeding of this kind is a contempt of Court, and the Court is entitled to enjoin the company from continuing the contempt. A bond given under the "*Lands Clauses Consolidation Act* 1845," Sec. 85, by a company to an owner of land entered upon by the company, is insufficient if it do not define the land. Such a bond is also insufficient if made jointly to parties having different rights. *Williamson v. Courtney*, 1 W. & W. (E.,) 21.

Payment Out of Court—Change of Solicitors—Solicitor's Lien.]—Under an arbitration under the "*Lands Clauses Consolidation Statute*" certain money was awarded as the value of the land in question, and as compensation for the severance. The railway company then paid the money so awarded into the Savings Bank in the name of the Master-in-Equity, with interest up to date of payment. The company and the owner then joined in a petition for the payment out of this sum and the original deposit by the company. In this petition the company employed different solicitors from those engaged in the valuation and arbitration, and the old solicitors claimed a lien for their costs upon the original deposit. *Held* that the first proceeding before the Court was the present petition, and the present solicitors were the solicitors before the Court, that there was therefore no need of an order for change of solicitors; that the old solicitors had no lien. Order as prayed. *Ex parte Wilmot*, 1 W. & W. (E.,) 310.

"Lands Clauses Consolidation Act," Secs. 76, 77, and 78—Disappearance of Owner—Petition for Payment out of Money.]—R., seised of land at Prahran, on 13th July, 1854, borrowed £50 of M., and to secure repayment with interest, deposited his title-deeds with M., and gave him a memorandum acknowledging the debt. He then went to the goldfields, and was never again heard of. The M. and S. Railway Company took the land under their Act, and on the 9th February, 1860, paid the value of the land (£55) into the Savings Bank to the credit of R., or other person or persons interested in the land. M. presented a petition, praying that the £55, with all interest accrued, might be paid to him; and moved accordingly, under the 76th, 77th, and 78th clauses of the "*Lands Clauses Consolidation Act*," incorporated in the Company's Act, on affidavits of the loan and its terms, and of such inquiries after R., without success, as raised the inference that he was dead or out of the jurisdiction. *Held* that the Court had no jurisdiction to make the order prayed; and motion refused, with costs. *Ex parte Edward Murdoch*, 1 W. & W. (E.,) 269.

"Lands Compensation Statute 1889," Sec. 6—Taking Lands of Infant—Appointment of Special Guardian.]—*See Hunter v. Hunter*, and *Smith v. Smith*, *ante* column 560.

"Lands Compensation Statute 1869," Sec. 30—Costs of Arbitration how to be Borne—Agreement.]—*See Fenton v. Board of Land and Works*, *ante* column 55.

Taking Land—Compensation—Act No. 344, Sec. 31—Practice.]—A.'s land was taken by a company under their Act, and the plaintiff, being dissatisfied with the compensation, took steps to have an issue tried as to its efficiency. Before the issue came to trial, A. withdrew the record. The Court granted, as under Sec. 31 of the Act, a rule absolute in the first instance for the trial, as in the nature of a trial by proviso. *Anderson v. Western Port Coal Company*, 3 V.L.R. (L.,) 232.

Inquiry under "Lands Compensation Statute 1869"—Power of Court to Direct New Trial.]—The Court has power to direct a new trial on an inquiry to determine the amount of compensation under the "*Lands Compensation Statute* 1869." *Austin v. Shire of Dunmunkle*, 8 V.L.R. (L.,) 224.

(*b*) *Evidence.*

Land taken for Purposes of Railway—Inquiry as to Value—Evidence of Offer by a Third Person.]—Upon an issue under Act No. 344, sec. 31, to determine value of the land, the jury found that the claimant was entitled to a sum less than the amount of the award. One of the witnesses gave evidence that he had offered a certain price for the land to the claimant shortly before and this evidence was rejected. On rule *nisi* for a new trial, *Held* that the evidence had been properly rejected being *res inter alios acta*. *Kilpatrick v. Board of Land and Works*, 5 V.L.R. (L.,) 122.

Inquiry to Determine Compensation—Evidence Admissible—"Lands Compensation Statute 1869," Sec. 36.]—On an inquiry to determine the amount of compensation to be awarded for the taking by a shire council of the bed of a creek and the adjoining strip of land on each side of it through the whole of a squatter's land, an objection to the admission of evidence that the defendant shire's works would reduce the amount of water in the creek was held good, notwithstanding that the shire afterwards gave, without objection, evidence of an offer in the notice to treat of a right of access and use of the water, for the purpose of lessening the compensation to be paid. *Austin v. Shire of Dunmunkle*, 8 V.L.R. (L.,) 224.

LAND TAX.

See REVENUE.

LEASE.

See LANDLORD AND TENANT.

Lease of Crown Lands for Pastoral and Mining Purposes.]—*See* LAND ACTS—MINING.

Leases under "Transfer of Land Statute."]—*See* TRANSFER OF LAND (STATUTORY)—Leases.

LEASES AND SALES OF SETTLED ESTATES.

See INFANT—SETTLEMENTS.

LEGACY.

Abatement.]—A testator whose lands were not liable to dower gave his residuary personalty to trustees on trust to pay his wife M. £700 after his decease on her executing a deed of renunciation of dower in all his freehold estates whatsoever; to each of his daughters M. and E. on their attaining twenty-one years respectively, or being married; and towards the building of a Roman Catholic Church on four acres previously devised for that purpose, £100. It was *Held* that as the widow, not being entitled to any dower capable of being released, was not a purchaser as to her legacy, all four legacies were on an equality, and must be abated equally. *Coady v. Buckley*, 1 W. & W. (E.,) 241.

Condition — Inoperative.]—A testator whose lands were not liable to dower gave his residuary personalty to trustees on trust, among other things, to pay his wife M., twelve months after his decease, £700 on her executing a deed of renunciation of dower in all his freehold estates wheresoever. *Held*, as to the condition of renunciation of dower on the widow's legacy, that, as she had nothing to renounce, and the condition was rendered inoperative, she should have her legacy without executing a barren release. *Ibid.*

Executors Paying a Legacy to a Married Woman who has Obtained a Protection Order.]—Executors may effectually discharge themselves by paying a legacy to a married woman who has obtained a protection order, and taking her receipt therefor without her husband's consent, provided the woman has not returned to cohabitation, and his desertion is continuing, and the order has not been varied or discharged. *In re Dickason's Trusts*, 8 V.L.R. (E.,) 238; 4 A.L.T., 22.

Payment into Court—Legacy.]—A bill was filed within a year of the testator's death by an infant legatee, against the executors, for the payment into Court of a legacy bequeathed to him, payable three months after the testator's death. No application was made for payment of the legacy at the end of the twelve months. *Held*, premature. The executors, however, not having taken any steps after a year from the testator's death to secure the legacy, and by their answer admitting assets, a decree was made for payment into Court of the legacy and interest thereon, and for payment by the executors of plaintiff's costs. *Baylee v. Morley*, 4 V.L.R. (E.,) 33.

In a suit to carry out the trusts of a will a decree had been made ordering the executors to pay the several legacies therein mentioned with interest thereon at the rate of 8 per cent. per annum, computed from the expiration of one year from the date of the testator's death. Among the legacies was one to M.M. when she attained the age of twenty-one years. One executor was then ordered to convey the balance of the property to the other who was to be colonial trustee, who was ordered after payment of all debts and after making provision for certain purposes mentioned in the will to maintain the plaintiffs for six months pending their departure for Ireland, and to pay for their passage. The trustee was then to transmit the residue of the estate to the trustees in Ireland. The decree had been carried out by the colonial trustee transmitting £12,000 to Ireland, and retaining £800 himself. On application to vary the decree by obtaining an order that the colonial trustee should transmit the residue in his hands to Ireland, and that the Irish trustee should pay the legacy to M.M., the application was granted

as to the transmission of the estate. *Kearny v. Lowry*, 1 A.J.R., 95, 96.

Annuity payable quarterly means a series of legacies payable at quarterly intervals during life of annuitant, and duty is to be deducted from such quarterly payment. *In the Will of Moffat, ante column* 390.

Abatement.]—Where in a will the testator directed as follows: "I will my executor to pay to M.G.N. as soon as possible after my decease the sum of £2500 to my brother J.H. after retaining themselves the sum of £50 each whatever balance of cash may remain undisposed of," and the estate was insufficient, *Held* that the legatees ranked co-equally, and must abate in proportion. *Noone v. Lyons*, 1 W. & W. (E.,) 235.

Vesting of Legacies.]—*See Osborne v. Osborne*, 9 V.L.R. (E.,) 1; 4 A.L.T., 113, under WILL—What interest passes—Vested or contingent.

Legacy to Executors.]—*See Griffith v. Chomley*, 5 W.W. & A'B. (E.,) 186, under WILL—What interest passes—Generally.

Payment of, Out of What Fund.]—*See* under WILL.

Charitable.]—*See* CHARITY.

LEGITIMACY.

Declaration of.]—*Dryden v. Dryden, ante column* 503.

LIBEL.

See DEFAMATION.

LICENSE.

Revocation—When Permitted.]—Where one person erects works on his own land with the consent of another, who had the power to interfere, the latter cannot withdraw that consent; but, *secus*, where one person erects works on the land of another with his knowledge and consent. Where, therefore, A. sued B. for injuries arising from a flow of foul water across his premises, and B. pleaded on equitable grounds that the flow was caused in consequence of a permission impliedly granted by A. to B.'s predecessor, and afterwards to B. to carry drainage across A.'s premises; that A. was aware of and saw the drain constructed by B.'s predecessor, and afterwards repaired and improved by B., had thereby impliedly acquiesced in the construction, and thus given a consent which could not be withdrawn without breach of faith, unless B. was placed in the same position as he occupied before he expended his money; and A. implied that he revoked and countermanded the acquiescence and consent, and forbade the trespass; *Held*, on demurrer, that where money is expended or work done on the land of another, the person so expending the money, or performing the work, must be satisfied that he possesses authority for his acts; that if the authority prove insufficient there is nothing to prevent the owner of the land taking advantage of it; that B. had insufficient authority; and judgment for plaintiff. *Aitken v. Bates*, 1 V.R. (L.,) 211; 1 A.J.R., 163.

Publican's License.] — *See under* LICENSING ACTS.

Under Land Acts.]—*See* LAND ACTS.

Slaughtering License—Compelling Council to Issue.]—*See Regina v. Caulfield Road Board*, 1 A.J.R., 170. *Post under* MANDAMUS.

LICENSING ACTS.

Statutes.]—
"*Wine, Beer, and Spirits Sale Statute* 1864" (*No.* 227.)
"*Wines, Beer, and Spirit Sale Statute* 1864 *Amendment Act*" (*No.* 390.)
"*The Licensing Act* 1876" (*No.* 566.)

(1) *Licenses.*

(*a*) *Generally.*

Act No. 566, Sec. 38—House Belonging to Several Owners.]—A license was granted to a house, either erected on land belonging to two separate owners, or formed by connecting two adjoining tenements. One of the owners moved for a rule *nisi* to set aside an order discharging a writ of *certiorari* to quash the license so granted. *Held* that the word "owner" in the Act No. 566 included the plural, and that the justices had power to grant a certificate for a license in respect of premises belonging to several owners. *Ex parte Slack, in re Panton*, 7 V.L.R. (L.,) 28; 2 A.L.T., 119.

Disability of Married Woman to hold Separate Property—"Licensing Act 1876," Sec. 50.]—*Held, per Williams* and *Holroyd*, JJ.; *dissentiente Higinbotham*, J., that Sec. 50 of the "*Licensing Act* 1876" prohibits a married woman living with her husband from holding a publican's license under that Act, whether she have property to her separate use or not. *Regina v. Nicholson, ex parte Minogue*, 10 V.L.R. (L.,) 255; 6 A.L.T., 102.

Semble, that the holding or obtaining of a publican's license is not one of the purposes mentioned in Sec. 18 of the "*Married Woman's Property Act*" for which a married woman is to be considered a *feme sole*, nor is the application for such a license *ejusdem generis* with the civil proceedings contemplated by the section, so that a married woman with separate estate is not under the section to be viewed as a *feme sole* on her application for such a license. *Ibid.*

Operation and Intent of License—Land Appurtenant to Licensed Premises.]—A license for the sale of liquor at a public-house, covers the land appurtenant to such public-house. *Cairns v. Peterson*, 2 V.L.R. (L.,) 143.

(*b*) *Transfer of Licenses.*

Act No. 390, Secs. 13, 20—Transfer of License—No Adjudication by Justices.]—Where no transfer of a license has been effected by an adjudication of the justices, *i.e.*, where the justices refused the application for a transfer, the rights of the licensee remain in him. *Regina v. Mollison, ex parte Fitzgerald*, 1 V.L.R. (L.,) 78.

"Licensing Act (No. 566), Sec. 48.]—A covenant in a lease by which the lessee is bound to buy all his beer and spirits from the landlord, is no reason under the Act for refusing a transfer to such lessee. *Regina v. Templeton, ex parte Jones*, 3 V.L.R., (L.,) 24.

The Court will not go into a magistrate's reasons for refusing a transfer of a license. *Regina v. Akehurst, ex parte Knowles*, 3 V.L.R. (L.,) 111.

Act No. 566, Secs. 18, 48.]—*Semble, per Fellows, J.*—A surrender by a licensed publican of his lease to his landlord is not an eviction within Sec. 48 of Act No. 566. Sec. 18 refers to a new license to a new house, and not a renewed license to an old house previously licensed. *Ibid.*

"Licensing Act 1876," Sec. 48—Splitting License.]—D. held a publican's license in respect of premises, part of which she held as tenant of S., and part as tenant of T. D. was evicted from the part of the premises owned by S., who applied, under Sec. 48 of the "*Licensing Act* 1876," for a transfer of the license to him. S.'s part of the premises did not contain all requirements for carrying on the business of a publican. *Held* that S. was not entitled to a transfer of the license to himself, by *Stawell, C.J.*, and *Higinbotham, J.*, on the ground that the section contemplated an eviction from the whole of the licensed premises, or at least from so much of such premises as afforded the accommodation required for a licensed house; by *Williams, J.*, on the ground that the section did not contemplate the case of a transfer of part of a license—that a license cannot be split for the purpose of transfer. *In re the "Licensing Act* 1876," *ex parte Downton*, 8 V.L.R. (L.,) 198; 4 A.L.T., 35.

Application to Transfer—"Licensing Act 1876," Sec. 48—Evidence.]—As to discretion of magistrate in hearing evidence on applications to transfer. *See ex parte Spangenberg*, 8 V.L.R. (L.,) 123; 4 A.L.T., 3. *Post* under Jurisdiction and Duty of Licensing Magistrates.

Jurisdiction of Magistrates in Regard to Districts in which the Premises, the Licenses of which are to be Transferred, are Situated.]—*Regina v. Alley, ex parte Ingram*, 7 V.L.R. (L.,) 238; 3 A.L.T., 10. *Post* under Jurisdiction and Duty of Licensing Magistrates.

Grant of Transfer is a Judicial Act, and Cannot be Revoked without a Proper Hearing—Transferee Entitled to a Rule to Compel Transfer notwithstanding Request on his part for Revocation—Rule Cannot be made Absolute against Magistrate if he has been Removed.]—*Ex parte Slack, in re Panton*, 8 V.L.R. (L.,) 144; 4 A.L.T., 6. *Post* under Jurisdiction and Duty of Licensing Magistrates.

(*c*) *Forfeiture.*

Dilapidation.]—Where justices have forfeited licenses, on the ground that the premises have been suffered to become dilapidated, the Court will not interfere merely as to the degree of evidence on which the justices acted. *Regina v. Call, ex parte Hood*, 1 A.J.R., 154.

Permitting a Room to be Used as a Concert Saloon—Admission Free—No. 390, Sec. 28.]—Forfeiture of a license is incurred, under Sec. 28 of the "*Wines, Beer, and Spirit Sale Statute* 1864 *Amendment Act*" (No. 390), if a room in the public-house is allowed to be used as a concert room, even though admission thereto be free. The words of the section "to which persons shall be admitted by ticket or otherwise" refer only to a place of common resort, and not to "a dancing, concert, or theatrical saloon." *Smith v. M'Cormick*, 2 V.R. (L.,) 93; 2 A.J.R., 62.

"Wine, Beer, and Spirits Sales Statute 1864 Amendment Act" (No. 390), Sec. 28.]—A license was taken out under the old Act (No. 227.) Sec. 28 of Act No. 390 provided for a forfeiture in case of the licensee using the house as a concert room, and under this section the license was forfeited. *Held* that Act No. 390 has not a retrospective effect. Rule absolute to quash the order of forfeiture. *Regina v. Sturt, ex parte Wright*, 3 V.R.(L.,) 1; 3 A.J.R., 22.

Act No. 390, Secs. 9, 10.]—Where an order had been made forfeiting a license by justices, who were not appointed "Licensing Magistrates" under the Act, the Court made absolute a rule to quash the order. *Regina v. Webster, ex parte Armstrong*, 1 V.L.R. (L.,) 187.

(*d*) *New Licenses.*

What is—Act No. 566, Sec. 111.]—A renewal of a license to a person previously licensed, and in respect of property previously licensed, is not a "new license" within Sec. 111, nor is an annual license issued to a transferee of a license in respect of the same premises; but where a licensed person procures a transfer of his license from one house to another, an annual license afterwards issued to him in respect of the latter

house is a new license. *The Queen v. Mayor of Melbourne*, 5 V.L.R. (L.,) 446.

Fees — "Licensing Act 1876," Sec. 111.]—A license granted in respect of a house which had been licensed for some years, but was unlicensed during the immediately preceding year, is a new license within the meaning of Sec. 111 of the "*Licensing Act* 1876," and the fee in respect of it goes into the consolidated revenue. *Shire of Eltham v. The Queen*, 6 V.L.R. (L.,) 451; 2 A.L.T., 88.

"Licensing Act 1876," Sec. 18.]—Sec. 18 refers to a new license to a new house, and not to a renewed license to an old house previously licensed. *Regina v. Akehurst, ex parte Knowles*, 3 V.L.R. (L.,) 111.

Act No. 566, Sec. 18.]—G. applied for a license of a publichouse which had been licensed prior to the Act No. 566, but the license had in 1878 been transferred to another publichouse. *Held, per Higinbotham, J. (in Chambers)*, that this was a new license within Sec. 18, and as it did not contain thirty rooms the justices were right in refusing a license. *Ex parte Gotz*, 2 A.L.T., 104.

Act No. 566, Secs. 3, 18.]—An hotel was licensed in 1871, the license lapsed, and it was not renewed till 1880. In 1880 the justices granted a certificate of license in respect of it, the grant being opposed on the grounds that under Sec. 18 of the Act no "new publican's license" could be granted until the ratepayers had determined to increase the number of licensed houses within the district; the justices overruled the objection on the ground that there was a licensed house, the "R. Hotel," within the district which was used as a private residence, and that the effect of granting a license to the said hotel would not increase the number of licensed houses. It was afterwards discovered that the "R. Hotel" was not in the district. *Held* that under Secs. 3 and 18 of the Act this was a new publican's license, and the justices had no power to grant the certificate even if the "R. Hotel" had been within the district. *Regina v. Hamilton, ex parte Attorney-General*, 7 V.L.R. (L.,) 194; 3 A.L.T., 11.

Act No. 566, Sec. 18—Lapse.]—A license for a hotel was in force prior to and after the passing of Act No. 566, and so continued until 1881, when it was allowed to lapse. In 1882 a poll of ratepayers decided there should be no increase of licenses in the district. *Held*, overruling the justices, that, notwithstanding the lapse, the application for a license in 1882 was not for a "new license" within Sec. 18, and should have been allowed. *Osbaldiston v. Licensing Justices of Wangaratta*, 9 V.L.R. (L.,) 9; 4 A.L.T., 145.

(e) *Renewal of Licenses.*

Additional Building Included in Renewed License.]— A publican, by his license, was authorised to sell liquor in his licensed house, and in the appurtenances thereto belonging. He erected a wooden building adjoining the house, and obtained a renewed license. *Held* that, though erected after the first license, the wooden building used as a bar, if *bonâ fide* part of the premises, might be considered as included in the subsequent renewed license. *Lagogiannis v. Cruikshank*, 1 V.R. (L.,) 97; 1 A.J.R., 84.

Act No. 227—License Extending beyond Expiry of Licensee's Lease—Refusal to Grant License to Subsequent Lessee.]—M. leased a hotel to E. for three years, and during the currency of the lease E. assigned, with M.'s consent, to McG. Two months before the lease was up, McG. obtained a license for twelve months. McG. was ejected at the expiration of the lease, and objected to the grant of a license to the new lessee, which the justices upheld, refusing to grant a license on the new lessee's application. The Court granted a rule *nisi* for a *mandamus* to hear the application of the new lessee, which was afterwards made absolute by consent, without costs. *Regina v. Sturt, ex parte Watson*, 5 A.J.R., 24, 36.

Act No. 566, Secs. 38, 47.]—An application was made for the renewal of a license, and the question before the justices was whether the licensed house was really the house of the applicant and in respect of which she sought the renewal. *Held* that such was a question of fact for the justices to decide, and the Court refused to interfere. If a judge of an inferior Court has erroneously found a fact, which was indeed essential to the validity of his order but which he was competent to try, that circumstance does not constitute a defect of jurisdiction. *Regina v. Alley, ex parte Slack*, 9 V.L.R. (L.,) 302; 5 A.L.T. 93.

(2) *Offences against the Tenor of License and Otherwise.*

Selling Liquor without a License.]—W. was fined for selling liquor on 15th February, 1871, without having a license in the manner and form provided by the "*Wines, Beer and Spirits Sale Statute* 1864." W. produced a license under the Statute authorising him to sell liquor to the end of 1871, but this license was informal. The Statute of 1864 was, however, repealed by the "*Licensing Act* 1870," and the Court held the summons bad inasmuch as the summons should have been, not for selling liquor without being licensed under the Act of 1864, but for having no license under the Act of 1870, it being impossible for any one to obtain a license under the Act of 1864 after the 1st of January, 1871. *McCulloch v. Wren*, 2 A.J.R., 32.

Selling Liquor without a License—No Proof of Authority—"Wines, Beer, and Spirits Sale Statute 1864," (Act No. 227,) Sec. 45.]—Under Sec. 45 of the "*Wines, Beer, and Spirits Sale Statute* 1864," a person is liable for "suffering" liquor to be sold without a license, though he was absent from his premises at the time the liquor was sold, and there was no proof that he authorised the sale, other than that a bar was fitted up in his house and furnished with liquors. *Cornish v. Elliott*, 4 A.J.R., 152.

"Wine, Beer, and Spirits Sale Statute" (No. 227), Sec. 45—Without a License—Onus of Proof.]

—It lies upon a person summoned for an offence under Act No. 227 to show that he had a license, or was the agent of a licensed person. H. was convicted in respect of a sale of spirits by his wife (H. holding no license) not in his presence. *Held* he was not liable, and prohibition granted. *Regina v. M'Queen, ex parte Hall*, 1 V.L.R. (L.,) 18.

Default in Payment of Penalties—Imprisonment—Distress—"Licensing Act 1876," Sec. 54.]—On a conviction, under Sec. 54 of the "*Licensing Act* 1876," for selling liquor without a license, by which conviction a fine is imposed, imprisonment must not be adjudged to follow forthwith upon default of payment, but only on default of sufficient distress. *Regina v. Lintott, ex parte Callinan*, 4 V.L.R. (L.,) 76.

Selling Liquor Without a License—"Licensing Act 1876," Sec. 54.]—A conviction, under Sec. 54 of the "*Licensing Act* 1876," for selling liquor without a license, must contain a forfeiture of the liquor, otherwise it is bad. *Ex parte Lennon*, 4 A.L.T., 88.

"Licensing Act" (No. 566), Secs. 54, 88, 93—Selling Liquor Without a License—Husband and Wife—Agency.]—A wife supplied a person with liquor in a private house, neither her husband nor herself having a license. *Held* that in the case of an unlicensed house the wife of the occupier was not his agent, especially not so for the purpose of committing an offence and making him liable for it; that Sec. 93 only was enacted to meet the case of secret payment, and did not affect the question of agency. *Hettenbach v. Isley*, 7 V.L.R. (L.,) 104; 2 A.L.T., 123.

Selling Liquor Without a License—Conviction under Act No. 566, Sec. 54—No Venue—Costs in Blank.]—A conviction for selling liquors without a license under Act No. 560, Sec. 54, in which no *venue* is stated in the margin, the amount of costs are left in blank and no person is named as payee, will not be quashed for those reasons. *Ex parte Tribble*, 5 V.L.R. (L.,) 162; 1 A.L.T., 10.

Where justices had convicted B. of selling liquor without a license, but had not gone on to order a forfeiture of the liquor, &c., as required by Sec. 54 of Act No. 566, and this adjudication was so entered in the book, the Court granted a writ of *certiorari* to bring it up to be quashed, even where afterwards a regular conviction had been drawn up including the order for forfeiture. *Ex parte Black, ibid*, p. 183; 1 A.L.T., 13.

Selling Liquor Without a License—Penalty—"Licensing Act 1876," Sec. 54—Power of Justices.]—*Regina v. M'Cormick, ex parte M'Monigle, ante column* 761.

Selling in Manner not Authorised by License—"Licensing Act 1876," Sec. 54.]—Sec. 54 of the "*Licensing Act* 1876" does not apply to the case of a licensed person selling at a place, or in a quantity or manner, not authorised by his license; but it does apply to a servant of such person so selling. *Ex parte Wylie, ex parte Butler*, 4 A.L.T., 41.

W. & B. were convicted under Sec. 54 of the "*Licensing Act* 1876" for selling liquor not in accordance with the terms of a license. B. was servant of W., and also had the license, and B. had sold the liquor in the manner complained of. *Held* that B. was rightly convicted, but that the conviction against W. should be quashed. *Ibid.*

"Licensing Act 1876," Sec. 61—"Customs and Excise Act 1862," Sec. 143.]—A person holding a license under Sec. 143 of the "*Customs and Excise Act* 1862," and selling liquor contrary to the provisions of his license, may be convicted, under Sec. 61 of the "*Licensing Act* 1876," for selling liquor otherwise than he was entitled to do under his license. *Regina v. Walsh, ex parte Pendreigh*, 6 A.L.T., 11.

Selling Liquor without a License—Forfeiture—"Licensing Act 1876," Sec. 90.]—To justify a forfeiture of liquor under Sec. 90 of the "*Licensing Act* 1876," the order for forfeiture must either follow the precise words of the Act, or state in express terms, or it should appear by necessary intendment that the liquor was on premises for the purpose of being "illegally" sold; it is not enough to state that the defendant, being an unlicensed person, had the liquor in his house for the purpose of sale. *Regina v. Drummond, ex parte Grigg*, 4 V.L.R. (L.,) 146.

"Wines, Beer, and Spirit Sale Statute 1864," Sec. 67—Seizure of Liquor Sold without a License—Adjudication of Forfeiture not a "Conviction" against which an Appeal to General Sessions will Lie under Sec. 14 of Act No. 267.]—*See Regina v. Pohlman* and *Regina v. Sturt, in re White*, 5 A.J.R., 22. *Post* under SESSIONS—Appeal to General Sessions.

Supplying Liquor on a Sunday—"Wines, Beer, and Spirit Sale Statute 1864," Sec. 47—Act No. 390, Sec. 29.]—C. held a license, authorising him to sell wines and spirituous liquors between 6 a.m. and 12 at night, for a certain period. During that period ten travellers were served with liquor by C. at 6.15 p.m. on a Sunday, and C. was fined for serving them. On appeal, *Held* that the "*Wines, Beer, and Spirit Sale Statute* 1864," did not except travellers from its provisions in restraint of Sunday trading, and that C. was rightly fined. *Cohn v. Sherwood*, 1 A.J.R., 132.

Act No. 227, Sec. 47—"Wines, Beer, and Spirit Sale Statute (No. 390,) Sec. 29—"Justices of the Peace Statute" (No. 267,) Sec. 50—Selling Beer on Sunday—Accessory.]—F. was convicted of selling beer on Sunday, and a complaint was laid against C. under Sec. 50 of Act No. 267 for aiding and abetting, and he was convicted, the only evidence against him being that F. had sold to him. *Held* that C. was only a buyer, and that the doctrine of accessories applies only to an indictable offence, in which there is a principal offender. Prohibition granted as to C.'s conviction, *Regina v. Barry, ex parte Connor*, 5 A.J.R., 124.

"Wines, Beer, and Spirit Sale Statute 1864," Sec. 46—Act No. 390, Sec. 24—Evidence of License

—Evidsnce of Conviction of "Thieves."]—A. was, under Sec. 46, summoned and fined for "permitting thieves to be on his premises." On rule *nisi* for prohibition, *Held* that presumptive evidence of the defendant holding a license is sufficient, and it is for him to prove that he has not a license; that persons (constables) who were present at the trial and conviction could depose to the persons so permitted being "thieves," and that such evidence was sufficient, it not being necessary to produce the convictions or the depositions. Rule refused. *Regina v. Call, ex parte Fisher*, N.C., 57.

Inspection of Premises (No. 227,) Sec. 60.]—Under Sec. 60 of the "*Wines, Beer and Spirit Sale Statute* 1864" (No. 227), a constable requiring admittance to inspect a public-house need not produce his authority unless asked for, but must state by whom he was authorised. *Raleigh v. M'Culloch*, 4 A.J.R., 22.

Delaying Admittance to Inspector of Police—Conviction when Bad—"Licensing Act 1876," Secs. 77, 104.]—A conviction, under sec. 77 of the "*Licensing Act* 1876" is bad which orders payment of a fine, distress in default of payment, and imprisonment in default of distress, since Sec. 104 of the Act enacts that orders of justices are to be enforced in the manner provided as to procedure in summary jurisdiction by the "*Justices of the Peace Statute* 1865," and such conviction is inconsistent with the provisions of that Statute, since it contains in one order, what should, under Secs. 117 and 123, be contained in separate warrants. *Regina v. Perry, ex parte Brown*, 10 V.L.R. (L.,) 114; 6 A.L.T. 11.

Note.—In the A.L.T. this case is reported to have been decided on the ground that the justices had no power to award a definite term of imprisonment.

Act No. 566, Sec. 55—Allowing Drunken Persons on Licensed Premises.]— Where a person not a *bonâ fide* lodger was found drunk on licensed premises, and it appeared that the landlord knew that he was drunk, *Held* that the landlord was liable under Sec. 55. *Quære*, whether Sec. 55 applies to *bonâ fide* lodgers. *Doyle v. Sparling*, 3 A.L.T., 63.

Holding Two Licenses—Section of Act Incapable of Meaning—"Wines, Beer, and Spirit Sale Statute 1870," No. 390, Sec. 22.]—W. was convicted under Sec. 22 of the "*Wines, Beer, and Spirit Sale Statute* 1864 *Amendment Act*" (No. 390), which enacts that "no person shall hold more than one license, except a temporary or special temporary license, or grocers' license, or license for railway refreshment-rooms, within the precincts of any city, &c., either by himself, servant, or agent, or have any beneficial interest in any *such license*, under a penalty of £5 per day for every day during which he shall hold *such license*, or have any beneficial interest therein." *Held* that the section was unmeaning, and that, in future cases, the conviction should negative the exceptions contained in the Act. *Wright v. Kabat*, 2 A.J.R., 97.

3. *Jurisdiction and Duty of Licensing Magistrates.*

Application for Temporary Transfer — Magistrates must Hear—Mandamus.]—An application to a stipendiary licensing magistrate under Sec. 20 of the "*Wines, Beer, and Spirit Sale Amendment Act*" (No. 390), for a temporary transfer of a publican's license, must be heard and determined by him; and should he refuse to do so, the remedy is a mandatory order under Sec. 138 of the "*Justices of the Peace Statute* 1865." *Regina v. Templeton, ex parte Taylor*, 2 V.L.R. (L.,) 236.

Proclamation of Licensing District—Act No. 566, Sec. 44.]—A special licensing district was proclaimed and C. obtained a license. The proclamation was revoked, and C. then applied at the annual licensing of the original district out of which the special district had been carved for a renewal of his license. The magistrates refused the license on the ground that they had no jurisdiction under Sec. 44. *Held* that they had jurisdiction, and *mandamus* granted. *Regina v. Carr, ex parte Cave*, 5 V.L.R. (L.,) 72.

Special Licensing District—Discretion of Magistrate—"Licensing Act 1876," Sec. 44.]—When part of a district has been proclaimed as a place where the necessity exists for the immediate grant of licenses, under Sec. 44 of the "*Licensing Act* 1876," a licensing magistrate has no discretion to refuse a license because he considers that no necessity exists for further accommodation in that district. The proclamation excludes such a question being raised. *Regina v. Wyatt, ex parte Shelswell*, 8 V.L.R. (L.,) 137; 4 A.L.T., 5.

Mandamus.]—*Per Higinbotham*, J. (in Chambers). *Mandamus* will issue to magistrates compelling them to sit and hear an application though they have adjourned *sine die*. *Ex parte Gotz*, 2 A.L.T., 104.

Act No. 566, Secs. 35, 36, 38—Meetings of Justices—Adjourned Meeting.]—T. applied for a license to a bench of justices, but the police objected that the house was not in proper repair. He then applied for an adjournment under Sec. 38, which was refused, and the license itself was finally refused. *Mandamus* to justices to hold a meeting and hear the application granted. *Regina v. Taylor, ex parte Tognini*, 7 V.L.R. (L.,) 139; 2 A.L.T., 124; 3 A.L.T., 3.

Jurisdiction of Justices in Inquiring into Fitness of Applicant.]—Justices have jurisdiction to inquire into the fitness of the applicant for a license, and to refuse an application; and if the objection to the fitness is raised in an informal way that does not deprive them of jurisdiction. *Regina v. Alley, ex parte Guess*, 9 V.L.R. (L.,) 19; 4 A.L.T., 150.

Act No. 566, Sec. 48.]—A licensing magistrate cannot sit and act outside the district in which the hotel, in respect of which he is acting, is situated. Where he has jurisdiction over two districts, he must hold his Court in the district

in which he is exercising jurisdiction. *Regina v. Alley, ex parte Ingram*, 7 V.L.R. (L.,) 238; 3 A.L.T., 10.

Application for Transfer—Magistrate not Bound to Hear Evidence.]—On an application for the transfer of a publican's license, the magistrate may exercise the discretion entrusted to him upon the knowledge which he possesses of the circumstances, if that knowledge be sufficient, and that without necessarily having heard evidence upon the application. *Ex parte Spangenberg*, 8 V.L.R. (L.,) 123; 4 A.L.T., 3.

Power of Licensing Magistrate to Revoke Transfer—Order to Issue—Magistrate Removed from District.]—The grant by a licensing magistrate, under Sec. 48 of the "*Licensing Act* 1876," of a certificate for a transfer of license, after the licensee has been legally evicted, is a judicial act, which cannot be revoked by such magistrate without another judicial act of equal validity; *e.g.*, a proper hearing, merely on the request of such transferee; and notwithstanding such request, the transferee is entitled to a rule to compel the issue of the certificate of transfer, though if the magistrate who gave the certificate has been removed from the district in the meantime the rule cannot be made absolute against him. *Ex parte Slack, in re Panton*, 8 V.L.R. (L.,) 144; 4 A.L.T., 6.

Mandatory Order to Licensing Magistrates.]—Where magistrates have ceased to be licensing magistrates the Court will not grant a mandatory order compelling them to do their duty as such licensing magistrates. *Ex parte Slack*, 5 A.L.T., 26.

4. *Practice on Applications for Licenses.*

Second Application for License within Six Months—No. 390, Sec. 18.]—A refusal of a license for a public-house is no bar to a second application for a license within six months under Sec. 18 of the "*Wines, Beer, and Spirit Sale Amendment Act*" (No. 390,) unless both the house and the applicant are the same as upon the previous application. *Regina v. Sturt, ex parte Lalor*, 4 A.J.R., 20, 72.

Refusal to hear Application for License—Mandamus.]—A refusal by justices to hear an application for a license is not a matter for a rule under the "*Justices of the Peace Statute* 1865" (No. 267,) Sec. 138, but for a *mandamus*. *Ibid.*

"Licensing Act 1876," Sec. 38—Objections to Licenses.]—It is no objection to the grant of a license that one of the owners of the house objects to the premises being used as a licensed house. *Ex parte Slack, in re Panton*, 7 V.L.R. (L.,) 28.

Act No. 566, Sec. 38.]—Magistrates refused a license, on the ground that the granting of a license would endanger the peace of the neighbourhood. *Held per Higinbotham, J.* (in Chambers) that the words "any other objection, &c.," in Sec. 38 referred to objections urged against an application for a license as well as for a renewal, and decision upheld. *Ex parte Kinane*, 2 A.L.T., 107.

"Wines, Beer, and Spirit Sale Statute" (No. 390,) Sec. 12—Petition in Favour of Grant of License.]—Sec. 12 only provides for reception of petition against a grant of license, and makes no provision for a petition in favour of a grant. Justices are not compelled to receive such last-mentioned petition as evidence, the persons who favour the grant must give evidence personally. *Regina v. Mollison, ex parte Horsey*, 3 V.L.R. (L.,) 28.

Note.—Sec. 39 of the "*Licensing Act* 1876," corresponds to Sec. 12 of Act No. 390.

"Licensing Act 1876," Sec. 39—Objections.]—*Semble*, that licensing magistrates have no right to take objections themselves under Sec. 39 of the "*Licensing Act* 1876," to the issue of a license, and an objection that the applicant's wife has been fined for selling spirits without a license, is not an objection under this section. *Ex parte Guess*, 4 A.L.T. 85.

Refusal of License—Statement of Objections and Grounds of Refusal—"Licensing Act 1876," Sec. 30.]—Magistrates, in refusing an application for a license, need not set forth the objections taken, and grounds of refusal in precise terms. It is enough if they state their grounds, so that it appears that valid objections were taken. They have, moreover, power to take a large view of the objections raised, and to consider objections of their own, upon personal inspection, or arising out of the evidence. If they find that the premises have insufficient accommodation, such ground need not be set forth in the terms of any of the requirements of Sec. 30 of the "*Licensing Act* 1876," provided the defect is indicated with reasonable certainty. *Regina v. Alley, ex parte Slack*, 10 V.L.R. (L.,) 42; 5 A.L.T., 178.

LIENS AND STATUTABLE MORTGAGES.

I. Liens—Generally.

For Antecedent Advances—Upon Deeds Deposited as Security.]—J., a squatter, being indebted to his agents B. and W., for a previous advance, applied to them to accept his draft for a further account; and wrote to them stating that certain deeds of his would be handed to them as security, and added—"On procuring the deeds of" [other lands] "I will also transfer them to you as a further security for the amount I obtained of you in December last, and the draft above-mentioned." The draft was accepted by B. and W. and paid, and the first-mentioned deeds deposited with them. On bill by B. and W. against

the infant heir-at-law of J., to enforce a lien upon these deeds, both for the antecedent advances and the amount of the bill accepted, *Held* that they were not entitled to a lien for the earlier advances. *Brent v. Jones*, 1 V.R. (E.,) 76; 1 A.J.R., 2, 51.

Consideration for Lien—Pre-existing Debt.]—A pre-existing debt without further forbearance or advance is not a good consideration for a banker's lien. *E. S. & A. C. Bank v. Levinger*, 4 W.W. & A'B. (L.,) 208; *ante column* 86.

But *see Ford v. London Chartered Bank*, 5 V.L.R. (E.,) 328; 1 A.L.T., 117; where it was held that a lien may arise upon a past consideration.

Lien for Overpaid Purchase-money—Partners Effecting a Partition of the Partnership Land—One Partner being Overpaid on Exchange of Lands.]—*See Manson v. Yeo.* 1 W. & W. (E.,) 187. *Post* under VENDOR AND PURCHASER—Enforcement, Discharge, &c.—Purchase-money and Lien.

Councillors who were Afterwards Ousted from Office Accepting Bills on Behalf of Corporation—Corporation not Disclaiming Benefits of Contract—Lien of Ousted Councillors on the Land for the Bills for which they had been Made Liable when in Office.]—*See Trainor v. Council of Kilmore.* 1 W. & W. (E.,) 293. *Post* under VENDOR AND PURCHASER.

Pawnbroker's Lien on Stolen Goods Pledged.]—*See Regina v. Clarke, alias Bonnefin. Post* under PAWNBROKERS.

Agent's Lien Over Client's Papers under "Land Tax Act."]—*See Watson v. Clinch.* 5 V.L.R. (L.,) 278; 1 A.L.T., 40. *Post* under REVENUE—Land Tax.

Maritime Lien of Master for Disbursements.]—*See Dunn v. Hoyt*, 4 A.J.R., 3. *Post* under SHIPPING—The Master.

Lien of Master not Lost by Taking a Mortgage Over the Ship.]—*See The Albion*, 3 A.J.R., 72; 27 L.T., 723. *Post* under SHIPPING—The Master.

Lien of Shipowner—How Satisfied—General Average.]—*See M'Lean v. Liverpool Association*, 9 V.L.R. (L.,) 93; 5 A.L.T., 1. *Post* under SHIPPING—Bill of Lading—Rights, &c., of Holders of Bills, &c.

Solicitor's Lien for Costs.]—*See* SOLICITOR—Costs—Lien.

Lien of Town Agent of Country Solicitor for Costs.]—*See Re Klingender, Charsley, and Dickson, ex parte M'Cullagh*, 8 V.L.R. (L.,) 164. *Post* under SOLICITOR—Relations between Country Solicitor and Town Agents.

Notary's Lien for Work Done.]—*York v. Lord*, 5 V.L.R. (L.,) 141; 1 A.L.T., 4. *Post* under NOTARY.

On Certificate of Title.]—*See* TRANSFER OF LAND (STATUTORY).

Banker's Lien.]—*See* BANKERS AND BANKING COMPANIES.

Vendor's Lien for Unpaid Purchase-money.]—*See* SALE—VENDOR AND PURCHASER.

II. STATUTABLE MORTGAGES AND LIENS.

(a) *Stock Mortgages and Liens on Wool.*

Statutes.]—17 *Vict.* (No. 16,) repealed by

"*Instruments and Securities Statute* 1860," (No. 204,) Part VIII.

"*Instruments and Securities Statute Amendment Act*" (No. 283). Explaining Part VIII. of Act No. 204.

"*Instruments and Securities Statute Amendment Act* 1867" (No. 313), repealing and re-enacting Part VIII. of Act No. 204.

Mortgage of Sheep—Subsequent Lien on Wool—17 Vict., No. 16, Sec. 5.]—A. mortgaged sheep to C. as sheep, and subsequently, without the consent in writing, as required by 17 Vict., No. 16, Sec. 5, of C., gave D. a lien on their wool. A. became insolvent, and his official assignee claimed the wool. Upon special case, *Held* that A. could not make his acts inoperative by the omission of a mere formal act, and that the official assignee stood in the same position as A. would if he were not insolvent and had paid off the first mortgage; that the first mortgagee not objecting, the first mortgage not being paid off did not affect the question, and that, though the lien would be invalid as against the first mortgagee, it was valid as against the insolvent, and therefore as against his official assignee. *Clough v. Laing*, 1 W. & W. (L.,) 20.

[Sec. 8 of Act No. 313 follows Sec. 5 of 17 Vict., No. 16.]

Lienee's Powers of Redemption — Subsequent Lien on Wool not in Accordance with Act No. 204.]—G., H., and A., were partners in a squatting investment, the station and sheep being mortgaged to secure the purchase-money. G., as the managing partner, without the consent of the mortgagees, gave to W. a lien over the ensuing clip to secure the advances made by W., but the instrument fixed no rate of interest. Afterwards G. mortgaged his interest in the partnership to the defendant bank to secure his private debt, which mortgage was registered before W.'s lien. The bank then got transfers of the mortgage from the vendors (mortgagees) and entered into possession, sold the wool and claimed to hold the proceeds. W. sued the bank seeking for a transfer of securities on payment of the amount due on the first mortgage and a charge to the amount of his debt, so far as covered by the net proceeds of sale in priority to the bank's second mortgage. *Held* that G. had power to give a lien and that the lien though bad under Act No. 204 was good in equity, that the sale of wool did not destroy W.'s right to marshal the securities, that W. was entitled to redeem but not to interest except in so far as the proceeds had reduced interest payable on the mortgage. *White v. Colonial Bank*, 2 V.R. (E.,) 96; 2 A.J.R., 49.

Priority of Lien Over Mortgage.]—W., a sheep farmer, mortgaged his station and stock to K. in February, 1864; and K., acting as W.'s agent, sold the station and stock to the defendant in March, 1866, the defendant agreeing to execute a mortgage to secure the purchase-money. In April the defendant borrowed money from the plaintiffs, and gave them a lien over the ensuing clip of wool. In May the defendant executed the mortgage to K., containing a clause empowering defendant to give a lien over the ensuing clip. On a suit by plaintiffs against defendant to enforce their lien on certain wool (part of the clip), *Held* that the lien given to plaintiffs, although not a good statutory lien according to the requirements of Act No. 204, took priority over the mortgage deed of May, even without the enabling clause in the deed. *London and Australian Agency Coy. v. Duff*, 5 W.W. & A'B. (E.,) 19.

Lien on Wool—Consent by Owner—Unsatisfied Mortgages.]—A carrier has no right of lien for the conveyance of goods, given to him to be carried, when they are so given without the consent of the true owner. G., in an action of detinue for the recovery of wool from M'C., a carrier, who claimed a lien for carriage, proved two statutable liens under the laws of New South Wales, given by D. & Co., the owners of the wool. It was proved that there were two other unsatisfied mortgages on the sheep from which the wool was shorn, and that no consent to the liens (G.'s lien) was given by the mortgagees. *Held* that the defendant was entitled to set up the objection that the mortgagees had not so consented; that the case was distinguishable in that respect from *Clough v. Laing*, 1 W. and W. (L.,) 20; and that G. had not proved his title. *Goldsborough v. M'Culloch*, 6 W.W. & A'B. (L.,) 113.

And *see* CARRIER, *ante column* 123.

Lien on Wool—Form of Instrument.]—The same particularity as to witnesses, and the residence of the parties, need not be observed in liens on wool, as in bills of sale. *Goldsbrough v. M'Culloch*, 5 W.W. & A'B. (L.,) 154.

A lien over an "ensuing" clip will, in the absence of evidence as to which clip was intended, cover wool partly clipped at the time of the execution of the lien; and the fact that, after the lien, a number of lambs were dropped, and their wool was commixed with that of the sheep, does not invalidate it. *Ibid.*

Lien on Wool—Registration.]—Registration is not essential to the validity of a lien on wool. Except where insolvency arises, unregistered liens are perfectly valid between the parties. *Stevenson v. Landale*, 1 V.R. (L.,) 31; 1 A.J.R., 45.

Under "Instruments and Securities Statute 1864"—What they should Contain.]—A stock mortgage under the Act must, by virtue of Sec. 64, Schedule 5, contain a description of the station whereon the stock, over which the security is given, are. *London and Australian Agency Company v. Duff*, 5 W.W. & A'B. (E.,) 19, 25.

Not Filled in as to Date of Execution, and not Registered within a Month of Execution.]—A lien on wool, which is not filled in as to date of execution, and not registered within a month of execution, is bad, under Act No. 204, but yet it is good in Equity. *White v. Colonial Bank*, 2 V.R. (E.,) 96; 2 A.J.R., 49. *See* S.C. *ante column* 846.

"Instruments and Securities Statute" (No. 204,) Part VIII.]—A bill of sale over certain property consisting of horses, cows, &c., and farming implements is good if registered, as a bill of sale under Sec. 56 of the Statute, and need not as against an execution creditor, be registered as a stock mortgage under Part VIII. of the Statute. *Woolcott v. Kelly*, 3 A.J.R., 39, 40; 3 V.R. (L.,) 62.

Validity of Stock Mortgage—Stock Mortgage Executed in New South Wales—Registration.]—A stock mortgage was executed in New South Wales between parties resident there, and over sheep at that time in that colony. The sheep were afterwards brought into Victoria. No proof was adduced in an action, in which the validity of the mortgage was disputed, of the law of New South Wales applicable to such document, or that the common law had been altered by legislation in that colony. *Held* that the Court would presume that the mortgage was valid in New South Wales, and that it was, therefore, as a mortgage at common law valid in Victoria, without registration under the Victorian Act, and without proof of compliance with the New South Wales Act. *Donnelly v. Graves*, 6 V.L.R. (L.,) 247.

Mortgage of Sheep and Cattle and their Increase—Substituted Animals.]—A mortgage was given upon a certain number of branded sheep and cattle on a run, with the issue, increase, and produce thereof. Subsequently certain of the sheep were, with the consent of the mortgagee, sold, and other sheep purchased and substituted for those sold. *Held, per the Privy Council*, affirming the Supreme Court, that the mortgage was limited to the issue and increase of the specific sheep, and did not include the sheep brought upon the run in substitution for those sold. *Webster v. Power*, L.R. 2, P.C., 69.

Mortgage of Stock then and thereafter to be on the Run—What it Comprises.]—S. was mortgagee of stock belonging to M., the mortgage containing a clause that stock subsequently placed on run should be subject to the mortgage. H. sold sheep to M. conditionally on payment being made, and possession was given on similar terms. *Held* that S. was not entitled to seize the sheep placed on the run, he being in no better position than M., who could not claim the sheep until they were paid for. *Hyland v. Smith*, 3 A.J.R., 109.

Mortgage of Sheep—Right of Mortgagee to Wool.]—Where wool shorn from sheep, mortgaged to a bank, was seized for a debt of the mortgagor, *Held* that the wool taken from the sheep belonged to the owners of the sheep, and the mortgagees being owners at the time of seizure, the wool belonged to them. *Dunn v. Lynch*, 1 V.R. (L.,) 4; 1 A.J.R., 24.

"Instruments and Securities Amending Act" (No. 313,) Secs. 8, 10—Failure of Consideration—Reassignment.]—C. bought sheep to be paid for by a promissory note to be endorsed by B. C. gave B. a mortgage over the sheep, which was registered under the Act, to secure the note. B. refused to endorse the note. C. mortgaged the sheep to S. *Held* that the consideration for the first mortgage having failed, the property revested in C., and the second mortgage to S. came into force, the property revesting in the mortgagor without any reassignment, there not being the same necessity for a reassignment of chattels as there is for a reconveyance in the case of a mortgage of land. *Synnot v. Ettershank*, 3 V.L.R. (L.,) 136.

"Instruments and Securities Amendment Act" (No. 313,) Sec. 5.]—*Per Fellows, J.*—The words in Sec. 5, "the possession of such mortgaged stock . . . . by the mortgagor . . . shall be, to all intents and purposes in law, the possession of the mortgagee," are restricted by the words, "notwithstanding the subsequent insolvency of the mortgagor" to such subsequent insolvency, and are not to be used in their most general sense. *Cave v. Beveridge*, 3 V.L.R. (L.,) 302, 304.

(*b*) *Liens on Crops.*

Statutes.]—
"*Instruments and Securities Statute* 1864," Part VII.
"*Liens on Crops Act* 1865" (No. 280.)
"*Liens on Crops Act* 1878" (No. 618.)

Lien on Crops—Act No. 618, Sec. 4.]—Of the total amount of a lien, a part consisted of an old debt incurred without any promise of giving a lien, and the residue consisted of a debt incurred on the promise of giving a lien for the whole amount. *Held* that the lien was good under Sec. 4 of No. 618; but *quære* whether for the whole amount or only for the further advance. *Powell v. Dawson*, 7 V.L.R. (L.,) 143; 3 A.L.T., 3.

LIFE ASSURANCE.

See INSURANCE.

LIMITATIONS (STATUTES OF.)

Statutes.]—
"*Real Property Statute* 1864" (No. 213,) Part II.
"*Common Law Procedure Statute* 1865" (No. 274,) Secs. 403—408, 425.
"*Common Law Procedure Statute* 1865, *Amendment Act*" (No. 290,) Sec. 2.

I. Relating to Land.

(*a*) *Lands and Rents.*

Plaintiff Relying on Certificate of Title under Act No. 140—Adverse Possession—"Real Property Statute" (No. 213,) Secs. 18, 19.]—In an action for ejectment 1867, the plaintiff put in a certificate of title, dated April 1866, which was subject to "such encumbrances, &c.," underwritten, and the memo. referred to ran thus:—"Any rights subsisting under adverse possession of the land." The defendant put in evidence of adverse possession since 1849, and the plaintiff called as a rebutting case a witness, who proved that she had herself in 1852 occupied the land with others, and that there was no one exclusively in possession. A verdict was entered for plaintiff. On rule *nisi* for a nonsuit or for leave to enter a verdict for defendant, *Held*—(1.) That the certificate of title under Act No. 140 was a valid one, and that an owner out of possession who receives a certificate subject to rights subsisting under any adverse possession, receives evidence of a good title until those rights are proved. (2.) That the words "adverse possession" in the certificate refer to Act 27 Vict. No. 213, that adverse possession need not necessarily be under the same person, or under several persons claiming from one another; that the right to bring an action *first accrued* to some person through whom plaintiff claimed, viz., the grantee from the Crown in May, 1839, and the case fell within Sec. 18 of Act No. 213, and not Sec. 19, and that plaintiff's right was barred. Rule absolute to enter verdict for defendant. *Murphy v. Michel*, 4 W.W. & A'B. (L.,) 13.

"Real Property Statute" (No. 213,) Secs. 17, 18—Adverse Possession—Ejectment by Curator—Onus of Proof.]—The curator in March, 1874, obtained a rule to administer land belonging to an intestate, who died January, 1858. And in March, 1874, he brought ejectment against B., who was in possession. *Held* that the defendant had to prove that the intestate was "the last person entitled who had been in possession," according to Sec. 17, and that he had to prove the heir's want of possession from the death until the passing of the Act No. 427, and that it was not necessary for the plaintiff to prove possession within the fifteen years. *Weigall v. Blyth*, 5 A.J.R., 106.

Ejectment—Absence of Plaintiff beyond Seas—"Common Law Procedure Statute 1865," Sec. 404—"Real Property Statute 1864," Sec. 31.]—Sec. 31 of the "*Real Property Statute* 1864" is not repealed by implication by Sec. 404 of the "*Common Law Procedure Statute* 1865," and therefore the absence beyond seas of a plaintiff in ejectment at the time his right to bring the action accrued, is a disability which extends the period of limitation. *Henley v. Dumphy*, 4 V.L.R. (L.,) 291.

Evidence of Adverse Possession—Interruption of such Possession—Question for Jury.]—Where in an action of ejectment plaintiff relied upon a certificate of title and defendant upon adverse possession for more than fifteen years, and it was proved that S., a tenant of the plaintiff's, had used the land for fourteen years before action brought, the Court held that S.'s use

must be proved to be in assertion of a right and not as a trespass, and the jury having found for the defendant the Court refused to interfere in what was properly a question for the jury. *Bicknell v. Heymanson*, 3 A.J.R., 22.

Adverse Possession—Onus of Proof.]—It is for the jury to determine the fact and the extent of the possession. *Per Fellows, J.* It is for the jury to determine whether certain acts were done in the assertion of a right or were mere acts of trespass. The *onus* of proof lies on the party relying on the "*Statute of Limitations*," so that in an action for ejectment by a registered proprietor under Act No. 301, the plaintiff need not prove when his title accrued until the necessity of such proof is established on the part of the defendant that the plaintiff has been out of, and the defendant or others in possession for more than fifteen years; acts of ownership on part of the land may be evidence of the possession of the whole. *Per Stephen, J.* Such acts of ownership are not necessarily evidence of the possession of the whole. *Staughton v. Brown*, 1 V.L.R. (L.,) 150.

Act No. 213, Secs. 18, 19—Evidence of Adverse Possession.]—To bring a case within the operation of Act No. 213 it is sufficient to show that the person claiming a right to the property has not been in possession for the statutory period. Plaintiff in ejectment claimed under the following title:—Crown grant to W., 1854; conveyance W. to M., 1860; conveyance M. to plaintiff, 1862. Plaintiff brought his action in 1879, and defendant claimed that M. was in possession from 1863 until 1867 when he conveyed to defendant, who had been in possession ever since. *Held* that M. and defendant's possession was continuous from 1863, and that such possession was hostile or adverse to plaintiff's rights. Rule absolute to enter verdict for defendant. *Delap v. Mawley*, 5 V.L.R. (L.,) 170.

Adverse Possession—Admissions after Lapse of Period.]—In an action of ejectment brought in 1882, the right of action accrued in February, 1858. The adverse possession had been continuous for seventeen years, and from the answers in an equity suit and the evidence taken in the action it appeared that A., the person through whom the defendant claimed (defendant's landlord), had admitted that he was receiver of rents, that he was prepared to give it up to the rightful owners, and that he was ready to account for the rents and profits. *Held* (*per Stawell, C.J., and Holroyd, J.* (*dissentiente Higinbotham, J.*) that there was no evidence that A. entered as caretaker for the then heir, and that the admissions made after the fifteen years had expired (dating from February, 1858) were too late, the acknowledgment of title after the adverse title has become paramount not being sufficient to restore the extinguished title, and that all that could be extracted from the admissions was that A. would, until the statutory period had elapsed, have yielded possession to a person who proved himself the rightful owner. *Per Higinbotham, J.*:—That the *onus* of proving that plaintiff's title had been barred by A.'s possession as owner lay on the defendant, and that the facts showed that A. asserted no right to the property as owner. *McVea v. Pasquan*, 8 V.L.R. (L.,) 347.

Adverse Possession — Evidence of.] — Plaintiff brought in 1869 an action of ejectment on a certificate of title. The defendant relied upon adverse possession and proved that, in 1841, a person assuming to act as owner gave it to him in satisfaction of a debt, and that defendant had then fenced it in; that defendant exercised no rights of ownership except looking to the fencing till his insolvency (1847); that after the insolvency he occasionally visited it. In 1851 nearly all the fencing had been removed except two or three posts, which were still standing. In 1864 defendant had been rated for the land, and in 1866 he evicted a person in possession and was in possession when plaintiff obtained his certificate. *Held* that there was not sufficient evidence to maintain the verdict found of adverse possession, and rule absolute for new trial. *Chisholm v. Capper*, 6 W.W. & A'B. (L.,) 225; N.C., 22.

Evidence of Adverse Possession—Fence.]—To prove adverse possession, it must be shown that there has been a continuation of acts apparently of trespass, but with a desire and intention to complete an inchoate title, affording evidence that the plaintiff, claiming under a documentary title, was not in possession. Plaintiff, in ejectment, launched his case on a certificate of title. Defendant proved occupation by a stranger more than twenty years ago, the erection of a fence by the stranger, the continuation of the fence for some time, and the erection of a new fence in the same position; but then a long interval, during which no occupation was proved. *Held* that such fence was not, in the absence of occupation, evidence of continuous occupation, and that defendant had not proved adverse possession. *Grave v. Wharton*, 5 V.L.R. (L.,) 97.

Inference to be Drawn from a Fence across a Boundary.]—Where a fence was proved to have been in existence within the fifteen years over a portion of the property which marked the boundary between two allotments, *Held* that it was not to be inferred that it had been continued right across the boundary, and appeal allowed where County Court judge had directed the jury to that effect. *Hall v. Warburton*, 6 A.L.T., 12.

Against Whom Statutes Run—Owner of Unenclosed Part of Close.]—Where the fence enclosing one part of a close has been allowed to disappear, and the owner of such part has been in continuous occupation of the adjoining enclosed part, and there has been no continuous adverse occupation of the unenclosed part, the "*Statute of Limitations*" does not run against the occupier of the enclosed part. *Small v. Glen*, 6 V.L.R. (L.,) 154; 1 A.L.T., 197.

What is a Bar to the Statute.]—The acceptance by a wrongdoer of a lease of property in respect of which the lessor had a previously existing cause of action at the time of the lease is not a release of that cause of action, and is no bar to the "*Statute of Limitations*" if pleaded. *M'Carthy v. Cunningham*, *ante column* 394.

Acknowledgment to Bar Statute — Affidavit— "Real Property Statute 1864" (No. 213,) Secs. 22, 30.]—D., having been in possession of Crown lands since 1838, obtained a Crown grant in 1852, paying the purchase-money. In 1856 he executed a conveyance of it to T. D., reciting that the purchase-money was T. D.'s and that the grant was taken by D. as a trustee for T. D. T. D. died in 1868, and D. sought a rule to administer his estate, stating in an affidavit in support of his application that the land was part of T. D.'s estate. In a suit for the administration of T. D.'s estate, D. claimed the land as held by T. D. in trust for him. *Held, per Molesworth, J.*, upon the evidence, that D. was not entitled to the land, and that the affidavit amounted to an acknowledgment by him of T. D.'s title, sufficient to bar his claim under the *Statute of Limitations* ("*Real Property Statute* 1864" (No. 213,) Sec. 30). On appeal, *Held* that the affidavit did not amount to such an acknowledgment. *Dryden v. Dryden*, 4 V.L.R. (E.,) 148.

How Statute Pleaded—No Statement of Possession since Other Party's Title Accrued.]— Declaration: Trespass *q.c.fr.* Plea: *Liberum tenementum.* Replication: That, at the time of the trespass complained of, and for a period of fifteen years prior thereto, the plaintiff had been in continuous, actual, exclusive, and uninterrupted occupation and possession of the said land. *Held* on demurrer, that the replication was bad for not stating that such fifteen years' possession had been since the defendant's title accrued. *Nott v. Gunn*, 2 V.L.R. (L.,) 114.

Bill Demurrable by Reason of the Statute — How Allegation in Bill Construed.]—*See Dalton v. Plevins*, 1 W. & W. (E.,) 177. *Post* under PRACTICE AND PLEADING—IN EQUITY—Bill.

(*b*) *Mortgages.*

"Real Property Statute" (No. 213,) Secs. 18, 47 —Equitable Mortgage—Deposit of Deeds.]—Suit by equitable mortgagee to enforce a mortgage nineteen years old by deposit of title document, the bill putting forward no fact to prevent operation of fifteen years' "*Statute of Limitations.*" Defendants answered denying many of the allegations and relying mainly upon "*Statute of Limitations.*" On a preliminary objection by defendant's counsel, setting up "*Statute of Limitations,*" *Held* that Secs. 18 and 47 were applicable to a case of this kind. *Kemp v. Douglas*, 1 V.L.R. (Eq.,) 92.

Interest—When Recovery of Principal Barred.]— Where the recovery of the principal sum in a mortgage deed is barred by the Statute, no interest can be recovered under the covenant to pay although payment of interest has been made within twenty years, the case not being distinguishable from that of a simple contract debt. *Weigall v. Gaston*, 3 V.L.R. (L.,) 98.

[NOTE ED.—This case was decided according to the view of *Fellows, J.*, on the assumption that Sec. 5 of 3 and 4 *Will. IV.* c. 42 was not in force in Victoria, but it is enacted by Sec. 425 of the "*Common Law Procedure Statute,*" see note in report of the above case at page 101.]

"Common Law Procedure Statute" (No. 274,) Sec. 407—No Mortgage Pleaded.]—Where a declaration does not state any mortgage but only a covenant to pay money with interest, the period of limitations is that fixed by Sec. 407 of the Act No. 274, viz., twenty years. *Weigall v. Gaston*, 3 V.L.R. (L.,) 294.

II. EQUITABLE MATTERS.

(*a*) *Trusts.*

The "*Statute of Limitations*" does not apply to an express trust. *Hunter v. Rutledge*, 6 W.W. & A'B. (E.,) 331; N.C. 61, 74.

(*b*) *Fraud and Concealment.*

Operation of.]—Until the discovery of fraud, *i.e.*, the time at which fraud ought to have been discovered, the "*Statutes of Limitations*" do not operate in Equity. *Clark v. Clark*, 8 V.L.R. (E.,) 303, 327.

Fraud—From what Period the Statute Runs.]— Where a plaintiff may proceed in Equity or at Law, the Court of Equity will not adopt a period of limitation different from that at Law. But in Equity, in the case of fraud, the Statute runs, not from the actual discovery of the fraud, but from the time when, with due diligence, it might have been discovered. The plaintiff and M. were partners in squatting property. By indenture, 1860, partnership was dissolved, M. assigning all his interest to plaintiff, and being indemnified against liabilities. M. managed the business, and represented it as having been carried on at a loss. At the time of the dissolution, P. & Co., a firm of brokers, acted as factors for the plaintiff and M., and the bill (1880) sought relief, as against M., with regard to certain sums held by the firm on account of the partnership at the date of dissolution, and which had been received by M. On demurrer by M., *Held* that as bill contained no general allegation that plaintiff could not have discovered fraud at a time to save the Statute, the Statute must run from the time when plaintiff might have discovered it with due diligence. Demurrer allowed. *Urquhart v. M'Pherson*, 6 V.L.R. (E.,) 17, 22, 23; 1 A.L.T., 126.

III. SIMPLE CONTRACTS—DEBTS.

Acknowledgment of Debt.]—In an action to recover rent, defendant pleaded the Statute. There was put in evidence a letter, undated as to the year, stating that defendant had recovered some of his back salary, and would place £10 to plaintiff's credit, and concluding, "if they pay me as I expect they will, I hope to clear off your account without having to pay 2s. in the £ at all events." *Held* that the letter contained a sufficient acknowledgment of the debt, even if made after debt was barred; and the "hope" expressed did not amount to a condition not to pay unless defendant received money so as to qualify the acknowledgment; that an acknowledgment of debt before the debt is barred is more liberally construed in plaintiff's favour than one made after the debt is barred. *Barrett v. Scott*, 3 V.L.R. (L.,) 222.

Bill of Exchange—Defendant beyond the Seas—Tasmania—4 and 5 Anne, c. 16, Sec. 19—"Common Law Procedure Statute 1865," Sec. 405.]—Sec. 405 of the "*Common Law Procedure Statute* 1865" does not touch the question of the absence of a defendant beyond the seas in actions on bills of exchange, but the enactment 4 and 5 *Anne*, c. 16, Sec. 19, touching these cases, is in force in Victoria, and Tasmania is "beyond the seas" within the meaning of that section. Therefore, in an action on a bill of exchange, if the defendant be absent in Tasmania when the cause of action arose, the statutory period of limitation does not begin to run till he comes into Victoria. *Griffith v. Block*, 4 V.L.R. (L.,) 294.

Imperial Statutes—Construction—Beyond the Seas.]—The words "beyond the seas" in the various Imperial Statutes of Limitations are to be read as "out of the territory." *Ibid.*

Declaration on Promissory Note—"Common Law Procedure Statute" (No. 274,) Sec. 404—"Amending Act" (No. 290,) Sec. 2.]—Sec. 404 only applies to the absence of plaintiffs, and not of defendants, and by Sec. 2 of Act No. 290, time only runs against defendant from their return from beyond the seas. *Levey v. Myers*, 3 A.J.R., 40.

Declaration on Dishonoured Cheque—Plea of Non-receipt of Moneys within Six Years Before Presentment or Action.] *O'Ferrall v. Bank of Australasia, ante column* 83.

LIQUIDATION.

Under Insolvency.]—*See* INSOLVENCY.
Under Winding-up Orders.]—*See* COMPANY AND MINING.

LIS PENDENS.

Lis Pendens Used Vexatiously—Effect of, on Costs.]—*O'Reilly v. Egan, ante column* 14.

LIVERY STABLE KEEPER.

Cannot Recover for Horse and Carriage Hired on Sunday—29 Car. II., c. 7, Sec. 1.]— A livery stable keeper cannot recover for damages done to a horse and carriage let out on hire by him on a Sunday since his trade is within the Act 29 Car. II., c. 7, Sec. 1. *Garton v. Coy*, 4 A.J.R., 100.

LOCAL AUTHORITY.

See HEALTH (PUBLIC)—LOCAL GOVERNMENT.

LOCAL GOVERNMENT.

(NOTE.—*See* Cases under CORPORATION.)

Statutes—

"*Melbourne Corporation Act*," 6 Vict. No. 7.
14 Vict. No. 20. Explained and extended by 27 Vict. No. 178, ss. 65, 66.
16 Vict. No. 40.

"*Shires Statute* 1863" (No. 176,) repealed by Act No. 358.

"*Melbourne and Geelong Corporations Amendment Act*" (No. 178.)

"*Municipal Institutions Act* 1863" (No. 184,) repealed by Act No. 359.

"*Shires Statute* 1869" (No. 358,) and "*Amending Acts*" (Nos. 387 and 401,) repealed by Act No. 506.

"*Boroughs Statute* 1869" (No. 359,) and "*Amending Act*" (No. 373,) repealed by Act No. 506.

"*Local Government Act* 1874" (No. 506,) and various "*Amending Acts*," for which *see* under CORPORATION.

I. ELECTION OF MEMBERS AND APPOINTMENT OF OFFICERS OF ROAD BOARDS AND LOCAL BODIES.

Road Board—Qualifications for Membership of—"Local Government Act" (No. 176,) Sec. 33.]—Sec. 33 of Act No. 176 does not require a person, in order to possess the qualification for membership, to go through all the steps of first getting on the rate book and then on the voters' list and then on the voters' roll. It is sufficient if he have the "property" qualification, and was rated in the rate-book, so being entitled to be put upon the voters' roll, although not actually placed there. *In re Cope, ex parte Egan*, 2 W.W. & A'B. (L.,) 75.

Person Not Having Paid Rates Not Entitled to be on Ratepayers' Roll, and so Unable to Act as Councillor—Rates Tendered but Not Accepted—"Shires Statute 1869," Secs. 57, 68, 220—"Local Government Act 1874," Sec. 73 —Mandamus to Rate Collector to Receive Rate Refused. —*See Regina v. Black, ex parte Twomey*, 5 A.J.R., 82. *Post* under RATES AND RATING—Other Points.

See also as to non-payment of rates, *Lennon v. Evans* and *Scotchmer v. Michael, ante columns* 220 and 225.

Candidate for Road Board—Nomination Paper—Validity of—Act No. 176, Sec. 84.]—*See Regina v. Munday, ex parte Daft, ante column* 221.

Proper Course to Compel Returning Officer to Receive Nomination—What is.] — *See ex parte Attenborough, in re Bent, ante column* 222.

Nomination of Candidates for Shire Council—Last Day for Nomination—"Shires Statute 1869" (No. 358,) Secs. 97, 373.]—*See Regina v. Hennessey, ex parte Knight, ante column* 221.

[Note.—Secs. 116 & 7 of Act No. 506 correspond with Secs. 97 and 373 of Act No. 358.]

And *see* as to qualification, nomination, and election of members of local corporations cases collected, *ante columns* 221-224.

Road Board—Rule to Oust Member—Burden of Proof of Disqualification—"Local Government Act 1874," Sec. 71.]—The burden of proof that a person elected is disqualified from being a member of a road board lies on the relator, and he must establish a *primâ facie* case of want of qualification before the member can be called upon to prove affirmatively that he does possess such qualification, and *quære*, whether the relator would be allowed to impeach the statement of the member that he possessed the requisite qualification. *Regina v. Mussen, ex parte Barrett*, 4 A.J.R., 149.

Quo warranto is the proper remedy where four months have expired from the declaration of the election. *Regina v. Donaldson*, 1 A.J.R, 162.

Quo Warranto—"Boroughs Statute 1869" (No. 359,) Secs. 137, 138—Delay of Relator—Court must be Satisfied that there was Good Reason for.]—*See Regina v. Laurens*, 3 V.R. (L.,) 73; 3 A.J.R. 46; *post* under QUO WARRANTO.

[Note.—Compare Sec. 71 of Act No. 506 with Secs. 137 and 138 of Act No. 359.]

"Shires Statute 1869" (No. 358,) Sec. 45—Ousting Shire Councillor from Office—Contract with Council.]—Order *nisi* to oust L. from office as councillor of the shire of R., on the ground that L., while acting as councillor, was concerned and participated in, in his own right and interest, the profit arising out of the supply and cartage of a quantity of sawn timber, used for the construction of culverts within the boundaries of the shire, constructed by order and under the directions of the shire council. It appeared that after L. was elected, at the request of the surveyor of the shire, he supplied certain timber, apparently without any profit to himself, and solely for the convenience of the council. The timber was supplied on certain conditions—one being that the amount was to be ascertained afterwards, and the timber was to be deposited on spots where required. *Held* that the Court would not exercise a discretion in the matter, and ascertain whether there was a profit on the contract or not, and order made absolute, but without costs. *Regina v. Lovell, ex parte Gwyther*, 2 A.J.R., 55.

Note.—Sec. 54 of Act 506 corresponds with Sec. 45 of Act No. 358.]

And as to removal and disqualification of councillors generally—*See* cases collected, *ante columns* 225-228.

Road Board—Appointment of Officers—Act No. 176, Secs. 126, 132, 134, 135, 151.]—E. claimed to be clerk of a road board. He was appointed in 1863, at a meeting of the board to elect a chairman. In April, 1868, he was appointed for the remainder of the year, was dismissed in October, 1868, and in December, 1868, at an ordinary meeting, B. was appointed his successor. Rule *nisi* for an information in the nature of a *quo warranto* for B.'s removal. *Held* that the office of clerk was not that of an inferior officer under Sec. 134, and that therefore an ordinary meeting could not appoint or remove a clerk; that B.'s appointment was irregular as being made at an ordinary meeting; that B.'s appointment in 1863 was proper, and until duly cancelled, remained. Rule absolute. *Regina v. Bonfield*, 6 W.W. & A'B. (L.,) 174, N.C. 4.

And generally as to the appointment and removal of officers of municipal and local corporations. *See* cases collected, *ante columns* 214, 215.

Mandamus Compelling Payment of Officer's Salary.]—*See Regina v. Keilor District Road Board*, 1 V.R. (L.,) 14; 1 A.J.R. 29; and *Regina v. Shire of Bulla, ex parte Daniel*, 8 V.L.R. (L.,) 214. *Post* under MANDAMUS—Where Writ Lies.

II. RIGHTS, POWERS, DUTIES, AND LIABILITIES OF ROAD BOARDS AND LOCAL BODIES.

(i.) *Generally.*

Road Board—Powers — Permanent Works — Act No. 176, Secs. 268, 269.]—The removal of a wooden bridge and the erection of a stone one is a permanent work within Sec. 268 of No. 176, and before it is entered on a road board should comply with the provisions of Sec. 269, and the following clauses as to preparing plans, giving notice, &c. *Attorney-General v. Epping Road Board*, N.C., 23.

Mandamus to Road Board to Issue Slaughtering License—"Abattoirs Statute 1869," Sec. 28.]—*Regina v. Caulfield Road Board*, 1 A.J.R., 170; *post* under MANDAMUS—Where Writ Lies.

Power of Municipal Council to Contract so as to Bind their Successors—Agreement for Continuous User—"Local Government Act 1874," Secs. 165, 169—"Transfer of Land Statute" (No. 301,) Sec. 42.]—*See Mayor of Brunswick v. Dawson*, 5 V.L.R. (E.,) 2. *Post* under VENDOR AND PURCHASER—ENFORCEMENT, DISCHARGE, AND RESCISSION—Specific Performance.

And as to powers, &c., of councils as to contracts *see ante columns* 229-231 under CORPORATION.

Road Board—Powers of Auditors—27 Vict. No. 176, Secs. 149, 160.]—Although auditors of a road board in disallowing items of expenditure,

act as judges in cases where they are interested, yet they have the power of disallowance under Sec. 160 of the Act No. 176. But they may not inquire into the merits of contracts or the mode in which works have been executed, or enter into a consideration of the economy observed, or the necessity for each particular work. They may disallow any item of which they think there is just cause to disapprove; and expending moneys in violation of the Act, or without due authority under the Act, or the non-production of vouchers for moneys expended would afford such just cause for disapproval, *e.g.*, items disallowed in consequence of non-advertising for tenders which is compulsory under Act No. 176, Sec. 149. *Heidelberg Road Board v. Young*, 2 W.W. & A'B. (L.,) 69.

And *see* cases collected, *ante columns* 72, 73, under AUDIT.

Adjusting Boundaries of Shires and Road Districts—Powers of Governor—No. 176, Sec. 284.]—The powers given to the Governor by Sec. 284 of the "*Local Government Act*" (No. 176,) to adjust the boundaries of a shire or road district to those of an electoral district, are merely so to adjust them, and a proclamation which only partially makes such an adjustment is in excess of the Governor's powers, which are to be construed strictly, and will not be effectual to transfer territory from one municipal body to another. *Shire of Buninyong v. Berry; Brown v. O'Malley*, 5 W.W. & A'B. (L.,) 175.

Power to Take Material for Road Making—Trespass—"Local Government Act" (No. 176,) Secs. 233, 235.]—Two boroughs, Ballarat and Ballarat East, jointly constructed on lands outside of their corporate limits, but temporarily reserved for that purpose, large waterworks to supply the boroughs with water. The Bungaree Road Board alleged a right under Act No. 176, Sec. 235, to authorise a contractor for stone for their roads to enter and quarry on this land. On a suit by the boroughs against the road board, the contractor, and the Attorney-General, to restrain the exercise of this alleged right, *Held*, and affirmed on appeal, that the possession of the plaintiffs entitled them to proceed against the defendants as wrongdoers, and although the plaintiffs did not show compliance with Act No. 184, Sec. 318, authorising them to hold land outside their corporate limits, yet their possession by common agents was established and enabled them to sue jointly. *Held, per Molesworth, J.*, that under Sec. 235 the road board was authorised as against "occupiers" of Crown lands to enter and take materials for road making, and bill dismissed; *per Full Court*, that the words "any land" in Sec. 235 do not include Crown land, and injunction granted. *Mayor of Ballarat and Ballarat East v. Bungaree Road Board*, 1 V.R. (E.,) 57, 67, 71, 72, 73; 1 A.J.R., 33.

Temporary Roads—Upon what Ground they may or may not be Made—Procuring Material for Roads—"Nursery"—"Building"—Act No. 176, Secs. 233, 235.]—*Per Molesworth, J.*:—The word "nursery" in Sec. 233 of Act No. 176 does not include land planted with trees in positions which they are intended permanently to occupy. A dam is not a "building," the damaging of which is forbidden by Sec. 235 of the Act. *Mayor of Ballarat v. Bungaree District Road Board*, 1 V.R. (E.,) 57, 68, 69; 1 A.J.R., 33.

And *see* also cases collected, *ante column* 331, as to removal of materials for road making from Crown lands.

Water Supply, Watercourses, &c.]—*See post* under WATER.

Rates.]—*See post* under RATES.

Tolls.]—*See post* under TOLLS.

Markets.]—*See post* under MARKETS.

(ii.) *In Respect of Streets, Roads, Bridges, and Drains.*

(*a*) *Fixing and Altering Levels and Widths of Streets and Roads.*

Street not Levelled—Act No. 184, Sec. 281.]—Where a street is not already paved and levelled it is not obligatory upon a municipal council to fix its level, under Act No. 184, Sec. 281, before altering its existing level. *Lavezzolo v. Mayor of Daylesford*, 1 W.W. & A'B. (E.,) 113.

[Compare Sec. 408 of Act No. 506.]

Act No. 184, Secs. 250, 261, 263—Altering Level of a Street—Notice.]—The power given to borough councils under Secs. 261, 263, to alter and raise the level of streets is not an unrestricted power, and must be exercised in the cases of both old and new streets by a reference and notice to the Board of Land and Works under Sec. 250. *Holmes v. Mayor, &c., of Ballarat*, 6 W.W. & A'B. (L.,) 210; N.C., 14.

[Note.—The provisions of Act No. 506, relating to the fixing the levels of streets, are contained in Sec. 377 and in Secs. 403 to 413.]

Action for Injury from Alteration of Street Levels Previously Fixed—Act No. 359, Secs. 277, 283.]—A. sued a borough for injury to his houses and land by the borough altering the levels of a street. Plea, payment into Court of £15. *Held*, upon a rule *nisi* for arrest of judgment, that the declaration need not state that the levels were previously fixed; that the declaration showed an injury at common law; and, if the defendants sought a justification of the injury under Sec. 283, they must set it up. Rule discharged. *Andrews v. Mayor of Emerald Hill*, 5 A.J.R., 167.

Altering Level of Streets—United Shire—No. 358, Sec. 17—No. 359, Sec. 319.]—A borough fixed the level of a street, and after the levels were so fixed the "*Boroughs Statute* 1869" (No. 359,) was passed which gave the shire councils power to repair streets and to raise and lower levels as they thought fit, provided that no level already fixed was to be altered. The shire was subsequently to this Act united with several other shires, and the united shires altered the level of the street, thereby injuring plaintiff in his business, and damaging his premises. *Held* that the

joint effect of Sec. 17 of No. 358 ("*Shires Statute* 1869,") and the proviso of Sec. 319 of No. 359 ("*Boroughs Statute* 1869") was to preserve the inviolability of the levels fixed by the original borough, and of the rights which an inhabitant thereof had acquired under that fixing, and that the united shires had no power to alter the levels and were liable. *Sinclair v. United Shire of Mount Alexander*, 4 A.J.R., 28.

[Compare Secs. 25 and 413 of Act No. 506 with the sections above referred to.]

Streets—Power of Municipal Council—"Local Government Act 1874," Sec. 408.]—Under Sec. 408 of the "*Local Government Act* 1874" it is not necessary for a municipal council before altering the level of a street which has been already levelled or paved, to advertise either notice of their intention so to do, or a time and place for receiving and hearing objections from adjoining owners. *Kensington Starch and Maizena Company v. Mayor of Essendon*, 6 V.L.R. (L.,) 93; 1 A.L.T., 163.

Sec. 377 of the "Local Government Act 1874"—Altering Street—Nuisance.]—The powers conferred upon a municipal council by Sec. 377 of the "*Local Government Act* 1874," as to raising or altering the ground of any street may not be exercised to interfere with individual rights, *e.g.*, as by obstructing access to a public highway, since the words of the section are not mandatory, but permissive only, and where an Act of Parliament merely authorises a body to do a particular act, such body is not thereby authorised to do that act in a manner which would create a nuisance, or would interfere with or injure private rights. *King v. Mayor, &c., of Kew*, 10 V.L.R. (L.,) 183; 6 A.L.T., 54.

Reducing Width of Street or Road—"Local Government Act 1874," Sec. 367.]—Under the "*Local Government Act* 1874," a municipal council has no power to reduce the width of any street or road in its district except under Sec. 367. *Kensington Starch and Maizena Company v. Mayor of Essendon and Flemington*, 6 V.L.R. (L.,) 265; 2 A.L.T., 35.

(*b*) *Liability for Non-Repair or Dangerous Condition.*

[N.B.—The provisions in the "*Shires Statute*" (No. 358) differ from the provisions in the other Statutes, and from the "*Local Government Act* 1874" (No. 506,) in that the provisions of the former Statute expressly make the duty of repairing streets a statutory duty, whereas the others do not so expressly.]

Liability of Shire for Accidents Caused by Non-Repair of Road—General Principles.]—Where the responsibility of keeping public works in repair is imposed by express words on any public body, no discretion being vested in them as to whether they should or should not execute them, and the terms used are so distinct and unequivocal that, for non-compliance with the Statute, the public body may be indicted as for a misdemeanour, then the public body is answerable for accidents caused by non-repair. But where a discretion is vested in these bodies to such an extent that they would not be subject to an indictment for non-repair, yet, if they choose to undertake the responsibility of performing these works, and attempt to construct them or put them in repair, they are bound to execute the works properly, and if they do not do so, they are answerable for their negligence; so that where a discretion exists, and a corporation or other public body does not commence the works, it is not answerable. *President, &c., of the Shire of Barrabool v. Torr*, 2 V.R. (L.,) 65; 2 A.J.R., 55.

The general principle seems to be that where trustees of a road, or municipal bodies charged with similar duties, are empowered to do a specific act—such as raise a road, lower a hill, or cut a drain—and in doing so they injure the property of some private person, they are not liable to answer for it if they do no more than the Act of Parliament enjoins. But where the act authorised is done so carelessly and improperly that the careless and improper manner in which the work is executed either creates a damage or aggravates an existing damage, then the public body is liable. *Shire of Corio v. Smith*, 2 V.R. (L.,) 163; 2 A.J.R., 111.

Liability of Corporation in Respect of Street not Formed—"Melbourne Corporation Act," 6 Vict. No. 7, Secs. 1 and 80—Discretion Given by Statute.]—The "*Melbourne Corporation Act*," 6 Vict. No. 7, Secs. 1 and 80, gives a full discretion to the corporation as to whether or not, and when, it should "form" any proposed street. Where G. sustained injury by falling into an unfenced hole in a certain place where the corporation had not yet exercised its discretion by "forming" a street in that place, *Held* that the corporation was not liable. *Grieve v. Mayor, &c., of Melbourne*, 1 W.W. & A'B. (L.,) 95.

No Statutory Obligation to Repair—No Liability for Nonfeasance—No. 184, Sec. 263.]—The words of Sec. 263 of the "*Municipal Corporations Act*" (No. 184) do not render it obligatory on a municipal corporation to repair a road which is in a dangerous state, such road having been formed at the time the municipality was created, and taken over by it, even though it be aware of the state of the road, and have sufficient funds in hand to repair it. Whether the corporation will repair the road or not is a matter for its own consideration. *Ryan v. Mayor of Malmsbury*, 1 V.R. (L.,) 23; 1 A.J.R., 29.

No Obligation Cast on Borough—Only Liable for Misfeasance—"Boroughs Statute 1869" (No. 359), Sec. 283.]—Under Sec. 283 of the "*Boroughs Statute* 1869" (No. 359,) a borough council is not liable for an accident resulting from their neglect to keep a footpath in repair, since there is no obligation cast upon them by that section to repair, but a discretion merely is given them. *Per Barry, J.* The only duty arising from the exercise of the power to repair given to a municipal corporation by the "*Boroughs Statute* 1869," Sec. 283, is to use proper care in its execution . . . In the present case there was no obligation to repair, and therefore no cause of action by reason of *nonfeasance*, and

nothing was done in any way conducing to the accident, and therefore, there was no cause of action by reason of *misfeasance*. *Reed v. Mayor of Fitzroy*, 4 A.J.R., 109.

Omission to Repair Streets—Municipal Corporation only Liable for Misfeasance when Given a Discretion.]—Under the Act 6 Vict. No. 7, Sec. 82, the Melbourne corporation have a discretion as to expenditure on streets, *i.e.*, as to what streets they shall make or repair, and are only liable for a *misfeasance* and not for a *nonfeasance*; they are not liable for injuries received through *nonfeasance* in omitting to repair streets. *Phillips v. Mayor of Melbourne*, 1 V.L.R. (L.,) 74.

Corporation not Liable for Fire Plug erected by Board of Land and Works Protruding—Act No. 506, Sec. 376.]—T. sued the defendant borough for damages through injuries received through his stumbling against a fire-plug erected by the board and allowed to remain protruding above the level of the street. *Held*, on demurrer, that the defendants were not liable, but the board. *Thompson v. Mayor of Fitzroy*, 5 V.L.R. (L.,) 105.

Liability of Borough Acting under Statutory Powers—Doing no More than Statute Enjoined—16 Vict. No. 40, Sec. 48.]—In 1853 the Government held land in Boroondara, which in 1858 was purchased by H. Between 1853 and 1858 the Central Road Board formed and metalled two roads—one along the margin of the land, and another following the line of a road reserved in the Crown grant. In so doing they diverted the local drainage on to H.'s land, causing additional waters to flow on to the land, breaking the surface, forming a watercourse, and damaging the land and its fences. Before the diversion the drainage had been diffused, and had done no injury. The roads could not, however, have been constructed in any other way than that adopted. The Central Road Board was succeeded by other bodies, and eventually by the Borough of Hawthorn, which in no way altered the roads except by putting footpaths, substituting an open arched water-table crossing for a culvert, and making a new crossing on an old one. Soon after the roads were originally made, H. suffered damage by the flooding of his land, and he called on the Central Road Board to construct a drain from the culverts sufficient to carry off the water from his land, and to pay him for damage, and he made similar demands from the borough, but in both cases without success. In 1865, H. erected a dam to keep the water off his land, and thereby flooded the roads. The borough pulled down the dam, and H. brought an action for trespass to try the question as to the extent of his rights. *Held* that the Central Road Board having special powers conferred upon them by Sec. 48 of the Act 16 Vict. No. 40, and being indemnified for acts done by them in the exercise of those powers, were not liable for the damage done to H.'s land; and that the borough, their successor, was not liable either for the acts done by the Road Board or for those done by itself. *Hepburn v. The Mayor, &c., of Hawthorn*, 3 W.W. & a'B. (L.,) 61.

"Shires Statute" (No. 358,) Secs. 279, 297, 309.]—A shire council, acting under Sec. 279 of the Act, cut a drain along a road and conducted water to a certain spot where it collected and flowed over plaintiff's land, thereby injuring it. The plaintiff sued the council for the damage done. *Held* (following *Hepburn v. The Mayor of Hawthorn*, from which case it differed only that in that case there was an averment that the roads could not have been constructed in any other way) that, under the power given by Sec. 297, the Council was not responsible, and that it was not obligatory on the council to avail themselves of the power conferred by Sec. 309, and to carry the water away; and that the council were not liable for the damage. *Shire of Ballarat v. Beaton*, 3 V.R. (L.,) 163; 3 A.J.R., 75.

Act No. 176, Sec. 237—Cutting Drain under Statutory Powers.]—A road board, acting under No. 176, Sec. 237, cut a drain upon a road and a few feet into adjoining land, but constructed no outlet, so that the water accumulated, and was distributed over the plaintiff's land. *Held* that if the drain were cut only a few yards into the plaintiff's land that would be sufficient, according to the words, "upon and through," in Sec. 237, and the Act giving compensation, an action for damages was not maintainable. *Cameron v. Shire of Mount Rouse*, 3 V.R. (L.,) 207; 3 A.J.R., 106.

Liability of Shire for Nonfeasance—"Shires Statute" (No. 358)—Express Duty enjoined by Statute.] —By the Act No. 358 ("*Shires Statute*,") Sec. 297, shires not only *may*, but in express terms are *required* to keep the common toll roads in repair. The shire of A. commenced to repair one of its common toll roads, but did not complete the repairs owing to a report that the line of the road was to be changed by the Government. Pending such delay a hole formed in the road in the unfinished part, and one of R.'s horses in passing over it sustained injuries which caused its death. *Held* that the express imposition of the duty to repair by the Statute rendered the council liable to an information for a misdemeanour, for non-compliance with the Act; and that R., having suffered damage, could maintain his action against the shire without showing that they had funds sufficient to repair the road. *Royle v. Shire of Avon*, 1 V.R. (L.,) 225; 1 A.J.R., 166.

Liability for Non-feasance—Injury caused by Damage to Street under which Right to Mine had been Granted by Corporation.] — A municipal corporation, under a power to permit mining under the streets within its boundary subject to conditions and restrictions for the public safety such as the corporation might think fit to impose, granted permission, subject to certain conditions and restrictions. The miners, having abandoned their workings, left their excavations in the street in such a condition that some of the water-pipes burst, and a chasm was made, into which the plaintiff, without neglect, drove, and suffered damage and loss. Plaintiff sued the corporation and recovered damages. On *rule nisi* for nonsuit, and on demurrer, *Held* that the fact of having power to permit mining did not relieve the corporation from the respon-

sibility cast upon it as manager of the public streets to see that those streets were kept in good order; and that the corporation was liable for the damage sustained by plaintiff. *Badenhop v. The Mayor, &c., of Sandhurst*, 1 W.W. & A'B. (L.,) 136.

Accident Caused by Non-Repair of Road—Bridge on Main Road—Liability of Shire for Non-feasance—Attempt to Repair.]—A bridge, which was not shown to be on a main road, being out of repair, T., in crossing it, met with an accident, and sued the shire council in whose district it was for damages. The council did not produce any evidence that they had merely taken over the bridge ready constructed and had not attempted to repair it since taking it over, and the inference was that they had constructed the bridge themselves. The secretary of the council, in answer to a letter from T., disclaimed liability, but spoke of the road as belonging to the council, which, after the accident, repaired the bridge. The court inferred that if the council had not built the bridge, at any rate they had attempted to repair it, and were therefore liable to T. for the damage sustained by him. *President, &c., of the Shire of Barrabool v. Torr*, 2 V.R. (L.,) 65; 2 A.J.R., 55.

Express Duty Enjoined by Statute—Liability Absolute.]—Under the "*Shires Statute* 1869," Sec. 297, the liability of a shire council for allowing a main road to be in a dangerous condition is absolute, and the fact that the dangerous condition, viz., by allowing a heap of metal to remain on a road, has been caused by a contractor employed by the council, will not relieve the latter from their liability. *Bell v. Shire of Portland*, 2 V.L.R. (L.,) 197. Following *Shire of Avon v. Royle*.

Culvert Insufficient to Carry off Storm Water—Injury to Plaintiff's Land—Negligence of Shire Council—Injury Occasioned in Consequence of Such Negligence.]—A shire council took possession of a certain road. At a certain place the road had been raised to cross a hollow, and a culvert had been made under the embankment to carry off the rain water. This culvert became choked with mud and silt, and the water being dammed back overflowed, and damaged S.'s property. S. sued the council, and recovered a verdict. *Held*, on appeal, that the proper questions for the jury were whether the absence of provisions for carrying off the accumulated storm water was caused by the shire's negligence, and whether the injury to S.'s property was the immediate consequence of that negligence, and as the jury had found these questions in the affirmative, the Court refused to interfere, and appeal dismissed. *Shire of Corio v. Smith*, 2 V.R. (L.,) 163; 2 A.J.R., 111.

Liability of Municipality for Nonfeasance—Leaving Works in an Unfinished State—Act No. 359, Secs. 4, 7, 393.]—The Act complained of, by which plaintiff sustained an injury, was leaving the footpath incomplete, there being a hole in the slope of certain street works left in an unfinished state. *Held* that the former municipality was liable, through not finishing a work it had undertaken, and that the Act entailed the liabilities of the former municipality upon the defendant borough. *Dummelow v. Mayor, &c., of St. Kilda*, 5 A.J.R., 74.

[Compare Sec. 10 of Act No. 506, with Sec. 4 of Act No. 359.]

Liability for Nonfeasance—Act No. 506, Secs. 380, 439—Unfenced Drain on Highway.]—The defendant corporation had the care and management of a certain portion of a highway, and on this highway there was an unfenced drain not constructed by the defendants, but within the municipal boundaries of the corporation. S., while driving in a buggy, fell into the drain and was injured, and sued the corporation for their negligence in leaving the drain unfenced. *Held* that the corporation was bound to keep the drain so as not to cause injury by its condition, and that as by Secs. 380 and 439 respectively of Act No. 506, the care and management of the highway and of the drain were vested in the defendants, they were liable for the injury caused. *Per Higinbotham, J.* The obligation to keep a formed road and every part of it in repair arises the moment the street is formed, and when once it exists, the council as the caretakers can never divest themselves of it. *Scott v. Mayor of Collingwood*, 7 V.L.R. (L.,) 280; 3 A.L.T., 16.

Trench in Street made by Stranger—Opportunity of Knowledge—Act No. 506, Secs. 376, 380, 399.]—Action of negligence against a municipal council on account of injuries sustained by plaintiff's horse falling into a trench permitted by the council to be made in a street under their control. It appeared from the evidence that a builder had without express permission, made this trench. *Held* that under Secs. 376, 380, the council had cast upon them the duty of keeping the streets in repair, and under Sec. 399, the power of punishing a person who without permission, made a hole in the street; and that several days having elapsed between the digging of the trench and the accident, it was a question of fact for the jury whether a reasonable time had elapsed for the defendants to become aware of, and to repair the defect, and the County Court Judge sitting as a jury having found that reasonable care had not been taken, the council was liable. *Mayor of Emerald Hill v. Ford*, 9 V.L.R. (L.,) 351; 5 A.L.T., 119.

Act No. 506, Secs. 376, 380—Dangerous Condition of Street—Opportunity of Knowledge.]—A plaintiff was injured by tripping in a hole in a street under the control of a municipal council. It appeared that this hole was caused by some heavy vehicle passing along the street and forcing apart two of the pitchers of a cross-water channel, and it was quite consistent with the evidence that this was done very shortly before the accident, and there was no evidence to show that the council had any knowledge or means of knowing of the existence of the hole. *Held per Stawell, C.J., and Williams, J.*, (*dissentiente Higinbotham, J.*,) that in the absence of evidence that a reasonable time had elapsed between the hole being made and the accident, so as to enable the defendants to become aware of and repair the defect, they were not liable. *Per Stawell,*

C.J.—That by Sec. 380 of the Statute, a municipality is not bound to keep the streets in repair as a statutory duty in the same way that it was required under Sec. 297 of the "*Shires Statute*," and that without proof of negligence, the municipality was not liable. *O'Connor v. Mayor of Hotham*, 9 V.L.R. (L.,) 435; 5 A.L.T., 131.

Obstruction to Roads—Shire Council not Liable for Partial Obstruction.]—Shire councils are justified in obstructing part of a road so as to direct the traffic over a newly-metalled portion of it; and no action for damages will lie against a shire council for injury sustained by a traveller through driving against the obstruction in the dark. *Webster v. Shire of Maldon*, 5 W.W. & A'B. (L.,) 140.

Obstruction in Way—Act No. 506, Sec. 399—Liability of Corporation for Nonfeasance.]—The liability of a corporation under Sec. 399 to keep open and free from obstruction surveyed roads applies only to an obstruction to the whole road, and not to obstructions (such as heaps of road metal) lying upon the road. *Burgmeier v. Shire of Darebin*, 5 V.L.R. (L.,) 1.

Liability for Gate Closed Across Way.]—*See Harvey v. Shire of St. Arnaud, ante* column 337.

Liability for Leaving a Road Closed—Contributory Negligence—"Local Government Act 1874," Sec. 399.]—Where a person erects a fence across a public road required for traffic, and leaves a slip-panel in the fence wide enough for a person using ordinary care and skill to pass through with a waggon, a shire council, to whom is entrusted the management of the road, is not liable under Sec. 399 of the "*Local Government Act* 1874," for an accident occurring to a person attempting to pass through owing to the absence of such care and skill. *Munro v. Shire of St. Arnaud*, 6 V.L.R. (L.,) 217.

Removing Obstructions—Brush Fence—Act No. 506, Sec. 399—Recovering Expenses.]—Burning a brush fence, which is an obstruction to a road, is a reasonable mode of removing it within the Act. Sec. 399 means that justices are to award the local board the reasonable expenses incurred, and that those expenses are not to be withheld because the person removing has used unnecessary violence in the mode of removal. *Wall v. Shire of Ararat*, 7 V.L.R. (L.,) 61; 2 A.L.T., 126.

No presumption of a nuisance legitimately arises from the mere fact that posts have been placed by a municipal council upon a road under its control for the protection of the public. *Birmingham v. Shire of Berwick*, 9 V.L.R. (L.,) 344.

Power of Municipal Council—Fencing in a Hole—"Local Government Act 1874," Sec. 418.]—Under Sec. 418 of the "*Local Government Act* 1874," a municipal council is not warranted in protecting a hole near a street by putting up a fence in the street, so as to obstruct an adjoining owner in his access to the street, even though the hole be dangerous. *Kensington Starch and Maizena Coy. v. Mayor of Essendon*, 6 V.L.R. (L.,) 93; 1 A.L.T., 163.

Dangerous Hole—Notice—Act No. 506, Sec. 418.]—L. sued the defendant borough for injuries received through falling into a dangerous hole, which was near a street and was left unprotected and unenclosed, and of the existence of which the borough surveyor was aware. *Held* that the defendants were liable; that though it was doubtful whether the notice mentioned in Sec. 418 was to be given *by* or *to* the borough, yet in the first alternative the defendants could not take advantage of their own wrong, and in the second alternative the knowledge by the surveyor was sufficient. *Levy v. Mayor of Portland*, 3 V.L.R. (L.,) 226.

Fencing in Dangerous Hole near a Street—Notice—"Local Government Act 1874," Sec. 418.]—If by the notice of the existence of a dangerous hole near a street required by Sec. 418 of the "*Local Government Act* 1874" be meant a notice to be given by the council, the council is justified in fencing without giving such notice. A hole in a street is not a hole near a street within Sec. 418. *Kensington Starch and Maizena Coy. v. Mayor of Essendon and Flemington*, 6 V.L.R. (L.,) 265; 2 A.L.T., 35.

Liability for Nonfeasance in Respect of Side-Road made for Accommodation of Public during the Repair of a Bridge—Employment of Independent Contractor—Action by a Shire Councillor.]—A shire council undertook the repair of a bridge, and during the time of its repairs let out to an independent contractor the contract for making a side road. The road was not fenced or lighted, as was provided by the contract. In an action for negligence by a shire councillor, who was injured while driving along the road, *Held* that the council was liable, and the fact that the plaintiff was a councillor did not preclude his recovering. *Bossence v. Shire of Kilmore*, 9 V.L.R. (L.,) 35; 4 A.L.T., 151.

Liability for Leaving Holes in a Road—Nuisance—Contributory Negligence.]—A dangerous hole left in a road is a public nuisance, for which a municipal council in whose care the road is, and which has partly formed such road, is indictable, and is therefore liable to a person for injuries sustained by his horse falling into such hole, though the horse were trespassing on the road, and the person were guilty of contributory negligence in permitting it to stray. *Smyth v. President, &c., of Shire of Kyneton*, 8 V.L.R. (L.,) 231.

Act No. 506, Sec. 418—Notice.]—*Semble, per Stawell, C.J.*, and *Holroyd, J.*, the notice to be given as to the existence of a dangerous hole is to be given by the council to the owner of the land on which it is situated. *Bisp v. Mayor of Collingwood*, 9 V.L.R. (L.,) 249; 5 A.L.T., 79.

Negligence—Act No. 506, Sec. 418—Dangerous Hole—Question for Court.]—M. brought an action against a municipal council for negligence, in allowing a dangerous hole near a highway to remain unfenced, into which M. fell and was injured. *Held* that it was for the Court to determine first whether the hole was near to or substantially adjoining the highway within the meaning of Sec. 418, before it went to the jury

as to its being dangerous. *Meury v. Mayor of Daylesford*, 9 V.L.R. (L.,) 123.

Dangerous Hole on Crown Land—Municipality not Liable to Enclose or Protect—Act No. 506, Sec. 418.]—*Bisp v. Mayor of Collingwood*, *ante* column 324.

IV. Offences Against the Various Acts.

Displacing Soil of Street—"Boroughs Statute" (No. 359,) Sec. 301—Continuation of and Width of Street.]—S. was summoned for displacing the soil of a street by sinking a shaft. It appeared that there was a formed street (V street) up to a certain point of a certain width, and on the plan it was marked as a street up to and further than the *locus in quo*; and certain Crown allotments had been granted opposite the shaft, having the unformed part as a boundary; but there was nothing otherwise to distinguish it from the surrounding land. *Held* that, in the absence of anything to the contrary, there was sufficient evidence to justify the justices in arriving at the conclusion that the street was of the same width all through, there being evidence that the street was of a certain width up to a certain point so as to let in that presumption, and case remitted, with an intimation that they might convict. *Drought v. Schonfeldt*, 5 A.J.R., 82.

[Compare Sec. 398 of Act No. 506 with Sec. 301 of Act No. 359.]

"Local Government Act 1874," Sec. 398—Removing Drift Sand from a Street.]—A person cannot be convicted of an offence under Sec. 398 of the "*Local Government Act* 1874" for removing sand which the force of the wind has caused to drift upon a street. *Regina v. Cowie, ex parte Clarke*, 8 V.L.R. (L.,) 203; 4 A.L.T., 36.

Displacing Soil of Land belonging to Borough—Question of Title.]—*Rowe v. Mayor of Ballarat*, *ante* column 747.

Disturbing Soil of a Street.]—*Koh-i-noor Mining Coy. v. Drought*, *ante* column 747.

Obstructing Person Employed to Remove Obstructions from a Road—Act No. 506, Sec. 511.]—*Ex parte Scott, in re Strutt*, *ante* column 747.

Interference with a Creek—Creek Managed as a Road not as a Watercourse—Act No. 506, Sec. 400.]—*Regina v. Mayor of Walhalla, ex parte O'Grady*, *ante* column 747.

Obstruction of Public Road—Act No. 506, Sec. 399.]—*Regina v. Foster, ex parte Molyneux*, *ante* column 747.

And *see*, for other cases, *post* under Offences (Statutory.)

LOTTERY.

Assisting in and Managing—Act No. 424, Secs. 2, 17.]—*See Covey Hing v. Kabat*, 4 A.J.R., 118; and *Regina v. Sturt*, 2 V.L.R. (L.,) 103. *Post* under Offences (Statutory.)

LUNATIC.

Statutes.]—
"*Lunacy Statute* 1867" (No. 309.)
"*Lunacy Statute Amendment Act* 1869" (No. 342.)
"*Lunacy Statute Amendment Act* 1878" (No. 628.)

I. Who is.

"Lunacy Statute 1867" (No. 309,) Sec. 3.]—A person suffering from *delirium tremens* comes within the definition of a lunatic in Sec. 3 of the "*Lunacy Statute* 1867." *Mayor of Daylesford v. Senior Constable of Daylesford*, 2 V.R. (L.,) 35; 2 A.J.R. 35.

Act No. 309, Secs. 60, 149.]—A lunatic permitted to reside with his parents under Sec. 60 of the Act is not a "lunatic patient" within Sec. 149 of the Act. *In re M'Gregor's Estate*, 4 V.L.R. (E.,) 1.

II. Powers and Disabilities of Lunatics.

Power to Contract — Contract of Marriage — Lucid Interval.]—If an alleged lunatic is found to have understood, or to have been capable of understanding the nature and consequences of any contract into which he has entered, and the reasons for or against entering into it, and to have been actuated by the same motives in entering into it, having the will as much under control as if he had been sane, the contract will be upheld. Contracts entered into by a person of unsound mind, but apparently of sound mind, and *not known* by the other contracting party to be insane, if executed and completed and if fair and *bonâ fide*, will not be held void; but the contract of marriage differs from other contracts in this respect, that the ignorance of the party marrying a lunatic as to his lunacy will not save such party from having the marriage declared void. In order to determine whether a particular contract of marriage or any other kind is void or not, the Court must endeavour to gauge the extent to which the mind is obscured and to ascertain whether the disease operates *quoad* that contract. In cases of permanent insanity the burden of proving a lucid interval rests with those who seek to establish it, and a lucid interval means a period in the course of a continuing disease during which its

influence on the mental faculties is either wholly suspended or so far suspended that the patient must be deemed legally sane with regard to the particular act under the Court's consideration. *In the Estate of Doull*, 7 V.L.R. (I. P. & M.,) 70.

Per Holroyd, J., (without expressly deciding the point) "I cannot see how, if the marriage were absolutely void, it could be thus confirmed," *i.e.*, by cohabitation on the part of a lunatic temporarily restored. *Ibid*, p. 85.

Insanity of a Partner—Effect of, on Agreements.]—*Gregory v. Welch*, 3 V.R. (E.,) 6; 3 A.J.R., 3; *Creswick v. Creswick*, 4 A.J.R., 23, 93. *Post under* PARTNERSHIP—Liabilities and Duties of Partners, *inter se*.

Service of Proceeding on Lunatic—Substituted Service.]—Where a defendant was lunatic and confined in an asylum, and it was admitted that service personally might have a dangerous, and perhaps fatal effect on the lunatic, the Court refused leave to effect substituted service on the superintendent of the asylum, and also refused to express any opinion that might influence the superintendent to allow personal service. *Kesterson v. Smith*, 1 W. & W. (L.,) 336.

Substituted Service of Proceedings in Equity Suit upon Lunatic Defendant.]—*See Allan v. Wilkie*, 1 V.L.R. (E.,) 6. *Post* under PRACTICE AND PLEADING—IN EQUITY—Service of Proceedings.

III. EXAMINATION, CONFINEMENT, AND DISCHARGE OF LUNATICS.

Act No. 309, Sec. 10—Expenses of Conveying to Lunatic Asylum.]—Rule *nisi* to prohibit magistrates from enforcing an order directing a distress warrant to be issued against a shire council for non-payment of an order certifying the amount to be paid for the examination and removal of a lunatic found within the shire. *Held* that the order must be enforced in the usual way, viz., that the parties against whom it is made must first be heard, and that proceedings on an order must not be *ex parte*. Rule absolute. *Regina v. Panton*, 6 W.W. & a'B. (L.,) 6.

Examination of Lunatic—Act No. 309, Sec. 10—Complaint Against Shire Council for Fees and Expenses.]—Order *nisi* for prohibition to restrain justices from enforcing an order on a complaint, whereby they ordered a shire to pay expenses for examining a lunatic, and for necessaries supplied to him. The grounds on which the prohibition was sought were:—(1) That the order was made *ex parte*, and (2) That the proceedings taken to enforce the order were improperly taken in the name of the Queen. Rule absolute without costs, and leave to amend refused. *Regina v. Rowe*, 1 V.R. (L.,) 83; 1 A.J.R., 79.

Expenses Incurred in Examination.]—A police constable may sue for the expenses incurred in the examination of a lunatic. *Mayor of Daylesford v. Senior-Constable of Daylesford*, 2 V.R. (L.,) 35; 2 A.J.R., 35.

Lunatic where "Found"—Who Liable for Expenses—No. 309, Sec. 10.]—The borough in which a lunatic is taken into custody, or in which an adjudication is made upon a lunatic, under the "*Lunacy Statute*," Sec. 10, is liable for the costs of the commitment. *Mayor of Beechworth v. Baker*, 2 A.J.R., 114.

Where a lunatic resided in a shire, and her husband went into a borough and informed a constable that his wife was insane, and it was arranged that she should be arrested before arriving in the borough, so as to throw the costs on the shire, but by mistake she reached the borough before arrest, and the justices committed her, and made an order for costs against the borough, *Held*, on appeal by the borough, that if Sec. 10 of the "*Lunacy Statute*" (No. 309) were to be read so that the order should be made against the borough in which the adjudication is made of the lunatic, the appellants were liable; and if the word "found" were to be read as discovered, apprehended, or taken into custody, they were still liable, and appeal dismissed. *Ibid.*

[Sec. 10 of the "*Lunacy Statute* 1867" is repealed so far as the power of justices to make orders upon the council of any shire or borough in which any lunatic is found for the expenses of his examination or any other expenses incurred in connection with such lunatic is concerned by Sec. 1 of the Act No. 628.]

Order for Discharge—"Lunacy Statute 1867," Sec. 73.]—Sec. 73 of the "*Lunacy Statute* (No. 309,) which provides for the bringing before a judge of a person in custody as a lunatic, and for the examination of such person before the judge, and for his discharge if the judge be satisfied that he is not insane, applies only to cases where the lunatic is confined at the instance of private persons, and not to the case of a committal to an asylum by justices for the public safety. *In re Roberts*, 4 A.J.R., 5.

Lunatic Confined under Informal Warrant — "Lunacy Statute 1867," Secs. 4, 7, 8, 73.]—On an application to discharge a lunatic from custody it appeared that he had been confined under a warrant in the form given by Sec. 4 of the "*Lunacy Statute*" (No. 309,) which related to dangerous lunatics, and not in the form prescribed by Sec. 8 for the class of lunatics mentioned in Sec. 7 of the Act: *Held* that the warrant being merely informal, not insufficient, and there being evidence that the alleged lunatic was in fact insane, he should be remanded to allow of the warrant being amended; and that if his discharge were desired a proper application should be made under Sec. 73 of the Act. *Ex parte Wilson*, 1 A.J.R., 100.

IV. COMMISSIONS DE LUNATICO INQUIRENDO.

(*a*) *Grant of Commission and Inquiry by Master-in-Lunacy.*

Act No. 309, Sec. 74—Infant Petitioner.]—An infant cannot, by his next friend, petition for a commission *de lunatico inquirendo*. The commission can only be granted on the application of an adult. It was subsequently granted on

the petition of the next friend in his own name. *In re Murphy*, 1 W. & W. (E.,) 147.

"Lunacy Statute" (No. 309,) Sec. 74—Petition de Lunatico Inquirsndo—Married Woman.]—A petition *de lunatico inquirendo* as to her husband was presented by a married woman. *Held* that petition must be amended and might be amended at hearing by inserting a next friend, and then petition granted. *In re Fulker*, 3 V.L.R. (E.,) 233.

Petition by Married Woman—Next Friend.]—Where a wife petitions for a commission of inquiry as to the lunacy of her husband, the petition must be presented by a next friend. *In re Feehan*, 6 V.L.R. (E.,) 237.

Application for Commission—Consent of Lunatic.]—Upon an application for a commission *de lunatico inquirendo*, the Court will not act upon the concurrence of the alleged lunatic in the absence of evidence as to his capacity. *In re Bull*, 6 V.L.R. (E.,) 70; 1 A.L.T., 144.

Commission in the Nature of a Writ de Lunatico Inquirendo—Motion for, by Creditor.]—A judgment creditor of an alleged lunatic moved, on notice to the lunatic's wife, and with the co-operation of the lunatic's other creditors, for a commission *de lunatico*, with a view of having the estate, which was in fact insolvent, administered by the Court for the benefit of all the creditors. Commission ordered on condition of applicant taking it at his own expense. *Per Molesworth, J.*—"If any particular creditor thought fit to issue execution, I do not know that a commission, having issued, would authorise the Court to protect the property from that creditor; and, even when the property is given into the hands of the committee, the Court cannot protect it from an execution." *In re Grant*, 1 W. & W. (E.,) 18.

Commission Refused to Creditor.]—A commission in lunacy is not a method for creditors procuring the administration of estates, their ordinary remedies not being interrupted. An application by a creditor for an inquiry as to the lunacy of his debtor was, therefore refused. *In re Burns*, 2 V.L.R. (E.,) 136.

Order not Prosecuted—Discharge.]—An order for an inquiry *de lunatico* having been made, but not further prosecuted by the petitioner, the proper course to obtain a discharge is to move upon notice to the petitioner to discharge the order with costs. *In re Feehan*, 6 V.L.R. (E.,) 237.

"Lunacy Statute" (No. 309,) Sec. 149—Inquiry by Master-in-Lunacy — Doctor's Affidavit — Appointment of Guardian.]—Motion under Sec. 149 for inquiry into lunacy of R., and for appointment of R.'s wife as guardian. *Per Molesworth, J.* The doctor's affidavit should state the probable duration of malady. On the application being renewed under a further affidavit stating that it was likely to be permanent, *Held, per Stephen, J.*, that the affidavit should give reasons for such an opinion. The Master having reported as to lunacy the Court referred it to the Master to appoint a guardian. *In re Reid*, 7 V.L.R. (E.,) 70; 3 A.L.T., 18.

"Lunacy Statute 1867" (No. 309,) Secs. 60, 149—Lunatic Patient—Infant.]—An infant lunatic permitted to reside with his parents under No. 309 Sec. 60, is not a "lunatic patient" within the meaning of Sec. 149; and the provisions of the latter section do not apply to the case of a lunatic who is also an infant. *In re M'Gregor's Estates*, 4 V.L.R. (E.,) 1.

(*b*) *Supersedeas of Commission.*

Act No. 309, Sec. 94—Sequestration by Lunatic after his Recovery—Conflict between Committee and Assignee.]—L. was found a lunatic, and X. was appointed his committee, the estate of the lunatic being duly vested in X. L. recovered, and voluntarily sequestrated his estate, G. being appointed official assignee. The assignee attached all the property in X.'s hands, and a creditor, B., brought an action against X. as to some mining shares. On application for advice to the Court, the Court intimated it would grant an order of *supersedeas* on the application of the *quondam* lunatic if G. and X. concurred. On motion for a *supersedeas* of the commission in lunacy, the Court intimated that it would not recognise G.'s position at all, but required a further affidavit as to the nature of the action *B. v. X.* On renewed motion upon an affidavit showing that the action was in respect of certain mining shares found among L.'s property, the Court granted an order of *supersedeas*, the scrip to be handed over to L. on X. receiving a proper indemity, L. to be at liberty to carry on the defence in the action *B. v. X.* as he should be advised. *In re Levey*, 3 A.J.R., 90, 100, 101.

Supersedeas of Commission — Necessary Affidavits.]—In an application for a *supersedeas* of commission in a case where lunatic had recovered, *Held* that an affidavit as to recovery was necessary from one of the medical gentlemen who had pronounced him insane, and that a certificate to that effect was not sufficient. *In re M'Closkey*, 3 A.J.R., 91, 94.

V. Guardians and Committees.

Appointment of Guardians—Female.]—On an application for the appointment of the wife of a lunatic as his guardian, the Court intimated a disinclination to appoint a female as guardian if a male were procurable, but left it for the Master to decide by a reference to him to appoint a guardian. *In re Morgan*, 3 A.J.R., 94.

And *see* S.P., *In re Reid*, 7 V.L.R. (E.,) 70; 3 A.L.T., 18.

Appointmsnt of Guardian—Costs.]—Where the Court made an order under No. 309 ("*Lunacy Statute* 1867") Sec. 149, for the appointment of a guardian of the person and estate of a lunatic patient, and considerable costs had been incurred and paid by the guardian under the order for the examination of the lunatic, he was thereby also permitted to retain such costs, and the costs of the application for his appointment. *In re Gordon*, 4 V.L.R. (E.,) 235.

Costs of Guardian.]—*Semble*, a reference to the Master to tax costs incurred by the guardian in lunacy proceedings is necessary. *In re Palmer*, 3 A.J.R., 17.

Evidence of Recovery—Discharge of Guardian.]—A letter from the medical officer of the asylum in which a lunatic is confined to the guardian, that the lunatic had recovered, and the fact of his subsequent discharge from the asylum, do not form sufficient evidence of his recovery to discharge the guardian. There should be proper medical testimony of his condition of mind. *In re Chambers*, 6 V.L.R. (E.,) 107; 2 A.L.T., 17.

Discharge of Guardian—Supersedeas.]—Where a guardian has been appointed under Sec. 149 of the "*Lunacy Statute*" (No. 309,) there should be some proceeding analogous to a *supersedeas* to discharge him, on the recovery of the lunatic. *Ibid.*

Powers of Guardian as to Management of Estate.]—*See* next sub-heading.

Appointment of Committee—Lunatic not so Found by Inquisition.]—The Court will not appoint a committee of a lunatic not so found by inquisition, or make any order affecting such lunatic's property, however small it may be, without a commission. *In re Arnott*, 2 W.W. & A'B. (E.,) 11.

Appointment of New Committee—Executor of Will under which Lunatic is Entitled to Property.]—Where a person had obtained an order appointing him committee of the person and estate of a lunatic, but had failed to find the neccssary sureties, the Court refused to appoint the executor of a will under which the lunatic was entitled to property a committee in place of the person who had obtained the order, without a reference to the Master-in-Equity. *In re Marris*, 10 V.L.R. (E.,) 94; 6 A.L.T., 3.

Appointment of New Committee—Costs of Former Committee.]—The costs incurred by a deceased committee of a lunatic in having him declared a lunatic and appointing himself as committee will not be allowed on an application for the appointment of a new committee, although the Master-in-Equity has reported that they should be paid. Such costs must be moved for by the personal representative of the deceased committee. *Ibid.*

Committee—Appointment of Substitute during Temporary Absence of.]—A reference to the Master ordered as to a proper person to be appointed committee, and whether such appointment should be temporary or permanent. *In re Thomas M'Carthy*, 3 A.J.R., 105.

Committee Administrator of Deceased Lunatic—Passing Accounts—Administration Bond.]—On the death of a lunatic his committee obtained administration *durante minore ætate* of the children. Motion for leave to pass accounts and for leave to deal as administrator with money in his hands as committee, and to have the bond vacated. Order refused as to vacating committee's bond. Granted as to other relief sought. *In re James Bull*, 7 V.L.R. (E.,) 11.

Remuneration of Committee — Act No. 309, Sec. 180.]—The remuneration, provided for in Sec. 180, should depend upon the amount of trouble entailed upon the committee, and not upon the amount of estate received, and may be calculated in the form of percentage. *In re Teece*, 5 A.J.R., 97.

Provision for Costs of Committee — Death of Lunatic.]—*See In re Anderson infra.*

Powers of Committee in Reference to Lunatic's Estate.]—*See* next sub-heading.

VI. Administration and Management of Lunatic's Estate.

(a) *Generally.*

Investment of Property—Practice.]—A lunatic's committee applied for the investment of his estate in Government debentures or real securities. *Held* that the committee might pay the money into the Master's hands, and, with his approbation, so invest them; the securities to be in the name of the committee as such, and to be held by the Master. *In re Anderson*, 6 V.L.R. (E.,) 241; 2 A.L.T., 43.

Death of Lunatic — Disposition of Estate.]—Where a lunatic died, the Court ordered the committee to pass his final accounts, and pay the balance in his hands to the executors; and ordered moneys of his estate in Court to be paid out to the executors, after providing for the costs of the committee. *In re Anderson*, 6 V.L.R. (E.,) 241.

Summary Proceedings for Protection of Lunatic's Property—Act No. 309, Sec. 144—Jurisdiction of Court.]—*Molesworth, J.* (in Chambers.) A complaint by the Master-in-Lunacy, under Sec. 144 of the "*Lunacy Statute*," against a person for wrongfully holding and detaining and converting to his own use property of a lunatic, should be in writing and signed by the Master. Under this section the jurisdiction of the Court is not restricted to simple cases only. *In re Rose*, 1 A.L.T., 148.

Powers of Guardian—Continuing Lunatic's Business—"Lunacy Statute" (No. 309,) Sec. 149.]—A guardian appointed under the "*Lunacy Statute*," Sec. 149, has the same power as a committee under the previous system, and *semble*, the committee not having had the power to carry on the lunatic's business, a guardian has not that power. *In re Bayldon*, 2 V.L.R. (E.,) 70.

Powers of Committee — Continuing Lunatic's Business.]—The Court will not make a general order for carrying on the business of a lunatic by his committee. *In re Bull*, 6 V.L.R. (E.,) 70. Following *In re Bayldon, supra.*

Lunatic Partner—Termination or Continuance of Business—"Lunacy Statute" (No. 309,) Secs. 98, 164, 167.]—The Master had made a report recommending that a partnership business, in which lunatic was a partner with two others,

should be carried on upon terms. Upon petition for that purpose, *Held* that it is doubtful whether the Court has a jurisdiction to make such an order independent of the Statute, and the spirit of the Statute seems to point to a winding-up rather than a continuation. Sec. 98 refers only to small properties, and in Secs. 164 and 167 there are provisions for dissolving and disposing of business without any alternative as to Court directing a continuance; that if Court has jurisdiction, there are grave doubts, except in the plainest cases, of the discretion of continuing business. Petition refused. *In re Joseph Wilkie*, 3 A.J.R., 12.

When Partner is Insane—"Lunacy Statute" (No. 309,) Sec. 164.]—The Court has no power under the "*Lunacy Statute*," Sec. 164, to dissolve a partnership upon an application on behalf of a lunatic partner, but only upon the application of the other partners. *In re Anderson*, 4 V.L.R. (E.,) 103.

The Court made an order for dissolution under Sec. 164, upon the application of the same partners, with the consent of the committee of the lunatic partner. *In re Anderson*, 5 V.L.R. (E.,) 133.

(*b*) *Sales and Mortgages of Lunatic's Property.*

Sale of Lunatic's Interest in a Contract for Purchase of Land.]—On a reference under Sec. 149 of the "*Lunacy Statute*" (No. 309,) the Master had reported P., in confinement as a lunatic, to be incapable of managing himself or his affairs, and a guardian was appointed under that section. Before P. was confined he had purchased land at auction, upon which he had paid a cash deposit of one-third of the purchase-money, under conditions of sale providing for forfeiture of the deposit in case of non-completion. There were no funds of the lunatic available for completion, and the vendors threatened to forfeit. Under these circumstances an order was made, upon affidavit of the facts, that the guardian might, with the approbation of the Master, sell for cash P.'s interest in the land. *In re Palmer*, 2 V.R. (E.,) 91.

Conveyance of Lunatic's Estate.]—Where a lunatic and his partner had entered into a contract for sale of real estate, and the partner upon dissolution became entitled to the balance of the purchase money, an order was made under the "*Lunacy Statute*" (No. 309,) Sec. 163, directing the committee of the lunatic to concur in the conveyance to the purchasers of the property, on payment to the partner of the balance of the purchase money due under the contract. *In re Wilkie*, 2 V.R. (E.,) 144.

Conveyance Under Contract Made Before Lunacy—"Lunacy Statute" (No. 309,) Secs. 143, 163—Necessary Affidavits.]—A lunatic before his lunacy contracted to sell some real estate. Before the last bill securing part of the purchase money was paid, the vendor became a lunatic; no inquisition was made, or committee appointed. Petition under Secs. 143, 163, of Act No. 309 for an order for Master-in-Lunacy to convey to the purchaser. The Court intimated that following affidavits were necessary:—That contract had never been disputed by lunatic T., or by any one assuming to represent him, that money due on bills had been paid, and that T. was capable when he endorsed them; and as to service, an affidavit should be made by the doctor of the asylum in which T. was, as to whether he showed notice of petition (which had been served on him) to T., and how far T. was capable of understanding it, and that Master-in-Lunacy should be served with notice. On these materials being furnished, Court made the order. *In re Tate*, 3 V.L.R. (E.,) 109.

Sale of Lunatic's Property—Act. No. 309, Secs. 115, 143, 154—Act No. 342, Sec. 3—Objection by Purchaser as to Validity of Proceedings.]—A guardian of the person and estate of a lunatic was appointed, and the Master-in-Lunacy made a report under Sec. 115 of Act No. 309, recommending the sale of the lunatic's property, and application of the proceeds in payment of the debts. This report was confirmed by the Court, and the lands were sold to B. B. made an application to be discharged from the sale, on the ground of the invalidity of the proceedings under which the order was obtained. *Held* that the Master was not, in a matter of this nature, entitled to proffer advice under Sec. 115, although he might have done so under Act No. 342, Sec. 3, that under Sec. 3 of Act No. 342, the Master is enabled to sell the real estate, but he cannot convey, and must resort to the Court under Sec. 154 for an order to convey, when the combined effect of Secs. 143 and 154, would enable him to convey; but that the irregularity of the proceedings, viz., the proffer of advice under Sec. 115 of Act No. 309, instead of under Sec. 3 of Act No. 342, was not an objection which a purchaser could take, and application refused. *In re Heller*, 3 A.J.R., 47.

"Lunacy Statute" (No. 309,) Secs. 143, 145, 154, 155—Act No. 342, Sec. 3—Powers of Master—Sale of Land.]—Under Act No. 342, Sec. 3, the Master has only power to sell for payment of debts, and the Master has no power to sell under that section where property is worth more than double existing liabilities. The decision in *Re Heller* means that the difficulty of conveyance would induce Master to apply to Court under Sec. 154 of No. 309 rather than sell under Act 342, Sec. 3, and it does not mean that if Master sells himself he can apply to Court to remove the difficulty. A motion under No. 309, Sec. 154, for an order authorising Master to sell lands of lunatic and convey to purchasers, and apply proceeds of sale, being made, *Ordered* as sought. *In re Smyth*, 3 V.L.R. (E.,) 31.

Sale of Lunatic's Property—Motion for, under Sec. 154 of the "Lunacy Statute" 1867.]—*Per Molesworth, J.* (in Chambers.) The Court looks with hesitation at the jurisdiction to sell the real estate of a lunatic for payment of his debts, &c., because it goes to establish a number of debts as good which are debatable. Where, however, the lunatic's wife concurred, the Court made an order for sale, the Master to select a competent part of the property. *In re Hughes*, 1 A.L.T., 200.

Powers of Master-in-Lunacy—Act No. 309, Sec. 115.]—The power in Sec. 115 is limited to cases

in which the Master thinks that the Court, if applied to, would direct a reference to him (*e.g.*, the case of an allowance to the lunatic's family), and does not extend to the case of a sale of the lunatic's real estate to pay his debts. *In re Heller*, 3 A.J.R., 47; for facts *see* S.C., *ante column* 872.

The Master may, under the "*Lunacy Statute* 1867," Sec. 115, without an order of reference, determine as to the sale of shares and personal chattels of a lunatic, and as to the payment of debts and claims against his estate. An order was, however, made, on motion of the lunatic's committee, referring it to the Master to inquire whether it would be for the benefit of the lunatic to complete certain contracts of sale and purchase into which the lunatic had entered, and as to the sale of real estate of the lunatic, and as to the remuneration to be allowed to the committee. *In re Anderson*, 4 V.L.R. (E.,) 103.

"Lunacy Statute" (No. 309,) Secs. 173, 174, 149—Power of Guardian to Exercise Lunatic's Power of Sale as Mortgagee.] — An application by guardian of estate and person of a lunatic for authority to exercise a power of sale which the lunatic possessed as mortgagee. *Held* that the order for such a power of sale to be exercised by a committee might be made by the Court under Secs. 173, 174, but that Sec. 149 only gives to guardians the powers which committees had previously to the Act No. 309, and that before the Act No. 309 committees had no such powers. Application refused. *In re Palmer*, 3 A.J.R., 17.

Application by Guardian to Sell Lunatic's Property should be made to the Master—Master's Report.]—An application by the guardian of a lunatic to sell his property should not be made to the Court but to the Master-in-Lunacy, in whose discretion it lies to report whether such sale will be beneficial or not. The Master's report, when he reports that it would be beneficial to sell specific portions of the real estate to pay debts, should state their value and the amount of the debts. *In re Chambers*, 6 V.L.R. (E.,) 107; 1 A.L.T., 180, 190.

Power to Consent to Mortgage, when Committee may Exercise—"Lunacy Statute 1867" (No. 309,) Secs. 143, 173, 174.]—Land was conveyed by deed to such uses as E.C. should, with the consent of husband, R.C., appoint. R.C. became a lunatic—and no committee had been appointed. E.C. was desirous of mortgaging the land. Upon motion for an order authorising the Master-in-Lunacy to give his consent, *Held* that so far as the beneficial interest of the lunatic was concerned the application should be made by the committee under Sec. 173 or under Sec. 143 by the Master; that by Sec. 174 the committee may exercise a power vested in a lunatic where he has no beneficial interest, but that in cases where lunatic had no beneficial interest the Master could not be substituted for the committee by Sec. 143, for that section does not apply to a case in which the consent of a lunatic is required for the protection of rights of third parties. Motion refused. *In re Cleland*, 6 W.W. & A'B. (E.,) 128.

Mortgage of Lunatic's Property—Power of Court—"Lunacy Statute" (No. 309,) Sec. 154—"Lunacy Amendment Act" (No. 342.)]—The Court has no jurisdiction to make an order for the mortgaging of the lands of a patient in a lunatic asylum, not being a lunatic so found by inquisition, or report of the Master-in-Lunacy. *In re M'Mullen*, 4 V.L.R. (E.,) 198.

Maintenance of Lunatic—Act No. 309, Sec. 148.]—The Master-in-Lunacy sued on a contract "made pursuant to the provisions" of the Act for the maintenance of a lunatic in the Kew Asylum, by which defendant agreed to pay certain amounts as for maintenance. *Held* that the Court must infer that the contract was made in the only form in which it could be good, *i.e.*, under seal, and that under Sec. 148 such an action was maintainable. *Wilkinson v. Watson*, 3 V.L.R. (L.,) 239.

Allowance to Wife—Act No. 342, Sec. 3—Discretion of Master as to Amount.]—Where the Master made an allowance for maintenance to the wife of a lunatic out of the income of his estate, the Court refused to interfere with his discretion as to the amount. *In re Bryce*, 4 V.L.R. (E.,) 111.

Payment to Wife Refused.]—Where the Master had in his hand a sum of money, part of the estate of a lunatic, so found, the Court refused to direct him to invest such sum on deposit in a bank or upon personal security, but ordered its investment on real or public security. *Ibid.*

Act No. 309, Secs. 101, 149—Percentage to Crown.]—N. was appointed a guardian of the person and estate of one who had been found a lunatic. *Held*, upon a special case, that N. was liable under Secs. 101 and 149 to pay a percentage of 5 per cent. to the Crown for all the moneys received by him. *Niven v. The Queen*, 3 V.R. (L.,) 33; 3 A.J.R., 53.

Commission not Remitted on Insolvency of Estate—"Lunacy Statute" (No. 309,) Sec. 105.]—The Court will refuse to remit the commission upon the estate of a recovered lunatic on the ground that it is hopelessly insolvent, when the estate is not under administration by the Court. *In re Levey*, 4 A.J.R., 6.

Commission—When the Crown is Entitled to—"Lunacy Statute" (No. 309,) Secs. 101, 180—Funds Lying in Bank which Committee did not get Possession of, but as to which he Served Notice not to Pay.]—T. became lunatic, and E. became his committee. T. had a large sum of money lying at deposit in a bank, as to which E. served notice not to pay to T. T. recovered, and an order of *supersedeas* was obtained, and a report was made, in accordance with the order, directing the Master to report as to the costs and liabilities incurred by E. on behalf of T. Upon exception to report, *Held* that this sum in the bank was not "collected by," or "come into the control" of E. within the meaning of Sec. 101, and that neither the Crown nor E. were entitled to commission on that amount. *In re Teece*, 5 A.J.R., 97, 98.

MAGISTRATE.

Jurisdiction under "Marriage and Matrimonial Causes Statute" (No. 268.)]—A police magistrate has power to do all that two justices may do under the "*Marriage and Matrimonial Causes Statute*," although there is no express provision in any Act authorising the appointment of magistrates, there being no necessity for such a provision, since it is a power inherent in all Governments to provide for the administration of the country. *Ex parte Hargreaves*, 1 A.J.R., 23.

Infraction of Mining Bye-Laws—Police Magistrate may Entertain Complaint for—Act No. 291, Sec. 237.]—*Regina v. Pohlman, ex parte Nickless*, 5 W.W. & A'B. (L.,) 31, *post* under MINING—Mining Boards, Officers, and Bye-Laws.

And *see* JUSTICE OF THE PEACE—LICENSING ACTS.

MAINTENANCE.

See HUSBAND AND WIFE—INFANT—LUNATIC—TRUST AND TRUSTEE—WILL.

Of Suits.]—*See* CHAMPERTY.

MAINTENANCE ORDERS.

See HUSBAND AND WIFE.

MALICIOUS ARREST AND PROSECUTION.

I. REASONABLE AND PROBABLE CAUSE.

Where a person went to a magistrate and told him an untrue story, upon which he got a warrant to arrest another for an offence which there was no pretence for charging him with, *Held* that, as the story was false, it was to be taken as maliciously untrue until it was shown not to be so. *Hopkins v. Brophy*, 1 W. & W. (L.,) 167.

Evidence of.]—*Per Barry, J.*—The real question is not what the defendant believed, but whether the facts, of which he was aware, presented reasonable grounds for believing that a felony had been committed. *Cornwall v. Martin*, N.C., 57.

How Proved—Depositions in Court Below.]—If the plaintiff in an action for malicious prosecution can prove the absence of reasonable and probable cause without putting in evidence the depositions taken in the Court below, he is at liberty to do so. *Dines v. Farringdon*, 1 V.R. (L.,) 158; 1 A.J.R., 135.

Evidence—Finding of County Court Judge.]—In an action before a County Court Judge there was evidence both ways as to the existence of reasonable and probable cause, and the County Court Judge found that there was not reasonable and probable cause. On appeal, *Held* that where there was evidence both ways, the Court would not interfere with the finding of the judge, as that would be to interfere, not with the province of the judge, but with that of the jury. *Daly v. Hughes*, 2 A.J.R., 66.

Statement of Constable as to Thief—Belief of Prosecutor.]—P. was coachman in W.'s employ, and it was his duty to take wood from a certain heap, but he was warned that he was not to take it for his own use. P. missed wood from the heap, and employed a detective to watch, who saw P. take wood, carry it some distance, and throw it over a fence into a paddock, in which his own house was; the constable then charged P. with it in W.'s presence, P. remaining silent, and W. told the constable to take out a summons against P. P. afterwards attempted to explain, but W. replied it was too late. W. gave P. a week's notice, and after the case was tried, which resulted in a dismissal, W. congratulated P. on the termination of it. P. sued W. for a malicious prosecution, and recovered a verdict of £30. On rule *nisi* for a nonsuit, *Held* that according to the constable's statement there was evidence of felony to go to a criminal jury against P.; that there was no evidence to support the finding of the jury on the only issue left to them, viz., as to whether W. believed the constable's statement; that there was nothing to show that W. did not believe such statement. *Per Barry, J.*, where there are no facts in dispute, and there are no doubtful or contested inferences of fact "reasonable and probable cause" is a pure question of law for the judge, whose duty it is to decide whether the facts so proved amount to "reasonable and probable cause," or not. In the former case he sends the case to a jury with instruction as to the additional ingredient of malice, in the latter he nonsuits. Rule absolute. *Waugh v. Palmer*, 6 W.W. & A'B. (L.,) 91.

How far Evidence for Defendant to be Considered in Entering a Nonsuit.]—B. sued S. in a declaration containing a count for malicious prosecution and a count for false imprisonment. S. pleaded justification. The jury gave a verdict for plaintiff. On rule *nisi* for a nonsuit, *Held* that inasmuch as it appeared that S. had purchased a piece of alpaca from which a certain part had been cut off, and on the same day S. discovered in the drawer of a room occupied by B. two pieces of exactly the same material and size as that she missed, there was from these facts sufficient evidence of the reasonable and probable cause for the prosecution and arrest; that although the facts did not appear wholly from the plaintiff's evideuce yet the evidence for the defendant which fully established them might be used for the purpose of entering a nonsuit. Rule absolute. *Burns v. Slater*, 5 A.J.R., 168.

Malics — Questions for Court and Jury.]—Malice is as essential as the want of reasonable and probable cause. In an action for

malicious prosecution the evidence showed an absence of reasonable and probable cause from which the jury were at liberty to draw an inference of malice. *Held* that such an inference might be rebutted. Rule absolute for new trial. *Longden v. Weigall*, 3 V.L.R. (L.,) 266.

Where the jury in the new trial found there was malice and returned a verdict for plaintiff, *Held* that the question of malice was for the jury, and the question of reasonable and probable cause was for the judge; and where two juries have found that there was malice, the Court, though entertaining a different opinion, would not interfere with the verdict. But the Court, being of opinion that the circumstances showed reasonable and probable cause for setting the law in motion, made the rule absolute for a nonsuit. *Ibid.*

Evidence of Reasonable and Probable Cause—Inquiry into Criminal Charge.]—Where a charge of larceny is laid against a person, and the things stolen are found in his possession, the *onus* is cast upon him of explaining how he became possessed of them. If he gives a reasonable explanation, inquiry into the truth of that explanation must be made before proceeding further with the criminal charge, and the absence of such inquiry is sufficient evidence of want of reasonable and probable cause. *Jenner v. Harbison*, 5 V.L.R. (L.,) 111.

What is.]—R. was owner of a yacht lying in Hobson's Bay, and found her one morning (28th April) scuttled. Two persons told R. that they had seen the plaintiffs put off in a boat to the yacht, on the night of 27th April, with an augur, and remain on board a quarter of an hour. A constable, in whose presence the story was told, advised that a warrant should be applied for, and signed the charge-sheet as prosecutor. *Held*, on appeal from County Court, that the information given to the defendant R. was extremely probable and consistent, and afforded him sufficient, reasonable, and probable cause for setting the law in motion. Appeal allowed. Nonsuit to be entered. *Robbins v. Davis*, 5 V.L.R. (L.,) 163; 1 A.L.T., 4.

What is—Laying a Charge before Steam Navigation Board.]—A ship-master charged a second engineer before the board with incompetence and negligence while on his watch in allowing the condensers to get hot through not paying attention to the injection cocks. There was not sufficient evidence to prove incompetency, but the charge of negligence was proved. The jury found for the plaintiff on the count for malicious prosecution. *Held* that the proof of the charge of negligence was not sufficient evidence of reasonable and probable cause for instituting the charge of incompetency, and verdict left undisturbed. *Tait v. Snewin*, 5 V.L.R. (L.,) 374; 1 A.L.T., 58.

See also S.C. *post column* 881.

Prosecution for Embezzlement—Secretary of Shire Council.]—D. charged R., the secretary of a shire council, with embezzlement, and his reason for so doing was that a Government auditor had discovered a deficiency in R.'s accounts, and sufficient opportunity had been offered to R. to test the auditor's accounts, and to offer an explanation, of which he had not availed himself. In an action by R. against D. for malicious prosecution, *Held* that D., who was president of the shire, had reasonable and probable cause for the prosecution. *Rippon v. Dennis*, 6 V.L.R. (L.,) 81; 1 A.L.T., 164.

Information Obtained at Second-hand.]—Plaintiff and defendant were owners of separate parcels of land on which sheep were depastured. At the shearing, which took place in the same building, some of the defendant's fleeces were missing, and H., a person living in the neighbourhood, told defendant that he had been informed by a shearer that certain fleeces claimed by the plaintiff were shorn from sheep with defendant's brand. Defendant saw plaintiff and asked for an explanation, which was not given. *Held* that defendant had reasonable and probable cause for setting the law in motion against plaintiff, and that H. being a credible person it was not necessary for the defendant to communicate directly with the shearer. *Turner v. Wright*, 6 V.L.R. (L.,) 273.

What is.]—B. sold to P. several horses, and a contract of letting and hiring was then entered into by which B. was to have the use of the horses, but was not to take them off his farm. B. took the horses off his farm, offered them for sale, and took them into New South Wales and there again offered them for sale. *Held* that these facts afforded reasonable and probable cause for P.'s instituting a prosecution for larceny as a bailee against B. *Playford v. Brown*, 6 V.L.R. (L.,) 467; 2 A.L.T., 101.

Direction of Judge.]—McK. and B., horse dealers, employed M. as foreman. While in their employ a friend asked M. to sell him an old saddle, the property of the firm, which M. did and accepted a watch and chain as security. He informed the firm's bookkeeper of the transaction, and subsequently McK. reproved him for lending the property of the firm; but no mention was made of the receipt of the watch. M. afterwards purchased a horse for one R., at his request, for £4 10s. R. objected to the horse, and M. agreed to keep it himself, and subsequently sold it at a loss of 15s. He informed the book-keeper at the time of the sale that the horse must be put down to him, and tendered the amount of £4 10s. in payment for it after his discharge, but the book-keeper would not accept the money. McK. and B., after M.'s discharge, prosecuted him on two warrants for stealing the saddle and embezzling the £3 15s., the difference between £4 10s. and 15s. The cases were heard at the Police Court, and dismissed. M. then sued for malicious prosecution, and the defence was that M. had no authority to lend saddles of the firm to other than customers without authority; and that he had been strictly forbidden to buy horses at the sale yards on his own account, and that if he did he should at once have entered the transaction in a book given him for the purpose. A verdict

was given for M. on both counts. A rule *nisi* for a new trial was granted on the ground that the jury should have been directed to find for the defendants on the first count; and that the judge who directed the jury to say whether the defendants, in instituting the prosecution, acted on a belief that the facts showed reasonable and probable cause for the prosecution was wrong in his direction, and that if reasonable and probable cause existed, and was known to the defendants, it did not matter whether they acted on that knowledge or from malice alone. *Held* that the judge was right in his direction, and rule discharged. *Mansergh v. McKersie*, 1 A.J.R., 114.

Questions for Court and Jury—Onus Probandi.] —*Per Higinbotham, J.*—The question of reasonable and probable cause in an action for malicious prosecution is a question purely of law, to be determined by the Court only where the facts present to the defendant's mind when he instituted the proceedings are simple and undisputed, and the inference to be drawn from such facts are clear and not doubtful. Whenever the facts, from which reasonable and probable cause is to be deduced, are complicated, or disputed, or it is doubtful whether the defendant believed the facts, it is the duty of the Judge, before he decides the law, to take the opinion of the jury upon the knowledge and belief of the defendant as a question of fact; or he may expressly tell the jury that reasonable and probable cause exists, or does not exist, according as they find that the defendant had, or had not, knowledge or belief in the facts upon which he relies as a justification. The defendant must both have a knowledge of, and a belief of the sufficiency of facts justifying a prosecution, and it lies in the plaintiff to prove the absence of such knowledge or belief. *Williamson v. M'Ravey*, 6 V.L.R. (L.,) 487; 2 A.L.T., 102.

Charge of Assault—Belief—Misdirection.]—A. charged B. with an assault and the charge was dismissed. B. sued A. for malicious prosecution, and the County Court Judge omitted to state to the jury what an assault is as a matter of law, and told the jury that A. must know whether he had been assaulted. *Held* (*dissentiente Higinbotham, J.*) that it was a misdirection, that the Judge should have stated what constituted an assault, and so have afforded the jury an opportunity of applying the evidence before them to the offence complained of, and so deciding whether the offence had been committed, or whether A. had reasonable and probable grounds for his belief that it had been committed. *Mitchell v. Bamford*, 7 V.L.R. (L.,) 96; 2 A.L.T., 127.

How Judge Should Direct Jury.]—In an action for malicious prosecution, the Judge must not merely tell the jury what is the law on the subject, but must also explain to them how the law applies to the facts of the particular case before them, and that if they should find one way there would be evidence of reasonable cause, but if the other way, there would not. If he merely tell them the law, the verdict may be set aside for non-direction. *Lyon v. Browne*, 8 V.L.R. (L.,) 247.

Where Malicious Prosecution Begins and False Imprisonment Ends.]—L., a servant in C.'s employ, was sent upstairs into C.'s room to get a handkerchief, and shortly afterwards a brooch was missed from the room. C. sent for a detective, and gave L. into custody. On the way to the watch-house, L. had a conversation with C., in which she said, "If you look in the wardrobe you'll find the brooch." L. sued C. for malicious prosecution as a first count, and false imprisonment as a second. The Judge told the jury that in the second count they need not regard the above-mentioned conversation. The jury returned a verdict for defendant on the first count, and for plaintiff, with damages, on the second. *Held*, on rule *nisi* for a new trial, that the conversation was properly withdrawn from the jury on the second count, as the false imprisonment commenced at the house, and this conversation, occurring afterwards, could not affect the question of reasonable and probable cause. *Langan v. Clarke*, 6 W.W. & A'B. (L.,) 252; N.C., 66.

II. Other Points.

Against whom Action may be Brought.]—An incorporated company is capable of such malice as is necessary to sustain an action for malicious prosecution, and accordingly an action will lie against such a company. *Youngsdale v. Keogh*, 5 W.W. & A'B. (L.,) 197.

Criminal Proceedings Instituted by Agent—Liability of Principal.]—L. was manager of a company of which the defendants were directors. At his resignation, a difficulty occurred as to the giving up of his books, and the defendants instructed a solicitor to take steps for the recovery of the books. L. was, on the advice of counsel, charged with stealing the books, S., one of the defendants, expressing his dissent from the proceedings. The charge against L. was dismissed. L. sued the defendants for malicious prosecution, and recovered a verdict of £125, a verdict being returned in favour of S. *Held*, on rule *nisi* for a new trial, that, as the defendants (excepting S.) had set the law in motion, they were answerable, even though the subsequent steps had been taken under the advice of counsel; that they might have protested, as S. did, against criminal proceedings being taken; and that it was no defence for them to allege that their resolutions and instructions only contemplated civil proceedings, and not criminal. Rule refused. *Lennox v. Langdon*, 3 A.J.R., 25.

Conspiracy to Depreciate Value of Company's Shares—Atcion against the Company.]—An information was, at the instance of the directors of a mining company, laid against T. before a J.P. for conspiracy to depreciate the value of the shares of the company. T. was committed for trial, but the Crown refused to file an information against T. T. sued the company for the malicious prosecution. *Held* that the object of spreading the reports by which value of the shares was depreciated was an object which affected the shareholders merely and not the company as distinct from the shareholders, and that the institution of proceedings by the directors in respect of an injury to the share-

holders was outside the scope of their authority, for which they were individually liable and not the company. Rule absolute for a nonsuit. *Thurling v. North Cornish Coy.*, 3 V.R. (L.,) 236; 3 A.J.R., 113.

Evidence of Termination of Prosecution in Plaintiff's Favour—Judgment of General Sessions.]—The evidence necessary to prove a determination of the proceedings in plaintiff's favour in a prosecution before General Sessions for larceny is a judgment drawn up in regular form, or a certificate under the "*Statute of Evidence*" (No. 197,) Sec. 23, or a duly authenticated copy of the judgment; the minute in the Court book is not sufficient. *Haynes v. Ware*, 1 V.L.R. (L.,) 272.

For what Action will Lie—Maliciously Exhibiting Articles of the Peace.]—An action will lie for maliciously causing a summons to be issued against another to appear before justices to show cause why such person should not be bound over to keep the peace towards the person obtaining the summons, where the person charged has obeyed the summons, and after both parties have been heard, the complaint has been dismissed. *Gooley v. Curtain*, 2 V.L.R. (L.,) 226.

Three Statements Separated, which might have been Joined—Plaintiff supporting One entitled to go to the Jury.]—In an action for malicious prosecution on a charge for perjury, set out in a paragraph of three sentences, which might be taken as three members of one passage, or might be taken separately, and all of which might have been included in one indictment, under three assignments of perjury; or portions of the whole might have been severally comprised in three separate counts, the plaintiff offered evidence which would entitle him to a verdict on one of the sentences. *Held* that he was entitled to go to the jury without establishing similar proof as to the remainder of the paragraph. *Moran v. Lyons*, 4 V.L.R. (L.,) 379.

Evidence of Previous good Conduct Inadmissible—Count for Charging with Misconduct—New Trial.]—In an action for malicious prosecution, the declaration contained a count for malicious prosecution, and a second count for causing the Steam Navigation Board to charge plaintiff with misconduct. Evidence of plaintiff's previous good conduct was tendered and admitted, and defendant obtained a verdict on that count, but plaintiff obtained a verdict on first count. *Held* that such evidence was inadmissible, inasmuch as the charge was not of general misconduct, but only of habitual misconduct while on the ship. Rule absolute for a new trial. *Tait v. Snewin*, 5 V.L.R. (L.,) 374; 1 A.L.T., 58. *See* also S.C., *ante column*.

Evidence.]—Evidence is inadmissible in an action for malicious prosecution, even in cross-examination, of a statement made by the magistrate, in dismissing the information that he thought a *primâ facie* case had been made out, but he would not commit in the face of certain letters of the prosecutor. *Hickey v. O'Keefe*, 8 V.L.R. (L.,) 400.

MANDAMUS.

I. Where Writ Lies.

To Judge of County Court — "County Court Statute" (No. 345,) Secs. 83, 90, 120—Attachment for Disobedience of Decree—Refusal of Judge to State Case or set aside Order for Attachment.]—T., a defendant in an Equity suit, had a decree pronounced against him and was imprisoned for disobedience to the decree, against which no appeal was made. The County Court Judge refused to state a case or to set aside order for attachment. The Court granted a *mandamus* for judge to state a special case. *Regina v. Pohlman, ex parte Thomson*, 3 A.J.R., 104.

To Judge of County Court—Trespass to Mining Claim — Concurrent Jurisdictions.] — Where a judge is vested with authority to hear a case, he is bound to hear it. B. sued F. in the County Court for trespass to a mining claim, but the judge struck out the case on the ground that the remedy was in the Court of Mines, and that, therefore, the County Court had no jurisdiction. *Mandamus* granted. *Regina v. Dunne, ex parte Baillie*, 3 V.R. (L.,) 239; 3 A.J.R., 110, 118.

To County Court Judge—When it Lies.]—A *mandamus* will not lie to compel the judge of a County Court, who has irregularly altered a judgment for one party to a judgment for the other, to issue execution upon the original judgment, so long as the altered judgment remains on the record. *Ex parte M'Ewan*, 4 V.L.R. (L.,) 9.

And *see Regina v. Leech, ex parte Ah Poy, ante column* 254.

To Judge of Court of Mines.]—The Court is bound to grant the prerogative writ, when satisfied that there will be a failure of justice unless it is granted. A judge of a district Court of Mines made a decree in favour of a company, and this was affirmed with slight variations on appeal to the Chief Judge. The cause was removed by *certiorari* into the Supreme Court, and the decree quashed. When the suit came before the District Court Judge he refused to hear it, on the ground that the decision of the Chief Judge, which by Sec. 173 of Act No. 291 is made "final," was not quashed. *Held* that the order of the Chief Judge fell with the quashing of the decree, and rule absolute for *mandamus* to compel the Judge of District Court to proceed with the hearing. *Regina v. Rogers*, 6 W.W. & A'B. (L.,) 138.

To Judge of District Court of Mines—Act No. 446, Secs. 17, 20.]—*Per Stawell*, C.J. (in Chambers.) Where the Judge of the District Court has a statutory discretion to hear an appeal from the warden or not in consequence of an omission in the proceedings, the Judge in Chambers will not interfere by *mandamus*. *Renwick v. Hyde*, 1 A.L.T., 77.

To Compel Clerk of Court of Mines to Issue Certificate of Registration.]—The Court granted a *mandamus* compelling B., a clerk of the Court of Mines, to issue a certificate of registration to a mining company, which had been registered by his predecessor. *Regina v. Bartrop*, 6 W.W. & A'B. (L.,) 84.

Warden—To Compel Execution of Decree of Court of Mines.]—Where a decree was made by a Court of Mines, and the warden refused to put parties in possession of a claim under the decree, on the ground that there was a discrepancy between the decree and a map referred to in it, *Held* that *mandamus* was not the proper remedy, the proper remedy being an application to the Court of Mines. *In re Cogdon, ex parte M'Dermott*, 2 W. & W. (L.,) 139.

To Warden.]—C. summoned a company before a warden to obtain a declaration of forfeiture to their claim, and the warden dismissed it on the ground that there was an application for a lease of the same land pending; the Chief Judge on a special case held that this application was no answer to the plaint, and still the warden refused to adjudicate. *Mandamus* granted. *Regina v. Strutt, ex parte Constable*, 3 V.L.R. (L.,) 186.

To Warden.]—Where an order had been made by a warden finding that complainant was entitled to possession, but the warden refused to order possession to be given to him because there was pending an application by a third party for a mining lease of the same ground, *Held* that *mandamus* was not the proper remedy, as the warden had already adjudicated, but the Court granted a *certiorari* to quash the order which was held to be wrong. *Regina v. Orme, ex parte Droscher*, 3 V.L.R. (L.,) 343.

To Surveyor to Survey Claim—Act No. 291, Sec. 47.]—*Regina v. Stephenson, ex parte Black*, N.C. 22, *post* under MINING—Mining Boards, Officers, and Bye-Laws.

To Justices—Where Applicable.]—Where justices improperly refused to grant a pawnbroker's license, and an application was made in the alternative for a rule *nisi* for a mandatory order under Sec. 138 of the "*Justices of the Peace Statute* 1865," or for a writ of *mandamus* to compel them to issue such license, *Held* that *mandamus* was the proper remedy, and that Sec. 138 of the "*Justices of the Peace Statute* 1865," was inapplicable, since the justices had heard and refused the application. *Ex parte Mendelssohn*, 2 A.L.T., 45.

To Justices—Refusing to Make Adjudication.]—Where justices, although satisfied with the character of an applicant for a pawnbroker's license, nevertheless refused the application, *Held* that, as there had been no adjudication on the matter, the proper remedy was by *mandamus*, and not by appeal. *Ex parte Nybery*, 4 A.L.T., 78.

To Justices—Objection Raised Informally.]—If justices have jurisdiction in a matter, the fact that an objection, on which they dismiss an application, is raised informally is not a ground for *mandamus*. *Regina v. Alley, ex parte Guess*, 9 V.L.R. (L.,) 19; 4 A.L.T., 150.

And *see* under JUSTICE OF THE PEACE—Compelling Justices to do Duty—and LICENSING ACTS.

To Chairman of General Sessions—Appellant not Prejudiced by Clerk of Petty Sessions Failing to Forward Recognisances.]—*Regina v. Pohlman, ex parte Cobb*, 3 A.J.R., 38. *Post* under SESSIONS—Appeal from Justices, &c.

To Chairman of General Sessions to State Special Case—Act No. 267, Sec. 135.]—*Regina v. Pohlman, ex parte Bagshaw*, 1 V.L.R. (L.,) 208. *Post* under SESSIONS—Appeal and Reviewing Decision, &c.

To Road Board Council to Issue Slaughtering License—"Abattoirs Statute 1869," Sec. 28.]—The "*Abattoirs Statute* 1869" took the power to grant slaughtering licenses from justices and conferred it upon local councils. E. had held a license from the justices, and applied to the council for one after the passing of the Act, but it was refused. Sec. 28 of the Act allowed licenses to be refused when the character of the applicant was exceptionable, or the site of the slaughter-house objectionable; but the council did not assign their reasons for the refusal. On a rule *nisi* for a *mandamus* to compel the council to grant the license, *Held* that the council must be assumed to have exercised a reasonable judgment in refusing the application, and rule refused. *Regina v. The Caulfield Road Board*, 1 A.J.R. 170.

To Rate-collector to Compel Receipt of Rate Tendered—"Shires Statute 1869," Secs. 57, 68.]—*Regina v. Black, ex parte Twomey*, 5 A.J.R., 82. *Post* under RATES—Other Points.

To Compel Municipal Council to Make a Rate to Satisfy Judgment Obtained against Council.]—*Regina v. Oakleigh Shire, ex parte Wilson*, 10 V.L.R. (L.,) 67; 5 A.L.T., 195. *Post* under RATES—Validity of Rate.

To Road Board—Compelling Payment of Officer's Salary.]—A *mandamus* will lie to compel payment of the salary of the clerk of a district road board, who has been illegally dismissed from office, although he has not in fact performed the duties of his office between his illegal dismissal and his legal removal from office. *Regina v. Keilor District Road Board*, 1 V.R. (L.,) 14; 1 A.J.R., 29.

To Borough Council—Compelling Payment of Officer's Salary.]—On a return made by a borough to a writ of *mandamus* commanding the mayor and councillors of the borough to pay to one J.I. a sum claimed as salary for services rendered as surveyor and superintendent of public works, *Held*, (1) that it was not necessary for the claimant to first ascertain the sum due by an action against the corporation; (2) that the denial of his mere appointment, when it was admitted that he was a necessary officer and his work necessary work, was insufficient as a defence; (3) that it was no defence that the corporation had not then the books which would enable it to ascertain the precise truth of the matters alleged in the writ; (4) that the allegation that J. I. had received and retained

out of the rates and had not accounted for moneys enough to satisfy his claim was no defence, it not appearing that he was ever called upon to account for such moneys, or that he had then any moneys of the corporation in his hands; (5) that an allegation that a former mayor of the borough had paid J. I. sums equal to his claim was no defence, it not being alleged that such sums were paid on account of the claim; (6) that the fact that an action was then pending by J.I. against the corporation was no answer; but the Court held that it was a good matter of defence that, as a matter of fact, there had been no estimate of the money required for this claim prepared under the Act No. 184, Sec. 180, or other compliance with Secs. 186—190, of that Act, in respect of the money required for the claim; that there were no funds applicable to the claim, and that none could be made applicable, unless by illegally striking and levying a retrospective rate to meet it. On the whole, the Court considered the return insufficient, except as to the part which stated that there were no funds available unless raised by a retrospective rate, and intimated that if it were desired to traverse that statement as a matter of fact, the proper application could be made; and that as matters were at the then stage judgment should be for the defendant borough. *Regina v. Mayor of Footscray*, 3 W.W. & A'B. (L.,) 9.

Mandamus for Payment of Salary of a Dismissed Officer of a Municipality—Granted where Amount Calculable with Certainty.]—*Regina v. East Collingwood, ante column* 214.

Mandamus to Compel Council to hold an Election —Councillor Declared Elected not Taking Seat.]—*In re Cordell, ex parte Walsh, ante column* 227.

To Municipal Council—Dismissal of Secretary—"Local Government Act 1874," Sec. 519.]—The Court will not grant a *mandamus* to compel a municipal council to pay the salary of its secretary with whom there is a dispute as to the propriety of his dismissal, for such dispute is a "difference" within Sec. 519 of the "*Local Government Act* 1874," the cognisance of which belongs exclusively to the Minister. *Regina v. Shire of Bulla, ex parte Daniel*, 8 V.L.R. (L.,) 214.

To Compel Returning Officer to receive Nomination Paper on Election—Mandamus not Proper Remedy.]—*Ex parte Attenborough, in re Bent, ante column* 222.

To Shire Council to Compel Payment of Fees for Special Audit—Costs.]—*See Regina v. Shire of Pyalong*, 4 A.J.R., 124, *ante column* 73; and *Regina v. Mayor, &c., of Collingwood* (questioning former case,) *ante column* 73.

To Medical Board—Compelling to Re-instate a Name on the Register—"Medical Practitioner's Act 1865."—*Regina v. The Medical Board, see post* under MEDICINE.

To Medical Board — Compelling to Register Diploma.]—*Regina v. Medical Board, ex parte Thomas; In re Medical Board, ex parte Yee, Quock Ping, and Bottrell, see post* under MEDICINE.

"Common Schools Act" (No. 149,) Sec. 6, Subsec. 4—Application of Funds of Board of Education.]—Sub-sec. 4, Sec. 6, enacts that one of the duties of the board shall be "to see that the moneys apportioned from the Consolidated Revenue for the purpose of public education be applied to the objects for which they are granted." Application was made for a rule *nisi* for a *mandamus* to compel the board to "see to the payment" of certain salaries of teachers. *Held*, it being a mere question of which is to be the ruling authority as to the retention of a teacher, and the Court finding that the board had large powers, and that there was no legal duty which it could specify and direct the board to perform, it had no power to grant the *mandamus*. Rule *nisi* refused. *In re Board of Education, ex parte Stevenson*, 4 W.W. & A'B. (L.,) 133.

To Registrar of Titles.]—*See* under TRANSFER OF LAND.

To Master-in-Equity under "Duties on Estates Act" (No. 388.)]—*Armytage v. Wilkinson, ante column* 393.

II. PRACTICE IN OBTAINING WRIT.

Materials on which Application is Made.]—A writ of *mandamus* was issued commanding the defendants to certify under 17 Vict. No. 31, Sec. 22, that H. "had made a good title to the satisfaction of the council unto certain lands specified in the writ, and which had been taken for local improvements." A rule *nisi* was obtained to quash the writ on one ground among four that the "writ asked for more than was authorised by the rule under which it was issued." On argument a preliminary objection was raised that the rule *nisi* purported to be drawn up on reading the writ, an affidavit of the town clerk, and "the affidavits, rules, orders, and proceedings of the Court in the cause," and that the general reference was insufficient. The Court reserved its opinion on the preliminary point, and allowed the other affidavits to be used, and the general objections argued, and then discharged the rule on the preliminary objection, leave being reserved to apply again. A fresh rule *nisi* was obtained on the first three of the four former grounds, a preliminary objection was taken that a second application could not be made on fresh materials. *Held* that the merits were not considered in the first application, but the preliminary objection only; that the case did not come within the principle that "parties are at once to bring the best evidence;" that the writ was bad, on the ground that it was larger than the rule granting it. Rule absolute to quash *mandamus*. *Hodgson v. Mayor of Fitzroy*, 4 W.W. & A'B. (L.,) 118.

Address of Writ—Costs.]—A writ of *mandamus* or *certiorari* should be addressed generally to the justices of the bailiwick, and not to the chairman of General Sessions. Where the opposition to an application for *mandamus* was unsuccessful as regarded the issue of the writ, but where, upon a sufficient return to the writ, the Court was of opinion that the evidence supported the conviction, and discharged a rule *nisi* to quash the return, the prosecutor was ordered to pay the costs. *Regina v. Pohlman, ex parte Bagshaw*, 1 V.L.R. (L.,) 208.

Costs—Appellant Falsely Swearing that Recognisances had been Entered into when they were Unnecessary.]—As a general rule where a *mandamus* is granted, the costs also are granted, but the Court has a discretion; and, where applicant falsely swore that he entered into recognisances to prosecute an appeal to General Sessions, and afterwards the position that such recognisances were unnecessary was assumed, the Court refused costs of the *mandamus*. *Regina v. Pohlman, re Cobb v. Munro*, 3 A.J.R., 109.

Rule nisi for Payment of Costs.]—The Court granted a rule *nisi* for payment of costs of a *mandamus*, although of opinion that the rule absolute should be made at once. *Regina v. Pohlman, ex parte Cobb*, 3 A.J.R., 72.

Costs—Mandamus Obeyed—Act No. 274 ("Common Law Procedure Statute") Secs. 244, 252.]—Where a *mandamus* had been obeyed, and there had been no return to it, the Court upon a rule *nisi* for payment of costs, made the rule absolute. *Regina v. Pohlman, ex parte Murray*, 5 A.J.R., 115.

Costs—Of Opposed Motion for Mandamus—Notice—An order for payment of the costs of an opposed motion for a *mandamus* will be made absolute in the first instance if notice of intention to apply has been given to the other side. *Regina v. Leech, ex parte Ah Poy*, 1 A.L.T., 151.

Costs—Where Less Amount Recovered than Amount Sought.]—Where an officer of a shire council obtained a *mandamus* for payment of fees of special audit, but recovered a less sum than he sought, the Court made the rule absolute with costs, notwithstanding that it was urged that this was a virtual compromise. *Regina v. Shire of Pyalong*, 4 A.J.R., 124.

Costs—Discretion of Court.]—*Per Higinbotham, J.* (in Chambers:)—The Court has a statutory discretion in the matter of the costs of any writ of *mandamus*, and will for a sufficient reason withhold them, but the Court will, in the exercise of its discretion, in general order costs to be paid by that party to the application who ultimately fails, to that party who ultimately succeeds, and it is no ground for exempting a party unsuccessfully resisting the issue of a *mandamus* that he relies upon the decision of the Court to which the *mandamus* is directed. *Regina v. Bailes, ex parte Pickup*, 6 A.L.T., 29.

The general rule that the costs of a *mandamus* go to the successful party, is subject to the exception that when a judicial officer is required by *mandamus* to do an act he shall not be fixed with the costs unless he has been guilty of improper conduct. So, too, a body exercising *quasi*-judicial functions is not to be fixed with costs unless guilty of improper conduct. *Ibid.*

Costs were refused against a Court of Revision which was ordered by *mandamus* to hear objections to a person's name appearing on a ratepayers' roll. *Ibid.*

Costs—Officer of Police.]—*Per Higinbotham, J.* (in Chambers):—The costs of an application for a *mandamus* are within the discretion of the Court, and there is no principle upon which an officer of police, who had successfully urged objections against the grant of a license, should be deprived of the costs of successfully opposing the issue of a writ of *mandamus*. *Ex parte Slack*, 6 A.L.T., 23.

MANSLAUGHTER.

See CRIMINAL LAW.

MARINE INSURANCE.

See INSURANCE.

MARINER.

See SHIPPING.

MARKETS.

Statutes—
21 *Vict.* No. 11.
"*Local Government Act* 1874" (No. 506,) Secs. 451—479.
"*Markets Statute* 1864" (No. 202.)

"Markets Statute 1864" (No. 202,) Sec. 28.]—Fish are included in the words "other provisions usually sold in markets," contained in Sec. 28 of the "*Markets Statute* 1864." *M'Pherson v. Freeman*, 2 V.R. (L.,) 131; 2 A.J.R., 83.

Unlawfully Selling Vegetables in a Public Place—Queen's Wharf—"Markets Statute 1864," Sec. 28.]—C. was convicted under Sec. 28 of the "*Markets Statute* 1864" for unlawfully selling vegetables in a public place; to wit, the Queen's Wharf, being a place other than that appointed for the holding of a market. On order *nisi* for a prohibition, *Held* that the Queen's Wharf had not ceased to be a public place by reason of its having been severed from the corporation of the City of Melbourne and vested in the Melbourne Harbour Trust Commissioners; and conviction upheld. *Ex parte Cooke*, 4 V.L.R.(L.,) 1.

Selling a Horse Elsewhere than in Market—"Boroughs Statute 1869" (No. 359,) Sec. 360.]—O had a horse in a licensed sale yard, and, at the request of an intending buyer, the horse was taken from the yards for the purpose of trial, and subsequently driven to the yard of a hotel, where the bargain was completed and the horse sold by O. The yard of the hotel was not licensed as a market, and was not O.'s private property. *Held* that O. was liable under Sec. 360 of the "*Boroughs Statute* 1869" for selling a horse elsewhere than in the market, or in licensed yards, or on any private property. *Cadden v. Osborne*, 4 A.J.R., 153.

[Sec. 456 of "*Local Government Act*" (No. 506) is the corresponding section.]

Persons Selling Articles Outside of Market without a License—Penalty—"Local Government Act 1874," Sec. 456.]—A person who, without a license, sells an article, though it be only a sample, outside of a market, and not upon his own private premises, or on licensed premises, is liable to the penalty prescribed by Sec. 456 of the "*Local Government Act* 1874." *O'Callaghan v. Waugh*, 6 V.L.R. (L.,) 413.

Market Dues when Payable—"Melbourne Corporation Act," 21 Vict. No. 11, Sec. 6.]—The words in Sec. 6, "all stock sold or exposed for sale in any of the said markets," apply only to stock brought into the market and there sold or exposed for sale; and if the stock are not brought into the market, dues are not payable to the Corporation of Melbourne, though a sale be effected in the market of stock which were never in the market. *Bate v. Gee*, 8 V.L.R. (L.,) 5.

MARRIAGE AND MARRIAGE SETTLEMENT.

See HUSBAND AND WIFE.

MASTER.

Shipping.]—*See* SHIPPING.

MASTER AND SERVANT.

Statutes.]—
9 Vict. No. 27, and several Amending Acts repealed by Act No. 198.
"*Master and Servants Statute* 1864" (No. 198.)
"*Master and Servant*" (Contractors' Debts,) (No. 385.)

I. THE CONTRACT OF HIRING.

Yearly.]—B. engaged W. as salesman, and the agreement provided that W. should serve for a year at so much per week, and if he served for three months his coach fare should be paid him. W. served for a week, and was then informed that he was expected to serve in another capacity in addition to the one in which he was engaged, and not being able so to do was dismissed, receiving only one week's wages. W. sued on the ground that the agreement was for three months, and being allowed by the County Court Judge to amend his claim, so as to sue for the second week's wages, he did so, and B. paid a week's wages into Court, and a verdict was given for him. On appeal, it was contended that the agreement was a yearly one, and that W. was entitled to at least a week's notice. *Held* that the agreement was not a yearly one, and that W. could not be allowed a week's wages instead of notice, since he had not claimed it. *Williams v. Beckett*, 2 A.J.R., 114.

Construction of Contract—Wrongful Dismissal—Measure of Damages.]—By agreement in January 1853, G. contracted to serve defendant bank as clerk, or in any other situation the defendants might appoint, and so on from year to year, defendants paying a salary of £100 a year; the contract after the first year's service being determinable upon one month's previous notice. G. rose in the service, and after 20 years' service when occupying the position of teller, and receiving £400 a year, he was dismissed without notice. The defendants paid into Court one month's salary at rate of £400 a year, and another month's salary under the agreement, in lieu of notice. *Held* that if the increase of salary was evidence of a new agreement, the terms of the old agreement must be adhered to as far as possible, and that the measure of damages was the month's wages at the time of dismissal. Rule absolute for a nonsuit. *Gilles v. Bank of Victoria*, 3 V.R. (L.,) 46; 3 A.J.R., 35.

Wrongful Dismissal — Presumption of Yearly Hiring.]—F. had been employed by the defendant as a travelling inspector, being first engaged for three months, after which he continued in the employment without further arrangement. He was dismissed, and sued for wrongful dismissal. The company paid three months' salary into court, and the jury found a verdict for defendant. *Held* that the hiring was for three months and not for a year, and rule to enter verdict for plaintiff or for new trial discharged. *Fox v. M'Mahon*, 4 A.J.R., 86.

Dismissal—Notice.] — A contract of service which provides that the servant shall for weekly wages act as a drover, and be responsible for losses over and above 2 per cent. up to a term of two months' travelling, after which no responsibility is to be incurred, and travel in a certain direction, is not a contract for a fixed time, and is determinable upon giving reasonable notice; and on dismissal before the expiration of the two months the servant is entitled to damages only in respect of such reasonable notice, *i.e.*, one week's notice. *Dalgety v. Husband*, 4 V.L.R. (L.,) 432.

Wrongful Dismissal — Contract of Hiring—Term.]—Where an original contract of hiring was entered into for a year certain, and at its expiration, nothing being mentioned to the contrary, the engagement ran on, the presumption is that the period of service was to be for another

year on the same conditions as those mutually binding on the parties during the previous year. Rule absolute for a new trial, where, under a a direction from the judge, the jury returned a verdict for defendant in an action brought for wrongful dismissal before the second year had expired. *Bullock v. Wimmera Fellmongery Coy.*, 5 V.L.R. (L.,) 362; 1 A.L.T., 59.

Parol Agreement — Variance — Amendment— "Statute of Frauds."]—D. agreed verbally with the defendants to enter into their employ as manager for a year, to commence in December, 1882. He continued to act as manager till February, 1883, when he received a telegram from the defendants stating that "A. appointed manager, you remaining as traveller;" he continued to act as traveller until March, 1883, when he received a letter stating that his services were no longer required. D. declared on a contract for a year from 14th February, 1883 (date of the telegram). *Held* that the offer in the telegram when accepted, formed a new contract for hiring for so much of the year as remained unexpired on 14th February, and not for a-year from 14th February; that the variance between the contract proved and declared upon might be amended; and that the new contract was one made in February for less than a year, and not, therefore, within the "*Statute of Frauds.*" *Dale v. M'Culloch & Coy.*, 9 V.L.R. (L.,) 136.

II. Rights and Duties of Master and Servant.

(1.) *Generally.*

"Master and Servant's Act," 9 Vict., No. 27—Engine Driver's Liability for Injuries.]—An engine driver in the course of his duty ran the engine off the line, and certain damage was done to the trucks and line. *Held* that the locomotive engine was not "goods, wares, work, or materials for work," committed to his charge within the meaning of the Act No. 27, and that the driver was not liable for the injuries committed, *Semble* that he was not a servant within the meaning of the Act. *Sacre v. The Board of Land and Works*, 2 W. & W. (L.,) 8.

[Compare Sec. 13 of Act No. 198.]

Dismissal—Action for, Who may Maintain.]—Plaintiff was employed by a company to buy sheep for them during certain months, and was to be paid a certain sum per head on the sheep bought by him. Plaintiff entered upon his duties and bought a large number of sheep, and after incurring expenses was dismissed. *Held* that the plaintiff was not in the position of a servant so as to be able to maintain an action for wrongful dismissal; but that he was entitled to be reimbursed by the company for the expenses incurred by him before dismissal. *Liscombe v. Echuca Meat Preserving Coy*, 1 V.R. (L.,) 148; 1 A.J.R., 132.

Dismissal—Justification of.]—V. sued C. for wrongful dismissal, and recovered a verdict. C. justified on the ground of misconduct in refusing to work. It appeared that V. had written to C. requesting that a charwoman should be sent to clean out his room, and refusing to go on with his work unless certain "improprieties" were altered and an apology offered. *Held* that V. had not refused to work so as to make it a ground for justification, but that C. would have been entitled to dismiss V. for impertinence. *Vardy v. Cuthbert*, 3 A.J.R., 25.

Dismissal.]—A temporary infirmity incapacitating the servant from discharging his duties is not a ground for dismissing him before the expiration of the term agreed upon by the contract. *Leake v. Holdsworth*, 4 A.J.R., 86.

Dismissal—Disobedience—Damages.]—Where a discretion has been committed to a servant as to the giving of credit, and the master subsequently wrote letters insisting strictly on the instructions (*i.e.*, as to credit being kept down) being followed, apparently ignoring the discretion, and dismissed the plaintiff (servant), thinking that amount of credit had increased, *Held* that the discretion not having been withdrawn the dismissal was wrongful, and that the direction that damages should be calculated upon the rate of wages under the agreement from the time of dismissal to the issue of the plaint summons, with reasonable damages for the breach of contract, and for board and lodging, was correct. *Watson v. Ross*, 5 A.J.R., 69.

Per Fellows, J.:—The County Court Judge was wrong in directing the jury that the damages should not exceed the wages which would have been earned up to the commencement of the action. *Ibid.*

Wrongful Dismissal—Damages.]—*See Gilles v. Bank of Victoria, ante column* 890 under The Contract of Hiring.

Wrongful Dismissal.]—*See Fox v. M'Mahon, ante column* 890.

Dismissal.]—In an action by a servant for wrongful dismissal, defendant pleaded that the servant had made a secret proposal to a third person to enter into a business in partnership, in competition with the master's business, and while in his master's service to divert custom from his master's business to that of the partnership. *Held* that the master was not bound to wait until the mischief in contemplation had been actually caused, and was justified in dismissing the servant. *Langhorn v. Bennett*, 3 V.L.R. (L.,) 108.

Dismissal—Notice.]—*See Williams v. Beckett*; *Dalgety v. Husband*; *ante column* 890 under The Contract of Hiring.

Absenting from Service—Belief and Assertion of Right to Leave.]—A servant who absents himself from his employment under a *bonâ fide*, but mistaken belief that he has a right so to absent himself, is not liable to a conviction under Sec. 11 of the "*Masters and Servants Statutes* 1864," for unlawfully absenting himself. *Regina v. Mollison, ex parte Crichton*, 2 V.L.R. (L.,) 144.

Quitting Service—Notice—"Master and Ssrvants Statute 1864," Sec. 11.]—W. engaged R. at weekly wages as a night miller and engine driver. Under the direction of a day miller in the same employment, R. gave W. about four days' notice and quitted his service. *Held* that R. was a servant within the meaning of the "*Master and Servants Statute* 1864," and was bound to give a week's notice, terminating at the end of some week of his engagement before leaving, and conviction under Sec. 11 of the Statute upheld. *Regina v. Bayne, ex parte Rea,* 4 V.L.R. (L.,) 89.

Quitting Service—Bona fide Belief of Right—Question for Justices.]—The question whether a servant entertained a *bonâ fide* belief that he had a right to leave his master's service at a particular time is a question for justices, and the Court will not interfere with their determination on such a matter. *Ibid.*

(2) *Wages.*

Wages—When Payable.—Under an agreement as follows:—"The said G. agrees to engage, and the said W. agrees to serve, as boots, &c., and obey all lawful commands, for the term of six months, at wages, and at the rate of £1 per week with board. If the said W. should not remain for the said six months, his fare from M. to H. is to be deducted from his wages," each week's service is apportionable, and the servant is entitled to be paid weekly, a sufficient sum being deducted and retained for the coach-fare till the six months expire. *Gaffney v. Werner,* 2 V.L.R. (L.,) 6.

Complaint for Wages not stated to have been on Oath—Act No. 198, Sec. 16.]—In a complaint for the recovery of wages under Act No. 198, Sec. 16, in which an order was made for the amount claimed, it appeared that neither in the summons nor in the order was it stated that complaint was on oath. *Held* that order was bad, even though an affidavit stated that the complaint was made on oath. Order quashed. *Regina v. Pearson, ex parte Hall,* 5 V.L.R. (L.,) 289; 1 A.L.T., 42.

(3) *Liability of Master for Injuries to Servant.*

(*a*) *General Principles.*

Where Master not Liable—Servant a Volunteer.]—If a servant volunteers to do work which his master had not required him to do, and which the servant never undertook to do, the relationship of master and servant does not exist between them as to that work; and if in doing such work the servant sustains injury from the imperfect or improper condition of machinery used in the work, or from other causes, the master is not responsible for such injury. *Knox v. Stephens,* 1 V.R. (L.,) 102; 1 A.J.R., 106.

When Master not Liable—Conveying Servant to place of Work.]—*Bateman v. Moffatt,* 5 W.W. & a'B. (L.,) 125; 1 A.J.R., 10; L.R. 3 P.C. 115; 1 A.J.R., 12; *post* under NEGLIGENCE—Actions—Evidence and other Matters.

When Master not Liable.]—A workman is not entitled to recover against a shipowner for damages sustained in his employ under circumstances which would entitle a visitor to the ship to recover damages. *M'Lachlan v. Service,* 2 V.R. (L.,) 198; 2 A.J.R., 116.

M., a labourer, employed on board a vessel as carpenter, while the vessel was loading, after dark, fell down an open hatchway near which no light was placed, and thereby sustained serious injury. *Held* that the owners of the vessel were not liable. *Ibid.*

Dangerous State of Ladder—What Necessary to Render Master Liable.]—In an action by a servant for injuries sustained by him owing to the dangerous state of a ladder belonging to his master (a mining company), it is not sufficient for him to prove that he was in the employ of the defendants, and that he sustained injury from the dangerous state of a ladder which belonged to the defendants, and was used by him in his employ, but he must also prove that the defendants, or their deputy, were aware of the dangerous state of the ladder, and, with such knowledge, neglected to repair it; or that the master knowingly employed incompetent persons to construct or fix the ladder. *North Shenandoah Coy. v. Fallover,* 4 A.J.R., 109.

And *see* under MINING.

Obvious Defect in Machine — Contributory Negligence.]—A servant was injured in his master's employ in working a machine which had a defect so far obvious that, by using reasonable means, he might have avoided the danger. *Held* that the master was not liable. *Per Higinbotham, J.*—A servant in such circumstances must make reasonable efforts to avoid danger, otherwise he may be held to contribute to any injury arising from the defect. *Litton v. Thornton,* 7 V.L.R. (L.,) 4.

Neglect of Competent Foreman.]—Where a master appoints proper and competent persons to superintend and direct the work, and furnishes them with proper appliances for performing such work, if he do not personally interfere, he is not liable for injuries sustained by any of his servants in consequence of the negligence of any servant so appointed to superintend and direct. *Brown v. Board of Land and Works,* 8 V.L.R. (L.,) 414, 429; 4 A.L.T., 103.

Held, per Stawell, C.J., and *Williams, J.,* that the Board of Land and Works is not liable for injury caused to one of its engine-drivers owing to the neglect of a competent foreman in charge of one of the repairing sheds for locomotives, to make good a defect in a locomotive reported to him by such engine-driver. *Held, per Higinbotham, J.,* that the Board, having a general duty of supervision and control of railway officers cast upon them by law, are liable for a neglect of that duty by their officer, who was appointed to represent them in directing and superintending the repair which the engine required, such neglect having caused the injury to the driver; that the question whether the officer so appointed to direct and superintend is in the position of a representative of the master so as to fix the latter with liability for his negligence is one of mixed law and fact, in determining which the jury may be guided by

the definition given in the English "*Employers' Liability Act* 1880." Also that the Board is liable, in such cases, not only for the supply in the first instance to the drivers, in a sound condition, but also for the continued maintenance of engines in a state in which they would not become dangerous. *Ibid.*

Injuries to Servants in Mines.]—*See* under MINING.

(*b*) *Common Employment.*

Where Master Liable.]—B. was engaged by M. to carry wheat from S. to another place. B. was to take the wheat from M.'s mill at S., and in order to do so backed his cart up to a shoot down which the bags were shot. During the process of loading B. was injured by the negligence of M.'s men. *Held* that though B. was in M.'s employment, it was under a separate contract from the other men—a distinct agreement to carry goods. *Bellis v. Maxfield*, 1 A.J.R., 35.

What is Common Employment — Liability for Injuries Caused by Negligence of Employer.] — C., a shipwright, was employed by a railway company to effect repairs on the line, and was conveyed in the company's trains to and fro from his residence to the scene of his labours. On one occasion C. was travelling to his residence after his day's work in one of the company's trains after dark, and there was no tail-light on the train, which was drawn by an engine which owing to the defective state of its wheels did not get under way as soon as it otherwise would. The train was late owing to the necessity of changing engines, the defective engine by which the train was drawn being substituted for a still more defective one, and the original engine started after the train and ran into it at an intermediate station, and thereby caused damage to T. It was proved that if a tail-light had been put on the train the collision might have been avoided, but owing to the defective state of the engine drawing the train, the collision was more serious than it would otherwise have been, because the train by reason of such defective state did not get under way sufficiently to lessen the shock from the engine behind. The absence of a tail-light was attributable to the negligence of the company's servants. *Held* that T. was a servant of the company in common employment with those who had neglected to attach the tail-light; but, that though the collision could have been avoided if the tail-light had been affixed to the train, and if that had been the sole cause of the injury to T. the company would not have been liable for the default of T.'s fellow servants, yet since the disturbance of the time arrangement for starting was caused by the defective state of the engines, the company was liable, and that the aggravation of the injury to T., caused by the defective state of the engine drawing the train, was evidence to go to the jury of actionable negligence. *Chandler v. Melbourne and Hobson's Bay Railway Coy.*, 2 V.R. (L.,) 71; 2 A.J.R., 1, 53.

What is Common Employment.]—M., a workman in the mine of a company was injured owing to the insecure fastening of a ladder which it was the duty of the manager of the company to see properly secured. *Held* that the manager was not a fellow servant of M., but was the representative of the company, which was therefore responsible for the negligence which caused injury to M. *Band of Hope and Albion Consols v. Mackay*, 2 V.R. (L.,) 158; 2 A.J.R., 112.

For acts of an *incompetent* servant, a master is not responsible to a fellow servant, but he is in the case of a *careless* servant. C. was employed by W. as a servant, and was injured. The accident was caused by the carelessness and negligence of G., a fellow servant, and there was evidence of the machinery being defective. C. sued W. and obtained a verdict, and the County Court Judge refused a motion for a nonsuit. *Held*, on appeal, that there was evidence to go to the jury and appeal dismissed. *Chambers v. Willey*, 3 V.R. (L.,) 17; 3 A.J.R., 30.

III. LIABILITY OF MASTER FOR NEGLIGENCE OR TORTIOUS ACT OF SERVANTS.

Where Master not Liable—Insufficient Evidence that Wrong Doers were in Defendant's Employ.]—Defendants, contractors for the formation of a railway, were sued in trespass for damages to fences outside the line of railway. It was proved that men, as to whom general evidence was received, that they were called defendants' labourers, had committed the trespass complained of, but none of them were called, nor were the foremen or other persons examined to identify the men, or prove that they were in the defendants service. *Held*, that defendants were not liable for the trespass. *Newcomen v. O'Grady*, 2 V.R. (L.,) 214; 2 A.J.R., 123.

Shipmaster—Liability for Injuries through the Negligence of the Crew.]—A shipmaster is only a fellow servant with the crew, and is not therefore liable for injuries caused by negligence of the crew when the ship is in port. *Clancy v. Harrison*, 4 V.L.R. (L.,) 437.

Nor for injuries to a passenger when the ship is at sea. *Stackpoole v. Betridge*, 5 V.L.R. (L.,) 302; 1 A.L.T., 43.

Injury Caused by Servant Acting Outside the Scope of his Authority.]—A master is not liable for injuries caused by his servant while acting outside the scope of an authority given to him by his master. *Heard v. Flannagan*, 10 V.L.R. (L.,) 1.

H. purchased from F. a load of hay out of a stack, and employed one R. to cut out and load the hay. R. cut out sufficient to form a load, went away some short distance, smoked his pipe, and then placed it in the pocket of his waistcoat, which contained some loose matches, and laid the waistcoat on the ground near the stack. He then went away to procure some lashing, and, during his absence, the heat of the pipe ignited the matches, and the stack caught fire and was destroyed. *Held* that smoking, being outside the authority given to R., H. was not liable for the loss of the stack. *Ibid.*

For Fraud.]—*See* PRINCIPAL AND AGENT.

MAXIMS.

Ignorantia Legis Neminem Excusat.]—For an instance where the Court was disposed to mitigate the force of this maxim in the case of a person who had prepared a transfer, and pleaded ignorance of the Statute 11 Vict. No. 33, which forbids a person not being a barrister, solicitor, or conveyancer from preparing a conveyance, &c., *see In re Strong, ex parte Campbell*, 4 A.J.R., 150.

Nova Constitutio Futuris Formam Imponere Debet non Præteritis.]—*Tommy Dodd Coy. v. Patrick*, 5 A.J.R., 14. *Post* under STATUTES—Construction and Interpretation—General Rules.

Marriage of a Minor—Omnia Praesumuntur rite esse acta.]—*Regina v. Griffin, ante column* 287. And for another illustration of the maxim *see Inskip v. Inskip, post column* 1005.

Caveat Emptor.]—Where a purchaser purchased an allotment which vendor purported to sell, but really obtained a transfer and certificate of title to another allotment, entered into possession and built, and was subsequently evicted, *Held*, in an action for deceit, that, there being no evidence of fraud, the maxim *caveat emptor* applied. *Hunt v. Johnson*, 5 V.L.R. (L.,) 401; 1 A.L.T., 98.

Actio Personalis cum Persona Moritur.] — *See Buckland v. M'Andrew* and *Buchner v. Davis, ante columns* 453, 454.

Falsa Demonstratio non nocet—Position shown by Plan in Certificate of Title governs, Dimensions marked in Figures Excluded.]—*Small v. Glen*, 6 V.L.R. (L.,) 154, 157, 159; *post* under TRANSFER OF LAND—Certificate of Title—Conclusive Effect of Certificate.

Falsa Demonstratio non nocet—Misdescription in Advertisement of Sale of Land.] — *Sargood v. Henry*, 5 A.J.R., 87; *post* under VENDOR AND PURCHASER—Enforcement, Discharge and Rescission—Specific Performance.

Falsa Demonstratio non nocet—Description by Metes and Bounds not Qualified by Description of Area Included.] — *Cunningham v. Platt, ante columns* 353, 354.

Qui prior est Tempore potior est Jure.]—*Henty v. Hodgson*, 1 W. & W. (E.,) 250; *post* under MORTGAGE—Several Mortgages.

MEDICINE AND MEDICAL PRACTITIONERS.

Statutes—
Various Acts repealed by Act No. 158.
"*Medical Practitioners Act* 1862" (No. 158,) repealed by Act No. 262.
"*Medical Practitioners Statute* 1865" (No. 262.)

I. REGISTRATION OF PRACTITIONERS.

Mandamus to Reinstate a Name on the Register—"Medical Practitioners Act 1865" (No. 262,) Secs. 5, 7.]—M., a duly qualified practitioner, had had his name erased from the register under Sec. 5, because he did not return an answer to a letter posted to his last address making inquiries authorised by the Act under Sec. 7. It appeared that the letter never reached M., but found its way back to the Medical Board through the "dead letter" department of the Post-office. *Held*, that the board, before it could strike out a name, must be satisfied that such a letter has reached its destination, and that M.'s name was improperly removed. Order for *mandamus* to restore M.'s name to the register. *Regina v. Medical Board*, 4 W.W. & A'B. (L.,) 139.

Mandamus to Register Diploma.]—T. had obtained in England the diploma of the Royal College of Physicians which was erased on account of his advertising. He then studied at the University of Giessen, where he obtained the degree of M.D. The Medical Board of Victoria refused to insert his name on the register, alleging that the diploma was not in the usual form. Rule *nisi* for a *mandamus* refused, the Court intimating that the applicant should obtain other evidence from persons already registered from that university as to the sufficiency of the diploma. *Regina v. Medical Board, ex parte Thomas*, 3 A.J.R., 81.

Act No. 262, Sec. 9—Schedule III., para. 13—Mandamus to Register.]—The Court will not grant a *mandamus* to register a medical practitioner in the absence of a specific demand by the applicant to be allowed to attend personally before the medical board. *Semble*, it is necessary for such applicant to prove that he has passed through a particular medical school or schools. *In re the Medical Board, ex parte Yee Quock Ping and Bottrell*, 1 V.L.R. (L.,) 112.

II. LIABILITIES AND POWERS OF PRACTITIONERS.

Unlawfully Practising—Act No. 262, Secs. 2, 11—Proof of Qualification—Act No. 158, Sec. 14—Criminal Charge—Admissibility of Evidence— N. was summoned and convicted under Sec. 11 of the Act No. 262 for "unlawfully pretending" to be a medical practitioner. N. proved by his own evidence that he had passed through a proper course of instruction, and had practised regularly since 1853; that in 1868 he sent documents and evidence of these facts to the medical board, which refused them with an intimation that they should have been sent while the Act of 1862 (No. 158) was in force. *Held* by *Williams* and *Barry, JJ.*, (*dissentiente Stawell, C.J.*), that the board constituted under the Act No. 158 was the only body authorised to examine N.'s qualifications and grant him a diploma which would exempt him from liability to penalties, and that not having proved before that board the matters specified in Sec. 14 of Act No. 158, his privilege to practise was lost by his delay, and as he had acquired no privilege under No. 158 he was not protected by Sec. 2 of Act No. 262; that this being a criminal charge his own evidence was inadmissible, but the majority of the Court being of opinion that N. could not

better his case if it were remitted to the justices, conviction affirmed. *Norris v. Smallman*, 3 V.R. (L.,) 25 ; 3 A.J.R., 32.

Act No. 262, Sec. 11—Use of Name of Doctor of Medicine—Defective Conviction.]—A conviction under Sec. 11 of the Act No. 262 adjudging a penalty and costs for the use of the name of doctor of medicine by an unqualified practitioner is bad if it does not state to whom the costs are to be paid. *Regina v. Hartney, ex parte Fischer*, 7 V.L.R. (L.,) 52 ; 2 A.L.T., 125.

Negligence—"Lunacy Statute" (No. 309,) Sec. 11—Giving Certificate of Insanity.]—Before signing a certificate under Sec. 11 of Act No. 309, it is the duty of a medical man to examine the lunatic personally as well as to make inquiries. The question whether the examination made is a sufficient one is entirely for the jury, and the Court will not interfere with their finding. It is not the duty of the judge to put the question whether there was reasonable and probable cause for the giving of the certificate. *Smith v. Iffla*, 7 V.L.R. (L.,) 435.

Medical Practitioner—Not Liable for Wrong Opinion as to Person's Sanity.]—A medical practitioner is not liable for the irregular proceedings of justices upon an incorrect certificate given by him as to the sanity of a person. *Roberts v. Hadden*, 4 A.J.R., 167, 181.

A constable laid an information that a person who was wandering at large was deemed to be a lunatic and was not under proper care and control. The information added another fact not required by the "*Lunacy Statute*," viz., that the person was unfit to be at large. Upon this information a justice made an order requiring H., a medical practitioner, to visit and examine the alleged lunatic, and report upon the matters of the information. Instead of reporting upon these matters, H. reported (or certified) that the subject of the examination was a "dangerous lunatic." This not being the question to be referred to H., the justice should have ignored the report, but instead he made an order to bring the alleged lunatic before two justices, and he was committed under Sec. 8 of the Statute. Being subsequently discharged as not having been a lunatic, he proceeded against H. for negligence in reporting him to be a dangerous lunatic. *Held* that, if the justice could have legally acted on the report, H. might have been liable, but that since the justice had no right to do so it was his act alone, and H. was not liable. *Ibid.*

Fees—Who may Recover.]—A surgeon can recover fees in a medical case, but a surgeon who holds himself out as, or is in fact, and acts as a physician, cannot recover such fees. *Southee v. Kirk*, I W. & W. (L.,) 200.

Act No. 262, Sec. 12—Recovery of Fees—Prohibition—Objection Taken too Late.]—Justices had made an order for the payment of the amount of a medical practitioner's fee. On an order *nisi* for a prohibition, *Held* that under the Act the proof of registration as a legally qualified practitioner was a condition precedent to the recovery of his fees, but such an objection must be taken before the justices at the proper time, and must be made a ground of the order *nisi*. *Regina v. Shaw, ex parte Selim*, 9 V.L.R. (L.,) 201 ; 5 A.L.T., 70.

Agreement for Remuneration for Giving Evidence as to Plaintiff's Condition in an Action in Respect of Injuries.]—A medical practitioner made an express agreement with his patient, who was plaintiff in an action for damages in respect of injuries, that he should be remunerated for giving medical evidence as to the condition of the plaintiff, whom he had examined for the purposes of such evidence. *Held* that he was entitled to recover on such agreement a larger sum than the witnesses' fees fixed by the "*Common Law Procedure Statute* 1865." *Stoddart v. Pinnock*, 10 V.L.R. (L.,) 22.

Semble, that an agreement to take less than the amount agreed upon, in case the plaintiff should not succeed in the action, does not render the contract illegal. *Ibid.*

MERCHANT SHIPPING.

See SHIPPING.

MERGER.

Of Debt of Three Joint Debtors in Specialty Debt of Two.]—A., B., and C. were, as joint importers of tea, liable for the full duty on it. B. and C. entered into a bond with Her Majesty the Queen to pay the full duty, with a condition that, if, after reciting that the duty had been lowered by a resolution of the Legislative Assembly, and that the duty so lowered had been paid, such resolutions were not confirmed, B. and C. should pay the full duty on the goods. The resolutions were not confirmed. In an action against A., who had not entered into the bond for the difference in duty (*i.e.*, between the full amount and that paid,) *Held* that the simple contract debt of A., B., and C. was not merged in the special debt under the bond given by B. and C.; that the creditor's liability on the bond was not co-extensive with his remedy in the simple contract debt; and that A. was liable. Judgment on demurrers to the plea for the Crown. *Regina v. Bowman* and *Henty v. The Queen*, 4 W.W. & A'B. (L.,) 257.

Of Simple Contract Debt—Memorandum under Seal Providing for Mortgage.]—A simple contract debt does not become merged where collateral security is given by a deposit of title deeds together with a memorandum under seal providing that if the debtor be not immediately pressed for payment, he would, upon demand, execute an assurance to the creditor of the lands comprised in the title deeds, there being a proviso in the memorandum that nothing contained in it, or in any further assurance taken

in pursuance of it, should prejudice any other security. *Bank of Victoria v. M'Coll*, 4 V.L.R. (L.,) 163.

Of Acceptance in Deed.]—A stock mortgage contained a clause that any "acceptances" given or to be given by the mortgagor or any other person to the mortgagee in respect to the amount secured, should in no way prejudice or affect the stock mortgage, and that the mortgagee should have the same powers under the mortgage as if the acceptance had not been given, and that the acceptances should be deemed a further or collateral security with the mortgage, so far as regards the rights or securities of the mortgagee thereupon. *Held* that this clause must be taken as amounting to an agreement between the parties, that the remedy upon a promissory note of the mortgagor then overdue should not be merged in the mortgage. *Synnot v. Parkinson*, 4 V.L.R. (L.,) 521.

Of Simple Contract in Deed.]—*See Abbott v. Commercial Bank, ante column* 82.

METROPOLIS.

Powers of City Council as regards Buildings—"Melbourne Building Act"—Bye-law—Consultation—Ultra Vires.]—It was enacted by a bye-law of the City of Melbourne, made under the "*Building Act of the City of Melbourne*" (13 Vict. No. 39,) that "every dwelling-house shall be built with a clear frontage to a street, and no such dwelling-house shall be so built as to intercept the clear street frontage of any dwelling-house previously built." S. was summoned for building a house not fronting a street more than 20 feet wide. *Held* that if the construction of the bye-law were that a house could not be built at all unless it fronted a street, the bye-law was *ultra vires;* but *Semble* that the right construction was that every house within a reasonable distance from a street should front that street; also, that the bye-law did not apply to a house fronting a park, but only to a house fronting a street. *Regina v. Call, ex parte Seamark*, 2 V.R. (L.,) 124; 2 A.J.R., 67.

Buildings—Person Building without Notice to Surveyor—"Melbourne Building Act," Sec. 10—Treble Fees.]—M. commenced to excavate the foundations of a building within the City of Melbourne without having given the notice to the surveyor as prescribed by Sec. 10 of the "*Melbourne Building Act.*" He was convicted and fined, but the treble fees to the surveyor were not imposed. The building was not erected so that the fees could not be ascertained. M. paid the fine and obtained a rule *nisi* for a prohibition. *Held* that the conviction was wrong as the penalty could not be inflicted without providing for the payment of fees: and that the rule for a prohibition was not obtained from the Court too late, though made after payment of the fine, and after the refusal by a Judge in Chambers in vacation to grant a prohibition, the application to such Judge having been made before the fine was paid, since the application to the Judge was made in time, and the application to the Court was virtually to obtain the order refused in vacation, and must be considered as having been made in vacation. *Regina v. Call, ex parte M'Donald*, 2 V.L.R. (L.,) 137.

MINING.

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"*Mining Statute* 1865" (No. 291.)
"*Mines Amendment Act* 1867" (No. 316.)
"*Mines Amendment Act* 1870" (No. 372,) Sec. 1 repealed by Act No. 409.
"*Mines Amendment Act* 1872" (No. 446,) Sec. 31 repealed by Act No. 504.
"*Mines Regulation Act* 1873" (No. 480,) repealed.
"*Mines Amendment Act* 1874" (No. 504.)
"*Regulation of Mines Act* 1877" (No. 583,) repealed by Act No. 783.
"*Drainage of Mines Act* 1877" (No. 596.)
"*Regulation of Mines Act* 1881" (No. 719,) repealed by Act No. 783.
"*Regulation of Mines Act* 1883" (No. 783.)
"*Residence Areas Act* 1881" (No. 709.)
"*Mining Partnership Act*" (No. 109,) repealed by "*Companies Statute*" (No. 190.)
"*Mining Companies' Limited Liability Act* 1864" (No. 228,) repealed by Act No. 409.
Amending Acts, Nos. 324 and 354, partially repealed by Act No. 409.
"*Mining Companies Act* 1871" (No. 409.)
"*Amending Acts* 1882 *and* 1883" (Forfeiture of Mining Shares,) (Nos. 742 and 779.)

I. Mines, Minerals, and Interests in Mines.

(i.) *Mines and Minerals.*

(1) *Management of Mines.*

(a) *Regulation and Inspection.*

Breach of Rules by Company—Person Liable to Penalty—"Regulation of Mines Statute 1873," Sec. 5 (xi.)]—The word "owner" in Sec. 5 of the "*Regulation of Mines Statute* 1873" means legal manager, and the legal manager is the person liable to a penalty under that section, Sub-sec. xi., for the contravention, in the case of a mine under the control of such company, of the general rules prescribed by the Act, unless he can show that all necessary preventive measures have been adopted against such contravention. *Curthoys v. Kilbride*, 2 V.L.R. (L.,) 265.

[Compare Sec. 8 of Act No. 783.]

Liability of Manager—Act No. 480, Sec. 5, Sub-sec. 8.]—An accident occurred in a mine causing bodily injury to miners working therein. The complaint was framed under Sub-sec. 8 of Sec. 5, "by not securing or making safe for persons, &c., a drive and excavation"—*i.e.*, under the first branch of the concluding clause, and alleging a personal contravention by the manager. *Held* that he was not liable, no personal contravention having been proved; and *Semble*, the words mean in the "mine," and are not restricted to the drive. *Gibson v. Chalk*, 3 V.L.R. (L.,) 15.

[Compare Sec. 8, Sub-sec. 10, of Act No. 783.]

Where it was not urged in defence that the provisions of the Act No. 583 as to having the cages in use fitted with safety appliances were complied with, and the manager had told the directors that the apparatus was required, but had taken no further steps, *Held* that he was liable, as he had not taken "reasonable means to prevent the non-compliance." *Stewart v. Berryman*, 9 V.L.R. (L.,) 116.

[Compare Sec. 8, Sub-sec. 17, of Act No. 783.]

Accidsnt in Mine—Action by Widow of Deceased—"Statute of Wrongs 1865"—"Mines Regulation Act 1873," Secs. 2, 3, 5, 8.]—The action which, before the passing of the "*Mines Regulation Act* 1873," might have been brought by a miner injured in a mine, or by his executor for the benefit of his relatives, at common law or under the "*Statute of Wrongs* 1865," is governed by Sec. 8 of the former Act, and may, under that section, be brought for the benefit of the widow and children. The "*Mines Regulation Act* 1873" moreover, abrogates the doctrine that a master is not responsible to one servant for the act of another in the course of their common employment, as far as mining accidents are concerned. An action under the Act too, is sufficiently sustained by proof of the happening of the accident, unless the defendant can show how it happened, and that it was caused by something for which no one was to blame, or that it was the result solely of the deceased miner's neglect of the provisions of the Act, since the Act shifts the burden of proof. *Kaye v. Ironstone Hill Lead G.M. Coy.*, 2 V.L.R. (L.,) 148.

[Compare Secs. 4 and 17 of Act No. 783.]

Accident in Mine—Contributory Negligence—Negligence of Fellow Servants—"Regulation of Mines Statute 1873."]—Where the accident to a miner has been caused by non-observance of the provisions of the "*Mines Regulation Statute* 1873," the owner is liable, even though the miner have been negligent, unless the non-observance of the provisions of the Statute were entirely attributable to such miner. But where the accident was not caused by non-observance of the provisions, the principles of the common law apply, except that the owner is expressly made answerable for the acts of a fellow servant of the injured miner, and contributory negligence on the part of the miner will be a good defence. *Laurenson v. Count Bismarck G. M. Coy.*, 4 V.L.R. (L.,) 83.

[Compare Sec. 17 of Act No. 783.]

Drive or Part of Mine—"Regulation of Mines Statute 1873," Sec. 2.]—A drive which has been worked out and is left unused is not a "drive" or part of the "mine" within the meaning of Sec. 2 of the "*Regulation of Mines Statute* 1873." *Laurenson v. Count Bismarck G. M. Coy*, 4 V.L.R. (L.,) 83.

[Compare Sec. 3 of Act No. 783.]

Negligence of Person in Charge of Machinery—"Regulation of Mines Statute 1877."]—The "*Regulation of Mines Statute* 1877," Sec. 6, Sub-sec. xx., as to negligence of persons in charge of machinery in connection with the working of a mine, does not apply to the mere *erection* of machinery at a mine. *Dunstan v. Stewart*, 6 V.L.R. (L.,) 175.

[Compare Sec. 8, Sub-sec. xxxi. of Act No. 783.]

Management of—Signalling—Act No. 583, Sec. 6, Sub-sec. x.]—Where a mining manager had employed as a means of communication from the top to the bottom, a mode of signalling by certain knocks with a hammer upon the centres of the top of the shaft, which was understood by the miners, and proved effective, *Held* that this was a sufficient compliance with the Act. *Stewart v. Berryman*, 9 V.L.R. (L.,) 116.

[Compare Sec. 8, Sub-secs. xiii, xvi. of Act No. 783.]

Secs. 8 (xxix.) and 18 of the "Regulation of Mines and Mining Machinery Act 1883"—Construction—"Platforms"]—*Quære*, whether the word "platform" in Secs. 8 (xxix.) and 16 of the "*Regulation of Mines and Mining Machinery Act* 1883" means something attached to the ladder or to the side of the shaft. *Campbell v. Parker's Extended Coy.*, 10 V.L.R. (M.,) 1.

Summons before Warden under Secs. 8 (xxix.) and 16 of the "Regulation of Mines and Mining Machinery Act 1883"—Vaguensss.]—*See* S.C. *post* under Practice in the Warden's Court.

Mining Accidsnt—Act No. 583 ("Regulation of Minss,") Ssc. 12.]—A miner was injured by a piece of timber intended to keep the pump-tube secure in the shaft, which had fallen from its position. The miner admitted that he had known of its being loose for nine months previously, and had not given information of the fact to the manager. *Held* that the plaintiff had not been guilty of contributory negligence in not reporting as dangerous what had existed so long without occasioning injury. *Eureka Extended Coy. v. Allen*, 9 V.L.R. (L.,) 341.

[Compare Sec. 20 of Act No. 783.]

(*b*) *Drainage of Mines.*

Lease from Crown—"Quartz Reef Drainage Act" (No. 153.)]—The Act No. 153 only applies to "claims." Where a person had obtained a decree before the warden under the Act, against a company holding a mining lease from Crown, for money due as contribution for draining their "claim," a rule absolute was made prohibiting further proceedings. *In re Clow, ex parte Hewitt*, 2 W. & W. (L.,) 160.

[Compare Sec. 71, Sub-sec. xiv., of Act No. 291.]

Contribution Towards — How Recovered — "Drainage of Mines Act 1877," Sec. 3.]—Contribution under the "*Drainage of Mines Act* 1877" (No. 596,) Sec. 3, may be recovered from the owner of a mine on the same reef, although the machinery used for drainage purposes is also used for mining purposes. *Wheal Terrill Q.M. Coy. v. Irwin*, 6 V.L.R. (M.,) 11; 1 A.L.T., 176.

Order for Contribution — Duty of Warden — "Drainage of Mines Act 1877," Sec. 3.]—It is not imperative on a warden when making an order for contribution, under the "*Drainage of Mines Act* 1877," Sec. 3, to impose upon the owner of the machinery terms with regard to the efficient working thereof, with regard to the benefit of all parties. *Ibid.*

(2) *Mining on Private Property the Subject of a Crown Grant.*

(*a*) *General Principles.*

Right to Mine How Far it Passes by a Crown Grant.]—*Per Molesworth, J.*:—By the law of England, which is also the law of this country, all gold mines belong to the Crown; and that though the Crown may have granted the lands containing them to a subject without reservation, the gold under the grantee's land is not his, and neither he nor anybody else has a right against the Crown to take it. *Millar v. Wildish*, 2 W. & W. (E.,) 37, 43, 44.

A grant of Crown lands under 5 and 6 Vict., cap. 36, made before the passing of the Act 18 and 19 Vict., cap. 55, does not transfer to the grantee the gold and silver that may be found under the land so granted unless the intention that such minerals should so pass is expressed by apt and precise words. *Woolley v. Ironstone Hill Lead Coy.*, 1 V.L.R. (E.,) 237; affirmed on appeal to P.C. *sub nom. Woolley v. Attorney-General*, L.R. 2 App. Cas., 163.

Rights of Owner to Restrain Mining without making Attorney-General a Party—Injury to Surface.]—The owner not being entitled to the gold can only restrain mining upon his land in so far as it causes real damage to the owner's use of the surface. *Millar v. Wildish*, 2 W. & W. (E.,) 37; *Star Freehold Coy. v. Inkerman and Durham Coy.*, 3 W.W. & A'B. (E.,) 181; *Astley United G. M. Coy. v. Cosmopolitan G. M. Coy.*, 4 W.W. & A'B. (E.,) 96; *Attorney-General v. Scholes*, 5 W.W. & A'B. (E.,) 164.

But if the Attorney-General be joined in the suit, the owners may sue for an injunction to restrain the trespass, and for account of the gold. *Lane v. Hannah*, 1 W. & W. (E.,) 66; *Attorney-General v. Gee*, 2 W. & W. (E.,) 122; *Attorney-General v. Boyd*, 3 A.J.R., 18, 99, 130. *Attorney-General v. Lansell*, 7 V.L.R., (E.,) 59.

If the owners are carrying on mining operations under their own land, even if their motive be to obtain the gold to which the Crown is entitled, they may restrain other people wrongfully carrying on similar works, and thwarting their own operations. *Broadbent v. Marshall*, 2 W. & W. (E.,) 115; *Astley United G. M. Coy. v. Cosmopolitan G. M. Coy.*, 4 W.W. & A'B. (E.,) 96; *Western Freehold Coy. v. G. W. Coy.*, 4 W.W. & A'B. (E.,) 44; *Woolley v. Ironstone Hill Lead Co.*, 1 V.L.R., (E.,) 237.

Persons mining under license from the owners of private property are entitled to restrain mining by the owners or persons claiming through them. *Newington Freehold G. M. Coy. v. Harris*, 3 W.W. & A'B. (E.,) 174; *Star Freehold Coy. v. Evans Freehold Coy.*, 4 W.W. & A'B. (E.,) 6.

[NOTE.—The facts of all the above-mentioned cases are set out fully under the next heading.]

Mining with Tacit Consent of Crown—Not Illegal.]—Mining for gold upon private property with tacit assent of the Crown is not illegal so as to avoid contracts. *Bonshaw Freehold G. M. Coy. v. The Prince of Wales Coy.*, 5 W.W. & A'B. (E.,) 140.

Agreements as to Mining under Private Land—Not Illegal.]—There is no illegality in agreements as to mining for gold on private property so as to enable the parties to avoid such agreements, the parties dealing remaining however subject to the Crown's right to the gold being at any time asserted. *Ah Wye v. Locke*, 3 A.J.R., 84, 85.

Mining Lease on Private Property—Plea of Illegality.]—C., the owner of private property, granted a mining lease thereof to P., and sued P. for breach of the covenants. P. pleaded that no consent of H. M. The Queen was given to the granting of the lease, and that the lease was thereby void and illegal. *Held* that it was quite consistent with the plea that C. might have had a good mining lease from the Crown, or a grant of royal mines, and that a plea of illegality must negative every hypothesis under which the contract could be legal. *Clarke v. Pitcher*, 9 V.L.R. (L.,) 128; 5 A.L.T., 17.

Reservation of Gold and Auriferous Earth and Stone—Power of Grantee as regards Person Removing.]—A grantee of Crown lands, with an exception and reservation in the grant of all gold and auriferous earth and stone, has no power to restrain a third person from removing gold and auriferous earth and stone from the land, notwithstanding that such person may be a trespasser against the Crown. *Garibaldi Coy. v. Craven's New Chum Coy.*, 10 V.L.R. (L.,) 233; 6 A.L.T., 93.

A., a Crown grantee of a freehold abutting on a street, applied for an injunction to restrain B. from mining for gold under the half of the street adjoining his land. A.'s grant expressly excepted and reserved all gold and auriferous stone and earth, and it was not shown that B. had extracted anything else. *Held* that A. could not obtain an injunction as he had shown no title to the auriferous stone and earth. *Ibid.*

Semble, a tenant for life even subject to paramount rights of the Crown is not entitled to the proceeds of gold raised from private property against a remainder man in tail. *In re Durbridge*, 3 V.L.R. (E.,) 21.

(*b*) *Injunction to Restrain Mining on Private Property and Practice Thereon.*

A Crown grantee died intestate, leaving an infant heiress-at-law. The brother of the grantee, without sanction of the Court, entered on the land on behalf of his infant niece, and granted a lease for gold-mining purposes. On a bill filed by the niece against her uncle and the lessees of the land, the Court granted an injunction to restrain all mining operations, without prejudice to any question as to the prerogative of the Crown over the gold. *Fullerton v. Fullerton*, 1 W. & W. (E.,) 224.

Injunction against Mining on Private Property—Surface Damage.]—Bill by plaintiff who claimed by several *mesne* conveyances from a

Crown grantee for injunction restraining defendants from encroaching on land and from mining thereupon or removing gold or auriferous material therefrom, and praying an account of gold and profits raised and made by defendant. *Held, per Molesworth, J.*, on a demurrer, that an owner of private property might by injunction restrain a trespasser mining and taking minerals belonging to him the owner, but that the plaintiff as mere owner seeking protection and account of gold fails because the gold is in no way his but the Crown's; and as to the removal of underground earth by a trespasser, that is not a subject of injunction unless real damage to the plaintiff's use of surface result from it, such as a sinking of the surface affecting the proper enjoyment of the land; and that a general averment of irreparable damage unexplained is not sufficient. *Millar v. Wildish*, 2 W. & W. (E.,) 37.

The plaintiffs claimed as assignees of a lease of land, the surface of which was reserved to the lessor. The defendants were owners of adjoining land, and also assignees of the reversion, and from shafts sunk upon their own land were encroaching upon and driving into the plaintiffs' mines and obtaining gold therefrom. On motion for an injunction, *Held* that the undermining being in no respect attributable to the claims the defendants had as assignees of the lessor to the surface, it was simply a case of lessees, having legal rights, being encroached upon by adjoining owners from within their own ground; and that the case was not distinguishable from *Millar v. Wildish*. Motion refused. *Star Freehold Coy. v. Inkerman and Durham Coy.*, 3 W.W. & A'B. (E.,) 181.

Injunction to Restrain Mining on Private Land —Injury to Surface.]—In an information and bill by the Attorney-General and the owners of private land to restrain mining, the pleadings stated that irreparable injury was being done to the surface, setting forth the nature of the injury. *Held*, upon demurrer on various grounds, that the plaintiffs, as owners, were entitled to restrain the mining, not as underground injury, but as injury to the surface, as stated in the pleadings. *Attorney-General v. Scholes*, 5 W.W. & A'B. (E.,) 164, 170.

Injunction against Mining Operations Interfering with Plaintiffs' Operations.]—The plaintiffs were lessees of certain private property legally carrying on extensive underground works in their own land, and were thwarted and obstructed by the defendants illegally carrying on similar works in the same place. The plaintiffs sought an injunction restraining defendants from carrying on mining operations under leased lands, and from working or continuing drives under such land. *Held, per Molesworth, J.*, that if plaintiffs' real motive was to obtain gold the Crown might stop them, but that their motive did not make their acts illegal, or deprive them of the protection of the law; that the case was distinguishable from *Millar v. Wildish* on the ground that in that case the plaintiffs were using the surface only, and were not obstructed in the use of it by the defendants' works. Injunction granted. *Broadbent v. Marshall*, 2 W. & W. (E.,) 115.

Exclusive Licensees from Owner of Private Property—Attorney-General not Joined.]—Plaintiffs and defendants held respectively licenses from one S., the owner of private property, to mine on parts of his property separated by a public road. The defendants mined under the road and encroached upon the plaintiff's land, and removed auriferous earth therefrom, and injured the plaintiffs' mine. The plaintiffs brought a bill against defendants and S.—the Attorney-General not being joined—praying for an injunction restraining the defendants from driving or taking gold or auriferous earth; that S. might be restrained from receiving gold so taken; and for an account of gold so taken and of injury to the mine. *Held, per Molesworth, J.*, that on the principle of *Millar v. Wildish*, the injunction as to and account of gold raised could not be granted, the Attorney-General not being a party, and that on the principle of *Broadbent v. Marshall* the injunction to restrain the encroachment would be granted, as the defendants, working under plaintiffs' ground, would obstruct the drives which the plaintiffs were contemplating, the principle of *Broadbent v. Marshall* being extended to exclusive licensees; that licensees actually mining on part of their land, and intending to mine on the whole, are protected as to the whole; that subsequent mining by one rightfully entitled is protected against a prior wrongdoer; that measuring the damage to the works was properly the province of a court of law, and, as it was reducible to the loss of gold, the plaintiffs had no claim to it; that, as to the injunction against S., no relief could be granted against him, as he contracted to give what belonged to the Crown; and that plaintiffs, as exclusive licensees, need not, as against wrongdoers, prove licensor's title. *Astley United G.M. Coy. v. Cosmopolitan G.M. Coy.*, 4 W W. & A'B. (E.,) 96.

Exclusive Licensees—Mining under a Street—Injunction.]—The plaintiff company obtained a license from S., the owner of private property, to mine under his land. The defendant company were owners of adjoining property, and were encroaching on the plaintiff company's land, and broke into their workings. The point of collision was under a street named M. street, and by some old *Gazettes* this was treated as a public street; but it was included in the plaintiff company's license as being part of S.'s private property. On a bill for an injunction restraining the defendants from encroaching, *Held, per Molesworth, J.*, that the street might be private property subject to the rights of the public, and that these rights, if they existed, were not sufficient to warrant the Court in withholding redress as between plaintiff and defendant; that, following *Astley United v. Cosmopolitan Coy.*, exclusive licensees from the owner of private property might restrain encroachments by wrongdoers although the municipal or Crown officers might interfere to protect the rights of the public. Injunction granted. *Western Freehold v. Great Western G.M. Coy.*, 4 W.W. & A'B. (E.,) 44.

Crown—Prerogative of Crown—Royal Mines—Crown Grant—Reservation.]—The bill stated a grant from Crown 18th June, 1853, to C. & C. of a piece of land (A) with reservations

of land for public ways; of all sand, clay, stone, gravel, and indigenous timber; of all materials for ways and bridges; with right of removing and taking, and rights of ingress and egress for those purposes, but with no other reservation. By divers conveyances A and B, which was the subject of a Crown grant with similar reservations, had become vested in the plaintiff Woolley and another plaintiff upon trust for a partnership known as the Coliban Mining Company. The plaintiff company had mined upon the land and erected plant, but were not able to find the gold-bearing gutter running through the land. The bill sought to restrain the defendant company who were mining on land adjoining B from encroaching on B and taking gold from the gutter through B it had discovered, and the Attorney-General was made a defendant. *Held* on a demurrer by Attorney-General on the ground that plaintiffs were not entitled to gold as against the Crown, that it is the law in England that the Crown is entitled to all gold and silver mines against the world, and that its rights cannot be conveyed away except by express conveyance of these royal mines; that the same law applied to rights of the Crown in Victoria, and that grant of lands did not pass the grant of these royal mines. The demurrer of the Attorney-General allowed with costs. *Held* on a demurrer by other defendants on ground of want of equity, that though the Crown was entitled to gold, yet that plaintiffs were entitled to an injunction against trespassers, and this part of demurrer was overruled. *Woolley v. Ironstone Hill Lead G.M. Coy.*, 1 V.L.R. (E.,) 237.

Licensees Entitled as against Licensors and Persons Claiming through Them.]— L. granted to the N. Company an exclusive license to mine under freehold land of L. for all mines and minerals which might be found thereunder, with a right to sink shafts on paying compensation. This license was duly registered. Subsequently to such registration, L. sold the land in question to H., who again sold it to the S. N. Company. The latter commenced mining operations on the land. *Held* that the N. Company, as exclusive licensees, had a title capable of being registered, so as to obtain priority against all subsequent registration by assignees of L.; that the case was one based upon contract—the case of a licensee's contract against the owners of the reversion, and the owners of that reversion proceeding to mine in defiance of the contract—and injunction granted to restrain the S. N. Company from carrying on their works. *The Newington Freehold G. M. Coy. Registered v. Harris*, 3 W.W. and A'B. (E.,) 174.

Licensees—Title from same Owner—Mortgagor —Injunction.]—The mortgagors and mortgagees of certain land granted the exclusive right to mine on certain property to the W. Company, who transferred the right to the plaintiff company. The defendant company subsequently purchased the equity of redemption to the land from the mortgagors, and sank a shaft to mine. On injunction to restrain defendants, *Held* that as both derived title from the same owner, and as the encroachment was from without, the case fell within the principle of *N. Coy. v. Harris*. Injunction granted. *Star Freehold Coy. v. Evans Freehold Coy.*, 4 W.W. & A'B. (E.,) 6.

Injunction against Mining on Private Property—Attorney-General a Party — Rights to Gold.]— Bill and information by Attorney-General and H. and others as plaintiffs against G. and others seeking an account of gold taken, and an injunction restraining defendants from trespassing or encroaching or taking gold. Certain land was granted by the Crown to one W. By an indenture this land was conveyed to certain of the plaintiffs as trustees for the B. F. G. M. Coy., which was registered according to provisions of 24 Vict., No. 109. The plaintiff H. was manager of the company; but the company itself was not a party, the other plaintiffs being the shareholders of the company. The defendants were the shareholders of another partnership company, the A. & W. Coy, which had taken possession of certain land adjoining the plaintiffs' under mining rights, and had encroached and taken gold from plaintiff's land. The pleadings alleged that the plaintiffs were mining with the consent of the Crown. *Held, per Molesworth, J.*, on demurrer that some of the plaintiffs, either the Attorney-General or the other plaintiffs, could make some title to relief, and they had an equity as against the defendants; that here the Crown was rightly joined as co-plaintiff; that the company stated an injury to them by improper removal of subsoil; that whether the company or the Crown are entitled to the gold they may make common cause against the defendants for the prevention of the encroachment; that there was no conflict of interest between the Crown and the plaintiffs, the plaintiffs considering themselves as tenants at sufferance of the Crown; that whether the removal of the gold was an irreparable injury to the plaintiffs or not it was to the Crown which was joined as co-plaintiff; that as to uncertainty whether the defendants are required to account to the Attorney-General or the co-plaintiffs, there is a continuing option in the Attorney-General whenever he pleases to put forward a claim on the part of the Crown; that the Attorney-General of Victoria and not the Attorney-General of England or the Commissioner of Crown Lands was the proper officer to file the information. Demurrer overruled. *Attorney-General v. Gee*, 2 W. & W. (E.,) 122.

But where the pleadings alleged no consent of the Crown to past mining, nor any consent to apply the past or future proceeds of gold mining to the plaintiff's benefit, *Held*, on demurrers (distinguishing *Attorney-General v. Gee*), that the information and bill seeking to restrain mining on behalf of the plaintiffs as on the ground of surface injury, and on behalf of the Crown as on the ground of its right to the gold, and seeking account of the gold raised were multifarious, there being no connection of interest between the Crown and the plaintiffs. *Attorney-General v. Scholes*, 5 W.W. & A'B. (E.,) 164.

Suit by Attorney-General, a Corporation and Owners of Private Property—Joinder of Plaintiffs.] — *Molesworth, J.*, granted an injunction against mining on private property at the suit of the Attorney-General, a corporation and

the owners of the freehold—all being joined as plaintiffs—but afterwards intimated that there had been a misjoinder of parties, and that the three parties could not join, each complaining of different injuries. *Attorney-General v. Rogers*, 1 V.R. (E.,) 132, 139; 1 A.J.R., 120, 149.

Bill and Information—Mining under a Road—Account—Valuation High against Trespassers.]—Information by Attorney-General at relation of co-plaintiffs, and bill by owners of property, their lessees, and a company mining for gold under arrangement with lessees to restrain defendants holding adjoining claims from encroaching on the land, and for an account of gold raised, and also to restrain defendants from mining under half a road the boundary of the freehold land. The pleadings alleged that the plaintiffs' mining was with the knowledge and consent of the Attorney-General. *Held per Molesworth, J.*, that landlord and tenant may join in a suit for injury to soil, and that Attorney-General as representing the Crown may join in the suit for an injunction and account; that the evidence of the alleged road being a road at all being insufficient, and it appearing that the defendants and plaintiffs had made an agreement seven years previously not to mine within certain limits and boundaries inconsistent with the relief now sought as to half the road, the co-plaintiffs had no right to such relief even although Attorney-General might have. Injunction granted save as to half the road, and accounts decreed. On exceptions to the Master's report, estimating the value of the gold at £607, *Held, per Molesworth, J.*, and affirmed on appeal, that in such cases the valuation as against trespassers should be high. *Attorney-General v. Boyd*, 3 A.J.R. 18, 99, 130.

Information by Attorney-General—Owners not being Joined as Plaintiffs—Defendant a No-Liability Company.]—Information by Attorney-General, at the relation of owners of private property to restrain encroachment, and for order for inspection. The defendant company was a no-liability company. *Interim* injunction granted, on the ground of peculiar nature of defendant company, but Court intimated that as against any other defendant an injunction would not be granted unless the owners of private property were joined as plaintiffs by bill. *Attorney-General v. Hustler's Consols Coy.*, 3 A.J.R., 70.

Parties—Licensees—Licensor Necessary Party.]—Information by Attorney-General at relation of W., and bill by plaintiff company and W. to restrain defendant from trespassing on certain land, and for an account of gold raised by him therefrom. Certain freeholders of the land had granted to the plaintiff company a license to mine under the land, and the plaintiff company had agreed with W. to allow him to mine under such land on tribute. *Held* that although the Attorney-General was a party, the freeholders and licensors were necessary parties—the injury to the land through the excavations, apart from the gold raised being an injury to the freeholders, and the injury by removal of the gold was partially an injury to the freeholders, the licensees having, under the license, to account to him for one-tenth of the gold, and in order to enable licensees to maintain suit they would have to show that they had an entire right to the gold raised. Liberty to amend. *Attorney-General v. Lansell*, 7 V.L.R. (E.,) 59; affirmed on appeal, 8 V.L.R. (E.,) 155, 173.

Parties — Lessees — Gold Mining.]—Where a plaintiff is entitled to land by Crown grant, and leases it for mining purposes to lessees from week to week, intending to resume possession very shortly, and brings a suit to restrain a defendant company from encroaching, such lessees are necessary parties. *Woolley v. Ironstone Hill Lead G.M. Coy.*, 1 V.L.R. (E.,) 237.

"Mining Statute" (No. 291,) Sec. 16—License from Council to Mine—Doctrine of ad medium filum *viæ* Applied.]—The plaintiff company were lessees from an owner in fee of certain land on the north of a proclaimed street, and had the permission of the Council of Sandhurst to mine under the street. The defendant company were lessees of owners in fee of certain land on the south of the street, and had no such permission from the council. A collision between the companies took place under the street nearer the northern side of the street than the southern, and the defendants, by letting water flow from their reservoir, injured the plaintiffs' workings. On bill for injunction to restrain the defendant company from mining under the street comprised in plaintiffs' permit, *Held* that, in accordance with the decision in *Davis v. The Queen*, the defendant company claiming from persons holding land adjoining the street had a paramount right to mine under the southern half of such street as against the permission given to the plaintiff company, but that under Sec. 16 of Act No. 291 the permission of the Council conferred title as to northern half against the defendants having no such permission. *Ordered* that defendants be restrained from mining under northern half of the street. *The Extended Hustler's Freehold Coy. v. Moore's Hustler's Coy.*, 5 A.J.R., 116.

Mining Lease—Highway ad medium filum—Order for Inspection.]—W. was registered proprietor under Act No. 301 of a certain allotment, deriving his title from a Crown grantee. W. granted a mining lease to the plaintiff company of the land, reserving to himself the use and enjoyment of the surface. This land was bounded on one side by a highway. The defendant company were mining lessees of land on the other side of the highway. The bill alleged that the defendant company had mined under the whole breadth of the street into the allotment; and plaintiff, in driving under the allotment, had broken into defendants' shaft on that allotment. The bill sought an injunction against mining under the allotment and under one-half of the street. *Held* that, as affidavit in support of bill did not set out lease so as to enable the Court to determine whether the highway *ad medium filum* passed to plaintiff company, the Court would refuse that part of injunction. Injunction ordered as to mining under allotment, and inspection granted with reference only to ascertain whether defendants were mining under it at the date of the order. *Victoria United Mining Coy. v. Prince of Wales Coy.*, 5 V.L.R. (E.,) 92.

But *see Garibaldi Coy. v. Craven's New Chum Coy.*, 10 V.L.R. (L.,) 233, where the doctrine of *Davis v. The Queen* was overruled.

Orders for Inspection under Private Property.]—*Attorney-General v. Cant; Attorney-General v. Gee; Attorney-General v. Hustler's Consols Coy.*; and *Attorney-General v. Lansell; post* under sub-heading Practice and Procedure—In Equity—Orders for Inspection.

(3) *Mining Boards, Officers, and Bye-Laws.*

Disbursements by Mining Boards under Bye-Laws—Salary of Officers—Act No. 115.]—G. was appointed an officer under a mining board and his salary was fixed but no bye-law was passed prescribing the duties of officers appointed under the Act No. 115, or for payment of such officers. The board after employing G. for some time dismissed him. A rule *nisi* was obtained for a *mandamus* to compel the board to pay to G. all salary due to date. *Held* that all fees necessary for the purposes of Act No. 115 can only be disbursed by a bye-law duly made, and that as no bye-law was passed there was no fund from which salary could be legally paid, and no salary legally due. Rule discharged. *Gill v. Nicholas*, 2 W. & W. (L.,) 3.

Compare Sec. 71, Sub-secs. xiv., of Act No. 291.

Mandamus to Surveyor to Survey Claim—Act No. 291, Sec. 47.]—A mining surveyor stands neutral between the parties, and his duties are purely ministerial. Where a surveyor, S., who was also registrar, refused to survey a claim on the ground that there was no certificate of registration, and S. had refused to issue the certificate because six persons held ten miner's rights, but it appeared that only six men's ground was claimed, the Court granted a *mandamus*. *Regina v. Stephenson, ex parte Black*, N.C., 22.

"Mining Statute 1865," Sec. 73.]—Sec. 73 of the "*Mining Statute* 1865" (No. 291,) giving the Governor-in-Council a power to cancel bye-laws, has a retrospective operation, and the title to a claim, pursuant to a bye-law, bad under the Act No. 32 was held validated by Sec. 73. *Vivian v. Dennis*, 3 W.W. & A'B. (M.,) 29.

Infraction of Bye-laws—Police Magistrate may Entertain Complaint for—No. 291, Sec. 237.]—A police magistrate is competent to hear a complaint, under Sec. 237 of the "*Mining Statute* 1865," for infraction of a mining bye-law. *Regina v. Pohlman, ex parte Nickless*, 5 W.W. & A'B. (L.,) 31.

Bye-laws under Sec. 111 of "Goldfields Act" (No. 32.)]—Sec. 111 of the "*Goldfields Act*," enacting that bye-laws made and published as therein directed, "at the expiration of twenty-one days next after such publication, but not before, shall have the force of law throughout the district," apply to the event after which, and not to the area over which the bye-laws become operative; and a bye-law made for "a division of a district" is without "force of law throughout the district," and invalid. Where, therefore, C., under a bye-law made only for the R. division of the A district, marked off a claim in the R. division under a bye-law made for that division, and sued for encroachment, *Held* that, the bye-law being invalid, C. could not maintain encroachment. *Jenkinson v. Cumming*, 1 W. & W. (L.,) 337.

[But *see* Sec. 71 of Act No. 291, where power is given to Mining Boards to make bye-laws for any division or part thereof.]

Construction.]—Mining bye-laws should be construed according to rules which have been applied to Acts of Parliament by courts of justice. *Lawlor v. Stiggants*, 2 V.L.R. (M.,) 17.

Construction—Condition Precedent.]—A bye-law which prescribed the conditions by which a valid title to a mining tenement might be obtained, contained in the middle of it a proviso containing exemptions from the foregoing conditions. *Held* that that which followed the proviso might be just as much a condition precedent as that which preceded it. *Beavan v. Rigby*, 2 V.L.R. (M.,) 7.

Retrospective Operation.]—Bye-laws have no retrospective operation; a bye-law under which a man takes up his claim is that which governs his rights and liabilities. *Bond v. Watson*, 4 W.W. & A'B. (M.,) 85; for facts *see* S.C. *post* under sub-heading, Claim—Forfeiture. And *see* S.P., *Regina v. Clow, ex parte Oliver*, 5 W.W. & A'B. (L.,) 89. *Post* under sub-heading, Claim—Forfeiture.

Ultra Vires.]—A bye-law of a mining district providing that no mining registrar "shall hold directly or indirectly except for the purpose of residence any claim or share" in his own district, is *ultra vires* of the Mining Board, the board having no power to exclude any individual from a public right; and a registrar is not thereby disabled from bringing a suit for a claim in his own district. *O'Mally v. Ward*, 1 W. & W. (L.,) 277.

Bye-Laws Preserved by Sec. 2 of "Mining Statute 1865."]—The second section of the "*Mining Statute* 1865" shows an intention to preserve bye-laws apart from the eightieth. *Longbottom v. White*, 3 W.W. & A'B. (M.,) 35.

Bye-Laws Preserved.]—Secs. 71—80 of the Act No. 291 continue the operation of all previous bye-laws, and continue the rights of the public holding miners' rights to insist on forfeiture, and all obligations connected with and all liability to the forfeiture of such titles. *Clerk v. Wrigley*, 4 W.W. & A'B. (M.,) 74, 83.

The principle of *Critchley v. Graham* (adjudication necessary to enforce forfeiture) is paramount to bye-laws, if the bye-laws are inconsistent with it. *Barlow v. Hayes*, 4 W.W. & A'B. (M.,) 67.

"Mining Statute" (No. 291,) Sec. 80—Retrospective Effect on Bye-Laws.]—Sec. 80 does not make valid and legal bye-laws which were previously illegal and invalid. Where a warden made an order under clause 8 of Sandhurst Mining Bye-Law (No. 6,) that possession should

be given to S. upon forfeiture of a claim, provided that a sum of money, being value of the materials and work absolutely beneficial to the defendant J., were paid by S. to J. within forty-eight hours. *Held* that the bye-law was invalid, and the order made under it also invalid. *Sayers v. Jacomb*, 3 V.R. (L.,) 132; 3 A.J.R., 66.

Act No. 291, Se. 73.]—The words "interest in a claim" in Sec. 73 do not include the right to compensation for improvements on eviction, and therefore Sec. 73 does not give a bye-law providing for compensation a retrospective validity. *Reardon v. Sayers*, 3 A.J.R., 126.

Sandhurst Bye-Laws, Government "Gazette," 1870, p. 287; and 1871, p. 1852—Act No. 291, Sec. 72.]—The approval of bye-laws by the law officers under Sec. 72 of Act No. 291 is not retrospective, and a bye-law takes effect from the date of its allowance and approval by the law officers. *Reardon v. Norton*, 5 V.L.R. (M.,) 12.

(4) *Other Points.*

What is a Mine.]—*See Regina v. Davies. Ante column* 296.

Mortgages of Mining Plant and Machinery—Act No. 109, Sec. 28.]—The word "mortgagees" was intentionally omitted from the latter part of Sec. 28 of Act No. 109, respecting registration, and therefore where the mortgagee is in possession, a mortgage deed of mining plant and machinery does not require to be registered. *Oriental Bank v. Carter*, 1 W.W. & A'B. (L.,) 36.

Existing Interests—Act No. 153—Repeal of, by Act No. 291, Secs. 2, 80—Warden's Order under Former Act.]—A summons dated 29th December, 1865, was taken out under the Act No. 153, returnable before a warden. The summons was adjourned to 26th January, 1866, upon which day the warden made an order for payment of £12 forthwith, and £2 weekly till December, 1866. The Act No. 153 was repealed by the Act No. 291 from 31st December, 1865, but such "suits and proceedings" begun and pending at the time of the repeal as were brought for fees, the right to which had then accrued, were kept alive, and by the new Act mining boards were empowered to assess drainage rates, under which power some board would have to assess for a part of the year 1866, the reef covered by the warden's order. *Held*, on rule *nisi* for prohibition, that as the summons had been issued, attended, and adjourned before the 1st January, 1866, it was a "matter or thing lawfully had or done," before the commencement of the repealing Act, and was therefore, by virtue of that Act "of the same force and effect to all intents and purposes as if no such repeal had taken place," and valid; and rule *nisi* discharged. *Regina v. Webster*, 3 W.W. & A'B. (L.,) 17.

Offences against Mining Statute—21 Vict. No. 32, Sec. 122—Act No. 148, Sec. 4—Warden's Order.]—On a complaint of encroachment under 21 Vict. No. 32, a warden made the following order:—"Visited ground in presence of parties. Removed pick and shovel from claim, ordered discontinuance until application for lease disposed of." A summons was taken out against the persons in occupation "for that they did retain possession, &c." after warden's order, and they were convicted. On motion for a rule *nisi* to restrain execution, *Held* that summons did not allege that defendants had been removed from land by warden, and disclosed no offence under Sec. 122 of Act No. 32, and that Act 148, Sec. 4, was not retrospective. Order absolute for prohibition. *Ex parte Barclay, in re Pasco*, 2 W. & W. (L.,) 38.

[Compare Sec. 240 of Act No. 291.]

Offences against Mining Statute (No. 32,) Sec. 116—Carrying on Business without a License—Onus of Proof.]—*See M'Cormack v. Murray, ante column* 431; and compare Sec. 235 of Act No. 291.

(ii.) INTEREST IN MINES.

(1) *Claims.*

(a) *Generally.*

What may not be Taken as a Claim—Land Reserved for a Public Use or Purpose—5 and 6 Vict. cap. xxxvi., Sec. 3—No. 32, Secs. 3 and 4.]—A municipal council, by letter, requested the Government to allow certain land in the municipality to be reserved for recreation and gymnastic purposes, for the inhabitants of the municipal district. An officer of the Crown Lands Department replied stating that the Governor-in-Council had approved of permissive occupancy being allowed of the land in question "to be used for recreation and gymnastic purposes." *Held* that this was a sufficient reservation of the land within the meaning of 5 and 6 Vict., c. xxxvi., Sec. 3, so as to prevent its being taken up as a mining claim under Sec. 3 of No. 32, being within the exceptions specified in Sec. 4 of the latter Act. *United Sir William Don Coy. v. Koh-i-noor Coy.*, 3 W.W. & A'B. (M.,) 63.

And a suit for encroachment by one company driving for gold under the reserve from a shaft outside the reserve against a company similarly driving dismissed without costs. *Ibid.*

[Compare Sec. 13 of Act No. 291.]

Land Reserved for Public Purpose—Reservation from Sale.]—A reservation of Crown land from sale under the "*Sale of Crown Lands Act* 1860" (No. 117,) without a dedication of it to some particular public purpose, does not *per se* take such land out of the operation of the Mining Acts. *Attorney-General v. Southern Freehold Coy.*, 4 W.W. & A'B. (E.,) 66.

How Far Land held under Miners' Rights may be Reserved—Act No. 291, Secs. 13, 14.]—The Governor-in-Council cannot apply Crown lands previously held as a claim to public purposes under Sec. 13, but may under Sec. 14 except such lands from further occupation as a claim, and then use them without regard to the rights of the claimholders. *Wakeham v. Cobham*, 1 V.R. (M.,) 34; 1 A.J.R., 93.

What Land may be Taken—Act No. 291, Sec. 5.]—Land unoccupied or land occupied under a claim, if liable to forfeiture, may be occupied

as Crown land by a holder of miners' rights under Sec. 5 of the Act. *Keast v. D'Angri*, 4 A.J.R., 61.

Land under a Street.]—Land under a public road cannot be occupied as a mining claim under the Act No. 32 without permission of the proper authorities, *i.e.*, the Board of Land and Works or the District Road Board. *House v. Ah Sue*, 2 W. & W. (L.,) 41.

[Compare Secs. 5 and 16 of Act No. 291.]

What Land may be Taken—Act No. 291, Secs. 3, 13.]—Where the *locus in quo* is a street, it cannot be taken up as a mining claim. *Schonfeldt v. Beel*, 1 V.L.R. (M.,) 1.

Jurisdiction of Warden—Estoppel.]—B. took up part of a public street as a mining claim, and S. summoned B. before the warden for a declaration of forfeiture on the ground of non-working, and for possession. B. contended that the warden had no jurisdiction to adjudicate, as the ground was not capable of being so taken up. *Held* that it was a good defence; and the injury being done to the public and not to individuals, that B. was not estopped from setting up that defence. *Ibid.*

What Land may be Taken—Subsoil of Residence Area—"Mining Statute 1865," Secs. 3, 13.]—Under the "*Mining Statute* 1865" the subsoil of Crown lands applied to any public purpose or held under a miner's right or business or other license (as contradistinguished from a lease) may be within the limits of a claim, and, unless excepted by the Governor-in-Council, be mined upon with impunity, so long as the surface-rights are not injured. A claim may therefore include a residence area, and such area may be mined under, subject to liability for disturbing the surface. *Parade G. M. Coy. v. Royal Harry Q. M. Coy.*, 2 V.L.R. (L.,) 214.

A claim may be occupied under bye-law 29 of the Gippsland Bye-laws (1867), which includes in its area other lands than the subject of a warden's declaration of abandonment under bye-law No. 17, although such other lands have not been previously occupied under bye-law 17; but if the claim is of dimensions which can be taken only in unworked and abandoned grounds, it must, to be supported, be all in some way of that description. M'C. and party obtained a warden's order entitling them to possession of a certain claim marked POKL, and marked off and registered a claim, as for unworked and abandoned ground, consisting of an area marked ROMK including the lesser area POKL. The ground in ROMK in excess of POKL was either maiden ground or had not been the subject of the warden's adjudication. *Held* that M'C. and party were wrong in taking so much land, and that M'C. and party in a suit against them by B. might give up the untried ground if improperly taken and confine themselves to the abandoned ground (POKL) in resisting the suit. *Bryson v. M'Carthy*, 6 W.W. & A'B. (M.,) 35; N.C., 18.

How many Claims may be Taken up.]—Sandhurst Bye-law (No. 7,) Sec. 5, allowing the holder of one miner's right to take several single men's claims under it, is not *ultra vires* of the "*Mining Statute* 1865." *Crocker v. Wigg*, 5 W.W. & A'B. (M.,) 20.

How many Claims may be Taken up—Act 291, Secs. 3, 7, 8.]—It is contrary to the spirit of the Act to allow an advantage as to *original taking* to be purchased by paying a multiplied tax. Sec. 3 of the Act does not enable a person to multiply himself or his powers by multiplying his miner's rights, and Ballarat Bye-laws (No. 3) does not amount to an express enactment to that effect. One man cannot apply for and obtain registration of and retain possession of five men's ground by obtaining five miner's rights, but after claims are taken up and registered, Secs. 7 and 8 allow several miner's rights to be assigned to a purchaser from several partners. *Cawley v. Ling*, 6 W.W. & A'B. (M.,) 12.

Seven men cannot, under Sec. 3 of the Act No. 291, effectually take up and be registered for more than seven men's ground. *Milne v. Morell*, 3 A.J.R., 21.

How many Claims may be Held under a Transfer—Act No. 291, Secs 7, 8.]—Under Ballarat Bye-Law XI. and Secs. 7 and 8 of Act No. 291, one man holding a miner's right may be a transferee of claims not exceeding fifty men's ground. *Baker v. Wong Pang*, 8 V.L.R. (M.,) 28; 4 A.L.T., 28.

Interest of Holder of Miner's Right in a Claim—Act No. 291, Sec. 3.]—The interest which the holder of a miner's right has in his claim is at the outside an estate at will, and an action of ejectment cannot be maintained for such an estate. *Jennings v. Kinsella*, 1 W.W. & A'B. (L.,) 47.

Claim Taken up by Power of Attorney—Miner's Right.]—A person not having a miner's right may give a power of attorney to a person to take up a claim for him, in anticipation of having it, as well as persons anticipating the acquisition of property. *Keast v. D'Angri*, 4 A.J.R., 61.

Boundaries of Claims.]—*Held* under Maldon Regulations, Clauses 2, 3, 4, that claimholders are entitled to hold spaces between the reef and a line running parallel to its actual course straight or curved, and also entitled to follow the dips and angles of the said reef connected with it, though beyond 100 feet. *Miller v. Fraser*, 4 W.W. & A'B. (M.,) 29.

[*See* now Sec. 71, Sub-secs. iii. of Act No. 291.]

Width of Claim—Local Court Rule—Act No. 291, Sec. 73.]—A local court rule was as follows:—"The width of claim from east to west shall be 200 feet, 100 feet on each side of the working shaft on the line of reef, and the holders of quartz claims shall be entitled to the dips and angles of all reefs found within the reef, and may follow the same to whatever distance they may dip, east or west." *Held* that this rule was not *ultra vires*, and that even if it were it would be cured by the retrospective operation of Sec. 73 of the "*Mining Statute* 1865" (No. 291.) *Vivian v. Dennis*, 3 W.W. & A'B. (M.,) 29.

Boundaries of Claim.]—In Rule V. of "*Ballarat Rules* 1856," under 18 Vict. No. 37, there are the words "claims upon all recognised leads or gutters shall be of indefinite width until such gutters or leads are found," &c. *Held* that the gutter is "found" when it is first struck in the successive claims by the claimholders who search for it there, and when struck it may generally be supposed that it will continue generally in its main course, and the finding is not postponed until it is found in every inch of its course in all its sinuosities. Rule VIII. provided that "In cases where the gutter or lead changes its course from the supposed one, the position of the original claims shall be changed accordingly, taking precedence according to their numbers." *Held* that the intention of the rule was to give the same persons who marked claims on the original lead in its original course the power to transfer those claims on it so as to accord with the whole of the actual course of the lead; and that, therefore, a claimholder could not in proceedings before the warden, under Sec. 77 of Act No. 32, dispossess adjoining claimholders on the basis that the lead had changed, and that measuring the new direction along its sinuosities would give the occupiers of claims more than their proper length of lead. *Thomas v. Kinnear*, 2 W. & W. (L.,) 221, 231, 239.

Effect of Registration upon Size of Claim.]—The clauses 10, 11, 15, 16 of Ballarat Bye-Laws 3, show that the depth of lead assumed at the time of registration is conclusive, so that a claim cannot be enlarged or restricted upon the discovery of the mistake. Clauses 10 and 11 do not mean that depth of sinking should be distinguished from depth of lead as a test of quantity allowed. *Milne v. Morell*, 3 A.J.R., 21.

Discrepancy between Plaint and Plan.]—Complainants subject themselves only to getting the smaller quantity as shown in the plan. *Ibid.*

Title to Claim—Not Registered.]—*Semble, per Molesworth, J.*—A defendant cannot set up a title not duly registered at the time of the trial. *Moore v. White*, 4 A.J.R., 17.

Title.]—A right to a claim based on possession is to be limited to one title. Where, therefore, a claimholder, afraid of an adverse title, took an assignment of such adverse title, and became registered as assignee thereof, *Held* that he thereby lost the protection of his previous title. *Barton v. Band of Hope and Albion Consols*, 6 V.L.R. (M.,) 1; 1 A.L.T., 145.

(*b*) *Marking out and Applications for Claim.*

"Goldfields Act," Sec. 111.]—A bye-law of a mining district provided that "any person taking possession of any such claim shall do so by erecting, or causing to be erected, a post at each corner of the claim, such post to be not less than three inches in diameter, to be firmly fixed in the ground, extending at least three feet above it, and to be kept erected during the occupation of the claim." *Held* that the bye-law was reasonable, and within the powers given by Sec. 111 of No. 32 (*Goldfields Act*); that a non-compliance with it avoided the effect of taking possession; and that a claim could be lawfully taken possession of only by erecting posts in the places and of the dimensions and height set forth in the bye-law. *Thompson v. Land*, 3 W.W. & A'B. (M.,) 13.

[Compare Sec. 3 and Sec. 71, Sub-sec. iv., of Act No. 291.]

Shape of Claim to be Marked off.]—No. 7, Sec. iii., clause 4, of the Sandhurst Bye-laws provided, "as far as practicable, all claims shall be marked off in a rectangular form, the length of the same in any case not to exceed twice the breadth;" and by clauses 16, 18, it was provided that, as to special claims of a larger extent, any miners taking them up "must mark off the proposed claim in a rectangular form." *Held* that ground which could not be marked off in a rectangular form could not be the subject of a special holding under clauses 16, 17, and 18, though it could be held as an ordinary claim under clause 4. *Roscrow v. Webster*, 5 W.W. & A'B. (M.,) 64.

Amalgamated Claim—How Marked Out.]—Several persons taking up ground of dimensions to which they are jointly entitled may take possession effectually under the Beechworth Mining Bye-laws of 19th November, 1869 (Nos. 5, 6, and 20,) by pegging and trenching the corners of the entire and not the separate single men's portion. *Lightbourne v. Stitt*, 1 A.J.R., 71.

Pegs in Street—Illegality.]—If bye-laws require pegs to be fixed for the purpose of marking out a claim and two corners of the claim are on a public street, although the fixing of pegs on such street may be illegal, yet persons fixing pegs as regards a mining claim can effectually take it up by so fixing them. *Parade G. M. Coy. v. Victorian United M. Coy.*, 3 V.L.R. (E.,) 24.

Going on Private Property to Mark Out.]—Under bye-law 3, clause 10, of the Castlemaine district, if the adjoining property to a claim, being private land, make the pegging out by the surveyor impossible, no title to the claim can be acquired under that bye-law. *Talent v. Dibdin*, 8 V.L.R. (M.,) 31.

Act No. 291, Sec. 71, Sub-sec. iii.—Shifting Pegs to reduce Area to Proper Dimensions.]—A mining bye-law provided that "all claims should be marked out at the time of taking possession thereof by substantial pegs erected at each angle of the claim." W. and party took up a claim which was in excess of the area allowed by the bye-laws, and marked it out by four pegs, and subsequently shifted two of the pegs so as to reduce the area to the proper dimensions. *Held* that such shifting of the two pegs was not a good marking out under the bye-law, and was not a constructive taking possession of the claim under miners' rights. *Barrington v. Willox*, 4 V.L.R. (M.,) 1.

Marking out Claim pending Application for a Lease—Warden's Decision terminates Pendency of Application—Act No. 32, Sec. 12—Orders-in-Council for Sandhurst, 30th August, 1859.] —

Certain persons applied for a mining lease of certain land. The surveyor marked out the land and posted a notice of the application. Pending the application, M. and party entered on the land by virtue of their miners' rights, marked out a portion of it as a claim and worked it for a time, when they were warned off by the warden on the ground that their claim was on land "protected and exempted by the leasing regulations from occupation by any person during the pendency of the application for the lease." M. and party ceased working the claim, but made formal entries on it, and marked it out with pegs, which were preserved in their places until the surveyor's official pegs were officially moved. Nearly six weeks after M. and party had ceased working, H. and party first marked out a claim identical with that of M. and party, and pulled up the pegs of M. and party's claim. Before or on that day (22nd July) the pending application was refused, and on that day the warden gave directions to the surveyor to remove his official pegs and publish the notice that the protection or exemption of the land was withdrawn. The notice was published in the morning papers on the 23rd July, but the pegs were not removed till the 24th. H. and party marked out the claim afresh on the publication of the notice, but M. and party waited till the surveyor had withdrawn his pegs, when they immediately put down again the pegs of the claim which they had originally marked out. On case stated, *Held*, by the Supreme Court, that the extraction of the official posts was not necessary to terminate the pendency of the application, but that the act of the warden sufficed; that the publication of the notice merely informed the public generally that the land was open to occupation, and that M. and party were entitled to the claim, having been in possession and entitled at the time of the warden's decision. *Hookway v. Muirhead*, 1 W. & W. (L.,) 107.

Marking out—Forfeiture of Lease.]—Marking out a claim on the evening of the day on which the *Gazette* notice of forfeiture of a gold mining lease of the land marked out is published is a good marking out. *Weddell v. Howse*, 8 V.L.R. (M.,) 44; 4 A.L.T., 95.

Notice of Application—Sandhurst Bye-laws.]—A notice of intention to take up a claim under the Sandhurst Bye-laws, signed by one of the intending claimholders for himself and nineteen others, is bad, and makes the title to the claim bad. *Cruise v. Crowley*, 5 W.W. & A'B. (M.,) 27.

Semble, the notice of application should give some description of the locality in which the land sought lies. *Ibid.*

Semble, that if a party properly marks an area of sixteen acres, and, without fraud, described it in the notice of application as twelve, and it was surveyed under the bye-laws of the district to sixteen acres, and the persons registered were entitled to that quantity, a good title would be acquired to the sixteen acres. *Ibid.*

(c) *Registration.*

Irregular Registration of Amalgamated Claim.]—If the amalgamation of two claims is irregular under the bye-laws, the claimants are only thrown back upon their original titles under the separate claims, and their rights prior to amalgamation revive. *Parade G.M. Coy. v. Victorian United Mining Coy.*, 3 V.L.R. (E.,) 24.

How far Registration Essential to Title.]—*Per Molesworth, J.—Semble*: "I have some difficulty as to whether registration in the manner and within the time prescribed by the bye-laws is a condition precedent to title. I would rather say that a defendant cannot set up a title not duly registered at the time of trial." *Moore v. White*, 4 A.J.R., 17.

Act No. 291, Sec. 7—Amalgamated Claim—Application to Re-register.]—Mining Bye-laws (Ballarat, 31st October, 1873) provided that the width of a quartz claim should not exceed 750 feet, and also for the amalgamation of claims, and re-registration as an amalgamated claim. *Held* that the registration of amalgamated claims was good, even although the width of the amalgamated claim was more than 750 feet; and that a verbal application to re-register made by the manager of a company with the consent of the parties interested was good. *Donaldson v. Llanberis Coy.*, 9 V.L.R. (M.,) 21; 5 A.L.T., 54.

Semble, that if the re-registration of the amalgamated claim was bad, the company could not fall back on its former titles. *Parade G. M. Coy. v. Victoria United M. Coy.*, doubted. *Ibid.*

Partnership—What Certificate of Registration should Contain.]—*Semble*, that it is not necessary that a certificate of registration of a claim should contain the name of a company, being only a partnership, in addition to the names of the members. *Cruise v. Crowley*, 5 W.W. & A'B. (M.,) 27.

Time for Registration—Beechworth Bye-Laws 1866, No. 4—"Mining Statute 1865," Secs. 5, 6, 7, 71 (xiii.,) 237.]—O. and others worked continuously on a claim for four days and registered at the end of that time. By No. 4 of the Beechworth Bye-laws 1866, a claim ought to have been registered in two days from the time of taking possession. *Held* that the omission to register did not avoid the taking possession by posts, &c.; that, coupling the "*Mining Statute* 1865," Secs. 5, 6, 7, 71, Sub-sec. xiii., with the language of the bye-law, the omission would only deprive O. and party of the powers of Sec. 7 until registration, and subject them to a pecuniary liability under Sec. 237. *Oxley v. Little*, 5 W.W. & A'B. (M.,) 14.

Under a similar bye-law it was *held* that registration within the time prescribed by the bye-law is part and parcel of the title, as that is the time from which the obligation to work begins. *Barker's G. M. Coy. v. Keating*, 1 A.J.R., 55.

Delay in Registration—Effect of.]—A delay in final registration under the Ballarat Bye-Laws (May, 1868) subjects the applicant to others getting before him, but not to having his title when registered defeated. *Band of Hope and Albion Consols v. Young Band Extended Coy.*, 9 V.L.R. (E.,) 37, 42.

Omission to Comply with Bye-Laws—Acts of Compliance of Previous Holders.]—In 1874 *Higgs* and party were duly registered for a claim, and complied with the bye-laws. In March, 1875, H. applied to the warden to be put into possession on the ground of forfeiture, and obtained an adjudication of forfeiture. In May, 1875, H. registered himself as owner of the claim by an independent registration, without reference to the previous registration of *Higgs* and party, but neglected to comply with a provision in the bye-laws with which *Higgs* and party had complied. In December, 1875, H. transferred to R., who obtained registration as transferee of H., but did not comply with the provision with which H. had not complied. B. applied for a forfeiture on the ground of the non-compliance. *Held* that R. could not avail himself of the acts of the antecedent registered owners (*Higgs* and party) as applicable to the claim which H. had registered afresh without any reference to *Higgs'* registration. *Beavan v. Rigby*, 2 V.L.R. (M.,) 7.

(*d*) *Frontage and Block Claims.*

[NOTE.—The system of frontage as distinguished from block claims has been in great measure abandoned, but it still exists in some mining districts.]

There are only two kinds of claims, viz., "frontage" and "block" claims. Every owner of a "block" claim has, equally with the holder of a "frontage" claim, a right to all gold within the boundaries of that claim. There is no such thing as a "block quartz claim," and holders of such claims have a right to gold found outside the reef in the soil within their claim. *Scottish and Cornish G.M. Coy. v. Great Gulf G.M. Coy.*, 2 W.W. & A'B. (L.,) 103.

Right to Work Lead passing through One Claim and returning to Another.]—If a lead return to the parallels of a frontage claim before passed, the return course of the lead is not public property, but belongs to the claimholder between whose parallels it lies, although he has before worked part of the lead from parallel to parallel. *United Working Miners' G.M. Coy. v. Prince of Wales Coy.*, 5 W.W. & A'B. (M.,) 50, 55.

Frontage Claim—Rights of Holder.]—A frontage claim subsists over its entire surface until narrowed under the bye-laws. The claimholder is entitled not only to the gold upon the lead in respect of which the claim is registered, but to all gold within the claim until so narrowed; and when narrowed, to all gold at whatever depths within it as narrowed. *St. George and Band of Hope Coy. v. Band of Hope and Albion Consols*, 2 V.R. (E.,) 206, 216; 2 A.J.R. 81.

The holder of a frontage claim may exclude from every portion of its area, persons who subsequently take up a block claim thereon. *St. George and Band of Hope Coy. v. Band of Hope and Albion Consols*, 2 V.R. (E.,) 206, 221; 2 A.J.R., 127.

Frontage Claims—Priority—Ballarat Bye-Laws, December, 1859 (No. 20.)]—The W. company had a frontage claim on the F. lead, the A. company a frontage claim on a lead adjoining, and outside that of plaintiffs, and also a frontage claim on the W. lead. The leads were so near that the different frontage parallels intersected. The two companies worked on their claims and collided. The Judge of the Court of Mines found that the place of collision was on the W. lead, and held that as the F. lead was the senior, the A. company's rights should be subordinate to the W. company's right of following the gold upon the F. lead, and that at the point of collision the W. company might carry it on uninterrupted, accounting to the A. company for all gold taken out of the F. lead. *On appeal, Held* by the Chief Judge that the local Court regulations and bye-laws contemplated the existence of simultaneous rights to intersecting frontage claims, but omitted to give specific directions as to priorities; that the prohibitions to interference with a frontage claim on a lead undefined, were not intended to apply to frontage claimants on other leads intersecting, but that priority of title depends upon which lead the gold is upon; that there was a preponderance of evidence as to the collision taking place on the W. lead, and that the A. company had the better right. *United Working Miners' Coy. v. Albion Coy.*, 4 W.W. & A'B. (M.,) 1.

Registration of a Frontage Claim—Power to Exclude Others from Taking up Block Claims.]—The clause No. 21 of Ballarat Bye-Law 3 has the force of law; and a person registering a frontage claim under No. x. of those bye-laws is entitled to the benefit of clause 21, and to exclude persons from obtaining registration for and occupying block claims within all parts of the surface boundaries or parallels of the frontage claim, without regard to the probability of the gutter or lead passing through. *United Extended Band of Hope Coy. v. Tennant*, 3 W.W. & A'B. (M.,) 41, 54.

Similarly a residence area cannot be taken up on a frontage area against the will of the owner of the latter. *Warrior Coy. v. Cotter*, 3 W.W. & A'B. (M.,) 81.

Person Taking up a Block Claim where he ought to have Taken a Frontage.]—Under the 13th bye-law of a certain district it was provided that "claims on alluvial leads of a greater depth than 200 feet shall be worked as frontage claims." *Held* that the owners of a block claim before the discovery of an alluvial lead of a greater depth than 200 feet could claim the lead and the gold in it, and it was not necessary for them to take out "a frontage claim." *Critchley v. Graham*, 2 W. & W. (L.,) 71.

"Goldfields Act," (No. 32)—24 Vict. No. 111, Sec. 11—Frontage Claims—Boundaries.]—The A. company were holders of several "frontage claims" on declared leads. These claims had been registered, but no lead having been discovered within their parallels, no lateral boundaries had been fixed. No blame was attached to the A. company in consequence of having unreasonably delayed the discovering the lead within any of their claims. McG. and party sought to take possession of "block claims" within the parallels of the "frontage claims." The Court of Mines granted an injunction restraining McG. and

party from mining on the "frontage claims," and from completely registering block claims of which they had registered one. *On appeal, Held* that under the "*Goldfields Act*" (No. 32,) the holders of miners' rights were entitled to all gold in any land occupied as a claim, and though the bye-laws directed that claims were to be worked on the frontage system only, they placed no restriction upon rights of the claim-holder to such gold; that the bye-laws declared that registration was possession or equivalent thereto; that Sec. 11 of 24 *Vict.* No. 111, expressly met the legal difficulty of being in possession of land the boundaries of which were unknown; that the A. company had thus inchoate rights as against McG. and party which were not displaced by McG. and party. Appeal dismissed. *McGill v. Tatham,* 2 W.W. & A'B. (L.,) 52.

Semble, where lateral and parallel lines of a "frontage claim" have been fixed, no "block claim" could be taken within such boundaries. *Ibid.*

The S. company were registered for a "frontage" claim on the S. lead, but the course of the lead had not been ascertained throughout the claim. The Court of Mines had restrained Smith and others from mining within the company's claim on the S. lead, and from applying for registration of "frontage claims" on the undefined leads within the boundaries of the company's claim. *Held,* on appeal, that the S. company were entitled to such an injunction, and appeal dismissed. *Smith v. Scottish & Cornish Coy.,* 2 W.W. & A'B. (L.,) 121.

Forfeiture—Frontage Claimant Taking Block Claim.]—The holder of a frontage claim, taking up a block claim on a part of his frontage area, does not forfeit all his rights to the remaining portion of frontage area although he does forfeit his rights to that portion of the frontage area comprised in his block claim. *United Extended Band of Hope Coy. v. Tennant,* 3 W.W. & A'B. (M.,) 41, 52.

The G. company marked off a frontage claim on certain land which had recently been thrown open; being opposed by others as to this frontage claim, it ceased to press for registration and ultimately took possession of a block claim comprising the land in dispute. The defendants then applied to be registered for a block claim comprising the land, and the G. company applied as under their frontage claim title to restrain registration by the defendants. *Held,* following *United Extended Band of Hope Coy. v. Tennant,* that the G.'s company taking possession of a block claim was a renunciation of the frontage to the extent of such claim. Plaint dismissed. *Great N. W. Coy. v. Sayers,* 4 W.W. & A'B. (M.,) 64.

Held, following *United Extended Band of Hope Coy. v. Tennant,* and *Great N. W. Coy. v. Sayers,* that persons entitled to a frontage claim taking up a block claim within its limits are thenceforth entitled to the block claim as such only. *Clerk v. Wrigley,* 4 W.W. & A'B. (M.,) 74, 79.

Abandonment of Frontage Claim by Taking Block Claim.]—The taking possession of a block claim, within the parallels of his frontage claim, by the holder of a frontage claim affords evidence of abandonment of that part of the frontage included in the block—evidence, moreover, to be taken most strongly against the claimholder so acting. *McCafferty v. Cummins,* 5 W.W. & A'B. (L.,) 73, 79.

Forfeiture of Frontage Claim by Taking up Block Claim.]—The taking up of a block claim within a frontage claim by the holder of the latter does not operate as a forfeiture of the entire frontage claim, but is a determination of the frontage interest in the land comprised in the block claim; but, generally, where a space of ground included in frontage claims of two companies, on two different leads, is taken up as a block claim by one of them, the other is not entitled to say that the taking of the block claim is effectual so as to determine the frontage interest of the company taking it, but ineffectual as against its own frontage claim. *United Working Miners' G. M. Coy. v. Prince of Wales Coy.,* 5 W.W. & A'B. (M.,) 50, 55, 57.

Frontage Claim—Merging in Block Claim.]—*Semble,* that where the holder of a block claim acquires from another person a prior frontage claim over a portion of the block claim, the frontage title merges in the block title in the same manner as if the holder of the block claim had held the frontage claim at the time of taking up the block claim. *United Working Miners' G.M. Coy. v. Prince of Wales Coy.,* 5 W.W. & A'B. (M.,) 50, 57.

(e) *In what Events a Claim may be Forfeited or Deemed to be Abandoned.*

For Non-working.]—Clause 116 of Maryborough Bye-laws, August, 1864, provided that "in all cases where the owner of any quartz claim or share therein shall not, within twenty-four hours after the expiration of the period of registration, cause work to be renewed on or in such claim, according to the usual course of proper and efficient mining, such claim or share shall be forfeited." *Held* that a company which had sunk a shaft in a claim taken up and registered in a place where mining could only be carried on at a ruinous loss were nevertheless bound to work it; *i.e.,* by draining the mine. *Duffy v. Tait,* 4 W.W. & A'B. (M.,) 17.

Under Nos. 12 and 49 of the Beechworth Bye-laws a party may hold a claim for three months without working or forming a company. At the expiration of that time, without forming a company, they may hold and work, employing the number of men required by No. 12, becoming subject to the penalties provided in No. 6, and to forfeiture at the suit of the persons who obtained an order for such penalty, but not liable to be displaced without legal process; and their violation of No. 48 will further subject them to the liability of being displaced by persons who have not previously obtained an order for penalty. *Kilgour v. Flinn,* 5 W.W. & A'B. (M.,) 32.

Beechworth Bye-laws (Nos. 14, 19.)]—Beechworth Bye-law (No. 14) directs that "a frontage claim on a supposed lead shall extend 60

feet by a width not exceeding one mile," and "that the holder may defer working till the lead be discovered without rendering the claim liable to forfeiture, provided he has a miner's right," &c., and "shall, within forty-eight hours after the lead is discovered, and the claim laid off by the surveyor, commence and carry on work," &c. No. 19 provides that the owner of a frontage claim shall make application for a survey within sixteen days after discovery of the lead, but the case of a claimholder residing more than ten miles from the surveyor's office is excepted. *Held* (1) That defendants, who had spoken to surveyor during the survey, after a lead had been discovered, but had not made any demand at the proper stage, or tendered survey fees, or done any work on the claim, which would have been numbered had it been laid off, had not been so negligent as to be deemed to have abandoned the claim; (2) That provisional claimholders, living more than ten miles off, are not bound to call upon the surveyor to act under No. 19, but that any person interested is entitled to call upon the surveyor to mark off substituted claims, and that he should do so along a straight line to avoid overlapping, and taking measures to inform the shareholders of what he is doing; and, so soon as he lays off the substituted claims, the successive claimholders not working become liable to penalties. *Atwell v. Ryan*, 6 W.W. & A'B. (M.,) 21.

Forfeiture—By Neglect of Employee—Notice.]—The 44th bye-law of the Beechworth district, gazetted 25th June, 1869, provided "that the registered owner of a claim who has employed a person to represent him, or in connection with it, by contract or on tribute, should have notice served upon him before he incurred a forfeiture through the neglect, absence, or omission of such employee." A company entered into a sealed agreement with tributers for a period of six months; but the company consented to the tributers abandoning their agreement, or, at all events, perfectly knew that there was no prospect of their executing it, and never urged them to do so. The company, during the six months for which the claim was let on tribute, registered a three months' suspension order, and did nothing during, or at the end of such order, and thereby incurred a forfeiture. The person enforcing the forfeiture did not serve any notice upon the company. *Held* that the forfeiture was not incurred through the neglect, absence, or omission of the tributers within the meaning of the bye-law so as to entitle the company to notice. And *semble*, that obtaining the suspension order by the company would not operate by way of estoppel against the company's right to have notice given them, if the forfeiture had been incurred by the neglect, &c., of an employee, &c. *O'Sullivan v. Mysterious Quartz G. M. Coy.*, 1 V.R. (M.,) 4; 1 A.J.R., 13.

Under No. 7, Sec. 5, Sub-sec. 8 of the Sandhurst Bye-laws a claim is liable to forfeiture if unworked for more than ninety-six hours. *Crocker v. Wigg*, 5 W.W. & A'B. (M.,) 20.

How far Working on Adjoining Land shows an Intention to Work a Claim.]—Persons represented at time of suit by the defendants took up a certain frontage claim, and on 12th June, 1866, the defendants took up certain land, including that frontage claim, as a block claim (No. 345,) and were registered as holders, and in September, 1866, No. 345 and other detached "blocks" were amalgamated. From June, 1866, the defendants had done nothing on the surface of No. 345, but had since September, 1866, worked on the other parts of the amalgamated block claim. The plaintiffs sought a declaration that the defendants had forfeited their right to No. 345, by not having worked and continued to work No. 345 at and after the expiration of eight days from registration in accordance with Ballarat Bye-laws (No. 14,) May, 1862. *Held* that the plaintiffs were entitled to the adjudication of forfeiture subject to the warden coming to the opinion on the evidence that the defendants had not within eight days of 12th June, 1866, worked efficiently on other land with a decided intention to mine No. 345, and with as great rapidity as to result as working on the claim itself might reasonably have; that although forfeiture makes the interest not void but voidable, the work on the amalgamated claim did not cure the previous forfeiture of No. 345, it not being necessary to commence the process for forfeiture, while the neglect, the cause of forfeiture, continues; and that the warden could not impose a pecuniary penalty in lieu of forfeiture. *Clerk v. Wrigley*, 4 W.W. & A'B. (M.,) 74, 78, 82, 83, 84.

The doctrine in the last-mentioned case as to forfeiture when work was done on adjoining land, with a decided intention to work on the claim, and with as great rapidity as to result as working on the claim itself might reasonably have, is not applicable where the adjoining lands are the property of different owners with a prospective contingent arrangement for their becoming the property of the same owner. *Schonfeldt v. Beel*, 1 V.L.R. (M.,) 1.

Sandhurst Bye-law (No. 8,) Clause 5, of Sec. 4.—Number of Miners to be Constantly Employed.]—The section of the bye-law required a certain number of miners to be constantly employed. *Held* that the fact of the inability of the claimholder to keep down the water in the shaft with one horse, which compelled them to knock off some of the miners, was not an *actus dei* to shield them from their liability to forfeiture for not having the requisite number of miners constantly employed. *Davis v. Bull*, 3 V.R. (L.,) 138; 3 A.J.R., 66.

No. 10 of the Ballarat Bye-Laws continues the obligation imposed by No. 12, r. 14, of advancing a main drive, and unreasonable delay in so doing, is a breach of a duty imposed by the bye-laws, but is not a ground of forfeiture. *United Extended Band of Hope Coy. v. Tennant*, 3 W.W. & A'B. (M.,) 41, 52.

Sandhurst Bye-law (No. 6,) Sec. 9—Notice of Claim — Possession without Adjudication.] — In 1863 A. and party took possession of a claim and were registered as owners. In January, 1864, B. was by mistake registered as owner of the claim. A. and party worked the claim or protected it by registration till about April, 1865. In June, 1866, H. and party applied to

know who was registered owner of the claim, and were informed that B. was. In July, 1866, H. and party summoned B. before the warden and obtained an order of forfeiture against him, and took possession of and worked the claim. On suit by A. and party to recover possession, *Held* that, under the 9th section of Sandhurst Bye-law No. 6, H. and party were not entitled to take possession of the claim without giving notice to or summoning A. and party, and without obtaining a declaration of abandonment by the warden as against A. and party. *Hunter v. Aratraveld*, 3 W.W. & A'B. (M.,) 59.

Curing Forfeiture by Resuming Work—What is not.]—The holders of a claim registered it for three months, so as to obtain an immunity from working, on the ground that they were unable to overcome the water, and that the adjoining claims were not down to the water. The registration was renewed for three months, and on the date of renewal other persons gave notice to the holders of their intention to claim the ground, alleging that it had been forfeited, whereupon the holders resumed work next day, without re-marking the ground. The holders were not entitled to exemption, but the warden decided that they had secured their title by resuming work. On case reserved, *Held*, by the Chief Judge, that the holders resuming work without abandoning their old title did not cure the forfeiture, irrespective of the question of the necessity of stirring old pegs on claiming to hold old ground under a new title. *Coles v. Sparta*, 3 W.W. & A'B. (M.,) 21.

What will not Cure Forfeiture—Pumping.]—Pumping water out of a claim will not protect it from forfeiture as abandoned under No. 8 of Part 12 of the Castlemaine Bye-laws of 18th August, 1863; unless the pumping be for the purpose of reaching and working at earth, &c. *Longbottom v. White*, 3 W.W. & A'B. (M.,) 35.

Application for a Lease does not Protect a Claim from Forfeiture.]—*See* cases *post* under subheading—LEASE.

Protection from Forfeiture—Expenditure upon Claim.]—S. and others were in possession of a claim, and laid out over £1000 upon it. W. and others subsequently obtained a forfeiture by a collusive proceeding, and went into possession, but did not mark out or register their claim. The 135th clause of the bye-laws provided that if £1000 were spent on a claim, the claim could not be forfeited except upon notice. M. brought a summons against W. and others, and S. and others seeking possession. *Held* that under the bye-laws the expenditure protected S. and party, but did not protect W. and party. *Moore v. White*, 4 A.J.R., 17.

Abandonment how Cured—Liability to Pay Drainage Assessment.]—One of the Sandhurst Mining Bye-laws provided that a claim might be declared abandoned if no work had been done on it for six months; and another bye-law provided that claims unworked for ninety-six consecutive hours should be forfeited, but exempted claims from forfeiture "during any period for which drainage is being paid." A claim was unworked for more than six months, but a drainage assessment had been made against the owners, and they remained liable for payment of the same. On special case *Held* on the construction of the bye-laws that a claim unworked for a period exceeding six months is not protected from being declared abandoned by a warden upon an application to be put in possession of such claim, on the ground that the owners of such claim are liable to pay drainage assessment; whether such payment has or has not been made during the period. *Christian v. Kenworthy*, 3 W.W. & A'B. (M.,) 11.

Certificate of Exemption Obtained by False Pretences—Bye-law.]—By a bye-law it was provided that claims, if unworked for a certain period, might be forfeited. By another a means was prescribed by which persons who had worked for some time might suspend the working of their claims for a time on obtaining a certificate of exemption from work for a time named in the certificate. Where such a certificate was admittedly obtained on false pretences, *Held* that the certificate was voidable only, and not void *ab initio*. *Butler v. O'Keefe*, 3 W.W. & A'B. (M.,) 16.

Ballarat Bye-laws 11, 23rd October, 1873—Amalgamation of Claims—No Re-registration.]—Several claims became vested in L., who obtained an amalgamation of them under Sec. 10. S. purchased L.'s interest, and became registered as holder of the amalgamated claim; but this was not re-registered under Sec. 12. B., as holder of a miner's right, proceeded against S. before the warden to obtain a declaration of forfeiture for not working under Sec. 16. *Held* that the amalgamation was effectual for all purposes of working; and, therefore, without re-registration, effectual to cause all liabilities for not working under the bye-law. *Seal v. Bebro*, 5 V.L.R. (M.,) 4.

Protected Registration under Sec. 14—False Declaration.]—Where C., on behalf of a company, obtained a protected registration of an amalgamated claim under Sec. 14 of the Ballarat Bye-laws (*supra*) upon a false declaration, the Court refused to answer as to C.'s agency, but answered that there was evidence upon which the District Judge might decide as to the effect of the false declaration. *Ibid.*

No Retrospective Effect of Bye-law.]—Under Sandhurst Bye-law, 1864 (No. 6,) a claim was subject to forfeiture for six months' not working, and the holder was entitled to orders exempting from work for periods not exceeding six months. By Bye-law, 1866 (No. 7,) "three months" was substituted for "six months." The claim was registered July, 1864, and an exemption order for three months was obtained February, 1867, but the claim had been unworked for some weeks after the expiration of the order. *Held* that the title was under No. 6, and the exemption order for three months did not bring it under No. 7, and consequently there was no forfeiture. *Bond v. Watson*, 4 W.W. & A'B. (M.,) 85.

Application for Exemption Certificate should be in Writing.]—A suspension certificate issued

under Sec. 76 of the Maryborough Bye-laws, 1866, is not effectual as an excuse for not working a claim, if applied for verbally and not in writing. *Brabender v. Gibbs*, 6 W.W. & A'B. (M.,) 62; N.C., 71.

Protective Registration.]--Under Ballarat Bye-laws, a protective registration under No. VIII. of such bye-laws must be obtained by, or as on behalf of the registered holder. *Thompson v. Begg*, 2 V.R. (M.,) 1; 2 A.J.R., 34.

The efficacy of protective registration depends on the truth and sufficiency of the declaration on which it is obtained. *Ibid.*

Protection Order--Neglect to Post Certificate.]—The period allowed by a protection order from forfeiture for not working is in some degree a judicial act of the registrar who registers, and the neglect of the claimholder to procure or post the certificate does not deprive him of the benefit of the protection from forfeiture, though he may be liable to other penalties. *Weddell v. Howse*, 8 V.L.R. (M.,) 44, 49; 4 A.L.T., 95.

Fine Inflicted Instead.]—A fine may properly be inflicted instead of a forfeiture in cases where early neglect is followed by zealous, continuous work, or claimholders fall into merely technical errors, but not where there has been aggravated neglect. *Thompson v. Begg*, 2 V.R. (M.,) 1, 10; 2 A.J.R., 34.

Abandonment under Bye-laws—Negativing Exceptions Protecting Against.]—A mining bye-law provided that any claim being unworked for four days should be considered abandoned, but that nevertheless it should be lawful to leave a claim unworked while the owners were engaged in extracting gold from any substance taken therefrom, or in the erection of machinery, or in procuring timber, or in doing anything necessary for the working of the claim. Where persons claimed a claim as abandoned under this bye-law, *Held* that it was not for them to negative the exceptions, resting, as they did, upon facts lying peculiarly within the knowledge of the owners of the claim. *Longbottom v. White*, 3 W.W. & A'B. (M.,) 35.

Bye-Law Enacting Valid though no Person Appointed to Enforce Forfeiture.]—Provisions for forfeiture in mining bye-laws are operative, although the bye-laws do not point out the person who may enforce the forfeiture, and under Bye-law 7 of the Beechworth mining district passed in May, 1866, any holder of a miner's right was held enabled to enforce the forfeiture. *Oxley v. Little*, 5 W.W. & A'B. (M.,) 14.

And *see* S.P. *Barker's G.M. Coy. v. Keating*, 1 A.J.R., 55.

How Forfeiture Determined—Repealed Bye-law.]—The question as to an alleged forfeiture of a claim registered under a bye-law, which has been repealed previously to such alleged forfeiture, must be determined according to such bye-law, notwithstanding its repeal, the bye-law under which the claim was registered, and not the circumstance of the forfeiture, having occurred since the passing of the Act No. 291, which, while introducing a new system, kept alive the old bye-law as fully as if the Act itself had not been passed, determines under which system any forfeiture is to be deemed to have taken place, and according to which system it is to be enforced. *Regina v. Clow, ex parte Oliver*, 5 W.W. & A'B. (L.,) 89.

Abandonment—How Made.]—Express renunciation is not necessary for actual abandonment of a claim, the whole tenor of the Act No. 32, and previous decisions, showing that cesser of actual possession operates as an abandonment. *Warrior Coy. v. Cotter*, 3 W.W. & A'B. (M.,) 81, 90, 91.

Abandonment — Cesser of Possession.] — *Per Molesworth, Chief Judge.*—The title to mine on the Crown lands of Victoria, from their being first let open to miners, has been based on possession, the person first taking such possession under restrictions imposed being held to have the best right. It seems reasonable, therefore, that possession should terminate with cesser of possession; indeed, with cesser of use of the land possessed. The tenor of the Act No. 32 seems to point to this conclusion. In *Critchley v. Graham* [2 W. & W. (L.,) 211] the Court had to deal with the case of the defendants claiming by forfeiture against plaintiffs in clear visible possession, and intimated that it would decide otherwise in case of actual abandonment. In *Landry v. Burton* it was taken for granted that abandonment, without a warden's order, put an end to title. People forgetting a right as valueless would never expressly say they abandoned. *Warrior Coy. v. Cotter*, 3 W.W. & A'B. (M.,) 81, 90.

Abandonment—Presumption of.]—*Per* the Full Court—When holders of a claim afterwards obtain a lease of the same ground, it may be presumed that they have abandoned any portion of the original claim which is not included in the parcels of the lease; and working a shaft which is partly on the excluded ground, but merely for the purpose of working the ground comprised in the lease, does not negative the presumption of abandonment. But, *per* the Privy Council, intentional abandonment is only to be proved by cogent evidence of the existence of such intention, and the fact that the lease does not include all the land occupied by the company is not sufficient evidence of abandonment. *Mulcahy v. Walhalla G. M. Coy.*, 5 W.W. & A'B. (E.,) 103. On appeal, 40 L.J., P.C. 41, 2 A.J.R., 93, *sub nom. Walhalla G. M. Coy. v. Mulcahy.*

Forfeiture through Default—Collusive Proceeding does not Confer a new Title.]—*Per Molesworth, J.*—In the case of claimholders having committed a forfeiture, and subject to eviction by an informer, I do not think that a collusive recovery by a friend undertaking to hold as a trustee should be allowed to form a new title for the defaulter. *Reardon v. Sayers*, 3 A.J.R., 126.

Abandonment—What Amounts to—Collusive Proceeding.]—A collusive proceeding whereby

land is allowed to be recovered as for a forfeiture is an abandonment of the prior title, and does not constitute a new title to the land. *Moore v. White*, 4 A.J.R., 17.

Abandonment of First Title by Second Pegging Out.]—Where plaintiffs took up a claim in conformity with bye-laws, and afterwards pegged out the same land afresh, *Held* that the plaintiffs must by the second pegging out be deemed to have abandoned their title under the first pegging out. *Barker's G. M. Coy. v. Keating*, 1 V.R. (M.,) 18; 1 A.J.R., 55; for facts *see* S.C. *post columns* 936, 937.

Abandonment—Upon what Warden's Decision Should be Based.]—On 7th May, 1866, R. took up a claim, which he worked till March, 1867, and then obtained a protection order up to 5th June, 1867. R. left a windlass and gear on the claim. On the 22nd of June, 1867, S. took up the same claim as abandoned; but did not obtain an adjudication against R. of abandonment or forfeiture. A servant of R.'s, claiming to be under his orders, entered on the claim and worked it. S. sued him before the warden for trespass. On a special case submitted by the warden as to the question whether S. could take up the claim as abandoned or forfeited without an adjudication by the warden or a Court of Mines, the Chief Judge *Held* that test of the warden's decision should have been if R. had actually abandoned the claim prior to the taking up of the same by S.; that it was a point the warden himself should have decided, and not proper ground for a special case; and that the warden should have considered the facts and circumstances to enable him to arrive at a conclusion. *Small v. Dyer*, 5 W.W. & A'B. (M.,) 1.

Publication, Date of—Government Gazette.]—The publication of a notice of forfeiture of a claim dates from the time of the *Government Gazette* containing it being fully printed, and not from the time when it was accessible to the general public, and a person acting in anticipation of the forfeiture, which is confirmed, although not informed of such confirmation, is entitled to the benefit of it. *Clarence United Coy. v. Goldsmith*, 8 V.L.R. (M.,) 14; 3 A.L.T., 147.

(*f*) *Means of Enforcing Forfeiture.*

"Goldfields Act" (No. 32,) Sec. 77—Adjudication Necessary for Forfeiture—Res inter alios acta.]—In 1861 shareholders of the A. company were in possession under miners' rights of a claim on certain land, and shareholders of the B. company under miners' rights were in possession of a claim on adjoining land. The B. company encroached on the A. company's claim and were summoned before the warden for encroachment. The B. company set up as a defence that the A. company had legally forfeited the claim or should be legally "deemed to have abandoned it," and that in proceedings before the warden by other complainants against the A. company the claim had been declared abandoned, but this was not followed up, and that the B. company had entered and pegged out and applied for a claim. *Held* (1) That the B. company could not avail themselves of the supposed forfeitures without first obtaining the adjudication of the warden under the 77th Sec. of the "*Goldfields Act*;" (2) That the adjudication of the warden in the proceedings by other complainants was as between the A. and B. companies *res inter alios acta*. *Critchley v. Graham*, 2 W. & W. (L.,) 211.

[Compare Sec. 101, Sub-sec. 1, of Act No. 291.]

Means of Taking Advantage of Forfeiture—"Mining Statute 1865" (No. 291,) Secs. 101, 177—Act No. 32, Sec. 77.]—The principle of *Critchley v. Graham* applies equally under Act No. 291, Secs. 101, 177, as under Act No. 32, Sec. 77; and if bye-laws are at all inconsistent with that principle, the principle is paramount. Where, therefore, the plaintiffs insisted that the defendants, who were in possession of an extended claim, held more than they were entitled to, and obtained a warden's decision to that effect, *Held* that a preliminary marking out by the plaintiffs before suing for such adjudication was unnecessary, for such preliminary marking out would be a trespass if the plaintiffs proved wrong; and several persons may sue for such adjudication, as to a quantity not exceeding that allowed them by the bye-laws, even though they amalgamated their rights of action into one. *Barlow v. Hayes*, 4 W.W. & A'B. (M.,) 67. *See* S.P., *Kilgour v. Flinn*, *post column* 938.

Enforcing Forfeiture—Where Claim not Actually Abandoned.]—C. and others were in possession of a claim, but discontinued working, and omitted for fourteen days to post the notics required by the bye-laws. O. and others took possession without seeking a warden's order. *Held* that the bye-law left untouched the principle of *Critchley v. Graham* [2 W. & W. (L.,) 211] as to forfeiture being enforced only by legal proceedings; and that where a claim is forfeited and actually abandoned it is open to the first legal claimant; but, unless it be actually abandoned, the persons alleged to have forfeited should be summoned before a warden to dispossess them. *Collins v. O'Dwyer*, 5 W.W. & A'B. (M.,) 30.

Who may Take up Abandoned Claim.]—Where ground is abandoned *de facto*, it may be taken up by any holder of a miner's right without any previous adjudication of abandonment. *Mulcahy v. The Walhalla G.M. Coy.*, 5 W.W. & A'B. (E.,) 103, 120, 121.

Possession though Irregular under Bye-laws cannot be Disturbed unless by Legal Process.]—Plaintiffs applied for a mining lease, and, pending the application, defendants came on to the ground and pegged out and applied for a claim. The application for a lease was refused, and plaintiffs then pegged out and applied for a claim. Plaintiffs sued defendants for encroachment, and defendants set up as a defence, "priority of legal occupation." It appeared that defendants' pegging out and registration were defective under the bye-laws. *Held* that though defendants' possession was irregular, and the plaintiffs' regular, yet, according to the principle of *Critchley v. Graham*, the defendants being in possession, the plaintiffs were

not entitled to disturb their possession without resorting to legal process. *Barker's G.M. Coy. v. Keating*, 1 V.R. (M.,) 18; 1 A.J.R. 55.

Where the plaintiff's claim, in respect of which he sued for trespass, was intersected by a road, and the defendant put this forward as a defence, *Held* that the objection was not available as a defence to the suit for trespass, notwithstanding that it might affect the title to the claim; and following *Critchley v. Graham*, that the defendant should have applied to a warden for possession instead of taking it for himself. *Vallancourt v. O'Rorke*, 1 V.R. (M.,) 43.

No Actual Possession or Legal Occupancy—No Adjudication Necessary.]—Plaintiffs were in occupation of ground under a permit for the erection of machinery. Defendants' occupying an adjoining claim, and legally following the dips and angles of the reef, took gold from under the machine area in plaintiffs' occupation. Plaintiffs sued defendants for encroachment. *Held* that defendants were entitled to the gold, and that it was not necessary for them to obtain a warden's order before helping themselves, inasmuch as the principle of *Critchley v. Graham* only applies as against persons having possession or claiming to occupy under the Statute, and that the plaintiffs had no claim to occupy, and no one was in possession of the gold till it was actually reached. *Vivian v. Dennis*, 3 W.W. A'B. (M.,) 29.

Possession of Intruder Good Except as Against Original Holder.]—A claim was constructively abandoned by A. C. went to the warden and informed him that the land was abandoned, and that he claimed it. The warden, without ascertaining the facts, and giving no decision, made a remark to the effect that if the land were abandoned C. should go and take it. C. proceeded to do so, and found that B. had already taken possession, without an adjudication of the warden. C. again applied to the warden, who gave a decision as against A., but refused to give an opinion as to C.'s right as against other parties interested. *Held* upon a rule *nisi* for a *mandamus* to compel the warden to put C. in possession, that B.'s rights had not been litigated, and B.'s possession could not be disturbed by litigation between the other parties; that the decision in *Critchley v. Graham* only went to show that the warden's adjudication is necessary to foreclose the rights of the original holder on a proceeding between the holder and a person claiming the same land on the ground of forfeiture, and that it does not apply in a contest between an intruder and a person asserting that he is the actual holder. *In re Drummond, ex parte Dunbar*, 2 W. & W. (L.,) 280. *See* S.P. *Hunter v. Aratraveld*, 3 W.W. & A'B. (M.,) 59.

Possession de Facto but without Legal Process Good as against another Person who has obtained an Order, but has Abandoned it.]—M. was in possession of some land in excess, and T. without legal process marked out and registered a claim in respect of this. P. obtained an order for possession of this, but abandoned his order and marked out the land as vacant ground. *Held* that T. being in *de facto* possession, though without legal process, was entitled to maintain trespass as against P. under the circumstances, although neither T. nor P. had rights as against M. without a warden's order. *Truswell v. Powning*, 1 V.R. (M.,) 13; 1 A.J.R., 18.

Possession de Facto—Good as against Others Marking Out under an Order which does not Authorise it.]—W. and party held a claim which became liable for forfeiture, and J. and eleven others brought a suit to enforce forfeiture on 2nd November. On 25th November D. and party, who had not obtained any order, marked off a portion of W.'s ground as a claim. On 26th November J. and the eleven others obtained a declaration of forfeiture from the warden, and on the same day J. and twenty others (including eight of the original eleven) marked off on W.'s ground a claim for twenty-one men. D. and party sued J. and the twenty for encroachment. *Held* that as there was no warden's order for J. and the twenty, and that as J. and the twenty were not identical with the persons obtaining the order, that D. and party were entitled by their prior possession as against J. and the twenty. *Keast v. D'Angri*, 4 A.J.R., 61.

The principle laid down in *Critchley v. Graham* (2 W. & W. (L.,) 211,) *i.e.* that a person in possession of ground as a claim can only be disturbed by legal proceedings, applies to a claim taken up under a bye-law which is *ultra vires*. *Bottrell v. The Waverley G.M. Coy.*, 2 V.R. (M.,) 16; 2 A.J.R., 133.

But the principle of *Critchley v. Graham* does not apply where a lease expires by effluxion of time, any one after such expiration being entitled to peg out the land without legal process. *Durant v. Jackson*, 1 V.L.R. (M.,) 6; *Cooper v. White*, 4 V.L.R. (M.,) 10.

Where A. claims that B. is in possession of land under a lease alleged to be void, and pegs out a claim on such land, A. is not entitled to maintain trespass against B., inasmuch as A.'s possession is without legal warrant. *Whitely v. Schlemm*, 8 V.L.R. (M.,) 58; 4 A.L.T., 115.

The principle of *Critchley v. Graham* applies to the case of a residence area; the occupant must be displaced by legal process before another can acquire possession. *Warrior Coy. v. Cotter*, 3 W.W. & A'B. (M.,) 81; *Fancy v. Billing*, 7 V.L.R. (M.,) 13; 3 A.L.T., 17.

Taking Possession under Forfeiture—Rights of Claimants.]—K. took up ground, but at the end of three months had not formed a company as required by the bye-laws. At the expiration of the three months L., without going before a warden, took possession of the claim by pegging out, alleging that K.'s title had expired, he having taken possession of the ground for the purpose of forming a company and not having done so. F. complained to the warden that K. had forfeited, and that L. was trespassing on the ground, and took proceedings to oust them both and to be put into possession. *Held* that L. was not justified in taking possession without going before a warden, but that F.

could not avail himself of the defect in L.'s title; that F. was right in not pegging out the claim before suit; and in proceeding against K. and L. jointly; but that he was subject to be defeated by them respectively according to their respective titles in existence at the time of the suit. *Kilgour v. Flinn*, 5 W.W. & A'B. (M.,) 32.

Effect of Order of Forfeiture.]—The warden's order only declares the land open for selection; it removes existing rights such as they were, and then people take it up under miner's rights. *Sayers v. Jacomb*, 3 A.J.R., 66.

Effect of Order of Forfeiture.]—An order of forfeiture merely operates as a clearing away of the old title, so as to authorise possession under miners' rights; and those who wish to take possession after a forfeiture must not rely upon the order alone, but must mark out; and, *Semble*, must register their claim in accordance with the bye-laws as though they were taking up original ground; and persons obtaining a forfeiture may not be entitled to take all the forfeited ground. They establish a right for the public, and may then help themselves to so much as they are entitled to, and not to the entire claim; and, to give them title, marking out is necessary. *Moore v. White*, 4 A.J.R., 17.

Where W. and others were in possession of a claim, and a collusive proceeding for forfeiture was taken, and an order for forfeiture obtained, and W. and some of the others took possession of the claim, but did not mark it out or register it, on suit by others who wished to take the claim, and proceeded against those who were in possession originally and those in possession under the forfeiture, *Held* that they were entitled, under their miners' rights, to succeed against the defendants. *Ibid.*

Effect of Declaration of Forfeiture.]—A complainant obtaining a decree of forfeiture does not thereby acquire a title to the land, but merely removes a prior title obstructing him in doing so; and, if he desires to obtain possession, he must go through the ordinary formalities as to acquiring title. *Beavan v. Rigby*, 2 V.L.R. (M.,) 7.

Marking Out Necessary to Complete a Transfer—Onus of Proof.]—P. summoned C. before the warden to have it declared that C. was in illegal occupation of land, C. not having marked out, and P. being entitled under miner's right. It appeared that M. had, by a warden's order, been declared to be entitled to possession of the land in dispute, such having been taken up by others, whom M. sued, in excess of what they were entitled to. M. transferred to C., but C. had made no application by marking out under the bye-laws. *Held* that C. could only have got a good title by marking out; that, as a defence, the onus of proof lay upon C. as to his marking out; and, so far as regarded the defence of M. marking out, it was a question of fact for the warden to decide upon whether M. had marked out or not. *Palmer v. Chisholm*, 5 A.J.R., 169.

A bye-law provided for marking out and registering claims, such provisions necessitating delays; and a subsequent clause of the same bye-law (Ballarat Bye-law No. 3, Sec. 28) provided that a person obtaining an order for possession from the warden should produce it before the registrar, who should *forthwith* register him for the claim in lieu of the person who had forfeited the claim. *Held* that though, as a general rule, a warden's order for possession merely clears away former titles, and the party obtaining such an order must mark out and register his claim as if taking up a new one; yet, under the bye-law in question, the word *forthwith* precluded the contention that the claim must be marked out and registered under the former sections of the bye-law, since the delays caused by such a course would be inconsistent with the word *forthwith*. *Barton v. Band of Hope and Albion Consols*, 6 V.L.R. (M.,) 1; 1 A.L.T., 145.

Occupying Forfeited Ground.]—A person seeking to be put into possession of forfeited ground is only entitled to be put into possession of so much as the bye-laws allow to a single individual, and not of all the ground occupied by those forfeiting it. *Oxley v. Little*, 5 W.W. & A'B. (M.,) 14.

Rights of Complainant Pending Suit.]—The inchoate rights of a complainant in a Court of Mines, under a plaint for forfeiture, are not to be obstructed by the right to a special case given by the Act No. 446 to the defendant. *Harwood v. Beavan*, 2 V.L.R. (M.,) 13.

A warden, being disposed to decide in favour of the complainant, nevertheless, on the application of the defendant, stated a special case, and, in accordance with the decision thereon, he made an order declaring the claim forfeited, and that the complainant was, on compliance with certain conditions, entitled to possession. A third person meanwhile took possession of the claim as abandoned ground; and, on the complainant entering, sued him for trespass. *Held* that a third person was not entitled to take up the claim in question pending the decision of the Chief Judge on the special case; and that the condition imposed by the warden between the parties to the previous plaint did not concern him. *Ibid.*

Holders of Miners' Rights—Forfeiture under repealed Bye-Law.]—A claim was liable to forfeiture for a breach of a bye-law, which was subsequently to such breach repealed. The repealing bye-law expressly saved "the rights of persons obtained previous to, and held at the time of this bye-law coming into force. *Held* that proceedings to enforce forfeiture for the breach would lie, notwithstanding the repeal of the bye-law, and that the persons seeking to enforce the forfeiture need not have held miners' rights, either when the breach occurred, or before the repeal of the bye-law, provided they held them when they so sought to enforce the forfeiture. *United Extended Band of Hope Coy. v. Doyle*, 5 W.W. & A'B. (M.,) 39.

Parties to Proceeding for Forfeiture.]—S. and party took up a claim, and by a collusive proceeding W. and party obtained a forfeiture, but did not mark out or register their claim. In a

proceeding by other parties to have themselves put in possession of the claim, S. and party and W. and party were made defendants. *Held* that they were all properly made defendants since the complainants did not know whose title would be set up. *Moore v. White*, 4 A.J.R., 17.

Suit for Forfeiture—Parties.]—In a suit for forfeiture, the complainant proceeded against the transferee of a person who had obtained a declaration of forfeiture against the prior registered owners, and had not removed their names from the register. *Held* that the prior registered owners were not necessary parties to the suit. *Beavan v. Rigby*, 2 V.L.R. (M.,) 7.

Want of Equity—Want of Parties.]—M. and H. were entitled to a quartz claim in equal shares. After registration P. and five others were improperly registered for the same claim, and H. was registered as one-third owner of this new claim, this one-third being transferred to him by P. On 12th December, 1874, M. instituted a suit against H., P., and the others, to have himself declared entitled to one-half of the claim, and obtained an order against assigning and a receiver. The judge of the court on 11th May, 1875, made his decree in M.'s favour, having on 12th February announced his intention of so deciding. On 8th March, the defendant, with notice of M.'s suit, summoned H., P., and the others before the warden, and obtained an order of possession of the claim, as a forfeited claim, on 11th May, and was registered as claimholder on 14th May. On 20th May, M. issued his decree. Some of the party, H., P., and others, instituted an appeal against the warden's order, but subsequently abandoned it. M. then summoned the defendant, seeking to have the order for alleged forfeiture set aside. *Held* that there was nothing to show that the claim was not properly liable for forfeiture when the defendant got his order, and that therefore M. had no equity, but that there was no want of parties, defendant's order and M.'s decree having concluded the rights of H., P., and the others. *Morrison v. Hartley*, 1 V.L.R. (M.,) 15.

Practice—Evidence.]—Where a warden is hearing a complaint as to forfeiture of a claim he should not decide it upon evidence taken in another proceeding as to propriety of granting a lease, but should take fresh evidence. *Constable v. Pigtail Coy.*, 3 V.L.R. (M.,) 7.

And *see* cases *post* under Practice in Warden's Courts.

(g) Proceedings in Respect of Trespass to or Encroachment upon Claims.

Act No. 291, Secs. 5, 101, Sub-sec. iii, 177.]—S. summoned J. for trespass in marking off and applying for a lease of portion of the plaintiff's claim. *Held* that Sec. 5 says nothing as to exclusive possession, and that the marking off and applying for a lease was not a trespass or unlawful interference within Sec. 177 (referring to Sec. 101, Sub-sec. iii.) *Stephens v. Jolly*, 5 A.J.R., 162.

Act No. 291, Secs. 195, 197—Complainant out of Possession.]—W. took up a claim under bye-laws, holding a miner's right at the time. P. trespassed on the ground. W. never took possession, being kept out by P. *Held* that W. was in such a position as to maintain trespass under Sec. 197, and that it was not necessary for him to proceed under Sec. 195 for recovery of possession. *White v. Perriam*, 5 V.L.R. (M.,) 31; 1 A.L.T., 95.

Encroachment—Complaint for—Who may Bring—Person in Possession—No. 291, Sec. 101 (iii.)]—Sub-sec. iii. of Sec. 101 of the "*Mining Statute* 1865," does not confine the remedy for encroachment to plaintiffs having good title, or indirectly oblige them to show a good title in addition to showing their possession undisturbed. The clause should be read so as to leave untouched the old principle that possession is *primâ facie* evidence of title, and is a sufficient title against a mere wrongdoer. And a defect in the plaintiff's title does not subject him to be defeated in a suit by the defendant entering without legal process according to the principle of *Critchley v. Graham*. *Cruise v. Crowley*, 5 W.W. & A'B. (M.,) 27.

A defect in plaintiff's title owing to his occupying a claim intersected by a public road does not defeat his right to bring trespass as against a defendant who has entered without legal process. *Vallancourt v. O'Rorke*, 1 V.R. (M.,) 43.

Person Marking Out under Invalid Bye-Law Cannot Sue for Encroachment.]—*Jenkinson v. Cumming, ante columns* 915, 916.

Land held in Excess—Possession de facto though without Legal Process—Good as against all but Rightful Owner.]—M., holder of a claim, was in possession of more land in the claim than he was entitled to under the bye-laws. A warden's summons was issued by P., returnable on 1st November at 10 a.m., against M. for possession of the land held by M. in excess. On 1st November at 2.30 a.m. T., without M.'s consent, pegged out a claim on the land in excess, and registered the claim at 10 a.m. The warden on the same day at 11 a.m. made an order in favour of P., who, at 11.30 a.m. with M.'s consent, pegged out his claim on the land in excess, and took possession of it as vacant ground, and not as under the warden's order, or as transferee of M. T. summoned P. for trespass, and to remove him. *Held* on special case, that T. could acquire a title by taking possession of and occupying the land as against all persons entering and marking out after him during the occupation of M. of the land held in excess; that P. had trespassed as regards T. by pegging out the claim after T. had done so, and could not set up the possessory title of M. as against T., and that T. was entitled to succeed. *Truswell v. Powning*, 1 V.R. (M.,) 13; 1 A.J.R., 18.

Actual Possession Good as a Defence to a Suit for Encroachment.]—Pending the application by plaintiffs for a mining lease, the defendant took up the land, the subject of the application, as a claim, but not in conformity with the bye-laws. Subsequently, while the application was still

pending, the plaintiffs also pegged out the land as a claim in conformity with the bye-laws. On the refusal of the lease, the plaintiffs again took up the land as a claim in conformity with the bye-laws, and sued the defendants for encroaching. *Held* that the application for a lease did not protect the land from being lawfully taken up as a claim by the applicants or any one else, subject to the rights of the applicants in the event of their lease being granted; that the plaintiffs, by their second pegging out, must be deemed to have abandoned their title under their first pegging out; and that the defendants, who were in actual occupation during the second pegging out, had a good title, by such occupation, against the plaintiffs, and could resist a suit for encroachment. *Barker's G.M. Coy. v. Keating*, 1 V.R. (M.,) 18; 1 A.J.R., 55.

Proof of Compliance with Bye-laws.]—It lies upon the defendants in a trespass suit to show that the plaintiffs in possession have not complied with the mining bye-laws in taking up their claim; *e.g.*, in not pegging out. *Mulcahy v. The Walhalla G.M. Coy.*, 5 W.W. & A'B. (E.,) 103, 121.

Trespass—De Facto Possession.]—In a plaint before a judge and assessors for trespass and damages to a claim, if the plaintiff prove prior possession *de facto*, the legality of such possession in respect to conformity to bye-laws, &c., should not be allowed to be questioned by the defendant. *Wearne v. Froggatt*, 2 V.L.R. (M.,) 1.

De Facto Possession.]—A plaintiff in actual occupation of ground as a residence area is entitled to recover in an action of encroachment against defendants, who commenced mining pending their application for a lease, which they had no right to do. *Fahey v. Koh-i-noor Coy.*, 3 W.W. & A'B. (M.,) 4.

Title to Claim—Transfer—Possession.]—Where the title of an applicant seeking injunction against encroachment to a claim under Sec. 203 of Act No. 291, is a recent transfer, such transfer should be supported by showing the title of the transferors or something else; if subsequent possession is shown evidenced by a proceeding for forfeiture against the transferees, such possession, if uncontradicted, may, in the warden's discretion, be deemed, in an application for injunction, sufficient evidence of title. *Grant v. Lawlor*, 3 V.L.R. (M.,) 15.

Suit for Trespass—Who Entitled to Maintain.]—After the expiration of a mining lease D., a holder of miners' rights, put in pegs in the land comprised therein and entered into possession of the land as a claim. J., who had been the previous lessee and who had held over after the expiration of the lease, put in lease pegs. *Held* that D. was sufficiently entitled to maintain trespass; *Critchley v. Graham* distinguished, on the ground that in that case the termination was by forfeiture or abandonment and not effluxion of time, while in this case the determination of the lease was by effluxion of time. *Durant v. Jackson*, 1 V.L.R. (M.,) 6.

Trespass Suit for—Who may Maintain—Void Lease—Possession under Miners' Rights without Legal Warrant.]—W. and company, claiming that S. and company were in possession of land under a gold mining lease which they alleged to be void, marked out the land under miners' rights as a claim, registered the claim and entered upon it. S. and company immediately expelled them, and they brought a plaint for trespass against S. and company. *Held* that having wrongfully taken possession of the land, without legal warrant, according to the doctrine of *Critchley v. Graham*, they could not maintain trespass. *Whitely v. Schlemm*, 8 V.L.R. (M.,) 58; 4 A.L.T., 115.

Trespass—Who is Responsible for—Hired Servant.]—The hired servant of a claimholder acting under his orders, will stand in the same position as regards a complaint against him for trespass, as the claimholder would if he were a defendant. *Small v. Dyer*, 5 W.W. & A'B. (M.,) 1.

Encroachment—When Unintentional and Unconcealed — Damages.] — Two adjoining claimholders had their boundary fixed by a consent decree, such decree fixing as the boundary two lines A B, B C, meeting at an obtuse angle in B. In consequence of a misplacement of the vertex B, it was found that the defendant company had unintentionally and without concealment encroached upon the plaintiff company's claim. *Held* that the defendant company was entitled to a deduction of the expenses of working, at the rate of a third of the value in dispute. *St. George's United Coy. v. Albion Coy.*, 4 W.W. & A'B. (M.,) 88, 95.

Trespass to Claim—Damages for.]—It is no ground for damages in a suit for trespass to a claim that the defendant's continuing trespass has caused an obstruction to the plaintiff's obtaining a lease of the land comprised in the claim. *Vallancourt v. O'Rorke*, 1 V.R. (M.,) 43.

Assessment of Damages where some of the Complainants have not Miner's Rights.]—*Critchley v. Graham; Chisholm v. United Extended Band of Hope Coy.; Sea Queen Q.M. Coy. v. Sea Q.M. Coy.;* and *Bebro v. Bloomfield; post column* 963.

Amalgamated Claim not Registered—No Evidence as to Trespass on Original Claims.]—A company was registered for two claims which had been amalgamated, but the amalgamated claim had not been separately registered, and, on a complaint for trespass to the amalgamated claim, the trespass was proved, but there was no evidence to show on which of the separate claims the trespass was committed. *Held* that the complaint could not proceed. *United Claims Tribute Coy. v. Taylor*, 8 V.L.R. (M.,) 19; 3 A.L.T., 147.

(2) *Residence Area.*

What Entitles to—Act No. 291, Sec. 5.]—A resident on goldfields, and holding a miner's right, who has complied with the bye-laws, and although not actually mining, was a water-race holder, is entitled to a residence area. *Campbell v. M'Intyre*, N.C., 12.

Suit by Married Woman to obtain Possession of —Husband must be Joined.]—A married woman

who held a miner's right, proceeded to sue alone before a warden to obtain possession of a residence area on the ground of abandonment. *Held*, on a special case, that there being nothing in the "*Mining Statute* 1865," to relieve a married woman from the common law necessity of being joined by her husband in all actions, and it not being shown that she came within the provisions of the "*Married Women's Property Act*," she was not entitled to sue without joining her husband. *Foley v. Norton*, 4 V.L.R. (M.,) 13.

Exception of Crown Land from Occupation as a Residence Area — "Gazette" Notice — "Mining Statute 1865," Sec. 14.]—M., by virtue of a miner's right, took possession as a residence area, and subject to the bye-laws, of a piece of Crown land. The land was subsequently, by a *Gazette* notice, excepted from occupation for mining, residence, or business purposes. M. was summoned for being in unauthorised occupation of the land in question, he having been previously convicted of being in unauthorised occupation of the same land. It was urged that M., having a miner's right and a residence area ticket, could not be said to be in unauthorised occupation. *Held* that since the power to except from mining purposes, conferred by Sec. 14 of the "*Mining Statute* 1865," extended to land already occupied, the notice in the *Gazette* was determination of the occupation; and, *Semble*, that, having lawfully entered into occupation, M. was entitled to personal notice of the exception of his residence area from mining, &c., and to a demand for possession before summons issued; but that, if this were so, the previous conviction was sufficient notice. *Regina v. Dowling, ex parte M'Lean*, 2 V.R. (L.,) 61; 2 A.J.R., 56.

Land Reserved for Public Purposes—Occupation as a Residence Area.]—A town council in 1856 took possession of land for the purpose of getting road material. In February, 1862, a notice appeared in the *Gazette* temporarily reserving the land from sale, and granting the council permissive occupancy, and the council fenced it in. After this, G., a holder of a miner's right, occupied the land as a residence area, and had paid rates to the council therefor. Subsequently, in 1871, by a proclamation in the *Gazette*, the land was exempted from mining. The council sued G. for trespass. *Held* that G.'s rights were terminated by the *Gazette* notice of 1871; that his possession was subject to the prior reservation for public purposes; and that although the possession of the council was irregular under the "*Land Act* 1860," yet it was *de facto*, and sufficient to enable the council to maintain the action. *Mayor, &c., of Sandhurst v. Graham*, 3 V.R. (L.,) 191; 3 A.J.R., 79.

Holder of, cannot Mine upon—Ballarat Bye-laws (No. 14.)]—The holder of a residence area under Ballarat Bye-laws (No. 14) has no title to mine upon such area; and, *Semble*, that the holders of residence areas under the above bye-law, by mining, are encroaching upon the rights of the mining public. *Warrior Coy. v. Cotter*, 3 W.W. & A'B. (M.,) 81, 94.

A residence area cannot be taken up upon a "frontage claim" against the will of the owner of the latter. *Ibid.*

Land Occupied for Mining Purposes.]—The definition of mining purposes both in Acts No. 32 and No. 291 does not include residence; though in both the holder of a miner's right is made entitled to a residence. *Rosales v. Rice*, 1 V.R. (M.,) 1; 1 A.J.R., 13.

[But now *see* Sec. 13 of Act No. 446, where mining purposes include residence and business areas.]

The Crown cannot grant a mining lease of land comprising a residence area previously acquired. *Jones v. Christenson*, 7 V.L.R. (M.,) 6; 2 A.L.T., 149; for facts *see* S.C. *post* column 953.

Rights of Holder.]—The holder of a residence area cannot lawfully mine on the area himself, or confer any title on another to mine. *St. George and Band of Hope Coy. v. Band of Hope and Albion Consols*, 2 V.R. (E.,) 206, 221; 2 A.J.R., 127.

Person Taking up Mining Claim over Residence Area.]—A person taking up a mining claim over a residence area, acquires no title to such claim, either as against the residence area-holder or anyone else. *Ibid*, 2 V.R., p. 218.

Whether it may be Sublet—Act No. 291, Sec. 5.]—A holder of a residence area under a miner's right cannot sublet it to another not holding a miner's right, and cannot sue for arrears of rent, although such *quasi* tenant may have paid rent previously. *Jones v. Joyce*, 3 V.R. (L.,) 209; 3 A.J.R., 105.

Powers of Holders to Sublet and Assign—Act No. 291, Sec. 5—Married Woman as Holder—Re-registration—Abandonment.]—N., a married woman, was registered in respect of residence area No. 4786; she and her husband resided on it till November, 1876, when they removed, and let the area to a tenant. In 1877 N. went to England and realised some property left to her to her separate use. In January, 1878, the house on the area was burnt to the ground, and on the next day the husband obtained a certificate of exemption from residence for six months. In July, 1878, F. claimed as on abandonment and took possession, and N. shortly after instituted a suit for trespass. In August N. re-registered the area as No. 7254. On 12th December, 1877, R. brought a plaint against N., seeking possession on the ground of abandonment. *Held* that holders of residence areas unless restricted by the bye-laws have power to sublet and assign, and that N.'s removal in 1876 was not an abandonment; that the certificate of exemption obtained by N.'s husband as her agent was valid; that N. was entitled to defend the plaint in *R. v. N.* as under the old number 4786; and that N. might be sued by R. without making N.'s husband a party. *Reardon v. Norton*, 5 V.L.R. (M.,) 12.

Transfer—Holder of Miners' Rights.]—H. was registered in respect of a residence area. H. transferred to N., who entered into possession and transferred, by way of mortgage, to S. S. was paid off by and transferred to A. A. never was in possession, but let it to N.,

who paid rent for it. After N.'s death his widow paid some rent, and then became registered as holder and transferred to C., who took possession. A. sued C. before the warden. *Held* that the letting to N. was legal if both held miners' rights, otherwise it was illegal; but that A. did not thereby lose all right to the area; and that A. must prove that at the time of the registration by N.'s widow he held a miners' right, otherwise he could not recover possession. *Summers v. Cooper*, 5 V.L.R. (M.,) 22; 1 A.L.T., 46.

Right to Remove Fixtures—"Mining Statute 1865," Sec. 5.]—The holder of a residence area must exercise the right to remove buildings and fixtures thereon belonging to him, given to him by Sec. 5 of the "*Mining Statute* 1865," during his tenure, or at farthest within a reasonable time after his right to possession has ceased, and before another person has lawfully entered into possession. *Summers v. Cooper*, 8 V.L.R. (L.,) 274; 4 A.L.T., 57.

Suit for Trespass on — Who may Maintain—Uncertificated Insolvent—Parties.]—An uncertificated insolvent who holds a miner's right may maintain a complaint before a warden for trespass on a residence area, and his assignee is not a necessary party to such a proceeding. *Fancy v. North Hurdsfield United Coy.*, 8 V.L.R. (M.,) 5; 3 A.L.T., 89.

An occupier of a residence area may maintain an action for encroachment against persons mining on land including the residence area, the subject of an application for a lease before such application has been dealt with. *Fahey v. Kohinoor Coy.*, 3 W.W. & A'B. (M.,) 4.

Owners of Machine Area cannot Maintain Trespass against Persons in Constructive Possession of the Gold.]—The occupants of ground, held under a permit from the warden for the erection of machinery, complained of a trespass committed by the owners of an adjoining quartz reef in following the dips of the reef under the machinery area. They were authorised to follow the dips and angles of the reef by a *Local Court Rule*, which was held not to be *ultra vires*. The occupants of the machine area had also struck gold by mining on the area, and they claimed this gold as against the owners of the reef; neither of the claimants were in actual possession of the gold till they reached it; and the defendants were, previously to reaching it, in constructive possession of the gold as connected with the reef on which their claim was marked out. *Held*, reversing the Court of Mines, that the plaintiffs could have no title to the gold in dispute but that of unlawful occupants; and that the defendants had a title to the gold the subject of dispute. *Vivian v. Dennis*, 3 W.W. & A'B. (M.,) 29.

Proceedings Necessary to Dispossess Occupant—Transfer to Trustee of a Company.]—C. obtained registration of a residence area and transferred to S., and by divers transfers the property in it became vested in F. It was proved that S. had purchased as a trustee for a company. B. marked out and was registered for a piece of land as a residence area including the part taken up by C. *Held* that B. was not entitled to mark out and take possession without taking proceedings against F. who was a *bonâ fide* purchaser without notice. *Quære*, whether the title to the residence area determined on the transfer to S. as a trustee for the company. *Fancy v. Billing*, 7 V.L.R. (M.,) 13; 3 A.L.T., 17.

(3) *Mining Leases.*

(a) *Application for, and Grant and Construction of Leases.*

Practice — Regulations 27th January, 1871 — Service of Notice.]—The warden's office as mentioned in the regulations as the place to which notices must be posted by applicants for leases, is not the place where he sits as judge, but the principal place from which he issues his summonses and orders. A company in possession is sufficiently served with notice when the applicant for a lease is the manager of the company and has kept a copy notice as served upon the company. *Constable v. Pigtail Coy.*, 3 V.L.R. (M.,) 7.

Regulations 1871 in Government "Gazette" p. 131—Service of Notices upon Occupiers.]—S., the manager of a company, applied for a lease and pegged out. The notice stated that a great many persons were occupiers, and service of the notice of application was effected by thrusting the notice under the door of the dwellings of some of the occupiers. *Held* that in order to make such service good the persons sustaining the notice must show that it reaches the person served; that the list of occupiers published by S. afforded evidence against him that the persons named were occupiers, and that there was not evidence of sufficient service; and that the want of sufficient service was a default in proceeding with the application for the lease within No. 446, Sec. 4. *Barton v. Band of Hope and Albion Consols*, 5 V.L.R. (M.,) 47; 1 A.L.T. 95.

Default in Application—Act No. 446, Sec. 4.]—The non-payment, under the sub-clause E. of Regulation 4 of the "*Leasing Regulations* 1871," within seven days prior to the making an application for a lease, of a sum of money to cover the cost of surveying interior lines, and the connection to the nearest fixed point, is a default in proceeding with an application for a lease within Sec. 4 of the Act No. 446. *Great Northern Coy. v. Brown*, 8 V.L.R. (M.,) 1; 3 A.L.T., 89.

Regulations 44—47 of the "*Leasing Regulations* 1871" are not *ultra vires*, although they do not require a person pointing out a forfeiture to peg out as he would be required to do in applying for a lease in the first instance under Sec. 37 of Act No. 291. *Robertson v. Morris*, 7 V.L.R. (M.,) 1; 2 A.L.T., 109.

The fulfilment of the preliminaries does not give such rights as would amount to a "claim" within Sec. 27 of Act No. 241. *Hitchins v. The Queen*, 4 W.W. & A'B. (E.,) 133.

Marking Out—Priority.]—The priority between one person marking out for a lease, and

another marking out for a claim, dates as to the former when he has fully complied with the regulations as to painting, &c., the posts. *Clarence United Coy. v. Goldsmith*, 8 V.L.R. (M.,) 14; 3 A.L.T., 147.

An intending applicant for a mining lease put in posts on the 18th of February, but did not paint them white or put on plates, as required by the leasing regulations, till the 21st. *Held* that this marking out dated only from the 21st. *Ibid.*

Act No. 291, Secs. 24, 40—Who may be Applicants.]—The applicant for a lease under Act No. 291 must be a person, persons or a company; a contemplated company cannot be an applicant. The Governor is not warranted in granting a lease to a person alleged to be an assignee of the applicant against the protest of the applicant. *Semble*, the Governor can only grant a lease to the applicant. *Aladdin G. M. Coy. v. Aladdin and Try Again G. M. Coy.*, 6 W.W. & A'B. (E.,) 266, 276, 277.

Who entitled to a Lease—Trust for one Company in Mistake for Another.]—The J. company held land as part of a claim, and permitted the A. company to put a dam and reservoir upon it. On a compromise of disputes between the J. and T. companies, the land and other claims were assigned to the T. company, and registered in the name of M. as trustee for it in January, 1870, and M. in the same month applied on behalf of the T. company for a lease of several claims, which lease did not include the claim in question (No. 1846); but notwithstanding this, M. amalgamated various claims of the T. company, including 1846. The T. company and the A. company had many officers in common. L. was chairman of both, M. a director of both, and the same person was manager of both. L. by letter, and then verbally, without resolutions of his boards, directed M. to apply for a lease for the A. company, and he, in mistake, applied for a lease for the T. company, and used the moneys of the T. company for the purpose. A meeting of the directors of the T. company subsequently directed the application on its behalf to be abandoned and the deposit got back, and they, acting for the A. company, ordered payment of the deposit as for it. On the execution of the lease by the Governor to M., he induced the Minister of Mines to hand it over to the solicitor of the A. company, for whom it had been applied for. The T. company subsequently became involved, and its plant, claims, &c., were sold under execution to certain persons who formed a company, the K. company, to mine on the property. The A. company discovered that the K. company had encroached underground upon the land included in the lease, and thereupon sued to restrain such encroachment in the Court of Mines, when the suit was dismissed. On appeal to the Chief Judge, *Held* that the A. company were entitled to relief; that the T. company had no inchoate right in the lease which could pass under the sale, by virtue of the application made by mistake in their name; that there was no necessity to consult those equitably interested as shareholders in the T. company, in order to rectify the mistake by transferring the lease to the A. company; and appeal allowed, and account of gold taken decreed. *Australasian G. M. Coy. v. Wilson*, 4 A.J.R., 63.

Registered Holder of a Mining Tenement—Power to Deal with it.]—The plaintiff and defendant companies had adjoining claims, and wished to obtain leasehold interests in them. Their applications were for lands overlapping, and there was much conflict between them before T. the warden, but subsequently an agreement between the companies was entered into and reported to T., who issued a lease to S., manager of the plaintiff company, and was prepared to issue a lease to A., the manager of the defendant company, who had carried on negotiations on behalf of the defendant company. T. had fixed a certain street as boundary. The defendant company refused the first lease, and obtained a second lease granting them certain other land, as to which neither S. nor plaintiff company remonstrated—this latter land not being included in plaintiff's lease. Suit by the plaintiff company seeking to set aside second lease to defendant company. *Held*, on appeal, affirming *Molesworth, J.*, that S., being the registered holder of the mining tenement, was empowered to authorise the agreement entered into without the consent of the plaintiff company, who held only the position of beneficiaries, and to consent to the part of the land (the subject of the dispute) being given up to defendants in return for other land being included in the lease to the plaintiff company; and that if the authority of the plaintiff company were necessary, the facts showed such authority. *Band of Hope and Albion Consols v. Young Band Extended Coy.*, 9 V.L.R. (E.,) 37.

"Mining Statute" (No. 291,) Sec. 24—Execution by Governor.]—F. was granted a mining lease on 6th March, 1872, and a notice appeared in the *Gazette* of 12th April, 1872, that, unless lessees attended at the proper time to execute, the leases would be liable to forfeiture. F. did not execute, and W., a holder of miners' rights, issued a summons to be put into possession of the lease as forfeited. The warden's clerk sent a telegram to prevent F. from executing, but it miscarried, and F. executed the lease before the summons was heard. *Held* that, reading the Act with the regulations, the execution by the Governor operates only by way of *escrow*, dependent for completion upon the lessee executing within the terms of the regulations; that the warden had power to question the power of the Governor to execute after the sixty days mentioned in the regulations, and to declare the lease void, and to put W. in possession. *Wissing v. Finnegan*, 3 A.J.R., 126.

When Valid—Not Executed within Prescribed Time—No. 291, Sec. 39.]—Sec. 39 of the "*Mining Statute* 1865," which enacts that a lease may be granted notwithstanding that the person applying for it may not in all respects have complied with the leasing regulations, will not operate to render valid a lease which has not been executed within the time prescribed by the leasing regulations after it has been granted, as against a person who has obtained possession from a warden after the time has elapsed, and before execution of the lease. Sec. 39 only relates to

the waiver of objections before the Governor's execution, not before that of the lessee. *Finnegan v. Wissing*, 4 A.J.R., 65.

Act No. 291, Sec. 24—Means by which Grant of Lease of Lands Occupied under Miners' Rights may be Restrained.]—Although under Sec. 24 the Governor-in-Council is prohibited from granting a lease of lands occupied under miners' rights there is nothing in the Act or regulations to bind the Governor to follow the opinion of the warden as to refusing a lease; Sec. 24 is an enabling section, and though it may be by implication prohibitory, there is no provision made to enforce the prohibition. *City of Melbourne G.M. Coy. v. The Queen*, 4 W.W. & A'B. (E.,) 148, 155.

And the right if any of a holder of miners' rights to stop the issue of a second lease inconsistent with the holder's previous rights is not a "claim" or "demand" within Sec. 27 of Act No. 241. *Ibid.*

What Passes by Grant of Lease—Act No. 148.]—A mining lease under the "*Leases of Auriferous Land Act*" (No. 148) passes everything to the lessees, and therefore a holder of a miner's right has no right to search on the leased ground for auriferous quartz. *Harwood v. Coster*, 2 W.W. & A'B. (L.,) 163.

[Compare Sec. 24 of Act No. 291.]

What Rights a Lease is Subject to—Act No. 291, Sec. 24—"Transfer of Land Statute" (No. 301,) Sec. 49.]—J. E. applied for a mining lease of certain land, and pending the application went into possession. When the lease was ready for issue it was, by a mistake, taken up and executed by another J. E., and the original J. E. not getting his lease went out of possession. On discovery of the mistake the lease was cancelled, and a fresh one issued to the proper J. E., who obtained a certificate of title on it, and transferred the certificate to plaintiff. Between the issue of the two leases defendant took up the land under miners' rights, and contended that plaintiff's lease was, under Sec. 24 of the "*Mining Statute* 1865," subject to their occupation under the miners' rights. *Held* that the lease was not subject to such occupation, such occupation not being a reservation or exception within the meaning of Sec. 49 of Act No. 301. *Munro v. Sutherland*, 4 A.J.R., 166.

What Passes under Grant of "Land."]—Although in the case of a conveyance by a subject entitled to land and gold mine thereunder the mine would pass under a grant of "land," yet in a mining lease from the Crown where the certificate of title is silent as to the mine, the lessees, though entitled to the *land* and the *mesne* profits on the surface, are not as against defendants, who claim under miners' rights, entitled to the gold, since their title to the gold is not conclusive, being subject to such miners' rights as to "rights, &c., subsisting at the time of the lease." *Munro v. Sutherland*, 5 A.J.R., 139.

See S.C. under Transfer of Land—Title under Certificate.

What Passes under a Mining Lease.]—A mining lease, under the "*Mining Statute* 1865," though it may include a public road, cannot give any right to mine under the half of the road which has previously become private property by virtue of a Crown grant conveying the lands abutting upon it. *Shamrock Coy. v. Farnsworth*, 2 V.L.R. (E.,) 165.

But *see Garibaldi Coy. v. Craven's New Chum Coy.* 10 V.L.R. (L.,) 233.

Construction of Lease—Reservation of Free Access to Creek.]—In a Crown mining lease the land demised comprised a creek, but there was in a subsequent part of the lease a reservation of the creek, with liberty of access to the creek. J. entered into possession of and mined part of the creek as an alluvial claim. *Held* that as between the lessees in possession, as under the lease, and J., the creek was protected from occupation for the purpose of alluvial mining under a miner's right, such occupation not being based on any legal proceeding. *Walhalla G.M. Coy. v. Jennings*, 1 V.L.R. (M.,) 12.

Labour Covenant.]—*Per Higinbotham, J.*—The labour covenant in a gold mining lease is the real consideration given for the lease, and should be strictly construed. *Barwick v. Duchess of Edinburgh Coy.*, 8 V.L.R. (E.,) 70, 78; 3 A.L.T., 68.

Lease Expired—Acceptance of Rent.]—A Crown lease was granted for a certain term, which, after various assignments, became vested in a bank. After the expiration of the lease, the bank, still holding possession by its agent, paid rent to a district treasury, which was received. *Held* that the acceptance of rent created no new interest. *Durant v. Jackson*, 1 V.L.R. (M.,) 6.

Reversionary Lease—Act No. 291, Sec. 24—Act No. 446, Sec. 3.]—During the pendency of a lease, W. applied for a lease of the same ground. *Held* that the Crown could not grant reversionary leases under Sec. 24 of Act No. 291, and that the provisions of Act No. 446, Sec. 3, did not apply to such a case. *Ibid.*

Grant of Lease—Holders of Miners' Rights in Occupation at Time of Grant.]—If a lease granted by the Governor comprises land then occupied by the holder of a miners' right, the lease is *quoad* such land void, and no proceedings to set it aside are necessary. In a trespass suit by a company mining on land the subject of a lease under Act No. 291, against a company mining on the same land, the defendant company relied upon a title derived from persons holding miners' rights and in occupation of the land at the time of the granting of the lease. *Held, per Molesworth, J.*, and affirmed on appeal, that there was no need for the defendants to seek relief against the lease by a cross bill, nor need the defendant move to set aside the lease by a writ of *scire facias*. *Aladdin G.M. Coy. v. Aladdin and Try Again G.M. Coy.*, 6 W.W. & A'B. (E.,) 266.

Power of Crown to Grant a Lease under a Residence Area.]—C. was in possession under

a miner's right of certain ground as a residence area. Subsequently J. applied for and obtained a mining lease from the Crown, embracing the ground so occupied as a residence area, and sued C. for trespass. *Held* that under Sec. 24 of Act No. 291 the Crown could not grant a lease of land comprising a residence area previously acquired. *Jones v. Christenson*, 7 V.L.R. (M.,) 6; 2 A.L.T., 149.

(*b*) *Rights and Powers of Applicants for Leases and Leaseholders.*

Application for Lease does not Protect Claim from Forfeiture—No. 291, Sec. 37.]—An application by a claimholder for a lease of the ground comprised in a claim does not, under No. 291, Sec. 37, protect the claim from a forfeiture incurred either before or after the application, on the ground of abandonment, or breach of a bye-law. *Smith v. Golden Gate G.M. Coy.*, 5 W.W. & A'B. (M.,) 5.

An application by a claimholder for a mining lease of the ground comprised in the claim, affords no exemption to the claim from the operation of mining bye-laws, nor will it protect it from forfeiture incurred by subsequent breach of such bye-laws. *Perkins v. Hercules G.M. Coy.*, 5 W.W. & A'B. (M.,) 48.

Protection afforded by Application for a Lease—Act No. 291, Sec. 37.]—The concluding words of Sec. 37 show that all that is meant is that no taking up is good as against the lessees. The application for a lease is only a provisional title; if refused it is just as if it had not been made. The protection is merely *quoad* the applicant for the lease. The applicant or any one else may take up a claim pending the application. *Barker's G.M. Coy. v. Keating*, 1 V.R. (M.,) 18; 1 A.J.R., 55.

Refusal to Grant Order of Possession—Act No. 446, Sec. 3—Certiorari pending Appeal.]—The pendency of an application for a mining lease is no ground for the warden's refusal to make an order of possession when the warden has decided that complainant is entitled to the order, and such order of refusal was quashed on *certiorari* under Sec. 3 of Act No. 446, even though an appeal to the Court of Mines was pending. *Regina v. Orme, ex parte Droscher*, 3 V.L.R. (L.,) 343.

Application for Lease Pending—Act No. 446, Sec. 3.]—The pendency of an application for a mining lease would not prevent the warden from putting a complainant seeking to enforce forfeiture of a claim into possession of the land comprised in such application if he declared the claim forfeited, leaving the complainant to meet the liabilities of Act No. 446, Sec. 3. *Jolly v. Stephens*, 5 A.J.R., 169.

Application for Lease Pending—Act No. 446, Sec. 3—Act No. 291, Secs. 37, 180.]—E. and others were in occupation of a quartz claim, and M. and others brought a complaint against them for being in occupation of more than they were entitled to and seeking an order of possession. At the trial E. set up a defence that he and his party had duly marked out the land as applicants for a gold-mining lease under Sec. 37 of Act No. 291. *Held* that Act No. 446, Sec. 3, prohibits all means of acquiring a claim whilst defendants are applicants for a lease, and that the warden should not have during that time put M. and others into possession; but that the warden should not have dismissed the complaint, but should have adjourned it from time to time under Sec. 180 of Act No. 291. *Hutcheson v. Erk*, 3 V.L.R. (M.,) 1.

Where persons proceeded before a warden to obtain a declaration of forfeiture of a claim for not working, *Held* that defendant's previously marking out the land for a lease was sufficient under Act No. 446, Secs. 3 and 4, to prevent an order for forfeiture unless default in complying with leasing regulations was proved. *Constable v. Pigtail Coy., ibid*, p. 7.

Marking out a Claim during Lease—Dispossession—Evidence—Jus tertii.]—C. marked out as a claim, land which was under lease to a mining company, and worked it. When the lease expired W. marked out the same land, pulled up C.'s pegs, put in his own, and took possession, while C. was working below. Upon plaint by C. against W. for trespass, *Held*, on question reserved for the Chief Judge, that the lease to the company was admissible as evidence against C.'s right to take possession, who could not mark out pending the lease; that W. was justified in marking out over C.'s head without first obtaining the decision of a Court; and that W. could set up the title of a third person to show the invalidity of C.'s title. *Cooper v. White*, 4 V.L.R. (M.,) 10.

Time of Marking out a Claim stated Erroneously—Subsequent Marking out for a Lease.]—B. pegged out land for two claims at 8 a.m., and on the same day, but later, G. pegged out the same land for a gold-mining lease, and next day applied for a lease. The day following his application B. applied for registration of his claim, stating in error that he had marked out at 8 p.m. instead of 8 a.m. G. sued B. for trespass for interfering with his land while the application for the lease was pending, and the warden admitted evidence by B. that his statement as to the time of pegging out was erroneous, overruled an objection on behalf of G. that the application being erroneous was invalid, and that B. therefore had no title, and held that B. was entitled to sue. On special case, *Held*, by the Chief Judge, that the warden's decision was right, that the statement in the application was an admission against B. which he could rebut by evidence; and that the question of registration was not material, since the contest was not between two claimholders, but between a leaseholder and a claimholder. *Greenhill v. Braidley*, 4 V.L.R. (M.,) 5.

Marking out Claim pending Application for a Lease.]—Land was marked out for a lease (by a person under whom the complainants did not claim, and whose application for a lease was ultimately refused,) before the land was marked out for a claim by those under whom the defendants claimed, and while the application for a lease was pending. *Held* that the complainants as holders of miner's rights might insist, under

Sec. 3 of Act No. 446, that the title of the defendants was bad as obtained during the application for a lease. *Weddell v. Howse*, 9 V.L.R. (M.,) 13; 4 A.L.T., 179.

Right of Applicant to Maintain Trespass.]—Trespass can be maintained under the provisions of Sec. 37 of the "*Mining Statute* 1865," by an applicant for a gold-mining lease, against a person who was not previously in lawful occupation of the land applied for, who, after the date of the application for such lease, obtained as against the applicant a warden's adjudication of forfeiture as a claim of the land, the subject matter of the application for a lease, and purported to enter upon the land under such adjudication, and continued thereon actually working. *Rendall v. Hadley*, 2 V.R. (M.,) 21; 2 A.J.R., 105.

What Applicant for Lease must Prove to Maintain Trespass.]—An applicant for a mining lease, in order to maintain an action for trespass, pending the application, must prove not only that he has marked out the ground, but that he has inserted advertisements in a newspaper as required by the Orders-in-Council in force, and applicable for the time being; and that the Orders-in-Council respecting publication by advertisement are not void as being *ultra vires*. *Craig v. Adams*, 3 W.W. & A'B. (M.,) 19.

Trespass to Land the Subject of an Application for a Lease—Act No. 291, Secs. 24, 37, 39.]—M., being in possession of a claim under a miner's right on the 10th August, 1871, applied for a lease of the claim and other land, and the warden recommended that it should be granted. Before the matter was decided by the Mining Department, one B. obtained a declaration from a warden that part of the ground for which a lease was applied for was abandoned, and B. took possession. M. then issued a summons against B. for trespass, and the warden decided against B.; but, on appeal to the Court of Mines, the decision was reversed, as M. had failed to prove that he had complied in all respects with the leasing regulations. Immediately after this decision, on 1st March, 1872, B. marked off the rest of the ground, and registered it under his miner's right. On 28th October, the Governor-in-Council issued a lease to M., who executed it on the 18th November. B. meanwhile had sunk a shaft. On 9th December, M. sent notice to B. that he claimed under the lease, and subsequently two of M.'s servants entered and ejected B., who sued to be put in possession, but lost his suit in the Court of Mines. On appeal to the Chief Judge, *Held* that although Sec. 37 of the "*Mining Statute* 1865" explains Sec. 24 of that Act so as to render an intruder upon land, an application for a lease of which is pending, liable if the lease be subsequently granted, yet if the applicant had not complied with all the leasing regulations the intruder would not be so liable; that it was unnecessary for the applicant to sue every intruder before obtaining his lease, but quite sufficient if the intruder were liable to such action before the lease issued to him subject to it being brought after; and that Sec. 39, which authorises the Governor to issue leases to an applicant who has not complied with all the leasing regulations, does not prejudice a person who has obtained a lawful title in the meantime; and appeal allowed. *Bain v. M'Coll*, 4 A.J.R., 62.

Right of Applicants to Mine—Act No. 291, Sec. 37.]—Persons applying for a lease of land occupied as a residence area are not entitled to mine upon the land pending the application for a lease, and are subject to an action for encroachment at the instance of the person occupying the residence area. *Fahey v. Koh-i-noor Coy.*, 3 W.W. & A'B. (M.,) 4.

Under the "*Mining Statute* 1865," Sec. 37, applicants for a mining lease are entitled to prevent other people mining, but are not authorised to mine themselves. Should they do so they are unauthorised trespassers upon public property. *Attorney-General v. Sanderson*, 1 V.R. (E.,) 18, 23; 1 A.J.R., 21.

Expectation of a Lease—Forfeiture of Prior Lease—Act No. 291, Secs. 37, 43—Mining Regulations, 44-47.]—R. held a mining lease under the regulations, and S. applied, alleging a forfeiture for breach of a covenant, for a lease of the whole land to himself under rule 44. The *Gazette* announced a forfeiture, and an intent to grant a lease to S. S. pegged out the land, but not regularly. Then R. marked out as applying for a lease, regularly marking out. R. then sued S. for trespass. *Held* that regulations 44-47 were not *ultra vires*, although they do not require a person pointing out a forfeiture to peg out as he would be required to in applying for a lease in the first instance under Sec. 37; but that S.'s expectation of a lease did not entitle him to mine on the land as against R., and that R. was entitled to damages to be impounded until he got a lease. *Robertson v. Morris*, 7 V.L.R. (M.,) 1; 2 A.L.T., 109.

Rights of Lessees.]—A bill will lie by a lessee in possession under a gold-mining lease granted by the Crown under Act No. 291, to restrain tortious mining on and removal of gold from the land so leased. *Aladdin G.M. Coy. v. Aladdin Try Again United G.M. Coy.*, 6 W.W. & A'B. (E.,) 266, 279.

Trespass to Land under Lease.]—A person who enters upon land held under a lease is liable for trespass if he enter upon the land and put up a fence thereon, even though he claim to act under the authority of persons who are transferees of the rights of a holder of a residence area, and of the holder of a miner's right of part of the land in question, where the holder of the residence area had abandoned his rights before the issue of the lease, and the holder of the miner's right was in possession unwarrantably as against the lessees under a lease issued to them before their present one. *Extended Cross Reef Co. v. Creaver*, 4 A.J.R., 10.

Institution of Suit for Trespass to a Lease—Trustees having Let a Mine to Tributors—Possession.]—The plaintiffs held land under a mining lease from the Crown and as trustees for a company. The mine had been let to certain tributors who were in possession at the time of the institution of the suit. The plaintiffs sought an injunction against the defendant company restraining them from encroaching and trespass, and an account

of the gold to which the tributors were not parties. *Held* that the plaintiffs could not maintain the suit under a plaint describing them as still in possession, although they might be entitled to some of the relief sought as reversioners under a plaint truly stating their position. *Penistan v. The Great Britain Coy.*, 5 A.J.R., 18.

Suit for Trespass by Lessee whose Lease declared Forfeited—Company holding Land comprised in Forfeited Lease under Miner's Rights—Act No. 291, Sec. 37.]—A. was lessee from Crown of a gold-mining lease which contained proviso for forfeiture in case of breach of covenants. A. committed breaches of labour covenants, and lease was, by *Gazette* notice, declared to be forfeited, but Crown did not re-enter or take possession. The defendant company were mining on this land under colour of their taking possession of it under miners' rights subsequently to the declaration of forfeiture. Bill by A. against the company to restrain it from trespassing and for account of gold raised. *Held* by Full Court (*dissentiente Williams, J.,*) affirming *Higinbotham, J.*, that as lease was not forfeited by the declaration, A. was entitled to maintain the suit. Injunction granted and account directed. *Per Higinbotham, J.*, the Attorney-General was not a necessary party. *Barwick v. Duchess of Edinburgh Coy.*, 8 V.L.R. (Eq.,) 70; 3 A.L.T., 68, 121.

Rights of Holders of Mining Lease—As against Prior License under "Land Act 1865" (No. 237,) Sec. 42, subsequently obtaining Fee Simple under Land Act 1869 (No. 360,) Sec. 313.]—D. was a licensee under the Act 237, Sec. 42, of certain lands, and applied to purchase them under the Act No. 360, Sec. 31. Pending his application the plaintiff, a mining company, obtained a lease from the Crown for fifteen years, for mining purposes, of land which comprised D.'s; and there was a provision in the lease that portions of ground held by licensees were reserved, and that mining was not to be carried on so as to injure the surface of the same, except as provided by the conditions of the licenses. Afterwards D. obtained a grant from the Crown in fee in pursuance of his application, and transferred to O., who leased the ground to the defendant, a mining company, for mining purposes. Upon motion by the plaintiff to restrain the defendant from mining, *Held, per Molesworth, J.*, that the plaintiffs had a right to mine (not injuring the surface) as long as D. was merely a licensee; but not after he had acquired the fee, although D. had then no right to the gold himself, nor had the defendants, but injunction refused. Upon appeal, *Held*, that by the mining lease and the grant in fee, the Crown had granted two distinct estates to different persons within the same area, and that the defendant must be restrained from mining for gold, though they would be at liberty to sink for any other purpose than gold mining, and in such a way as not to interfere with the plaintiff's mining, and appeal allowed. *Alma Consols G.M. Coy.* v. *Alma Extended Coy.*, 4 A.J.R. 144. (On appeal,) *Ibid*, 190.

(c) *Forfeiture of Lease.*

Lease Granted under Act No. 148—Regulations under Act No. 291.]—Where a lease was granted under Act No. 148, *Held* that it was not subject to regulations afterwards published (under Act No. 291), so as to make a notice of forfeiture gazetted under them evidence that the lessee had forfeited his lease. *Johnson v. Thomson*, 6 W.W. & A'B. (M.,) 18.

Voidable on Breach of Covenant—Ultra Vires—Estoppel—Act No. 291, Secs. 42, 43, 45.]—A mining lease, under Sec. 24 of the "*Mining Statute* 1865," in the form fixed by the regulations of 2nd March, 1866, contained the following provisions:—"If there shall be a breach of covenant (on the part of the lessee) these presents shall be voidable at the will of the Governor-in-Council; and in case the Governor-in-Council shall declare these presents void, the term shall cease and the declaration be conclusive evidence of breach in all Courts." *Semble*, that this proviso is opposed to the policy of the "*Mining Statute* 1865," and *ultra vires*; but *Held* that a lessee who had executed such a lease was estopped from objecting to the proviso, and that his term was effectually determined by such declaration without notice to him or evidence of any breach of covenant. *Matt v. Peel*, 2 V.R. (M.,) 27; 2 A.J.R. 133.

"Mining Statute 1865," Secs. 42, 43, 45—Forfeiture of Lease—Whether Re-entry Necessary.]—A gold mining lease contained a proviso that, if there should be breaches of the covenants contained therein, the lease should be voidable at the option of the Governor-in-Council; and in case the Governor-in-Council should, by writing under his hand, declare the lease void, the term should determine both at law and in equity, and it should be lawful for H.M. to re-enter. Breaches of the labour covenants occurred, and the Governor-in-Council, by *Gazette* notice, declared lease forfeited, but no re-entry was made on behalf of Her Majesty. *Held* by the Full Court (*dissentiente, Williams, J.,*) affirming *Higinbotham, J.*, that the declaration of forfeiture did not avoid lease till persons representing Crown took some step to determine it; that lessees were in the position of persons whose leases are provided to be void on breach of covenant, which means voidable at option of lessor; that rights of Crown to rent, and lessee to possession, remained unchanged till some act was done by Crown. *Per Williams, J.*, that the declaration of forfeiture *per se* determined the lease, and no further act on the part of the Crown was necessary. *Barwick v. Duchess of Edinburgh Coy.*, 8 V.L.R. (E.,) 70, 85, 92; 3 A.L.T., 68, 121.

Forfeiture—Re-entry by Crown.]—On the forfeiture of a gold-mining lease, it is not competent for any one other than the lessees to take the objection that the lease is not actually determined till re-entry by the Crown, and no one can mark out and take possession of the land before re-entry by the Crown without obtaining an adjudication by a competent Court in their favour. *Weddell v. Howse*, 8 V.L.R. (M.,) 44; 4 A.L.T., 95.

Forfeiture of Mining Lease—How Enforced—"Mining Statute 1865," Sec. 101.]—Under the "*Mining Statute* 1865," Sec. 101 (i.,) a warden has jurisdiction, if the complainant has a right to recover the leased land, to declare a forfeiture of such lease for non-compliance with

the labour covenants; but the holder of a miner's right cannot enforce a forfeiture of a lease held by a defendant, such lease being in the form in the *Gazette* of 1871, p. 935, for non-performance of the labour covenants, until the lease has been legally declared forfeited by the Governor-in-Council under clause 21 of such lease. *M'Millan v. Dillon*, 6 V.L.R. (M.,) 15; 1 A.L.T., 203.

4. *Miners' Rights.*

(*a*) *Who may hold.*

Married Woman.]—*Semble* that a married woman is a person entitled to get a miner's right under the "*Mining Statute* 1865," and to take a claim under it, though such claim would at once become the property of her husband. *Foley v. Norton*, 4 V.L.R. (M.,) 13.

Company Registered under the Mining Acts.]—*See* cases *post*, *columns* 960, 961, 962.

(*b*) *Privilege of Holders of.*

The holder of a miner's right is not entitled to mine under a public road without the permission of the proper authority, viz., the Board of Land and Works or District Road Board; the authority of a warden is not sufficient. *House v. Ah Sue*, 2 W. & W. (L.,) 41.

Rights of Holders of, to Enter on Crown Land Alienated without Consent of Proprietor.]—*See Regina v. Davies*, *ante column* 296.

Rights of Holders of, as Against Crown Lessees—To the Land and to the Gold.]—*See Munro v. Sutherland*, *ante column* 951; and *post* under TRANSFER OF LAND—Certificate of Title.

Quære, whether a title under a miner's right, liable to forfeiture from the omission to take one out, is restored by one being taken out before adverse proceedings. *Summers v. Cooper*, 5 V.L.R. (M.,) 22; 1 A.L.T., 46.

(*c*) *Miners' Rights Considered as Conditions Precedent to Right to Sue in various Cases.*

Application for Certiorari—Act No. 291, Sec. 246.]—An applicant for *certiorari* to bring up a warden's order ousting him from a claim to be quashed, need not have a miner's right since that is not within Sec. 246, an application to be put in possession of a claim. *Regina v. Heron, ex parte Bryer*, 2 A.J.R., 110.

Goldfields Act (No. 32,) Sec. 90—Trustee and Cestui que Trust.]—Separate miners' rights both for trustee and *cestui que trust* are not required under Sec. 90 of the Act. *M'Dougal v. Webster*, 2 W.W. & A'B. (L.,) 164.

[Compare Sec. 246 of Act No. 291.]

What is a Sufficient Holding under Act No. 32, Sec. 90.]—Where a plaintiff in equity held a miner's right at the time when his title to relief first arose, and also at the time of filing his bill, but had, during a portion of the interval, been without one, *Held*, that this was a sufficient compliance with the Act No. 32, Sec. 90. *Niemann v. Weller*, 3 W.W. & A'B. (E.,) 125, 132.

Mortgagor Seeking Redemption.]—A mortgagor of mining shares, seeking redemption, is not liable to the necessity of holding a miner's right under the Act No. 32, Sec. 90. *Niemann v. Weller*, 3 W.W. & A'B. (E.,) 125, 132. *See* also S.P. *Salmon v. Mulcahy*, *ibid*, p. 139.

Vendor and Purchaser—Specific Performance—Act No. 291, Sec. 246.]—As between vendor and purchaser of a mining claim it is not necessary that the purchaser should be the holder of a miner's right in order to enable him to sue in equity for specific performance, it being sufficient if the vendor have one; and in the absence of evidence either way it will not be presumed that vendor had not a miner's right. *Learmonth v. Morris*, 6 W.W. & A'B. (E.,) 74, 85.

Suit in Respect of Partnership—Act No. 32, Sec. 90.]—M. bought in March, 1865, a share in a company as a co-partner with defendants in a claim held by them under miners' rights. M. never obtained a miner's right until December, 1864. In December, 1862, his share was forfeited on account of arrears in calls. In 1865 M. sued the defendants, and prayed for a declaration of partnership in the mining claim, and for an account of profits. *Held*, by the Court of Mines, and affirmed, that the plaintiff's title to relief "first arose or accrued" in December, 1862, and that as he then had no miner's right he was not entitled to any relief. *Mackeprang v. Watson*, 2 W.W. & A'B. (L.,) 106.

Suit in Court of Mines for Share in a Claim—Act No. 115, Sec. 11.]—J. purchased a share in a claim May, 1857, and took out a miner's right in November and December, 1858. J.'s share was declared to be forfeited. J. did not take out a right again until December, 1859, but took them out in the years 1860, 1861, and 1862. In 1862, J. filed a bill in the Court of Mines to have his right to a share declared, but the suit was dismissed on the ground that J. was not a holder of a miner's right when his right to sue accrued. *Held*, on appeal, that as appellant held a right when Act No. 115 was passed he was within the remedy of the Act. Appeal allowed. *Jones v. Abraham*, 2 W. & W. (L.,) 158.

Suit by Company—Act No. 291, Secs. 2, 80—Act No. 32, Secs. 2, 3, 42, 53, 74, 93—Proceedings in Personam.]—Where in a suit by four trustees of a registered mining company (the G. company) and the G. company, as plaintiffs, against another company (the V. company), to set aside a sale of machinery as irregular, it appeared the trustees of the G. company had miners' rights at the time the seizure of machinery took place, but the G. company itself had no such rights. *Held* that though under Secs. 2 and 80 of Act No. 291, and Secs. 2, 3, 42, 57, and 74 of Act No. 32, a holder of a miner's right might take up a claim as a trustee for, and confer equitable rights upon another not holding one, yet that related to remedies *in rem*, as in the cases of *Jones v. Abraham*, *Salmon v. Mulcahy*, *M'Dougall v. Webster*, *Niemann v. Weller*, and not to remedies in a proceeding *in personam* like the present, where the plaintiff company, under cover of their trustees, sought redress against defendants, who tortiously sold

under an execution against the plaintiff company and purchased the claim; and that Sec. 90 of Act No. 90 did include corporation in the word "person"; that the plaintiffs were not entitled to sue in the present frame of the suit without producing a miner's right for the company. *Volunteer Extended Coy. v. Grand Junction Coy.*, 4 W.W. & A'B. (M.,) 6.

Company Suing for Benefit of the Company—Consolidated Miner's Right — "Mining Statute 1865" (No. 291,) Sec. 4.]—The B. company and two trustees, A. and B., for it, summoned C. and others for encroachment upon their claim. The claim in respect of which the complaint was laid consisted of forty-four men's ground, taken up under miners' rights, and by divers assignments and transfers became vested in A. and B. as trustees for the B. company. There were produced the following rights—(1.) Consolidated miners' rights to the manager of the company (representing two miners' rights) and a miners' right to A. and B. respectively. *Held* that the case was governed by the same principle as *Volunteer Coy. v. Grand Junction Coy.*, and that the company were incompetent to sue for the benefit of the company, joined by persons professing to be trustees; and that the consolidated miners' right taken out for *two*, in respect of a claim originally held by forty-four, and being for a corporation holding no land save by trustees was not within Sec. 4 of Act 291, and did not aid the plaintiffs. *Chisholm v. Band of Hope Coy.*, 4 W.W. & A'B. (M.,) 31.

Company Suing—What Miner's Rights insufficient.] — A. company and its trustees as co-plaintiffs, sued in the Court of Mines to restrain registration for a block claim within the claims of the company. The company never had a miner's right, but obtained a consolidated miner's right as for two men's ground only, in the name of its manager. *Held* not to be a sufficient miner's right to enable the company to sue. *Great North-west Coy. v. Menhennet*, 4 W.W. & A'B. (M.,) 62.

Suit by Company—Right to Relief — Miners' Rights what Sufficient.—In a suit by a company and persons who were trustees of ground for them, the company sought relief for encroachments on claims held by the trustees for them, and leased ground held by the company. No miner's rights were produced by the company, but the other plaintiffs produced miners' rights. *Held* that the miners' rights produced were sufficient to entitle the company to sue in the suit as framed, and to entitle them to obtain relief as to the leased ground, if otherwise entitled. *Australasian Coy. v. Wilson*, 4 A.J.R., 18.

Application for Injunction under Sec. 203 of Act No. 291.]—A miner's right held by a person as trustee for a company where such person and the company are applicants for an injunction under Sec. 203 is not sufficient evidence of title. *Grant v. Lawlor*, 3 V.L.R. (M.,) 15.

Suit by Shareholders.]—In a suit by one shareholder in a mining company, on behalf of himself and all other shareholders except the defendants against the directors and trustees, it is not necessary that the bill should contain an averment that the plaintiffs held miners' rights when the cause of suit arose, though it will be necessary to give evidence thereof before final relief can be given. *Lee v. Robertson*, 1 W. & W. (E.,) 374, 390.

Suit by a Company.]—A company registered under the "*Companies Act*" is "a person" within the meaning of the Acts requiring every "person" to have a miner's right before he appear in an action on a claim; and such company is entitled to a miner's right whether it be, or be not necessary that each individual member of the company should personally hold a miner's right as heretofore. *In re Verdon*, 1 W.W. & A'B. (L.,) 207.

Suit by a Company—Consolidated Miner's Right —"Mining Statuts 1865" (No. 291), Secs. 4, 7, 8—Act No. 228.]—Plaint summons by the A. company against the G. company for encroachment. The A. company being a registered company under Act No. 228, had no separate miner's rights, but a consolidated miner's right, representing 1031 men. *Held* that Sec. 4 of No. 291 was consistent with companies registered under No. 228 being entitled, as well as others, to consolidated miners' rights, such companies having power to manage their internal affairs like those of common partnerships; and that Secs. 7 and 8 were not inconsistent with registered companies holding such a right; and that the plaintiff company had sufficient miners' rights to enable them to sue. *Albion Coy. v. St. George United Coy.*, 4 W.W. & A'B. (M.,) 37, 58, 59.

Suit by Company—Shareholders Holding Individual Rights.]—Where the shareholders of a company hold sufficient individual miners' rights, but no corporate miner's right has been taken out for the company, *Held* that Sec. 90 of Act No. 32 was sufficiently complied with, and that the corporate right for the company was not essential. *Smith v. Scottish and Cornish Coy.*, 2 W.W. & A'B. (L.,) 121.

[Compare Sec. 246 of Act No. 291.]

Who may Maintain Suit for Trespass—Claimholders suing with a Company not having a Miner's Right.]—Registered owners of a claim under the Sandhurst Bye-laws having formed themselves into a company, sued with the company for a trespass committed after incorporation. The company had not a proper miner's right, so the individual claimholders obtained leave to amend by striking out the company as co-plaintiff. *Held* that registration being essential to a legal transfer by the Sandhurst Bye-laws, and there having been no registered transfer from the claimholders to the company, the claimholders could sue alone. *Vallancourt v. O'Rorke*, 1 V.R. (M.,) 43.

Who may Maintain Trespass—Company not having Miner's Right at time Trespass Commenced.]—A mining company which held a miner's right at the time of the trespass in respect of which it was suing, was held entitled to sue under Sec. 246 of the "*Mining Statute* 1865," although it had no miner's right at the time the trespass actually commenced. *Sea Queen Coy., v. Sea Quartz Coy.*, 4 A.J.R. 130.

Some Complainants not holding Miner's Rights.] —B. and fifty-three others, under a warden's order, took possession of tenement No. 1248 (being fifty-four men's ground) and were registered. Then A. and others came on the ground on 5th April, 1879, and worked it. B., for himself and the fifty-three, applied the next day for the tenement as for thirty-three men, but was not registered up to 5th May, 1879. On 16th April the fifty-four miners' rights expired, and thirty-three only were renewed. On 24th April B. and the fifty-three sued A. for trespass, the plaint being heard on 5th May, when only thirty-three rights were produced. *Held*, that the warden could not make an order in favour of the complainants generally or in favour of the thirty-three holding rights. *Bebro v. Bloomfield*, 5 V.L.R. (M.,) 26; 1 A.L.T., 47.

Some Complainants not holding Miners' Rights.] —In a complaint for encroachment brought in respect of damages to claim taken up as for eighty men, the warden or Court should ascertain the damages generally, and out of them award an amount in proportion to number of shares held by shareholders entitled to institute proceedings by virtue of miners' rights. *Critchley v. Graham*, 2 W. & W. (L.,) 71.

In the case of a continuing trespass, as for an encroachment *de die in diem* for twelve days, if some of complainants had miners' rights during part of time only, the warden or Court should divide the time, and give damages accordingly. *Ibid.*

[Compare Sec. 101, Sub-sec. iii., of Act No. 291.]

But where a company holding two rights as for forty-four men's ground, were suing with the trustees of the company holding individual rights, *Held* that the miners' rights held by the company were not sufficient to entitle them to sue, and recover for any part of their claim or damages, and the trustees could not recover as co-plaintiffs *pro rata*. *Chisholm v. United Extended Band of Hope Coy.*, 4 W.W. & A'B. (M.,) 31.

A company sued with A. and B., its trustees, in respect of trespass to a claim. The company and A. had miners' rights as for twenty-three twenty-fourth parts of the claim, but B. had no miner's right. *Held* that the warden might assess damages as for twenty-three twenty-fourths of the said claim, and declare that the company and A. entitled to possession thereof. *Sea Queen Q.M. Coy. v. Sea Q.M. Coy.*, 4 A.J.R., 174.

Act No. 291, Secs. 4, 5, 12, 246—Onus of Proof—Termination of the Right before Suit.]—Act No. 291, Secs. 4, 5, in creating miners' rights says affirmatively that they shall last as long as the tax is paid, and therefore by clear implication no longer; and the meaning of the words "save as against Her Majesty" only means that the Crown may even during the continuance of the rights revoke the titles. Sec. 246 only applies to persons neglecting to renew miner's rights as plaintiffs. The *onus* of proving that a defendant has a miner's right in force at the time of the commencement of the suit lies upon such defendant; the termination before the commencement of the suit of the miner's right under which the defendant previously held the claim, such right not having been renewed, terminates the defendant's interest in the claim as against the complainant. *Lennox v. Golden Fleece and Heales Coy.*, 5 A.J.R., 18.

Who may Enforce Forfeiture—Holders of Miner's Rights.—Claims to mine on Crown lands are dependent for their continuance or means of legal enforcement upon the renewal of miner's rights, but still are in the nature of permanent estates, and are not confirmed by that which is a means of renewal. Where, therefore, the holders of miners' rights sought for a declaration of forfeiture, *Held* that it was sufficient if they had miners' rights at the time of complaint, and immaterial whether they had taken them at the time of the forfeiture. *Clerk v. Wrigley*, 4 W.W. & A'B. (M.,) 74, 83, 84. *See* S.P. *United Extended Band of Hope Coy. v. Doyle*, 5 W.W. & A'B. (M.,) 39.

Who may Enforce Forfeiture—Holder of Miner's Right—Sandhurst Bye-law (No. 7.)]—A holder of a miner's right for a full claim need not produce and prove a miner's right specially taken out for the ground of which he seeks possession as forfeited under Sandhurst Bye-law (No. 7.) *Crocker v. Wigg*, 5 W.W. & A'B. (M.,) 20.

Possession of a Miner's Right — When Presumed.]—In a suit for encroachment the plaintiff's only title stated in the case was possession of the ground before and during the acts of trespass complained of. *Per* the Chief Judge:—As nothing is said of a miner's right, I presume he had it for the period of the alleged trespass. *Fahey v. Koh-i-noor Coy.*, 3 W.W. & A'B. (M.,) 4.

Entries in Register — Act No. 291, Secs. 49, 246.]—An entry in the registrar's book of miner's rights of persons taking up a claim is under Sec. 49 *primâ facie* evidence only to show the existence of miner's rights in the person taking up as their qualification for so doing, not for the collateral purpose of showing that the plaintiffs had miners' rights at the time of the injury complained of such as to entitle them to succeed in their suit under Sec. 246. *Cruise v. Crowley*, 5 W.W. & A'B. (M.,) 27.

Insolvent having Miner's Right—Assignee need not have one.]—L., who had a share in a mining company's claim on a quartz reef, and who had a miner's right, sold, in December, 1861, his share to K., who had no miner's right, but was registered as owner of the share. L. became insolvent, and in January, 1862, his assignee was appointed. The assignee had no miner's right, and L.'s expired in February, 1862. In March, 1862, G. purchased the share from K., with notice that K. was only a trustee for L. Suit by L.'s official assignee against K. and G. to have the sale to K. set aside; to have K. declared a trustee for L.; and to set aside the sale by K. to G. *Held* that it was unnecessary for the assignee to take out a miner's right, and that he could maintain the suit as against G. *Goodman v. Kelly*, 1 W. & W. (L.,) 332.

Appropriation of Specific Ground—Costs.]—S., as the trustee for a company, held what had been twenty-five men's ground by different transfers at different times, under a consolidated miner's right. This right expired, and was not renewed. S. also had another miner's right, which he had not appropriated before, and which he now appropriated to the ground to protect its forfeiture. *Held* that under Ballarat Bye-law 11 he might so appropriate it, although he might not have so intended when he took it out, but the Court refused to give S. his costs because he had made such a puzzle of his title. *Fattorini v. Band and Albion Consols*, 9 V.L.R. (M.,) 1; 4 A.L.T., 121.

(5) *Water Rights.*

"Goldfields Act" (No. 32,) Secs. 3, 76—Water Right.]—S. and party and D. and party occupied adjoining creek claims, S. and party occupying a claim above that of D. and party. S. and party diverted water from the creek, and returned it charged with sludge into the creek by a tail race passing through D.'s claim. D., wishing to work a distant part of the claim, placed a dam in the race to divert the water, and consequently the water charged with sludge did not flow away from S.'s claim unless constantly cleared from sludge at the dam. *Held*, on case stated, that under Sec. 76, the warden has no jurisdiction to determine such a question, since the right interfered with is not a water right within Sec. 3. *Schultz v. Dryburgh*, 2 W. & W. (L.,) 224.

[Compare Secs. 5 and 101, Sub-sec. 3, of Act No. 291.]

Dam on Crown Lands—Watershed—No. 32, Sec. 3.]—The holder of a dam constructed on Crown land, under Sec. 3 of the "*Goldfields Act*" (No. 32,) is not entitled to have, by virtue of the provisions of the Act, a right inconsistent with the common law, and is, therefore, not entitled to have the ownership of a watershed over the area of Crown lands from which the water would naturally flow to his dam, and which right he could only get by the express grant of the Crown. The Act protects him in the ownership of, and against all direct injuries to the dam itself. *Stevens v. Webster*, 3 W.W. & A'B. (M.,) 23.

[Compare Sec. 5 of Act No. 291.]

Dam on Crown Lands.]—The holder of a miner's right is entitled to occupy Crown lands for a dam for domestic purposes, though not actually engaged in mining. *M'Lean v. Wearn*, 1 A.J.R., 152.

Duty of Miners Using Streams.]—To a declaration for throwing sludge on the plaintiff's land, whereby it was injured, the defendants pleaded that, as holders of miners' rights mining on Crown lands, they used a stream flowing by those lands, and afterwards flowing through plaintiff's lands, for mining purposes and as an outlet for the water so used, and thereby the water so used became impregnated with earthy substances, whereby, &c. Demurrer, that it was incumbent on the defendants to do the acts complained of in such a manner as not to injure plaintiff. *Held* that the plea disclosed no defence to the action. *Campbell v. Ah Chong*, 1 V.R. (L.,) 25; 1 A.J.R., 35.

License under No. 148, Sec. 11, to Divert Water—Priority Over Creek-right.]—A license properly granted under Sec. 11 of No. 148, to divert water by race, &c., from a river, has superiority over a pre-existing creek right; and the holder of such a creek-right is not entitled to deprive the holder of such a license of any portion of the quantity of water specified in such license when the natural supply is insufficient for both; *sed quære*, whether the grant to the licensee, as between him and any other person having legal rights to the water of the river, the subject of the license, in the part of it through which the water is diverted, whether such rights be acquired before or after the grant, can stop the water to the extent prescribed in the grant, the section directing that the diversion by the licensee shall be to no greater extent than might be done by the licensee if owner of the land granted. *Nightingale v. Daly*, 3 W.W. & A'B. (M.,) 7.

[Compare Sec. 36 of Act No. 291.]

Lease of Reservoir Granted under No. 148, Sec. 12, to Road Board with Right to Cut and Use Channels, Races, &c.—License under "Mining Statute 1865" to Another Person to Cut a Race from Creek within the Area—Application for Injunction.]—The Court refused an injunction to restrain the Crown from issuing a license under the "*Mining Statute* 1865" to cut a race in an area in which a road board had been granted, under Act No. 148, Sec. 12, the exclusive right of cutting races and channels for the purpose of collecting storm-water for a reservoir of which the board had a lease. *Shire of Ballan v. The Queen*, 10 V.L.R. (E.,) 255; 6 A.L.T., 109.

For Facts *see* S.C., *ante column* 326.

Act No. 291, Sec. 101, Sub-sec. iii—Summons for Interfering with Water—Trespass.]—Under a summons before a warden for "interfering with and trespassing on the complainant's right to divert and use for mining purposes certain water by abstracting and diverting the same," the warden cannot go into the question of prospective injury to the complainant's right, or of trespass to the land occupied by the complainant's aqueduct. *Hyndman v. Micke*, 8 V.L.R. (M.,) 39; 4 A.L.T., 84.

Regulation by Order of Council, 21st January, 1878, Clause 27—Notice of Transfer.]—Clause 27, providing for a notice of the transfer of a license to cut races to be given to the Minister of Mines, means that the notice should be given after the transfer is completed; and the refusal of transferees to accept a transfer when tendered prevents such notice being given, of which they cannot complain. *Baw Baw Sluicing Coy. v. Nicholls*, 9 V.L.R. (L.,) 208; 5 A.L.T., 73.

II. Practice and Procedure in Mining Matters.

(A) In Equity.

(i.) *Injunctions to restrain Mining on Private Property, see ante columns* 908, 915.

(ii.) *Injunctions Generally, and Practice Thereon.*

Mining under a Street.]—Plaintiffs claimed the whole land in dispute under a frontage claim, and also part of the land, including half a street under a block claim. On motion for an injunction as to all the land, there was evidence of abandonment by the plaintiffs of all the land except as to the street, as to which the defendants had no colour of title; the plaintiffs too had not obtained the consent of the Borough Council to mine under the street. *Molesworth, J.*, granted an injunction as to the street only on terms of the plaintiffs submitting to a cross-injunction as to it. On appeal the Full Court granted an injunction as to the street only without any such cross injunction. *Band of Hope and Albion Consols Coy. v. All Saints Coy.*, 2 V.R. (E.,) 83; 2 A.J.R., 37, 49.

In a contest between two persons as to title, an assertion that defendants had not obtained from the proper authorities permission to mine underneath a street gives the plaintiff no title. The alleged power of intervention to prevent an unauthorised act, which power has not been exercised, cannot be set up by a trespasser who has not a shadow of title in himself against a person in prior occupation of the *locus in quo*. *St. George and Band of Hope United Coy., v. Band of Hope and Albion Consols*, 2 V.R. (E.,) 206, 221; 2 A.J.R., 127.

Act No. 291, Sec. 16—Permission to Mine.]—Under Sec. 16 of Act No. 291, the permission of a municipal council given to plaintiffs confers a title as against defendants having no such permission only as to such half of the street as the plaintiffs may claim in accordance with the doctrine of *ad medium filum viae*, and no further, when both plaintiffs' and defendants' own land adjoin the street. *The Extended Hustler's Freehold Coy. v. Moore's Hustler's Coy.*, 5 A.J.R., 116.

For facts *see* S.C., *ante column* 314.

Holder of Amalgamated Claim—Medium filum viae.]—The plaintiff C. was legal owner of an amalgamated claim, in trust for himself and the K. company, which had been let on tribute to the plaintiff B. company. The defendant W. was owner of three freehold allotments within the claim, and the defendant company was his tributor. These allotments were bounded by a public road on one side. The defendant company had driven under the road 75 feet into plaintiff's claim. On motion for injunction and inspection, injunction granted, but, as other means of information were open, inspection only through the aperture caused by plaintiff's breaking into defendant's drive granted. *Band of Hope Coy. v. Williams Freehold Coy.*, 5 V.L.R. (E.,) 257.

[But now *see Garibaldi Coy. v. Craven's New Chum Coy.*, 10 V.L.R. (L.,) 223; 6 A.L.T. 93, where the principle of *ad medium filum viae* was overruled.

User—Mining Claim—Reservation.]—If the case for the Crown depends upon public documents and public user, the nature of the case renders minute and specific allegations by the applicant less necessary, and comparatively vague statements are sufficient to launch the bill and throw on the defendants the burden of contradiction by special allegation. By order of the Governor-in-Council, 1861, Crown land was applied to a public use by being temporarily reserved from sale as a public park. The defendants in the first suit were mining upon part of the land under miners' rights which were not proved to have been granted before the date of the order-in-council. In the first suit there was no definite evidence of the alleged user of the land as a public park. On bill and information seeking to restrain the defendants from mining on this land, and on motion for injunction, *Held*, upon the above principle, that as the defendants had not met the necessity of special contradiction the Crown were entitled, and injunction granted. In the second suit defendants claimed under miners' rights issued before the order-in-council, and the allegations of the hill and information were met hy distinct affidavits sworn by residents in the vicinity that the land had never been used as a public park; that it was not prior to 1861 used as a place for public recreation, and had been since used for grazing purposes. On a bill and information for a similar purpose, *Held* that the evidence given by defendants was strong enough to disprove public user, and that as the proclamation of reservation had been made under "*Sale of Crown Lands Act* 1860" (No. 117), that the reservation did not *per se* dedicate the land to any specific purpose, and was only a reservation from sale and did not take the land out of the operation of the "*Mining Acts*;" that as the defendants had for years before the order occupied the land for mining purposes, and had expended large capital in their mining operations, the Court would not interfere by injunction. Injunction refused. *Attorney-General v. Southern Freehold Coy.*; *Attorney-General v. United Hand-in-hand* and *Band of Hope Coy.*; 4 W.W. & A'B. (E.,) 66, 78, 80, *et seq.*

Who are Entitled to.]—Two adjacent mining companies entered into a written agreement defining, by reference to a plan, a common agreed boundary line, and mutually covenanted not to cross it. On the plan, this line extended beyond the then claim of either company. Subsequently one company acquired land not previously in the possession of either, and mined in it across the boundary line as drawn on the plan. The other company filed a bill to restrain such mining as a breach of the agreement, but alleged neither title to, nor possession of the *locus in quo*. *Held* by the Full Court on appeal from an order for an *interim* injunction, that the plaintiffs, showing neither title nor possession, were not entitled to an *interim* injunction; and appeal allowed with costs, and defendants allowed their costs of opposing the granting of

the injunction. *Semble*, that the acquiring the land by the defendants after the agreement was not a violation of it. *The Band of Hope and Albion Consols v. The St. George and Band of Hope United Coy.*, 1 V.R. (E.,) 183, 188; 1 A.J.R. 174; 2 A.J.R. 127 (on appeal.)

Proving Case different from that made by Bill.] —The plaintiffs by their bill and affidavits made a case of encroachment by means of particular drives, and upon motion for injunction and inspection, the case failed partially, and was ordered to stand over for further affidavits. On further hearing of motion plaintiffs tried to set up a different case of encroachment from that set out in bill. *Held* they were not entitled to do so, and motion dismissed with costs. *Parker's Freehold United Q.M. Coy. v. Parker's United Coy.*, 7 V.L.R. (E.,) 16.

Interlocutory Injunction—Acquiescence.]—The defendant Y.B. company sunk a shaft on the ground in dispute two years before suit brought, with acquiescence of the B. company, through which plaintiff company claimed, and mined without interference on part of B. company. *Held* on motion for injunction that there was such acquiescence on the part of the B. company as would disentitle it to relief, and the plaintiff company obtaining rights through the B. company was in the same position. If a person believes his land is encroached upon, he should ascertain what the boundaries are; and if a person come near his boundary to sink a shaft, he should take immediate steps to assert his claim, and prevent encroachment. Motion refused. *Band and Barton United Coy. v. Young Band Extended Coy.*, 7 V.L.R. (E.,) 162.

Acquiescence—When no Bar to Relief.]—If a plaintiff, having reason to believe that defendant is engaged in a fraudulent mining encroachment, underground and difficult to detect, permits him to go so far that the injury is serious, but detection certain, the plaintiff is not by this sort of acquiescence disentitled to relief. *Lane v. Hannah*, 1 W. & W. (E.,) 66, 72.

Account of Gold—How Taken.] — *Held, per Molesworth, J.*, and affirmed on appeal, that the valuation of gold as against trespassers should be high. *Attorney-General v. Boyd*, 3 A.J.R., 99, 130.

For facts *see* S.C., *ante column* 913.

Dispute as to Title—Duty of Court with Rsgard to Gold.]—*Per* Full Court.—Where there is in dispute a difficult question of title to auriferous land, the Court should, on an interlocutory application, endeavour to preserve the gold for the party ultimately succeeding. *Band of Hope and Albion Consols v. Young Band Extended Q.M. Coy.* 8 V.L.R. (E.,) 120, 125; 3 A.L.T., 125.

Disputed Ground—Gold How Dealt with.]—An injunction was obtained *ex parte* against a "No Liability" mining company to restrain it from working on ground which was claimed by itself and the plaintiff company. The injunction was subsequently dissolved by the Primary Judge in Equity on the ground that it was obtained by misrepresentation; but the defendant company was ordered to keep an account of the gold taken by it from the land, the Primary Judge refusing the request of the plaintiff company for an order that the gold obtained by the defendant company should be paid into a bank. On appeal, *Held*, by the Full Court, that the plaintiff company was entitled to an order directing the surplus of the gold over and above the working expenses to be paid into a bank in the joint names of the managers of the plaintiff and defendant companies; that accounts of gold raised and working expenses should be kept, the plaintiff company having liberty at all reasonable times, at their own expense, to inspect the workings of the defendant company on the land in dispute. The form of the order was settled by the Court. *Band of Hope and Albion Consols v. Young Band Extended Q.M. Coy.*, 8 V.L.R. (E.,) 120; 3 A.L.T., 125.

Breach of Order—Per Confusionem.]—Where there was an order against a defendant company that they might continue to work auriferous land, the title to which was in dispute in the suit, on the terms of keeping an account of the gold extracted and of the working expenses, and paying into a bank named the surplus proceeds of it, to abide the result of the suit; and the defendant company worked the land in dispute in conjunction with adjoining land of their own in such a way that the quartz from the two had been mixed, and gave in their accounts the approximate quantity of gold raised from the land in dispute, *Held, per Molesworth, J.*, that there had been no substantial breach of the order; and that, if there had, the proper course was to apply to vary the order, or to proceed against the defendant company for contempt. Upon appeal, *Held*, by Full Court, that the defendant company had practically infringed the order, and defendant company ordered to pay into the bank the whole of the gold obtained from the quartz they had mixed. *Band of Hope and Albion Consols v. Young Band Extended Q.M. Coy.*, 8 V.L.R. (E.,) 277, 283; 4 A.L.T., 60.

A. was working, under tribute from freeholders, mines under certain land, and B. was working mines under adjoining land. It was proved in evidence that B. had sunk a shaft on his own ground, and had thence driven into plaintiff's ground. From one level about 2600 tons of quartz had been raised and crushed at B.'s battery, but B. had, by blasting, prevented the discovery of the exact extent of encroachment and of gold raised. *Held* that there were sufficient facts to prove the trespass, and that an account of gold raised should be taken; all doubt to be taken most strongly against B. *Attorney-General v. Lansell*, 8 V.L.R. (E.,) 155, 161, 171, 174; 3 A.L.T., 87, 141.

Encroachment—Account of Ore Raised and Gold Extracted.]—The Master in his report found that a certain number of tons of quartz were raised from the defendant's own mine and his encroachment on plaintiff's, so many tons from encroachment and so many from defendant's mine, and found also total number of ounces extracted. *Held* that the proper inference was

that the gold was procured from the tons of quartz proportionately. *Attorney-General v. Lansell*, 9 V.L.R. (E.,) 172, 178; 5 A.L.T., 71.

Encroachment—Confusion of Gold Removed.]—Where a decree found an encroachment by the defendant on the plaintiff's mine, and directed an account of all gold, &c., removed therefrom, *Held* that the onus of showing confusion of the gold removed from plaintiff's and defendant's mines lay upon the plaintiff at the inquiry. *Ibid.*

Witnesses Engaged in Encroachment.]—The evidence of witnesses engaged in an encroachment should be received as true so far as consistent and uncontradicted. *Ibid.*

Action for Value of Gold Taken—Trespass under bona fide Belief of Right.]—There had been a previous action in ejectment in which plaintiff recovered, and now an action was brought in the nature of an action for *mesne* profits. It appeared that defendants were in under a claim of title; that an injunction had been granted, and defendants were allowed to carry on the mining under certain conditions. The jury had found the gold taken to be of a certain value, and had allowed the expenses at a certain sum, giving plaintiff a verdict for the balance. On rule *nisi* to increase damages, *Held* that the cases of a wilful trespasser and a person in under *bonâ fide* belief of right being different, the damages had been correctly assessed. Rule discharged. *Munro v. Sutherland*, 5 A.J.R., 75.

Trespasser—Not Allowed Cost of Mining.]—A wilful trespasser upon a gold mine will not be allowed the expense of raising the gold removed by him. *Attorney-General v. Lansell*, 9 V.L.R. (E.,) 172, 178.

What a Breach of Injunction.]—Finishing work necessary to the stability or use of a mine, is not a breach of an injunction not to work it. *Mulcahy v. The Walhalla G.M. Coy.*, 5 W.W. & A'B. (E.,) 103, 110.

What is a Breach of Injunction.]—The D. gold-mining company had obtained an injunction against the M. C. company to restrain an encroachment. The D. company mined on private property. Subsequently to the granting of the injunction, B., one of the members of the M.C. company, purchased the interests of three of the persons who had constituted the D. company, and continued the mining. Upon motion by the D. company to commit B. for a breach of the injunction, *Held* that B. had committed no breach, and that to restrain him from exercising the rights acquired by purchase another suit would be necessary. *Attorney-General v. Boyd*, 4 A.J.R., 103.

Bill for Injunction—Defendant not Connected with Acts Complained of.]—Where a bill was filed against a mining company and its tributors to restrain undermining streets, and it was alleged that the tributors were mining under the streets with the knowledge and assent of the company, but the company was not distinctly stated to be the doer of the acts complained of, nor was it shown that it shared in the profits arising from them, a demurrer by the company was allowed. *Mayor, &c., of Ballarat East v. Victoria United G.M. Coy.*, 4 V.L.R. (E.,) 10, 17.

When Cross Injunction will be Granted.]—*Mulcahy v. Walhalla G.M. Coy., ante column* 570.

(iii.) *Orders of Inspection—When and How Made.*

Order to Inspect and Survey Mine.]—In a suit for an injunction to restrain defendants from trespassing on plaintiff's ground and removing gold therefrom, the Attorney-General, on behalf of the Crown, having been made a co-plaintiff with his consent after injunction obtained, on motion for an order for inspection, the Court ordered that the district surveyor might inspect the mine of the defendants and survey it, the plaintiffs undertaking to pay any damage or loss resulting to plaintiff through stoppage of his works. *Attorney-General v. Cant*, 2 W. & W. (E.,) 113.

In a suit brought by Attorney-General and the owners of private property, the Court has jurisdiction to make an order for inspection. *Attorney-General v. Gee*, 2 W. & W. (E.,) 122, 131.

Information by Attorney-General—Owners of Private Property not Joined as Co-plaintiffs by Bill.]—On an information by the Attorney-General where the owners of the private property were not joined as co-plaintiffs by bill, an order for inspection was refused on the ground that no demand for inspection had been made by any one on behalf of the Crown. *Attorney-General v. Hustler's Consols Coy.*, 3 A.J.R., 70.

Order for Inspection—Mining Lease on Private Property—Highway ad medium filum—Inspection Granted as to the Property Only.]—Where a company were mining, under a mining lease from the proprietor, on private property which was bounded on one side by a highway, and alleged that the defendants, who were mining lessees of land on the other side of the highway, had mined under the whole breadth of the highway into their allotment, the Court granted an injunction only as to mining under the allotment, and an order of inspection only to ascertain whether defendants were mining under it at the time of the order. *Victoria United Mining Coy. v. Prince of Wales Coy.*, 5 V.L.R. (E.,) 92.

Mining on Private Property—Licensees—Attorney-General—Encroachment.]—In a suit by the Attorney-General and the licensees for gold-mining purposes of the owners of private property against an adjoining mineowner, for an alleged encroachment, a motion by the plaintiffs other than the Attorney-General, for inspection of the adjoining mine, was granted, to enable them to establish the fact of encroachment. *Semble*, that if the defendant had admitted the fact of encroachment, an inspection to ascertain the extent of encroachment would not have been granted upon such a motion, on the ground that the plaintiffs other than the Attorney-General had no interest in seeing what was the quantity

of the injury done, their right being merely a license to work. *Attorney-General v. Lansell*, 6 V.L.R. (E.,) 134; 1 A.L.T., 177.

Motion for Inspection—Boundaries on a Plan Attached to an Agreement—Error in Plan.]—The plaintiff and defendant company made an agreement by which certain boundaries were fixed, and these boundaries were marked in an attached plan. These boundaries were imaginary lines, and the plan was inconsistent with itself as to the course of those lines with reference to land marks, and showed a shaft in a wrong position. The plan had on it a description and bearing of imaginary lines accurately given. On motion for injunction to restrain encroachment, and for order for inspection, *Held* that measurements from the accurate description in the plan were dominant over other measurements, no order for injunction, but order made for inspection to procure evidence of the true position of the alleged encroachment, with reference to the real boundaries. *Band and Albion Coy. v. St. George United Coy.*, 3 A.J.R., 20.

Inspection.]—The plaintiff company were mining under land held on lease from the Crown, and the defendant company on adjoining freehold. The manager of the plaintiff company applied by letter for leave to inspect defendants' mine, and this was allowed. He made a second application, and an answer was returned that he might be at liberty to inspect if plaintiff company would give a bond not to flood defendants' mine. This was refused, and the defendant company continued to refuse inspection except on terms of a bond being given. The bill charged encroachment by defeudants upon plaintiffs' land, which encroachment it was alleged the defendants justified by pretending there was a road as boundary between the adjoining lands of the plaintiffs and defendants, and that the defendants had a right to mine half-way under this road. Motion for inspection refused, the defendants having denied that they went as far as the road. *United Hand and Band of Hope Coy. v. Winter's Freehold Coy.*, 3 A.J.R., 59.

Where other means of information were open to a party seeking an order of inspection, inspection only granted through the aperture caused by plaintiff's breaking into defendant's drive. *Band of Hope Coy. v. Williams Freehold Coy.*, 5 V.L.R. (E.,) 257.

For facts *see* S.C., *ante column* 967.

Inspection—Working Machinery for Purposes of—Defendant not Bound to.]—An order for inspection of a mine was granted upon the plaintiff giving two days' notice, and with liberty to use defendant's machinery for descending and ascending the mine. After notice to inspect, defendant stopped working, and plaintiff was thereby prevented from descending to inspect at the time appointed. Upon motion for attachment, *Held* that under the literal terms of the order, the defendant was not bound to provide firewood or engines; that such orders are based on the supposition that the mine will be working when inspection is to be made, and the Court could not make an order that defendants should go on working simply for the purposes of inspection. Motion dismissed. *Attorney-General v. Lansell*, 6 V.L.R. (E.,) 134; 1 A.L.T., 177.

(B) Jurisdiction Practice and Procedure in Wardens' Courts and Courts of Mines.

(1) *Jurisdiction.*

(a) *Jurisdiction, Duties, Powers, and Liabilities of Warden.*

In Cases of Encroachment—Act No. 291, Secs. 37, 101, Sub-sec. i.]—The warden has jurisdiction under Sec. 101, Sub-sec. i., to hear a case of trespass by entering upon land in possession as a claim or under a lease and erecting a fence; and Sec. 37 extends this jurisdiction to cases where a lease is being applied for, but has not, at the time of the trespass, been granted. *Extended Cross Reef Coy. v. Creaver*, 4 A.J.R., 10.

"Mining Statute," Sec. 101 (i. and iii.)]—R. took up a business site nearer to a public road and to plaintiff's residence area than was permitted by the district bye-laws. R.'s site, though inconveniently near to plaintiff's residence area, did not encroach upon it. Plaintiff summoned R. before a warden for a trespass, and sought to have him removed from his business site. *Held* that the jurisdiction conferred upon the warden by reference to that of the Courts of Mines under the "*Mining Statute* 1865" (No. 291,) Sec. 101 (i.,) was confined to cases in which two persons are litigating for the same land, &c., which they both claim; that Sec. 101 (iii.,) applying only to land used for mining purposes, which under neither No. 32 or No. 291 includes residence, did not confer jurisdiction on the warden in this case; and that the warden had no jurisdiction in the matter. *Rosales v. Rice*, 1 V.R. (M.,) 1; 1 A.J.R., 13.

Forfeiture—Mining Lease.]—A warden has jurisdiction, under Sec. 101 (i.) of the "*Mining Statute* 1865," to entertain a complaint for forfeiture of a gold-mining lease for non-performance of the labour covenants. *M'Millan v. Dillon*, 6 V.L.R. (M.,) 15; 1 A.L.T., 203.

Forfeiture—Claim Taken up on Public Street—Warden has no Jurisdiction.]—*Schonfeldt v. Beel*, *ante column* 919.

Act No. 291, Sec. 101, Sub-sec. iii., Sec. 177—Non-payment of a Lien.]—H. was owner of land under a residence area license, and he died intestate, having given F. a lien over the land to secure payment of a debt. H.'s widow married E., and E. and his wife went into possession of the ground. F. sued E. and wife as executor and executrix *de son tort* to obtain a declaration that they had forfeited all right to the land. *Held* that the proceedings must be brought under Sub-sec. 3 of Sec. 101, and under Sec. 177, and if that were done the warden had jurisdiction to adjudicate upon the forfeiture for non-payment of the lien, and that E. and his wife could be sued jointly as executor and executrix *de son tort*. *Fitzgerald v. Elliott*, 5 A.J.R., 3.

Act No. 291, Secs. 101, Sub-sec. iii., 177—Forfeiture of Shares in Company.]—The warden has no jurisdiction under Sec. 101, Sub-sec. 3, and Sec. 177 of Act No. 291, to declare shares in a company registered under Act No. 228, illegally forfeited, or to award damages for such forfeiture. Rule *nisi* discharged, calling on warden to state a case under Sec. 22 of Act No. 446. *Newey v. Garden Gully Coy.*, 5 A.J.R., 116.

Jurisdiction as to Water Rights—Act No. 32, Sec. 76.]—*See Schultz v. Dryburg, ante column* 965; and compare Sec. 101, Sub-secs. iii. and vii. of Act No. 291.

Matters of Contract—"Mining Statute 1865," Sec. 101, (vi.)]—The G. company, registered as a no-liability company, held a claim adjoining the M. company, which was not registered. The M. company was divided into five shares, of which the G. company purchased two; but it never obtained possession of the ground, the land was worked by the other partners, and the G. company never received any of the gold raised from the mine. P. sued the G. company and the three other owners of the M. company's mine to recover a sum due to him for work done for that mine before the two shares were sold to the G. company. The warden made an order for the sum. On rule *nisi* for a prohibition as far as regarded the G. company, *Held* that there was no contract with P., so far as the G. company was concerned, and that the warden had no jurisdiction under the "*Mining Statute* 1865," Sec. 101 (vi.,) to enforce payment as against it. *Regina v. Philp, ex parte Granya Coy.*, 6 A.L.T., 13.

Jurisdiction over Crown Lands Temporarily Reserved—Act No. 291, Sec. 177.]—The warden is not deprived of his jurisdiction over Crown lands temporarily reserved by proclamation in the *Government Gazette* for public purposes where such Crown lands were, at the time of being so reserved, held under miner's rights. *Wakeham v. Cobham*, 1 V.R. (M.,) 34; 1 A.J.R., 93.

Trespass by Government Officials.]—A warden has jurisdiction in cases arising between the Government and parties claiming under miner's rights, as regards suits for trespass on claims against officials acting unlawfully on behalf of the Crown; but has no jurisdiction in such suits against the Crown itself, unless named. *Ibid.*

Act No. 291, Sec. 177—Mining on Private Lands—Partnership.]—W. proceeded by plaint before the warden against a company for money due to him on a mining adventure. This adventure was on private lands and the warden decided in favour of W. *Held* that the entire scope of Act No. 291 confined the general words in Sec. 177 to partnerships on Crown lands, and that, therefore, the warden had no jurisdiction over a partnership on private lands. *Pride of the East G.M. Coy. v. Wimmer*, 5 V.L.R. (M.,) 9.

Partnership Claim—Act No. 32, Sec. 77.]—Where a suitor alleged that he had originally been a partner, and was entitled to an undivided share in a claim from which he was kept out of possession, *Held* that the warden had power to hear and determine a complaint by a partner claiming an undivided share in the claim and to put him into possession, and to decide the question of partnership. *Kin Sing v. Won Paw*, 1 W. & W. (L.,) 303.

[Compare provisions of Act No. 291, Sec. 177.]

Land under Lease from Crown—Act No. 291, Sec. 177.]—Plaintiffs summoned defendant for trespass to land held under lease from Crown, and obtained an injunction. Defendant moved to dismiss injunction, and warden made an order refusing motion, with costs. Rule granted for *certiorari* to quash the order on the ground that the warden had no jurisdiction over land held under lease from Crown. *Regina v. Smith*, 3 A.J.R., 22.

As to Abandonment and Forfeiture—No. 291, Secs. 71 (x.,) 177.]—The 177th section of the "*Mining Statute* 1865" shows an intention that wardens should have jurisdiction in all cases of disputed ownership of claims; and Sec. 71 (x.) does not make it necessary for the efficacy of a bye-law as to abandonment that it should point out a person to adjudicate, but that the Board may leave that duty to the ordinary officer. A warden, therefore, has jurisdiction under a bye-law as to abandonment without being expressly named in such bye-law. *Longbottom v. White*, 3 W.W. & A'B. (M.,) 35.

As to Enforcing Forfeiture.]—It has never been decided that where the warden has no jurisdiction to enforce a forfeiture the Supreme Court will not interfere; but where the warden declared a forfeiture under a bye-law, which, though repealed, the Court held was the bye-law governing the liability to forfeiture, *certiorari* to quash the order was refused. *Regina v. Clow, ex parte Oliver*, 5 W.W. & A'B., (L.,) 89.

To Let Some of Several Complainants into Possession.]—A warden has jurisdiction in a suit by several persons seeking damages, and to be let into possession of ground, where some only of the complainants produce miner's rights, to assess damages as to such complainants alone, and to let them into possession. *Sea Queen Q.M. Coy. v. Sea Q.M. Coy.*, 4 A.J.R., 174; *Critchley v. Graham*, 2 W. and W. (L.) 71.

For facts of these cases *see ante column* 963.

Power of Warden under Bye-laws.]—A bye-law provided that for non-working a claim should be forfeitable, and went on to provide that "it may be by any competent court declared forfeited." *Held* that under this bye-law the warden was allowed no discretionary power to refrain from enforcing forfeiture should the circumstances appear to him sufficient to warrant such a decision as being equitable. *Lawlor v. Stiggants*, 2 V.L.R. (M.,) 17.

Commitment by Warden—"Mining Statute" (No. 291,) Secs. 195, 197.]—Certain persons were

brought before a warden by summons, charging them with having from a day named, continuously trespassed upon the claim, and praying amongst other things that the applicants might be ordered to remove therefrom. The warden decided that the "defendants" had trespassed on the claim, ordered them to pay damages and costs, and to remove from the claim. Defendants disobeyed the order and were committed. *Held* that the summons and order were bad as confounding the jurisdiction under Secs. 195 and 197 of Act No. 291. *Semble, per Molesworth, J.*, that Sec. 195 authorises the warden to order a defendant in possession to deliver possession to the complainant, and to punish disobedience, irespectively of the power of transferring possession by his officer. *In re Yung Hing*, 4 A.J.R., 57.

Act No. 291, Secs. 5, 195—Buildings and Fixtures—Jurisdiction of Warden.]—A warden dismissed a plaint seeking recovery of the possession of a mining tenement: on the soil were erected certain buildings and fixtures belonging to the complainant. *Held* that the warden had no jurisdiction to deprive the complainant of the buildings and fixtures. *Summers v. Cooper*, 7 V.L.R. (L.,) 443; 3 A.L.T., 61.

The Court will not restrain a warden from hearing a case on the ground of his having no jurisdiction, but will entertain the question of jurisdiction only after he has adjudicated. *Regina v. Warden at Donnelly's Creek*, 3 A.J.R., 38.

Plaint Summons Exceeding Jurisdiction but Order made Valid.]—Where G. summoned M. before a warden praying for the cancellation of a certain assignment of an interest in a claim and for accounts, and the warden made an order cancelling the assignment only, *Held* that the order was valid in itself; and, even if did not strictly follow the summons, the summons might have been amended by striking out the relief sought as to accounts, which was in excess of the jurisdiction. Rule to quash the order discharged. *Regina v. Smith, ex parte Mahony*, 3 A.J.R., 48.

Warden's Order—Bad as to Part—Necessity for Quashing.]—Where a warden's order gave possession to complainant of a claim declared forfeited, provided that a sum of money, representing value of materials, &c., were paid to the defendant, and the complainant took possession without making the payment, *Held* that complainant could not and was not entitled to take possession until the bad part of the order (the proviso as to payment) was quashed. *Sayers v. Jacomb*, 3 V.R. (L.,) 132; 3 A.J.R., 66.

Warden's Order Valid in Part and Invalid in Part—Invalid Part Quashed.]—Where a warden had made an order valid in part and invalid in part, the Full Court, on rule *nisi* to quash the invalid part, made the rule absolute, with costs. *Regina v. Cogdon, ex parte Hartmann*, 3 A.J.R., 118.

Compelling Warden to do his Duty—Act No. 291, Sec. 166.]—Upon a special case from warden the Chief Judge made a certain direction which the warden from some misapprehension failed to enter up. *Held* that the warden's duty in such a case is judicial and not ministerial, and it was not a case for an order under Sec. 166, but for a *mandamus* to compel the warden to enter the direction. *Regina v. Strutt, ex parte Lawlor*, 3 V.L.R. (L.,) 2.

Mandamus to Compel Warden to Hear and Determine Case.]—A *mandamus* to compel a warden to hear and determine a case was refused where the warden had heard it as to the individual defendants, but had struck out a company, on the ground that he had no jurisdiction as regarded them, the Court holding that he had heard and determined the complaint. *Regina v. Gaunt, ex parte Bahlman*, 4 A.J.R., 114.

Mandamus to Compel Warden to Carry Out Decree of Court of Mines—Proper Remedy to Apply to Court of Mines.]—*In re Cogdon, ex parte M'Dermott, ante column* 883.

And *see* cases under MANDAMUS, *ante column* 883.

Upon an application for *mandamus* to a warden, he has not, under Sec. 10 of Act No. 565 (*"Justices' Amendment"*,) the same privileges as justices as to being able to file an answering affidavit without a fee. *Regina v. Strutt, ex parte Constable*, 3 V.L.R. (L.,) 186.

Liability to Pay Costs—Act No. 291, Sec. 166.]—Where a rule *nisi* for a warden to state a case is made absolute costs will not be given against the warden unless they are specially asked for in the rule *nisi*. *Grant v. Lawlor*, 3 V.L.R. (M.,) 15.

Conclusive Nature of Warden's Decision—Act No. 32, Sec. 80.]—Where a warden has jurisdiction, and gives his decision, such decision is conclusive unless it is appealed from. *Kin Sing v. Won Paw*, 1 W. & W. (L.,) 303.

[Compare Sec. 193 of Act No. 291.]

Conclusive Nature of Warden's Decision—Act No. 291, Sec. 177.]—A warden's order, if not appealed from, is conclusive, and acts as an estoppel against a suit being brought by the same parties in respect of the same matter. *Mulcahy v. Walhalla G.M. Coy.*, 5 W.W. & A'B. (E.,) 103, 115.

See S.P., *Constable v. Smith*, 6 W.W. & A'B. (M.,) 58; N.C., 70.

But a decision purporting to be a decision of the warden, but being in fact only a finding of assessors upon facts, and not accompanied by a judgment of the warden, is a nullity. *Mulcahy v. Walhalla G.M. Coy.*, 2 A.J.R., 94.

For facts *see* S.C. *post column* 989.

The decision to be binding must be recorded under Sec. 193 of the Act No. 291. *Mulcahy v. Walhalla G.M. Coy.*, 2 A.J.R., 94; *Sim v.*

Eddy, 3 W.W. & A'B. (L.,) 21; *Early v. Barker*, 1 W.W. & A'B. (L.,) 32.

For facts *see post columns* 988, 989.

Conclusive Nature of Warden's Decision—Act No. 291, Sec. 193.]—S. proceeded by plaint before the warden, and reserved a special case for the Chief Judge, which was answered to the effect that S. was not entitled to relief unless he proved that he held a miner's right on a certain day. The warden then dismissed the plaint. S. then issued a fresh summons precisely the same as the first, seeking to have a new trial, supplying his former defect of evidence. *Held* that the decision given in the former case between the parties was a bar to the second proceeding; that the warden's omission to state any fact found, the warden merely giving an order as upon the fact, does not prevent the effect of such order being final. *Semble*, a complainant producing insufficient evidence is not entitled to a nonsuit. *Summers v. Cooper*, 5 V.L.R. (M.,) 42; 1 A.L.T., 115.

(*b*) *Jurisdiction, Powers, and Duties of Judges of District Courts.*

In Matters of Practice—Act No. 32, Sec. 70.]—The 70th section of the "*Goldfields Act*" (No. 32,) gives the judge of the Court of Mines power to grant only one re-hearing of a hearing or an appeal. *Dennis v. Vivian*, 1 W.W. & A'B. (L.,) 201.

[Compare Sec. 170 of Act No. 291.]

The Supreme Court will not issue a prohibition to a Court of Mines where it has acted within its jurisdiction, although it may have decided wrongly. *Regina v. Cope, In re Moore*, 4 A.J.R., 113.

Judge of Court of Mines—Pronouncing Decision Outside of his District.]—A judge of a Court of Mines, having heard a case within his district, afterwards, by consent of the parties, when within another district announced the decision he had arrived at and gave his reason. *Held, per* Privy Council, that there was no objection to such a proceeding, and that it could not form ground for a prohibition, and that if the judge, at the request or with the consent of the parties, allowed them to attend him out of the jurisdiction to hear his reasons and conclusions, there was nothing to prevent him, being afterwards within his jurisdiction, from giving his formal order formally signed to the proper officer to be duly recorded. *Mulcahy v. Walhalla G.M. Coy.*, 2 A.J.R., 93, 95.

Act No. 32, Sec. 27.]—The judge of a Court of Mines has no jurisdiction to hear and decide, outside the territorial limits of his Court, a motion for an injunction in a matter otherwise within the jurisdiction of his Court. *James v. Higgans*, 1 W.W. & A'B. (L.,) 51.

[But now *see* Act 446, Sec. 8.]

Act No. 32, Sec. 27—Equitable Matters—Work and Labour Dons.]—The jurisdiction of Courts of Mines is expressly limited to matters cognizable by a Court of Equity; and a judgment for work and labour done given by a Court of Mines is wholly unauthorised. *Wilson v. Broadfoot*, 1 W. & W. (L.,) 214.

[But now *see* Act No. 291, Sec. 101, Sub-sec. iv.]

"Mining Statute 1865" (No. 291,) Secs. 101, 124, 129—Cross Relief—Demurrer—Certificate of Title—Cancellation.]—E. obtained in January, 1872, on behalf of himself and seven others, who were mining in partnership under the style of the Herald Company (which was never incorporated,) a gold-mining lease of certain land. On 1st December, 1873, E. assigned his individual interest in lease to plaintiff G., and by the consent of the Governor-in-Council, lease was transferred to G. as trustee for the Herald Company, 17th February, 1874; in May, 1874, G. with consent of his co-partners, sold his individual interest to B. In 1873, one Atkinson sued E. for a small debt in a County Court, which bill alleged was paid, but in December, 1873, one Welsh purporting to act as attorney for Atkinson, obtained from Registrar of County Court a certificate of judgment, and that debt was unpaid, and signed final judgment. In January, 1874, Welsh issued a writ of *fi. fa.* upon the judgment, and E.'s interest in lease was sold by sheriff, the defendant Harvey becoming purchaser, G. entering a protest against sale. The plaintiffs, the co-partners mining together as the Herald Company, remained in occupation of lease. On 9th February, 1875, the plaintiffs were served with an injunction of the Court of Mines, Sandhurst, in a suit wherein present plaintiffs were defendants, and defendant Harvey and defendant company, the Nell Gwynne Quartz Mining Company, were plaintiffs, and the present plaintiffs were restrained from mining on land. The plaint alleged that defendant Harvey was the registered proprietor of a leasehold estate for an unexpired term in land comprised in lease of January, 1872, and that defendant Harvey was a trustee for defendant company. Bill prayed for sale to defendant Harvey to be set aside, a declaration that certificate of title issued to him was void and should be cancelled, and for an injunction to restrain the defendants from proceeding in Court of Mines. *Held* on demurrer, that Supreme Court has concurrent jurisdiction with Court of Mines; that Equity Court has no jurisdiction to order certificate of title to be cancelled, the proper relief being to order holders to transfer; that Court of Mines had power to consider all matters put forward in bill, and to give cross-relief (Secs. 124 to 129). When Court will not grant other relief sought, it will refuse to restrain proceedings in Court of Mines. Demurrer allowed. *Gunn v. Harvey*, 1 V.L.R. (Eq.,) 111.

In Partnership Suits.]—A quartz crushing partnership is a mining partnership within the meaning of Act No. 32, Sec. 27, and a Court of Mines has jurisdiction over a suit concerning such a partnership, if such partnership be limited to a "gold-field" as defined by the Act. *Harvey v. Rodda*, 1 W.W. & A'B. (L.,) 21.

[Compare Act No. 291, Sec. 101, Sub-sec. vii.]

"Goldfields Act" (21 Vict. No. 32,) Sec. 27—Boundaries.]—On a plaint in a Court of Mines for defining boundaries it turned out that the question in dispute was not really one of boundaries, but that one party denied the other's right *in toto*. *Held* that the jurisdiction of the Court of Mines being limited by Sec. 27 of the "*Goldfields Act*," if the Court of Equity had no original jurisdiction in the matter, no more had a Court of Mines, and the equitable jurisdiction of defining boundaries being based on the admission that both parties are entitled to something, the case, in its then form, could not be entertained by a Court of Mines. *Banks v. Granville*, 1 W. & W. (L.,) 158.

[*See* now Act No. 291, Sec. 101, Sub-sec. 11, where jurisdiction is given in all events.]

Jurisdiction as to Production of Books.]—The Judge of a Court of Mines has no jurisdiction in a suit between two companies to order the defendant company to produce for inspection books of another company not a party to the suit. *Park Coy. v. South Hustler's Reserve Coy.*, 8 V.L.R. (M.,) 37.

Expunging Proof of Debt.]—Courts of Mines, which had vested in them by the "*Mining Statute* 1865" the powers possessed by commissioners of insolvent estates, have not by virtue of the "*Insolvency Statute* 1865," the power of expunging proofs of debt, that power not having been vested in the commissioners at the time of the passing of the "*Mining Statute* 1865," and the Court being unable to extend the jurisdiction conferred by that Statute. *Regina v. Skinner, ex parte Smith*, 2 A.J.R., 107.

Act No. 228, Sec. 33].—By the Act No. 228, Sec. 33, Judges of Courts of Mines were given, in relation to mining companies being wound up under that Act, the powers possessed by the Chief Commissioner of Insolvent Estates, and at the time of the passing of the Act the Chief Commissioner did not possess the power of expunging proofs of debt. By the "*Insolvency Statute* 1869," passed subsequently to the Act No. 228, the power of expunging proofs of debts was given to the Chief Commissioner. *Held* that the late Act could not incidentally exteud the jurisdiction conferred by the former, and that Courts of Mines, therefore, had no jurisdiction to expunge proofs of debts against a mining company being wound up under No. 228. *In re The Barfold Estate G.M. Coy.*, 2 V.R. (L.,) 186.

To Award Costs on Petition for Winding Up—Act No. 228, Secs. 29,30—Act No. 324, Secs. 3, 10—Act No. 291, Sec. 230.]—The Court of Mines has two jurisdictions, one under Act No. 291, Sec. 230, and the other under Acts No. 228 and No. 324, but those jurisdictions are separate and distinct. The Court of Mines has not, under the power to give costs under No. 291, jurisdiction to award costs on a petition for winding up under Act No. 228 or No. 324. *Regina v. Bowman, Ex parte Willan*, 3 V.R. (L.,) 213, 3 A.J.R. 109.

To Award Costs in Winding-up Order—Act No. 228, Sec. 31.]—*See Walker v. Jenkins post* under

III. MINING COMPANIES: Winding Up—Winding-up Orders.

To Award Costs—Interlocutory Application.]—Act No. 291, Sec. 230, gives to a judge of the Court of Mines the power to award costs upon an interlocutory application. *Watson v. Commercial Bank*, 5 V.L.R. (M.,) 36.

Mandamus to Courts of Mines.]—*See* cases *ante column* 882 under MANDAMUS.

Mandamus to Compel the Clerk of a Court of Mines to Issue a Certificate of Registration.]—*See Regina v. Bartrop, ante column* 883.

(*c*) *Jurisdiction of Supreme Court and of Chief Judge of Courts of Mines.*

Of Supreme Court.]—The Legislature, by creating the Court of the Chief Judge of Courts of Mines, and declaring its decision to be final as between the parties, in certain cases, has not deprived the Supreme Court of its jurisdiction in those cases, and the Supreme Court cannot refuse to hear a suitor who comes to ask its decision. *M'Cafferty v. Cummins*, 5 W.W. & A'B. (L.,) 73.

And the jurisdiction of the Supreme Court is not ousted merely because the Chief Judge of Courts of Mines has already decided the point of law involved in the case. *Ibid.*

Remedies for Encroachment.]—The remedies afforded by the "*Mining Statute* 1865," in cases of encroachment, are cumulative, and do not exclude the ordinary jurisdiction of the Supreme Court, that jurisdiction not being ousted by express terms or necessary intendment. *Mulcahy v. The Walhalla G.M. Coy.*, 5 W.W. & A'B. (E.,) 103, 120.

Imprisonment—Arrest Pending Rule Nisi for Prohibition.]—An order under Sec. 203 of the "*Mining Statute* 1865" was made by a warden upon an affidavit entitled, "In the Warden's Court at Ballarat," and the defendant appeared, and made no objection to the affidavit being read. In showing cause against commitment for disobedience of the order, defendant for the first time objected that the affidavit was not evidence upon which the order could be properly made, but the warden overruled the objection, and a warrant was issued. Before arrest, a rule *nisi* for prohibition was served on the bailiff, and the defendant was arrested before discharge of the rule. Defendant applied, under Sec. 221 of the Act, to the Chief Judge for discharge from arrest, but his application was refused on the ground that the Chief Judge had no jurisdiction to deal with the case of an arrest being made after a rule *nisi* for prohibition which was afterwards discharged. *In re Clerk*, 2 V.R. (M.,) 11; 2 A.J.R., 48.

(*d*) *Duties of Officers of Court.*

Assistant Registrars—How they should Sign.]—Assistant mining registrars are given the powers of registrars, and should sign by their own names as assistant registrars, and should not, when they have done any business themselves, sign the name of the registrar. *Thompson v. Begg*, 2 V.R. (M.,) 1; 2 A.J.R., 34.

(2) *Practice and Procedure in Warden's Courts and Courts of Mines.*

(*a*) *In Warden's Courts.*

Summons — Vagueness — Objection to, When Taken—Act No. 291, Sec. 185, Schedule 20.]—B., claiming under a miner's right, sued the defendant company before the warden claiming possession of land "of which defendants were in illegal occupation." The counsel for defendants objected that the summons was too vague, and the warden gave leave to amend, which B. refused, and was then about to dismiss it when he stated a special case. *Held* that such summons showed jurisdiction, but that schedule 20 indicates that the objection to defendant's title should be in some degree pointed out, and that the summons was therefore too vague, and that the warden could hear the objection before the case was opened by B.'s counsel, and should have dismissed it on B.'s refusal to amend. *Barton v. Band of Hope and Albion Consols*, 5 V.L.R. (M.,) 18; 1 A.L.T., 30.

Description of Locus in Quo.]—As the Act No. 291 or the rules under it do not require particularity of description, the description of the *locus in quo* in a summons for encroachment—as plaintiff's claim registered in the books of the Creswick division—is sufficient. *Stephens v. Jolly*, 5 A.J.R., 162.

Summons to Enforce Forfeiture—Vagueness — Amendment — Act No. 291, Secs. 180, 185.]—A summons seeking to be put in possession of part only of an entire claim alleged to be improperly held, should define accurately the part sought; and a summons omitting so to define it should be dismissed for vagueness and want of description, unless the complainant, upon the warden's stating a disposition to dismiss it, had sought to amend, which the warden has power to allow under Sec. 185. *Roscrow v. Webster*, 5 W.W. & A'B. (M.,) 64.

Plaint Summons Exceeding Jurisdiction — Amendment.] — *Regina v. Smith, ex parte Mahony, ante column* 979.

Plaint for Forfeiture—Not Showing under what Bye-law—Complainants Entitled to Show Forfeiture under Bye-laws Applicable—Act No. 291, Sec. 185.]—A plaint seeking a declaration of forfeiture was apparently framed so as to seek forfeiture for non-compliance with a bye-law made subsequently to the taking up of the claim, and therefore inapplicable. The plaint, however, was very indefinite, and stated that the defendants had "failed to work for the space of seven consecutive days," and did not indicate which of several forfeitures for not working it was intended to enforce, or whether it was for non-continuance of *bonâ fide* working. *Held*, by the Chief Judge upon special case, that if no objection had been taken to the form of the plaint before the warden, the complainants were entitled to prove a forfeiture for non-compliance with such bye-laws as might be applicable; and that, if the objection were taken, the plaint might have been amended under Sec. 185. *Hooke v. Burke*, 4 A.J.R., 122.

Summons under "Regulation of Mines and Mining Machinery Act 1853"—Vagueness.]—A summons before a warden to recover damages for injuries sustained by complainant while working in defendant's mine ran as follows:—"For that the complainant on, &c., was employed in and about the mine of the defendant at, &c., and whilst so employed was descending the shaft of the defendant at the said mine, and the complainant fell down the said shaft to a depth of one hundred feet, and had his legs and ribs broken, and suffered, &c., and was permanently injured, and the complainant says that such injuries were occasioned to him by reason or in consequence of the defendant having contravened and neglected to comply with the provisions of "*The Regulation of Mines and Mining Machinery Act* 1853." *Held* that such summons was bad for vagueness, since it did not allege which provision of the Act had been contravened or not complied with. *Campbell v. Parker's Extended Coy.*, 10 V.L.R. (M.,) 1.

The warden directed the plaint to be amended by adding at the foot the following:—"Sec. 8, Sub-sec. 29, by not having substantial platforms at intervals of not more than thirty feet in the ladder in the shaft used for descending the mine of, &c.; and Sec. 16, in not having in connection with the shaft of the mine of, &c., securely fixed platforms at intervals of not more than thirty feet from each other in the ladder of the said shaft." *Held* that the summons as thus amended was neither contradictory nor vague, since it gave the date of the accident, and referred to the sections relied on; and that it showed jurisdiction in the warden. *Ibid.*

Act No. 291, Sec. 185—Amendment of Summons—Parties.]—A summons was taken out before the warden for the forfeiture of four claims stating the registration and amalgamation. There was such neglect in working them that the right to each and to them as amalgamated would be subject to forfeiture under certain bye-laws; but no amalgamation in fact was proved. *Held* that the warden could not on the summons as framed, adjudicate as to the forfeiture of any one claim, but that he might amend the summons under Sec. 185, and then adjudicate as to one of them. *Jolly v. Stephens*, 5 A.J.R., 169.

Summons including Different Causes of Action.]—If a summons includes different causes of action as to original defect of title, and of forfeiture, if the title were originally good, and at the beginning transposed the words "in illegal occupation and forfeited" that is no objection to the summons. *Weddell v. Howse*, 9 V.L.R. (M.,) 13; 4 A.L.T., 179.

Summons signed by Warden's Clerk in his Own Name, and not in Name of Warden.]—*See Regina v. Strutt, ante column* 127.

Amendment of Plaint—Act No. 291, Secs. 180, 185.]—L. sued H. and others before the warden for trespass, and at the trial plaintiff's counsel sought to amend the plaint by changing the count for trespass and encroachment into one

for ouster and exclusion. *Held* that such amendment was inconsistent with the summons, it appearing that L. and H. were mining as partners, and H. brought in the other defendants, and prevented L. from occupying the claim or any part, and that the summons should be dismissed without amendment. *Lindgren v. Halpin*, 3 A.J.R., 107.

Amendment of Summons—Act No. 291, Secs. 180, 185.]—The warden may amend a summons praying to be put into possession of surplus ground by altering it to one seeking a declaration of right, and may add co-defendants. *Oxley v. Little*, 5 W.W. & A'B. (M.,) 14.

Parties—Act No. 32, Sec. 76.]—Where deceased persons or persons incapacitated from suing are made parties in a complaint before the warden under the Act No. 32, Sec. 76, that does not invalidate the proceedings, and it is not the proper course on appeal to the Court of Mines to reverse the warden's decision without prejudice to fresh proceedings before him confined to the proper parties; but for the Court of Mines to amend the proceedings both before the warden and the Court by striking out such persons. *Critchley v. Graham*, 2 W. & W. (L.,) 71.

In complaints before warden under Sec. 76, all shareholders being holders of miners' rights and entitled to sue, or such of them as appear to the warden or Court sufficiently to represent such shareholders ought to be before the warden. *Ibid.*

[Compare Sec. 180 of Act No. 291.]

Parties—Act No. 32, Secs. 76, 77.]—C. and party summoned B. and party before a warden by a plaint showing title to a claim and demanding possession, "for that complainants are entitled as owners of miners' rights to be put into possession of a certain claim, the same having been forfeited by you." It appeared that the land had been long abandoned by the V. company, but that their registration remained uncancelled. B. and party included M., but not the A. company. M., a member of the V. company, waived the warden's appearance on the land. The A. company claimed to appear and to be entitled to the land by two titles, both independent of the V. company. The warden found that land had been forfeited, and ordered possession to C. and party. *Held* that as between B. and C. the A. company had no right to appear as a party and had no *locus standi* in the Appellate Court; the "parties interested" in Secs. 76 and 77 being the actual parties concerned. *Band of Hope Coy. v. Critchley*, 2 W. W. & A'B. (L.,) 47.

[Compare provisions of Sec. 180, Act No. 291.]

Suit for Forfeiture—Parties.]—*Moore v. White, Beavan v. Rigby, ante* column 941.

Necessary Parties—Act No. 291, Sec. 180.]—Where a summons is taken out to enforce a forfeiture the company for whom the defendants hold as trustees are not necessary parties under Sec. 180. *Jolly v. Stephens*, 5 A.J.R. 169.

Person Made a Party without his Consent and without Notice.]—A person not having been summoned, and being accidentally present at the hearing of a suit, cannot, against his will, be made a party thereto; and a decision pronounced against him in such a case will not be binding on him. Where, on the hearing of a plaint before a warden against a company, the legal manager, who was present in court, was, notwithstanding his protest, made a party to the suit on the request of the complainant, and the warden pronounced a decision against him, *Held* that the warden had no jurisdiction so to act, and order quashed. *Semble* that if the warden had adjourned the case, after adding the manager as a party, thereby allowing him an opportunity of preparing a defence, it would have been equivalent to serving a summons upon him, and the warden's decision at such adjourned sitting would have been binding. *Regina v. Sherrard, ex parte Fraser*, 5 W.W. & A'B. (L.,) 80.

Deciding whether One Defendant sufficiently Represents the Rest—Act No. 291, Sec. 180.]—At the hearing of a complaint before a warden for the forfeiture of a mining claim, one of the defendants appeared and stated that he appeared for himself and the other defendants, and he actually had authority so to appear from some of the defendants, who subsequently raised objections to his so appearing, and complained that they had not been served. *Held* that, under Sec. 180 of the "*Mining Statute* 1865" (No. 291,) it was for the warden to decide whether the defendant who appeared sufficiently represented all the parties interested. *Regina v. Clow, ex parte Oliver*, 5 W.W. & A'B. (L.,) 89.

Application to be Put into Possession of Surplus Ground—Parties—Amendment.]—Persons cannot join in an application to be put into possession of surplus ground, though their individual rights may be exactly parallel; and the warden is not justified in amending a summons by four into a summons by one by striking out the other three. *Oxley v. Little*, 5 W.W. & A'B. (M.,) 14.

Service of Summons—"Mining Statute" (No. 291,) Sec. 180.]—Every defendant, in a proceeding before a warden to obtain possession of a mining claim, must be served with the summons either personally or by substitution, and there is no power in the warden, under Sec. 180 of the "*Mining Statute*" (No. 291,) to decide that a defendant not served is sufficiently represented, and an order made by the warden in such a case cannot stand. *Regina v. Heron, ex parte Bryer*, 2 V.R. (L.,) 155; 2 A.J.R., 110.

Service of Summons—Insufficient in Point of Time.]—Where a summons had been served upon defendants to appear before a warden, and they all appeared and objected that the service was insufficient in point of time, not having been made four days before the day of appearance, *Held* that the objection was properly overruled. *Regina v. Strutt*, 4 A.J.R., 147.

Order made against Defendants where One Unserved—Whole Order Bad.]—A warden has no jurisdiction to make an order for damages for trespass against a defendant who has not been served, and where no substituted service has been effected. And if such an order be made against such a defendant, and other defendants who have been served, the whole order is bad, as against the unserved defendant, and so must be quashed as against all the defendants. *Regina v. Belcher, ex parte Gilbee*, 4 A.J.R., 80, 110.

Substituted Service of Summons.]—Although Sec. 180 of the Act No. 291 gives the warden a wide discretion, yet he has no power to make an order to substitute service before the return of the summons. *Taylor v. Stubbs*, 6 W.W. & A'B. (M.,) 19.

S.P.—*See Regina v. Akehurst*, 6 W.W. & B. (L.,) 244.

Substituted Service.]—A warden has no jurisdiction to direct substituted service of a summons at the time it is issued, but only at the hearing. *Regina v. Akehurst*, 6 W.W. & A'B. (L.,) 84.

There is no provision made by the "*Mining Statute*" (No. 291,) for a warden to dismiss a suit where the parties do not proceed with the summons. *Regina v. Carr*, 6 W.W. & A'B. (L.,) 240; N.C. 59.

Order for Injunction—No. 291, Sec. 203.]—A warden is warranted in making an order under Sec. 203 of the "*Mining Statute* 1865," to restrain encroachment, trespass, &c., upon affidavits. *In re Clerk*, 2 V.R. (M.,) 11; 2 A.J.R., 48.

Injunction Orders by Warden—Act No. 291, Secs. 203, 204.]—A warden made, as under Sec. 203, an order enjoining the registrar from registering certain people for a claim, such order being without limit as to time. *Held* that the injunction orders under Secs. 203, 204, are temporary or interlocutory, and should be limited as to time; but if the warden was making a final order or decree, coupled with an injunction to the registrar, such injunction should be perpetual. *Semble* the warden might amend if he thought the appellants interested under the circumstances. *Keast v. D'Angri*, 4 A.J.R., 61.

Injunction—Act No. 291, Sec. 203.]—Where notice of an application for an injunction under Sec. 203, of Act No. 291, is given by more than one person, the warden should dismiss it on the non-appearance of any of the persons so giving notice. *Grant v. Lawlor*, 3 V.L.R. (M.,) 15; and *see* S.C., *ante column* 943.

Order for Inspection—Breach "Mining Statute 1865" (No. 291,) Secs. 202, 207—Schedule 26.]—Where a warden made an order for inspection worded, "upon the application of W., of Ballarat, claiming, &c.," and S. the mining manager of the company, whose mine was to be inspected, obstructed and prevented W. from descending the mine, S. was convicted and fined under Sec. 207 of No. 291. S. appealed, urging that the order did not show facts bringing it within warden's jurisdiction, and that it was not made in the form given in Schedule 26. *Held* that the order was bad, and that the declaration of secrecy under Sec. 202 must be made before disobedience becomes an offence under Sec. 207. Conviction reversed. *Spiers v. Whiteside*, 4 W.W. & A'B. (L.,) 91.

Record of Warden's Decision—Act No. 32, Sec. 80.]—A warden gave decisions on various claims, and in each case signed a minute of the decision. On a separate sheet he made a further order imposing certain conditions on the parties in whose favour he had decided. *Held* that the warden should have signed the separate sheet as part of his decision, but the appellants were allowed to correct the defect in the minutes of the decision. *Early v. Barker*, 1 W.W. & A'B. (L.,) 32.

For facts, *see* S.C., *post column* 998, and compare Sec. 193 of Act No. 291.

Record of Warden's Decision—Act No. 32, Sec. 80.]—On a complaint before a warden, the warden's decision was minuted under Sec. 80 of the "*Goldfields Act*" (No. 32,) as follows:—"Case dismissed, having been adjudicated on before. See 23rd October, 1865." On appeal to the Court of Mines the jurisdiction of that court was objected to on the ground that the case was dismissed as having been previously heard. *Held*, on questions reserved, that the words "case dismissed" must be taken to mean that the case was "entertained and dismissed," and not dismissed as not entertained, and that the Court of Mines had jurisdiction to hear the appeal; and that this minute was not conclusive evidence, because it extended to the reason why the decision was pronounced, and was not an entry of the "decision" which alone is made conclusive under Sec. 80 of the Act No. 32. *Sim v. Eddy*, 3 W.W. & A'B. (L.,) 21.

[Compare provisions of Sec. 193 of Act No. 291.]

Warden Sitting with Assessors — "Mining Statute 1865" (No. 291,) Secs. 212, 220.]—In both the cases of a hearing and rehearing before the warden, with or without assessors, it is, under Sec. 212 of No. 291, the decision of the warden only which forms the groundwork of an appeal, and Sec. 220 does not militate against this. If therefore a person is aggrieved with and appeals from the finding of the assessors only, that is an appeal on a question of fact, and the appropriate remedy is to apply to the warden for a new trial. *Regina v. Brewer and Walhalla Coy.*, 4 W.W. & A'B. (L.,) 124.

Adjudication by Warden and Assessors.]—In a case as to forfeiture of certain claims there was an adjudication by the warden (October, 1865) dismissing the summons, and in another case (April, 1866) as to the same land in which the parties were reversed, there was a finding by a majority of assessors, and order for dismissal. *Held, per Molesworth, J.*, and affirmed, that the first adjudication was inconclusive, as it was not clear what land was really in debate, and that though the second adjudication was informal inasmuch as

there should have been a judgment of the warden as to the facts based upon the finding of the assessors, yet it was such cogent evidence of the facts upon which it adjudicated as to be conclusive. *Held, per Privy Council,* that there was enough in the history of the case to make it clear as to the land in the first adjudication, and that the form of the decision made it conclusive under Sec. 193 of the Act No. 291; that as to the second adjudication it was informal altogether as not complying with Sec. 193 of the Act, and should have been a finding of the assessors followed by an adjudication of the warden on the law and facts, and that in its form it was in effect only a verdict not followed by a judgment, and therefore a nullity. *Mulcahy v. Walhalla Coy.*, 5 W.W. & A'B. (E.,) 103, 123; 2 A.J.R., 93, 94.

Affidavit.]—If an affidavit be entitled in a "Warden's Court" it is wrongly entitled, for the "*Mining Statute* 1865" does not apply the word "Court" to the place or manner of a warden's judicial acts; but the title may be treated as surplusage. *In re Clerk,* 2 V.R. (M.,) 11; 2 A.J.R., 48.

When Copy of Entry in Register is Evidence—No. 291, Secs. 47, 49.]—The "*Mining Statute* 1865," Sec. 49, makes the copy of an entry in the registry, made by a registrar in books directed to be kept by the regulations under Sec. 47, *primâ facie* evidence of the truth of matters in the books stated; but such a copy will not be evidence under Sec. 49 unless it be shown that the book in which it was made was directed to be kept by the regulations under Sec. 47. *Cruise v. Crowley,* 5 W.W. & A'B. (M.,) 27.

Taxation of Costs—No. 291, Secs. 228, 230.]—A warden taxed costs as a lump sum, and not item by item in reference to any scale. *Held* that such taxation was good, it not being shown that the amount was greater than if costs had been taxed item by item. *In re Strutt, ex parte Lawlor,* 3 V.L.R. (L.,) 1.

(*b*) *In District Courts of Mines.*

Parties.]—R. sued M. to establish a partnership in a claim. The plaint alleged that M. had contracted to sell more than his moiety to several persons, who were, with the exception of two named, unknown to R., and charged that the contracts for sale were void as to the excess beyond M.'s share, and should be restrained. A decree was made affirming the partnership, and declaring M. trustee of the claim for the partnership. An objection was taken that the two purchasers named in the plaint should have been parties, but was overruled. On appeal, *Held* that they were not necessary parties, since, if the contracts were valid and binding, R. could not break them, but would have to proceed against M.; and, if they were not binding, R. would have an option to proceed against M. alone; and appeal dismissed, with costs. *Miller v. Rigby,* 2 V.R. (M.,) 32; 2 A.J.R., 134.

Parties.]—Sec. 101, Sub-sec. i. of the "*Mining Statute* 1865," which gives jurisdiction to Courts of Mines in cases of lands in which some person other than the plaintiffs shall be or shall claim under miners' rights, &c., to be entitled to be in the occupation or possession, does not mean that no person can be made a defendant who claims no right, &c. And in order to maintain a suit for forfeiture of a claim, the plaintiff need not show that the defendant either is, or claims to be, in possession of the claim. *Thompson v. Begg,* 2 V.R. (M.,) 1; 2 A.J.R., 34.

Misjoinder of Parties—Act 291, Sec. 130.]—A plaint is objectionable, which comprises land held under different titles, and which joins as co-plaintiff parties not interested in all. *Australasian Coy. v. Wilson,* 4 A.J.R., 18.

Suit to Restrain Encroachment — Parties—Lessees and Tributors—Amendment—Act No. 291, Sec. 130.]—O. and seven others instituted a suit in the District Court of Mines to restrain encroachment, and for value of gold. The co-plaintiffs consisted of four Crown lessees and four tributors. The defendants moved for a nonsuit, on the ground that either the four lessees were entitled to sue to the exclusion of the tributors, or *vice versâ*. The district judge then went into evidence as to the time at which the encroachment took place, and finding it happened after the letting on tribute, amended the plaint under Sec. 130 of Act No. 291, by striking out the lessees as plaintiffs, and made a decree for the tributors. *Held* on appeal, that the relation of the two sets of co-plaintiffs was that of landlord and tenant, and that therefore the eight might join as to the remedy by injunction, but not as to the account of value, because the gold would never be their common property; that it was a case for amendment under Sec. 130, and that the District Court Judge acted rightly in postponing his discretion till all the facts were discovered. The Court feeling a doubt as to whether the tributors were now in possession, gave the appellant an opportunity of giving evidence on the subject, but that not being exercised, the decree was affirmed. *Osborne v. Elliott,* 6 W.W. & A'B. (M.,) 49; N.C., 20.

Suit to Enforce Title to Claim—Parties.]—*Morrison v. Hartley, ante column* 941.

Affidavit of Service—Interlineations not Verified—Not Sealed with Court Seal—No. 291, Sec. 111.]—An affidavit of service of a plaint summons was not sealed with the seal of the Court, and there were in it erasures and interlineations uninitialled. Upon the case being called on in the Court of Mines, the defendant's solicitor took the objection as to the irregularity of the affidavit of service, but the judge refused to recognise him unless he appeared, stating that if he appeared such appearance would waive the irregularity. The solicitor thereupon appeared under protest, and a decree was made against the defendants. Upon appeal, *Held* that the objection was good, and decree reversed, with costs. *Mitten v. Spargo,* 1 V.R. (M.,) 22; 1 A.J.R., 69.

Judge's Summons—Seal of Court—Act No. 291, Sec. 100.]—Sec. 100 of Act No. 291 applies only to process—*i.e.*, something by which the suit is advanced—and where a judge's summons under

Sec. 35 of Act No. 409, as to the rectification of the register of a mining company, was, by mistake, sealed with the seal of the Court of Insolvency. *Held* that the judge had jurisdiction to hear the case. *Murphy v. Cotter and United Hand and Band Coy.*, 7 V.L.R. (M.,) 16; 3 A.L.T., 17.

Trial by Assessors—Finding Contrary to Direction—Act No. 32, Sec. 32.]—Where assessors found for a plaintiff in the face of a direction of the judge that there was no evidence to go to them, and that a verdict for the defendant should be entered, *Held* that the judge could not disregard the assessors' finding. *Brinkman v. Holstein*, 1 W. & W. (L.,) 368.

[Compare provisions of Sec. 136 of Act No. 291.]

Power of Judge to Settle Issues on Appeal from Warden—No. 291, Secs. 218, 137.]—The Judge of a Court of Mines has the like power of settlement of the question of fact to be tried by assessors on appeal under the provisions of Sec. 218 of the "*Mining Statute* 1865," which he would have in his original jurisdiction under Sec. 137. *Brennan v. Watson*, 3 W.W. & A'B. (M.,) 55.

Trial by Assessors—Issues.]—*Semble*, that where issues have been settled for trial by assessors, the parties should not be allowed in argument, to go outside those issues. *Wearne v. Froggatt*, 2 V.L.R. (M.,) 1, 6.

When Injunction may be Granted—No. 32, Sec. 70—Pending Appeal.]—*Semble, per Stawell, C.J.*, that under Sec. 70 of the Act No. 32 "*Goldfields Act*," a suit existing in the Warden's Court, and transferred to the Appellate Court, would support the issue of an injunction by the Appellate Court (Court of Mines), without the institution of any suit in that court for an injunction. *Dennis v. Vivian*, 1 W.W. & A'B. (L.,) 201.

[Compare Secs. 170, 171 of Act No. 291; and *see* also Sec. 219.]

Injunction Granted on Insufficient Grounds—Act No. 32, Sec. 27.]—A Deputy-Judge of a Court of Mines granted an injunction outside of his territorial limits. The plaintiffs moved before the Judge of the Court of Mines to vary the injunction, and the defendants to dissolve it. The judge refused the application to dissolve, considering that his deputy had jurisdiction, and did not grant the motion to vary; but of his own motion made a fresh injunction substantially similar to that granted by the deputy. On appeal from both decisions, *Held* that the injunction of the deputy should have been dissolved; and that the injunction granted by the judge was not warranted by the proceedings or materials before it, it not being regular to regrant the injunction made by the deputy, or to make an order of the kind made when not asked for by the party in whose favour it was made, and both appeals were allowed. *James v. Higgans*, 1 W.W. & A'B. (L.,) 51.

[Compare Sec. 101 of Act No. 291.]

Order for the Payment of Money—Enforcement of Order.]—An order of a Judge of a Court of Mines as follows:—"£35 and interest at 10 per cent. on 24th June, 1862; and £35 and interest at 10 per cent. on 24th December, 1862. Defendant to transfer his share on these conditions, and payment of the above; plaintiff to retransfer; and in default of the first or second payment, plaintiff to be entitled to sell his share by public auction or private contract, and pay the balance (if any) to the defendant," is an "order for the payment of money" within the meaning of the "*Goldfields Act*" (No. 32,) Sec. 41, and an execution can issue under such an order. *Lee v. Conway*, 2 V.R. (L.,) 77; 2 A.J.R., 58.

[Compare Sec. 146 of Act No. 291.]

Disobedience to Decree—Act No. 291, Sec. 155—Drawing up of Decree.]—A decree was made by a Deputy-Judge of a Court of Mines, and, on appeal to the Chief Judge, was varied. After the Deputy-Judge ceased to be Deputy-Judge, and after the decree had been varied by the Chief Judge, a decree was drawn up, dated with the date of the original hearing, but signed by the Judge of the Court, who had returned, thereby displacing his deputy. The defendant disobeyed the order, and was summoned under Sec. 155 of the "*Mining Statute* 1865" to show cause against commitment for disobedience, and raised the objection that the decree was improperly drawn up, and the judge allowed the objection, and dismissed the summons. On appeal from the order of dismissal, *Held* that the decision was right, since the decree must be signed by the judge who was judge at its date; and appeal dismissed without costs. *Vallancourt v. O'Rorke*, 2 V.R. (M.,) 14; 2 A.J.R., 84.

Evidence—Warden's Evidence.] — The verbal evidence of a warden as to an admission in an inquiry before him relating to an application for a lease is admissible in evidence, although it is the warden's duty to report the evidence given before him to the office of the Minister. *Weddell v. Howse*, 9 V.L.R. (M.,) 13; 4 A.L.T., 179.

Costs of a Co-defendant who asserts that he Claims no Interest.]—In a plaint against H., B. was a co-defendant. Before the plaint, B. attempted to transfer to H., but B. appeared as a litigant, and before the warden stated that he claimed an interest and did not disclaim. B. was made a co-defendant in the appeal to the District Judge but was not examined. *Held* that the plaint could not be dismissed as against B., and that B. had to pay half complainant's costs of the special case to the Chief Judge. *Ibid.*

Taxation of Costs — Not Taxed by Judge at Hearing under Sec. 230 of Act No. 291, but by Clerk — Appeal not Certiorari the Remedy.]—*Regina v. Quinlan, ex parte Sampson, ante column* 125.

(3) *Appeal and Reviewing Decisions.*

(i.) *Warden.*

(a) *Appeal to Court of Mines — Where it Lies and General Principles.*

"Goldfields Act" (No. 32,) Secs. 84, 88—Where Appeal Lies from Warden.]—Where a warden refuses to give possession on a complaint demanding such possession, there is no appeal

under Secs. 84 and 88 of the Act against such refusal. Rule for prohibiting judge of Court of Mines from proceeding in a decision in such an appeal from warden made absolute. *Power v. M'Dermott*, 2 W. & W. (L.,) 241.

Varying Decision—Reversing—Dismissing Appeal—"Goldfields Act," Secs. 84, 88.]—The 84th and 88th sections of the "*Goldfields Act*" (No. 32,) which give power to the Court of Mines to vary the decision of a warden, do not give power to reverse such decision, and the powers to enforce a varied decision of a warden are not to be impliedly inferred in cases of reversal, and the Court of Mines has not jurisdiction to enforce such a reversed decision. The Court of Mines is not justified in dismissing an appeal on the ground of imperfect jurisdiction arising from the fact that if the appellant succeeded the warden's decision would have to be reversed, and no mode is provided by the Act by which the decision of the Court of Mines could be enforced. An application was made to the warden to put applicant in possession of certain ground which he alleged to have been abandoned, and the warden refused the application. The difficulty as to enforcing the decision of the Court of Mines (in case of a reversal) was that the Court of Mines could not order possession to an applicant who had never been in possession. *Bray v. Mullen*, 1 W.W. & A'B. (L.,) 191.

Where it Lies.]—Where, in a complaint before him, a warden declines to make an order, there is no appeal to the Court of Mines under Act No. 32. The summons before the warden was for interfering with a water-right, and the warden dismissed the summons. *Wardle v. Evans*, 1 W.W. & A'B. (L.,) 188.

"Goldfields Act" (No. 32.) Secs. 84, 88.]—On a complaint before the warden for encroachment, the warden found there had been no encroachment. Special case stated by Judge of Court of Mines as to whether he had jurisdiction to hear the appeal. *Held* that Sec. 84 grants an appeal from the warden to the Court of Mines, and empowers that Court to reverse or vary such decision, or to dismiss the appeal, and, if necessary, to order restitution; that Sec. 88 contains no express provision for the enforcement of a reversal of a decision appealed from; that if the Court of Mines should be of opinion that the complaint dismissed by the warden ought to have been allowed, and that the respondent had encroached, it would be competent for the Judge of the Court to order that possession of the part so encroached on should be restored, and that such an order might be enforced; *Bray v. Mullen* distinguished on the ground that in that case there was no previous possession by the appellants to the Court of Mines; *Power v. M'Dermott and Wardle and Evans* distinguished on other grounds. *Tatham v. M'Gill*, 2 W.W. & A'B. (L.,) 113.

[But now *see* Sec. 212 of Act No. 291, where provision is made for an appeal from a dismissal.]

Appeal from Warden and Assessors—Act No. 291, Sec. 212.]—Where a warden sits with assessors there is no appeal against the finding of the assessors on the facts. Under Sec. 212 the basis of an appeal is the warden's adjudication; and the remedy in case of a misfinding by assessors is a new trial. *Regina v. Brewer and Walhalla Coy.*, 4 W.W. & A'B. (L.,) 124.

Per Privy Council—It may be true that no appeal will lie from a mere decision of the assessors, because that decision requires to be followed by an express finding and order of the warden by Sec. 193 of the Act No. 291 and in the form of Schedule 25. But if the decision is minuted as required the assessors' decision and the order become the decision and order of the warden, against which an appeal lies under Sec. 212. *Mulcahy v. Walhalla Coy.*, 2 A.J.R., 93, 95.

Under Sec. 212 an appeal lies from a decision of the warden and assessors. *Moore v. White*, 4 A.J.R., 17.

Sum under £100—Joint Mining Adventure.]—An appeal lies to a Court of Mines from the decision of a warden under Sec. 177 of the "*Mining Statute* 1865," in respect of a sum under £100, claimed as accruing to the complainant from a joint mining adventure between complainants and defendants. *Pride of the East G.M. Coy. v. Wimmer*, 4 V.L.R. (M.,) 3.

General Principles — Act No. 291, Secs. 212, 216.]—Appeals from wardens under the "*Mining Statute* 1865" should be practically re-hearings. There being no distinct provision in Sec. 212 for appeals from the wardens being in the form of special cases collecting and stating the facts, appellants are entitled to a re-hearing to the extent of being allowed to prove another and different case to that proved before the warden; but they are confined to the grounds stated in the notice of appeal, subject to the relaxation of Sec. 216. *Constable v. Smith*, 6 W.W. & A'B. (M.,) 58; N.C., 70.

Where it Lies—Question of Jurisdiction of Warden.]—The Judge of a District Court has power to hear an appeal on the question of the warden's jurisdiction and to reverse the warden's order if made without jurisdiction. *Pride of the East G.M. Coy. v. Wimmer*, 5 V.L.R. (M.,) 9.

For facts *see* S.C. *ante* column 975.

Who Entitled to Appeal—Act No. 32, Secs. 76, 84.]—A person who has no right to appear before the warden as one of the "parties interested" within the meaning of Sec. 76, has no *locus standi* in the Appellate Court under Sec. 84. *Band of Hope Coy. v. Critchley*, 2 W.W. & A'B. (L.,) 47.

See S.C. *ante* column 985.

[Compare Secs. 180, 212 of Act No. 291.]

Per Molesworth, J.—"I rather think that persons who do not appear before the warden may appeal." *Constable v. Smith*, 6 W.W. & A'B. (M.,) 58; N.C., 70.

Plaint for Trespass—Assignment of Claim pending Appeal.]—Between the hearing of a complaint before a warden for trespass to a claim and damages, and the hearing of an appeal to a Court of Mines against the decision of the warden dismissing the plaint, the complainants assigned their rights in the claim and the assignees had been registered. *Held* that the complainants had not by such assignment lost their right to proceed with the appeal. *Herbert v. Millan*, 6 V.L.R. (M.,) 13; 1 A.L.T. 202; *sub nom. Herbert v. M'Millan.*

Per Molesworth, Chief Judge.—So far as the plaint sought damages and the appeal sought those damages and relief from the costs adjudged, there was no colour for the objection. There may be some as to the seeking a declaration of right and the removal of the defendants on the ground of maintenance or champerty. If the complainants assigned their interest in the claim and their right of action against defendants, I am inclined to say there would be nothing illegal in it. But if there were, it would not destroy the interest of the assignor, but prevent the acquisition of interest by the assignee. *Ibid.*

(*b*) *Conditions Precedent to be Observed on Appealing.*

Notice of Appeal for Trial by Assessors—What is Sufficient—No. 291, Sec. 217.]—A notice of appeal from the decision of a warden was headed "For Trial by Assessors," and set out the grounds of appeal; but did not set out any question of fact or issue which the appellants required to be tried by assessors. *Held*, insufficient notice of trial by assessors, under the provisions of the "*Mining Statute* 1865" (No. 291,) Sec. 217. *Brennan v. Watson*, 3 W.W. & A'B. (M.,) 55.

Notice of Appeal — Signature.] — The word "undersigned" does not require that the appellants should actually sign the notice; it is sufficient if their names appear at the foot of the notice. *Frayne v. Carr*, 5 W.W. & A'B. (M.,) 12.

The notice need not be signed by the appellants or as on their behalf. *Kilyour v. Flinn*, 5 W.W. & A'B. (M.,) 32, 37.

A notice of appeal commencing "I the undersigned," and signed "M. attorney for D.;" was held sufficient. *Dillon v. Matthews*, 3 V.L.R. (M.,) 5.

And *see Cock v. Sayers, post column* 1006.

A notice of appeal contained the names of the appellants in the body of the notice, and concluded, "yours, &c., F.C., attorney for and on behalf of the appellants above-named." *Held* that the names of the appellants should appear at the bottom of the notice, and that the signature of the attorney "for and on behalf, &c." was not sufficient. *Ryan v. Callaghan*, 6 W.W. & A'B. (M.,) 54; N.C., 23.

Form of Notice of Appeal.]—A notice of appeal from a Warden's Court to a Court of Mines should describe the decision appealed from both by date and place, and the heading of the order containing the name of the place is not sufficient. *Frayne v. Carr*, 5 W.W. & A'B. (M.,) 12.

The date of the decision appealed from should be correctly stated; as to stating the time when the appeal should be heard, if sittings of the District Court are not fixed and publicly announced, a party should not by omitting the date of the hearing of the appeal be deprived of his right to appeal, but the date of the decision appealed from should be correctly stated in the notice of appeal. *Kilgour v. Flinn*, 5 W.W. & A'B. (M.,) 32, 37.

Notice of Appeal—Form of.]—A notice of appeal was as follows:—"Take notice that D.R., T.W., M.R., and J.C., being desirous of appealing from a decision of, &c., intend to appeal to the Court of Mines to be holden at J. on the 9th of July next—*i.e.* to say, to the next Court of Mines in the mining district of B. at the sitting of such court, which next after the expiration of fifteen days from the making of the said decision shall be held at B.—against such decision." *Held* that the Court of Mines actually having been held on 10th July, the notice of appeal did not properly name the sittings of the court in which the appeal was to be heard. *Ryan v. Callaghan*, 6 W.W. & A'B. (M.,) 54; N.C., 23.

"Mining Statute 1865," Sec. 212—Fifteen Days—Nearest Sitting of Court of Mines to Place where Decision was Pronounced.]—Sec. 212 of the "*Mining Statute* 1865" (No. 291,) provides that any person desirous of appealing from a warden's decision may do so to the Court of Mines of the same district, at the sitting of such Court which shall, within fifteen days next, be held nearest to the place where the decision was pronounced. Where a complaint was heard in the Warden's Court at F., in the C. district on 5th February, and the next sitting of the Court of Mines at F. was on the 15th February, within the fifteen days, and the next sitting to that in the C. district was at C., on the 6th of April, and notice of appeal to the Court of Mines, to be holden at C., on that date, was given, and on the 15th February, application was made to the Court of Mines at F. to have the case set down for hearing at C. on the 6th of April, and refused, *Held*, on appeal, that the next sitting at F. being within fifteen days of the warden's decision, the appeal ought to have been to the next sitting but one at F., and the refusal to hear the appeal at C. was right. *Vicary v. Row*, 3 W.W. & A'B. (M.,) 1.

Heading of Notice of Appeal—Power of Amendment—Act No. 291, Sec. 133.]—A notice of appeal from a warden was headed "In the Court of Mines for the district of Heathcote"—there was no district of Heathcote. *Held* that the notice of appeal was bad, and under Sec. 133 of the Act the judge had no power to amend. *Burch v. Brown*, 7 V.L.R., (M.,) 10; 2 A.L.T., 149.

Substituted Service of Notice of Appeal—"Goldfields' Act" (No. 32,) Sec. 84.]—In an appeal summons, under Sec. 84 of Act No. 32, twenty-five persons were named, but only six were served, and no order had been made by the Judge of the Court of Mines under Sec. 84 as to substituted service upon those whom he considered sufficient to represent all before the appeal was heard, the judge being doubtful of

his jurisdiction to make the order at the hearing. *Held* that the Judge had power to make such order at the hearing. *In re Rogers, ex parte Shean*, 2 W.W. & A'B. (L.,) 84.

[Compare Sec. 212 of Act No. 291.]

Service of Notice of Appeal.] — Where on an appeal from the warden the appellants served notice on one of five parties (plaintiffs,) and served a copy upon the warden's clerk, which came to the warden's hands after the three days prescribed in Sec. 212, *Held* that it was in the discretion of the Judge of the District Court to determine whether the party served sufficiently represented the co-plaintiffs; that in case of difficulty in serving the other plaintiffs if necessary, the warden should have been served within the three days; and *Semble* that the service of the clerk at the warden's office would have been sufficient; and that serving the appellants through an attorney with notice to produce a document at the hearing of the appeal, did not cure a defect in the service. *Whiteman v. M'Gallan*, 6 W.W. & A'B. (M.,) 28.

Service of Notice of Appeal—Act No. 291, Secs. 171, 212.]—The power of an attorney in a warden's court ceases upon the decision, so that he does not represent his client to receive notice of appeal. Sec. 212 does not authorise service upon the authorised agent of a respondent, but the Court, not having heard counsel on both sides, was unwilling to express an opinion as to the necessity of personal service. Respondents have a right to be heard to object to defective service and to cross-examine or give evidence upon controverted facts as to service. Objections to the hearing of an appeal as to service of notice stand on the same footing as preliminary objections to hearing of a suit as to service of summons, and may be the subject of a special case to the Chief Judge under Sec. 171 of the Act. *Murphy v. Neil*, 6 W.W. & A'B. (M.,) 45; N.C., 19.

Service of Notice of Appeal—Act No. 291, Sec. 212—Act No. 446, Sec. 19.]—Service of notice of an appeal upon an attorney by leaving the same with an inmate of his private house is not good service under the Acts. *Lawlor v. Grant*, 3 V.L.R. (M.,) 12.

Affidavit of Service.] — Where an affidavit, stating that the respondent could not be found and that notice of appeal had been served on the warden, was intituled "A. plaintiff *v.* B. defendant." and not "A. appellant *v.* B. respondent," *Held* that the service was bad. *Mole v. Williams*, 3 A.J.R., 21, 22.

Notice of Appeal and Deposit—Enlargement of Time by Consent—"Mining Statute 1865," Sec. 212.]—The time for notice of appeal and deposit under the "*Mining Statute* 1865," Sec. 212, and the Act No. 446, Sec. 18, may be enlarged by verbal consent of the parties. *Conway v. Louchard*, 10 V.L.R. (M.,) 6; 6 A.L.T., 120.

Notice of Appeal — May be Waived.] — The enforcement of the notice of appeal is a mere right of the parties and may be waived. *Crocker v. Wigg*, 5 W.W. & A'B. (M.,) 20, 22.

Computation of Time—No. 291, Sec. 212.]—The last day for giving notice of appeal from a Warden's Court under No. 291, Sec. 212, fell on a Sunday, and the notice was given on the Monday following. *Held* that, in the absence of express provision, Sundays and holidays could not be excluded from the computation of the time; and notice held bad. *Regina v. Macoboy*, 1 V.R. (L.,) 26; 1 A.J.R., 37.

Production of Minutes of Decison—"Goldfields Act," Sec. 80.]—On an application to assess several claims under the "*Drainage of Quartz Reefs Act*" (No. 153,) the warden made his decision in each case, and signed a minute of each decision. On a separate sheet he made a further order, imposing conditions on the owners of the machinery for pumping. The owners of one of the claims appealed to the Court of Mines, but gave no notice of their appeal to the other claimholders. On the appeal, the copy of minute produced by the appellants was that which was furnished to them under the Act No. 32 ("*Goldfields Act*,") viz., a copy of the "decision" entered in each case without the separate "conditions" imposed on the owners of the machinery. On questions stated under No. 32, Sec. 80, *Held* that the objection as to the non-production of a copy of the minute of the warden's decision would be best met by allowing the appellants in such a case as the present to correct the mistake, arising as it did from the warden's inadvertence; permitting the production of a proper copy of the minute of the decision; and, if necessary, adjourning the Court for that purpose on such terms as the judge might think equitable. *Early v. Barker*, 1 W.W. & A'B. (L.,) 32.

And *see Sim v. Eddy*, *ante column* 988.

Production of Warden's Decision—Act No. 291, Sec. 213.]—The production of the warden's decision under Sec. 213 is a condition precedent, and is not like the notice of appeal, the enforcement of which, as a mere right between the parties, may be waived. The judge should not decide in an appellant's favour without the production of the certified copy, but he may exercise a reasonable discretion as to the period of the hearing at which he requires its production. *Crocker v. Wigg*, 5 W.W. & A'B. (M.,) 20, 22.

[N.B.—So much of Sec. 213 which provides for the production of the certified copy of the warden's decision has been repealed by Sec. 21 of Act No. 446.]

Production of Certificate of Decision—Act No. 291, Sec. 213.]—Where the appellants produced a copy of warden's decision and of his order, having his signature at the bottom, and then a certificate "That the above is a true copy of the minute of my decision in the above-named case," which was signed by the warden, *Held* that it was not a certificate of the "minute of the decision and of the order thereon" within the meaning of Sec. 213, and that the warden's register should not have been received at the hearing for the purpose of complying with the section. *Whiteman v. M'Gallan*, 6 W.W. & A'B. (M.,) 28.

(c) *Practice on Appeal.*

Reversing or Varying Decision of Warden—"Goldfields' Act," Sec. 84.]—The jurisdiction of the Court of Mines under the "*Goldfields' Act*," Sec. 14, to "reverse or vary" the decision of a warden, cannot be limited by the form in which an appellant seeks, and the clerk issues an appeal summons. *Ex parte Clarke*, 1 W.&W. (L.,) 209.

An appellant issued a summons to show cause why the decision against him should not be "reversed" only, and not "reversed or varied;" the respondent in the Court of Mines attended, and first asked leave to have the summons altered by inserting the words "or varied," and the appellant protested against the alteration as beyond the judge's jurisdiction, but did not withdraw, but entered into the merits of the case, and the Judge of the Court of Mines gave judgment increasing the amount awarded by the warden against the appellant. *Held* that the jurisdiction was given to the Judge by the Act and not by the words of the summons; that the appellant's proper course was to have paid the costs of the appeal and withdrawn, and that the judge had jurisdiction throughout, and that there were no grounds for a prohibition. *Ibid.*

[Compare Sec. 213 of Act No. 291.]

Reversing and Affirming Warden's Decision.]—If in a complaint under Act No. 32, sec. 76, the warden finds a joint trespass against all of certain persons against whom complaint is brought, and awards damages as against all, and the Court of Mines finds that some only participated in the trespass, the Court should not reverse wholly, but should reverse in part or affirm in part. *Critchley v. Graham*, 2 W.&W. (L.,) 71.

Dealing with Warden's Decision.]—B. complained against K., before a warden, that K. had marked out 100 yards of land, being only entitled to eighty, and B. applied for surplus. The warden ordered that K. had forfeited the twenty yards of land and ordered possession of same to be given to B. K. appealed to the Court of Mines. The judge held that he could not strike out adjudication of forfeiture, and directed assessors to find for K., and reserved a question for the judges of the Supreme Court as to whether his direction was right. *Held*, that the matter for the Court of Mines to determine was whether the subject matter of the complaint and that of warden's adjudication were the same; not whether the grounds on which the warden had arrived at his decision were formally or technically right; that he ought to have heard the evidence, and determined whether the adjudication should have been varied or otherwise dealt with. *Kirk v. Barr*, 2 W.W. & A'B. (L.) 44.

Copy of Complaint—No. 446, Sec. 20.]—Under the Act No. 446, Sec. 20, the copy of the complaint delivered to the Court of Mines on an appeal from a warden need not be certified, but a copy must be delivered, and it is not sufficient to present to the clerk of the Court of Mines an affidavit of service of a summons containing the complaint, unless the appellants at the same time aver that they present it as a true copy of the complaint, and the Court of Mines cannot, if this be not done, receive preliminary evidence that the copy in the affidavit is a true copy of the complaint. *Hok John v. Yung Hing*, 4 A.J.R., 173.

Right to Begin.]—The appellant has the right to begin on an appeal by way of special case from a warden to the District Court of Mines. *United Claims Tribute Coy. v. Taylor*, 8 V.L.R. (M.,) 19; 3 A.L.T., 147.

The complainant in the court below has the right to begin in the District Court, the appeal being practically a rehearing. *Mole v. Williams*, 3 A.J.R., 21, 22.

Right to Begin.]—*Semble.* The appellant, whether plaintiff or defendant, has the right to begin. *Stevens v. Webster*, 3 W.W. & A'B. (M.,) 23.

Costs in Appeal—Warrant Issued in Excess—Act No. 291, Sec. 220.]—The Judge of the District Court ordered the A. company to pay £47 costs to the B. company in an appeal before him from the warden. The B. company drew out of court the £10 deposited as security for the appeal, and then issued execution for the whole £47. On summons to set aside the execution as excessive the judge made an order to that effect. *Held* that that was the correct remedy, and appeal against the order dismissed. *Sea Q.M. Coy. v. Sea Queen Coy.*, 5 A.J.R., 112.

Parties—Act No. 291, Sec. 212.]—In an appeal from the decision of a warden, it is sufficient if the parties to the proceedings in the Warden's Court appealed from are before the Court of Mines. *Early v. Barker*, 1 W.W. & A'B. (L.,) 32.

Parties to Appeal—Act No 291, Sec. 212.]—A Judge of a Court of Mines has jurisdiction to order that an appellant's name be struck out from all proceedings in his Court, and that all such proceedings be set aside as against him, or for some part of such order, when, from the circumstances, it appears that the appellant did not authorise litigation in his name, and was not aware that he was a litigant till execution under the decree was levied upon his goods. *M'Leod v. Whitfield*, 2 V.R. (M.,) 17; 2 A.J.R., 104.

(d) *Stating Special Case for Opinion of Chief Judge or Supreme Court.*

Stating Special Case—Time for—Warden's Order when Made—Act No. 446, Sec. 23.]—A warden at the close of a case before him announced his intention of making an order in favour of the complainants, and was then asked by the defendants to state a special case on certain questions of law, but the warden entered up his order and refused to state the case, on the ground that, having made his order, it was too late to state a case. On appeal, *Held* that for the purposes of the "*Mining Statute* 1865," and Sec. 23 of the "*Amendment Act*" (No. 446,) the warden's order is made when he announces his intention to make it; and that the application to state the case was made too late. *Regina v. Thomson, ex parte Costin*, 4 V.L.R. (L.,) 512.

Order made within Ten Days after Refusal to State a Case.]—*Semble*, that if a warden make an order within ten days after an application to state a special case for the opinion of the Chief Judge has been made and refused, such application having been made and refused before the warden made any order, the order made within the ten days will be had. *Ibid.*

Act No. 291, Sec. 194—What may be the Subject of a Special Case.]—*Semble*, there may be special cases on appeal under Sec. 194 as to the admissibility of evidence. *Palmer v. Chisholm*, 5 A.J.R., 169.

Questions of the preponderance of evidence are not fit subjects for a special case; *i.e.*, inferences as to the fact of abandonment, these should be determined by the warden himself. *Small v. Dyer*, 5 W.W. & A'B. (M.,) 1.

For facts *see* S.C., *ante column* 935.

Right to Begin.]—Upon a special case stated by the warden under Sec. 194 of the "*Mining Statute* 1865" (No. 291,) the complainant in the court below has the right to begin. *Fahey v. Koh-i-noor Coy.*, 3 W.W. & A'B. (M.,) 4.

No Appearance for Either Party.]—Upon a special case stated by the warden being called there was no appearance for either party. The Chief Judge directed a written opinion to be forwarded to the warden by whom it was stated. *Anderson v. Coyle*, 3 W.W. & A'B. (M.,) 10.

No Appearance of Complainant.]—A warden was about to decide against complainants, but at their request stated a special case to the Chief Judge. At the hearing of the special case the complainants did not appear. The Chief Judge heard the case nevertheless and answered the questions on the undisputed facts. *Reardon v. Norton*, 5 V.L.R. (M.,) 12.

Setting Down Special Case — No Appearance of Complainant—Rehearing.]—A special case stated by a warden for the opinion of the Chief Judge, arrived on the morning of the first day of the sittings of the Chief Judge. *Held* that it was rightly set down for hearing at those sittings; and that both parties ought to be prepared to proceed with the case, and the case being argued in the absence of the complainant, who had not instructed counsel, a motion for a rehearing was refused with costs. *Fattorini v. Band and Albion Consols*, 8 V.L.R. (M.,) 41; 4 A.L.T., 94.

Costs.]—No costs will be given on special case stated under Sec. 194 of the "*Mining Statute* 1865" for the opinion of the Chief Judge. *Ibid.*

[But *see* Sec. 25 of No. 446 ("*Mining Statute* 1865 *Amendment Act* 1872,") allowing the Chief Judge to exercise his discretion as to costs. Ed.]

Special Case Remitted to Warden — Power of Warden to take Additional Evidence—Act No. 291, Sec. 194.]—Where a question in a special case has been answered, and the case has been remitted to the warden for his opinion on the facts, there is nothing to prevent the warden taking additional evidence on the question as left to him. *Clerk v. Wrigley*, 4 W.W. & A'B. (M.,) 74, 84.

Effect of Answer of Chief Judge to One Question—Other Points Open.]—Where the Chief Judge has given an answer to a question, viz., that miners' rights should have been produced, the appellant may then apply to the warden for a rehearing to produce further evidence. *Per Molesworth, J.*—"Virtually my answer was decisive only as far as it went; all other points were left open. The Privy Council has decided that upon questions submitted by special case, the case remains open for adjudication by the original Court notwithstanding my answers thereto—to be inferred from *Smith v. Harrison*, 3 A.J.R., 44." *Summers v. Cooper*, 5 V.L.R. (M.,) 42, 44, 45; 1 A.L.T., 115.

Special Case—Answer by Chief Judge—Fresh Evidence—Discretion of Warden—Appeal.]—It is a matter of judicial discretion for the warden, whether, after an answer is given by the Chief Judge to a case stated by him, he should take fresh evidence or allow an amendment, and, *Semble*, that there is no appeal from the exercise of such discretion. *United Claims Tribute Coy. v. Taylor*, 8 V.L.R. (M.,) 19.

Evidence—Affidavits Filed after Special Case Stated.]—The Chief Judge will not, on the hearing of a special case from a Court of Mines, stated on an appeal from the warden, receive affidavits filed after the special case has been stated, but will answer the special case as it stands. *Conway v. Louchard*, 10 V.L.R. (M.,) 6; 6 A.L.T., 120.

(ii.) *Of Courts of Mines.*

(*a*) *Special Case Stated by Judge of Court of Mines to Chief Judge on Appeal from Warden.*

Special Case—What is a Proper Point for.]—The question whether a Judge of a Court of Mines has power, after the dismissal of an appeal, to grant an application by one of the appellants to have his name struck out of the case, and all the proceedings set aside as against him, is not a proper point for the transmission of a special case to the Chief Judge under the "*Mining Statute* 1865," Sec. 171, since it does not arise on the hearing of any suit or appeal. *McLeod v. Whitfield*, 2 V.R. (M.,) 17; 2 A.J.R., 104.

Objections to the hearing of an appeal as to service of notice and preliminary objections to the hearing of a suit as to service of summons may be the subject of a special case under Sec. 171. *Murphy v. Neil*, *ante column* 997.

What Special Case should State.]—The proper office of special cases, under Sec. 171, is to state facts, and ask the opinion of the Chief Judge as to the law only; not to substitute the Chief Judge for a judge or warden to decide facts upon a balance of evidence. *Keast v. D'Angri*, 4 A.J.R., 61.

Special Case Stated by Judge of Court of Mines under Sec. 171 of Act No. 291.]—Where a special

case, under Sec. 171, embraced many questions of fact, and the evidence set out was complicated and conflicting, the Chief Judge refused to answer it, not thinking that questions of fact were warranted by the section. *Australasian G.M. Coy. v. Wilson*, 4 A.J.R., 18.

Where defendants consented to a case being stated by the Chief Judge upon appeal from the warden, and assisted in the drawing up of the case, and expressed no intention of calling evidence, they were not allowed afterwards to call evidence. *Regina v. Cope, in re Moore*, 4 A.J.R., 113.

Nonsuit—Points not Distinctly Stated—Act No. 291, Sec. 171—No Reason Given by Judge.]—In a case for the opinion of the Court stated by Judge of Court of Mines, the case did not state the nonsuit points distinctly, and where the case set out the whole of the evidence and asked the question, "Whether the respondents had, by the evidence adduced and set out in the case, established a case which would entitle them as against the appellants to" certain relief,—*Held* that the nonsuit points should have been set out succinctly, and case remitted to be re-stated. *Thomas v. Kinnear*, 2 W. & W. (L.,) 221.

In a case stated by a Judge of the Court of Mines, upon appeal from the warden, the case set out the evidence given *verbatim*. *Per Molesworth, J.*—"This way of asking the propriety of a nonsuit, not showing in some degree what is the supposed defect in the plaintiff's case according to the judge's view, is inconvenient." *Longbottom v. White*, 3 W.W. & A'B. (M.,) 35.

Where a Judge of the Court of Mines stated a special case to the "Judges of the Supreme Court" and not to the "Supreme Court," *Held* that as it purported to be a "special case" and to be stated under sec. 70 of the "*Goldfields' Act*" it was well stated. *Kirk v. Barr*, 2 W.W. & A'B. (L.,) 44.

[Compare Sec. 171 of Act No. 291.]

Costs—Power of Supreme Court to Award on Special Cass from Court of Mines.]—*Semble*, that on a question reserved under the "*Goldfields Act*," No. 32, Sec. 70, by the Judge of the Court of Mines, on an appeal from the warden in the form of a special case for the opinion of the Supreme Court, the latter Court should not give costs. *Jenkinson v. Cumming*, 1 W. & W. (L.,) 337.

[But now *see* Sec. 25 of Act No. 446.]

Act No. 446, Sec. 25—Refusal of Judge of District Court to Make any Order except Recording the Opinion of the Chief Judge as his Decree.]—A special case, on an appeal from the warden, was stated to the Chief Judge, on which he delivered his opinion. The District Court Judge then read the opinion and declared it to be his decree, and refused to make any further order. On rule *nisi* for a *mandamus*, *Held* that the applicants must draw up an order from the decree (*i.e.*, the opinion of the Chief Judge,) and if the Judge refused to sign the order, they might apply for a *mandamus*. Rule refused. *Per Fellows, J.*, that the hearing of a case must be completed before any question is stated for the Chief Judge. *Ex parte Sea Queen Q.M. Coy.*, 5 A.J.R., 77.

Question not Answered may be Put Again.]—Where, in a special case under the Act No. 446, from a District Court of Mines, upon appeal from a warden, several questions are put to the Chief Judge, one of which questions is not at the time material, and is not answered, such question may be asked again in another special case after a further hearing in the Court below; and where, under such circumstances, the Judge of a District Court of Mines refused to state a case, the Chief Judge made absolute an order to compel him to do so. *Talent v. Dibdin*, 8 V.L.R. (M.,) 31.

Compelling Judge to State Special Case—Act No. 291, Sec. 171.]—A rule compelling a Judge of a Court of Mines to state a special case on an appeal from a warden to his court, was granted where the warden, on a plaint for trespass to a claim, had decided for the plaintiff company and not for an individual co-plaintiff, who had no recent miner's right. *Sea Queen Coy. v. Sea Quartz Coy.*, 4 A.J.R., 130.

Compelling Judge to State a Case—Point of Law not Raised at the Trial—Act No. 446, Sec. 24.]—A rule was granted compelling a Judge of a Court of Mines to state a special case, on an appeal from a warden, as to the questions whether the burden of proof as to the defendants' possession of a miner's right was on the complainant or the defendants, and whether the termination of the defendants' miner's rights terminated their interest in their claim; but not as to a question of law which did not arise at the hearing, the Chief Judge observing that if a judge decided a case on points of law not raised during the trial proceedings might be taken to set his judgment aside. *Lennox v. Golden Fleece and Heales United Q.M. Coy.*, 4 A.J.R., 154.

(*b*) *Appeal from Court of Mines.*

(1) *Where Appeal Lies.*

No appeal lies from the Court of Mines to the Supreme Court in a matter before the Court of Mines on an appeal from the warden, but the Judge of the Court of Mines should state a special case for the opinion of the Supreme Court, as provided for in Sec. 70 of the Act No. 32. *Schultz v. Dryburgh*, 2 W. & W. (L.,) 127.

[Compare Secs. 170 and 171 of Act No. 291.]

Dismissal of Summons for Commitment—No. 291, Secs. 172, 155.]—An appeal will lie under Sec. 172 to the Chief Judge from an order of a Court of Mines dismissing a summons for commitment under Sec. 155 of the "*Mining Statute* 1865." *Vallancourt v. O'Rorke*, 2 V.R. (M.,) 14; 2 A.J.R., 84.

When Appeal "Saved" by "Mining Statute 1865," Ssc. 2.]—In a suit in a Court of Mines in 1861 a decree was made for the transfer to the plaintiff of defendant's share in a claim as

security for a debt, with power of sale, but no sale was ever held, and nothing was done in the matter. Plaintiff, in 1871, took out a summons in the Court of Mines for execution against the defendant for the amount due under the decree, with interest from the date of the decree. The summons was dismissed, and plaintiff appealed. *Held* that this appeal in a case under the "*Goldfields Act*" was a suit commenced before the passing of the "*Mining Statute* 1865," and was kept alive by Sec. 2 of that Act so as to permit of the appeal; and that execution should now issue on the decree, but with interest for six years only. *Lee v. Conway*, 2 V.R. (L.,) 77; 2 A.J.R., 58.

Order Granting New Trial—"Mining Statute (No. 291,) Sec. 172.]—The subsequent words of Sec. 172 make a distinction between orders on application for a new trial and other orders. In cases of new trial being granted the section provides for appeal only after the decision on the rehearing. Appeals only are allowed where the merits are concluded, and an order for a new trial is not such an order as concludes merits. *Watson v. Morwood*, 3 A.J.R., 21.

From Order Winding-up a Company.]—There is no appeal from the Court of Mines to the Chief Judge from an order made by the Court of Mines winding up a company under Act No. 228. *Perseverance Q.M. and A.G.M. Coy. v. Bank of N.S.W.*, 4 W.W. & A'B. (M.,) 21.

Act No. 297, Sec. 172—Winding-up Order under Act No. 228, Sec. 28, Act No. 324.]—*Per Privy Council*—The words of Sec. 172 of the Act No. 291 providing for appeals to the Chief Judge from Courts of Mines are wide enough to embrace an appeal by the shareholders of a mining company against an order made by a Judge of a Court of Mines for winding up a company upon such a proceeding as that prescribed by the 28th and following sections of Act No. 228, and the Amending Act No. 324. *Colonial Bank v. Willan*, 5 A.J.R., 53; L.R., 5 P.C., 417.

[Contrast Sec. 71 of the "*Goldfields Act*," 21 Vict. No. 32.]

(2) *Statement of Case, Time for Appealing and Practice on Appeal.*

What Must Appear in Case—Objection How Taken.]—Before a Judge of the Court of Mines, under the Act No. 32, Sec. 71, can state a case for appeal, it must, under that section, appear on the case that the parties could not agree. The non-appearance of this requisite is fatal to the jurisdiction of the judge to state, and of the Supreme Court to hear such a case. But if notice of appeal and security for costs have not been given, or other requisites have not been complied with, the non-appearance of such requisites does not justify the Court in acting against the maxim:—"*Omnia præsumuntur rite esse acta donec probetur in contrarium.*" At most their absence affords grounds for an application to the Court to strike the case out of the list if, on affidavits, it can be shown that the requisites are absent in fact. *Inskip v. Inskip*, 3 W.W. & A'B. (L.,) 24.

[Compare Sec. 172 of Act No. 291.]

Case Stated Imperfectly—Omission of Evidence given Below—Act No. 291, Sec. 172.]—A case stated by the Judge of a Court of Mines omitted evidence, which one of the parties alleged was given in the Court of Mines. *Held* that the Chief Judge could not control the Judge of the Court of Mines, and that if he refused to introduce evidence into the case, the Chief Judge had no power to deal with it; and the Chief Judge refused to allow the case to be supplemented by affidavit that such evidence was given, or to remit the case to be re-stated. *Mitten v. Spargo*, 1 V.R. (M.,) 22; 1 A.J.R., 69.

Stating Case on Appeal under Sec. 172—Evidsnce not Set Out Satisfactorily—Rehearing.]—The Chief Judge will direct a rehearing where facts material to the decree do not appear to have been made the subject of evidence, or where the evidence being set out he cannot arrive at a conclusion. *Shaw v. Costerfield G.M. Coy.*, 1 V.R. (M.,) 7; 1 A.J.R., 17.

Practice in Stating Case—Time for Transmission.]—Where a special case stated by a Judge of the Court of Mines sets out the facts sufficiently clearly so as to leave no doubt as to what the facts really are, so that the Court can infer facts to warrant conclusions of law; but does not set out the facts *verbatim*, the Court will not direct a rehearing. *Semble*—Where an appeal case is not transmitted within the time required by the 172nd Section of the "*Mining Statute* 1865," and the case stated that the time was extended, upon an objection that the time had not been properly extended, the Court is to infer in favour of the appeal, that the order was properly made when the objection is not sufficiently proved by affidavit. *Lewis v. Pearson*, 4 W.W. & A'B. (M.,) 23.

Result of Removal of Judge of District Court—Act No. 291, Sec. 172.]—The "Judge of the Court" in Sec. 172 means the Judge for the time being. Where a Judge of a District Court made an order against which an appeal was pending, and was removed to another district during the pendency of the appeal, *Held* that his successor was the proper person to state the case under Sec. 172. *Brennan v. Watson*, 6 W.W. & A'B. (M.,) 1.

Appeal not Set Down in Time.]—Where an appeal case was not forwarded within the proper time, and the only order made for enlargement appearing on the case was one made by the judge after he was removed from the district, no order was made on the appeal. *Ibid.*

Notice of Appeal—Signature by Attorney's Clerk—Act No. 291, Sec. 172.]—A notice was signed "H.C. by his attorney, J.R.H." H. did not sign, but his clerk, R., did. *Held* that the notice was sufficiently signed. *Cock v. Sayers*, 3 A.J.R., 63.

Waiver of Objections to Notice of Appeal.]—The enforcement of the notice of appeal is a mere right of the parties, and may be waived. *Crocker v. Wigg*, 5 W.W. & A'B. (M.,) 20, 22.

And for form of notice of appeal under Sec. 212 *see ante column* 995.

Transmission of Special Case—No. 291, Sec. 172.] — Under Sec. 172 of the "*Mining Statute* 1865" (No. 291), the Judge of a District Court of Mines has a discretion as to the extension of the time within which a special case in an appeal to the Chief Judge is to be transmitted, and no appeal will lie from its exercise. He has, moreover, the power of rescinding or varying the order extending the time, and no appeal will lie from the exercise of his discretion in this case either. *Collins v. Hayes*, 5 W.W. & A'B. (M.,) 24.

Enlarging of Time for Transmission of Special Case—Attorney cannot Consent to, when Cause is out of Court.]—A client is not bound by his attorney's consent to the enlargement of the time for transmission of a special case on appeal to the Master-in-Equity, when the cause is out of court by virtue of the provisions of Sec. 172 of the "*Mining Statute* 1865." *Odgers v. Waldron*, 1 V.R. (M.,) 26; 1 A.J.R., 71.

Enlargement of Time for Transmission of Case—No. 291, Sec. 172.]—The power conferred by Sec. 172 of the "*Mining Statute* 1865" (No. 291,) upon the Judge of a District Court of Mines to direct a further time for the transmission of a special case on appeal to the Master-in-Equity, must be exercised before the original or extended time has expired. *Ibid.*

Extending Time for Appeal.]—After the time limited for appeal by Sec. 172 of the "*Mining Statute* 1865" from a Court of Mines to the Chief Judge has expired, a Judge of a Court of Mines has no power to extend it. *Central Q.M. Coy. v. Morgan*, 4 A.J.R., 174.

Time for Appeal—From what Time it Runs.]—*Per Holroyd, J.*—The time within which an appeal from the decree of a Court of Mines may be made might be held to run from the day on which the decree was settled, though I am myself inclined to think, that it should run from the date of the pronouncing of the decree. *Regina v. Quinlan, ex parte Sampson*, 10 V.L.R. (L.,) 102; 6 A.L.T., 8.

Appeal from Warden Carried through Court of Mines to Court of Chief Judge—Right to Begin.]—Where an appeal from a Warden's Court which has passed through the Court of Mines, is pending before the Court of the Chief Judge, it must be dealt with iu the same manner as if it had come before the Chief Judge without the intervention of the intermediate court; and as the decision of the inferior court is supposed to be right, the duty of showing it to be wrong lies on the appellants, who must therefore have the right to begin. *Stevens v. Webster*, 3 W.W. & A'B. (M.,) 23.

Parties—Representatives.]—Under Sec. 131 of the "*Mining Statute* 1865," the Chief Judge may, on appeal to him from a Court of Mines, decide whether some of the defendants below, who were served with notice of the appeal, sufficiently represent all the defendants; and it is not necessary that defendants who did not appear in the court below should be served. The Chief Judge has, moreover, the same discretion as the District Judge as to proper representations, and on appeal may review the discretion of the District Judge in the matter. *Thompson v. Begg*, 2 V.R. (M.,) 1; 2 A.J.R., 3.

Evidence—Point not Taken Below.]—On an appeal to the Chief Judge it was contended that there were houses built on a machinery area which had been undermined. The point was not taken in the court below. *Held* that the Court could not regard the plan annexed to the case for the purpose of deciding whether houses were in fact so built. *Vivian v. Dennis*, 3 W.W. & A'B. (M.,) 29.

Objection not Taken in Court Below.]—At the hearing of a plaint by a shareholder, seeking to upset the forfeiture of his shares for non-payment of a call, no objection was taken by him in the Court of Mines to the regularity of the meeting at which the call was made, and no attempt was made to amend the plaint and put it in issue. On seeking to raise the objection on appeal, *Held* that the objection could not then be raised, and plaint dismissed without prejudice to the question of the regularity of the meeting. *McLennan v. Myrtle Creek Coy.*, 1 V.R. (M.,) 39; 1 A.J.R., 157.

Appeal from Court of Mines to Chief Judge—Evidence.]—*Per Molesworth, J.*—"The judge's notes of evidence are only to be taken with reference to the arguments urged before me and made the ground of appeal. The parties are not to object that they did not show evidence of something as to which objection was not taken." *Barker's G.M. Coy. v. Keating*, 1 A.J.R., 55.

Appeal from Court of Mines—Increase of Damages.]—An appeal from the Court of Mines opens the whole case, and the Appellate Court may increase the amount of damages. *United Working Miners' Coy. v. Prince of Wales Coy.*, N.C., 71.

Rehearing.]—A rehearing should be decided according to the law at the time of the rehearing. *Semble*, that a decree which was right according to the law at the time it was made should not be reversed because the law is altered by a retrospective Act coming into operation between the two hearings. *Shaw v. Costerfield G.M. Coy.*, 1 V.R. (M.,) 7; 1 A.J.R., 17.

Accounts—Act No. 291, Secs. 173, 174.]—Although the order of the Chief Judge is final, yet it is contemplated in Sec. 174 that the case may be sent back to the District Court for its officers to work out ministerially the decree of the Appellate Court. Accounts sent to be taken by the District Court. *Albion Coy. v. St. George United Coy.*, 4 W.W. & A'B. (M.,) 37, 60.

Act No. 291, Secs. 173, 174, 175—Taking Accounts—When it may not be Done.]—The taking of accounts is not a purely ministerial proceeding—it is *quasi* judicial, therefore, since the Judge of the Court of Mines must conclude the hearing before making a decree, leaving nothing more to be done than what is purely ministerial, he cannot take accounts in a suit after having

made his decree. Where, therefore, the Judge of a Court of Mines made a decree directing accounts and payment of what should be found due, and proceeded, after his decree was confirmed by the Chief Judge, to take the accounts, a *certiorari* was granted. *Regina v. Rogers*, 5 W.W. & A'B. (L.,)206.

Act No. 291, Sec. 174—Duties of District Court Judge as to Decres of Chief Judge.]—In a proceeding by plaint the judge dismissed the plaint, but the Chief Judge, on appeal, made an order in favour of the plaintiff. The District Judge refused an application for the enforcement of the decree on certain grounds which he had no right to take cognisance of. *Held* that under Sec. 174 of the Act the decree of the Chief Judge should be entered as a decree of the District Court and be acted on accordingly, and that the judge could exercise no discretion as to its propriety, his duties being only ministerial; but the proper mode of redress is not an appeal to the Chief Judge against the dismissal of the summons to enforce, though the Court will entertain an appeal on the order for costs made upon the dismissal. *Bain v. M'Coll*, 5 A.J.R., 17.

Costs of Appeal — Act No. 291, Sec. 173.]—Where a suit might have been dismissed in the Court of Mines as wrongly framed, but there had been a miscarriage on two other points appearing in the case but not argued, the appeal was dismissed *without* costs. *Banks v. Granville*, 1 W. & W. (L.,) 158.

For facts *see* S.C., *ante column* 44.

III. Mining Companies.

(1) *Formation, Incorporation and Registration of Company.*

(a) *Registration, Incorporation and Constitution.*

Notice of Particulars—Copy of Rules—18 Vict. (No. 42,) Secs. 2 (vi.) and 3.]—The notice of particulars and the copy of rules, which by Secs. 2 (vi.) and 3 of the "*Mining Companies' Act*," 18 Vict., No. 42, must be given to the Clerk of Petty Sessions by persons forming a company under that Act, need not be separate documents if all the particulars which should appear in the notice of particulars are comprised substantially in the wording of the rules themselves. *In re Harrison*, 1 W. & W. (L.,) 47.

[Compare Sec. 6 of Act No. 409.]

"Declaration — "Copy of Rules"—18 Vict. No. 42 Sec. 2 (vi.)]—A mining association under the Act No. 42 cannot be "a company within the provisions of the Act" unless the "declaration" and the "copy of rules" mentioned in Sec. 2, Sub-sec. 6 of the Act have been registered in accordance with the provisions of that section as two separate documents. *Carter v. Watson*, 1 W. & W. (L.,) 222.

[See provisions of Sec. 6 of Act No. 409.]

Act No. 42, Secs. 2, 6—Act No. 56, Sec. 8.]—The terms of Sec. 2 of 18 Vic., No. 42, are mandatory, and Sec. 6 of the Act having been repealed, the mode of correcting errors provided by that section no longer exists, and the effect of Sec. 8 of 21 Vict., No. 56, is limited in its application to companies formed under that Act, and cannot be extended to companies formed under No. 42. *Oriental Bank v. Casey*, 1 W. & W. (L.,) 229.

S.P.—*See Carter v. Watson*, 1 W. & W. (L.,) 222.

[Compare Sec. 6 of Act No. 409.]

Irregular—Non-compliance with Acts—Members not Protected.]—C., a member of a mining association, pleaded to an action by W. for a debt incurred "for and on behalf of the association," as to part of the debt, that it was incurred by the association as a company duly formed under the "*Mining Companies Act*," 18 Vict., No. 42; and as to the rest of the debt that C., by merely holding shares in the company, had authorised only the lawful acts of the company, and that the acts out of which the later debt arose, were acts "done by the company without C.'s privity, and after it had ceased to be a company under the provisions of the Act" 18 Vict., No. 42, by the operation of Secs. 7 of that Act. It was shown that the association had not complied with some of the provisions of the first sections of the Act 18 Vict., No. 42 or Sec. 65 of the Act No. 56, viz., a copy of the "Rules of the Association" had been registered, but no "deed notice, or other document whatsoever;" that the shareholders having held themselves out to the public as partners, and having incurred a partnership debt, and not having formed a company in accordance with the provisions of the enactment, could not avail themselves of its exemption, and that creditors were not to be deprived of their right of enforcing payment of the partnership debt from any of the partners, and that C. was liable for the whole debt. *Carter v. Watson*, 1 W. & W. (L.,) 222.

S.P.—*See Oriental Bank v. Casey*, 1 W. & W. (L.,) 229.

Memorial—Act No. 109.]—If the memorial required by the Act No. 109 be in the form required by that Act, a mining company may be "registered" under that Act, although the memorial does not truthfully set forth the facts required in it by the Act. *In re Mackenzie*, 1 W. & W. (L.,) 135.

Memorial–No. 228, Sec. 9.]-Where the memorial of a mining company has not been filed with the clerk of the "nearest" Court of Mines under No. 228, Sec. 9, *Held* that the omission was fatal to a summons in which the official agent sued a shareholder for contribution. *Wooller v. Carver*, 3 W. W. & A'B. (L.,) 1.

[Under Sec. 6 of Act No. 409 the memo. must be lodged with the Registrar-General.]

Act No. 228 — Registration.] Under the "*Mining Companies' Limited Liability Act* 1864" (No. 228,) the incorporation of a mining company is to be effected by registration with the clerk of the Court of Mines for the district in or nearest to that in which it

carries on its operations; but not necessarily with the clerk at the place within the district at which such court sits nearest to the company's operations. *The Attorney-General v. The Prince of Wales G.M. Coy.*, 5 W.W. & A'B. (E.,) 208, 219.

Certificate, Evidence of What—How Binding.]—The certificate of incorporation of a company under the Act No. 228 is conclusive evidence of the prior assent of the shareholders to registration, as well as of all other preliminaries to registration; and the certificate of registration may be given stating the memorial of registration to have been lodged at a prior date, and such certificate will be evidence of prior incorporation at that date. *Ibid*, pp. 221, 222.

Registration—Certificate.]—A mining company or any other person may obtain a certificate of its registration as often as it or he pleases on payment of the proper fee. *Regina v. Green*, 5 W.W. & A'B. (L.,) 202.

Evidence of Registration—Certificate Signed by Deputy-Registrar Sufficient—Act No. 409, Sec. 10.]—*Regina v. Walters*, *ante column* 139.

Execution of Deed of Association—No Estoppel against Proving Defective Registration.]—*Reeves v. Greene*, *ante column* 138.

Certificate of Registration—Act No. 409, Secs. 6, 7, 8, 10, 116, 118—No Liability Company—Non-payment of 5 per cent. of Capital at Time of Registration.]—A plaintiff no-liability company was registered regularly and upon a proper statutory solemn declaration of its legal manager that 5 per cent. of its subscribed capital had been paid up at the time of registration, which statement proved to be false. *Held* that although Sec. 10 makes the certificate conclusive evidence of registration, and Secs. 6, 7, and 8 make a registration conclusive evidence of incorporation, yet Sec. 118 provides that the 5 per cent. shall be paid up and a declaration made to that effect, and not that the declaration shall in any way supply the want of fact alleged in it; and that a no-liability company under Act No. 409, having an assignment of a lease under Act No. 291, suing for trespass or injury upon the leased land may be defeated by a defendant showing that one-fifth of its capital was not paid up at the time of its registration. *Park Coy. v. South Hustler's Reserve Coy.*, 9 V.L.R. (M.,) 4; 4 A.L.T., 135.

Company for Mining on Private Land—May be Incorporated under Act No. 228.]—A company formed for the purpose of mining for gold upon private land may properly be incorporated under Act No. 228. *Bonshaw Freehold G.M. Coy. v. Prince of Wales Coy.*, 5 W.W. & A'B. (E.,) 140, 152.

[Compare Sec. 5 of Act No. 409.]

A company mining on private land may be incorporated under No. 228, since the general words of Sec. 2 of that Act are not to be limited by those in Sec. 25. *Davies v. Cooper* and *Adair v. Cooper*, 2 V.R. (L.,) 95; 2 A.J.R., 62.

Title of Company—"Mining Companies Act 1871," Secs. 9, 118—Limited.]—Secs. 9 and 118 of the "*Mining Companies Act* 1871" do not render it necessary for a company incorporated under that Act to have the word "Limited" added to its name. *Clarence United Coy. v. Goldsmith*, 8 V.L.R. (M.,) 14; 3 A.L.T., 147.

Amalgamation of Companies.]—*See* cases *ante columns* 139, 140.

(*b*) *Effect of Registration.*

Registered Company—Whether it Represents former Partnership.]—A party was registered as owners of a claim under the title of the "W. Coy." Eight of the party entered into an agreement with other parties to form a new company to work the claim upon certain terms. Shares in the new company were given to some of the original party; some were reserved presumably for others of such party; and some of the party were completely excluded from the new company, which was duly registered under No. 228 as a new company. On a suit by the company for encroachment on the claim, *Held* that the company did not represent the partnership or the excluded members of the partnership, and had no title to maintain the suit. *Warrior Coy. v. Cotter*, 3 W.W. & A'B. (M.,) 81.

Liability for Debts Incurred before Incorporation—Acts Nos. 109 and 228.]—A company formed under the Act No. 109 ("*Mining Partnerships Act*") as the M. Coy. (Limited), incurred a debt to I., and then became incorporated under the Act No. 228 ("*Mining Companies Limited Liability Act* 1864") as the M. Coy. (Registered), and took over the assets of the company. I. sued the corporation for the debt of the company, and obtained a verdict subject to a motion for a nonsuit. *Held* that the Act No. 228 did not alter the remedy or redress possessed by a creditor from that which he possessed before the Act; and that whatever the remedy was which a creditor possessed under the Act No. 109, that remedy existed under the Act No. 228; and that, it being difficult to say what that remedy was, the best course was to nonsuit the plaintiff and let him begin *de novo* as against the company existing before incorporation, in the manner he might be best advised. *Irving v. Minerva G.M. Coy.*, 3 W.W. & A'B. (L.,) 78.

(2) *Directors and Officers.*

(*a*) *Directors.*

Appointment of Directors—Rule Providing for an Extraordinary Meeting to Set Aside Resolution of Annual General Meeting.]—A rule providing for the rescinding, at an extraordinary meeting, of resolutions passed at the general annual meeting does not apply to rescinding the appointment of directors elected at such annual meeting. *Schaw v. Wekey*, 1 V.R. (L.,) 205; 1 A.J.R., 161; *Aberfeldie G.M. Coy. v. Walters*, 2 V.L.R. (E.,) 116. *See ante column* 142.

Election of Directors—Quorum—Adjournment of Meeting.]—*See Old Welshman's Reef Coy. v. Bucirde*, *ante columns* 142, 143.

Election of Directors—Proxies Improperly Admitted.]—*Highett v. Sun Q.M. Coy. Post column* 1022, 1023.

Qualification of Directors—Payment of Calls by Promissory Notes.]—*Umphelby v. Wilkie*, 5 A.J.R., 108; *ante column* 143.

Qualification—Forfeiture of Shares.]—*Reeves v. M'Cafferty, ante column* 153.

Continuance in Office.]—*See Schmidt v. Garden Gully Coy.* and *M'Lister v. Garden Gully Coy., ante columns* 138, 142. And *see Barford Estate G.M. Coy. v. Klingender, ante column* 148.

Powers of—How far Consent Decree Sanctioned by Directors Binding on Company.]—The plaintiff and defendant companies (A. and G.) were the holders of adjoining frontage claims on the W. lead. The defendant company (G.) measured from the datum peg. The plaintiffs were entitled as assignees of adjacent block claims, and the defendants to similar block and frontage claims intersecting the frontage claims of both on the W. lead. A collision having occurred, and a compromise having been discussed, it was agreed to have the boundaries settled by an amicable suit, and consent decree in the Court of Mines, and by a decree, conformable with one initialled at the meeting of the companies, two lines, A, B, B, C, meeting at B in an obtuse angle, were fixed as the boundary. The directors of the G. company reported upon these arrangements, which were well-known to the shareholders of both companies, and the report was adopted. The A. company brought a plaint alleging encroachment by the G. company, and seeking relief. The deed of association of the G. company required the consent of a general meeting to any contract exceeding £1000, and the matter in dispute was valued at £1050. *Held* (1) that the provisions in the deed did not refer to "a bargain" but to a "contract" in a limited sense, and that the directors' powers to dispose of the property were not controlled thereby except as to purchase and hire of machinery; (2) that the consent decree was binding on the G. company as sanctioned by the directors, the manager, and the solicitor of that company, and relief granted as prayed. *Albion Coy. v. St. George United Coy.*, 4 W.W. & A'B. (M.,) 37, 51, *et seq.*

Power to Bind Company—Incurring Debt and Borrowing Money.]—*See In re Tyson's Reef Coy. and Colonial Bank v. Loch Fyne Coy., ante column* 147.

Overdraft Sanctioned by Quorum — Cheque Signed by One Director, but Amount Passed by Board of Directors.]—*Bank of New South Wales v. Moyston Junction Coy., ante column* 147.

Powers of—Borrowing Money.]—Duly appointed directors of a mining company can act as agents for the company for the purpose of borrowing money. *Bank of New South Wales v. Undaunted G.M. Coy.*, 1 V.R. (L.,) 146; 1 A.J.R., 131.

Guarantee Given by Directors—Power to Bind Company.]—The directors of a mining company gave a guarantee as follows:—"We, the undersigned directors of the New Ringwood Antimony Mining Company, Limited, in consideration of the Bank of Victoria having, at our request, transferred to an account opened by us in the name of the New Ringwood Antimony Mining Company, Limited, the sum of £804 6s., standing in the name of M. as liquidator of the *above company*, do hereby guarantee the Bank of Victoria from all loss or damage the bank may sustain in respect of any action M. may take against the bank for having parted with the fund standing in his name as liquidator of the company to us the directors of the said company." By the regulations of the company the directors were empowered to give a guarantee for an overdraft. *Held* that the guarantee was beyond the power of the directors under the regulations, and under the "*Mining Companies Act*" (No. 409,) and that the money having been already transferred when the guarantee was made, there was no consideration for it. *White v. Bank of Victoria*, 8 V.L.R. (M.,) 8; 3 A.L.T., 90.

Quorum of Directors not Fixed—Contracts not Vitiated thereby.]—By rule 22 of a company's deed of association the directors were bound to appoint a quorum. Before a quorum was so appointed certain of the directors apparently acting as a quorum entered into a contract with the plaintiff. After the contract was entered into the quorum was fixed. *Held* that the contract was binding; that the directors having full authority to appoint a quorum, and having acted as if they had done so, the plaintiff was entitled to assume that they had done that which they ought to have done and to act accordingly. *Anderson v. Duke and Timor G.M. Coy.*, 1 A.J.R., 161; 1 V.R., (L.,) 203.

Property of Company—Demand for, by Attorney whose Authority was not Signed by a Quorum of Directors or by Manager.] — In an action of detinue for the recovery of books and other property belonging to a mining company, it appeared that the authority to the company's attorney to make the demand was not signed by a quorum of directors or by the manager *qud* manager. *Held* that the evidence of authority to make the demand was insufficient. *Aladdin and Try Again Coy. v. Schaw*, 2 V.R. (L.,) 18; 2 A.J.R., 20.

Power of Directors to Let on Tribute—"Mining Companies' Limited Liability Act 1864"—"Mining Companies' Act 1871," Sec. 124—"Mining Statute Amendment Act 1872" Sec. 7.]—All companies registered under the "*Mining Companies Limited Liability Act* 1864" (No. 228,) and not registered as "no liability" companies under the Act No. 409 ("*Mining Companies Act*" 1871,") are by virtue of Sec. 124 of that Act brought under Part I. of the Act; and therefore Sec. 7 of No. 446 ("*Mining Statute Amending Act* 1872,") prohibiting the making of tribute agreements except with the consent of the shareholders, applies to such companies. *Regina v. M'Dougall*, 3 V.R. (L.,) 66; and *Tommy Dodd Coy. v. Patrick*, 5 A.J.R., 14, overruled. *Chun Goon v. Reform G.M. Coy.*, 8 V.L.R. (E.,) 128, 151; 3 A.L.T., 137.

"Mining Companies' Act 1871" (No. 409,) Sec. 131.]—Sec. 131 of Act No. 409, which prohibits letting on tribute without the sanction of the shareholders, only applies to a lease of a mine on tribute. *Ibid* at p. 150.

Sale of Property by Director—Acquiescence of Plaintiff.] — A mining company incorporated under Act No. 228, being in embarrassed circumstances, sold great quantities of ore to its legal manager. The sale was made by the directors without the knowledge of the shareholders. The Act No. 228 and the deed of association of the company required sales to be by the directors, not by the shareholders. Subsequently one of the shareholders, who, at the time of the sale, had been a director, brought a suit to avoid the sale or make the defendant liable for the difference between the price given and what plaintiff asserted to be the true price, on the ground that the sales were unjust to the shareholders; that defendant, as manager, knew the true value of the ore that he sold on behalf of the company to himself at too low a price; and that the shareholders had no knowledge of his being the purchaser. *Held* that since the Act No. 228 and the deed of association of the company required sales to be by the directors, and the plaintiff was at the time of the sale one of the directors who assented thereto, he had acquiesced in the sale and was debarred from suing to impeach it, and bill dismissed with costs as against the defendant manager. *Youl v. Lang*, 1 A.J.R., 9.

Power to Sell Real Estate.]—Where directors sold real estate belonging to a mining company without the authority and sanction of the company in a general meeting, *Held* that by the terms of the deed of association such sale should have received such sanction, and being made without such sanction it was voidable, and the directors were liable for the fair value of the land. *Reeves v. Croyle*, 2 V.R. (E.,) 42; 1 A.J.R., 109; 2 A.J.R., 13.

Authority to Sell—Extraordinary Meeting, Act No. 409.]—Under the Act No. 409 the sanction of an extraordinary meeting is not necessary to the sale of part of the property by the directors. Directors of a company offered to sell part of a company's property (water rights) under a contract which had a condition that the sale should be sanctioned and authorised by an extraordinary meeting of the company. A resolution was passed at such meeting authorising the sale of the property, but not specifying the particular contract. *Held* that the condition had been substantially complied with. *Baw Baw Sluicing Coy. v. Nicholls*, 9 V.L.R. (L.,) 208; 5 A.L.T., 73.

Acquiescence by Shareholders — How far it ratifies Acts of Directors otherwise Ultra Vires.]—*Creswick Grand Trunk Coy. v. Hassall, ante column* 148.

Liability of Directors making Dividends out of Capital.]—Where the directors of a mining company in contravention of a rule in the deed of association made dividends partly out of profits and partly by encroaching on the capital, *Held* that neither the company nor a shareholder had any remedy against the directors, as the act was not shown to be fraudulent. *Reeves v. Croyle*, 2 V.R. (E.,) 42; 1 A.J.R., 109; 2 A.J.R., 13.

[But now *see* Sec. 49 of Act No. 409.]

Liability for Hasty and Improvident Sale—For Loss of Gold and Calls Received by Manager—For Loss of Books of Account.]—*Reeves v. Croyle, ante columns* 144, 145.

Liability of Retiring Directors.]—*Reeves v. Croyle, ante column* 145.

Personal Liability of Directors–Cheque Honoured by Bank by their Authority.]—*Colonial Bank v. Cherry, ante columns* 143, 144.

On Joint and Several Promissory Notes.]—*McMullen v. O'Connor, ante column* 144.

Liability of Promoters for Secret Profits made on Formation of Company.]—*Benjamin v. Wymond, ante column* 141.

Power of Director to Enforce Forfeiture.]—A person, being a shareholder or director of an incorporated company, is not precluded from enforcing a forfeiture incurred by such company for breach of a bye-law; though he may be accountable in equity for so doing. *Smith v. Golden Gate G.M. Coy.*, 5 W.W. & A'B. (M.,) 5.

A director of a company who has obtained, while acting as such director, information as to the period when its miners' right would terminate, is not estopped, after he has ceased from acting as such director, from instituting a suit to obtain possession of its mining claim. *Lennox v. Golden Fleece and Heales United Q.M. Coy.*, 4 A.J.R., 154.

But *see Harrison v. Smith, ante column* 143.

Directors' Powers and Liabilities—Payment of Manager's Costs of Litigation—Payment to Officer of more than he could Legally Claim.]—*Hardy v. Wilson, ante columns* 146, 149.

(*b*) *Managers.*

Appointment of Manager—Need not be under Seal—Act No. 228.]—The appointment of the manager of a mining company registered under the Act No. 228, is not an "office," but a "situation" under a contract for service, and need not be under the corporate seal of the company. The sealed articles of association of a company registered under the Act provided that one P. should be the first official manager; that the company should last seventeen years; and that a general meeting should have the power of removing the manager from, and electing a new person to fill the "office" of manager, and P. signed the memorial required by Sec. 9 of the Act to be filed for incorporating the company, and at the first general meeting resigned, and W. was elected and appointed manager. This appointment was not under the corporate seal. W. convened an extraordinary general meeting, as manager, to resolve on an increase of capital, and the meeting was held and the resolution carried. In pursuance thereof the company sued a shareholder in the County

Court for calls of increased capital. The company was nonsuited, and appealed. *Held*, on appeal, that W.'s position was not an "office," but a mere "situation" under a contract for service; and that his appointment was good though not made under seal; and appeal allowed. *Royal Standard G.M. Coy. v. Wood*, 3 W.W. & A'B. (L.,) 85.

Liability of Member for Contract Made by Agent—"Mining Companies Act 1864 Amendment Act," Sec. 9.]—A member of an unincorporated mining company is, under Sec. 9 of the "*Mining Companies Act* 1864 *Amendment Act*" (No. 324,) not liable upon a contract made by the manager or agent of such company to whose appointment he did not consent, and to whom he has given no authority in writing to contract. *Renwick v. Barkas*, 2 V.L.R. (L.,) 269.

Power of Manager to Contract for Necessaries—Act No. 409, Secs. 21, 40.]—Sec. 21 only gives a manager authority to bind the company for necessaries up to £50, and a manager has no authority to bind the company to a larger amount except by express authority given by the board of directors. *M'Iver v. Duke Coy.*, 5 V.L.R. (L.,) 449.

Authority of Manager—Agreement by Manager to Let on Tribute.]—The manager of a mining company, incorporated under the Act No. 228, has no inherent authority to bind the company by an agreement for letting a portion of its land on tribute. *Chun Goon v. Reform G.M. Coy.*, 8 V.L.R. (E.,) 128, 148, 149; 3 A.L.T., 137.

(3) *Rules and Articles of Association.*

Where one of the rules of a company, registered under Act No. 228, was *ultra vires*, *Held* that that did not vitiate the rest. *Solomon v. Collingwood Q.M. Coy.*, 4 W.W. & A'B. (L.,) 128.

Chairman of Meeting at which Rules were Made Estopped from Objecting to Form of Meeting.]—*See* S.C., *ante column* 159.

Validity of Rules.]—Rules and articles of a mining company incorporated under Act No. 228, whether made before or after incorporation, are valid only so far as they are not inconsistent with the Act, and rules cannot be made for winding-up otherwise than as the Act provides. *Creswick Grand Trunk G.M. Coy. v. Hassall*, 5 W.W. & A'B. (E.,) 49, 81.

And *see* S.P., *Tommy Dodd Coy. v. M'Clure*, 1 V.L.R. (L.,) 237.

A mining company registered under the Act No. 228 cannot, under Sec. 39 of the Act, make rules providing for forfeiture of shares. *Nolan v. Annabella Coy.*, 6 W.W. & A'B. (M.,) 38; N.C., 19.

For facts, *see* S.C., *ante column* 153; but now *see* Sec. 54 of Act No. 409.

Power of a Company under Act No. 228 to Make Rules for Forfeiture.]—Even where a deed of association of a mining company under Act No. 228 has been signed before incorporation, such a company has no power to make rules for the forfeiture of shares, and any acts by directors under such rules are unauthorised. *Jenkins v. Speed*, 6 W.W. & A'B. (L.,) 255; N.C., 67.

But where a company registered under Act No. 228 made rules in its articles of association executed after registration providing for forfeiture in a way not exactly following, but still not directly contrary to the provisions of the Act, *Held* that the rules so made were valid. *Shaw v. Costerfield Mining Coy.*, 1 V.R. (M.,) 7; 1 A.J.R., 17.

Rules made at Meeting of Shareholders—Proxies Admitted Illegally—Rules Invalid.]—*Highett v. Sun Q.M. Coy.*, 4 A.J.R., 119. *See* S.C., *post columns* 1022, 1023.

Rules can only under Sec. 39 of the Act No. 228 be altered after incorporation by an extraordinary meeting duly convened. *A1 G.M. Coy. v. Stackpoole*, 4 A.J.R., 170.

[Compare Sec. 58 of Act No. 409.]

Rules can only be made by a mining company after incorporation at extraordinary meeting. *Ballarat and Chiltern G.M. Coy. v. Cleeland*, *ante column* 160.

A company registered under Act No. 228 cannot make rules as to extraordinary meetings. *Tommy Dodd Coy. v. M'Clure*, 1 V.L.R. (L.,) 237.

Rules for Continuance in Office of Directors.]—The provisions of the articles of association of a mining company registered under Act No. 228, and the regulations thereunder, are invalid if not in accordance with the terms of the Act. A rule for the continuance in office of directors for more than a year is invalid as in contravention of the implied provisions of Sec. 39 of the Act. *Schmidt v. Garden Gully Coy.*, 4 A.J.R., 166, 137. For facts, *see* S.C., *ante column* 138.

Misrepresentations in Prospectus—Liability of Promoters for.]—*Benjamin v. Wymond*, *ante columns* 136, 137.

Variance between Prospectus and Articles of Association.]—*Bowman v. Homan*, *ante column* 137.

(4.) *Shares and Shareholders.*

(*a*) *Shares.*

Allotment of—Tribute Companies.]—A mining company, registered under Act No. 228, advertised on 15th August that shareholders in the company would have shares in two tribute companies to be formed in proportion to shares they held in the original company, if the scrip were left on 24th August. G. purchased 200 shares in the company on 18th August, and left the scrip with the company. On 26th August G. sold his shares in the original company, and, on applying for the tribute shares, they were refused. The tribute companies were

not registered until 5th September. G. brought an action against the original company for not allotting tribute shares, and obtained a verdict. On rule *nisi* for a nonsuit, *Held* that the tribute companies having been formed before G. sold his shares, the sale did not carry the tribute shares, and that the action was rightly brought against the original company. Rule discharged. *Gordon v. Golden Fleece Coy.*, 3 V.R. (L.,) 195; 3 A.J.R., 80.

Transfer of Shares—Fictitious Person.]—A shareholder was sued for contribution in respect of shares in a mining company, and it appeared that three months before the company was wound-up he had transferred his shares and procured registration of the transfer to one *John Smith*, of Latrobe-street, Melbourne. The transfer purported to be accepted and signed by *John Smith*, of Latrobe-street. On winding up the company, *John Smith* could not be found or heard of in Latrobe-street. *Held* that it was not to be presumed that *John Smith* was a fictitious person, since it would be in effect to prove that defendant was guilty of forgery. *Simpson v. Mullaly*, 2 V.R. (L.,) 56; 2 A.J.R., 45.

Transfer of Shares—Evidence of.]—*Reefs Q.M. Coy. v. Bennett, ante column* 155.

Transfer by Blank Form of Assignment.]—*Atkinson v. Lansell, ante column* 157.

Issue of New Shares—Fraud—Liability of Transferee.]—*See Creswick Grand Trunk Coy. v. Rowell, ante columns* 155, 156.

Transfer to Escape Payment of Calls.]—An absolute transfer made to a third person, though made to avoid payment of calls, is not *per se mâla fide*. *Sleep v. Virtue*, 2 V.R. (L.,) 29; 2 A.J.R. 20.

Transfer of Shares—Setting Aside Sale of—Miner's Right.]—Where L., a holder of a miner's right, and an insolvent, before sequestration transferred shares to K. as a trustee, who had no miner's right, and K. sold to G., who had notice of the trust—*Held* that L.'s official assignee in setting aside the sale to G. need not have a miner's right and need not show that the alienation was fraudulent under the Insolvency Acts. *Goodman v. Kelly*, 1 W. & W. (L.,) 332.

And *see* also as to the transfer of shares, the cases collected under VIII. WINDING-UP—Contributories.

Rectification of Register—Act No. 409, Sec. 35—Practice.]—Proceedings under Sec. 35 to rectify the register of shares, by having a shareholder's name inserted as a transferee, may be taken by summons, or in any way consistent with substantial justice, and the judge has jurisdiction to hear a case though no plaint is filed. *Murphy v. Cotter and United Hand and Band Coy.*, 7 V.L.R. (M.,) 12; 2 A.L.T., 150; 3 A.L.T., 17.

Forfeiture of Shares.]—Provisions for forfeiture are regarded as exceptional, and to be strictly construed. *Nolan v. Annabella Coy.*, 6 W.W. & A'B. (M.,) 38; N.C. 19; and *see* S.C. *ante column* 153.

Validity of Forfeiture—Qualification of Director—Mode of Entering Forfeiture.]—*Reeves v. M'Cafferty, ante columns* 153, 154.

And *see Smith v. Garden Gully Coy. Ibid.*

Power of Company to Make Rules as to Forfeiture.]—*See Jenkins v. Speed, ante column* 1018.

Notice of Forfeiture—Formality of.]—*Wood v. Freehold Q.M. Coy., ante column* 154; *Marshall v. Creswick Grand Trunk Coy., ante column* 154; *Cushing v. Lady Barkly Coy., ante column* 155.

Forfeiture—How it Affects Liability for Calls.]—So long as a shareholder's name remains on the register he is liable for calls; the absolute forfeiture of his shares does not relieve him. *Guthridge v. Gippslander Coy.*, 5 A.J.R., 161.

Forfeiture under Articles of Association.]—A company registered under Act No. 228 by articles of association executed after registration provided for the forfeiture of shares in a manner not exactly following, but still not directly contrary to the provisions or policy of the Act. C., a shareholder, who had executed the articles, had his shares forfeited for non-payment of a call. Upon suit by his official assignee to have the forfeiture set aside, *Held* that the forfeiture made under the articles of association was valid, notwithstanding that the company was registered under the Act No. 228. *Shaw v. Costerfield M. Coy.*, 1 V.R. (M.,) 7; 1 A.J.R., 17.

Forfeiture—Non-payment of Call.]—The partners in a mining claim incorporated themselves into a company. It was provided by the rules of such company that the company should take over the liabilities of the partnership, and discharge them out of the first profits received; that a bill of sale should be given by the company, upon request of certain creditors, as security for a debt owing to them; and that the shareholders should contribute the capital by such instalments as the directors should appoint. The bill of sale, though requested, was not given, and instead the directors made a call to pay the debt, for non-payment of which all the plaintiffs' shares were forfeited. *Held* that the directors had power to make the call for the purpose of paying the debt; and that the forfeiture was not impeachable on the ground that the call was improper. *M'Lennan v. Myrtle Creek Coy.*, 1 V.R. (M.,) 39; 1 A.J.R., 157.

Forfeiture—Non-payment of Calls—Act No. 228—Act No. 409.]—*Held, per Barry and Williams, JJ. (dissentiente Fellows, J.,)* that the Act No. 409 is not retrospective as to companies registered under Act No. 228, so as to authorise a forfeiture in accordance with Act No. 409 for non-payment of calls made under No. 228. *The Tommy Dodd Coy. v. Patrick*, 5 A.J.R., 14.

But it was *Held* in *Chun Goon v. Reform G.M. Coy.*, 8 V.L.R. (E.,) 128, 151; 3 A.L.T., 137;

that all companies registered under the Act No. 228, and not registered as No Liability Companies under Act No. 409, are, by virtue of Sec. 124 of Act No. 409, brought under the operation of Act No. 409, Part I., Secs. 1-58.

Dividends on Shares.]—*Per Molesworth, J.*—The profit of mining shares, as between persons successively entitled, goes to the person entitled when the dividend is payable, not when the gold is raised. *Shaw v. Wright*, 2 W. & W. (E.,) 57, 71.

Mortgage of Shares—Once a Mortgage always a Mortgage.]—The principle once a mortgage always a mortgage applies to shares in mining companies, and must be followed out with such allowances as the character of the case may require. A new rule is not to be created for this species of property. *Niemann v. Weller*, 3 W.W. & A'B. (E.,) 125, 137, 138.

For facts *see* S.C. *ante column* 153.

(*b*) *Shareholders—Who are, their Meetings and Rights.*

Person not Executing Instrument of Association not Liable for Calls—Act No. 56, Sec. 3.]—An allottee of shares in a mining association registered under the "*Mining Association Act* 1858," who has not executed the instrument of association, can not be sued by the director of the association for calls due under the instrument, inasmuch as Sec. 3 of Act No. 56 provides that "the instrument shall be subscribed by each member." *Farran v. Bowman*, 1 W. & W. (L.,) 150.

Who is a Shareholder—18 Vict. No. 42, Sec. 14.]—A person who has made a written application for, and is the holder of, shares in a mining company, is a "shareholder of the shares subscribed for" within Sec. 14 of No. 42, although he may not have subscribed the instrument of association of the company. *Melville v. Higgins*, 1 W. & W. (L.,) 306.

Mining Partnership—Act No. 109—Who are Shareholders.]—A person may be a shareholder in a mining company under Act No. 109 even though such "holder" of shares has not executed deed of association. *Farran v. Bowman*, and *Melville v. Higgins* distinguished. *Maconochie v. Woods*, 2 W. & W. (L.,) 249.

[But now *see* Sec. 13 of Act No. 409.]

Act No. 228, Sec. 3—Shareholder not Signing Deed of Association.]—L. applied for shares and enclosed £30. Twenty-five were allotted to him, and £5 was returned, but L. did not sign the deed of association. *Held* that although the Act No. 228, Sec. 3, does not contemplate the execution of the deed as essential, yet as it appeared that both L. and the company contemplated the signing of a deed as essential to constitute L. a member of the company and L. had not signed, he was not a shareholder and was not liable for calls. *Guiding Star Coy. v. Luth*, 4 W.W. & A'B. (L.,) 94.

[Compare Sec. 13 of Act No. 409.

Evidsnce of Membership—Payment of Call to a Duly Authorised Agent.]—*Ogier v. Smith*, N.C., 3., *see ante column* 160.

Liability of for Calls.]—*See post* under subheading Calls.

Meetings—Notice to Call Extraordinary Meeting—Act No. 228, Sec. 23.]—Sec. 23 providing for the calling of an extraordinary meeting means that the meeting shall be convened fourteen days *at least* after the last insertion of advertisements; and therefore where a meeting was convened twenty-four days after the last insertion, *Held* that it was duly convened. *Robin Hood Coy. v. Stavely*, 4 W.W. & A'B.(M.,) 26.

[Compare Sec. 41 of Act No. 409.]

Increase of Capital—Notice of—Act No. 228, Sec. 24.]—The provisions of Sec. 24 are only directory and not mandatory, and therefore where a defendant in an action for calls objected that no written notice of the increase of capital was made according to the provisions of that section, *Held* that he was liable. *Ibid.*

Notice of Meeting—Act No. 228, Sec. 23.]—The notice of meeting under Sec. 23 of Act No. 228 should be a fourteen days' notice, and therefore a meeting called six days after notice has been advertised is an irregular meeting. *M'Lister v. Garden Gully Coy.*, 5 A.J.R., 152; L.R., 1 App. Ca. 39.

Meeting Irregulary Called.]—A rule of a mining company provided that if the manager neglected for four days to call a meeting after a requisition to that effect had been delivered, then a majority of the members might call one. *Held* that the act of the requisionists in calling a meeting within the four days was not validated by the manager's subsequent neglect. *Aberfeldie G.M. Coy. v. Walters*, 2 V.L.R. (E.,) 116.

Notice of Meeting.]—No need to prove actual knowledge on part of a shareholder. *Cushing v. Lady Barkly G.M. Coy.*, *ante column* 150.

Meetings—Notice.]—Where the rules of a mining company do not prescribe any mode of summoning a general meeting, such meeting must be summoned by serving the individual shareholders with separate notices thereof. *Charlton v. Barkly Reef G.M. Coy.*, 3 V.L.R. (L.,) 101.

Meeting of Shareholders—Not Authorised to Pass Resolutions as to Sale, when Advertisement only Refers to Winding up.]—*Hick v. Havilah G.M. Coy.*, *ante columns* 149, 150.

Right to Vote—Neglect to Pay Calls, How it Affects.]—*Aberfeldie G.M. Coy. v. Walters*, *ante column* 150.

Reception of Proxies.]—Where the rules provide for proxies being received, they must be received. *Hick v. Havilah G.M. Coy.*, *ante columns* 149, 150.

Act No. 228, Sec. 39—Meeting of Shareholders—Proxies—Calls.]—The "*Mining Companies Act*" (No. 228,) Sec. 39, empowers a "majority in

number and value of the shareholders" to make rules. At a meeting at which eight only of thirty-seven shareholders were present, but thirteen others were represented by proxies, rules were made authorising proxies, and the same meeting elected directors, who subsequently sued for calls. *Held* that since proxies cannot be allowed till provided for by the rules, there could be no valid meeting held with proxies present till rules were passed authorising them, and that consequently the meeting was informal and the rules invalid, as also the election of directors, since to enable proxies to be present the rules authorising them would have to be passed by a regular meeting of a majority in number and value of the shareholders; and that the election of directors being invalid, the calls made by them were invalid also, and could not be recovered, and that the execution of the deed, containing the rules, by the defendant, such deed not having been executed by the other shareholders, could not bind him. *Highett v. Sun Q.M. Coy.*, 4 A.J.R., 119.

[*See* Secs. 43, 58 of Act No. 409.]

Meetings—"Mining Companies Act" (No. 409,) Secs. 41, 43, 58—Proxies.]—Where a notice of an extraordinary meeting under Sec. 41 had been duly given pointing out the several objects of the meeting, *Held* that a proxy could be admitted under Sec. 43 in order to constitute the majority necessary under Sec. 58 for the purpose of making rules. *Robertson v. Weddell*, 5 A.J.R., 115.

Right to Inspect Book of Account—"Mining Companies Act 1871," Sec. 38.]—A minute-book containing minutes of the proceedings of the directors of a mining company, and including the accounts of the company as brought before the directors and passed for payment, is not a "book of account" within Sec. 38 of the "*Mining Companies Act* 1871," and is not, therefore, open to the inspection of shareholders under that section. *James v. Thomson*, 10 V.L.R. (L.,) 125; 6 A.L.T., 12, *sub nom. Thompson v. James.*

Right of Shareholders to Impeach Rules.]—*Schmidt v. Garden Gully Coy.*, *ante column* 150.

(5) *Contracts and Power to Mortgage.*

Power to Make Promissory Note.]—*Semble*, that a mining company incorporated under the "*Mining Companies Limited Liability Act* 1864" has no power to make a promissory note or bill of exchange. *M'Mullen v. O'Connor*, 5 W.W. & A'B. (L.,) 200.

Contracts by Company—How far Person Contracting with a Company Bound to Inquire into Regularity of Proceedings.]—*Anderson v. Duke and Timor G.M. Coy.* and *Commercial Bank v. M'Donald*, *ante column* 151.

Tribute Agreement—"Mining Statute Amendment Act 1872" (No. 446,) Sec. 7.]—The provision in Sec. 7 of Act No. 446, prohibiting certain mining companies from entering into a tribute agreement, unless with the sanction of a general meeting of the shareholders, makes it incumbent upon a person entering into such an agreement with the manager or directors to inquire whether such sanction has been duly given. *Chun Goon v. Reform G.M. Coy.*, 8 V.L.R. (E.,) 128, 151; 3 A.LT., 81.

And Sec. 131 of Act No. 409, which prohibits letting on tribute without the sanction of the shareholders, only applies to a demise of the land. *Ibid.*, p. 151.

Company—Registered under No. 228—Power to Mortgage—Past Debt.]—A mining company, registered under the Act No. 228 ("*Mining Companies Limited Liability Act,*") possesses only the powers given by that Act; and in consequence is unable to mortgage its plant, &c., for a past debt, the Secs. of the Act (21, 25) relating to mortgaging only giving power to mortgage for present advances. *M'Kean v. Cleft in the Rock G.M. Coy.*, 5 W.W. & A'B. (L.,) 42.

[Compare Secs. 47, 48, of Act No. 409.]

Mortgage to Secure Past Debt—Liability.]—It is not competent for a mining company registered under the Act No. 228 to mortgage its plant and tools of trade to secure a past debt, and if they do give such a mortgage they cannot be held liable to pay the amount of the debt, either upon an express or an implied covenant in the mortgage deed. *Commercial Bank of Australia v. Grassy Gully Coy.*, 2 V.R. (L.,) 23. 2 A.J.R., 18.

[Compare Secs. 47, 48 of Act No. 409.]

Mortgage—Act No. 228.]—Where a mining company incorporated under the Act No. 228 mortgaged their plant, &c., by bill of sale, and part of the consideration expressed in the bill had been previously advanced; but the residue was advanced subsequently to the bill being given. *Held* that the mortgage was valid. *Commercial Bank v. M'Donald*, 2 V.R. (L.,) 211; 2 A.J.R., 120.

[Compare Secs. 47, 48 of Act No. 409.]

Resolution Authorising Borrowing—Act No. 228, Sec. 25—Future Advances.]—A resolution of an extraordinary meeting of a mining company, authorising the directors to borrow, and execute necessary securities, would (but for the Act No. 228 Sec. 25, repealed by No. 409) authorise a mortgage to a bank for a past overdraft and future advances; such mortgage is good as to future advances, and, in subsequent dealings, the bank is at liberty to apply the receipts from the company, to repayment of the past debt. *United Hand-in-Hand and Band of Hope Coy. v. National Bank of Australasia*, 2 V.L.R. (E.,) 206.

[Compare Secs. 47, 48 of Act No. 409.]

Bill of Sale—Act No. 409, Sec. 48.]—A bill of sale given by a mining company over certain property is binding against the company under Sec. 48, although no extraordinary meeting was called to authorise it. *Campbell v. Hassan*, 5 A.J.R., 135.

And a bill of sale sealed by the company's seal is binding under the Act No. 409, sec. 48, although not affixed in the presence of two directors as required by the rules. *Newey v. Rutherford*, 3 V.L.R. (L.,) 340; *see ante column* 230.

(6) *Increase of Capital.*

Notice of—Act No. 228, Sec. 24.]—The provisions of Sec. 24 as to increase of capital are only mandatory and not directory, and therefore where a defendant in an action for calls objected that no written notice of the increase of capital had been given according to the provisions of that section, *Held* that he was liable. *Robin Hood G.M. Co. v. Stavely*, 4 W.W. & A'B. (M.,) 26.

[Compare Sec. 45 of Act No. 409.]

Rules Increasing Capital after Incorporation—Calls—"Mining Companies Statute," No. 228, Sec. 39.]—By Sec. 39 of the "*Mining Companies Statute*" (No. 228,) rules can only be altered after incorporation by an extraordinary meeting duly convened. When therefore the capital of a company was increased by a rule made at an extraordinary meeting not duly convened, *Held* that the company could not sue for calls made in respect of such increased capital. *The A1 G.M. Coy. v. Stackpoole*, 4 A.J.R., 170.

[And *see* Sec. 44 of Act No. 409.]

(7) *Calls.*

(*a*) *Making Calls and Liability thereon.*

Calls to be Paid on an Impossible Day.]—Where a notice was advertised to the effect that "unless calls were paid on Thursday, 31st June," shares would be forfeited, *Held* that the notice was insufficient as fixing an impossible day. *Wood v. Freehold United Coy.*, 1 V.R. (E.,) 168; 1 A.J.R., 173.

Notice of Making Calls.]—*See Solomon v. Collingwood Q.M. Coy.*; *Clunes and Blackwood Coy. v. Coulter*; *and Goldsbrough Mining Coy. v. M'Bride*, *ante columns* 157, 158.

Making of Calls—When Made.]—Calls are made when the resolution is passed, not when the call is payable. *Hodgson v. Fermoy G.M. Coy.*, *ante column* 158.

And *see Cushing v. Lady Barkley G.M. Coy.*, *ante column* 158, as to verbal direction as to time and place of payment.

Making of Calls—Directors must be Duly Elected and Qualified.]—*Highett v. Sun Q.M. Coy.*, *ante column* 1023; *Barfold Estate G.M. Coy. v. Klingender*, *ante column* 148.

It is not enough that a call be made by directors *de facto*, the directors to be competent to make such a call must be directors *de jure* as well. *Schmidt v. Garden Gully Coy.*, 4 A.J.R., 66, 137.

Payment of Call.]—*See Umphelby v. Wilkie*, *ante column* 159.

Object of Call—Payment of Debt.]—Directors have power to make a call for the payment of a debt. *M'Lennan v. Myrtle Creek G.M. Coy.*, *ante column* 1020.

Liability for Calls—Transferee Cannot Object to the Invalidity of Forfeiture.]—*Jones v. Star Freehold Coy.*, *ante column* 160. And *see Guthridge v. Gippslander Coy.*, *ante column* 1020; and *Creswick Grand Trunk Coy. v. Rowell*, *ante column* 156.

(*b*) *Enforcement of Calls.*

(*i.*) *When the Company is still in Existence.*

Act No. 409.]—Act No. 409 is not, except as to winding up, retrospective, and does not apply to companies registered under No. 228 so far as the provisions for enforcement of calls are concerned. *Regina v. McDougal, ex parte Baillie*, 3 V.R. (L.,) 66; 3 A.J.R., 40.

But *see Chun Goon v. Reform G.M. Coy*, 8 V.L.R. (E.,) 128, 151; 3 A.L.T., 137; in which it was held that all companies registered under Act No. 228 and not registered as a No Liability Company under the Act No. 409 are by virtue of Sec. 124 of the Act No. 409 brought under the operation of that Act, Part 1, Secs. 1-58.

Act No. 228, Sec. 39—Liability for Calls.]—Where rules were passed at a meeting, not duly convened in accordance with Sec. 39 of Act No. 228, authorising the increase of capital, *Held* that the company could not sue for calls in respect of such increased capital. *The A1 G.M. Coy. v. Stackpoole*, 4 A.J.R., 170.

Act No. 409, Secs. 52-56.]—The justices have jurisdictiou where a suit is brought before them to enforce the payment of calls within twelve months after the call is made, the sixteen days' limit in Sec. 52 only applying to suits in the County Court, and though shares are forfeited under Sec. 54 for non-payment within a fortnight, yet the liability for calls remains until the shares are sold under Sec. 55, the forfeiture not being final as there may be a redemption under Sec. 56. *Guthridge v. Gippslander G.M. Coy.*, 5 A.J.R., 161.

Liability of Shareholder—"Mining Companies Act 1871," Secs. 52, 54.]—So long as the name of a shareholder in a mining company appears on the register of shareholders he is liable to have payment of calls not more than twelve months old enforced against him by justices, though the calls be more than fourteen days old, jurisdiction in the matter being given to justices by Sec. 52 of the "*Mining Companies Act* 1871" (No. 409), and Sec. 54 of the same Act not operating to forfeit the shares by non-payment of calls, but leaving the directors an option of suing for calls instead of enforcing the forfeiture. *Regina v. M'Gregor, ex parte Wilkinson*, 6 V.L.R. (L.,) 167, 2 A.L.T., 4; *sub nom. Ex parte Wilkinson.*

Duties of Justices on Complaints for Calls.]—On a complaint for calls it was contended as a defence that the statutory provisions, as to notice of a meeting to increase capital in respect of which the calls accrued, had not been complied with, and the justices acceded to this and

dismissed the complaint. *Held* that they ought not to embarrass themselves with such considerations. *Creswick Grand Trunk Coy. v. Rowell*, 2 A.J.R., 35.

Including Calls in One Complaint—Act No. 267, Sec. 73.]—The Court held an objection that there must be a separate complaint for each call and a separate order fatal. *Ogier v. Ballarat Pyrites Coy.*, 4 W.W. & A'B. (L.,) 245.

But in *Guthridge v. Gippslander G.M. Coy.*, 5 A.J.R., 161; and in *Regina v. McGregor, ex parte Wilkinson*, 6 V.L.R. (L.,) 167, 2 A.L.T., 4; the Court *held* a company might sue for several calls under one complaint.

(ii.) *When Company is Wound-up.*

Suit for Calls by Liquidators and Official Agents.]—*See* cases collected *post columns* 1038, 1039.

(8) *Suits and Actions by and against Companies.*

Suit by — Appearance — Appointment under Seal.] — Where an incorporated mining company (under the "*Mining Companies' Act* 1871") is complainant in a Warden's Court, it must appear either by a barrister or an attorney appointed under seal, though it is not necessary that such appointment should appear on the face of the summons. *Clarence United Coy. v. Goldsmith*, 8 V.L.R. (M.,) 14; 3 A.L.T., 147.

Company Suing in a Name Different from its Registered Name.]—*Iredale v. Guiding Star G.M. Coy., ante column* 162. But now *see* Act No. 409, Sec. 9.

Service of Plaint upon Company—"County Court Statute 1869," Sec. 122—"Common Law Procedure Statute 1865," Sec. 91.]—Service upon a mining company registered under the Act No. 228, of a plaint summons, may, under the joint operation of the "*County Court Statute* 1869," Sec. 122, and the "*Common Law Procedure Statute* 1865," Sec. 91, be effected by service upon the manager, even though he be not at the registered office of the company as required by Sec. 14 of Act No. 409. *Porter v. Leviathan Coy.*, 2 V.L.R. (L.,) 228.

Service of Summons on Company—"Mining Companies Act 1871," Sec. 14.]—A summons to a mining company, registered under the "*Mining Companies Act* 1871," was delivered to the manager personally at an office other than the registered office of the company, in a registered letter addressed to him at such other office. *Held* good service of the summons. *Regina v. Lawlor, ex parte Lone Hand G.M. Coy.*, 8 V.L.R., (L.,) 207.

And *see* generally cases *ante columns* 161, 162, *et seq.*

(9) *Winding up.*

(*a*) *General Principles.*

Validity of Rules as to Winding-up.]—A company registered under Act No. 228 cannot provide by rules passed either before or after incorporation, for winding-up in a different mode from that contemplated by that Act; and such a company cannot, by resolution of the shareholders, validly sell the whole of its property, and thus virtually wind itself up in a manner different from that authorised in the Act. *Creswick Grand Trunk G.M. Coy. v. Hassall*, 5 W.W. & A'B. (E.,) 49, 81.

Rules made by a company registered under Act No. 228 providing for winding-up otherwise than as the Act contemplates are *ultrâ vires*. A valid resolution to wind up can only be adopted at an extraordinary meeting summoned in accordance with that Act. *Tommy Dodd Coy. v. M'Clure*, 1 V.L.R. (L.,) 237.

[Compare Sec. 59 of Act No. 409.]

A company registered under the Act No. 228 cannot be wound-up under the "*Companies Statute* 1864." *In re Collingwood Q.M. Coy.*, 5 W.W. & A'B. (E.,) 190.

Act No. 228—Act No. 409, Sec. 112—Voluntary Winding-up.]—A dividend due by a company upon shares improperly forfeited is a debt for which a shareholder can sue, and the existence of such a debt owing by the company prevents its being wound up voluntarily under Sec. 112 of Act No. 409. *Tommy Dodd Coy. v. M'Clure*, 1 V.L.R. (L.,) 237.

(*b*) *Petition and Practice.*

Proof of Debt Incurred by Directors—Authorisation of Company not Necessary.]—The directors of a mining company incurred a debt to a bank, which, upon the winding-up of the company, proved its debt in the Court of Mines. The official agent and other creditors opposed the proof on the ground that the debt had been incurred by the directors without the sanction of the general body of the shareholders. On rule *nisi* for a *certiorari* to quash the order allowing the proof, *Held* that it was premature to object to proof of the debt, and that the ultimate battle might yet be fought on the question whether this debt should be paid as against the general body of the creditors. *In re Tyson's Reef Coy.*, 3 W.W. & A'B. (L.,) 162.

Debt for which Shareholders may Sue—What is —Dividend.]—*See Tommy Dodd Coy. v. M'Clure, supra.*

What Constitutes a Good Debt.]—The A. Bank had made advances to a company, and, with the sanction of a meeting of shareholders not regularly convened under Sec. 23 of the Act, transferred this overdraft to the C. Bank. The C. Bank presented a petition for the winding-up of the company. *Held*, by the Privy Council, reversing the Supreme Court [*Regina v. Bowman, ex parte Willan*, 3 V.R. (L.,) 258; 3 A.J.R., 22,] that the overdraft so transferred constituted a good debt, it not being incumbent on the C. Bank to show that all proceedings of the mining company and its shareholders *inter se* had been strictly regular before it advanced the money. *Colonial Bank v. Willan*, 5 L.R. P.C., 417; 43 L.J. P.C., 39; 5 A.J.R., 53.

Stale Demand—Act No. 345, Sec. 93—Act No. 409, Sec. 71.] — In December, 1873, a bank recovered a judgment in the County Court against a company, and in August, 1878, removed such judgment to the Supreme Court under Sec. 93 of the Act No. 345, and issued a writ of *fi. fa.*, which was returned unsatisfied. In September, 1878, the bank petitioned for the winding up of the company, but the District Judge dismissed the petition on the ground that the removal did not revive the judgment. *Held* that the combined effect of Sec. 93 of Act No. 345, and of Sec. 71 of Act No. 409, was that the removal to the Supreme Court did not create a new debt, but was only a means of enforcing a remedy for the original debt, and that, therefore, the petition was not based upon a judgment obtained within the previous year (as under Sec. 71 of No. 409,) and was properly dismissed. *Commercial Bank v. Hope Tribute Coy.*, 5 V.L.R. (M.,) 1; followed in *Watson v. Commercial Bank*, 5 V.L.R. (M.,) 36; 1 A.L.T., 94.

Signature of Petition.]—It is not necessary for *creditors petitioning* for a winding-up order to sign the petition when the petition is verified by affidavit. *Osborne v. Gaunt*, 3 A.J.R., 47.

[Compare Sec. 62 of Act No. 409.]

Act No. 409, Sec. 61—Proof of Service of Petition.]—An order was made for winding up a company; it did not appear that seven days' notice of the application had been given, except that the order recited that it was made upon reading the affidavit of a person who swore he had served the company. *Held* that the order was bad, that proof of service could not be made by affidavit under Sec. 61. *Garrett v. Creeth*, 5 A.J.R., 36.

Act No. 228, Sec. 28 — Service of Notice of Petition.]—Service of notice of petition under Sec. 28 of Act No. 228 at the office of a company which has become defunct is good service. *Colonial Bank v. Willan*, 5 L.R., PC., 417, 5 A.J.R., 53; overruling *Regina v. Bowman, ex parte Willan*, 3 V.R. (L.,) 258; 3 A.J.R., 22.

Service of Notice of Petition—Act No. 409, Sec. 15 — Company Defunct — Publication in "Gazette."]—Where a company has delivered up all its books and papers to the Clerk of the Court of Mines, and its name plate is removed from the door of the registered office, it may for all practical purposes be deemed to be defunct, so as to justify publication of notice of petition for winding up in the *Gazette* under Sec. 15 of the Act No. 409, even although the registration of its office has not been cancelled. *Regina v. Leech, ex parte Tolstrup*, 5 V.L.R. (L.,) 494; 1 A.L.T., 109.

Service of Petition.] — A petition for the winding up of a mining company is sufficiently served by being served at the place registered as the office of the company in the office of the Registrar-General. *Smith v. Australian and European Bank*, 8 V.L.R. (M.,) 23; 4 A.L.T., 26.

Costs—Jurisdiction of Court of Mines to Award—Act No. 228, Secs. 29, 30—Act No. 324, Secs. 3, 10—Act No. 291, Sec. 230.]—*Regina v. Bowman, ex parte Willan, see ante column* 981, and *see Walker v. Jenkins, post column* 1033.

(c) *Official Agents and Liquidators—their Appointment and Powers.*

Appointment of Liquidator—Proxies—Act No. 409, Sec. 74.]—Where after a company had been wound up, one person holding proxies for two creditors constituted the meeting of creditors for the appointment of a liquidator. *Held* that the appointment of a liquidator by that person was good. *Regina v. Cogdon, ex parte Hasker*, 3 V.L.R. (L.,) 88.

The appointment of a liquidator at a meeting of creditors composed of one person holding proxies for two creditors is good. *Regina v. Leech, ex parte Tolstrup*, 5 V.L.R. (L.,) 494.

Appointment and Removal of Liquidator — Sanction of Court—Creditors' Meetings—Act No. 409, Secs. 74-78.]—A liquidator cannot be appointed except by the sanction of the Court under Sec. 75, and should only be removed after he has had an opportunity of being heard both by the creditors in their meeting and before the judge whose sanction for his removal is requested; the effect of Secs. 74-78 is that the sanction of the Court is required for his removal. Where a meeting of creditors appeared to be a fraudulent scheme to substitute one liquidator who was not to give security in place of one who had given security, and to carry out such a project against the wishes of another creditor who had a larger interest than those who actually voted, the Chief Judge affirmed the district judge's refusal to sanction the removal of the old liquidator and the appointment of a new one. *Rigby v. Hasker*, 5 V.L.R. (M.,) 32; 1 A.L.T., 88.

Appointment of Liquidator of a Mining Company—Judgment for Work and Labour Done—18 Vict. No. 42, Sec. 14—No. 56, Sec. 63.]—A Court of Mines, by virtue of Sec. 14 of No. 42, may, upon judgment recovered in the County Court against a mining company, and upon complaint of a creditor that such judgment is unsatisfied, appoint a liquidator, but Sec. 63 of the Act No. 56 does not give such court jurisdiction to pronounce judgment against a mining company "for work and labour done and materials supplied, and for interest due and payable upon an account stated;" and such a judgment is not a judgment on the basis of which, if unsatisfied, a liquidator to wind up the company can be appointed by the Judge of a Court of Mines. The proper course is for the judgment to be recovered in the County Court, and for the Court of Mines to appoint the liquidator. *Wilson v. Broadfoot*, 1 W. & W. (L.,) 214.

Power to Sue for Capital Subscribed for—18 Vict. No. 42—11 and 12 Vict. c. 43, Sec. 11.]—B. was appointed, by order of the Court of Mines, a liquidator of a company. O'F. was a subscriber to and shareholder in the company. B. sued O'F. by summary plaint before magistrates for "the balance of subscribed capital due from

O'F., which sum did not include any call." *Held*, reversing the magistrates, who had nonsuited the plaintiff, that the suit being for capital and not calls, and as the manager of the company could not have sued for capital, the cause of action arose after B.'s appointment; and, as proceedings were instituted within six months, B. was entitled to sue. Nonsuit set aside. Verdict for plaintiff. *Broadfoot v. O'Farrell*, 2 W. & W. (L.,) 102.

[Compare the provisions of Secs. 98–101 of Act No. 409.]

Power to Sue for Calls.]—*See* cases *post column* 1038, under Calls—Enforcement of.

Official Agent—Right to Sue for Accounts—Act No. 324, Sec. 6.]—A mining company, registered under the Act No. 228, and mining on private property alienated from the Crown, was ordered to be wound up. R. was appointed official agent. Previous to the order for winding-up, the company had been sequestrated by order of the Court for breach of an injunction. R. brought a suit against the directors and managers of the company charging them with misappropriation of the gold raised and other assets, with mutilating and concealing account-books, and with improper payment of dividends to certain shareholders out of borrowed moneys and not out of profits; and praying for accounts, declaration, and enforcement of liability. *Held*, upon demurrer, for want of equity in R., by Full Court, affirming *Molesworth, J.*, that R., as official agent, had a right and an equity to bring the suit, under the Act No. 324, Sec. 6, in his own name, as representing the company, and that the sequestration was no bar to his right, the assets of the company not having come into the possession of the sequestrators. *Reeves v. Croyle*, 6 W.W. & A'B. (E.,) 302.

[Compare provisions of Sec. 89 of Act No. 409.]

Mining Company—Act No. 228, Sec. 33—Duty of Official Agent as to Resisting Proof of Debts—As to Enforcing Contributions from all Shareholders.]—Bill by S. and five other shareholders in the B. company against the manager, other shareholders, and C., the official agent, alleging proof by defendant shareholders of debts not really due, and collusion between such shareholders and C., and seeking a declaration that such proof of debts should be expunged, and that defendants should be liable to contribute. *Held*, on demurrer, that Sec. 33 of Act No. 228 does not expressly direct that official agents shall have the same powers and duties as official assignees under "*Insolvent Acts*" Nos. 17 and 19, and those Acts did not impose on assignees the duty of resisting proof of debts, and that a case of collusive omission was not proved against C. to subject him to the jurisdiction of a Court of Equity as for a breach of trust; that the Court had no power to enforce contribution; and that where the defendants had had their debts allowed by a District Court of Mines, and no appeal was made, a Court of Equity has no jurisdiction to review such allowance. Demurrer allowed. *Semble*, an official agent conclusively enforcing contributions from some, and omitting to do so in case of others, would be ground for a Court of Equity to compel him to bear the loss, and perhaps to enforce contributions. *Smith v. Seal*, 3 A.J.R., 8.

[Compare Sec. 95 of Act No. 409.]

Powers of Liquidator's Successor—No. 324, Sec. 8.]—Under Sec. 8 of the "*Mining Companies Limited Liability Amendment Act*" (No. 324,) a suit for contribution which has been commenced by an official agent may be continued by his successor, without entering any suggestion of the change. *Selfe v. Simpson*, 2 V.R. (L.,) 99; 2 A.J.R., 63.

[Sec. 8 of Act No. 324 has been repealed and re-enacted by Sec. 80 of Act No. 409.]

Official Agent—Contract by.]—A contract by an official agent appointed under Sec. 6 of the Act No. 324, to give a person whom he is suing for contribution time until the proceedings against the other shareholders have been determined is not *ultra vires*, and the succeeding official agent may, by virtue of Sec. 8 of the Act, sue on the contract. *Hasker v. Schlesinger*, 4 A.J.R., 186.

(*d*) *Winding-up Order.*

County Court Judge's Order—18 Vict., No. 42, Secs. 2 and 3.]—An order for winding-up a mining company made by a County Court judge, appointing a creditor to sue for unpaid calls under Act No. 42, Secs. 2 and 3, omitted the words "and to do all other acts which may be necessary to carry out the provisions herein contained." *Held* that it was a sufficient compliance with the Act to render the appointment of a creditor good, and to entitle him to sue for calls. *In re Harrison*, 1 W. & W. (L.,) 47.

[Sec. 90 of Act No. 409 gives the liquidator power to sue for calls.]

Order based upon County Court judgment—18 Vict., No. 42, Sec. 14.]—B. recovered judgment against the A. company, for goods delivered, in the County Court, and an order was made by the Court of Mines, based upon that judgment, winding up the A. company, and appointing B. liquidator; B. then sued W. for a debt due in respect of his shares and recovered a verdict in the County Court. The order for winding up was based upon an affidavit showing that an office copy of judgment had been served on the manager, and that judgment had been unsatisfied for seven days, but no process or warrant of execution had issued. *Held* that the judgment of the County Court was such a judgment as is contemplated in 18 Vict., No. 42, Sec. 14, and that Sec. 14 contemplates that process and not judgment should be served in order for such judgment to be the basis of a winding-up order, and that as no process had been served and seven days could not have elapsed since service of process, the order was invalid, and B. was not entitled to sue. *Wilson v. Broadfoot*, 2 W. & W. (L.) 96.

[Compare Sec. 60 (ii.) of Act No. 409.]

Conditional Order Bad under Act No. 228, Secs. 30, 31.]—An order for winding up a mining company directing the company to pay a debt or give security by a day named; and by which in default of making payment or giving security the company was ordered to be wound up, is bad, the "*Mining Companies Limited Liability Act* 1864" (No. 228,) Secs. 30, 31, not authorising a conditional order; and an official agent appointed by such an order cannot sue the shareholders for contribution. *Haigh v. Hart*, 3 W.W. & A'B. (L.,) 123.

[N.B.—Sec. 64 of Act No. 409 does not give the judge power to make an order as for payment of debt, but authorises him either to grant the prayer for winding up or to dismiss the petition.]

Act No. 228, Secs. 30, 31—Evidence Necessary to give Jurisdiction.]—An order by the Judge of the Court of Mines winding up a company was made "upon hearing the petition herein and the order made herein, and upon reading the affidavit of H. and upon hearing the petitioner's attorney." The liquidator appointed sued a shareholder in respect of unpaid capital, viz., his contribution towards his shares in "additional capital," and recovered from a magistrate an order for payment. *Held*, on appeal, that, there being no evidence of the sanction of the majority in number and value for the increase of capital, as required by Secs. 30 and 31, the order for winding up was bad, as it made no attempt to show the matters necessary to give jurisdiction. Magistrates' decision reversed. *Campbell v. Carver*, 4 W.W. & A'B. (L.,) 48.

[Compare Sec. 64 of Act No. 409.]

Order Good as to Part—Bad as to Part.]—It is beyond the jurisdiction of a Judge of the Court of Mines to give costs in the order for winding up a mining company under the Act No. 228, Sec. 31; but where such an order gave costs and was otherwise valid, the Court treated the part giving costs as surplusage, and allowed the rest to stand. *Walker v. Jenkins*, 1 V.R. (L.,) 9; 1 A.J.R., 25.

Where an order for winding up was bad on its face as showing no jurisdiction, a second order was allowed to be made without an order to set aside the first order, the petitioner being held justified in treating the first order as a nullity. *Reeves v. Bowden*, 6 W.W. & A'B. (L.,) 218; N.C., 17.

An order to wind up a mining company under the Act No. 228, recited that a judgment had been recovered against the company; that execution had been issued, but not satisfied; that the judgment creditor presented a petition to wind up, setting forth the facts already recited; that the company had been duly served with the petition and did not appear; but the order did not recite the anterior proceedings at length. *Held* that the order set out sufficient facts to show jurisdiction. *Davies v. Cooper; Adair v. Cooper*, 2 V.R. (L.,) 95; 2 A.J.R., 62.

See Sec. 66 and Sched. V. of Act No. 409.

Signature of Judge to Order—Evidence Statute, Sec. 54.]—The Court can take judicial notice, under Sec. 54 of the "*Evidence Statute*" (No. 197,] of the signature of the Judge of a District Court of Mines to an order for winding up a mining company under Sec. 31 of No. 228, where the judge has merely signed his name, without describing himself as "Judge of the said Court of Mines." *Walker v. Jenkins*, 1 V.R. (L.,) 9; 1 A.J.R. 25.

Order in Schedule V. of Act No. 409, Sec. 66, for What Intended.]—The form of winding-up order in Schedule V. of the "*Mining Companies Act* 1871" (No. 409,) is intended for cases in which the company is petititoner or appears. On appeal, *Held* that such an order may be made *exparte*, and if made in the scheduled form is on its face unobjectionable, although it does not show any notice to or appearance by the company wound up. *United Hand-in-Hand and Band of Hope Coy. v. National Bank of Australasia*, 2 V.L.R. (E.,) 206; on appeal, 3 V.L.R. (E.,) 61, 69.

Order under "The Mining Companies Act 1871" (No. 409.]—A judgment creditor of a mining company obtained an order to wind it up under the Act No. 409; but no liquidator was appointed. Subsequently, by an order of the same court, the first order was discharged, and nothing more was done under it. *Held* that if the winding-up order was irregular the Court that made it could set it aside; and that, assuming it to be irregular, since neither the creditor nor any one else had taken any steps under it for the appointment of a liquidator, the right of the company to sue in Equity remained. On appeal, *Held* that such an order may be made *exparte*, and if in the scheduled form it is on its face unobjectionable, although it does not show any notice to or appearance by the company, and decision of Court below affirmed. *Ibid.*

Informal Order—Setting Aside.]—Where an order was made by a District Court Judge winding up a company and objections were taken:—(1) That the petitioning creditor, a bank, was not a creditor, the directors not having authority to contract the debt; (2) That sufficient notice of the application was not given, —the Court granted a rule absolute in the first instance to bring up the order on *certiorari*. *Regina v. Hackett, ex parte Golden Gate Coy.*, 3 A.J.R., 73.

A good winding-up order under the Act No. 409 is the common property of all the creditors and cannot be discharged on the consent of the petitioner. *United Hand-in-Hand and Band of Hope Coy. v. National Bank of Australasia*, 2 V.L.R. (E.,) 206, 210.

Order Bad—Laches in Moving to Set it Aside.]—Winding-up orders only terminate the operations of companies, and their existence is an obstacle to other creditors entitled to obtain such orders doing so. Where, therefore, an order was improperly obtained, but list of creditors and contributories had been settled and it was generally acted upon for two months, when a contributory with full knowledge of the fact applied to set it

aside, the Court refused to set it aside on the ground of his *laches* in applying. *Watson v. Commercial Bank*, 5 V.L.R. (M.,) 36; 1 A.L.T., 94.

Appeal from Winding-up Order—Act No. 291, Sec. 172—Act 409.]—Though Act No. 409 contains no express provision for appealing from winding-up orders, yet it does impliedly in conjunction with Act No. 291—*Semble*, that the limit of time (ten days) in Sec. 172 of No. 291 is not binding in the case of a person affected by an order procured without notice to him. *Ibid.*

It will require a very strong case of irregularity in obtaining the order, and an application should be made with great promptitude, to set aside a winding-up order when it has been made by the proper judge and extensively acted upon, other enforcements of rights suspended, and much trouble and expense incurred under it. *Smith v. Australian and European Bank*, 8 V.L.R. (M.,) 23; 4 A.L.T. 26.

(e) *Contributories.*

(i.) *Who are.*

Where Liability to Contribute arises—Jurisdiction of Justices, Limitation to.]—The liability of shareholders in respect of contributions upon the winding-up of a mining company under the Act No. 228, arises immediately the winding-up order has been made, and the period of limitation of the jurisdiction of justices to order payment begins to run from that time. *Hart v. Garden*, 5 W.W. & A'B. (L.,) 213.

[*See* Sec. 94, Sub-sec. i. of Act No. 409.]

Where Liability to Contribution arises—No. 228, Sec. 36.]—The commencement of the winding-up of a mining company under the Act No. 228, Sec. 36, dates from the presentation of the petition, and not from the date of granting the order; and a shareholder who has parted with his shares between the presentation of the petition and the granting of the order is liable to contribute in respect of such shares. *Reeves v. Millsom*, 1 V.R. (L.,) 15; 1 A.J.R. 28.

[Compare Sec. 94, Sub-sec. i., of Act No. 409.]

Executors of Deceased Shareholders—No. 228, Sec. 37.]—Under Sec. 37 of the "*Mining Companies Limited Liability Act* 1864" (No. 228,) executors of a deceased shareholder cannot be sued at petty sessions for contribution in respect of shares held by their testator at the time of his death in a mining company registered under the Act and being wound up under it. The section confines the power to enforce payment of contribution to the case of present shareholders only, and it cannot be extended to the representatives of a deceased shareholder. *Cooper v. Bath*, 2 V.R. (L.,) 136; 2 A.J.R., 86.

[But *see* now Sub-sec. ii. of Sec. 94 of Act No. 409.]

Liability of Past Sharsholder—Question for Magistrates.]—Sec. 36 of No. 228 enacts that past shareholders of a mining company shall not be liable to contribute unless present shareholders are unable to pay or cannot be found. In an action by the official agent of a mining company against a past shareholder for contribution, it is a question of fact for the decision of the magistrates whether the present shareholders of the company could or could not be found. *Reeves v. Ninham*, 1 V.R. (L.,) 100; 1 A.J.R., 90.

[There appears to be no analogous enactment in Act No. 409, the contributories being defined in Sec. 94.]

Liability of Transferor—Transfer of Shares not Registered.]—A shareholder in a mining company incorporated under the Act No. 228, had paid his calls by allowing, under an arrangement with the manager, a debt due to him by the company for goods to stand against the amount of calls, and had subsequently transferred his shares *bonâ fide*. The transfer was executed by him, and transmitted to the directors for registration with the necessary fee; but the directors, without due cause, omitted to register the transfer. The company was wound up, and the official agent sued the shareholder for unpaid capital on his shares. *Held*, that the defendant was not liable as a shareholder as regards the shares transferred. *O'Donovan v. O'Farrell*, 5 W.W. & A'B. (L.,) 169.

[Act No. 409, Sec. 94, Sub-sec. i., only regards as contributories those who at the time of presentation of the petition are registered shareholders.]

Transfer of Shares—Liability of Transferor.]—A shareholder cannot, when the company is unable to pay dividends and calls are due by surrendering his shares, escape liability to contribution, even though the transfer be *bonâ fide*, and recognised by the company. *Reeves* v. *Highett*, 1 V.R. (L.) 110; 1 A.J.R., 84. *S. P. Reeves v. Bonneau*, 1 A.J.R., 116.

And the fairness and *bona fides* of the transfer are matters for the magistrates acting as jurymen to consider. *Reeves v. Bonneau*, 1 A.J.R., 116.

Transfer of Shares—Cessation of Liability.]—In the absence of any proof of a rule of a mining company registered under Act No. 228, that transfers are not to be recognised until passed by the directors, a shareholder who has transferred his shares, such transfer having been accepted by the transferee more than three months before the petition for winding up, but not having been passed by the directors till within that period, ceases to be liable for contribution from the date of the transfer. *Jones v. Simpson*, 2 V.R. (L.,) 96; 2 A.J.R., 63.

(ii.) *Enforcement of Contribution.*

Issuing Distress Warrant under No. 228, Sec. 38—Affidavits.]—A justice, before issuing a distress warrant for contribution under Sec. 38 of the "*Mining Companies Limited Liability Act*" (No. 228,) without a summons to show cause, must be satisfied that the money was required for the payment of the company's

debts; and the affidavit in support of an application for a rule *nisi* to compel a magistrate to issue such a warrant must state the proceedings in the Police Court, it not being sufficient to state that the magistrate was satisfied that the money was required for payment of the debts. *Regina v. Gaunt*, 1 A.J.R., 36.

[Compare Sec. 101 of Act No. 409 as to present provisions for enforcing contribution.]

Distress for Calls—No. 228, Sec. 38.]—A distress warrant for non-payment of calls under Sec. 38 of the "*Mining Companies Act*" (No. 228,) cannot be issued without the previous issue of a summons upon the shareholders to show cause. *Smith v. Cogdon*, 4 A.J.R., 76.

S.P.—*See Bradley v. Creeth*, 4 A.J.R., 92.

[Compare Secs. 95—102, of Act No. 409.]

Contribution, Suing for—Unpaid Calls—Condition Precedent.]—On the winding-up of a mining company, certain calls previously made remained unpaid, and the official agent sued the holder of the shares, on which the calls were unpaid, for contribution. Sec. 36 of the Act No. 228 provides that no contributions shall be recovered by the official agent exceeding the amount unpaid on shares. *Held* that suing for the unpaid calls was not a condition precedent to suing for contribution; that the company being in liquidation, an action for calls would be improper; that it was impossible that defendant could be vexed by a second action for calls; and that the official agent might recover the amount unpaid as for contribution. *Simpson v. Hunt*, 2 V.R. (L.,) 54; 2 A.J.R., 44.

[Compare Secs. 90, 94, and 95 of Act No. 409.]

Suit by Official Agent for Contribution—Title to Sue.]—Where an official agent of a mining company incorporated under the "*Mining Companies Act*" (No. 228), who was appointed under a winding-up order made under the "*Amending Act*" (No. 324,) Sec. 6, sued for contribution and did not expressly allege that the company was registered under the Act No. 228, *Held*, on demurrer, that such an allegation was not necessary. *Hasker v. Schlesinger*, 4 A.J.R., 186.

Settling List of Contributories — Objection to Winding-up Order—Act No. 409, Sec. 97.]—On an application to settle the list of contributories under Sec. 97 by the liquidator of a mining company, an order to wind-up which has been made, the judge ought not to entertain objections to the validity of the order for winding-up. *Regina v. Trench, ex parte McDougal*, 6 V.L.R. (L.,) 309; 2 A.L.T., 60; *sub nom. Ex parte McDougal.*

Notice to Contributories—Act No. 409, Secs. 96-99.]—Although Sec. 99 as compared with Secs. 96-98 seems to require contributories to pay on a past day and before list of contributories has been settled, yet if the contributory has had reasonable notice he must pay. The list of contributories was advertised under Sec. 96 on 16th September, and the order for payment under Sec. 98 was made 18th October. On 19th October, notice was served upon the contributory (H.) requiring him to pay within ten days after 16th September in accordance with the provisions of Sec. 99. On 29th October the liquidator applied to a magistrate for a distress warrant, which was refused. *Held* that H. having had a longer notice than that prescribed by the Act was liable, and rule absolute for a *mandamus* to compel issue of distress warrant granted. *Regina v. Cogdon, ex parte Hasker*, 3 V.L.R. (L.,) 88.

Suit for Contribution—No Set-off.]—W. was sued by B., the official agent for contribution, and set-off a promissory note for £205 due to him by the company and unpaid. *Semble* that there could be no set-off under Act No. 228, and *Held* that even if there could be the justices had no jurisdiction in the matter of a set-off for £205. *Wynne v. Barnard*, 5 W.W. & A'B. (L.,) 35.

[*See* Secs. 100 and 101 of Act No. 409.]

(*f*) *Calls—Enforcement of.*

Who may Sue for.]—The official agent of mining company registered under the Act No. 209 is the proper person to sue for calls due on shares when the company is being wound up, and he may recover summarily before justices. *In re Mackenzie*, 1 W. & W. (L.,) 135.

Suing for Calls.]—A mining company which has been wound up before the date of a summons requiring a shareholder to pay calls, cannot be made plaintiff in the summons *Regina v. Gaunt, ex parte Turner*, 2 A.J.R., 106.

Suing for Calls—"Mining Companies Statute 1871" (No. 409), Sec. 105]—A mining company in course of being wound up under the "*Mining Companies Statute* 1871" cannot sue for calls. The proper person to sue for such calls is, by virtue of Sec. 105 of the Statute, the official liquidator. *Great Northern Coy. v. Maughan*, 4 A.J.R., 161.

Suing for—Limitation—11 and 12 Vict. Cap. xliii., Sec. 11.]—An order was made, under 18 Vict. No. 42, Sec. 14, to wind up a mining company, and the person appointed to wind up the company sued the shareholders summarily before justices for calls. An objection was raised that the limitation of six months in "*Jervis' Act*" (11 and 12 Vict. cap. xliii.,) Sec. 11, applied, and that the complaint upon which the summons was founded, not having been made within six calendar months from the time when the calls became due, the calls could not be recovered summarily before justices. *Held* (*dissentiente Molesworth, J.,*) that the calls sued for were substantially the same thing and might have been recovered in the same summary manner by the manager of the company during its existence, and therefore that the period of limitation (six months) which began against the manager ran on against the person appointed to wind up, and that the latter could not sue after the former

would be barred. *Melville v. Higgins*, 1 W. & W. (L.,) 306.

[But *see* Sec. 90 of Act No. 409.]

Recovery of Calls—Liquidator—"Mining Companies Act 1871" (No. 409), Secs. 52, 90.]—Upon the winding-up of a mining company registered under the Act No. 228, the official liquidator may, under Sec. 90 of the "*Mining Companies Act* 1871," recover in a County Court calls made by the company before winding up in the same manner as the manager of the company might have done had the company continued, and he is not subject to the limitation imposed on the latter by Sec. 52 of the latter Act, of suing within fourteen days after the call is made. *Hasker v. Bride*, 4 V.L.R. (L.,) 460.

Payment of Calls cannot be Enforced in Equity.]—In a suit by the official agent of a company seeking to recover calls due on shares in the names of the directors and manager, or in those of their nominees, *Held* that the payment of calls could not be enforced in a suit in Equity. *Reeves v. Croyle*, 2 V.R. (E.,) 42, 48; 2 A J.R., 13.

Enforcement of Payment of Calls Recovered by a Company before it was Wound Up.]—A company obtained a judgment in 1869 for calls, in 1870 it was wound up, and an official agent appointed. Judgment was signed, and execution issued in 1871, but there was no entry of a suggestion of the appointment of the official agent. *Held* that the omission was fatal, and that the execution should be set aside. *Barfold Estate G.M. Coy. v. Davies*, 2 V.R. (L.,) 154; 2 A.J.R., 97.

Where a shareholder has paid certain calls to the directors he cannot be compelled to pay them a second time to the official agent. *Reeves v. Brown*, *ante* column 159.

MISTAKE.

Concurrent Jurisdiction of Equity.]—M. and Y. being in partnership, agreed to divide their land on the assumption that M.'s portion was worth £700 more than Y.'s, and that Y. should in the division of assets, get the whole benefit of this excess. The portions were valued, and M.'s portion appeared to be worth £655 10s. more than Y.'s. Y. purchased from M. part of his share for £461, and on the deed of partition being executed, M. paid to Y. the balance of the £655 10s. On suit by M. to have the mistake rectified, and offering to take back the land conveyed to Y. upon a proper adjustment, *Held*, on demurrer to the bill, that a court of law could not do justice to the parties, and that it was a proper question of mistake in which Courts of Equity had concurrent jurisdiction. Affirmed on appeal, chiefly on the ground of M.'s lien on the overpaid purchase-money. *Manson v. Yeo*, 1 W. & W. (E.,) 155, 187, 189.

Relief against, when Granted.]—Equity only interferes in a case of mistake where two parties acting together are honest or each believes the other to be so. *In re Gipps Land Steam Navigation Coy., ex parte Chuck;* 1 V.L.R. (E.,) 141.

Relief against, when Granted.]—At an auction sale B. purchased lot No. 139, and also lot No. 140; but, at the time of sale, agreed to let P. have lot No. 140. The clerk, by mistake, drew up memos. of agreement giving P. lot 139, and B. lot 140, and conveyances were prepared accordingly. B. entered into possession of lot No. 139 and built upon it, and P. entered into possession of lot 140. Afterwards P. conveyed by deed lot No. 139 to two purchasers, one of whom took possession of the corresponding portion in No. 140 and B. similarly sold a house on lot No. 139 to a purchaser, but the conveyance was of a portion of lot No. 140. B.'s vendee sued P.'s vendee to have the conveyances rectified and ejectments restrained. *Held* that notwithstanding the want of privity the plaintiffs were entitled to relief on the ground of mistake, and that plaintiffs were entitled to their proper lot, No. 139, upon showing title to and conveying lot No. 140 to the defendants. *Sutherland v. Peel*, 1 W.W. & A'B. (E.,) 18.

Mistake of Vendee and his Principal as to Lots Purchased—The Fault of the Vendee, but Unintentionally Contributed to by Vendor—Specific Performance Refused at Suit of Vendor.]—*Clarke v. Byrne*, 3 A.J.R., 20; *post* under VENDOR AND PURCHASER — ENFORCEMENT, &C. — SPECIFIC PERFORMANCE.

Relief against, when Granted.]—L. was in occupation of a residence area under the Ballarat Bye-laws, which in December, 1865, the defendant applied to have put up for sale. L. transferred to W. in February, 1866. In July, 1866, the land was advertised for sale in the *Government Gazette*, the value of the improvements being stated at £50, that being their value at a valuation made in February; but W. had, in the meantime, in ignorance of the proceedings to sell the land by the Government, spent £400 in improvements. The defendant bought the land in August, 1866, at the upset price. He paid this at once, and also £50 for the improvements, and obtained the Crown grant. On the evidence, it appeared that the defendant and the Crown were ignorant of the increased improvements, both thinking the improvements were worth £50. On a bill and information by the Attorney-General against the defendant, praying that the sale and the grant to the defendant purchaser might be set aside on the ground of mistake, *Held* that the sale was made and the grant issued on a mutual mistake, and the sale and the grant ordered to be set aside. *Semble*, that the Crown is entitled by information to redress injuries to others, as well as to itself from the wrongful consequence of its own mistakes. *Attorney-General v. Belson*, 4 W.W. & A'B. (E.,) 57.

Relief against, when Granted.]—Plaintiff having two estates, 6A and 1B, and intending to sell 1B; by mistake the other was put up for sale, and the defendant, knowing it to be the most

valuable, purchased it. He did not take possession of it, but asserted his rights to timber removed from the other estate, and subsequently his conduct was not straightforward. Upon bill by plaintiff seeking a reconveyance of the estate, and containing an offer to convey all the other to the defendant, *Held*, *per Molesworth, J.*, that there was no mutual mistake, but that plaintiff was entitled to the reconveyance upon paying defendant his purchase-money with interest at 8 per cent., and his costs of suit. Upon appeal by plaintiff, appeal dismissed without costs. *Ashley v. Cook*, 6 V.L.R. (E.,) 204; 2 A.L.T., 2, 50.

Rectification of Deed on Ground of Mistake.]—*See* cases under Deed, *ante column* 357.

In Issue of Crown Grant.]—Where concealment or mistake as to the issuing of a Crown grant is alleged in the pleading, it should have reference to the mind of the Governor himself, and he, personally, should be described as deceived or mistaken. S. made an application to purchase Crown land, which was refused on the ground that it was auriferous; H. then applied for a mining lease, and a notification of the intention to grant it was published. A company, formed with H.'s consent, commenced to work the land, and afterwards S., knowing this, renewed his application to purchase, which was granted by the Crown Land department in ignorance of the application for the lease. On information by the Attorney-General setting forth the facts, and seeking to set aside the Crown grant as issued to S. in mistake, a demurrer was allowed. *Attorney-General v. Sanderson*, 1 V.R. (E.,) 18; 1 A.J.R., 21.

For meaning of word "error" in the "*Transfer of Land Statute*" *see* cases *post* under TRANSFER OF LAND (STATUTORY).

"Mistake or Error"—Ground for Prohibiting or Quashing Orders of Justices.]—*See* cases, *ante columns* 774, 775.

Rectification of Order—To meet Event not in the Contemplation of Both Parties—Mistake on One Side only.]—*See Williamson v. M'Ravey*, *ante column* 734.

MONEY CLAIMS.

(1) *Money Lent.*

Action for—Where it will not Lie.]—An action for money lent will not lie for money lent by one player to another for the purpose of gambling, though it be admitted that the game was not an illegal one. *Ritchie v. Eckroyd*, 5 W.W. & A'B. (L.,) 98.

(2) *Money Had and Received.*

Action-at-Law against Trustee who has Appropriated Trust Money to Use of Cestui que Trust.]—Y. paid money to G., his attorney, to be divided among Y.'s creditors, who should sign a composition deed. F., a creditor, did not sign, but applied to Y. for payment of a dividend under the deed. Y. told G. to do so. G. did not pay. Y. then applied to G. for an advance, and G. said, "There is F.'s money; it would not be right to give that;" and refused to give it on the ground that he was a trustee for F. F. brought an action for money had and received against G. The County Court Judge refused to nonsuit, and entered a verdict for plaintiff. *Held*, on appeal, that G. had in fact appropriated this money for the use of his *cestui que trust*, and he could be sued at law. Appeal dismissed. *Gresson v. Foster*, 2 W. & W. (L.,) 187.

Against a Warden—Money Paid in "to Abide Event of Appeal."]—M. and others were sued by B. and others for a mining encroachment before the defendant as warden. The defendant decided in favour of B., and ordered certain sums to be paid. M. gave notice of appeal, and on the same day B. issued an execution, and some of M.'s goods were seized under it, along with the mine. M. then went to the warden's clerk and paid into court a sum of £150 to stay the execution, and received a receipt from the clerk. Execution was then withdrawn from the mine, and from M.'s individual property. The appeal was allowed as to M., but dismissed as to others, and the warden made an order for payment out of court of the £150 to B. and others. M. sued the warden for money had and received, and on an account stated. *Held* that M. was not entitled to succeed, the £150 being paid in "to abide the event of the appeal," and the inference being that M. and the others went together to take common luck in the appeal, and if B. succeeded against any of M.'s party he was entitled to the money. *Morganti v. Bull*, 6 W.W. & A'B. (L.,) 134.

For Illegal Purpose—Payment of a Larger Dividend to One Creditor than to the Others.]—At a meeting of creditors of a firm of L. and H., it was arranged that H. should be allowed to purchase back the estate by a composition of 8s. in the £. The defendant bank, as creditors, refused to assent unless H. should pay them 15s. in the £. H. consented to this, and gave the bank bills at 12 months, D. becoming surety. D., to secure himself, obtained an absolute conveyance of some of H.'s land. H. paid the bills, obtained a reconveyance from D. and then sued the bank for the amount of the bills. *Held* that if H. had paid the amount into a bank, he would be entitled to a verdict, he would not have been *in pari delicto* with the defendant bank, but having paid the bills without communicating with D. and without pressure was not entitled to the verdict. Rule absolute for a nonsuit. *Harris v. National Bank*, 6 W.W. & A'B. (L.,) 261; N.C. 72.

Action by Cestui que Trust against Trustee—Trusts not Closed.]—In an action by a *cestui que trust*, who had obtained advances from his

trustees, and had executed a deed assigning to them his interest in monies coming to him under the trusts, upon trust to repay themselves, and also to pay any prior encumbrances, and to pay the balance to him, the *cestui que trust* put in the deed as evidence of his claim. *Held* that since the action ought to have been brought on the deed, and the trusts were not closed, the plaintiff by putting in the deed and showing that the trusts were not closed, had nonsuited himself. *Evans v. Nicholson; Merry v. Nicholson*, 2 V.R. (L.,) 80; 2 A.J.R., 59.

Action by Receiver in an Equity Suit.]—An administratrix who had settled her share of an intestate's estate by a marriage settlement, deposited large sums belonging to the estate at interest in a bank, and obtained advances on the security of her share. In a suit in connection with the intestate's estate a receiver was appointed of the estate; but the administratrix never drew out the money from the account of the estate, nor handed it to the receiver, who did not, consequently, formally re-deposit such money, but the money was treated as the money of the receiver, and a large portion of it was transferred to his account, and the receiver's account was overdrawn to the extent of a portion transferred to a suspense account. The bank subsequently claimed a lien on the residue for the overdraft. The receiver sued the bank for money had and received. *Held* that the transfer by the bank, together with certain letters which passed between the bank and the other parties, were sufficient to fulfil in this case the requirements of this form of action, viz., an ascertained debt due by the administratrix to the receiver, an equal or larger debt due to the administratrix by the bank, and an agreement that the bank should be the receiver's debtor, instead of that of the administratrix; that there was no *quasi* estoppel preventing the bank from denying that it held to the use of the receiver; and that the bank was entitled to charge bank interest on the receiver's overdraft, though at a greater rate than it allowed on the deposit. *Ware v. London Chartered Bank*, 2 A.J.R., 70.

Action Lies to Recover Money Erroneously Paid by Garnishees.]—*Beauchamp v. Nathan, ante column* 63.

Deposit Money Paid to Government for Lease of Turnpike—Failure of Consideration—Breach of Contract.]—*Martin v. Board of Land and Works, ante column* 205.

When Maintainable.]—R. applied to K. for a loan, and K., not being in funds, drew an accommodation bill on R., and, in order to enable him to discount the bill, he handed R. certain shares to be deposited with the person who would advance the money. L. discounted the bill for R., who deposited the shares with him as security not only for that advance, but also, in violation of the agreement with K., to cover any other bills L. might discount for R. The bill was twice renewed, and during the currency of the last renewed bill, L. discounted two drafts for R. at his request, which were dishonoured. L. sold the shares and appropriated part of the proceeds to pay the drafts, and retained the balance till the bill became due, when he sued K. for the difference between the balance of the proceeds of the shares and the amount of the bill. K. obtained leave to appear, but took no further steps, and eventually paid the difference. K. then discovered how L. had dealt with the shares, and sued for trover and conversion, with a count for money had and received, and a verdict was returned on the first count for L., since K. had not proved a right of property or possession at the time, not having offered to redeem; but on the second count K. recovered damages. On rule *nisi* to reduce damages, *Held* that K. was not seeking to recover money voluntarily paid, and was not bound in the action on the bill to plead payment to the extent of the proceeds of the securities, since that would have been to recognise and condone the improper conversion by L., and that the action for money had and received was maintainable, and rule discharged. *King v. Levinger*, 2 A.J.R., 113.

Clerk of Petty Sessions—Excessive Fees.]—Where M., a clerk of Petty Sessions, had acted tortiously in receiving more money as fees than he was entitled to claim, *Held*, reversing the Judge of the County Court, who had nonsuited the plaintiff C., who had sued M. for money had and received, that, the payment not being a voluntary one, the excess could be recovered by C., and that as the amount was very small it was unnecessary to proceed against the Crown. *Cobb v. Munce*, 3 A.J.R., 46.

When Maintainable—Money Paid for Illegal Purpose not Carried Out—Duress.]—A. had a claim against the Government which he was unable to get paid, and S. offered to use his influence with the Minister, in whose department the matter was, if A. would authorise him to stop £500 out of the amount to be recovered under the claim; the £500 being intended as a bribe to the Minister. A. thereupon executed a bond for the sum, and gave S. a power of attorney to draw the money from the Treasury when it should be payable. The £500 was not used as a bribe, the Minister having left office, and three years afterwards the Government recognised A.'s claim, and the money for it was voted. S., meanwhile, had lodged the power of attorney at the Treasury, and refused to allow A. to obtain the money without paying the £500, and eventually A., in order to obtain the money, paid S. the £500, and recovered a verdict for it as money had and received to his use, it having been paid under compulsion. On the rule for a nonsuit S., for the first time, raised the plea that according to A.'s own showing the money had been paid for an illegal purpose, and that the evidence did not show compulsion. *Held* that the money was recoverable, since the illegal purpose had not been carried out; that since S. was able, under the power of attorney and the forms of authority to receive the money in use at the Treasury, which power and forms were executed by A., to prevent A. from receiving any of his claim, the parties were not on an equal footing, and there was oppression on the part of S.; and that A. might contradict the deed which asserted that there was a debt due from him to S.; and rule for a nonsuit discharged. *Armitage v. Smith*, 4 A.J.R., 175.

Plea under Sec. 51 of "*Police Offences Statute* 1865" that contract was by way of gambling must negative every other hypothesis save that of illegality. *Miller v. Harris*, 1 V.R. (L.,) 91; 1 A.J.R., 83; *post* under PRACTICE AND PLEADING—At Law—Pleading—Plea—Generally.

When it Lies.]—B. owed S. £15, and E., S.'s trustee in insolvency, sued E. in the County Court for that sum. Before trial B. informed E. that he had a claim against S. and it was agreed that B. should pay E. £7 10s. as in full. B. then gave E. a cheque for the amount. When he gave the cheque he had funds to meet it, but before the cheque was presented he had given several other cheques, and in the result there were insufficient funds to meet the one given to E. E. without notice to B. sued him in the County Court and recovered a verdict for £15 and costs. Execution was issued but was not satisfied as B.'s goods were claimed under a bill of sale. It was then discovered that B. had funds in the bank, and a judge's order was obtained attaching the £15 and costs, and the amount was paid to E. B. sought to get it back and recovered a verdict in the County Court. On appeal, *Held* that B. had no cause of action and could not sue for money had and received. *Ecroyd v. Bennetto*, 4 A.J.R., 150.

Auctioneer—Grantor of Bill of Sale Selling in a Way that was not Authorised.]—D. granted L. a bill of sale over certain goods to secure bills of exchange which were afterwards dishonoured. The bill provided for D. retaining possession of the goods (the stock-in-trade of D.'s business), and selling the goods in the ordinary course of business, accounting to L. for the proceeds. Before the bills of exchange became due D. sent the goods to an auctioneer for sale by auction, and they were sold notwithstanding a notice from L. that he claimed the proceeds. L. sued the auctioneer for money had and received, and in trover. *Held* that D.'s only interest in the goods was to keep possession of them until default in payment, the property being in L.; and that the authority given to sell did not bar L.'s action, because the goods were not sold in the ordinary course of business. Verdict entered for plaintiff. *Lockhart v. Gray*, 5 A.J.R., 178.

Payment under Garnishee Order by Mistake.]—A party paying money under a garnishee order which has been made upon a mistake as to facts, cannot recover such money unless the order has been set aside before action brought. *Partridge v. National Insurance Coy. of Australasia*, 2 V.L.R. (L.,) 203.

R. recovered judgment in the Supreme Court against John P. for £78 16s. 2d. One James P. held a policy of insurance from an insurance company over certain premises which had been recently burned down. R. went to the secretary of the company, asked if John P. was entitled to the sum insured, and the secretary, in mistake, replied that he was. It was then arranged that the company should consent to a garnishee order for the amount of the judgment debt, and an order was made dated 5th May, 1876. R. had in the September preceding, assigned the judgment to P. The company paid the amount of the judgment to their solicitors, who paid it, less the garnishee's costs, to R.'s attorney, who paid to P., after deducting his own costs, a balance of £69 2s. 2d., by the direction of R. On 10th May it was discovered that James P., and not John P., was the person insured; and on 17th June a summons was issued to set aside the order, which was rescinded on 22nd June. The company had, however, on 19th May, sued P. for the money paid them under the garnishee order, and recovered a verdict. P. appealed on the ground that they should have been nonsuited, since the money had been paid under a judgment of the Supreme Court, and there was no privity between P. and the company. *Held* that there was privity between the parties, since P. stood in the same position as R.; but that the garnishee order being still in existence at the time the company sued formed a bar to the suit, since it assumed that the company had money liable to satisfy the judgment, and it was not competent for the company to deny the truth of the assumption till they took steps to have the order set aside; and appeal allowed. *Ibid.*

When Maintainable—Over-payment by Mistake.]—A shire owed K. a debt, and by inadvertence the shire secretary wrote out a cheque for more than the sum, and K. received it, and without examining it gave it to B. to cash, and B. gave him only the amount for which the cheque was intended to be drawn. Four months afterwards the shire discovered the error and sued K. for the balance for money had and received and for money paid. The jury found that K. had received only what was due to him, but had taken the cheque as cash. *Held* that the shire could recover from K. *Shire of Rutherglen v. Kelly*, 4 V.L.R. (L.,) 119.

By Mistake—Purchaser giving too High a Price.]—A purchaser, who is misled by an erroneous statement by the vendor as to the total cost of goods bought by him into giving a higher price than he otherwise would, may recover the difference between the two prices in an action for money had and received, although he may have had before him materials from which the correct total cost of the goods could be computed. *Grimwood v. Smith*, 6 V.L.R. (L.,) 433.

Excessive Rates Paid under Protest—Action for Money Had and Received does not Lie.]—*Belfast Road Board v. Knox*, 1 W.W. & A'B. (L.,) 133. *Post* under RATES—Other Points.

Money Entrusted to Defendants to Pay a Dividend—Revocation of Authority before Payment.]—The directors of a company declared a dividend and placed the amount necessary to pay it to the defendant's credit upon trust to pay the dividend. Before payment, the company, in general meeting, rescinded the resolution to pay a dividend, although the dividend had been advertised. *Held* that the company was entitled, on counts for money had and received, to repayment of the amount, and that a promise by one or two of the defendants to pay dividends to some of the shareholders on a condition which was not performed was ineffectual as a defence. *United Hand and Band Coy. v. M'Iver*, 7 V.L.R. (L.,) 471.

Money Paid by Principal to Agent as Deposit Money on Purchase of Land—Repudiation of Purchase by Principal (the Purchaser.)]—*See Allison v. Byrne*, 3 V.R. (L.,) 155; 3 A.J.R., 67. *Post* under PRINCIPAL AND AGENT—RIGHTS AND LIABILITIES OF PRINCIPAL AND AGENT INTER SE.—General Principles.

(3) *Money Paid.*

Sub-tenant—Landlord—Distress.]—Wherever a plaintiff, in consequence of a dealing with the defendant, has been forced to pay a debt for which the defendant was primarily liable, the money so paid is money paid for the defendant's use. T., a landlord, leased land to E. for five years. E. subleased to N. during the term for the remainder of the term. E.'s rent being in arrear, T. distrained on N.'s sheep and sold them to N., and the bailiff also sued N. on a promissory note given for the rent, which N. paid. *Held* that the money paid being the plaintiff's (N.), it was immaterial whether it was paid in purchase of the goods, or merely to release and get them back, and the plaintiff was entitled to sue E. for the money so paid as money paid to his use. *Noyes v. Ellis*, 3 V.L.R. (L.,) 307.

Action for Money Expended in a Joint Adventure by one Adventurer.]—*Collins v. Locke*, 5 V.L.R. (L.,) 13. *See post* under PARTNERSHIP—The Contract—What Constitutes a Partnership.

One partner cannot recover as against another for money paid to his use, but only on an account stated and settled, when the sum due has actually been ascertained, and one of the partners has promised to pay that sum to the other. *Perkins v. Cherry*, 3 A.J.R., 51; *see* S.C. *post* under SET-OFF.

And see Shire of Rutherglen v. Kelly, ante column 1040.

(4) *Account Stated.*

When Maintainable—Consideration for Executed Contract.]—C. verbally promised S. in consideration of £600, that he would not lodge a *caveat* against the bringing of certain land under the "*Transfer of Land Statute*," that he would assist S. in obtaining a certificate of title, and would give a transfer of his interest. C. carried out the contract as far as he could, the land was bought under the Act, an increased contribution being made to the guarantee fund, and it was agreed that £50 should be deducted from the sum to be paid to C. *Held* that though C. could not recover on the agreement, since it was not in writing, he could maintain his action upon an account stated for the amount of the consideration. *Coker v. Spence*, 2 V.L.R. (L.,) 273.

And *see Perkins v. Cherry, ubi supra.*

Award—Submission by a Chairman of a Board in his Individual Name.]—A matter in dispute between W. and a road board was submitted to arbitration, and the deed was executed by E., the chairman of the board, under his signature of E.E. An award was made in favour of W., and E. was ordered to pay certain moneys. The Judge of the County Court, in an action for money due on the award and on an account stated, refused a nonsuit which was moved for on the ground that the defendant E. was not personally liable since he had executed the agreement to refer as chairman of the board. *Held*, on appeal, that E. had made himself personally liable for the debt of another, and he was rightly sued in his individual capacity. Appeal dismissed. *English v. White*, 2 W. & W. (L.,) 14.

MORTGAGE.

I. CONTRACTS OF MORTGAGE.

What is a Mortgage.]—Where an owner in fee (A.) borrowed money on the property as security from H., and it was agreed that H. should take a conveyance to himself, and that A. should pay him a certain rent, being interest on the advance at the rate of 10 per cent., and that H. should have the produce of the land until the amount

and interest was paid off; and H. gave A. a lease for five years at the fixed rent, with an option of purchase at the end of the term on payment of the advance, *Held* that this was a mortgage, and that A. was entitled to redeem during the term. *Murphy v. Mitchell*, 5 V.L.R. (E.,) 194.

Selection under "Land Act 1865" (No. 237,) Sec. 42—"Land Act 1869" (No. 360,) Sec. 31—Decision in another Suit.]—M. selected land under Act No. 237, Sec. 42; improved it, and was entitled to purchase from Crown on preferential terms under Sec. 31 of Act No. 360. M. owed money to O., and a *fi. fa.* being issued against him, H. advanced the money to M. to pay off O., M. authorising sheriff to sell the land to H. for the money he had advanced, which was done. M. received further advances from H., and took a lease from him at a rent as a means of providing for interest. H. afterwards got the Crown grant issued to him. After this M.'s interest was sold under a *fi. fa.*, held by another person, to B., and B. brought a suit—*B. v. H.*—to redeem H., which was dismissed. B. afterwards assigned his interest to M. *Held* that the transaction between M. and H. was a mortgage, and that M. was entitled to redeem, the suit *B. v. H.* being no obstacle, as the subsequent assignment B. to M. removed what would be a bar to M. *Ibid.*

"Land Acts" (No. 237,) Sec. 42—No. 360, Sec. 31—Equitable Mortgage.]—A., a licensee under Act No. 237, Sec. 42, had an execution issued against him, and a friend of his, B., verbally agreed to advance him the amount due on condition of A. letting sheriff sell the land to B. for that amount, and that Crown grant should issue to B. as a security. B., having obtained the grant, died shortly afterwards. A.'s interest and right in the lease were afterwards sold to C. under another execution. Suit by C. against B.'s executors to redeem. *Held*, affirming County Court judge, that inasmuch as the plaint alleged no facts to show that under the "*Land Acts*" the Crown grant should be deemed a graft upon the license, the contract was void under the "*Statute of Frauds*," that there could be no mortgage of an estate not then in existence, and there could be no equitable mortgage, as A. had not then the Crown grant. *Harrison v. Murphy*, 3 V.L.R. (E.,) 105.

Parties to Contract—Mortgagors.] — A mortgagee cannot be allowed to set up two different persons as mortgagors (by different transactions) of the same property. *London and Australian Agency Coy., Limited, v. Duff*, 5 W.W. & A'B. (E.,) 19, 28, 29.

For facts *see* S.C., *ante column* 841.

Dealing in Mining Shares, whether Mortgage or Sale.]—*Niemann v. Weller*, *ante column* 153.

Mortgages by Mining Companies—When Valid and when Invalid—For Past Debt or Future Advance.]—*See M'Kean v. Cleft*, in the *Rock G. M. Coy.*; *Commercial Bank of Australia v. Grassy Gully Coy.*; *Commercial Bank v. M'Donald*; and *United Hand in Hand and Band of Hope Coy. v. National Bank of Australasia*, *ante column* 1024.

Amount and Extent of Security—Mortgage of Station—Right to Discounts—Sums Paid for Rent and Management.]—F. mortgaged a station to his general mercantile agents to secure payment of a bill of exchange for a loan. The bill was renewed several times, but eventually the mortgagees had to take it up, and F. assigned his estate for the benefit of his creditors. The mortgagees then sold the station. At each renewal the mortgagees discounted the bill at a bank and charged F. with the discount in their periodical accounts as his agents. A second mortgagee of F. obtained a decree for account, and the Master's report allowing these charges for interest was confirmed. The mortgage also empowered the first mortgagees to pay, on the default of the mortgagor, all necessary sums for keeping up the license of the station, and for all licenses and penalties under the "*Scab Act.*" They paid rent, fees for scab licenses, and sums for sheepwash, though F. remained in possession and management. The Master allowed these payments in his report and the report was confirmed. Upon appeal to the Privy Council, *Held*, that the charges for interest were rightly allowed; that, as the charges for discount had not been paid by F., they were not a satisfaction of the interest; that these charges did not imply that the first mortgagees had paid such discounts as agents for F. on his personal security, and could only prove against his estate for the amounts; that the entries of sums received from F. were appropriated to other specified advances; that the charges for rent and scab licenses were properly allowed, and were not to be taken as paid by the first mortgagees merely as agents for F.; but that the sums for sheepwash were not within the provisions of the mortgage, and should be disallowed, and as to these sums the decree of the Supreme Court was varied. *Fenton v. Blackwood*, 2 A.J.R., 99; on appeal, *Ibid*, 124.

On appeal to the Privy Council, 5 A.J.R., 39; 5 L.R., P.C., 167; 22 W.R., 562.

Mortgage or Sale.]—M., being in embarrassed circumstances, executed a conveyance purporting to be an absolute bill of sale of certain premises to E., the alleged consideration being certain overdue bills and an advance in cash, there being at the time a mortgage on the land. The balance of testimony on the whole was, that the consideration was inadequate. The visible possession of the property remained unchanged, M. continuing to live on part of the property and collecting the rents of the residue. After his insolvency M. began to give receipts for rent, as agent of E.; but no accounts rendered were proved between them. On suit by the official assignee of M., praying that the conveyance should be set aside or should be declared a mortgage, *Held* that the conveyance was a mortgage. *Halfey v. Egan*, 4 A.J.R., 147.

Vivum Vadium—Absolute Sale by Plaintiff of Equity of Redemption by Letters of Defendant to be Regarded and Operate as a Second Mortgage—Redemption.] — The plaintiff, who had

mortgaged his property to B., wished for a further advance from the defendant, and the defendant would not advance upon a second mortgage. Plaintiff therefore sold the equity of redemption absolutely to defendant, defendant to have possession, and out of the rents to keep down the interest on the first mortgage, which he was to pay off, and pay off the further advance and interest thereon, defendant giving a letter admitting the transaction to be a mortgage. On the defendant paying off the money due to B. he wrote a letter to plaintiff undertaking to sell and convey the property to plaintiff on receiving the amount due *within twelve months*, otherwise the plaintiff was to forfeit his interest in the property. The plaintiff answered by letter, undertaking merely to hand over the proceeds of another property towards payment of the purchase-money as *per* defendant's last letter, but in no other respect adopting the terms of defendant's letter. On a bill by plaintiff for redemption, *Held* by *Molesworth, J.*, and affirmed, that the original transaction placed the defendant in the position of creditor holding a *vivum vadium* redeemable without limit of time; that the two letters were a sufficient compliance with the "*Statute of Frauds*," but they were open to objection because of the uncertainty as to who was entitled to the mesne rents, and that if the defendant were to be entitled without accounting, such an arrangement would be oppressive; that this arrangement, arrived at by the letters, was not binding in its strict terms as to time, but that as the parties had no dealing for buying or selling, and considered themselves as mortgagor and mortgagee, the time fixed for redemption was no more binding than it was in the case of ordinary mortgages. Decree for redemption. *Mouatt v. M'Kenzie*, 5 A.J.R., 47, 147.

Mortgage of Personal Chattel—How Made.]—A legal mortgage of a personal chattel may be made without a deed. *Johnson v. Union Fire Insurance Coy. of New Zealand*, 10 V.L.R. (L.,) 154, 160; 6 A.L.T., 50.

Construction of Deed—When Covenant to Pay Principal and Interest Inferred.]—*Bruce v. Kerr*, 1 W. & W. (L.,) 141, *ante columns* 351, 352.

II. Equitable Mortgages.

Equitable Assignment—What is.]—In December, 1864, H. and A., then partners as squatters, authorised C. and M. to sell certain sheep on their behalf. C. and M. thereafter made advances to H. and A. to the extent of about £10,000. At this time a bank was pressing H. and A. for payment of a debt of £3800, and with the view of satisfying the bank C. and M. at the request of H. and A. wrote the bank manager as follows:—"Messrs. H. and A. have placed in our hands for sale 34,000 wethers. When sold they ought to realise a sum that will leave £8000 to £9000 over and above our advances. Messrs. H. and A. have asked us to hand over to you £3800 out of the proceeds of these sheep, after paying ourselves our advances and travelling expenses. We are prepared to do this on your getting from these gentlemen an order upon us to that effect." This did not satisfy the bank, and at the request of H. and A. a letter was written by C. and M. to the plaintiff as follows:—"At foot you have a copy of the letter we wrote to (the manager) of the Bank of Victoria. The bank is not satisfied with that letter, but is pressing H. on account of H. and A., to give them your acceptance instead. In event of your agreeing to do this, we hereby undertake to hand over to you £3800 out of the proceeds of these sheep, after paying ourselves our advances, with commission and interest and travelling expenses. The surplus should amount to from £8000 to £9000." In pursuance of this request and in reliance upon the promise of C. and M., the plaintiff accepted and delivered to H. four bills of exchange for £1000 each, which H. discounted, and applied the proceeds in payment of the debt to the bank, and no notice of his so doing was given to C. and M. by H. and A., or by plaintiff. Some of the sheep were sold by C. and M., who received the proceeds, and the remainder were attached in the hands of C. and M. by a writ of foreign attachment obtained by a creditor of A. No notice of this order was given to plaintiff, and it was made without his knowledge or consent. On bill by plaintiff against C. and M. seeking to establish the letter to plaintiff as an equitable assignment, and to have a specific lien upon the sheep enforced, C. and M. demurred for want of equity generally, and on the specific grounds that it did not appear that there was an equitable assignment to plaintiff of £3800, or any other part of the proceeds of the sheep, or at least any equitable assignment thereof, to which A. was a party, and that the plaintiff did not offer to redeem C. and M. *Molesworth, J.*, allowed the demurrer, on the grounds that no order had been received from H. and A. as required by the letter to the bank; that C. and M. had received no notice of the acceptances having been given by plaintiff; and that such acceptances were not such as were requested by the letter to plaintiff, since, instead of giving one acceptance of £3800 to the bank, he gave four of £1000 each to the draft of H. alone, and that they were not directly used in the way proposed by that letter. On appeal, *Held*, per the Full Court, that the first letter constituted no part of the contract contained in the second; that no notice to C. and M. was, under the circumstances, required to complete plaintiff's security; and that a substantial compliance with the terms of the letter to the plaintiff had been shown by the bill, since H., as one of the principals in the matter, had authority to vary the details of the arrangement. Appeal allowed, and demurrer overruled. *Williamson v. Cuningham*, 3 W.W. & A'B. (E.,) 188.

Right of Mortgagee to Interest.]—Where a bank claimed to be equitable mortgagee of deeds, which the defendant alleged to be merely deposited for safe keeping, the issue was sent to a jury for trial. The jury found in favour of the bank, and upon the suit coming again before the Court to be disposed of, the bank asked for interest at 10 per cent. *Held* that the bank was not entitled to interest at 10 per cent.; but was only entitled to the ordinary interest, not having previously demanded interest from the mortgagor. *National Bank v. Clark*, 1 A.J.R., 14.

Power of Sale if Bill not Paid.]—C. was Crown grantee of certain land, and gave B. an equitable mortgage over the land to secure an advance by B. As further security C. gave B. a bill accepted by C. for the amount. The equitable mortgage recited that C. authorised B. to sell the land if the bill "payable to B. or order" was not paid. B. in default of payment sold to L. L. sued C. to recover possession. The County Court Judge nonsuited, on the ground that no bill "payable to B. or order" was produced, and that non-payment by C. of the bill accepted by him would not justify B. in selling. *Held*, on appeal, that the bill alluded to being the only one produced, it was to be assumed in the absence of other evidence that it was the one referred to in the mortgage. Nonsuit set aside. *Lear v. Connell*, 3 A.J.R., 41.

Vendee without Notice—Equitable Mortgagees of Vendor.]—The title of a *bonâ fide* purchaser, without notice, of goods in a bonded store, for which he obtained a transfer into his own name, on production of endorsed bonded certificates, is, in equity, to be preferred to that of mortgagees, who have only a prior *equitable* right, even after notice by the latter to the warehouseman. *Ross v. Blackham*, 2 V.L.R. (E.,) 159.

Land under the "*Transfer of Land Statute*" may be mortgaged by way of equitable mortgage by deposit of the certificate of title. *London Chartered Bank v. Hayes*, 2 V.R. (E.,) 104; 2 A.J.R., 60.

There Cannot be an Equitable Mortgage by a Selector under the "Land Acts" not having the Crown Grant.]—*See Harrison v. Murphy, ante column* 1049.

Priority between Successive Equitable Mortgages.]—*See* cases *post column* 1054.

The proper remedy in equity of an equitable mortgagee is a sale, and not a foreclosure. *Bank of Victoria v. Cozens*, 1 W.W. & A'B. (E.,) 93; *White v. Hunter*, 5 W.W. & A'B. (E.,) 178, 185.

III. Transfer and Assignment.

Equitable Mortgage—Registered Security.]—Title deeds were deposited by H. with C., by way of equitable mortgage, with a memorandum duly registered acknowledging that this deposit was made to secure payment of moneys lent. W., at H.'s request, paid off C., and took over the deeds as security for his advance without any memorandum. *Held* that the transaction did not operate as an assignment of the benefit of the memorandum as a registered security. *White v. Hunter*, 5 W.W. & A'B. (E.,) 178.

Breach of Trust—Notice through a Solicitor Employed by both Parties.]—*See Chomley v. Firebrace*, 5 V.L.R. (E.) 57, under Transfer of Land (Statutory)—Transfers.

Quære.—Where a mortgage purports to be for money lent, whether the assignee of a mortgage could be affected by notice that it was for the purchase-money, and that the mortgagee had no title. *Dallimore v. Oriental Bank*, 1 V.L.R. (E.,) 13.

IV. Several and Successive Mortgages.

Priority — Equitable Mortgage — Subsequent Equitable Mortgage—Registration of First.]—H. deposited with a bank title deeds as a security for a balance then due, and to cover further advances, and executed a memo. to that effect. Afterwards the bank voluntarily parted with the deeds to enable H. to raise money upon them (and being informed of H.'s intention.) H. afterwards deposited them with plaintiff's solicitor to secure an advance of £600, neither the plaintiff or his solicitor knowing of the equitable mortgage to the bank. After hearing of this advance, the bank then registered their memo. The plaintiff then brought a suit against the representatives of H. and the bank, claiming priority in respect of his mortgage. *Held* that the maxim "*Qui prior est tempore potior est jure*" only applies when both equitable mortgagees are deceived; that the bank was not deceived; and that plaintiff was entitled to the relief he sought. Decree made for immediate sale on consent of all parties *sui juris*. *Henty v. Hodgson*, 1 W. & W. (E.,) 250.

Legal Mortgage—Registration—Priority.]—G., knowing that title deeds of C. were in W.'s hands, but not that they were held as security, and without inquiry of W., subsequently made advances to C., and took a legal mortgage of the lands comprised in the deeds, which mortgage was duly registered. *Held* that G.'s registration did not give him priority over W.; and as G. was aware of the deposit with W. he could not claim as a purchaser for value without notice. *White v. Hunter*, 5 W.W. & A'B. (E.,) 178.

See S.C. under Deed, *ante column* 355, and as to priority dependent on registration *see Fraser v. Australian Trust Coy., columns* 355, 356.

Mortgages of Several Properties—Second Mortgage to Different Persons—Principle of Division.]—A. mortgaged X to B.; B. sub-mortgaged X and mortgaged Y to C. to secure £40,000; B. then made a second submortgage of X to D. to secure £30,000, and a second mortgage of Y to E. to secure £8000. C. became mortgagee in possession of X and received certain payments out of sale of stock, and sold X, there being from the proceeds a surplus after paying his debt; and sold Y to D. for £18,000. In a suit for adjustment of the rights of the mortgagees, *Held* that C. should be paid his debt out of X and Y rateably according to their respective values, and that surplus of the proceeds of each should be paid to D. and E. respectively. *White v. London Chartered Bank of Australia*, 3 V.L.R. (E.,) 33.

Consolidation—Land under "Transfer of Land Statute" (No. 301) — Land not under Act.]—L., being registered as proprietor of land under No. 301, mortgaged it to the defendant, and by several *mesne* transfers the land became vested in the plaintiff as registered proprietor subject to the mortgage. The defendants held another mortgage from L. over land not under the Statute and claimed to consolidate the two mortgages. *Held* that a mortgage of land under No. 301 cannot be consolidated with a mortgage of land not under the Act. *Greig v. Watson*, 7 V.L.R (E.,) 79; 3 A.L.T., 13.

V. Stock Mortgages and Mortgages of Wool.

See under Lien, *ante column* 840.

VI. Rights and Liabilities of Mortgagors and Persons Claiming through them.

Purchase of Equity of Redemption—Effect of, as to Indemnifying Mortgagor.]—There is no implied contract for the purchaser of an equity of redemption at a sheriff's sale to indemnify the mortgagee (*sic! sed quære* "mortgagor"!) against the mortgage debt. The defendant bank had made advances to a company secured by deposit by way of equitable mortgage of the company's lease, and also by promissory notes given by plaintiffs as sureties for the company. The bank recovered judgment against the company and at a sheriff's sale under execution of the judgment purchased through a trustee for the bank the lease of the company's land, subject to the lien of the bank. On a motion to restrain the bank from levying execution on a judgment recovered in an action on the promissory notes, *Held* that the principle of an implied contract for indemnity could not be extended to the purchaser of an equity of redemption at a sale under an execution. *Robertson v. Bank of Victoria*, 4 W.W. & A'B. (E.,) 85.

Mortgage of Equity of Redemption—Suit to Set Aside—Misrepresentation—Onus Probandi.]—In a suit by a mortgagor (lately an insolvent) to set aside on the ground of misrepresentation or mutual mistake a release by the official assignee of the mortgagor's equity of redemption, for accounts against the mortgagees, and in effect to have the benefit of a subsequent resale by the releasee's purchaser, it appeared that the official assignee had in the release admitted the truth of the representations made to him, and that the mortgagee had thereafter taken a conveyance from him of all the estate vested in him under the insolvency. *Held* that the *onus probandi* was upon the mortgagor, who was *primâ facie* bound by the admission under seal of his vendor, the assignee, to prove the falsehood of the representations, and not upon the mortgagees to establish their truth. *Brougham v. Melbourne Banking Corporation*, L.R. 7 Ap. Cas., 307: overruling *Molesworth, J.*, 6 V.L.R. (E.,) 214.

Release of Equity of Redemption.]—Where a mortgagor, in consideration of the mortgage debt, releases the equity of redemption to the mortgagee, the parties should be regarded, until the contrary is shown by the party impeaching the release, as on the ordinary footing of vendor and purchaser. *Brougham v. Melbourne Banking Corporation*, L.R., 7 Ap. Cas., 307.

Right of Mortgagor to Set Asids Release of Equity of Redemption.]—Where a release of an equity of redemption was made by the official assignee of an insolvent mortgagor, who subsequently, after obtaining his certificate, obtained from the assignee a conveyance of all his interest in the insolvent estate—*Held*, that assuming the release to be voidable, an equity to set it aside was an equitable interest in the property to which it related, and therefore was part of the estate vested in the official assignee. The mortgagor, therefore, under his conveyance from the official assignee, obtained a *locus standi* to maintain the suit. *Brougham v. Melbourne Banking Corporation*, L.R., 7 Ap. Cas. 307, confirming *Molesworth, J.*, 6 V.L.R. (E.,) 214.

Action by Mortgagor—Consent of Mortgagee—Transfer of Land Statute, Sec. 94.]—In an action of ejectment by a mortgagor of land against the representative of his mortgagor, the objection that no consent of the plaintiff's mortgagee to the bringing of the ejectment, as required by Sec. 94 of the "*Transfer of Land Statute*," has been stated or proved may be cured by amendment, and cannot therefore be taken on appeal. Such an objection, moreover, is not one of which the Judge of the County Court is bound to take notice unless raised by the parties. *Griffin v. Dunn*, 4 V.L.R. (L.,) 419.

Mortgagor in Possession after Default.]—A mortgagor in possession after default is a tenant at sufferance and not a tenant at will. *Ibid.*

Mortgagor of Mining Claim—Right to have Rent Paid to Preserve the Lease.]—A mortgagee of a mining leasehold, in possession, is bound to pay the rent to save mortgage leasehold from forfeiture, being entitled to charge the mortgagor therewith. If the property be not worth the rent he should at all events give it up to the mortgagor. Where, therefore, such a mortgagee paid the rent for some time, and after decree for redemption wrote to the mortgagor for advice as to whether he should continue to pay the rent or not, and the mortgagor having declined to advise the mortgagee, who was at the time largely overpaid, discontinued to pay the rent, and the lease became thereby forfeited. *Held per Molesworth, J.*, affirmed upon appeal, that the mortgagee was liable to make good to the mortgagor the value of the lease at the date of forfeiture. *United Hand-in-Hand and Band of Hope Coy. v. National Bank of Australasia*, 6 V.L.R. (E.,) 60. On appeal, *Ibid*, 198; 1 A.L.T., 181.

Action by Transferee of Mortgagor for Use and Occupation—Mortgagee not in Possession—Act No. 301, Secs. 93, 94.]—*See Louch v. Ball*, 5 V.L.R. (L.,) 157; 1 A.L.T., 10, under Transfer of Land (Statutory)—Mortgages.

Right to Title Deeds.]—When mortgage-money is due, an offer by the mortgagor to pay it, if the mortgagee will first deliver up the title deeds, is not a good tender, and will give the mortgagor no right of action against the mortgagee for non-delivery of the deeds or for their loss. The mortgagor must offer absolutely, and without any condition, to pay the mortgage debt due in order to make a good tender. *Armstrong v Robinson*, 8 V.L.R. (L.,) 17.

An action for the non-delivery of the deeds, or for their loss, will not lie at law before payment of the money due. *Ibid.*

Mortgagor having Redeemed when Entitled to Writ of Assistance or Habere against Tenant of Mortgagee.]—*Slack v. Atkinson*, 6 V.L.R. (E.,) 32; 1 A.L.T., 113, 139. *Post* under Practice, &c.—Equity—Writs.

VII. Rights and Liabilities of Mortgagees and Persons Claiming through them.

(*a*) *Rights and Powers.*

Interest — How Accruing — Apportionment.]—*Per Chapman, J.*—Interest on mortgage securities is considered to accrue *de die in diem*, and the rule as to apportionment is not defeated by its being in fact payable half-yearly or quarterly. It is not analogous to rent, and, therefore, needs not the aid of the English Statute to render it apportionable. *In re Mitchell*, 1 W. & W. (E.,) 167, 171.

Right of Equitable Mortgagee to Interest—Rate when Interest not previously demanded.]—*National Bank v. Clark, ante column* 1052.

Interest—Agreement to Reduce Acted Upon.]—Where a mortgage is overdue, a verbal bargain between mortgagor and mortgagee to reduce the rate of interest, acted upon for some time, is binding in equity; and this applies also as between the mortgagor and the executors of a mortgagee. *Lewis v. Levy*, 2 V.L.R. (E.,) 110.

Receipt by Executor of Part Payment of Principal.]—One of the executors of a mortgage, having reduced the rate of interest payable by the mortgagor, and having also received part payment of the principal, *Held* (*dubitante curid*) that the principal sum was in part discharged. *Ibid.*

Accounts—Mortgagee—Improvements.]—Where a mortgagee knows of a defect in his title, and that a sale through which he claims is unreal, and that the person entitled to redeem never acquiesced in the sale, he will not generally be entitled to be allowed for improvements, but will not be charged with income of mortgaged land so enhanced by improvement. *Per Molesworth, J. Slack v. Atkinson*, 1 V.L.R. (E.,) 335.

But *Held* by Full Court on appeal, that as the person entitled to redeem had to a certain extent misled the defendant by his conduct, the defendant mortgagee was entitled to credits and allowances in respect of increased price and improvements, and that the accounts should be taken on that basis. *Atkinson v. Slack*, 2 V.L.R. (E.,) 128.

Mortgagee in Possession—Costs of Proving Expenditure in Improvements.]—A mortgagee in possession owning land adjoining the mortgaged premises erected buildings running over both properties, a thing he was not warranted in doing. *Held* not entitled to his costs in the Master's office of proving the amount of expenditure in substantial improvements. *Slack v. Atkinson*, 4 V.L.R. (E.,) 195.

Mortgagee in Possession of Mine—Expenses of Unproductive Mining.]—Where a mortgagee had mined extensively, and, as to a large part of the mining, without profit, but had mined judiciously, and to a great extent following out work commenced by mortgagor, and the decree directed that he should account as a mortgagee in possession should, in regard to wilful default, *Held* that he was entitled to the expenses of unproductive mining and prospecting. *United Hand-in-Hand and Band of Hope Coy. v. National Bank of Australasia*, 4 V.L.R. (E.,) 173.

Power of Mortgagee in Enforcing Securities.]—A mortgagee is entitled to make the best of his securities and to enforce them in such order as he may think fit. *Walpole v. Colonial Bank*, 10 V.L.R. (E.,) 315, 325; 6 A.L.T., 147.

And where the security was a mortgage of a policy of life assurance which was to be void in the event of the assured's suicide except to the extent of the interest of a *bonâ fide* assignee, provided notice was given within a certain time, *Held*, *per Molesworth, J.*, and affirmed, that the mortgagee was not bound to embark in litigation with the company to recover the policy-moneys before compromising with the company; and, *per the Full Court*, that the mortgagee was under no liability to see that the notice required was given. *Ibid*, pp. 325, 334.

For facts *see* S.C., *ante column* 724.

Power of Mortgagee to Enforce Security—Administrator Pledging Assets for Purpose of Carrying on Trade with Mortgagee's Knowledge—Mortgagee Barred.]—*Swan v. Seal, ante column* 437.

Power of Sale—To Whom it Passes.]—Where a mortgagee dies before exercising a power of sale, such power passes to his personal and not his real representative. J.A.S. was mortgagee of certain land with a power of sale. J.A.S. died in England intestate in November, 1861. F.R.S. was devisee of the heir-at-law of J.A.S., and proved the will, and obtained administration in England to J.A.S.'s personal estate. O. was appointed agent of F.R.S. by power of attorney, *inter alia*, to take out administration to the estate of J.A.S. in the Australian colonies. O., without taking out administration, sold the mortgaged property to S., who obtained possession, and then sold to the defendant H. O. absconded without accounting to F.R.S. for purchase-money. The plaintiff W. obtained administration in Victoria of the personal estate of J.A.S., as attorney under power of F.R.S., in December, 1865, and, in conjunction with F.R.S., brought a suit against C., the mortgagor, for foreclosure, making H. a co-defendant in order to dispossess him and avoid his alleged title. *Held* that the power of sale could not be exercised by F.R.S., or his attorney under power, until taking out administration in Victoria, such power passing to the personal and not to the real representative, and that the sale by O. must be set aside, because if F.R.S. himself had sold to S. he might, on obtaining administration in Victoria, disaffirm his own acts and maintain the suit. *Walduck v. Corbett*, 4 W.W. & A'B. (E.,) 48.

Power of Sale.]—*Semble*, that a power of sale under a mortgage deed, exercised by a sale to a trustee for the mortgagee, cannot be exercised a second time; at any rate, not without a fresh

demand of payment. *United Hand-in-Hand and Band of Hope Coy. v. National Bank of Australasia*, 2 V.L.R. (E.,) 206, 219.

Power of Sale—Whether it Passes to a Sub-Mortgagee.]—*Quære*, whether a power of sale passes to a sub-mortgagee, *see Slack v. Atkinson*, 1 V.L.R. (E.,) 335, *post column* 1068.

Power of Sale — Demand — Wrongful Sale — Laches of Mortgagor.]—H., in 1874, deposited scrip of 200 mining shares held by him with the defendant bank as a security for an overdraft, constituting the manager his attorney to sell shares when default was made in moneys secured, and pay out of proceeds money secured, and hold surplus on trust for the mortgagor. Verbal requests for payment were made in January and February, 1875; and in February, 1875, the manager wrote to H. stating that shares had been sold, which was not the case, they having been transferred by a fictitious sale to a nominee of the bank. In January, 1877, the bank sold 125 shares for a large sum; and in February, 1877, plaintiff, believing that the bank still had the shares, demanded them, when the manager offered to give up the balance of the shares on payment of the amount due. The shares were subsequently sold, and the plaintiff, having in February, 1878, tendered the amount due, which was refused, in August, 1878, brought a bill for redemption, seeking to set aside sale. *Held, per Molesworth, J.*—(1) That the bank had not proved a sufficient demand for the payment as would warrant it in selling, even if whole number of shares had remained unsold. (2) That the bank had no right to sell unless it could in 1877 restore all the shares to the plaintiff, or until there was an adjustment of their relations as to 125 shares really sold; that mortgagor being poor was entitled to consideration, and was guilty of no *laches* or acquiescence so as to bar his right. Decree for payment of equivalent value of the whole number of shares with dividends, shares to be treated as of their value at the date of institution or of decree. *On appeal* affirmed chiefly on the ground that transfer by bank to nominee and the false statement of a sale having been made rendered the subsequent real sale invalid. Decree varied by charging bank with interest on value from February, 1878, till date of decree instead of dividends, on the ground of the plaintiff's *laches*. *Hicks v. Commercinl Bank of Australia*, 5 V.L.R. (E.,) 228; 1 A.L.T., 60.

Semble, per Molesworth, J., it is not a sufficient demand for a bank official to require verbally a customer to pay his debt and talk of power of sale being exercised, unless he sends him away under the impression that the sale will be probably effected without further notice. *Ibid*, p. 234.

Sale under Power — Proceeds Deficient.]—A mortgagee sold under his power of sale and did not realise the whole amount of his mortgage debt, and then sued the mortgagor on the covenant to pay. *Held* that the mortgagee can set all his remedies in operation at once and was entitled to sue. *Pattinson v. O'Mara*, 3 V.L.R. (L.,) 103.

Powers of Sale— Several.]—*Per Molesworth, J.*—Mortgagees having several powers of sale over different lands comprised in different mortgages are not authorised in exercising them in one sale. *Per Williams, J.*—Courts of Equity may sanction such a sale where the mortgagee clearly proves that the sale so made has been more beneficial to all parties concerned than a sale in separate lots would have been. The *onus* of proof is on the mortgagee. *Ross v. Victorian Permanent Building Society*, 8 V.L.R. (E.,) 254, 265, 271; 4 A.L.T., 61.

Power of Sale—Mortgage of Land under General Law and under Act No. 301.]—A. mortgaged to a building company land under the general law, and land under the Act No. 301. The mortgagee sold the whole land as a lot and under one sale. *Held, per Stawell, C.J., and Holroyd, J.*, that, there being a great difference in the manner of disposing of the proceeds of land mortgaged under the general law and under the Act, and the Act containing special clauses as to payment of the purchase money and as to title, the combination and selling in one sale of land subject to different mortgages some under the Act and some under the general law was improper. *Ross v. Victorian Permanent Building Society*, 8 V.L.R. (E.,) 254, 269, 275; 4 A.L.T., 61.

Mortgage of Personalty—Notice of Default sent through Post — Mortgagee Selling Goods after Tender of Amount Due.]—M. gave S. a mortgage over goods with a proviso for redemption, S. being at liberty to sell on making a demand in writing personally or through post office, and on mortgagor failing to pay. The notice in writing never reached M., though there was evidence that it had some days prior to the sale been duly posted. S. seized the goods and sold them, but before the sale M. tendered the amount of the debt, which S. refused. M. sued S. for trespass and detinue. *Held* that the notice sent was sufficient, and that S. was justified in seizing the goods; that S. was not warranted in selling the goods after tender of the amount due. Verdict for defendant on first count; for plaintiff on second count. Damages £300, the value of the goods as fixed by plaintiff and not controverted. *Mills v. Smith*, 3 A.J.R., 111.

Mortgagee in Possession — Seizure of After-acquired Property of Mortgagor.]—D. mortgaged all the stock, &c., depasturing on a station, and his interest in the station, to P. The mortgage deed contained a clause providing for seizure by P. of all working horses, bullocks, &c., on the station, and all so found upon the station in lieu of or in addition to those at date depasturing and used thereon in default of payment. Default was made in payment, and subsequently to the default D. purchased 350 head of cattle, and put them on the station. Eight months afterwards P. entered into possession, and seized the 350 head of cattle. On suit by D.'s official assignee, *Held* that D. not having objected at the time of seizure, the seizure by P. completely divested the equitable title sought to be enforced, and bill dismissed. *Goodman v. Power*, 1 W. & W. (E.,) 96.

Subsequent Mortgagee Selling Property Previously Mortgaged to Another.]—M., owner of one share in a mining company, mortgaged it to P., to secure a loan. M. remained with the other shareholders in possession of the whole mining property. M. then, without the consent of P., joined in a mortgage with the other shareholders of all the mining property, including the share mortgaged to P., to a bank, with power of sale over the whole. The bank sold, and P. sued the bank in the County Court and recovered judgment. On appeal, *Held* that the judgment was wrong, it not appearing from the case that the bank had done anything whereby P. was in a worse position as a co-shareholder with the purchaser from the bank, than he would have been in as co-shareholder either with the bank or their mortgagors. *Bank of Australasia v. Platt*,1 W. & W. (L.,) 212.

Purchase by Mortgagee under the Power of Sale.]—A purchase by a mortgagee of mortgaged property, sold either under the power of sale or in execution of a decree against the mortgagor company (obtained collusively between the mortgagee and directors) does not operate to vest an absolute title in the mortgagee. *National Bank of Australasia v. United Hand-in-Hand and Band of Hope Coy.*, L.R., 4 App. Cas. 391.

Right to Distrain for Rent on Mortgage.]—A mortgagee is not entitled to treat the mortgagor as a tenant unless there be a special provision to that effect. Where, therefore, a mortgage deed provided that the mortgagor should be a tenant-at-will to the mortgagees, and should pay rent in the shape of redemption moneys, and that the mortgagees should have power to distrain, and the covenant for quiet enjoyment was omitted, *Held* that the mortgagees might distrain for rent. *Moore v. Lee*, 2 V.R. (L.,) 4; 2 A.J.R., 16.

Costs Between Mortgagees — Mortgages of Several Properties—Second Mortgages to Different Persons—Costs of Suit between 1st and 2nd Mortgagees.]—A. mortgaged X to B.; B. sub-mortgaged X, and mortgaged Y to C.; B. then made a second sub-mortgage of X to D., and a second mortgage of Y to E. In a suit in New South Wales between C. and E. caused by B.'s misconduct, C. recovered some of his costs from E., but had to abide some of his costs. On a bill brought by D. for an adjustment of rights, *Held* that C. was entitled to charge as against D. all costs properly incurred in resisting the suit in New South Wales not recoverable against E. in that suit. *White v. London Chartered Bank of Australia*, 3 V.L.R. (E.,) 33.

Insolvency of Mortgagor—Release of Estate—Right of Mortgagee to full Amount Due.]—The insolvency of the mortgagor and the subsequent release of his estate from sequestration does not extinguish the mortgage debt, but the mortgagee is entitled to claim the amount due to him on his security. *Hodgson v. Young*,6 A.L.T., 117.

Mortgagee in Possession—Mortgagor Agent of Mortgagee.]—R. mortgaged his estate to F. & Co. The rents of R.'s estate were reserved in wheat and sent to R. & Co., who separated the wheat into two lots, distinguishing between what was due to R. and what was that of the tenants. R. being embarrassed, and not being able to pay the instalment of the debt falling due, agreed to collect the rents as F. & Co.'s agent. One of the firm said to him, "As you are not able to pay this, I shall now require you to act as our agent in receiving the rent in money and wheat as it falls due;" and to this R. agreed, and handed in a list of what was due from tenants and his rent-roll. R. also gave evidence that he had agreed to receive the rents for F. & Co., the money as soon as received, and the wheat as soon as possible after it was received to be disposed of by F. & Co. to the best advantage; but R. did not use the word "agent" in describing himself or his firm, ou their undertaking to receive the rents for F. & Co. R. became insolvent, and his assignee took the wheat. In an action for trover by F. & Co., a verdict was returned for plaintiffs, and upon rule *nisi* for a new trial, *Held* that R. had become agent for F. & Co., and that his acts were their acts as mortgagees in possession; and that the verdict should be upheld. *Flower v. Webster*, 1 W. & W. (L.,) 380.

(*b*) *Liabilities.*

Mortgagee in Possession, Who is.]—Where a plaintiff in a redemption suit reads from his answer an admission by which it appears that the defendant collected certain rents as agent for the mortgagor, the plaintiff cannot treat him as to those rents as mortgagee in possession. *Slack v. Atkinson*, 1 V.L.R. (E.,) 335.

Accounts by Mortgagee in Possession—Receipts by Mortgagor as Agent for Mortgagee.]—Where a bank was mortgagee in possession and the mortgagor received rents and profits as its agent in decree for an account of bank's receipts with wilful default, the bank was only charged with the mortgagor's receipts as its agent only so far as he had paid them to the bank. *Dallimore v. Oriental Bank*, 1 V.L.R. (E.,) 13.

For facts *see* S.C. *post columns* 1067, 1068.

Mortgagee in Possession—Interest.]—A mortgagee in possession is not chargeable with interest on his receipts if, when he took possession, an arrear of interest was due to him, unless by setting up a title adverse to the mortgagor he has lost the immunities of an ordinary mortgagee. *National Bank of Australasia v. United Hand-in-Hand and Band of Hope Coy.*, 3 V.L.R. (E.,) 61; L.R. 4 App. Cas. 391.

Liability of Mortgagee Exercising Power of Sale.]—A mortgagee exercising his power of sale, has some of the liabilities of a trustee. *United Hand-in-Hand and Band of Hope Coy. v. National Bank of Australasia*, 2 V.L.R. (E.,) 206.

Liability of Mortgagor Exercising a Power of Sale in Contravention of Terms of "Transfer of Land Statute" as to Notice.]—The mortgagee in such a case is liable to be charged with the value of the land at the time of sale, or at the time of decree, at the mortgagor's option. *M'Donald v. Rowe*, 4 A.J.R., 134.

For facts *see* S.C. under TRANSFER OF LAND (STATUTORY)—Mortgage.

Mortgagee Selling—How far a Trustee for Mortgagor.]—*Per Holroyd, J.*—A mortgagee is only a trustee of the surplus purchase money when the property is sold. He sells to the best advantage to himself, and is not obliged to consult the advantage of the mortgagor so long as he keeps within the terms of his power. *Ross v. Victorian Permanent Building Society*, 8 V.L.R. (E.,) at p. 273; 4 A.L.T., 17, 61.

Mortgagee in Possession—Receipts.]—A mortgagee is accountable, not merely for his actual receipts whilst in possession of the mortgaged property, but also for whatever is received by those to whom he transfers possession under an arrangement inoperative to transfer title, and in derogation of the rights of the mortgagor. *National Bank of Australasia v. United Hand-in-Hand and Band of Hope Coy.*, L.R. 4 Ap. Cas. 391.

Sale by Mortgagee—Liability of Mortgagee.]—A mortgagee is chargeable with the full value of the mortgaged property sold, if from want of due care and diligence, it has been sold at an under value. *National Bank of Australasia v. United Hand-in-Hand and Band of Hope Coy.*, 2 V.L.R. (E..) 206; 3 V.L.R. (E.,) 61, 70; L.R., 4 Ap. Cas. 391.

Mortgagee in Possession—Redemption—Accounts—Wilful Default.]—By a decree made 18th May, 1874 (reported 5 A.J.R., 47) the plaintiff was declared entitled to redeem a house and premises, and ordinary mortgage account was directed with wilful default. Evidence was given to show that an adjoining house of similar nature brought during the same period higher rents than those received by mortgagee. The Master surcharged the defendant with half the difference received from two houses respectively. On exceptions to report, *Held* that Master was right in charging defendant with additional sums as to rent he might have received before October, 1863, at which time defendant had regarded himself as absolute owner, but he should not be so charged after that date. On case coming on for further directions as to costs, *Held* that, where a mortgagee claiming to be absolute owner resisted the right to redeem and failed, the plaintiff mortgagor was entitled to his costs down to and inclusive of original hearing, and defendant mortgagee entitled to his costs of the account and hearing on further directions. *Mouatt v. Mackenzie*, 1 V.L.R. (E.,) 73.

Accounts—Sale by Mortgagees—Bill for Account during Currency of Promissory Note.]—The defendants (mortgagees) sold under a power of sale contained in their mortgage deed, partly for cash, and partly by means of promissory notes. F., to whom the equity of redemption had been assigned during the currency of two of the promissory notes, filed a bill for an account and payment to him of any surplus, alleging in the bill that the money received and the amount of the current notes would exceed the money owing on the mortgage security. *Held*, on demurrer, that the bill was premature and that F. had no equity, the bill not being framed as a bill of discovery to protect future rights, and not alleging that the plaintiff had offered to pay what might be due to the mortgagees. *Fenton v. Blackwood*, 1 V.R. (E.,) 124; 1 A.J.R., 104.

Account—Mortgagee Dealing with Property so as to Lessen its Value.]—B. and others mortgaged certain station property to C., and mortgagors and mortgagee joined in selling the mortgaged property to a company, and the purchase-money was paid partly in cash, partly in debentures, and partly in paid-up shares, which were all retained by the mortgagee as security for the debt. By an agreement made between the company and the vendors certain concessions were to be made by the vendors in the event of the property not being of the value represented, and shortly after the sale the company represented that the property was of less value than was stated, and demanded a concession. B. assented to one concession, but on a further concession being demanded by the company absolutely refused to assent thereto. C., however, agreed to the concession, and made an agreement with the company by which he gave up some of the debentures and paid-up shares to the company, and assented to the dividend on the rest of the paid-up shares being deferred until a dividend of seven per cent. should be paid on the ordinary shares. On bill by B. against C. seeking for *inter alia* the ordinary mortgage account, and for an account of what C. ought to have received from the company on behalf of B. but for the second concession, *Held* that the second concession, so far as it affected B. being unauthorised, C. should be responsible for it, and should not be entitled as a set-off against his responsibility to any advantage which B. might indirectly derive from the arrangement. *Bell v. Clarke*, 10 V.L.R. (E.,) 283, 300.

Accounts were taken before the Chief Clerk in pursuance to the decree. On appeal from the Chief Clerk's decision in taking the accounts, *Held* that C. must be charged with the value of the paid-up shares and debentures as they were at the date of the second concession. *Ibid*, p. 304.

VIII. Foreclosure and other Remedies for Non-payment.

Mortgage of Land under "Transfer of Land Statute" (No. 301)—Secs. 84, 85, 98, 99.]—Where land is mortgaged under the Act No. 301, foreclosure is to be sought under the provisions of Secs. 98 and 99, and not in the old way by a suit in Equity. *Greig v. Watson*, 7 V.L.R. (E.,) 79, 84; 3 A.L.T., 13.

Rights of Equitable Mortgagees.]—The proper remedy in Equity, of an equitable mortgagee by deposit of title deeds, is a sale and not a foreclosure. *Bank of Victoria v. Cozens*, 1 W.W. & A'B. (E.,) 93; *White v. Hunter*, 5 W.W. & A'B. (E.,) 178, 185.

Against an Infant.]—An infant foreclosed is entitled to a day to show cause notwithstanding "*The Trustee Act* 1856." *Bank of Victoria v. Cozens*, 1 W.W. & A'B. (E.,) 93.

Parties.]—Where in a suit by the assignees of a mortgagee of a lease against the assignees of the mortgagor and the mortgagor, for an account and payment or foreclosure, A., one of the assignees, and G. and M., two others of the assignees of the mortgagor, claimed antagonistically under different assignments, *Held* that A. and G. and M., though claiming antagonistically, might be made defendants, and a decree was made for an account, &c.; and that on the "defendants or one of them paying, &c.; the plaintiff should transfer, &c.; but that in default of the defendants or any of them paying, &c., the defendants be all foreclosed." *Tuckett v. Alexander*, 1 W. & W. (E.,) 87.

Mortgagor in Possession Receiving Rents between Ascertainment of Amount due by the Master and Time Fixed for Payment and Reducing Amount due by Mortgagor.]—Where a plaintiff mortgagee in possession had obtained a decree in a foreclosure suit, and between the time of ascertainment of amount due by the Master and the time fixed for payment, received rents, and the amount due by the mortgagor became thereby reduced. *Held*, on motion, that the proper course is to refer it back to the Master to ascertain the amount due and to fix a new day for payment—in this case fixed at three months from finding of amount due by the Master. *Payne v. Keogh*, 2 W. W. & A'B. (E.,) 30.

Foreclosure Granted notwithstanding Irregular Proceedings in the Master's Office.]—Where under a foreclosure decree the Master had reported the amount due and fixed the day for payment, and in arriving at the amount due had credited the mortgagee with interest prospectively down to day for payment, and had debited the mortgagee, who was in possession, with the amount that would probably be received for rents down to that day, on a motion for an order for foreclosure absolute, default having been made in payment at time appointed, the Court, while questioning the propriety of the course pursued, made the order absolute, inasmuch as the mortgagor had not appeared to object when the report was confirmed. *Australian Trust Coy. v. Colonial Bank of Australasia*, 2 W.W. & A'B. (E.,) 105.

Interest Allowed where Foreclosure Suit is Undefended.]—Where a foreclosure suit is undefended the Court has power to allow the mortgagee compound interest. *Ronald v. M'Pherson*, 1 A.J.R., 105.

Mortgagee in Possession carrying on a Sheep Station after Decree for Redemption—Motion for Foreclosure.]—In a redemption suit the Master found a certain sum due and an order was made on further directions that plaintiff might redeem within six months, and if default was then made should stand foreclosed. During this time the mortgagee being in possession of the premises, a sheep station, carried it on. Default having been made in payment, a motion for foreclosure was dismissed by *Molesworth, J.*, but *Held* by Full Court that a reference to Master should be ordered to inquire whether the amount due had been decreased in the six months, and if it had not been, then order absolute for foreclosure would be granted. *Dallimore v. Oriental Bank*, 3 V.L.R. (E.,) 203.

Practice—Enlargement of Time for Payment.]—Defendant had been ordered to pay amount due within six months or be foreclosed. Defendant stated that the land was highly auriferous, that he had formed a company to work it, and had a large claim pending against the Government. Plaintiff filed no affidavit in opposition. Time enlarged for three months, on terms of defendant paying all costs within a month; interest to run in the meantime. *Wills v. Ogier*, 2 A.L.T., 1.

IX. Redemption.

(*a*) *Right to Redeem.*

When Mortgagor Entitled.]—Defendant promised to subscribe £100 towards the erection of a church, and a committee appointed raised £40 by subscriptions. Defendant then purchased the land as for £140 paid partly by cash, partly by bills. In order to raise funds for the erection, D. discounted a promissory note of £315 signed by the committee and endorsed by him, and by a bill of sale granted the land to the committee as for the £40 received. It was agreed that the bill of sale should not be executed till the promissory note was met. Defendant having met the bills for the purchase money of the land, had it conveyed to him absolutely. The promissory note was dishonoured, and defendant mortgaged the land to secure advance of £500, out of which he satisfied the promissory note, and handed the surplus to the treasurer of the committee. The committee demanded a conveyance, which defendant refused, except on terms of being indemnified against his liability under the mortgage deed, and afterwards paid off the mortgage, had the mortgage transferred to himself and brought ejectment against the committee. On suit for redemption by committee, and for restraint of ejectment proceedings, *Held* that plaintiffs were entitled to redeem, on paying defendant the principal and interest of the mortgage debt, and interest to himself on that sum, to date, cost of insurance and of ejectment proceedings. *Bulling v. Bryant*, 1 W. & W. (E.,) 121.

Right of Redemption as Affected by Priority of Registration of Mortgage Deeds.]—*Fraser v. Australian Trust Coy.*, *ante* column 356.

When Barred — Laches — Acquiescence.]—In May, 1866, P. left with B. shares of P.'s in a mining company, transferred into B.'s name, as security for the payment of P.'s acceptance due in November, 1866. The acceptance was dishonoured at maturity. B. retained the shares and paid calls upon them. Subsequently dividends were paid upon the shares, which B. received in excess of the amount of his debt. No communication took place between P. and B. from December, 1866, to January, 1871, when P. demanded an account and transfer of the shares, which B. refused. On bill for redemption, *Held* that P. was entitled to redeem, and was not barred by laches or acquiescence. *Port v. Bain*, 2 V.R. (E.,) 177; 2 A.J.R., 129.

Not Barred by Laches.]—B., being embarrassed and unable to pay certain calls which were due on mining shares held by him, transferred the

shares into the name of W., in consideration of W. lending him enough to pay the calls. After the transfer W. paid calls on the shares, which were low in value, for some years. Subsequently the shares rose, and on the whole yielded in dividends more than was due by B. to W. W. died, and her executors published the usual advertisements calling on those who had claims against the estate to give notice of their claims. Of these advertisements B. took no notice, but subsequently brought a suit for redemption of the shares against W.'s executors. There was evidence to show that the original transaction was a mortgage. *Held*, that B.'s neglect for several years to assert his claim, notwithstanding the advertisement by W.'s executor, did not bar him, but that his conduct disentitled him to costs. *Bryant v. Saunders*, 2 V.L.R. (E.,) 225.

Dismissal of Suit to Redeem by Purchaser of Mortgagor's Interest at Sheriff's Sale—Subsequent Suit by Mortgagor, who had become Purchaser's Assignee—Decree in First Suit no Bar.]—*Murphy v. Mitchell*, *ante column* 408.

Beneficiaries under a Voluntary Settlement—Accounts by Mortgagee in Possession—Receipts by Mortgagor as Agent for Mortgagee—Parties—Practice—Trustee out of Jurisdiction.]—D., by one entire contract, purchased on 4th March, 1863, freehold and station properties from C. and B., and mortgaged same to C. and B. to secure purchase-money. Some of these stations were never delivered to D.; C. and B. sub-mortgaged to a bank. D. subsequently, in 1863 and 1864, mortgaged other lands not in the sale to C. and B., and C. and B. sub-mortgaged these to the bank. On 31st May, 1864, the bank entered into possession of property as mortgagee, D. at that time signing a letter stating he had given possession to the bank of the various station properties including those of which he had never received possession himself, and acted as the bank's agent till 1867, when he was displaced. On 1st October, 1870, D. executed a voluntary postnuptial settlement, by which he granted the equity of redemption in all his mortgaged properties to one Gilbert in trust for his wife's appointee, and in default of appointment upon certain trusts for his wife and children. On 1st June, 1871, D.'s estate was sequestrated and Goodman appointed assignee. C. and B. assigned all their interest to the bank, and Goodman released the equity of redemption vested in him as assignee to the bank; in Goodman's release certain lands mentioned in certain paragraphs of the bill were not comprised. On 22nd March, 1874, D.'s estate was released from sequestration. The defendant trustee, Gilbert, was out of the jurisdiction. *Held*, in a redemption suit by the beneficiaries under the settlement, that they were only entitled to redeem lands not comprised in Goodman's release, the settlement being void as against Goodman as to the rest; that it was not necessary for Gilbert to sue as a co-plaintiff or to be served; that Clark, a mortgagee who was not a defendant, was not a necessary party to a suit in which parties were litigating as to the equity of redemption. Accounts decreed against the bank as mortgagee in possession, for what it had received or might have received, but for wilful default, but the bank only charged with D.'s receipts as its agent only so far as he had paid them to the bank. *Dallimore v. Oriental Bank Corporation*, 1 V.L.R. (E.,) 13.

Who May Redeem,]—Where an insolvent, after obtaining his certificate, took a conveyance from the official assignee of all his interest in the insolvent estate, which comprised, among other things, an equity of redemption, which had been released by the assignee, but about which there was a dispute, *Held* that the insolvent had, by his purchase, obtained the right to redeem. *Brougham v. Melbourne Banking Corporation*, 6 V.L.R. (E.,) 214, 225; 2 A.L.T., 81.

Vivum Vadium—Absolute Sale of Equity of Redemption by Mortgagor by Letters of Mortgagee Agreed to be Regarded as a Second Mortgage.]—*See Mouatt v. M'Kenzie*, *ante columns* 1050, 1051.

Suit by Second Mortgagee against Prior Mortgagee—Person Seeking to Redeem not Really a Mortgagee—No Right to Redeem—Estoppel.]—*Ettershank v. Zeal*, *ante column* 414.

Creditor Purchasing from Official Assignee of an Insolvent Heir-at-Law of Mortgagor — Champerty.]—C. mortgaged to A. for £500 by several mesne assignments, and the mortgage became the property of D. All these assignments treated the £500 as due. D. sub-mortgaged to Q. for £200. Q. sold all his interest in it to defendant for £300 by a deed which recited that £300 and no more was due to Q. The defendant sold the land in fee to S. absolutely for £367. S. mortgaged the property to a building society as for £480 advanced, and further charged the property with a sum of £120 advanced to him by the society. C., the original mortgagor, died intestate before any assignment was made, leaving an infant son (J.C.) his heir-at-law. J.C. became insolvent in 1866, and Shaw became his official assignee. In July, 1866, plaintiff, who was a creditor of J.C.'s, purchased the insolvent estate from Shaw. In December, 1866, the building society ejected plaintiff and sold to X., who mortgaged to a building society. X. sold the equity of redemption to defendant. On a bill by plaintiff against defendant to redeem, *Held* that the sale to S. was a sham and void; that defendant repurchasing the equity of redemption subjected the estate to plaintiff's rights through J.C. as if he had never sold to S.; that J.C. being in possession of the hotel at the time plaintiff purchased from Shaw, and the plaintiff being a creditor interested in making the most of J.C.'s estate, his bill was not champertous, and he was entitled to redeem. *Quære*, whether a power of sale would pass to a sub-mortgagee like Q. *Slack v. Atkinson*, 1 V.L.R. (E.,) 335; *Atkinson v. Slack*, 2 V.L.R. (E.,) 128.

(*b*) *Suits for Redemption.*

Offer to Redeem—Demurrer.]—On a demurrer to a bill for the sale of mortgaged lands on the ground that the bill contained no offer to redeem, it appeared that plaintiffs could not have a partition; and, the offer to redeem being

merely formal, the demurrer was overruled. *Hunter v. Rutledge*, 6 W.W. & A'B. (E.,) 331, 357; N.C., 61, 74.

Practise in.]—The defects or omissions in a bill framed to set aside a mortgage may be supplied from the answer, so as to enable the Court to pronounce a decree for redemption. *United Hand-in-Hand and Band of Hope Coy. v. National Bank of Australasia*, 3 V.L.R. (E.,) 61, 67.

Beneficiaries of Voluntary Settlement Seeking Redemption—Trustee out of Jurisdiction—Not Necessary to Join Him as a Co-plaintiff or to Serve Him with Bill.]—*See Dallimore v. Oriental Bank, ante columns* 1067, 1068.

A mortgagee is not a necessary party to a suit where parties are litigating as to the right to equity of redemption. *Ibid.*

Practice—Exceptions to Master's Report—Special Agreement—Accounts.]—Where, in a suit for redemption in which a decree has been made, a motion was made by plaintiff for an order directing the Master to review his report and receive evidence as to an alleged agreement to depart from the ordinary course of dealing between mortgagor and mortgagee as to the appropriation of payments, *Held*, on the motion and on exceptions, that such agreement should be distinctly stated in writing in the office by way of objection, surcharge, or otherwise; and evidence thereof should be tendered to the Master, otherwise the Court cannot, upon exceptions, re-open the matter. *Ross v. Victorian Permanent Building Society*, 9 V.L.R. (E.,) 59.

Decree—Date for Redemption—How Fixed.]—It is usual in a decree for redemption to direct payment of the money in six months from the date of the report finding the amount due. Where the case was complicated, and there was a hearing upon further directions, the six months were increased from the date of the report and not from the hearing on further directions. *Jamieson v. Johnson*, 2 V.R. (E.,) 26; 2 A.J.R., 7.

Decree for Redemption—Where Bill Impeached the Mortgage and did not Pray to Redeem.]—In a suit to set aside a sale and to have mortgaged property recognised, the bill impeached the mortgage, but did not pray to redeem. *Held*, by the Full Court, affirming *Molesworth, J.*, that if upon the pleadings there are facts necessary to maintain a redemption suit, a decree for redemption will be granted, although the only case made by the bill is the invalidity of the mortgage and subsequent dealings, and no redemption is prayed by it. Upon appeal to the Privy Council, *Held* that although a mortgagor is not entitled to a decree for redemption on a bill which impeaches the mortgage securities and contains no prayer for redemption, yet such rule does not apply when the issues disclosed by the pleadings are not merely mortgage or no mortgage, but whether the defendant, by means of his acts subsequent to the impeached mortgage, had ceased to be mortgagee and had become absolute owner, and also whether the mortgagee's advances on the footing of the mortgage had not been more than satisfied by his receipts, the bill praying for an account, and offering to allow to the mortgagee all just credits. *United Hand-in-Hand and Band of Hope Coy. v. National Bank of Australasia*, 2 V.L.R. (E.,) 206; on appeal 3 V.L.R. (E.,) 61; on appeal to Privy Council, *sub nomine National Bank of Australasia v. United Hand-in-Hand and Band of Hope Coy.*, L.R. 4 App. Ca., 391.

Construction of Decree—Order Directing Mortgagee out of Possession and Purchaser from Him in Possession to Give up Possession.]—An order of the Court directing a defendant mortgagee out of possession, and a co-defendant, an equitable purchaser from the mortgagee in possession, to give up possession to the mortgagor, does not impose upon the mortgagee the active duty of giving up possession, but only means that he shall let the mortgagor take possession without obstruction. *United Hand-in-Hand and Band of Hope Coy. v. National Bank of Australasia*, 4 V.L.R. (E.,) 259, 270.

Decree Directing Certain Accounts to be Taken—Report Made in Pursuance of such Decree—Exceptions.]—A decree directed redemption in the ordinary way, directing accounts to be taken of the mortgage debt and of the receipts of the mortgagee as mortgagee in possession. The decree also noticed the fact of a release by G., the official assignee of the mortgagor of the equity of redemption to the defendant bank (the mortgagee) as affecting other rights, but as in no way affecting the mortgage debt. The Master reported a certain sum due to the defendant bank as mortgage debt without noticing the effect of the release of the equity of redemption upon such mortgage debt. Upon exceptions to the report based upon the release by G. accepted by the bank as discharging all moneys owing to the bank up to the date of the release, *Held*, by the Full Court, affirming *Molesworth, J.*, that it was not competent for the Master to consider the release by G. as operating in any way as a discharge of the mortgage debt, and that any such objection to the account on the ground of the release should have been taken by appeal from the decree and not upon exceptions to a report which had followed the decree consistently. *Dallimore v. Oriental Bank*, 3 V.L.R. (E.,) 56.

Who Entitled to Mortgage Money.]—The personal representative of a deceased mortgagee is entitled in equity to the mortgage-money, but the mortgagor is entitled to redeem upon payment to the real representative. *Walduck v. Colgin*, 5 W.W. & A'B. (E.,) 1, 5.

Deceased Mortgagee—To Whom the Mortgage-money may be Paid.]—A payment of principal and interest, when due, to the attorney under power of the real representative of a deceased mortgagee, if out of the jurisdiction, is good, though such attorney has not taken out administration to the estate of the mortgagee and misappropriated the money; but such payment made before the money is due is invalid. *Ibid.*

A mortgagor, to save forfeiture, may make a strict legal tender or payment of the mortgage-

money either to the real or personal representative of the deceased mortgagee. But where the money has not been paid or tendered on the day for payment, *i.e.*, on the day when there was constituted a duly appointed agent of the real representative—and a legal forfeiture has been incurred, the mortgagor can then only wait and make a valid payment to the personal representative of the mortgagee. *Walduck v. Dane*, 5 W.W. & A'B. (E.,) 8. 13.

Interest—Right of Mortgagee to After Tender of Principal and Interest.]—A mortgage contained a covenant for payment of interest by equal quarterly payments, so long as the principal remained unpaid. After the day fixed for payment of principal, and between two of the quarterly days for payment of interest, six months' notice to redeem was given. At the end of the six months principal and interest to date were tendered, and refused by the mortgagee, who insisted on his right of interest up to the next quarterly day of payment. On bill to redeem, *Held* that the amount tendered was sufficient, and that the mortgagor was entitled to his costs of suit; that interest stopped from the day of tender, but that the mortgagee was entitled to all interest on the sum tendered actually obtained by the mortgagor after tender. *Conroy v. Mason*, 2 V.R. (E.,) 93; 2 A.J.R. 46.

What is a Good Tender.]—*See Armstrong v. Robinson, ante column* 1056.

Interest.]—D., an administrator, entitled beneficially to one-third of his wife's land, and holding the other two-thirds on trust for his children, borrowed money from the defendant bank and expended it in improving the whole of the property, which he mortgaged to the bank as security for the loan. The bank advanced the money and took the mortgage, with notice of the children's interest. On suit by the children for redemption, *Held* that the plaintiffs were entitled to be let into possession of or to receive two-thirds of the rents of the improved value of the land upon payment to the bank of two-thirds of the money advanced by the bank, with interest at eight per cent., and not at rate fixed in the mortgage, and that defendant bank should do everything to vest the legal estate in the two-thirds of the land in the plaintiffs. *Droop v. Colonial Bank of Australasia*, 8 V.L.R. (E.,) 7.

[NOTE.—The parties consented to and acted upon a suggestion by the Court that the land should be sold.]

Costs—Mortgagee Claiming as Absolute Owner.]—Where a mortgagee claiming to be absolute owner resisted right to redeem and failed, *Held* that mortgagor was entitled to his costs down to and inclusive of original hearing. *Mouatt v. Mackenzie*, 1 V.L.R. (E.,) 73; for facts *see* S.C. *ante column* 1063.

Costs.]—In a suit to have an absolute conveyance declared a mortgage, for redemption and accounts, the defendant by his answer offered to allow redemption, though he had previously claimed to hold absolutely. *Held*, that on a decree being made for redemption, plaintiff mortgagor was entitled to his costs of suit up to decree, and defendant mortgagee to his costs subsequent thereto. *Pickles v. Perry*, 4 V.L.R. (E.,) 66.

Mortgagor's Costs.]—A mortgagor filed his bill to redeem. The mortgagee resisted, on the ground of a sale and subsequent purchase by him. By the decree the sale was declared void, and the plaintiff entitled to redeem. *Held* that the mortgagor was therefore entitled to his cost up to the decree. *Slack v. Atkinson*, 4 V.L.R. (E.,) 195.

Costs.]—Where a mortgagor, seeking to redeem land alleged to have been sold by the mortgagee, proved that the alleged sale was, on technical points, invalid, but his bill contained charges of fraud and collusion against the mortgagee and the purchaser, which were totally unfounded, *Held* that, though entitled to redeem he should pay the costs of the mortgagee and of the purchaser. *Ross v. Victorian Permanent Building Society*, 8 V.L.R. (E.,) 254; 4 A.L.T., 17.

Costs of Mortgagee—On Further Directions.]—By the decree in a suit to set aside a sale by the mortgagee and to redeem, the mortgagee was ordered to pay costs up to the decree. Accounts were directed, but no day was fixed for redemption. On further directions after report finding a balance due to the mortgagee in possession, *Held* that the costs subsequent to the decree should follow the ordinary rule in a redemption suit. *Jamieson v. Johnson*, 2 V.R. (E.,) 26; 2 A.J.R., 7.

Costs of Mortgagee.]—Where a mortgagee, who has improperly exercised his power of sale, has been paid off before a suit in substance for redemption was instituted, the rule that a mortgagee is entitled to his costs will not apply; and if, after decree for redemption, he resists the redemption in the Master's office, he will have to pay the costs subsequent thereto. *United Hand-in-Hand and Band of Hope Coy. v. National Bank of Australasia*, 4 V.L.R. (E.,) 173, 192, 193.

Mortgagee's Costs.]—In a suit for redemption in which the mortgagor succeeded, upon taking the accounts a balance was found due to the mortgagee. *Held* that the mortgagee was entitled to his costs in the Master's office and on further directions. *Slack v. Atkinson*, 4 V.L.R. (E.,) 195.

Costs—Of Mortgagee.]—In a redemption suit against a mortgagee in possession, a decree was made in favour of plaintiff with costs, and he then agreed to pay the mortgagee a sum named by the mortgagee. The mortgagee withdrew from the agreement, and insisted upon accounts. In the accounts brought in both parties claimed a balance. The Master found in favour of the mortgagee, but for a smaller sum than that claimed, but for a larger sum than that agreed upon at first. *Held*, upon further directions, that the mortgagee should have his costs subsequent to the decree. *Murphy v. Mitchell*, 6 V.L.R. (E.,) 140; 2 A.L.T., 26.

Costs—Mortgagee with Notice of Claims.]—A bank took a mortgage over an entire property, in which the plaintiffs, as next-of-kin, were jointly interested with the mortgagor as administrator, and beneficially entitled in his own right, with notice of the plaintiffs' claims, and persistently litigated with them, and set up defences which failed. *Held* that the bank should pay the costs of the suit, except of a charge of fraud in the bill which failed; and that the plaintiffs must pay so much of the bank's costs as were attributable to resisting such charge. *Droop v. Colonial Bank of Australasia*, 8 V.L.R. (E.,) 7.

Costs.]—A mortgagee who, in a redemption suit, sets up and fails to prove an absolute title to the mortgaged property, and is then found to have been, at the date of suit, overpaid as mortgagee, will not only not be entitled to his costs of suit, but may have costs given against him. *National Bank of Australasia v. United Hand-in-Hand and Band of Hope Coy.*, L.R. 4 App. Ca., 391.

Costs.]—A mortgagor paid off part of the principal to one of several executors and tendered the remainder, which the other executors refused, insisting that the whole sum was due. On bill for redemption, a reference was made to the Master-in-Equity, who found that the sum tendered was all that was due. *Held* that, though the plaintiff had thus sustained the substance of his bill, yet he and the defendants having been guilty of irregularities in the payment off of the part, no costs should be allowed to either side. *Lewis v. Levy*, 4 V.L.R. (E.,) 106.

NAVIGATION.

Negligent Navigation of River.]—*Fergusson v. Union Steamship Company.* *See post* under RIVER.

Negligent Navigation at Sea.]—*See post* under SHIPPING.

NE EXEAT COLONIA.

The writ *ne exeat colonid* may issue for costs before taxation. *Musson v. Bourne*, 1 W. & W. (E.,) 1, 4, 5.

An order for the issue of such writ may be made by a single Judge in Chambers; and the writ may be issued on such order without drawing up any order of Court. *Ibid*, p. 6.

Though the sum for which the party be arrested be in the body of the writ, it should be "endorsed in words at full length," as an intimation to the sheriff. *Ibid*, p. 6.

The omission of such endorsement may be amended by the Court. *Ibid.*

Service of Copy—Supreme Court Rules, Cap. x., Rule 20.]—It is not necessary to serve the defendant with a copy of the writ *ne exeat colonid*. *Simpson v. Goold*, 1 W. & W. (E.,) 245, 247.

Where the order for the writ of *ne exeat colonid* is obtained from a Judge in Chambers, a formal order to the officer for its issue should be drawn up. *Ibid*, p. 248.

Application to Set Aside—Discharge of Defendant.]—On application to set aside a writ of *ne exeat colonid* the defendant will not be discharged on his own affidavit denying that there is any balance due to the plaintiff. *Ibid.*

Per Chapman, J.—"If upon the face of the bill and answer, it can be ascertained that it is almost certain there will be no balance due to the plaintiff on taking the accounts, then the Court will discharge the defendant. There is another course frequently adopted, which is, that if the Court is satisfied after answer that the defendant has been arrested for too large an amount, the Court will, upon application being made for the purpose, reduce the amount endorsed upon the writ, and allow the security to be taken for the smaller amount." *Ibid.*

Return of the Writ.]—The return which the ordinary form of the writ *ne exeat colonid* requires the sheriff to make under seal is confined to the security taken by him, and not to the mere return of the writ of arrest, which is in the usual form *corpus cepi*. *Ibid.*

Discharge from Arrest.]—Where a defendant has stated in writing that he intends to leave the colony, the Court will not discharge him from arrest under the writ, merely on his affidavit that he never did intend and does not intend to leave the colony. *Ibid.*

Motion to Set Aside—Defendant Leaving Colony in Ordinary Course of Business and Returning Again in Time for Payment.]—In the suit accounts were decreed and defendant ordered to pay into court £700 within three months. The defendant was captain of a vessel, and was leaving Melbourne in the vessel on a voyage to Newcastle. The plaintiff obtained a writ *ne exeat colonid*, and the defendant gave his bond as bail. Defendant's affidavits stated that the vessel he was in command of was trading between Melbourne and Newcastle, and that he would be in Melbourne before the time for payment of the £700 had elapsed and before final taking of accounts. Writ and bail bond set aside. *Smith v. Knarston*, 3 A.J.R., 103.

NEGLIGENCE.

1. *What Amounts to.*

Of 'Bus Driver—Contributory Negligence.]—For circumstances under which a 'bus driver was held guilty of negligence for getting off the seat to look after a horse that had fallen, and not keeping the reins, and a passenger who got out of the 'bus whilst it was in motion and was injured, was held not guilty of contributory negligence. *See Melbourne Omnibus Company v. Thomas*, N.C. 15.

Of Licensed Carrier—"Licensed Carriage Stat. 1864" (No. 217) Sec. 14.]—The disregard of the provisions of Sec. 14, of Act No. 217, forbidding more than one person to be carried on the box of a coach is not conclusive proof of negligence as against the owners in the case of an accident. *Robertson v. Carmody*, 1 V.R. (L.,) 6; 1 A.J.R. 24.

Adjoining Houses—Lateral Support.]—Where W. was sued for negligently excavating so close up to P.'s house as to cause the fall of the house and consequent injury, *Held* that, it appearing from the evidence that P.'s house was substantially built, and that the house fell partly through its own weight and partly through its not being shored up, that the fall was to be attributed to the superincumbent weight of the house and that therefore the plaintiff was not entitled to recover, being only entitled to the support of the land in its natural state. *Piper v. Walsh*, 5 A.J.R., 13.

Negligence consists in doing that which a person ought not to do, or omitting to do that which he ought to do, in disregard of the rights of another. *Fergusson v. Union Steamship Company*, 10 V.L.R. (L.,) 279, 286; 6 A.L.T., 120.

See also *Lewis v. M'Mullen, ante column* 84.

Negligence of Sheriff in Levying Under fi. fa.]—*Smith v. Colles*, 2 V.R. (L.,) 195; 2 A.J.R., 117, *post* under SHERIFF.

Neglect of Statutory Duty in Maintaining and Repairing Roads, Bridges, &c.]—*See* cases under LOCAL GOVERNMENT, *ante columns* 854-863.

Negligence by Bankers as Gratuitous Bailees—Theft by Clerk.]—*Lewis v. M'Mullen, ante column* 84.

2. *Parties Liable.*

Collateral Negligence of Persons Employed.]—*Per Stawell, C.J.*—If the injury arises from the collateral negligence of persons employed, they, and not the employers, are liable, unless the employers actually interfere. *Badenhop v. Mayor of Sandhurst*, 1 W. W. & A'B. (L.,) 136, 141.

Liability of Corporation for Injuries Caused by Negligent Mining under Streets under which Permission to Mine has been Given.]—*See* S.C., *ante column* 859.

Person Undertaking a Duty — Independent Contractor.] — A landlord, at his tenant's request, undertook to renew the roof of the house, and employed a contractor to do the work. During the progress of the work injury was done to the tenant's goods by a sudden and very heavy rain, and the absence of sufficient precaution in carrying out the work. *Held* that the landlord was liable for the injury. *Meyers v. Easton*, 4 V.L.R. (L.,) 283.

Corporation Undertaking Repair of a Bridge—Independent Contractor Employed to Make a Side Road.]—*Bossence v. Shire of Kilmore, ante column* 862.

Obstruction on Road — Materials Left by a Contractor—Corporation Liable.]—*Bell v. Shire of Portland, ante column* 859.

Contractor — Sub-Contractor.] — P. contracted with a borough to repair streets, &c., under a contract which required him to light and fence obstructions, and which forbade his sub-letting the contract without consent. P. sublet a part to W. without consent, and W. failed to light and fence, whereby B. fell over the obstruction and suffered injuries. *Held* that P. was not liable in an action by B. for W.'s negligence. *Phillips v. Byrne*, 3 V.L.R. (L.,) 179.

Construction of Railway—Liability of Contractor for Injury done through Sparks from Engine—"Public Works Stat., No. 289," Secs. 77, 138—Act No. 344, Sec. 71.]—T., the owner of a farm, sued a railway contractor in the County Court for injuries caused by C.'s negligence in using a locomotive so that sparks issued therefrom and caused the injuries. The County Court Judge directed the jury that the Act No. 580, which authorised the construction of the railway, did not authorise the use of the locomotive in its construction, and the jury found for the plaintiff. *Held* on appeal that the "*Public Works Stat.*" (No. 289) impliedly authorised the use of locomotives by the Board of Land and Works, and therefore by its contractors, and that Sec. 71, of Act No. 344, also gave the authority more expressly; and that C. was not liable except upon proof of negligence in not using all reasonable precautions. Case to be re-heard. *Topham v. Christie*, 5 V.L.R. (L.,) 306; 1 A.L.T. 43.

Contractor Erecting Hoarding—Sub-contractor.]—A contractor who has been allowed to enclose a part of a street with a hoarding for the purpose of carrying on building operations, and of depositing building materials, is absolutely responsible for the use of such hoarding, and of a gate constructed in it, in such a manner that no injury shall result to the public. When, therefore, a passer-by was injured through the negligent use of the gate by an independent sub-contractor, who had undertaken to supply the defendant (the contractor who had been allowed to erect the hoarding) with building materials, *Held* that the defendant was liable for the injury occasioned. *Evans v. Martin*, 6 V.L.R. (L.,) 176; 2 A.L.T., 7.

Public Body — Statutory Authority.] — By accepting the authority given to it by a statute to do acts, which, without such authority, would constitute a public nuisance, a public body undertakes an obligation to use all the care necessary to protect the public from injury, and cannot, by employing an independent contractor to do the acts, relieve itself from this obligation. *O'Brien v. Board of Land and Works*, 6 V.L.R. (L.,) 204; 2 A.L.T. 22.

The Board of Land and Works let a contract to H. and G. to cart waterpipes, and deposit them in streets to be named. H. and G. received instructions to deposit pipes in a certain street, but in doing so left one of them lying partly on the paved crossing of that street and another. Over this pipe the plaintiff fell and sustained injury thereby. *Held* that the Board of Land and Works, and not the contractors, was liable. *Ibid.*

Although the Board of Land and Works is a public body, discharging statutory duties, it is liable for the improper execution either by the Board or its agents of works constructed in discharge of those duties by which injury is occasioned. *Victorian Woollen and Cloth Manufacturing Company v. Board of Land and Works*, 7 V.L.R. (L.,) 461; 3 A.L.T., 65.

Accidental Fire Spreading to Neighbour's Land—Liability.]—It is the duty of any person who originates or brings any matter, animate or inanimate, attended with danger on his ground to keep it within bounds: but no duty is cast upon a landowner to keep within bounds, and from spreading into a neighbour's land a fire which is raging on his land through no fault of his own. *Batchelor v. Smith*, 5 V.L.R. (L.,) 176; 1 A.L.T., 12.

Careless Use of Fire.]—A person lighting a fire on his own land does it at his own risk, and notwithstanding that he uses diligence to prevent it spreading he is answerable for the mischief it may cause, and the question of his diligence does not require to be considered. *Sheehan v. Park*, 8 V.L.R. (L.,) 25; 3 A.L.T., 98.

Corporation Succeeding to Liabilities of its Predecessors.]—*Dummelow v. Mayor etc. of St. Kilda, ante column* 860.

3. *Railways.*

Negligence—Extinguishing Lights—Contributory Negligence.]—B., a female passenger, arrived in Melbourne by train twenty minutes before midnight, her luggage having been sent on by a previous train. B. was informed that she must go and identify the luggage, and after waiting in the waiting room till 12.18 she went to the parcels office and on her return the station lights were extinguished and she fell and was injured. *Held* that the defendants were guilty of negligence, it being their duty, if the station was kept open after midnight, to inform persons on the station that the lights were going to be extinguished; that B. was on the station with the leave of the defendants and was guilty of no contributory negligence. *Black et uxor v. Board of Land and Works.* 1 V.L.R. (L.,) 12.

Swing Gates at a Highway—Contributory Negligence.]—A boy entered by one of the swing gates at a railway crossing, and instead of crossing directly in a line with the footpath by which he had entered the gate, he crossed the line diagonally towards the footpath on the other side of the line and was run over and killed. *Held* that there is no obligation on the part of a railway company to place men at the swing gates to warn crossers, except perhaps where a sudden curve, a hill or building intercepts the view of the line, and that crossers cross at such places at their own peril and must take proper precautions. Rule absolute for nonsuit. *Gallogly v. M. and H. B. U. Railway Company*, 1 V.L.R. (L.,) 58.

Board of Land and Works—Unlighted Railway Station—Injury to Person Accompanying Passenger.]—S. was accompanying a passenger to a night train. He took a ticket for the passenger, crossed the line at the ticket office end and saw the passenger off. He then proceeded along the platform in order to depart by a public crossing at the other end; but, in the darkness, he fell into the ashpit and was injured. At the ticket office end there was a lamp, but at the opposite end none. S. did not return by the way he came because a train was approaching that end. Verdict for S. Rule *nisi* for a new trial, or to enter a nonsuit on the grounds (1) that defendants were not liable to be sued in this action; (2) that there was no duty or contract as regarded S. obliging defendants to light the place where the accident happened; and (3) that there was no evidence of negligence to go to the jury. *Held* that the fact that the Board was a public body acting as trustees did not exempt them from liability, that they were not public officers, that the Board was under an obligation as regarded S., that the question of negligence was one for the jury, and rule discharged. *Sweeney v. Board of Land and Works*, 4 V.L.R. (L.,) 440.

Dangerous Track—Friend of Passenger Injured—Duty of Board of Lands and Works.]—The proprietors of a railway owe a duty to the friends of a passenger going to a station to see him off or to meet him, where such a practice is

allowed by the proprietors, to protect them from any dangerous place which may exist, not only in the regular approach to the station, but also in any other approach which is allowed to be commonly used by persons going to and from the station. And this duty extends to a person not a friend of a passenger, but accompanying friends going to meet a passenger. *Langton v. Board of Land and Works*, 6 V.L.R. (L.,) 316; 2 A.L.T., 65.

Leaving Articles upon Platform.]—A passenger alighting at Melbourne was passing along the platform of the station about 5.20 p.m. in May, the lamps not being lighted, when he tripped against an engine spring left on the platform and injured himself. In an action for negligence, *Held* that the sufficiency of light, the placing of articles on the platform before the passengers had left, and the position of the articles, were all questions for the jury, and the Court would not interfere with their verdict for the plaintiff. *Burke v. Board of Land and Works*, 9 V.L.R. (L.,) 356; 5 A.L.T., 122.

Crane Allowed to be Used by Persons Sending Goods — Railway Department — Liability for Defective Condition.] — The plaintiff was in the employ of B. and Co., who were sending logs of timber by rail, and was loading the vans with these logs by means of a crane allowed by the Railway Department to be used by persons sending goods, when he was injured by the logs falling upon him owing to the defective condition of the crane. *Held*, per *Stawell, C.J.*, and *Higinbotham, J.* (*dissentiente Williams, J.*,) that the plaintiff was more than a bare licensee, and that the department was liable for the defective condition of the crane. *Sheridan v. Board of Land and Works*, 9 V.L.R. (L.,) 421; 5 A.L.T., 138.

4. *Actions.*

(*a*) *Under the "Stat. of Wrongs 1865."*

Apportionment of Damages—Nominal Damages — "Stat. of Wrongs 1865," Sec. 14.] — Since, under the 14th Sec. of the "*Stat. of Wrongs* 1865," the jury, in an action by the administrator of a person killed through the defendant's negligence, must apportion the amount of damages given amongst those persons on whose behalf the action is brought, a verdict for a farthing, if there be more than one such person, since a farthing cannot be apportioned, cannot be upheld. *Shallue v. Long Tunnel Gold Mining Company*, 10 V.L.R. (L.,) 56.

Proper Measure of Damages as Compensation for Death.] — *See M'Lean v. Board of Land and Works*, 7 V.L.R. (L.,) 239; 3 A.L.T., 8, *ante column* 340.

Action by Widow—"Stat. of Wrongs 1865"—"Mines Regulation Act 1873," No. 480.]—The action which, before the passing of the Act, No. 480, might have been brought by a miner injured in a mine, or by his executor for the benefit of his relatives, at common law, or under the "*Stat. of Wrongs*," is governed by Sec. 8 of Act No. 480, and may under that Sec. be brought for the benefit of the widow and children. *Kaye v. Ironstone Hill Lead Gold Mining Company*, 2 V.L.R. (L.,) 148.

(*b*) *Evidence and other matters.*

W., the plaintiff, was a labourer in defendants' employ, working at a puddling-machine. The complaint was that defendants had negligently permitted a chain connected with a truck used to discharge auriferous matter into the puddling-machine to be in an unsound condition and to break, whereby the plaintiff was injured. There was evidence that the chains being used in wet earth became in time rusted, and were at no time tested by defendants. The plaintiff had, in his "tipping" the truck, used means which relieved him from exertion, but increased the strain on the chain. It was not certainly proved that plaintiff had knowledge of the weakness of the chain; he had conversations as to necessity of shackles with the engineer. *Held*, per *Stawell, C.J.* and *Barry, J.* (*dissentiente Williams, J.*) that there was evidence to go to a jury of defendants' negligence, and to rebut contributory negligence, and a rule *nisi* for a nonsuit discharged. *Withell v. Lowe*, 2 W. W. & A'B. (L.,) 57.

Master and Servant—Conveying Servant to place of Work.]—B., who was performing certain work under contract with M., was requested by M. to accompany him to another place, an out station, for the purpose of assisting in other work not in the contract, and upon M. insisting B. allowed him to drive him there in his buggy. B. did not trust the capacity of M. as a driver, but eventually consented to allow M. to drive him. On the journey, whilst going up a slight incline, the buggy came in contact with a fallen limb of a tree, the kingbolt parted, and B. and M. were thrown out, and the former sustained severe injuries, and accordingly sued M. for damages for breach of a promise safely to convey him for profit. *Held* that the driving of B. by M. was not the consideration which moved B. to go to the out-station, but that, even if no profit or reward were proved to M., he would be liable for the injury to B. if there were any evidence that M. had not used due care and skill as a gratuitous bailee; that mere proof of an accident does not in all cases throw upon a defendant the burden of showing the real cause of the injury; there must be reasonable evidence of negligence; but, *per Stawell, C. J.*, and *Barry, J.* (*dissentiente Williams, J.*,) that where, the thing being under the management of the defendant, the accident is such as in the ordinary course does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of proper care; and that the jury should have been allowed at the former trial to decide upon the circumstantial evidence, and to infer from the position of the buggy, and of B. and M., after the accident, that the buggy had been driven against a fallen branch, and that that would be evidence to go against them of negligence. But, *per Williams, J.*, that B. was not entitled to succeed unless there were affirmative proof of negligence

on the part of M., and that there was no such proof in this case. On appeal to the Privy Council, *held* that B. was not entitled to a verdict in the absence of any evidence of gross negligence on the part of M.; and that the evidence did not show such negligence as to make M., performing a gratuitous service for B., responsible; and decision of Supreme Court reversed. *Bateman v. Moffatt*, 5 W. W. & A'B. (L.,) 125; 1 A.J.R., 10.

On appeal *sub. nom.*, *Moffatt v. Bateman*, L.R., 3 P.C., 115; 1 A.J.R., 12.

Steam Roller—Question for Jury.]—An injury to plaintiff was occasioned by his horse taking fright at a steam roller employed by a municipal council in a street. In an action it was held that the question whether the council, by placing a notice upon a stand in the roadway, stating that the roller was at work, but leaving the street open to traffic, had taken proper precautions to prevent accident, was a question for the jury; but the Court granted a new trial on the ground that the steam roller was at rest taking in water, and that that there was contributory negligence on the part of the plaintiff. *Levy v. Mayor, &c., of St. Kilda*, 4 V.L.R. (L.,) 302.

Obstruction to Road—Question for Jury.]—In an action against a municipal council to recover damages for injuries sustained in falling over materials left upon a public road for its repair by the council, it is essentially a question for the jury whether the materials left on the road were of such a character as to be dangerous. *Ogburn v. President, &c., of Shire of St. Arnaud*, 8 V.L.R. (L.,) 308.

Medical Examination of Plaintiff.]—In an action for damages for injury sustained by the plaintiff from an omnibus company, *Molesworth, J.* (in Chambers) allowed the defendant company to obtain an order to have the plaintiff medically examined, before any pleadings had been delivered in the action. *Phillips v. Melbourne Tramway and Omnibus Company*, 1 A.L.T., 116.

Medical Practitionsr Negligently Signing Certificate of Insanity Under Sec. 11 of the "Lunacy Stat., No. 209."]—*Smith v. Iffla, Roberts v. Hadden. See ante column* 899.

Passenger—Onus of Proof.]—It is sufficient evidence to launch the case against a carrier that a passenger travelling in a public vehicle, is thrown therefrom by an accident, though the cause of such accident be unexplained. The *onus* lies on the carrier to show that the accident was not the result of negligence on his part. *Pink v. Melbourne Tramway and Omnibus Company*, 6 V.L.R. (L.) 186; 2 A.L.T. 18.

Accident to Person not in Vehicle—Mode in Which Accident Occurred.]—Although the mere fact of an accident occurring to a person not being carried in a vehicle owing to the shying of the horses is not of itself sufficient to launch the case against the owner of the vehicle and dispense with the establishing by the plaintiff of some act of negligence on the part of the defendant beyond mere proof of the accident; yet the manner in which the accident occurred may nevertheless be considered by the jury, to enable them to arrive at a conclusion as to whether there was or was not actionable negligence on the part of the defendant. *Phillips v. Melbourne Omnibus and Tramway Company*, 6 V.L.R. (L.,) 229.

Negligence in Driving—Evidence.]—*Per Williams, J.* The mere fact that a person lawfully walking along a street was run over by a vehicle raises a *primâ facie* case of negligence. *Per Curiam.* Where a cart is driven at a smart trot across a principal line of traffic at a busy time of the day, that is sufficient evidence of negligence to go to a jury. A statement made by the driver of the cart that he was in the employ of the defendant, is admissible as evidence in an action of negligence. *Brundell v. Wane*, 7 V.L.R. (L.,) 319; 3 A.L.T., 22.

Break-down of Passenger Coach from Unexplained Cause—Burden of Proof—Res ipsa loquitur—More than Statutory Number of Passengers.]—S. sued R. for damages sustained by him while travelling as a passenger in one of R's coaches. A wheel had come off the coach, before the end of the journey, from some unknown cause, for it was shown that the coach and the way its wheels were secured was of approved construction, and in good order. There were, however, more than the statutory number of passengers on the coach at the time of the accident. *Held* that it was for the jury to determine whether the fact that more than the statutory number of passengers were carried, was or was not in some way connected with the accident. It is a question for the judge whether there is evidence, reasonably fit to be considered by the jury, of negligence connected with the injury. Proving the break-down of the coach in a manner which does not usually happen without negligence, is sufficient to launch the plaintiff's case; and the *onus* then lies on the defendant to rebut the presumption against him, by satisfying the jury by evidence reasonably sufficient for the purpose, that he has not been guilty of negligence, which was in reality a cause of the injury. It does not lie upon the plaintiff to prove that the breach of the statutory duty was the cause of the accident. *Smith v. Robertson, Anderson v. Same*, 8 V.L.R. (L.,) 256; 4 A.L.T., 45.

Damages—Measure of and When Court will Interfere with Assessment of.]—*M'Lean v. Board of Land and Works, ante column* 340; *Archibald v. Pruden, ante column* 338, *and see* S P. *Geach v. Board of Land and Works*, 8 V.L.R. (L.,) 29.

5. *Contributory Negligence.*

Railway Company—Level Crossing.]—A light or notice at a dangerous place is only necessary when the public have right of access. W. was approaching a station belonging to the defendant company, and being anxious to catch a particular train, which was nearing the station, diverged, instead of going by

either of two routes, one of which led to the platform by steps, and the other by a public bridge, from the lawful crossing at an acute angle, went over the rails, and was attempting to mount to the platform by means of a step placed there for the sole use of the company's servants, when he fell, was caught by the train, and injured. *Held* that the company were not guilty of negligence in not having a light or notice at the spot where he diverged; that W. was a trespasser, and diverged at his own hazard. Rule absolute for a nonsuit. *Williams v. Melbourne and Hobson's Bay United Railway Company*, 3 V.R. (L.,) 91; 3 A.J.R., 51.

And *see Black v. Board of Land and Works*, and *Gallogly v. Melbourne and Hobson's Bay Railway Company*, *ante column* 1078.

Falling into a Dangerous Hole—Forgetfulness—Question for Jury.]—L., being in defendant's store on business, fell through an unprotected hole in the floor into a cellar, and was injured. L. sued defendant for negligence, and recovered a verdict. It appeared from the evidence that L. had been in the store before, and had seen the hole covered with hatches, and on the occasion when he was injured, forgot about the hole, or thought that the hatches were on, it being dark at the time. *Held*, on rule *nisi* for a nonsuit or new trial, that jury having found defendants guilty of negligence, the plaintiff's forgetfulness was a question of contributory negligence for the jury, and not a question of law for the Judge. Rule discharged. *Leahy v. Stuart*, 3 V.L.R. (L.,) 310.

Where the Court were of opinion that there was evidence of contributory negligence, it granted a new trial on payment of costs, on the ground that, though contributory negligence as a rule is a question for the jury, yet that rule is subject to the principles of law that every verdict is to be founded on, and not in opposition to, the evidence adduced. *Levy v. Mayor of St. Kilda*, 4 V.L.R. (L.,) 302.

"Statute of Wrongs," No. 251, Part II.—Contributory Negligence—Direction to Jury.]—Rule *nisi* for a new trial. The plaintiff sued the defendants for negligence as the administratrix of her husband, who had lost his life by passing along an unfenced road under defendants' care, which had been suddenly flooded during the night. The Judge directed the jury that they were to determine whether the road was dangerous, and asked them whether the deceased had foolishly and recklessly formed an opinion as to the safety of going along the street, and told the jury that if the defendants were guilty of negligence, no mere want of care on the part of the deceased would exonerate the defendants. *Held* a good direction. *Smith v. Mayor of Emerald Hill*, 7 V.L.R. (L.,) 431.

Evidence of.]—In an action against a shire council for injuries to a horse, which, while straying on a highway under the care and management of the council, fell into a hole in or near the highway, and was injured, the Court *held* that if the horse strayed through the default of the plaintiff, such default was evidence of contributory negligence. *Smyth v. Shire of Kyneton*, 8 V.L.R. (L.,) 37; 3 A.L.T., 99.

Damage Caused by a Nuisance—Contributory Negligence.]—Contributory negligence on the part of the plaintiff is no defence to an action for damage caused by a nuisance. *Smyth v. Shire of Kyneton*, 8 V.L.R. (L.,) 231.

Obstruction on Road.]—Where a fence has been erected across a road, having a slip panel wide enough for vehicles to pass through with ordinary care, the corporation is not liable for an accident under circumstances showing the want of such care. *Munro v. Shire of St. Arnaud*, 6 V.L.R. (L.,) 217.

Accident in Street—Drunkenness of Plaintiff.]—In an action for damages in respect of injuries caused by the plaintiff's falling from a vehicle on a dark night into a cutting at the end of a street then being formed, the plaintiff having driven through a panel, which some one had removed, of a fence placed by the corporation across the street, the drunkenness of the plaintiff is material to the question of the liability of the corporation which had the control of the street. *Mayor, &c., of Melbourne v. Brennan*, 8 V.L.R. (L.,) 113; 4 A.L.T., 1.

If a man trespasses on another's land, knowing that he is running into danger, although he does not know in what part of the land the danger is situated, and is injured, his own wilful act is regarded in the eye of the law as the cause of the injury. If he had trespassed without notice of the danger the injury would not be attributed to him. If he has a right to go where he is going, and knows there was danger in his path, and comes upon it without perceiving it, he will be deemed guilty of contributory negligence or not, according to the degree of caution which he has exercised in approaching it. *Boyle v. Shire of Mornington*, 9 V.L.R. (L.,) 265; 5 A.L.T., 83.

Unprotected Bridge.]—A person, who was in bad health and had been drinking, fell from an unprotected bridge under the control of a shire council, and sued the council for their negligence. The jury found that the plaintiff could have avoided the accident by the use of ordinary care, and yet returned a verdict for the plaintiff. *Held* that the verdict could not be sustained, and rule absolute to enter a verdict for defendants. *Hynes v. Shire of Broadford*, 9 V.L.R. (L.,) 346.

And *see Melbourne Omnibus Company v. Thomas*, *ante column* 1075.

6. *Liability of Master for Negligence of Servants. See cases, ante columns* 893-895. Under MASTER AND SERVANT.

7. *In Management of Mines. See ante columns* 905, 906. Under MINING.

8. *In Construction and Maintenance of Roads, &c. See ante columns* 854-863. Under LOCAL GOVERNMENT.

9. *Liability of Solicitor for Negligence. See post,* under SOLICITOR.

10. *Liability for Injuries caused by Animals. See cases, ante columns* 24, 25.

NEGOTIABLE INSTRUMENTS.

1. *Bills of Exchange and Promissory Notes. See* BILLS OF EXCHANGE AND PROMISSORY NOTES.
2. *Bills of Lading. See* SHIPPING.
3. *Cheques. See* BANKERS AND BANKING COMPANIES AND CHEQUES.
4. *Delivery Orders. See* LIEN—SALE.
5. *Other Documents.*

(5) *Other Documents.*

Order for Payment of Money—Revocation.]—J. gave B., the sub-manager of a firm, an order for a certain sum upon the manager of the firm, and at the same time signed an account purporting to be between J. and the firm, whereby the firm admitted the order and gave credit for it. Before payment of the order, J. called on the firm and told them not to pay it. In an action by J. for a balance of wages due by the firm, *Held* that, although J. might revoke the order before payment, if no steps had been taken to pay it, J., by signing the account, had changed his own position and induced the firm to change their position in regard to him, and could not therefore be permitted to stop the order. *Grice v. Johnson,* 2 A.J.R., 61.

NEW TRIAL.

1. *On What Grounds Granted or Refused, column* 1085.
2. *Practice, column* 1095.
3. *In Criminal Cases. See ante columns* 318, 319, 320.

STATUTES—"*Common Law Procedure Stat.* 1865" (No. 274) Secs. 312-316.
"*Judicature Act* 1883" (No. 761,) repeals Secs. 312-314, and Order xxxix. of the Rules, 1884, provides for the new procedure in cases of New Trials.

(1) *On What Grounds Granted or Refused.*

New Trial in County Court.]—*See cases ante column* 259.

Misdirection in Law—What is and What is Not.]—On the trial of an action of trover, and also for certain empty bags which had before the floods contained salt, the Judge said to the plaintiff's counsel, "I suppose the count in trover is for the bags." Counsel made no answer; but the Judge was under the misapprehension that he had replied in the affirmative. The Judge assuming his apprehension to be correct, that the count only covered the empty bags, directed the jury that as there was no evidence of conversion as to those bags, they must find for the defendant. As a matter of fact the count covered the bags of salt as well as the empty salt bags. The mistake was not corrected, and the jury found for the defendant. *Held* that the mistake and the direction founded on it, did not amount to a misdirection in law; that it was the right and duty of counsel to interfere and correct such mistake; and that counsel not having done so at the trial when the mistake could have been readily corrected, a rule *nisi* for a new trial, on the ground of misdirection, granted to have the matter discussed and settled, should be discharged with costs. *Halfey v. Cole,* 1 W. W. & A'B. (L.,) 37.

Direction to Jury.]—A Judge is right, in trying a case as to whether a contract has been formed or not, to leave it to the jury whether conversations and letters put in evidence form a contract or not, instead of deciding the question himself as a matter of law. *Hardy v. Anderson,* 2 A.J.R., 110.

A Judge should not be bound by every inadvertent word used in summing up; though it may have been an ill-advised word, it will not be binding upon him, if the jury are properly seized of the case. *Ibid.*

Jury Not Directed as to Part of Amount Sued for—Objection Not Taken at Trial.]—In an action by a trustee in insolvency for money paid as a preference, a verdict was given for the defendants, and a new trial applied for on the ground that the jury had not been directed as to part of the amount sued for, that being in respect of bills current and not then due, the defendants were not entitled to retain the amount. A new trial was refused on the ground that the objection had not been taken during the progress of the trial. *Aylwin v. Callaghan,* 4 A.J.R., 79.

Misdirection, What is.]—In an action upon a deed, on the issue *non est factum,* it is not misdirection to tell the jury that, if they find for the defendant, they will not necessarily find the plaintiff guilty of forgery, whereas if they find for the plaintiff they will find the defendant guilty of perjury; but this is merely a strong mode of putting to the jury on which side the *onus* of proof lay—on which side the proof of the affirmative rested. *Bishop v. Stone,* 6 V.L.R. (L.,) 98; 1 A.L.T., 168.

Misdirection—Omission to State that Plaintiff's Interest was only a Life Interest.]—In an action for trespass by cutting and making a road on plaintiff's close, in which the plaintiff had only a life interest, the County Court Judge directed the jury that there was no question of title involved. *Held,* a misdirection and new trial ordered. *Shire of Portland v. Kennedy,* 7 V.L.R. (L.,) 140.

When Granted—Misdirection.]—Where, in an action for assault, the defendant sets up as a defence that he used no more violence than was necessary to establish his legal right, the jury should be directed that the defendant's assertion, if proved, entitles him to a verdict, otherwise a new trial will be directed. *Johnson v. Rushford*, 2 A.L.T., 58.

For a case where the Court was divided as to a certain direction being a misdirection, *see Walker v. George*, 5 A.J.R., 29, *ante column* 369.

Misdirection as to Measure of Loss.]—*Harwood v. Stackpoole, ante column* 340.

Discovery of Fresh Evidence—Rule of Law.]—The Court refused to grant a new trial, applied for as on the discovery of fresh evidence, upon an affidavit that the defendant was not aware of the existence of a rule of law of another colony, which rule of law he had omitted to prove at the trial. *Goldsbrough v. M'Culloch*, 5 W. W. & A'B. (L.,) 154.

Discovery of Fresh Evidence.]—M. sued S. for breach of a contract to deliver a certain quantity of coals. The measure of damages was difference of price at which defendant had agreed to supply them, and the market value, M. swearing that he had paid a certain price for a quantity bought through a Mr. L. The jury gave plaintiff a verdict for what he claimed. Rule *nisi* for new trial on the ground that defendant had been taken by surprise, it being sworn in an affidavit by a bookkeeper of L.'s that no such purchase had been made through L. *Held* that it was not to be assumed that jury had arrived at their estimate solely on plaintiff's evidence, but on the whole evidence, some of which contradicted plaintiff. Rule refused. *Morley v. Smith*, 3 A.J.R., 108.

Discovery of New Evidence.]—Where a party seeks for a new trial on the ground of discovery of new evidence he must prove that the evidence could not have previously been procured by the exercise of reasonable diligence. *Leury v. Want*, 5 A L.T., 121.

Discovery of Fresh Evidence—What Must be Shown.]—Applications for a new trial on the ground of the discovery of fresh evidence are viewed with disfavour by Courts of Justice. On such applications the following conditions must be satisfied:—(1.) It must be shown clearly that the new evidence was not in the possession of the party applying, and could not by proper diligence have been procured by him at the time of the first trial. (2.) It must appear that the newly discovered evidence is such as ought, if it had been brought forward at the first trial, to have led the jury to come to a different conclusion from that at which they have arrived. *Ward v. Hearne*, 10 V.L.R. (L.,) 163; 6 A.L T., 49.

Discovery of Fresh Evidence.]—Where the new evidence relates to alleged facts not known to the defendant before the trial, and which could not have been discovered by the exercise of reasonable diligence on the part of his legal advisers, the Court will grant a new trial. *Egdin v. Horner*, 10 V.L.R. (L.,) 353, 358.

Improper Admission of Evidence.]—The Board of Land and Works invited tenders for occupation for depasturing purposes of a certain run. W. tendered and was accepted, having paid a certain *bonus* and rent. Licensees of adjoining runs were in occupation of parts of this run, and though the Board promised to give W. full possession, they never did. W. had expended large sums in improvements, and sued the Board for damages. Certain conversations between W. and successive Presidents of the Board were received in evidence. On rule *nisi* for a new trial *Held* that, as some of the conversations were received without objection, objections to the evidence, which was merely a repetition of testimony previously received, could not be entertained, as the plaintiff was not fairly apprised of the risk he incurred in tendering it. *Williams v. Board of Land and Works*, 2 W. W. & A'B. (L.,) 130.

Improper Reception of Evidence.]—In an action for assault and false imprisonment the plaintiff was cross-examined as to transactions with a third person (S.) out of which the assault arose; and the evidence of S., called by the defendant, was admitted to contradict the plaintiff's evidence on those points. *Held* where a witness is asked questions with a view to disparaging his character solely, and not material to the issue, his answers should be accepted as final. Rule absolute for a new trial on improper reception of evidence. *Lorimer v. Henderson*, 3 V.R. (L.,) 10; 3 A.J.R., 28.

Improper Admission of Evidence.]—The Court will not grant a new trial on account of the admission of evidence which ought not to have been received, provided there be sufficient, without it, to authorise the finding of the jury. *Tracy v. Luke*, 2 V.L.R. (L.,) 64.

Improper Admissions of Evidence—Interrogatories and Answers.]—The Court grants a new trial where improper evidence is formally objected to and received, unless it can see clearly that the improper evidence could not have weighed with the jury, or that a contrary verdict would have been against evidence. A defendant, to prevent plaintiff going into a rebutting case, put in certain interrogatories and answers to show that plaintiff had knowledge of defendant's title. *Held* that such evidence was tendered under a misapprehension of the law as to the plaintiff going into a rebutting case, and was only referred to on that question, and could not have influenced the jury, as they could not draw any inference of fact from it. New trial refused. *Welsh v. Hackett*, 3 V.L.R. (L.,) 155.

Improper Reception of Evidence.]—A document which is put in evidence subject to the opinion of the Court *in banco*, whether it could be received, and what would be its effect if received, is not received as evidence so as to furnish grounds for a new trial on the improper reception of evidence. *Ireland v. Chapman*. 3 V.L.R. (L.,) 242.

Improper Admission of Evidence.]—In the case of a conflict of testimony, where evidence has been improperly admitted which might influence the minds of the jury, even though there was other evidence on the same point, the party objecting to the improper admission will be entitled to a new trial. But where the evidence was all one way, although a portion was improperly admitted, yet if a verdict returned in opposition to that portion would have been set aside as against evidence, the verdict actually returned (in accordance with that portion) will not be disturbed. *Dowsett v. Smith*, 4 V.L.R. (L.,) 58.

Improper Admission of Evidence.]—If evidence is admissible in one of two different aspects it cannot be rejected, because it would not be admissible in the other; nor can a new trial be granted on the ground of its admission. *Horne v. Milne*, 7 V.L.R. (L.,) 296; 3 A.L.T., 23.

Improper Admission of Evidence.]—A new trial will be granted if hearsay evidence be admitted on cross-examination, subject to objection. *Williams v. Spowers*, 8 V.L.R. (L.,) 82; 3 A.L.T., 113.

Evidence Improperly Admitted.]—In an action for dishonouring a cheque, whereby the plaintiff lost a partnership into which the other party refused to enter by reason of such dishonour, evidence of the probable value of the partnership was improperly admitted, though without objection on the part of defendant's counsel, and the Judge omitted to warn the jury that they should not take the amount of the loss of the contract as the measure of damages; *Held* that it was the duty of the Judge so to warn the jury, and that his omission to do so entitled the defendant to a new trial. *Dyson v. Union Bank of Australia*, 8 V.L.R. (L.,) 106; 3 A.L.T., 135.

Rejection of Evidence—Devisavit vel non—Proof.]—Plaintiff tendered in evidence in an action for ejectment a will, the execution of which was proved, but no direct evidence was offered as to the testator's competency. Defendant then went into evidence to prove his incompetency, whereupon plaintiff tendered rebutting evidence, which was rejected. On a rule *nisi* for a new trial, *Held* that the *onus* of proving the issue *devisavit vel non* in all its parts, including that of competency was upon the plaintiff, and that the plaintiff could not sever his case; that as no new matter had been introduced by the defendant there was nothing to rebut. Rule discharged. *Wharton v. Tuohy*, 1 W. & W. (L.,) 217.

Improper Rejection of Evidence.]—In an action by a father for breach of a covenant to teach contained in an indenture of apprenticeship by which his son was bound, the son swore that he had not been taught, and the defendant then tendered evidence to contradict such statement, which evidence was rejected. *Held* that the principal issue being whether the son had been taught or not, such evidence was admissible as being tendered for the purpose of contradicting the apprentice on a material matter. Rule absolute for new trial. *Buzolich v. Fletcher*, 7 V.L.R. (L.,) 356.

Verdict Against Evidence or Against Weight of Evidence.]—The principle on which the Court acts in granting new trials is this: That where the jury have not misapprehended the issue, and have not disregarded the Judge's direction, taking, as it were, both the law and the facts into their own hands; and where the verdict is sustained by any evidence at all, though there be evidence directly against it, it ought not in general to be disturbed. Though the verdict be one which the Judge would not if sitting in the jury-box have given himself, it will not be disturbed on that ground. The Court only interferes where the evidence is wholly opposed to the verdict, or where there is documentary evidence very inconsistent with oral testimony. *Owston v. Mullen*, 4 W.W. & A'B., (L.,) 36.

Verdict Against Evidence — Decided Conflict Between Oral and Documentary Evidence.]—*Held*, following *Owston v. Mullins*, *supra.*, that a new trial will be granted under such circumstances. *Stephens v. Shire of Belfast*, 5 A.J.R., 79.

And *see* S.P., *Treen v. Cameron*, 5 A.J.R., 32; and *ante column* 369.

Verdict Against Evidence.]—*Per Privy Council.* There ought not to be a new trial unless the verdict was so contrary to the weight of evidence that the Court must say that the jury were wrong in giving such a verdict upon the evidence before them. *Forbes v. McDonald*, 5 A.J.R., 85.

Verdict Against Evidence.]—Although the Court is unwilling to grant a new trial when there is conflicting evidence of the same nature, yet there ought to be a distinction where the evidence differs in its character and value, *e.g.*, as in the case of engineers against members of a council as to the damage done by an overflow of sludge. *Cameron v. Shire of Mount Rouse*, 5 A.J.R., 136.

Verdict Against Evidence—Evidence of Experts.]—Where only a question of fact is involved the Court can estimate the value of the evidence as well as a jury, and, if the verdict is not according to evidence, can grant a new trial; but when the question depends also on the evidence of experts, the Court cannot tell how far the verdict may have been influenced by their opinions, and will not grant a new trial unless there has been a manifest mistake and miscarriage of justice. *Turner v. Van Hemert*, 2 A.J.R., 114.

Verdict Against Evide ce—Question for Jury.]—M. sued an insurance company on a policy for £350 on some buildings. The fire which destroyed the buildings was caused by the negligence of the Railway Department. In addition to the buildings, uninsured property was destroyed. The company refused to pay till M. had settled with the Railway Department, which he did for £500 in full of all

demands. M. then sued the company, and recovered £150. The company moved for a new trial on the ground, among others, that the verdict was against evidence, since M.'s claim for £350 was included in the £500 paid by the Railway Department. *Held* that the question whether M.'s claim for the insured property was included in the £500 was a question for the jury, and new trial refused. *M'Ilree v. Norwich Union Insurance Company*, 4 A.L.T., 45.

Conflict of Evidence—Matter of Fact.]—Where there is a mere conflict of evidence the Court will not interfere with verdict of the jury on a matter of fact. *Kong Meng v. Peters*, 1 A.L.T., 136.

Finding of Jury—Credibility of Witness.]—The Court will not interfere with the finding of a jury where the case is oue involving the credibility of witnesses. *Bishop v. Stone*, 6 V.L.R. (L.,) 98; 1 A.L.T., 168.

Conflict of Evidence—Unsatisfactory Verdict.]—Where there have been two trials in a case, and both have resulted in a verdict for the same party, and the evidence is conflicting, the Court will not, in the absence of peculiar circumstances, grant a third trial, the judge who tried the case not being dissatisfied with the verdict, though the verdict is unsatisfactory to the Court. *Brophy v. Bonham*, 6 V.L.R. (L.,) 256; 2 A.L.T., 33.

Finding of Jury on Unsufficient Grounds.]—Two trials of an action on a breach of contract, had resulted in a verdict for the plaintiff, and the defendant moved for a third trial. The application was refused, although there was little difference in the state of the case at the two trials, as the only objection was, not that the finding of the jury was contrary to law, but that it was on insufficient grounds, and as there was some shred of a case to go to them, and they might draw inferences from the conduct of the parties between the two trials, each endeavouring to extract from the other as much favourable to his case as he could. *Maclaine v. Clarke*, 1 W. & W. (L.,) 119.

When a plea of waiver is put in to an action on a promissory note, the fact of the plea must be strictly proved, and the Court will interfere if the finding is based upon unsatisfactory evidence. *Bank of Australasia v. Cotchett*, 4 V.L R. (L.,) 226.

Jury, Bringing in two Inconsistent Special Findings.]—For circumstances and terms on which a new trial was granted when a jury had found two inconsistent special findings. *See Bowman v. Homan*, 1 W. & W. (L.,) 390.

Verdict Inconsistent With Special Finding.]—Where a verdict is inconsistent with the special findings of the jury, the Court will not allow it to stand, but will grant a rule absolute for a new trial. *Ogden v. Board of Land and Works*, 7 V.L.R. (L.,) 469; 3 A.L.T., 63.

Inconsistent Verdict.]—M. instructed W. by telegraph to purchase certain shares, at discretion, naming the prices at which the shares were quoted. W. advised M. that the shares were rapidly rising, and eventually purchased at nearly double the prices M. had quoted. The shares then fell and M. declined to take them. The jury found for W. for the then value of the shares, though W. had not actually delivered them. *Held* an obvious mistake and new trial granted. On the new trial the jury found that W. had not properly exercised the discretion as to price allowed him by M.; but that M. had not repudiated the purchase within a reasonable time; yet they returned a verdict for M. *Held* that on this inconsistent verdict there should be a new trial. *Were v. Muston*, 4 A.J.R., 82.

Different Verdicts on Same Facts.]—It is no ground for granting a new trial in a case, that in another case, in which the facts were precisely similar, a different jury has given a different verdict to the one given in the second case. *Bogg v. London and Australian Agency Corporation*, 4 A.J.R., 70.

Verdict Against Evidence—Judge Satisfied With Verdict.]—Where the Judge who tried the case has expressed himself as satisfied with a verdict, the Court will not, except under special circumstances, interfere with the verdict by granting a new trial, on the ground that it is against evidence. *Meagher v. London and Lancashire Fire Insurance Company*, 7 V.L.R. (L.,) 390.

Judge Dissatisfied with Verdict.]—Where a Judge is dissatisfied with a verdict, such verdict will not be allowed to stand, and a new trial will always be granted. *Polynesia Company v. Bank of New South Wales*, 3 A.J.R., 52.

Judge Dissatisfied with Verdict.]—A new trial will always be granted where the Judge who tried the case is dissatisfied with the verdict. *McDonald v. Hughes*, 8 V.L.R. (L.,) 59; 3 A.L.T., 103.

Judge Not Dissatisfied With Verdict.]—Where the evidence for one side or the other does not greatly preponderate, and the Judge has expressed himself as not dissatisfied with the verdict, no new trial will be granted. *Carroll v. Melbourne Omnibus Company*, 4 A.J.R., 138.

On Ground of Surprise.]—When a party at a trial has been taken by surprise, and a verdict returned against him, the Court will grant a new trial, if the nature and fact of the surprise be clearly shown, and the Court be satisfied that the verdict is substantially wrong. *Clough v. London and Australian Agency Corporation*, 4 A.J.R., 69.

On Ground of Surprise.]—H. sued as mortgagee or unpaid vendor of certain goods upon a policy of fire insurance. At the trial, H. set up a claim for part as still being his own goods.

The Court granted a new trial on the ground of surprise in H.'s setting up a claim as owner. *Haynes v. Royal Insurance Company*, 2 V.L.R. (L.,) 125.

Verdict for Plaintiff in Absence of Defendant When Case Called on—Division of Lists.]—In an action on a bill of exchange against the drawer, the case was called on earlier than was anticipated by reason of a division of *Nisi Prius* lists. The defendant put in no appearance, and a verdict was entered for the plaintiff. The affidavits showed that defendant had a good defence on the merits, and under the circumstances the Court granted a new trial. *Chapman v. Ireland*, 5 V.L.R. (L.,) 328; 1 A.L.T., 49,

But *see Mays v. Watmough, ante column* 259.

Absence of Witness.]—The accidental absence of a witness at a trial is not a good ground for a new trial. *Dines v. Farrington*, 1 A.J.R. 135.

Necessary Witness Absent—Practice.]—A new trial will not be allowed on the ground that a necessary witness could not be obtained in time to give his evidence at the trial. If such a witness is not forthcoming at the trial, the party requiring him should apply for an adjournment till he can be produced. *Loney v. Excell*, 5 A.L.T., 168.

Evidence Taken Under Commission not Forthcoming at the Time of the Trial.—*Johnston v. Jackson*, 5 V.L.R. (L.,) 331; 1 A.L.T., 49. *ante column* 370.

Mistake in Awarding Damages.]—M. instructed W., by telegraph, to purchase 100 shares in a mining company, at discretion, naming the prices at which the shares were quoted. W. advised M. that the shares were rapidly increasing in price, and eventually purchased the shares at nearly double the prices M. had quoted. The shares then fell, and M. declined to take those W. had purchased. On the trial the jury returned a verdict for W. for the then value of the shares, though W. had not actually delivered them. *Held* that this was an obvious mistake in the verdict, and that there should be a new trial. *Were v. Muston*, 4 A.J.R., 35.

When Court will Interfere in the Matter of Damages.]—The Court refused a new trial in an action for personal injuries occasioned by the defendant's negligence, where the jury had apparently given no compensation for permanent injury, though the evidence negativing such permanent injury was apparently not so strong as that in its favour, on the ground that in the absence of mistake or misconduct in the jury, their decision on such questions cannot be interfered with. *Geach v. Board of Land and Works*, 8 V.L.R. (L.,) 29.

And *see* generally on the question of damages the cases, *ante columns* 336, 338, 339, 340.

Damages Assessed Generally on Several Breaches of which One is Bad—Venire de novo Proper Remedy not New Trial.]—*Nolan v. Chirnside, ante column* 341.

Plaintiff Remitting Improper Damages.] —Where, on the argument of a rule *nisi* for a new trial, the plaintiff remitted the damages improperly awarded to him at the trial, a new trial was refused. *Hamilton v. Walker*, 4 A.J.R., 36.

Improper Compromise—Who May Take Advantage of.]—Where a plaintiff is entitled to all he claims or nothing, and the jury give him a verdict for half his claim, the defendant is not entitled to a new trial on the ground that the verdict is an improper compromise. It might, however, be a reason for granting a new trial on the application of the plaintiff, on the ground of inadequacy of damages. *Logan v. Spence*, 8 V.L.R. (L.,) 197.

Plaintiff Receiving Inadequate Damages.]—The defendant is not entitled to a new trial, because the damages received by the plaintiff were not so large as the plaintiff ought to have received. *M'Ilree v. Norwich Union Insurance Company*, 4 A.L.T., 45.

M. sued an insurance company on a policy for £350 on some buildings which had been burnt down by reason of the negligence of the Railway Department. There was some other property destroyed, which was uninsured, and the company refused to pay until M. had settled with the Department, which he did for £500, in full of all demands. M. then sued the company, and recovered £150. The company moved for a new trial on the grounds, among others, that M's. claim was included in the £500, and that if M. were entitled to anything over the £500, he was entitled to £350. *Held* that the Company was not entitled to a new trial on this ground. *Ibid.*

Mistake of Jury.]—At a trial the jurors gave a verdict for a certain sum, under a mistaken impression that the Court would make deductions for a set-off, and admissions as to payments, &c., made by the defendant; the amount of the deductions which the jurors ought to have made was admitted. On affidavits by three of the four jurors to this effect, the Court granted a rule *nisi* for a new trial. *Welsh v. Smith*, 1 V.R. (L.,) 87; 1 A.J.R., 88.

On Ground of Mistrial by Challenged Juror.] —On an application for a new trial on the ground that a juror, who had been challenged by the defendant, nevertheless sat on the trial; *per Williams, J.* On applications of this sort there should be a distinct statement that the applicant had not exhausted his challenge. *Bryens v. M'Lennan*, 1 A.J.R., 89.

Disqualified Juror not Challenged.]—If a juror, who is disqualified, be not challenged at the trial, the Court will not grant a new trial upon affidavits of the subsequent discovery of such disqualification. *Sinclair v. Harding*, 2 V.R. (L.,) 185; 2 A.J.R., 114.

Authority of Counsel Before Trial to Consent to Verdict.]—Where defendant's counsel had authority before trial to consent to a verdict, and the defendant being present in Court when he consented to a verdict had not expressed dissent, the Court refused a rule for a new trial. *Jones v. Hodgson*, 5 A.J.R., 17.

Limits to Comments on Conduct of Opposing Counsel.]—Plaintiff was asked certain questions in cross-examination as to his having executed a deed of assignment, and he answered that he had. This was objected to, and defendant put the deed in when plaintiff's counsel objected that it was not admissible, but immediately afterwards withdrew his objection. Defendant's counsel then declined to put the deed in, plaintiff's counsel commented on this, and asked the jury to believe the plaintiff rather than the witness who contradicted him, as they might fairly infer that the deed, if defendant had not been afraid to put it in, would have shown that the plaintiff was not quite disinterested. *Held* that the plaintiff's counsel pushed his privilege too far, but it was not a case for granting a new trial. *Challacombe v. Wiggins*, 7 V.L.R. (L.,) 330; 3 A.L.T., 33.

(2) *Practice.*

False Imprisonment and Malicious Prosecution—Two Actions by two Persons for the Same Cause Against the Same Defendant—Cross Rules for New Trial.]—L. C. brought an action against J., and J. C. against J. for the same cause. The jury found for plaintiff, in the first action, damages (£50,) and entered a verdict for defendant in the second. On cross rules by defendant in the first case, and by plaintiff in second, for new trials on the ground that verdicts were in each case against evidence, the Court ordered verdict to stand in first case, and entered a *stet processus* in the second, each party to pay his own costs in the second case. *Coe v. Jamieson*, 3 A.J.R., 118.

Omission in Rule Nisi to State Grounds of Misdirection Complained of.]—Where a rule *nisi* for a new trial omitted to state the grounds of misdirection, the Court held that any objection to the rule could be made when it came on for argument. *Walker v. George*, 5 A.J.R., 21.

Rule Nisi When Granted.]—A rule *nisi* for a new trial should not be granted, generally speaking, if it would not be made absolute in the absence of any cause shown. *Meyers v. Easton*, 4 V.L.R. (L.,) 283.

Leave to Move that Verdict be Entered—Damages Contingently Assessed—Plaintiff May Not Move for New Trial.]—A plaintiff may not move for a new trial where a verdict has been directed for the defendant, and contingent damages assessed, with leave to the plaintiff to move that a verdict be entered for himself. The plaintiff can do no more than move in pursuance of the leave reserved. *Hasker v. Moorhead v. Blackwood, v. M'Mullen*, 2 V.L.R. (L.,) 160.

Objection Not Taken at the Trial.]—The rule which guides the Court in refusing new trials where the objection was not taken at *nisi prius* is adhered to generally, and alike whether it be applied to the improper reception or admission of evidence, or to the direction of the Judge on matter of fact, and whether the omission be on the part of the plaintiff or defendant. If parties come prepared to try issues and confine themselves to certain of them, or to one only, or to a particular view or hearing of the evidence with respect to that one, they are not at liberty to open up a new and totally different case *in Banco*, and it would appear that the result is the same whether the omission to take the objection, or to present the particular view to the jury, or to the judge, arise from inadvertence, forgetfulness, or deliberate intention. *Roycroft v. Iago*, 4 A.J.R., 145.

Seduction — Plaintiff Not Standing in Loco Parentis—Objection Not Taken at Trial.]—In an action for seduction the sole defence raised was that the defendant was not the father of the child, and a verdict was given for the plaintiff. On a rule *nisi* for a new trial it was objected that the plaintiff did not stand in *loco parentis* to the girl, and there was no evidence that he paid her anything for her services. *Held* that these objections not having been taken at the trial, the rule must be discharged. *Ibid.*

For a case in which the Court granted a new trial on an objection not taken at the trial, *see Hartney v. Higgins, ante column* 454.

Rule Nisi—Abandonment—Costs.] — Where a rule *nisi* for a new trial had been obtained, and before it came on for argument, but after briefs had been delivered, notice of abandonment had been served upon the other side by the party obtaining the rule, the Court discharged the rule with costs, leaving it to the Prothonotary to ascertain what costs had been incurred before service of the notice of abandonment. *Chirnside v. Sanderson*, 4 V.L.R. (L.,) 53.

Costs of Rule.]—A defendant is entitled to his costs of a rule for a new trial, though a new trial be not necessary, if the jury by mistake have included in their verdict an amount not proved, which error can only be rectified by obtaining a rule *nisi* for a new trial, and this is not altered by the rule being discharged on terms of the plaintiff consenting to the necessary amendment. *Quarrell v. Brown*, 6 V.L.R. (L.,) 212.

Costs.]—To a declaration on a promise to marry, defendant pleaded that he had never promised as alleged. On a rule *nisi* for a new trial (the jury having given substantial damages) on the ground that the fresh evidence showed that the plaintiff was not a widow, and had not been married to A., as she swore, but had been married to B. who was now living. Rule absolute granted on terms

of defendant withdrawing his plea and pleading otherwise as he might be advised, and of his paying the taxed costs of the rule and of the former trial. *Egdin v. Horner*, 10 V.L.R. (L.,) 353.

NEWSPAPER.

Copyright in Telegrams Published in.]—*See* cases, *ante column* 208, 209.

Publication of Libels]—*See* DEFAMATION.

NEXT FRIEND.

See HUSBAND AND WIFE—INFANT—PRACTICE.

Incapacity of Next Friend to Purchass Trust Estate—Fiduciary Position.]—*Larnach v. Alleyne*, 2 W. W. & A'B. (E.,) 39 *post* under TRUST AND TRUSTEE—Rights and Powers.

NONSUIT.

Per Privy Council—In every case before evidence is left to the jury there is a preliminary question for the Judge, not whether there is literally any evidence, but whether there is any evidence upon which a jury can proceed to find a verdict for the party producing it upon whom the *onus* of proof is imposed. *Giblin v. M'Mullen*, L.R. 2, P.C. 317.

Per Privy Council—A nonsuit should not be entered if there is any evidence whatever to go to the jury. *Forbes v. M'Donald*, 5 A.J.R., 85. For facts *see* S.C., *ante column* 24.

Proof of Issue—Plaintiff Offering no Evidence.]—If a plaintiff offers no evidence in support of the issue he has to prove he must be nonsuited; and if he offers some, however slight, he must not sever his case. *Wharton v. Tuohy*, 1 W. & W. (L.,) 217.

When Granted—Improper Admission of Evidence.]—Where, in a dispute as to the proper position of certain land, and the deeds of other lands have been improperly admitted in evidence to show the position of one of the abutting streets, it is no ground for a nonsuit if there be sufficient evidence without them to support the verdict. *Small v. Glen*, 6 V.L.R. (L.,) 154; 1 A.L.T., 197.

Duty of Judge Where Evidence Conflicts.]—Where the evidence is conflicting, the Judge ought to send the case to the jury, or, if he nonsuit, he ought only to say that there is no evidence fit to be sent to a jury with which they could deal; he is not to offer any opinion upon the effect of the evidence. A Judge should not nonsuit because some of the evidence for the plaintiff suggests that the cause of action was a felony. *Foster v. Green*, 8 V.L.R., (L.,) 19; 3 A.L.T., 97.

How far Evidsnce for Defendant may be Considered in Entering a Nonsuit.]—*See Burns v. Slater*, *ante column* 876.

Objection by Way of Nonsuit—How it Should be Taken.]—An objection by way of nonsuit at a trial ought to be taken upon some specific grounds, and not upon the general ground that there is no case to go to the jury. *Band of Hope and Albion Consuls v. Mackay*, 2 V.R. (L.,) 158; 2 A.J.R., 112.

Setting Aside Nonsuit.]—It is not necessary to state any grounds in a rule *nisi* for setting aside a nonsuit. *Bishop v. Martin* 1 V.L.R. (L.,) 33.

When Set Aside.]—Where evidence on behalf of a plaintiff was tendered for one purpose (parol evidence explanatory of a contract,) and it was rejected by the Judge as inadmissible for that purpose, and the plaintiff thereupon elected to be nonsuited, but afterwards it appeared that the evidence was admissible, and material for another purpose (viz., to explain the true state of accounts between the parties,) not presented at the trial. *Held*, by *Stawell, C.J.*, and *Williams, J.* (*Molesworth, J.*, dissenting,) that there should be a rule to set aside the nonsuit, and directing a new trial. *Beedle v. Thomas*, 2 W. & W. (L.,) 89.

When Set Aside.]—A plaintiff who was present, but whose counsel was absent, was nonsuited, but was not formally called in the usual way. The Court set aside the nonsuit, and granted a new trial on payment of the costs of the day, but without costs of the rule. *Francis v. Dunn*, 2 W. & W. (L.,) 201.

When Set Aside.]—A. brought an action for assault against B. B. apologised and agreed to pay costs. During negotiations as to costs, B., without any communication to plaintiff, got a nonsuit recorded. Rule absolute to set aside nonsuit with costs. *Boyle v. Hepburn*, 3 A.J.R., 73.

Jury Discharged Without a Verdict.]—Where a jury was discharged without being able to agree as to a verdict, the Court refused to grant a rule to enter a nonsuit pursuant to leave reserved. *Filgate v. Thomson*, 5 A.J.R., 66.

In County Court—County Court Act, No. 184.]—Where the plaintiffs sued defendant in the County Court at Sandhurst, for the expense of making a drain, and the particulars of demand were drawn in the form of a declaration, and

the defendant demurred to the plaint and particulars as not disclosing a cause of action, the County Court Judge nonsuited the plaintiffs on that ground. On *appeal Held* that the objection was one to the proofs and not to the pleadings. Nonsuit set aside, case remitted for hearing. *Mayor of Sandhurst v. Sherbon*, 4 W. W. & A'B. (L.,) 37.

And *see* cases *ante columns* 258, 259, under COUNTY COURT.

NOTARY.

Lien For Work Done.]—The only lien which a notary public could have would be in respect of work done by him *qud* notary, and he cannot claim a lien on deeds in his possession for work done in making searches to enable the owner of the deeds to bring his land under Act No. 301. *York v. Lord*, 5 V.L.R. (L.,) 141; 1 A.L.T., 4.

Affidavit Sworn Before Notary.]—Where an affidavit is sworn before a notary in a place where there is a commissioner of the Court, evidence is required of the notary's signature, *In the Estate of Sutherland*, 10 V.L.R. (I. P. & M.,) 23; 5 A.L.T., 156.

NOTE.

Bank.]—*See* BANKER.

Promissory.]—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

NOTICE.

Of Action.]—*See* ACTION.

To Quit.]—*See* LANDLORD AND TENANT.

Of Trial.]—*See* PRACTICE.

NUISANCE.

(1) *What Amounts to.*

Noxious Trades.]—*Per Barry, J.* To constitute a nuisance there need not be injury to the public health. If a noxious trade is established in a place and people come to reside in the neighbourhood, or a road is brought to it, the public are entitled to complain. Judicial notice must be taken that this country is in a state of progressive location; it is only being inhabited by degrees. *Regina v. M'Meikan*, 6 W. W. & A'B. (L.,) 68.

Flow of Sludge—Diversion.]—Where sludge from the workings of a third person flows through the plaintiff's land, defendants have no right to intercept such sludge and divert it into their own land for the purpose of extracting water from it, and then to allow the residue in a more mischievous form, to resume its previous course down to the plaintiff's land. *Bonshaw Freehold Gold Mining Company v. Prince of Wales Company*, 5 W. W. & A'B. (E.,) 140, 162.

Flushing Closet—Percolation of Water Used.]—*M'Ewan v. Mills, see post column* 1101.

Claim in Respect of Future Contingent Liability of Land to be Depreciated in Value through being Flooded—Future Damages.]—A declaration set forth that defendants had cut away the bank of a river, placed the earth forming it so as to protect a public road from floods, and afterwards removed it, but did not replace any of the earth removed in the original position on the bank of the river, by which plaintiff's land was flooded, and was liable to be flooded. *Held* that in the case of such a nuisance, no cause of action arose in respect of a future injury until such injury occurred; that until such injury occurred there was no *damnum*. *Manson v. Shire of Maffra*, 7 V.L.R. (L.,) 364; 3 A.L.T., 32.

Use of Nightsoil for Manure.]—The use of nightsoil for manure is not a nuisance at common law, and since it is not, a bye-law for preventing it is not authorised by Sub-sec. 8, of Sec. 213, of Act No. 506. *Higgins v. Egleson*, 3 V.L.R. (L.,) 196.

Obstruction of Sea Breezes and View—Private Persons Suing.]—Courts of Equity do not treat agreeable views and clear ventilation as valuable rights legally enforceable, or the infringement of them as nuisances. Private persons can only sue to restrain public nuisances when they are specially injured by a breach of public trust. *Palmer v. Board of Land and Works*, 1 V.L.R. (E.,) 80.

See S.C. *ante columns*, 329, 330.

Presumption of Nuisance—Posts Placed on Road for Protection of Public.]—*Birmingham v. Shire of Berwick, ante column* 861.

Dangerous Hole Left in Street.]—A dangerous hole left in a road is a public nuisance, for which a Municipal Council, in whose care the road is, is indictable. *Smyth v. Shire of Kyneton*, 8 V.L.R. (L.,) 231.

Unwarrantable Erection of Fence Upon a Road—Who may Sue—Liability.]—The unwarrantable erection by a Municipal Council of a fence upon a road, is a nuisance, which affords only one cause of action to an adjoining owner injured thereby, and for which he may recover prospective damages. And he will not be bound by acquiesence in the nuisance if he were not aware that injury would result to his property. No damages can be recovered by a tenant of such adjoining land for an injury to the reversion. *Kensington Starch and Maizena Company v. Mayor of Essendon and Flemington*, 6 V.L.R. (L.,) 265; 2 A.L.T. 35.

Altering Street—"Local Government Act 1874," Sec. 377.]—A Corporation in altering levels of streets under the powers given by Sec. 377, must not do so, so as to create a public nuisance, *e.g.*, by obstructing the access to a public highway, or so as to interfere with or injure private rights. *King v. Mayor, &c., of Kew, ante column*, 855.

Obstruction in a Public Highway.]—A permanent obstruction placed in a public highway without lawful authority, which renders such highway less commodious than before to the public, is a public nuisance at common law, punishable by indictment, and removable by any member of the public whose right of user of the highway is obstructed by it. *Fergusson v. Union Steam Navigation Company*, 10 V.L.R. (L.,) 279, 287; 6 A.L.T., 120.

(2) *Parties Liable.*

Landlord—Defendant.]—M. was the freehold owner of certain stores, and previous to his letting the premises to A., a tenant, he had built a closet so constructed as to require its being daily cleansed. During A.'s tenancy A. flushed it with water, and the water used for this purpose becoming foul, used to percolate into the cellars underneath, and thence into the plaintiff's adjoining cellars. The plaintiff sued M., and obtained a verdict. On rule *nisi* for a nonsuit, *Held* that the closet was not *per se* a nuisance, that it need not have been used at all, and whether used or not the landlord would have been entitled to the rent reserved; that the adoption of the particular mode of cleansing by the tenant created the nuisance, and that M., as landlord, was not answerable for his tenant's act. Rule made absolute. *McEwan v. Mills*, 2 W. W. & A'B. (L.,) 118.

Liability of Occupier.]—S. was the occupier of certain cottages from and through which a drain-pipe came, which caused a nusiance on B.'s land. *Held* that S. as such occupier was liable for the nuisance, although he had not constructed the drain. *Braine v. Summers*, 7 V.L.R. (L.,) 420; 3 A.L.T., 57.

Liability of Council for Nuisance Under Executed Contract.]—*Weir v. Mayor of E. Collingwood, ante columns* 230, 231.

(3) *Suits, Actions, and Proceedings to Restrain.*

(*a*) *Suits and Actions.*

Parties—Plaintiffs—Municipal Corporation when Entitled to Restrain Public Nuisance.]—*Mayor of Ballarat East v. Smith, see ante column* 213, and *see Mayor of Ballarat v. Victoria United Gold Mining Company, ante column* 70.

And *see Palmer v. Board of Land and Works*, and *Kensington Starch and Maizena Company v. Mayor of Essendon, ante columns* 1100, 1101, as to rights of parties to restrain.

Nuisance Caused by Several Persons.]—It is no defence to a suit to restrain a nuisance to set up that so many other persons have contributed to the nuisance that it would be useless to restrain the defendants. *Bonshaw Freehold Gold Mining Company v. Prince of Wales Company*, 5 W. W. & A'B. (E.,) 140,156.

Pleadings in Action—Plea of Acquiescence.]—In an action for a nuisance the defendant put in a plea setting up the plaintiff's acquiescence in certain erections and improvements on the defendant's premises made with a view of endeavouring to prevent a nuisance. *Held* bad. *Cooper v. Dangerfield*, 10 V.L.R. (L.,) 96; 6 A.L.T., 8.

Per Holroyd, J. To render the plea good, the defendants would have to show that the plaintiff knew, not that the alterations made by the defendants were made to prevent a nuisance, but that the result of such alterations would be a continued nuisance. The responsibility of attempting improvement was upon the defendants, but the effect of their attempt was not for the plaintiff to foresee. When the plaintiff merely knows that certain alterations in works which cause a nuisance are being effected with a view to make and keep those works inoffensive, he cannot be assumed to know that those alterations will end in a result exactly the reverse of their object. *Ibid.*

Declaration for a nuisance caused by defendant in carrying on his business as an iron-founder, on premises adjoining the plaintiff's. Plea, that the defendant's business was a necessary and a proper one, carried on in an inoffensive manner; that the defendant had three years before, with the plaintiff's knowledge, erected certain buildings and improvements intended to prevent the nuisance; and that the plaintiff, knowing the purposes for which such buildings were erected, had consented and acquiesced in their erection. *Held* bad, as neither raising the general issue, nor affording a good defence on equitable grounds. *Ibid.*

Injunction Against Crown.]—The Court has no jurisdiction to prevent a nuisance on the part of the Crown if the matter does not rest on a contract. *Pike v. The Queen*, 6 V.L.R. (E.,) 194; 2 A.L.T., 75.

For facts *see* S.C., *ante column* 323.

And *see* S.P., *Palmer v. Board of Land and Works, ante column* 330.

Revocation of License to Commit Nuisance—When Permitted.]—*Aitken v. Bates, ante columns* 827, 828.

Flow of Sludge—Mining Works—Issue at Law.]—The plaintiff company were seized of certain lands on which they were mining; the defendant company were mining on Crown lands adjoining. The defendants had allowed the sludge from their works to flow into a certain creek on defendant's land, rendering it unfit for mining purposes. On motion for interlocutory injunction restraining defendants from permitting the overflow of sludge, *Held* that the plaintiffs were suffering from day to day an inconvenience from the pollution of their water, and a class of inconvenience which is in one sense irreparable, that is, hardly reducible to damages, and injunction granted. *Held* also that where there is no question as to plaintiff's title or as to fact of nuisance, but only as to whether nuisance was committed by defendants or not, an injunction will be granted without an issue at law being directed. *Bonshaw Freehold Gold Mining Company v. Prince of Wales Company,* 4 W. W. & A'B., (E.,) 126.

Flow of Sludge—Injury to Land—Reversioner.]—Where the flow of sludge had accumulated on surface land in the occupation of a tenant of the plaintiff company, and the defendant company had agreed with the tenant to pay him an adequate compensation for the injury caused thereby, *Held* that the plaintiff company, as reversioners, were entitled to protect their land from an accumulation of sludge upon it, which would probably injure its value permanently, but that they might be fully compensated in damages at the termination of the lease, and it was not a case for interlocutory injunction. *Ibid.*

Cause to Stand Over—Conflicting Evidence.]—Where the evidence was very conflicting the Court ordered the cause to stand over for six months with liberty to bring an action at law. *Lockhead v. Noble,* 3 V.L.R. (E.,) 131.

Bill Retained—Action at Law.]—In a suit for an injunction to restrain several distinct and different nuisances caused by an iron foundry, there was no doubt as to the plaintiff's title to the land, or as to the inconvenience suffered by him from the foundry; but the Court distinguishing between inconvenience and nuisance, and thinking it advisable that the question whether a nuisance was in fact committed, should be tried by a jury, ordered the bill to be retained for six months, with liberty to the plaintiff to proceed meanwhile by an action at law. *Cooper v. Dangerfield,* 10 V.L.R (E.,) 29.

Suit for Injunction—Three Nuisances out of Six Proved—Costs.]—In a suit for an injunction to restrain the defendant from committing six alleged nuisances, the plaintiff proved three only, but the nuisances proved were not distinct in character from those not proved. *Held* that the plaintiff was entitled to his general costs of suit. *Cooper v. Dangerfield,* 10 V.L.R. (E.,) 145.

Suit for Injunction — Delay — Costs.] — The defendants began to commit nuisances by means of an ironfoundry in 1878, but at first only in a small degree, gradually increasing their magnitude till 1883, when plaintiff instituted a suit to restrain them. The plaintiff made few complaints, and mild, till shortly before suit, when they became vehement. *Held* that the delay in bringing the suit was not so long as to convert the defendant's encroachment into a right, or to disentitle the plaintiff to his costs of suit. *Ibid.*

Endeavour to Abate Nuisance—Acquiescence.]—*Semble,* Acquiescence by the plaintiff in buildings and erections being put up at a large expense by the defendant, in order to try and abate a nuisance, will not bar the plaintiff's right to an injunction if the endeavour be unsuccessful. *Ibid.*

Complaint for Creating a Nuisance Under "Public Health Act," No. 310, Sec. 32—Adjournment for Opportunity of Abatement—Practice.]—*See Regina v. Marsden, ex parte Corbett, ante columns* 498, 499.

(b) Criminal Information and other Proceedings.

"Public Health Stat.," No. 310, Sec. 32.]—Rule *nisi* calling on M'M., proprietor of a bone mill at Flemington, to show cause why a criminal information for a nuisance should not be filed against him. *Held* that the same principles which guide grand juries should guide the officers here who stand in the place of grand juries, and that affidavits showing a strong *primâ facie* case, being sufficient to justify a grand jury in filing an information, would be sufficient here; that the jurisdiction of the Court is not taken away by Act No 310, which contains no express enactment to that effect; but that as the Central Board of Health had issued an order to abate the nuisance, the Court would presume that the Board would see its orders carried into effect, and that the Court is loth to interfere except in extreme cases. Rule discharged, defendant paying costs. *Regina v. M'Meikan,* 6 W. W. & A'B. (L.,) 68.

The complaint must be laid at the instance of the Local Board, but the summons under Sec. 32 of Act No. 310 may be in any person's name. *Cruikshank v. Kitchen, ante column* 498.

15 Vic., No. 10, Sec. 13.]—15 Vic. No. 10, Sec. 13, confers larger powers on the Supreme Court than the Court of Queen's Bench, and the Court has a discretion as to granting criminal informations. Rule absolute for leave to file a criminal information for a nuisance where a summons before justices for the nuisance had been dismissed. *Regina v. M'Meikan,* 6 W. W. & A'B. (L.,) 267; N.C. 72.

NULLITY.

See HUSBAND AND WIFE.

OFFENCES (STATUTORY) IN WHICH JUSTICES HAVE JURISDICTION.

1. *Under "Police Offences Statutes" column* 1105.
2. *Under other Statutes column* 1113.
3. *Punishment of Offences and Jurisdiction of Justices column* 1114.

STATUTES.

"*Police Offences Stat.* 1865," No. 265.
"*Police Offences Stat.* 1865, *Amendment Act*, 1872," No. 424.
"*Amsndment Act* 1876" (*Gaming*,) No. 532.
"*Amendment Act* 1876" (*Obscene Books*,) No. 544.
"*Amendment Act* 1878," No. 630.
"*Amendment Act* 1883" (*Gaming*.) No. 770.
"*Amendment Act* 1876" (*Dancing Saloons*,) No. 564.

1 *Under "Police Offences Statutes."*

Act No. 265, Sec. 5, Sub-sec. 7—Carting Putrid Flesh.]—Putrid flesh is not *ejusdem generis* with nightsoil in Sec. 5, Sub-sec. 7 so as to make the carting of it an offence within the Act. *Sutton v. Parker*, N.C. 15.

Act No. 265, Sec. 5, Sub-sec. 7—Carting Nightsoil—Licence.]—All that the Act requires is a licence from the municipality from which the nightsoil is carted away, and it is not necessary to obtain a licence from another municipality through which it is being carted. *Fitches v. Burnell*, 3 V.L.R. (L.,) 194.

Carting Nightsoil Without a Licence—Onus Probandi—"Police Offences Stat. 1865," Sec. 5, Sub-sec. 7.]—The offence of carting away nightsoil without a licence is a *quasi* criminal offence, and the *onus* of proving that the defendant has not a licence, and has not given the security to the local authority as required by sub-sec. 7 of Sec. 5 of the "*Police Offences Stat.* 1865," is on the complainant. *Morrison v. Woodgate*, 4 V.L.R. (L.,) 430.

"Police Offences Stat.," No. 265, Sec. 5, Sub-sec. 8—Offensive Matter from Butcher's Shop.]—Where offensive matter was found flowing in a street gutter, and was traced to a butcher's shop, *Held* that it was not an offence within the section, not being *ejusdem generis* with nightsoil, and not "being cast into or upon the street." *Roberts v. Edwards*, 5 A.J.R., 70.

Act No. 265, Sec. 5, Sub-sec. 13, Secs. 11, 12—Obstructing Thoroughfares.]—L. was convicted of obstructing a lane by leaving his cab in it. This lane had been metalled and formed, and was used as a thoroughfare, though it had not been set out in accordance with Secs. 11 and 12. *Held* that the existence of the footway in fact was sufficient evidence to constitute a footway within the meaning of Sec. 5, Sub-sec. 13, and that proof of compliance with Sec. 11 was not necessary. Order *nisi* for prohibition discharged. *Regina v. Lloyd, ex parte Leonard*, 1 V.L.R. (L.,) 79.

Act 265, Sec. 8—Obstructing Street by Exposing Goods for Sale.]—To constitute an offence under Sec. 8, it is sufficient if an owner authorise his servant to expose the goods for sale, and if any part of the goods are exposed for sale, the justices may infer that a portion of the goods in cases not opened to view were similarly exposed. *Regina v. O'Flaherty, ex parte Winter*, 9 V.L.R. (L.,) 14; 4 A.L.T., 147.

Act No. 265, Sec. 16, Sub-sec. 7—Allowing Cattle to Wandsr in ths Streets.]—*Held* that the enactment must be read as "wilfully allowing, &c.," and that wilfulness was an essential element in the offence. *Regina v. Shuter, ex parte Walker*, 9 V.L.R. (L.,) 204.

Act No. 268, Sec. 16, Sub-sec. 8—Attack by Dog.] It is necessary that the "permitting" under the section should be wilful, and the owner of the dog is not liable for the offence if he is not present at the time of the attack. *Regina v. Munro, ex parte Stephen*, 5 A J.R., 16.

Obstructing Water Course—"Police Offences Stat., 1865," Sec. 17, Sub-sec. 1.]—Sec. 17, Sub-sec. 1 of the "*Police Offences Stat.* 1865," applies only to artificial, and not to natural, watercourses. *Weist v. Whittan*, 1 A.J.R., 78.

Polluting a Fountain—"Police Offences Stat. 1865," Sec. 17, Sub-sec. 1.]—An iron tank used to collect and hold water from the roof of a house for drinking purposes is not a "fountain" within the meaning of Sec. 17, Sub-sec. 1 of the "*Police Offences Stat.* 1865." *Stewart v. Finnegan*, 4 V.L.R. (L.,) 93.

Wilful Trespass—"Town and Country Police Act 1855," No. 14, Sec. 15, Sub-sec. 7.]—The cases of wilful trespass contemplated in Sec. 15, Sub-sec. 7, of Act No. 14, are those where a person in undisputed possession, finding a trespasser warns him off, and in such the justices have jurisdiction; but it is not contemplated in the Act that justices should have jurisdiction in such a complicated case as the right of property in a school-house. *Fisher v. Wheatland*, 2 W. & W. (L.,) 130.

[Compare Sec. 17, Sub-sec. 6, of Act No. 265.]

Wilful Trespass—Act. No. 265, Sec. 17, Sub-sec. 6.]—A trespass committed by a person authorised by another person who claims to be a part owner of the premises alleged to be trespasseed upon, is not a wilful trespass within the jurisdiction of justices under Sec. 17, Sub-sec. 6, of the "*Police Offences Stat.* 1865." *Regina v. Mollison, ex parte Colclough*, 4 A.J.R., 75.

Trespassing in Pursuit of Game.]—An entry upon land "to seek" game is an offence, and is not within the protection of Sec. 17, Sub-sec. 6, as to entry upon land in "pursuit" of game. *Plier v. Trumble*,, 4 A.J.R., 26.

Act No. 265, Sec. 17, Sub-sec 6—Damaging a Fence.]—It is open to the defendant, on a complaint before justices for trespass and damaging a fence, to prove that the complainant was not possessed of the property damaged. *M'Mahon v. O'Keefe*, 1 V.R. (L.,) 125; 1 A.J.R., 121.

Wilful Trespass—"Police Offences Stat. 1865," Sec. 17, Sub-sec. 6.]—R. was warned not to enter a private market, but, notwithstanding the warning, entered with his horse and cart, and was turned out, but pushed back and took out his horse and cart. *Held* that R. was not guilty of wilful trespass under Sec. 17, Sub-sec. 6, of the "*Police Offences Stat.* 1865," in respect of such re-entry, to bring out his horse and cart *Regina v. Lloyd, ex parte Rowan*, 2 V.L.R. (L.,) 227.

Act No. 265, Sec. 17, Sub-sec. 6—Wilful Trespass—Possession Obtained by Subterfuge.]—B. was convicted by justices under Sec. 17, Sub-sec. 6, of the Act for wilful trespass upon his brother's house. It appeared that the brother (the informant) had been in undisturbed possession of the house, having the key of it, that B. obtained the loan of the key on the pretext of getting some of his luggage out of the house, and then refused to give up possession. *Held* that the Court would not interfere with the conviction, there being evidence to support the justices' determination, and that they fully understood the law. *Regina v. Taylor, ex parte Blain*, 5 V.L.R (L.,) 271; 1 A.L.T. 39.

Act No. 265, Sec. 17, Sub-sec 6—Trespass.]—The trespass mentioned in Sec. 17, Sub-sec. 6, of Act No. 265, must be a personal act. *Regina v. Garside, ex parte Biggs*, 6 A.L.T., 152.

"Police Offences Stat. 1865," Sec. 17, Sub-sec. 7—Injury to Property.]—Where five persons were summoned before justices for damage to a tramway, the damages being estimated at £62, and all the parties were summoned as for £15 damages, and one of them on conviction with £5 damages, appealed on the ground that the damage done amounted to £62; and by Sec. 17, Sub-sec. 7, of the "*Police Offences Statute*," the justices only had jurisdiction when the damage was under £20; and that it was impossible to apportion the damages between the five offenders, *Held* that the objection was fatal, and appeal allowed with costs. *Smith v. Perkins*, 1 A.J.R., 28.

"Town and Country Police Act," 18 Vic., No. 14, Sec. 15—Injury to Boat in Hobson's Bay.]—*See Webb v. Andrews*, *ante column* 752, and compare Sec 17, Sub-sec. 7, of Act No. 265.

Wilful Destruction of Property—Act No. 265, Sec. 17, Sub-sec. 7.]—Where a tenant cuts down a fence he is guilty of no offence under the Statute, the landlord's remedy being by civil action. *Regina v. O'Brien, ex parte Davidson*, 5 A.J.R., 16.

Destruction of Property—Act No. 265, Sec. 17, Sub-sec. 7—In Assertion of Right.]—C. was convicted of cutting down a fence upon private property belonging to W. It appeared that a public road on the property was fenced across, and that the track generally used diverged upon W.'s property, that C. went along the track and cut down the fence, believing that the place where he cut it was on the road, though actually it was on W.'s property. *Held* that he was liable, and conviction by justices affirmed. *Cahill v. White*, 5 A.J.R., 73.

Accidentally Breaking Glass in a Window—"Police Offences Stat. 1865" Sec. 17, Sub-sec. 7.]—Accidentally breaking glass in a window is not an offence under Sub-sec. 7 of Sec. 17 of the "*Police Offences Statute* 1865." *Regina v. Little, ex parte Reynolds*, 8 V.L.R. (L.,) 124; 4 A.L.T., 4.

Act No. 265, Sec 17, Sub-sec. 7.—Injury to Property.]—*Held, per Stawell, C.J., and Williams, J., dissentiente Higinbotham, J.*, Sub-sec. 7 of Sec. 17 (in this respect the same as Sub-secs. 3, 4, 5, and 6,) refers to acts committed wilfully and intentionally, and does not refer to injuries occasioned by negligence: such last mentioned injuries are to be compensated for by actions seeking damages, and do not constitute offences within the Act. *Regina v. Alley, ex parte Davey*, 9 V.L.R. (L.,) 59; A.L.T., 158.

Act No. 265, Sec. 18—Possession of Stolen Property—Evidence.]—Defendant was summoned to satisfy justices that she came lawfully by property found in her possession and alleged to have been stolen. Defendant's counsel made a statement that the property was her own property, and this statement was not contradicted by any evidence brought before the justices. On this the justices dismissed the summons. On appeal, *Held* that they were right. *Cameron v. Thompson*, 8 V.L.R. (L.,) 70.

Act No. 265, Secs. 3, 23—Cruelty to Animals.]—*See Anderson v. Wilson*, under ANIMALS, *ante column* 28.

Abusive Language in a Place of Public Resort—"Vagrant Act," 16 Vic., No. 22, Sec. 5.]—The defendant was convicted in Petty Sessions for that he was on a certain day "in a certain public place, to wit, a room in the Shamrock Hotel, Barkly-street, Ararat, where the public were then assembled, and there had the right of free access, ingress, regress, and departure, and did use abusive language towards one S., whereby a breach of peace might have been occasioned, to wit, &c." *Held*, reversing decision of General Sessions, that the room might have been shown by evidence to have been a place of public resort within the meaning of Sec. 5 of the Act No. 22, and an order, quashing conviction by Petty Sessions, on the ground

that the conviction did not show upon its face that the room was a public place within the meaning of the Act, was itself quashed. *Swan v. M'Lellan*, 2 W. W. & A'B. (L.,) 6.

[Compare the provisions of Act No. 265, Sec. 26.]

Act No, 265, Sec. 26—Obscene Language in a "Public Place."]—The board-room of a district road board, although the Act No. 176 requires the public to be admitted to the proceedings of the board, is not, during the sittings of the board, a public place within the meaning of Sec. 26 of Act No. 265. *Taylor v. Phelan*, 6 W. W. & A'B. (L.,) 242; N.C. 59.

Act No. 265, Sec. 26—Public Place.]—A room in a publichouse is not a public place within Sec. 26, necessarily, for a public place is a place where all the public may pass and repass at any hour of the twenty-four, and not where the public may resort for particular purposes at certain hours only. *Morgan v. Smallman*, 5 A.J.R., 165.

Act No 265, Sec. 26—Insulting Words.]—C. was summoned and fined for using insulting words "whereby a breach of the peace *might have been* committed." There was no breach of the peace in fact committed. *Held* that the summons disclosed no offence under Sec. 26 of the Act. *Clarson v. Blair*, 3 V.R. (L.,) 202; 3 A.J.R., 82.

Act No. 265, Sec. 26—"Insulting Words" in Public Place—Publichouse Bar.]—An information was laid for using insulting words in a public place. The evidence proved that the words had been used in "P.'s publichouse at B." *Held* that the justices might infer that the language was used on the premises of a licensed publican, and that the bar, at which it was sworn people had drinks in that publichouse, was an open bar in such premises. *Regina v. Carr, ex parte Sanderson*, 9 V.L.R. (L.,) 188.

Sunday Trading—Act No. 265, Sec. 30—Conviction Negativing Exemptions.]—*See Regina v. Montford, ex parte Schuh, ante column 776.*

Drawing for Prizes in a Lottery by a Mode of Chance—"Police Offences Stat. 1865," No. 265, Sec. 31.]—A person not being beneficially interested in a lottery cannot be convicted of an offence under Sec. 31 of the *"Police Offences Stat. 1865,"* for drawing for, or throwing for, or competing for, a prize in such lottery by dice or any other mode of chance. *Bergin v. Cohen*, 3 W. W. & A'B. (L.,) 133.

Amending Act, No. 424, Sec. 2—Lottery.]—The appellant C. was convicted of "assisting in managing and conducting a certain lottery, &c.," under Sec. 2 of the Act, but there was no evidence to show that the defendant C. was beneficially interested. *Held* that under such a conviction it is absolutely necessary to show that the person charged had a beneficial interest in the lottery. Appeal allowed. *Cooey Hing v. Sadleir*, 1 V.L.R. (L.,) 130.

Assisting in Managing a Lottery—Act No. 424, Sec. 2—Bensficial Interest.]—On a charge of assisting in managing a lottery it is not necessary to show any beneficial interest in the lottery in the person charged, or in any other person. *Regina v. Sturt, ex parte Ah Tack*, 2 V.L.R. (L.,) 103.

Act No. 424, Secs. 4, 6—Betting—"House, Office, Room, or Place"—Evidence.]—In an information under Sec. 6 of the Act, evidence was given of betting having taken place in a shop upon a certain day, not the day mentioned in the conviction. *Held* that there being no evidence of betting upon the day mentioned in the conviction, the case failed, and the date not having been amended, the conviction was ordered to be quashed. *Zucker v. Jennings*, 1 V.L.R. (L.,) 168.

A "shop" is within the meaning of a "house, office, room, or place" in Sec. 6. It is not necessary for the information or the conviction to charge, that the betting was upon any event or contingency of or relating to any horse race, &c., specified in the latter part of Sec. 4 of Act No. 424. *Jacobs v. Jennings, ibid*, p. 172.

Act No. 424, Secs. 4, 6—Act No. 267, Sec. 73—Gaming—Two Offences.]—An information was laid against D. "for that he used a public-house" for the purpose "of money being received by and on behalf of himself, and for the consideration for an undertaking to pay certain money on the contingency of a horse race." The justices dismissed the information on an objection that the words "by and on behalf of" constituted two offences, and therefore the information was bad under Sec. 73 of Act No. 267. *Held* that the objection was untenable, and rule absolute for justices to hear case. *Regina v. Moore, ex parte Duncan*, 9 V.L.R. (L.,) 1.

"Amendment Act," No. 424, Sec. 10—Betting Lists.]—C. erected a square board standing on the ground and supported by two uprights on two feet resting on the ground on "the Hill" at the Flemington racecourse, and was seen to take bets and to enter names on the board, using it as a betting list. *Held* that the spot occupied by the board was a "place" within the meeting of Sec. 10 of Act No. 424. *Walker v. Cowen*, 3 V.R. (L.,) 244; 3 A.J.R., 119.

Act No. 265, Sec. 32—Illegal Detention of Property—Contract of Letting.]—A Mrs. W. made an agreement with pianoforte sellers, W. and Co., to hire a piano, paying so much before delivery and so much by instalments, the property to be hers after a certain amount had been paid, with a proviso that she should have no property in it until that amount had been paid. When a small part of the purchase money had been paid, her husband sold the piano to B, who claimed it as against W. and Co. *Held* that it was an offence within Sec. 32, and that W. and Co. were entitled to a verdict. *Wilkie v. Brew*, N.C. 16.

"Under Police Offences Stat., 1865," Sec. 32—Illegal Detention of Goods—"Documents."]—H. was entrusted by C., as agent, with documents bearing on C.'s title to certain land, to obtain legal advice thereon. On C.'s demanding them back, H. pleaded inability, stating that they had been transmitted to a barrister, approved of by C., for opinion, and that the barrister upon being requested to return them stated that he had mislaid them. The justices ordered H. to return them, or pay £10. *Held* that the documents were not goods; and that the Justices had therefore no jurisdiction under the "*Police Offences Statute* 1865," Sec. 32. *Headland v. Charlesworth*, 1 A.J.R., 89.

Act No. 265, Sec. 32—Books of Mining Company.]—Books of a mining company are not goods within the meaning of Sec. 32. *Zumstein v. Frey*, 3 V.R. (L.,) 212; 3 A.J.R., 108.

Illegal Detention of Property—Due Notice.]—Under the "*Police Offences Statute*," No. 265. Sec. 32, on a charge for illegally detaining property, a demand by the complainant is a sufficient notice within the section.—*Longford v. Meldrum*, 4 A.J.R., 21.

Act No. 265, Sec. 32—Illegal Detention of Property—"Volunteers' Stat.," No. 266, Sec. 12.]—By the Stat. No. 266, the arms issued to a volunteer corps are vested in the commanding officer, and to justify the detention of a rifle by a gunsmith, an order from such officer is necessary. *Hitchins v. Mumby*, 5 A.J.R., 114.

Illegal Detention of Goods—Letter—"Police Offences Stat. 1865," Sec. 32.]—A letter is not "goods" within the meaning of Sec. 32 of the "*Police Offences Stat.* 1865," relating to illegal detention of goods, so that justices have no jurisdiction to convict for illegal detention of a letter. *Regina v. Heron, ex parte Hamilton*, 6 V.L.R. (L.,) 21.

Act No. 265, Sec. 32—Illegal Detention—Removal of Fence.]—K. was entitled to an allotment of Crown Land under a miner's right, on which was erected a fence. This fence became the property of A., who removed the fence to an adjoining highway. B. purchased the allotment from the Crown under conditions of sale which reserved leave to the owner of improvements to remove them within a month. A. had not removed the fence within the month, and B. took possession of it on the highway. *Held* that A. could not, under Sec. 32 of Act No. 265, complain of B.'s detention of it as illegal. *Ryan v. Nagle*, 7 V.L.R. (L.,) 1.

Idle and Disorderly Person—Act No. 265, Sec. 35, Sub-sec. 4.]—R. S. and A. S., husband and wife, occupied a house for which R. S. held a beer license, and this house "was frequented by prostitutes, who were in the habit of receiving men there for the purposes of prostitution." R. S. and A. S. were convicted at General Sessions "for being occupiers of a house frequented by persons having no visible means of support." *Held* that prostitutes were persons having "no visible means of support," and, as such, are idle and disorderly persons within the meaning of Sub-sec. 4, Sec. 35, of the Act; that the wife was rightly charged and convicted as "occupier," occupier being equivalent to "keeper" and not to "occupant" in its legal sense. Convictions upheld. *Regina v. Sayers*, 4 W. W. & A'B. (L.,) 46.

Frequenting a House—"Police Offences Stat.," Sec. 35, Sub-sec. 4.]—L. was convicted for being the occupier of a house "frequented" by persons having no lawful visible means of support. It appeared that L. was the occupier of a house, and that three girls (reputed to be prostitutes) resided with her. One had done so ever since L. first occupied the house, and the other two had done so for six weeks previous to the summons; but none of them paid any rent. *Held* that the fact that the girls resided in the house for some time did not prevent its being held that they "frequented" it; and that the girls were not the occupiers of the house, but were merely tolerated there by L. *Leister v. Short*, 1 V.R. (L.,) 187; 1 A.J.R. 151.

Act No. 265, Sec. 36, Sub-sec. 3—Fraudulent Representations to "Charitable Institution and Private Individual."]—The word "charitable" in Sub-sec. 3 of Sec. 36, governs both "institution" and "private individual," and the justices have not jurisdiction over offences which are ordinary impositions upon private individuals. The offence is that of a person who endeavours to obtain as a gift of charity some benefit or advantage by means of a fraudulent representation. *Regina v. Armstrong, ex parte M'Pherson*, 7 V.L.R. (L.,) 234; 3 A.L.T., 9.

Act No. 265, Sec. 36, Sub-sec. 5—Indecently Exposing Person—Evidence.]—A. was convicted for indecent exposure of his person under Sec. 36 of the Act, and the question reserved was whether certain evidence, which put a true colour upon certain acts which were equivocal, and which rebutted a defence of infirmity, was admissible. *Held* that where the act was equivocal, there being a doubt whether the act was wilful or not, evidence was admissible, and it was also admissible to rebut the defence set up. *Vernon v. Mollison*, 5 A.J.R., 123.

Sec. 36, Sub-sec. 5—Indecent Exposure—What is.]—On a charge of indecent exposure it is unnecessary to prove that the prisoner was actually seen by any one in the highway when he was exposing himself; it is sufficient to prove that he was in view, and could have been seen by any person there. *Regina v. Benson, ex parte Tubby*, 8 V.L.R. (L.,) 2.

"Vagrant Act," 14 Vic., No. 4, Sec. 3—Summary Jurisdiction of Magistrates.]—The game of "red and white" at cards is, not in itself, an "unlawful game;" and unlawfully playing the game does not make it an "unlawful game," or constitute the offence of "playing at any unlawful game" within the meaning of the

"*Vagrant Act*," Sec. 3, so as to give magistrates summary jurisdiction over the offence, the game not being enumerated in that section as an unlawful game. *Regina v. Smith Brown*, 1 W. & W. (L.,) 121.

[Compare the provisions of Act No. 265, Sec. 36, Sub-sec. 6.]

Act No. 265, Sec. 51—Gaming and Wagering—Betting on the Result — What is.] — *Miller v. Harris*, 1 V.L.R. (L.,) 142; 1 A.J.R., 127, *ante column* 482.

Recovery of Deposit from Stakeholder—Game Unfinished and Stakes Unpaid—Locus Penitentiæ.] —*Melville v. Pendreigh*, *ante column* 482; and see cases, *ante column* 483.

What Constitutes an Offence — Wilfulness or Intention.]—Wilfulness, or intention to commit an offence, is not to be taken as a necessary ingredient in a statutory offence, unless the statute creating the offence so provides. *Persse v. Smith*, 4 V.L.R. (L.,) 201.

2. *Under other Statutes.*

"Criminal Law and Practice Stat. 1864," Sec. 34—Assaulting a Police Officer in the Execution of his Duty.]—Where a constable comes up after an assault has been committed, it is his duty, under Sec. 56 of the "*Police Offences Stat.* 1865," if required by the person assaulted, to arrest the offender; and if such offender forcibly resist, he may be convicted, under Sec. 34 of the "*Criminal Law and Practice Stat.* 1864," of assaulting a peace officer in the execution of his duty. *Regina v. Huxley and Walsh*, 8 V.L.R. (L.,) 15; 3 A.L.T., 96.

Act No. 233, Sec. 178 — Destroying Dividing Fence.]—Under Sec. 178 of the Act, malice is essential to the offence of destroying a dividing fence. *Trotman v. Shankland*, 7 V.L.R. (L.,) 16.

Unlawfully and Maliciously Destroying a Fence—Jurisdiction of Justices.] — *See Williams v. Clauscen*, 6 V.L.R. (L.,) 29, *ante columns* 746, 747.

Forcible Entry and Detainer—5 Rich. II., Stat. 1, Cap. 7.]—*See Regina v. Templeton, ex parte Moore*, *ante column* 754.

"Criminal Law and Practice Stat. 1864," Sec. 194—Poisoning Dogs.]—To constitute poisoning a dog an offence under Sec. 194 of the "*Criminal Law and Practice Stat.* 1864," malice against the particular dog poisoned must be shown, and if the evidence only shows an intention to poison dogs in general, no offence within the meaning of the section has been committed. *Regina v. Puckle, ex parte White*, 2 V.R. (L.,) 63; 2 A.J.R., 57.

Bakers' and Millers' Stat. 1865," (No. 243,) Sec. 11—Selling Bread Without Weighing it—Sale by Servant.]—*See Regina v. Panton, ex parte Edmonds*, *ante column* 75.

Under "Fisheries Act."]—*See ex parte Tobias*, *ante columns* 458, 459.

Under "Abattoirs Stat.," No. 356, Sec. 36—Being in Possession of Skin with Defaced Brand.]—*See Smith v. M'Gann*, *ante column* 2.

Under "Gunpowder Stat."]—*See* GUNPOWDER.

Under "Hawkers and Pedlers' Stat. 1865"—Hawking Without a Licence.]—*See Hanson v. Tweedale*, *ante column* 495.

Under "Public Health Stats."]—*See* HEALTH (PUBLIC.)

Under "Land Acts."]—*See* LAND ACTS.

Under "Licensing Acts."]—*See* LICENSING ACTS.

Under "Market Stats."]—*See* MARKETS.

Under "Pawnbrokers' Stat."]—*See* PAWNBROKERS.

Under "Pounds Stat."]—*See* POUNDS AND IMPOUNDING.

Within Jurisdiction of General Sessions."]—*See* SESSIONS.

Under "Thistle Prevention Acts."] — *See* THISTLES.

Evasion of Tolls.]—*See* TOLLS.

Under "Shipping Acts."]—*See* under SHIPPING—Registration.

Harbouring Deserter—17 and 18 Vic., Cap. 104, Sec. 257.]—*See Regina v. Clark, ex parte Doyle*, 5 V.L.R. (L.,) 440; 1 A.L.T., 105. *Post* under SHIPPING—Nationality.

Under "Harbours and Passenger Acts."]—*See ante* under HARBOUR TRUST, and *post* under SHIPPING—Passenger Ships—Ports, Harbours, &c.

Against Railway Bye-Laws.] — *See* PUBLIC WORKS.

Under "Trade Marks Stats."]—*See* TRADE.

Under "Customs Acts."]—*See* REVENUE.

Under "Scab Acts."]—*See* ANIMALS.

Offence Against "Gold Fields Act," No. 32, Sec. 116—Onus of Proof—Carrying on Business Without a Business Licence.]—*M'Cormack v. Murray*, *ante columns* 430, 431.

Offences Against "Local Government Act."—*See* LOCAL GOVERNMENT.

3. *Punishment of Offences and Jurisdiction of Justices.*

Act No. 265, Sec. 8—Act No. 22, Sec 8—Obstructing Street by Exposing Goods for Sale—Non-removal of Goods After Notice—Forfeiture.]—

Sec. 8 of Act No. 265, provides two independent punishments for two distinct offences; the one being a conviction for obstructing the street by exposing the goods for sale; the other forfeiture of the goods when not removed after six hours' notice; the conviction for the first offence need not precede a forfeiture of the goods exposed and not removed. Although no power is given by Sec. 8 of Act No. 265 to justices to forfeit, yet (*dubitante, Williams, J.*) the power may be inferred from Sec. 8 of Act No. 22 ("*Interpretation Act.*") It is sufficient if an owner authorise his servant to expose the goods for sale, and if any part of the goods are exposed for sale, the justices may infer that a portion of the goods in cases not opened to view were similarly exposed. *Regina v. O'Flaherty, ex parte Winter*, 9 V.L.R. (L.,) 14; 4 A.L.T., 147.

"Police Offences Stat. 1865," No. 265, Sec. 16, Sub-sec. 7—Conviction—Second Offence—Act No. 630, Sec. 5.]—Defendant had been previously convicted of an offence under Sec. 16, Sub-sec. 7, of Act No. 265, and was convicted of a second like offence, and under it sentenced to pay £10. The Court of General Sessions quashed the conviction on the ground that it had been made under Sec. 16, Sub-sec. 7, of Act No. 265 (which left the justices no jurisdiction as to the amount of the penalty, but compelled them to inflict a penalty of £10 for a second offence.) Sec. 16, Sub-sec. 7, of Act No. 265 was repealed by Act No. 630, Sec. 5. On appeal to the Supreme Court, *Held* that the conviction was good. *Dobson v. Sinclair*, 8 V.L.R. (L.,) 69; 3 A.L.T., 106.

Conviction for—Compensation—"Police Offsnces Stat. 1865." Sec. 17, Sub-sec. 1.]—A conviction under Sec. 17, Sub-sec. 1, of the "*Police Offences Stat.* 1865," is not bad, because it does not also award compensation to the person aggrieved, since the provision for the award of compensation and the penalty are quite distinct. *Stewart v. Finnegan*, 4 V.L.R. (L.,) 93.

Conviction for Trespass—Penalty—Lighter Penalty in the Alternative.]—In convicting for wilful trespass, under Sec. 17, Sub-sec. 7, of the "*Police Offences Stat.* 1865," the justices have no power to award an alternative lighter penalty in the case the defendant should quit the premises trespassed upon within a certain time. *Regina v. Synnot, ex parte Main*, 6 V.L.R. (L.,) 35.

Jurisdiction of Justices when Ousted by Question of Title, and Claim of Right.]—*Regina v. Webster*, and other cases, *ante columns* 745, 746, 747.

Order for Delivery of Stolen Property—"Police Offences Stat. 1865," Secs. 19, 32.]—An order for the delivery of stolen property under Sec. 19 of the "*Police Offences Statute* 1865," cannot be enforced by the justices making an order for payment of the value of such property under Sec. 32 of that Act. *Regina v. Templeton, ex parte Rea*, 4 A.J.R., 116.

Act No. 265, Sec. 26—Jurisdiction to Add Hard Labour to Imprisonment.]—Justices have no power, under Sec. 26, to add hard labour to imprisonment in default of payment, and a prisoner so sentenced was on *habeas corpus* ordered to be discharged. *In re Rogers*, 7 V.L.R. (L.,) 449.

(Sec. 26 is repealed by Act No. 502, "*Judicature Act* 1874.")

Conviction — Act No. 265, Secs. 26, 63.]—Under Sec. 26 the conviction must order, in default of immediate payment, commitment to prison as an alternative, and must be complete in itself, and Sec. 63 does not apply to Sec. 26, so as to control or supplement it. *Regina v. Crotty, ex parte Gavin*, 9 V.L.R. (L.,) 6; 4 A.L.T., 147.

"Police Offences Stat. 1865," No. 265, Sec. 32—Limited "Trover" Jurisdiction.]—A. assigned his stock to N. by bill of sale. N. sold part of it, viz., 2 cows to K. K. demanded the cows from A., who refused to give them up. The justices made an order for delivery of the cows. Upon an order *nisi* for prohibition, *Held* that, by Act No. 265, the magistrates had a wider jurisdiction than, as was contended, between assignor and assignee only, and had not exceeded their jurisdiction. Order discharged. *Regina v. Barnard*, 4 W.W. & A'B. (L.,) 249.

Followed in *Longford v. Meldrum*, 4 A.J.R., 21.

Inability to Obey Order of Justices.]—S. had in his possession goods of M., and was summoned under Sec. 32 of the "*Police Offences Stat.* 1865" for illegal detention of the goods, and an order was made that S. should deliver the goods before a certain date. Before the date fixed an order was made by other justices, at the suit of S., against M. for payment of certain moneys due, and in default a distress warrant was issued, and on the date fixed for delivery up of the goods under the first order a constable executed the distress warrant, and took possession of the goods. M. summoned S. for disobedience of the order for delivery of the goods, and the justices who had made the order fixed the value of the goods, deducted the amount of the distress warrant, and ordered payment of the balance to M. The justices fixed the value of the goods arbitrarily without taking evidence, and when sold they realised about half of the value so fixed, and S. paid the difference between what they realised and the amount of the distress warrant to M. On rule *nisi* for a prohibition against the order directing payment of the difference between the value fixed by the justices and the amount of the distress warrant, *Held* that the order was wrong, and that S. had not disobeyed the order directing delivery up of the goods, but was unable to comply with it owing to the distress warrant. *Regina v. Wyatt, ex parte Strettle*, 4 A.J.R., 25.

Act No. 265, Sec. 32—Illegal Detention of Property—Ordsr.]—On a complaint under Sec. 32 of No. 265, the defendant set up a counter-claim, which the justices allowed to a certain

amount, and ordered the goods to be delivered upon tender to defendant of a seaman's advance note for such amount. On disobedience a further order was made for the value of the goods. *Held* that the first order was bad, and that the second order based upon it could not stand; and that the order should have been made for delivery upon payment of the counter-claim in money. *Regina v. Marks, ex parte O'Day*, 5 A.J.R., 71.

Under Sec. 32 of the Act the value of the goods is to be determined by the same justice who heard and determined the original complaint, and the same justice must make the order for costs. *Regina v. Call, ex parte Barber*, 3 V.L.R. (L.,) 346.

Illegal Detention—Order for Delivery or Payment of Value—Amendment—Costs—"Police Offences Stat. 1865," Sec. 32.]—Justices have no authority on a complaint, under Sec. 32 of the "*Police Offences Stat.* 1865," for illegal detention of goods, to make an order for delivery up of the goods, and also, in default, payment of their value; but, in drawing up the formal order, there is nothing to prevent the justices omitting that which is in excess of their jurisdiction, and making the order for delivery only. If they award costs in such order, the Court may amend by striking out the part relating to costs. *Regina v. Miller, ex parte Dreher* 8 V.L.R. (L.,) 157; 4 A.L.T., 12.

Indecent Exposure—Punishment—"Police Offences Stat. 1865," Sec. 36.]—On a conviction, under Sec. 36 of the "*Police Offences Stat.* 1865," for indecent exposure, justices may inflict the additional punishment of whipping, without further evidence as to the prisoner's age than their own conclusions. It then lies upon the prisoner to show that he is under the age mentioned in the Statute. *Regina v. Benson, ex parte Tubby*, 8 V.L.R. (L.,) 2.

But a single justice, not being a police magistrate, has no power when adjudicating under Sec. 36, Sub-sec. 5, to inflict a whipping under Act No. 399, Sec. 33. *Purcell v. Nimmo*, 3 V.R. (L.,) 233; 3 A.J.R., 112.

Sentence for Unlawful Assault—Act No. 233. Sec. 38.]—*Morrison v. Clarke, ante column 753.*

Assisting in and Managing a Lottery—"Police Offences Stat. 1865," Part 2, Sec. 63—Act No. 424, Secs. 2, 17.]—C. was convicted and fined for assisting in and managing a lottery contrary to the provisions of the Act No. 424 ("*Police Offences Stat.* 1865" *Amendment Act,*) Sec. 2, and of Sec. 31 of the "*Police Offences Stat.* 1865," and on appeal to the General Sessions the conviction was affirmed subject to the opinion of the Supreme Court, on the points as to whether there should have been an adjudication of distress to bring the penalty under Sec. 31 of the "*Police Offences Stat.* 1865" before proceeding to imprisonment; whether before C. could be imprisoned he should be summoned to show cause, and whether there was evidence, that any one was beneficially interested in the scheme. *Held* that it was unnecessary to consider the third point, because the fact that tickets were sold, showed that some one was beneficially interested; that since the necessity for issuing a summons could not arise till after the conviction, the question in no way affected the conviction; and that as to the first point of Section 2 of the Act No. 424 was to be considered, as contained in Part 2 of the "*Police Offences Stat.,*" the objection failed because Sec. 63 of that Statute authorised the course pursued; but that since the Act No. 424 made itself part of the "*Police Offences Stat.*" generally, and not of Part 2, the justices could not award, as under Sec. 63, imprisonment in default of payment, without an intervening distress, and the conviction must be quashed. *Cooey Hing v. Kabat*, 4 A.J.R., 118.

Acting as Banker and Croupier at a Common Gaming-house — Penalty — "Police Offences Stat. 1865," Secs. 43, 63.]—Defendants were convicted, under "*Police Offences Stat.* 1865," Sec. 43, of having acted as banker and croupier respectively at a common gaming-house, and were adjudged to forfeit and pay the sum of £20 each, and each conviction then proceeded as follows:—To be paid immediately, and also to be paid and applied according to law, and the said sum not having been paid immediately, we, in the exercise of our discretion—which discretion we hereby exercise—adjudge the said *defendant* to be imprisoned. . . . for the space of three calendar months, unless the said sum shall be sooner paid. *Held* that the justices had power under Sec. 63 of the same Act to adjudge immediate imprisonment upon default of immediate payment without intervening distress, and that the convictions were good. *Ex parte Fat Tack, ex parte Ah Poon*, 6 A.L.T., 37.

Costs.]—*Held*, also, that the justices had a discretion, under Sec. 63, to award or not to award costs. *Ibid.*

Hearing Separate Summonsss Together.]—Three summonses in the same terms issued against three defendants for assisting in managing a certain lottery, were heard together, and the defendants convicted. On rule *nisi* for a prohibition, *Held* that the summonses were rightly heard together. *Regina v. Sturt, ex parte Ah Tack*, 2 V.L.R. (L.,) 103.

Penalty — Method of Enforcing.] — Where a statute, "*Sale of Poisons Act* 1876," authorising the infliction of a penalty, is silent as to the mode of levying for the penalty, distress must precede imprisonment. *Regina v. Shillinglaw, ex parte Chine and Ah Sen*, 6 A.L.T., 161.

Vagrant Act, 16 Vic., No. 22, Secs. 2, 6—Power to Arrest—Warrant.]—Where justices, who had ordered the arrest of persons as vagrants for not giving a satisfactory account of themselves, were not seized of the case, and there was no information, summons, or warrant, and the parties were not offending at the time of arrest, *Held* that as there is no power under the "*Vagrant Act*" to arrest without warrant

in cases where the act of vagrancy charged is the not giving to the justices a satisfactory account of means of livelihood, the arrest was bad. *In re Cornillac*, 1 W. & W. (L.,) 193.

[Compare Secs. 35, Sub-sec. 1 and 41 of Act No. 265.

OFFICE.

Statutory Office—Tenure Cannot be Altered by Commission Under Which it is Granted.]—Where an office is created by statute with a certain tenure, the tenure cannot be altered by the terms of a commission granting such office to the person appointed. *Per Stawell, C. J.*, and *Barry, J.*; and *per Molesworth, J.*—A commission purporting to confer a different tenure would be altogether invalid. *Regina v. Rogers, ex parte Lewis*, 4 V.L.R. (L.,) 334.

Manager of Mining Company—Situation Not an Office.]—The appointment of the Manager of a Mining Company, registered under Act No. 228, is not an "office," but a "situation," under a contract for service, and need not be under the Corporate Seal of the company. *Royal Standard Gold Mining Company v. Wood, ante column* 1017.

The word "officer" in Sec. 38 of the "*Statute of Trusts* 1864," includes the assistant manager of a bank. *Regina v. Draper*, 1 V.R. (L.,) 118; 1 A.J.R., 94.

PARLIAMENT.

Barrister, Member of One House Practising Before the Other.]—A barrister who is a member of one House of Parliament may plead before a committee of the other. *Harbison v. Dobson*, 2 A.J.R., 51.

Offence Against House of Parliament—Personating an Elector—"Electoral Act 1865," Sec. 116—"Judicature Act," No 502, Sec. 15, Sub-sec. 7—Jurisdiction of General Sessions.]—*See Regina v. Hynes*, 6 V.L.R. (L.,) 292; 2 A.L.T., 45. *Post* under SESSIONS—Jurisdiction of Court of General Sessions.

Vote of Money to do a Work Confers No Authority.]—The fact that Parliament has voted a sum of money to defray the expenses of a certain work, gives no legal authority to do such work. Parliament may annul rights by legislation, not by votes of money for an object. *Brooks v. The Queen*, 10 V.L.R. (E.,) 100, 110; 5 A.L.T., 199.

And *see ante* CONSTITUTIONAL LAW and ELECTION LAW.

PARTITION.

Specific Performance of Agreement for.]—*See Aslett v. Kinsella*, 1 A.J.R., 2, *post under* SPECIFIC PERFORMANCE—MATTERS OF DEFENCE—Statute of Frauds.

PARTNERSHIP.

I. THE CONTRACT.

(*a*) *What Constitutes a Partnership.*

Part Owners of Land—Graziers—Conversion into Partnership Property.]—W. and R., not previously partners, purchased lands, and sheep grazing on them, at an entire price, paid by their equal separate moneys and bills. After the purchase, each removed a portion of the sheep to their respective stations, and sent others in lieu of them. The substituted sheep and their progeny were there for three years, managed as joint property by R., and a station fund was lodged in a bank on their joint account, deducting station disbursements. *Held* that the lands were purchased, not to be sold as a joint speculation, but to be ultimately divided, and in the interim used only as a joint grazing farm; that W. and R. became partners in grazing as a result of being part owners in land, and did not become part owners of land in order to become partners in grazing; that there was nothing to convert separate property into partnership property, and that the land was therefore real and not personal estate. *Ware v. Aitken*, 2 W. & W. (E.,) 152.

G., a baker, being indebted to T. S. & Co., assigned his machinery, materials, etc., to T. S. & Co. T. S. & Co. took possession. B., one of the firm, acted as manager, and G. as salaried assistant. T. S. & Co. dissolved partnership, but this business was conducted as to the world in substantially the same manner as before, the only difference being that B. no longer remitted profits, but kept the proceeds and paid expenses—the partners agreeing that "G.'s business was to be worked

within itself," with a view to a sale to B. M., the plaintiff, supplied necessary goods to B., and B. gave a promissory note, signed "T. S. & Co., in liquidation," M. being at this time aware of the dissolution. On an action on the note against T. S. & B. for goods sold and delivered, judgment went by default against B., but a verdict was entered in favour of T. S. On motion to enter a verdict for M., *Held* that, as creditors of G., T. S. & Co. were not partners with B., or liable for his acts, but as trustees they were entitled to all the proceeds of the business, and that a new partnership arose of T. S. & Co., B. managing on their behalf, and that T. S. was answerable for a debt properly incurred in the management of this business. Verdict entered for plaintiff. *Moore v. Slater*, 2 W. & W. (L.,) 161.

Participation in Profits.] — By agreement between A. and B., A. was to assist in preparing certain models for exhibition. B. had agreed to give A. 30s. a week while preparing models, and afterwards said that this amount should be treated as an advance, and that A. should "stand in," and refused to give A. more, representing that the less he received then the more he would get ultimately, and that it was as much to A.'s interest as his own to keep the expenses down. *Held* that it was evidence of a partnership. *Smith v. Jones*, N.C., 21.

Agreement to Share Profits — Agreement for Half Proceeds in Lieu of Rent.]—An agreement made between M., the landlord, and H., the lessee of a public-house, that every month an account of profits should be taken, and a half thereof should be paid to M. in lieu of rent, does not constitute a partnership between M. and H., so as to authorise H. to pledge M.'s credit for goods supplied to H. in his business as a publican. *Regina v. Willis, ex parte Martin*, 5 V.L.R. (L.,) 149.

Agreement to Share Profits—Stipulation that one should be a Dormant Partner, and not Liable for Losses.]—R. was carrying on business alone, and was indebted to B. By a deed of March, 1874, it was recited that B. was about to purchase one-fourth interest in the business for the benefit of her son, aged 19, in R.'s employ, and that B. was to have sole control of the share in the business until the son came of age, and to have power to dispose of the share in case the son died under age. R. covenanted to assign in consideration of the purchase money, which was treated as paid to B. or her nominee, one fourth interest in the business, with all usual clauses in assignments from one partner to another, to pay her until son's majority, one-fourth of the profits, provided that until son's majority B. should not be liable for losses, or be held out to the world as a partner, and that R. would, during that period, indemnify her against losses, and that R. should allow B. access to the books, and behave towards her as a partner. *Held* that B. being entitled to profits, she was for the time a partner with R.; and that the matter being a purchase for a price never to be repaid, it was not a loan, and that B. could not prove in competition with other creditors. *In re Ruddock*, 5 V.L.R. (I. P. & M.,) 51; 1 A.L.T., 25.

Contract for Joint Sale of Goods.]—An agreement as follows:—"It is understood that we are to have one-fourth interest in T. and Co's remaining stock of rice, being about 1400 tons, *ex Seagull, Portlaw*, and *Manifred*, at £18 per ton in bond, four months' credit, with interest from 1st October. We are to receive 2½ per cent. commission on all rice sold through our hands (signed) A., agreed T. and Co.," does not constitute a partnership between the parties to it, and an action may be maintained at law for a loss on the transaction. *Turnbull v. Ah Mouy*, 2 A.J.R., 40.

Series of Isolated Transactions Held not to Constitute a Partnership.]—*Boyd v. Holmes, ante columns* 183, 184.

Bill Seeking Declaration of Partnership against Two Defendants—Proof of Sub-partnership between One of Defendants and Plaintiff.]—Bill sought a declaration of partnership and accounts as against two defendants, S. and T. S., one of the defendants, admitted there was a sub-partnership between him and plaintiff as to the half share of his partnership with T. in several contracts on separate bargains. On July 19, 1872, S. and T. entered into a contract as between themselves to share profits, taking no notice of plaintiff. In several of the contracts plaintiff superintended the men and paid wages, but his doing so was quite consistent with his being a ganger or a clerk of works. There was no proof of plaintiff having been consulted as to the contracts. *Held* that there was no partnership between plaintiff and both defendants, and the plaintiff could not turn his bill for accounts against two defendants into a bill for an account against J., who admitted a sub-partnership as to several of the contracts. *Farham v. Thomas*, 3 A.J.R., 103.

Joint Adventure—Recovery at Law of Part Expenses.]— C. and L. agreed that they should pay equally all the expenses of working a mine. C. and L. were owners of machinery which they agreed should be carried to the mine, and that all expenses connected with the mine should be borne equally by them until a company floated to work the mine, and in which they were shareholders, should be registered. L. had promised to pay C. a cheque for £28 as half the expenses, and C. sued L. for money paid. The Judge of the County Court nonsuited C., holding C. and L. to be partners. *Held* that the promise to pay an ascertained sum entitled C. to have the case sent to a jury; that the agreement was for a definite period, and a special object, and the fact that gold obtained during that period was to be placed to their joint account did not constitute a partnership. Appeal allowed. *Collins v. Locke*, 5 V.L.R. (L.,) 13.

Incomplete Negotiations.] — An action was brought for breach of an alleged agreement to enter into partnership. A mere skeleton of an agreement was entered into, the terms of which

were to be filled up by the parties subsequently. *Held* that in the absence of the fact of the parties having been previously acting together, so that their antecedent conduct might afford some grounds for drawing inferences, from which an agreement might be deduced, there was no binding contract. *Ferrie v. Whitehead*, 5 V.L.R. (L.,) 132.

Share of Dividends—Mine.]—The plaintiff and others entered into an agreement with defendants that plaintiffs and others should work a share in a mine "on terms," viz., that they should receive £2 a fortnight each, and half the overplus of the dividend, after deducting the wages. Defendants then put an end to the bargain, and plaintiff claimed to be entitled as a partner, but acquiesced in an arrangement by which defendants paid for labour of plaintiff and three others, two "on terms," and two on wages, dividing amongst them the total amount which was received by plaintiff on their account. *Held* that there was no partnership between plaintiff and defendants under the original agreement, and that plaintiff could not claim an account of net profits as distinguished from dividends, as plaintiff had only stipulated for a share of dividends. *Meldrum v. Atkinson*, 5 V.L.R. (E.,) 154.

(*b*) *Construction of Articles.*

E. M. and L. were partners in a contract to construct a railway. The deed of partnership, December, 1858, provided (*inter alia*) that L. should receive out of the entire net profits, as a debt due from it, the sum of £100 per month for the use of plant, chattels and effects brought in by him, the property after completion of the contract reverting to him absolutely. L., in fact, acted as a trustee for A. and B. Fresh plant and material were afterwards brought in and used. By deed, March, 1860, the partnership between E. M. and L. was dissolved, and a new partnership between L. and W. created on terms that the plant, &c., should be valued and assigned to W., and the amount of the aluation applied for the benefit of A. and B.; and by the deed E. and M. assigned their interests to W., and L., with A. and B.'s consent, assigned the plant, &c., to W. In a suit for accounts the Master in his report excluded from the disbursements a sum of £76,000, which had been spent in purchasing fresh plant, &c., and included only as disbursements the sum of £1500 paid to L. at the rate of £100 per month. *Held* that the Court could not go behind the provisions in the deed; and that, under the deed of 1858, L. being under no obligation to purchase fresh plant, &c., and such fresh plant being by the deed of March, 1860, treated as L.'s property, the expenses of repairing old and purchasing fresh stock should be borne by L. alone, and not by the partnership, and master's report affirmed. *Evans v. Guthridge*, 1 W. W. & A'B. (E.,) 119.

Terminated Agreement—Forfeiture.]—A partnership agreement, containing a clause of forfeiture in certain events, having been terminated by consent, without any reservation as to forfeitures already incurred, the Court would not allow a prior forfeiture to be enforced against one of the partners. *Collins v. Robbins*, 5 W. W. & A'B. (E.,) 194.

Meaning of the Word "Stevedoring."]—*Semble*, that "dumping" wool is not comprised within the term "stevedoring," in an agreement as to the latter business. *Ibid.*

When a deed of partnership between three partners, provided that no partner should dispose of his share except with express consent of a majority, and A wished to dispose of his share to D., B., one of the partners being a lunatic, *Held* that the consent of the partner selling and of one other partner was sufficient. *In re Anderson*, 5 V.L.R. (E.,) 133.

Deed Containing Mutual Releases in Respect of Partnership Claims or any Other Account Whatever—ejusdem generis—Action by Partner on Money Counts.]—*See Cameron v. Hughes, post* under SUITS, &c., BETWEEN PARTNERS, &c.

Reference to Arbitration—Injunction to Restrain Partner from Interfering.] — F. carried on business as brewer and entered into partnership with E. and W., a deed being drawn up by which F. was appointed brewer and manager, and containing provisions for referring disputes to arbitration. Provision was also made for half-yearly meetings, and, at one of these, so much dissatisfaction was expressed at F.'s management that he resigned, and his resignation was accepted, and E. appointed manager. F. now insisted that his partners had no power to remove him except for just cause, and that they had no cause for so doing, and that the dispute was one properly referrable to arbitration. *Held* that E. and W. were justified in removing F., and that the arbitration clauses only referred to disputed accounts; and injunction granted to restrain F. from interfering in the business as manager, without prejudice to the right of F., if any, to act as brewer. *Gough v. Farrington*, 1 A.J.R., 3.

II. AGREEMENTS TO BECOME PARTNERS.

Uncertainty—Contrary to Public Policy.]—An agreement for mutually sharing, in certain proportions, the profits of all patents, industries, and copyrights possessed, or to be possessed by either party, indefinite as to duration, is not so uncertain or against public policy, as to prevent the Court from dealing with it. *Le Roy v. Herrenschmidt*, 2 V.L.R. (E.,) 189.

Specific Performance.]—Specific performance of an agreement for a partnership is generally refused where part of the consideration consists of duties of which specific performance cannot be enforced. *Ibid.*

Specific Performance.] — Where a plaintiff seeks to enforce a partnership agreement, the terms of which are not reduced to writing, he must prove distinctly what its terms are. And unless the parties have engaged to execute

some instrument of which execution can be ordered, Courts of Equity will not decree specific performance of an agreement for a partnership. *Ogier v. Booth*, 9 V.L.R. (E.,) 160; 5 A.L.T., 109.

Shares and Proportions.]—M. purchased an hotel in 1875, and agreed with K. that he should share in the venture. K. paid a small part of the purchase-money, M. the rest, and M. received the rents and profits until 1877, when a re-sale was made at a profit. On bill by K. for a half share of the profit, there being a conflict of evidence, *Held* that K. was entitled to half such profit; but that, not having strenuously resisted M.'s contention, of which he was apprised before the re-sale, that he was not entitled to so much, K. was not entitled to costs. *Kilpatrick v. Mackay*, 4 V.L.R. (E.,) 23.

Where a partnership is shown, the presumption is of equality of shares. *Ibid.*

Partnership in Selections—Partnership in Produce.]—In 1874 C. D. and W. took up adjoining selections under the "*Land Act* 1869," Sec. 20, and obtained licenses therefor, fenced and improved them. D. paid all the licence fees, and supplied all moneys for materials, &c. In 1877 leases were issued to C. D. and W., in accordance with the provisions of Sec. 20, and they agreed that the accounts should be adjusted between them by W. transferring to D. the lease of his selection, and, before this was done, C. and W. agreed that, in consideration therefor, W. should have an equal share in C.'s allotment, and that they should carry on a farming business thereon in partnership. In pursuance of the agreement they worked the lands in partnership, and stocked and improved them till W.'s death, on 11th September, 1883. On suit by W.'s administrator, seeking a declaration that a partnership existed between C. and W. in reference to the selections, *Held* that the agreement between C. and W. as to the transfer of W.'s selection being illegal under the "*Land Act* 1869," Sec. 21, the plaintiff was precluded from claiming the land as partner; but that there had been a partnership as to the farming business, and the plaintiff was entitled to half the partnership property on the land at W.'s death, but not to the subsequent produce. *Wisbey v. Churchman*, 10 V.L.R. (E.,) 214; 6 A.L.T., 82.

III. Liability of Partners to Third Persons.

On Mortgage of Personalty of Firm.]—One partner can bind his co-partner by a mortgage of personal property of the firm, to secure a partnership debt. *Williamson v. Cuningham*, 3 W. W. & A'B. (E.,) 188, 201.

Security Given by One Partner on Behalf of Firm.]—J. and G. entered into partnership on the agreement that each partner should contribute a certain amount of capital. J. did not bring in his stipulated amount of capital, and the firm commenced business with deficient capital. To remedy this G. borrowed from K., by means of acceptances, which he signed at various times, to the extent of £3000. There was a clause in the partnership deed, providing that no partner should give any note, bill, or security for the payment of any money on account of the partnership, without the written consent of the others, and if any partner should give any such without such consent, it should be deemed to be given on his separate account, and he should discharge the same out of his own moneys, and indemnify his partners against the same. There was evidence that J. had profited by, and was well aware of the transaction, although he had given no consent in writing. On taking accounts the Master reported that this sum of £3000 was due by the firm, and J. took exception to this on the ground that G. was really responsible for it. This exception was allowed, and G. appealed, and on appeal, *Held* that J. was aware of the whole transaction, and had profited by it, and so must have given his consent, and exceptions disallowed. *James v. Greenwood*, 1 A.J.R., 125; 2 A.J.R., 14.

Squatting Partnership—Power to Borrow so as to Bind the Firm.]—*Per Molesworth, J.* The power of borrowing by partners, so as to bind the co-partners, is incidental to a squatting, like a mercantile, partnership. *Glass v. Higgins*, 2 V.R. (E.,) 28, 31.

Proof of a debt as a partnership liability was admitted on a promissory note, given by one member of a squatting partnership on behalf of the firm. *Ibid.*

Power of Partner in Squatting Partnership to Give Lien on Wool.]—*White v. The Colonial Bank*, 2 V.R. (E.,) 96; 2 A.J.R., 49.

For facts, *see* S.C., *ante column* 840.

Promissory Note made in Name of Firm for Payment of Separate Debt of Partner—Presumption.]—A partner made a promissory note in the name of the firm, and gave it to a creditor in payment of his separate debt. For six months beforehand the partner had been in the habit of drawing cheques in the same way, for the same purpose, and these had been duly honoured. *Held* that this practice gave the creditor reasonable ground to presume that such partner had authority from the firm to make a promissory note in the manner, and for the purpose mentioned, and that the firm was liable. *London Chartered Bank of Australia v. Kerr*, 4 V.L.R. (L.,) 330.

Breach of Trust—Liability of Co-partner of Executor.]—Two executors, J. T. and T. T., got in the estate of their testator, and lodged the overplus, consisting of money, in a bank. Of this a certain sum was advanced to J. T., who was in partnership with B., and was secured by an acceptance of B. and J. T., drawn in favour of T. T. in his private capacity. B. was aware that the money the firm received was a trust fund. T. T. had the bill discounted, and applied the proceeds to his own use. B. and J. T. paid the amount to the acceptor. *Held*

that they, nevertheless, remained liable to the estate as having been parties to the breach of trust. *Jones v. Taylor*, 2 V.R., (E.,) 15.

Debt Incurred by One Partner Outside Scope of Authority—Absent Partner Complaining of Dealings Outside Scope of Authority, but Accepting Accounts Based on Them—Liability for Debt.]—*See in re Oppenheimer and Co., ante column* 585.

Old and New Firms—New Firm taking Liabilities of Old.]—R. and F. were trading together in partnership, and, amongst other liabilities, incurred a large indebtedness to F. S. and Co. whilst this partnership was solvent, and the accounts showed a large excess of assets over liabilities and an increase of profits. Forster, a clerk in the employ of R. and F., was admitted as a partner, and had access to the account books. R. and F. swore that the new firm took over the assets and liabilities of the old firm, and there was evidence that the profits of the new firm were applied to extinguish the old liabilities. F. S. and Co. knew of the change in the firm, and the accounts submitted to them were in the same form, and treated the members of the firm of debtors in the same way under the old firm as under the new. *Held* by the *full Court*, reversing *Molesworth, J.*, that the debt was transferred to the new firm from the old, as between the partners, and that the creditors, F. S. and Co., adopted that arrangement, and adopted the new firm in place of the old. *Ex parte Rolfe and Bailey, in re Rutledge*, 2 W. & W. (I. E. & M.,) 16. Affirmed on appeal to the Privy Council, L.R., 1 P.C. 27.

Members of a Partnership Ineffectually Attempting to Form Themselves into a Company—Liability for Debt.]—*Carter v. Watson, and Oriental Bank v. Casey, ante column* 1010.

Assets, What Are—Bank Shares.]—A deed of partnership between A. and M. contained a promise that the firm should take over the assets, and become responsible for the debts of an old firm of M. and N. *Held* that under this clause the new partnership was not entitled to separate bank shares deposited by M. and N. to secure a joint debt to a bank. *Agnew v. M'Gregor*, 1 A.J.R., 133.

On Joint Speculation.]—Where three persons joined in a guaranty for £10,000 to a bank for an overdraft on account of a vineyard speculation this was held not to limit the liability of one of them, to one third of that amount, as there was evidence of his recognising an extension of the undertaking. *Holmes v. Bear*, 2 A.J.R., 9. Affirmed on appeal, *Ibid* 41.

Act to Exempt Certain Contracts from Law of Partnership, No. 179.]—*Per Molesworth, J.* "There is nothing to prevent a person lending money to be used in trade making any such stipulations as to not giving credit and keeping accounts and not carrying on any other business. All these stipulations are consistent with the mere relation of borrower and lender. *In re Butchart*, 2 W. W. & A'B. (I. E. & M.,) 8, 12.

For facts *see* S.C., *ante column* 621.

Loan of Capital Under No. 179—Creditor Claiming Under a Deed of Assignment.]—J. T. H. agreed with B., by deed, to make certain advances for the purposes of a business to be carried on by B., in the name of H. and Co., but under the control of H., who was to participate in the profits. The deed, which was drawn with express reference to the Act No. 179, provided that J. T. H. was not to be a partner. This business, which was unsuccessful, was carried on till September, 1869, when a new partnership was entered into between B. and W. H. for the purpose of carrying on the same business under the same name, J. T. H. to be in no way interested in the profits, but to receive the promissory notes of the firm for the debt due by B. in respect of the advances made to the former business. The new firm carried on business till January, 1870, when they executed a statutory deed of assignment in trust for creditors, in which J. T. H. was entered as a creditor, but the trustee refused to pay him a dividend on the ground that he was not entitled to rank in the joint estate until all the joint creditors had been paid, there being no separate estate, the trustee alleging that J. T. H. was either a partner in the firm or personally responsible for its debts. On rule *nisi* to compel the trustee to pay a dividend to J. T. H., *Held* that there was not sufficient evidence that the creditors of the firm considered J. T. H. as a partner; that if they had so considered him they ought not to have executed the deed of assignment in which he appeared as a creditor, and rule absolute, but considering J. T. H.'s conduct, without costs. *In re Harcourt and Bailey*, 1 V.R. (E.,) 104; 1 A.J.R., 76.

What Constitutes a Loan so as to Enable a Partner to Prove—Advance of Money Which is not Treated as Liable to be Repaid.]—*In re Ruddock, ante columns* 1121, 1122.

IV. Liability and Duties of Partners inter se.

When One Partner Insane—Dissolution—From what Date—Arbitration—If made during Insanity not Binding—Remuneration to One Partner—Valuation, not Sale.]—X. and W. were carrying on a business in partnership under a deed which contained the usual stipulations for fidelity, justice, and diligence; that each should not, without the consent of the other, endorse, sign, draw, or accept any bill of exchange or promissory note; and that each should enter all moneys paid out or received by him in the partnership books. It provided also for each partner giving the other a week's notice calling upon him to make reparation in case of infringement of any clause by that other, and, after the week's notice, for a settlement of

disputes by arbitration; and that, on arbitrators' decision, the offender should be excluded from participation, and be paid off. In January, 1871, W. became eccentric, and accepted bills on London for £1100, and failed to enter an account of them. X. got no satisfactory explanation, and sent the week's notice, and, this being unnoticed, appointed his arbitrator, and, on 9th March, obtained an award in his favour. W.'s insanity had become more and more marked during February and March, and on 18th March he was confined in a lunatic asylum. X., acting under the award, treated the assets as his own, made arrangements for paying off W.'s share, and carried on business in his own name. On bill by lunatic and his committee, seeking to set aside the award, and have a dissolution declared and accounts taken, *Held* that the award was not a bar to the dissolution sought, and that W., though not entitled to a dissolution on the ground of his own insanity, was entitled by the way X. had prematurely taken upon himself the ownership of the assets, the dissolution to date from the decree; that the award made during W.'s insanity was not binding on W.; that X. was to be remunerated for his working the business alone since the 8th of March; and that as the deed contemplated a valuation and not a sale on dissolution, for which it expressly provided, a similar course should be adopted as to a dissolution arising from W.'s insanity. *Gregory v. Welch*, 3 V.R. (E.,) 6; 3 A.J.R., 3.

Accounts Taksn by Master—Excess of Capital of Lunatic Partner Bearing Interest—Value of Leasehold Premises—Discrepancy as to Balance Sent Back to Master for Re-consideration.]—Accounts were decreed in a suit seeking dissolution and accounts. On exceptions to Master's report, *Held* that, it appearing that the lunatic partner's excess of capital in October, 1869, was £3400, such partner being sane at the time, the partnership fund was liable for interest up to October, 1871, the year's relations commencing as by balance-sheet of October, 1870, and after the partner became lunatic in March, 1871, the same partner made no distinct offer to his committee to pay off excess of capital; that a rest should not be taken in March, 1871, but in October, 1871; that the Master should have in his accounts valued the leasehold premises in which business was carried on, and that the Master be directed to value them at £300; that it appearing by the accounts that there was a discrepancy as to balance arrived at, such discrepancy should be referred to the Master for reconsideration. *Gregory v. Welch*, 3 A.J.R., 102.

Where One Partner Insane.]—In a suit by the committee of a lunatic against the lunatic's partner, the plaintiff had unsuccessfully applied for a receiver. The defendant, however, had been in the wrong in two other instances in the suit, and had had the use of the money awarded to plaintiff since the dissolution of partnership, and the benefit of the goodwill and connection without paying for it, owing to his partner's lunacy. Upon winding up the suit on further directions, the Court thought justice would be done by making each party bear his own costs, and by not charging the defendant interest upon the amount found due to the lunatic's estate. The partnership property was ordered to be handed over to the defendant, who was to execute an indemnity against all liabilities. *Gregory v. Welch*, 4 A.J.R., 14.

Where One Partner Insane.]—One of two partners had become insane, but was released from confinement, and his partner made an agreement with him for dissolution. In this agreement the lunatic partner acted through one of his sons, but assented to the agreement, and as part of it signed a promissory note. Subsequently the lunatic's partner wished to revive the partnership, and made an agreement to that effect with one of the lunatic's sons, without in any way consulting the lunatic, who upon its being brought to his knowledge, absolutely refused to assent to it In a suit to enforce the agreement, *Held* that as the plaintiff had, in the agreement for dissolution, treated his partner as sane, he was estopped from setting up his incapacity to reject the agreement for reviving the partnership, and fulfilment of the first agreement decreed. Upon appeal *Held* that the decree was right, and that the Court would not measure the amount of mental capacity of a person. *Creswick v. Creswick*, 4 A.J.R., 23. On appeal—*Ibid*, 93.

Suit for Dissolution and Accounts—Authority by One Partner to an Agent to Arrange a New Partnership or Sell Assets—Different Arrangement made by Desd—Plaintiff's Refusal to Ratify such Arrangement.]—The plaintiff and defendant were in partnership, the plaintiff residing in Europe and sending out goods to defendant, who managed business in Melbourne. Differences arose, and plaintiff sent out H. as his agent to arrange for a new partnership, in which H. was to have an interest, and for a sale of the assets. A different arrangement was made by deed between H. and the defendant by which partnership was dissolved as from a certain date, and the plaintiff and defendant were to divide assets. Plaintiff refused to ratify this, as it was beyond H.'s authority to make such an arrangement. Bill by plaintiff for dissolution, sale and accounts. Defendant demurred on ground that settlement arrived at was one authorised by power of attorney H. held from plaintiff. *Held* that power of attorney did not warrant such an arrangement, and demurrer overruled. *Oppenheimer v. Oppenheimer*, 3 A.J.R., 60.

Mining Partnership—Account—"Mining Companies Amendment Act" (No. 324,) Sec. 9.]—A partnership was not registered under Act No. 228, and some of the partners proceeded by plaint under Sec. 177 of Act No. 291 against their co-partners for accounts. *Held* that in Sec. 9 of No. 324 the word "action" is used strictly and means an "action" on a contract by a third person against the partnership, and that no evidence in writing of authority is necessary to establish liability between mining partners as to expenditure incurred by other partners with sufficient authority. *Allardyce v. Cunningham*, 5 A.J.R., 162.

One Partner Purchasing Assets at a Sale made upon a Dissolution.]—A partnership firm getting into difficulties assigned all its joint property

to trustees upon trust for creditors, one partner at a sale of the property made by the creditors bought the assets, no other offers having been made. A bill was brought by the other partner seeking for a declaration of trust as to the purchase and for accounts. *Held* that assignment of property on trust for creditors was a dissolution of partnership, and there being no evidence that the defendant had bought the assets on account of the partners that defendant was as much entitled to bid for the assets as a stranger. Bill dismissed without costs. *Muir v. M'Gregor*, 3 A.J.R., 14.

Sale to One Partner—Fraudulent Misrepresentations.] — A. and B. entered into an agreement for partnership under which each was to bring in £10,000 as capital, B.'s consisting, not of money, but of stock in trade at cost price. A. agreed to purchase B.'s interest on the valuation of B.'s stock in trade, made by B. and accepted by A. as correct. A. afterwards discovered it was at cost price worth less by £6000 than B.'s valuation. Bill by A. seeking to have sale set aside, partnership revived and accounts taken. *Held*, on demurrer, by *Molesworth, J.*, that plaintiff was not entitled to relief because he could not reinstate B. into the subject of the bargain, plaintiff having sold some of the assets since the transaction, and demurrer allowed. *Per the Full Court* that the facts stated did show some ground of relief, viz., plaintiff's right to have accounts taken, and demurrer overruled. *Per Molesworth, J.*—If a misrepresentation made at the commencement of a partnership remained uncorrected and influenced the plaintiff at its close in his bargain to purchase it would have the same effect as if then repeated. *Longstaff v. Keogh*, 3 V.L.R. (E.,) 175.

See same case *ante column* 404.

Set off.]—*See Perkins v. Cherry*, 3 A.J.R., 51, *post* under SET OFF.

Action at Law—Money Lent to a Partner.]—L. lent his partner, R., a sum of money which was to be paid as his share of the capital. L. sued R. for the money and obtained a verdict. *Held*, on rule *nisi* for a nonsuit, that L. was entitled to sue. *Lee v. Roberts*, 5 V.L.R. (L.,) 26.

Suit to Establish Partnership—Costs.]—In a suit to establish a partnership and for accounts defendants admitted partnership, but set up an unsuccessful defence of composition with creditors. On taking accounts the Master found a sum due from them to plaintiff. *Held* that defendants were to pay plaintiff his costs up to and inclusive of hearing. *England v. Moore*, 5 V.L.R. (E.,) 312.

And *see* also cases under following subheadings.

V. RETIREMENT AND EXPULSION OF MEMBERS.

P. was entitled to one-third of a mining claim (A), and also to one-sixth of an adjoining claim (B). The other shareholders of the two claims agreed behind P.'s back to amalgamate the two claims to form a company with 1800 shares to be incorporated under Act No. 228. This was acted upon and P. was registered as for 150 shares in the B. claim, but was excluded altogether in respect of his interest in the A. claim. P. brought a bill against the company and its legal manager seeking to be registered as for 450 shares. *Held* that P. had no right to object to other shareholders in the two claims forming themselves into a company and assigning to him 150 shares only, or totally excluding him; he had a right to object to being included at all; that this grievance consisted in the company having appropriated his one-third interest in the A. claim without his consent; that he had a right to claim that third, but not without agreement, to claim a number of shares as an equivalent for it against partners who wrongfully excluded him; that P. might have a case against the shareholders in claim A. individually. Bill dismissed without prejudice to P.'s right to set aside the amalgamation and to enforce against the company his property in the A. claim and recover its value from the other shareholders in the A. claim. *Parle v. Harp of Erin Coy.*, 3 W.W. & A'B. (E.,) 98, 107, 109.

Injunction to Restrain Partner from Interfering.] —Four out of five partners who owned coal mines and brickfields in Tasmania applied for an injunction to restrain the fifth partner, who was managing the affairs of the partnership in Melbourne, from interfering in the business, and for a receiver over the property in Melbourne. It appeared that the defendant was not managing in a satisfactory manner; but the Court, thinking him rather culpable as to his temper than as to his honesty, refused the application, the defendant undertaking to change the registry of a schooner belonging to the firm, but which was registered in his own name, to meet a bill about to fall due and to pay all current liabilities. The defendant complied with the first condition, his compliance with the third was doubtful; but with the second he did not comply. After a delay, caused by his partners becoming aware of the breach in vacation time, a fresh application was made to restrain the defendant from interfering, and for a receiver of the partnership property in Melbourne. The injunction and receiver were granted, but the plaintiffs were required to meet the current liabilities, subject to a right to move, subsequently to the receiver's appointment, for the application of the funds in his hands for that purpose, the Court requiring this on account of the unusual course pursued in appointing a receiver of the property in Melbourne, leaving the property in Tasmania untouched. *Barrett v. Snowball*, 1 A.J.R. 8.

Misconduct of Partner's Agent.]—Two partners agreed that one of them might absent himself from the business and act by attorney. Accordingly one partner appointed an attorney under power and retired to Scotland. The attorney improperly withdrew bills of the firm deposited for collection, and placed the proceeds of their discount to the credit of his principal, in payment of a debt alleged to be due to the principal by the firm. The other partner filed a bill claiming to act alone, and to restrain the attorney from obstructing him from so acting. On demurrer for want of equity, *Held* that since the absent partner was responsible for the

attorney's acts, and that the misconduct of the attorney if committed by the absent partner himself would only give the plaintiff a right to file a bill for an injunction against its repetition and for a dissolution of the partnership, the plaintiff was not entitled to act alone, and demurrer allowed accordingly. *Terry v. Strachan*, 1 V.R. (E.,) 180.

Forfeiture when Incurred.]—The plaintiff and defendants entered into a partnership agreement, under which one of them (the defendant B) was to take up and cultivate a farm, and the others were to contribute the expenses. The plaintiff paid only part of his contributions, and had denied his liability, and had stated his inability to pay and his desire to withdraw. In a suit for a declaration of the plaintiff's right to his share, the Court held that he had not forfeited his interest; that none of the partners, by asserting unfounded claims were able to forfeit their actual rights; but the plaintiff was ordered to pay up his contributions with interest at 8 per cent., with half-yearly rests; the partnership to be dissolved from the date of the decree. *Dobbs v. Bromfield*, 4 A.J.R., 8.

But when the partnership agreement is unconditionally terminated by consent, a prior forfeiture cannot be enforced. *Collins v. Robbins*, 5 W.W. & A'B. (E.,) 194.

Repudiation of Rights—Laches.]—Where plaintiff claimed to be a partner with defendant in certain mining shares, and it appeared that while plaintiff was a director of the company the shares became unprofitable, and plaintiff joined in resolutions forfeiting them, and denied all interest in them in order to avoid liability, upon bill by the plaintiff seeking to have the defendant declared a trustee of a certain number of the shares, *Held* that the plaintiff had not lost his right to be declared a partner in the shares by his attempt to repudiate them when unprofitable. Upon appeal this decision was affirmed, and *Held* that plaintiff was not guilty of laches in not prosecuting his claim for six years, he being during that period actively engaged in the affairs of the company. *M'Ewing v. Auld*, 4 A.J.R., 13; on appeal, *Ibid*, 49.

Right of Retiring Partner to Join in Sale of Assets.]—B., and the two defendants, in 1876 entered into a partnership for twelve months. By the partnership agreement it was provided that if after the twelve months any partner wished to retire he could do so by giving three months' notice in writing, and that if all the partners should agree, the partnership might be continued for one or two years longer, in which case an endorsement was to be made to that effect; and that rent, cost of repair, rates, wages, and expenses should be paid by the partners in equal shares. The partnership owned a patent for branding stock, and owned stock-in-trade and tools, and debts were owing to the firm. No endorsement was made, but the partnership was continued for four years. In 1880, defendants gave B. notice that the partnership was dissolved, and requested him to concur in winding-up, and in distributing the moneys to be derived from the sale of assets. They forthwith took possession of the business and effects, dismissed the workmen, and re-engaged them as for themselves. They also issued a circular stating that the partnership was dissolved, and that they were going to carry on the business. On motion by B. for a receiver and injunction, *Held* that the defendants had acted unwarrantably in excluding B., and had no right to treat the assets as their own; and motion granted. *Boyle v. Willis*, 1 A.L.T., 189.

VI. Dissolution.

What Constitutes—Assignment of Joint Property in Trust for Creditors.]—An assignment of all the capital of a partnership firm on trust for creditors puts an end to its dealings, and on the same principle that the assignment of all a trader's property was, by the decisions of English Courts and by English Statutes, an act of bankruptcy, such an assignment by a partnership firm is a dissolution. *Muir v. M'Gregor*, 3 A.J.R., 14.

What Operates as.]—A mere refusal to acknowledge that a partnership exists, where there is no time specified for the partnership to continue, does not necessarily operate as a dissolution. *Kin Sing v. Won Paw*, 1 W. & W. (L.,) 303.

Loss of Rights by Acquiescence—Dissolution by Marriage.]—Three sisters, having saved some money, induced other members of their family to emigrate, and in conjunction with them, started a small grocer's shop. Other members of the family came out, and were taken into the business. No accounts were kept between them, and they lived together using the proceeds of the business indiscriminately. Gradually the elder brother assumed the management, conducted all out-door business himself, and acted as though he were sole owner. One of the sisters married in 1861, and another in 1862. The sister who first married took no more part in the management, and after the marriage of the second sister, the business was carried on by two brothers and another sister. One of the brothers alleged that there was an agreement by which the three sisters were to retire and take £300 as their share of the assets. Disputes arose, and the first married sister (M.J.) and the unmarried sister (E.C.) declared the partnership to be still existing. *Held*, *per Molesworth, J.*, that the acquiescence of the others in the elder brother's acting as sole owner, would deprive them of their rights as partners in the partnership at will; that the marriage of M. J. terminated the partnership, that she agreed to take £300 for her share, of which £100 had been paid, and was entitled to interest on the balance at eight per cent.; that E. C. was only entitled to a fifth share up to the date of M. J.'s marriage. Upon appeal, *Held* that M. J. was only entitled to £200; that upon M. J.'s marriage, the partnerships still subsisted between the others; that on the marriage of the second sister, it was put an end to as far as she was concerned; that as one of the brothers had been bought out, E. C. was entitled to a half share of the partnership; and that the elder brother should be charged with interest at eight per cent. for partnership moneys he had expended in land. *Johnson v. Colclough*, 4 A.J.R., 53. On appeal—*Ibid*, 131.

Indorsing Note in Name of Firm after Dissolution.]—An ex-partner in a dissolved firm has no power to endorse a promissory note made payable to the firm, in the name of the firm, unless he has express authority from his former co-partners to do so. *Paterson v. Hughes*, 2 V.R. (L.,) 148; 2 A.J.R., 96.

Rights of Partners to Carry on the Same Sort of Business after a Dissolution on Expiration of Term, and to Solicit Custom—Goodwill.]—There is nothing to prevent partners from carrying on respectively the same kind of business in another place after the expiration of the partnership firm, and there is no reason why towards the end of the term they may not solicit a continuance of the business to each. Nor is there any legal obligation to carry on the business in such a way as to preserve the goodwill. A. and B. were partners for a certain term, under a deed which provided that in six months after termination, accounts were to be taken, valuation made, provision made for debts, and the balance to be equally divided. Shortly before end of term, A. sent round a circular to customers, giving them notice of impending dissolution, and of his intention to carry on the same kind of business in other premises, and soliciting their custom. Bill and motion for injunction by B. restraining the issue of such circular. Injunction refused. *Cornwall v. Hicks*, 5 A.J.R., 61.

Court will not Generally Interfere unless Dissolution Prayed.]—Courts of Equity are disinclined to interfere in partnership affairs, unless a dissolution is sought; but this rule should not be extended so as to force a plaintiff to an unfair dissolution, as a means of obtaining redress. *Le Roy v. Herrenschmidt*, 2 V.L.R. (E.,) 189.

Refusal of Partner to Account—Order for Payment into Court.]—Courts of Equity in suits for partnership accounts, so long as the accounts remain open, are very reluctant to order money to be brought into Court; but where defendant does not in his answer allege that there will be a balance in his favour, or where money has been received in violation of good faith an order may be made. *Hart v. Belinfante*, 1 W. & W. (E.,) 196.

Plaintiff, a member of a Melbourne firm of S.B. & Co., was also a member of a London firm of H. & Co. The Melbourne firm was dissolved by effluxion of time 1st August, 1861. The London firm sent out an agent to wind up affairs between them and the Melbourne firm, and pressed defendant B. for an account, which was refused. After this, in September, B. withdrew from the firm a sum of £1777, there being at the time no money due to B. from the firm. Plaintiff's bill alleged that a sum of £16,000 was due to him by the Melbourne firm, and the answer alleged that this was true without taking into account the losses occasioned by plaintiff's wilful neglect and default. On motion upon affidavits verifying bill and alleging that a receiver had been appointed, *Held* that this case came within the exception, and order made for payment into Court. *Ibid.*

Dissolution Refused where Plaintiff has Broken Conditions—Injunction.]—Plaintiff and defendants carried on partnership, but none of the parties had observed the conditions of the partnership deed. After a while disputes arose and plaintiff dissolved a collateral partnership of which he and another member of the main partnership were members, and the withdrawing partner covenanted not to carry on business in their trade except as a shareholder in the main partnership. Subsequently he entered into negotiations for the purchase of another business in the same trade, which plaintiff regarded as a breach of the covenant, and which caused ill-feeling between plaintiff and defendants. The defendants denied plaintiff certain privileges to which he was entitled under the deed of partnership, and he obtained an injunction to restrain them from so doing. After further disputes plaintiff brought a suit for dissolution, which the Court refused to grant on the ground that he himself had not fulfilled the conditions of partnership, or performed his duties towards the defendants, but the injunction was continued. *Campbell v. Blair*, 4 A.J.R., 148.

Suit for—Parties.]—In a suit for dissolution of a partnership, all persons who have an interest in the suit must be made parties. *Dancker v. Porter*, 1 W. & W. (E.,) 313, 326. For fuller statement of the facts *see* S.C. *post* under PRACTICE AND PLEADING—IN EQUITY—Bill.

Procedure in Suits for Dissolution—Costs—Against Executor of Partner.]—In a suit for dissolution, one of the defendants was the executor of a partner, and had never interfered in the disputes between the surviving partners, but reasonably objected to a dissolution. The Court ordered the plaintiff to pay his costs of suit. *Campbell v. Blair*, 4 A.J.R., 148.

Where One Partner Insane.]—*Gregory v. Welch*, *Creswick v. Creswick*, *ante* columns 1128, 1129 1130.

When Granted or Refused—No Misconduct—Strife Between the Partners.]—Where a partner sued for a dissolution, and no misconduct was proved against the defendant partner, but there had been strife between the partners, the quarrels having been begun by the plaintiff, and the defendant was the more violent of the two after the quarrels had once begun, the bill was dismissed, with costs. *Mitchell v. Welsh*, 4 A.J.R., 183.

Receiver—Lunatic Partner—Doubtful Award.]—W. and X. entered into a partnership under a deed which provided that if an award, to be made as therein provided, were made finding that any of the provisions of the deed had been contravened by either partner, the partner so offending should at once cease to have any further interest in the business, and should be paid off his share of the partnership capital. X. became eccentric, and improperly gave a bill in the name of the firm without W.'s consent. W. requested an arbitration, but X. took no notice, so W. proceeded *ex parte*, as provided by the deed. An award was made and acted on by W., who treated the partnership assets,

after dissolution, as his own. X. shortly became insane, having shown symptoms of incipient insanity before the reference to arbitration. Motion by X. and his committee, in a suit to set aside the award and dissolve the partnership, for a receiver. *Held, per Molesworth, J.*, that though the validity of the award was doubtful through X.'s having so soon afterwards become insane, that did not justify the appointment of a receiver at the request of X.; and that X.'s insanity was not to deprive W. of his power of managing the partnership property, no misconduct having been proved against him. *Gregory v. Welch*, 2 V.R. (E.,) 129.

Injunction—Receiver—Accounts.]—A. and B., in partnership as solicitors, upon dissolution agreed that A. should collect the assets and pay the debts, and that B. should pay to A. certain sums of money. A. filed his bill alleging that B. had improperly collected assets and appropriated them to his own use, giving particular instances, and had permitted persons indebted to the firm to set off their debts against B.'s private debts to them, and praying for a dissolution, injunction, receiver, and accounts. Upon motion by A. a *primâ facie* case being made an injunction was granted against B. restraining him from collecting or recovering partnership debts; and at the hearing, which was undefended, the relief prayed was granted; but the Court refused to appoint A. as receiver without a reference to the Master that relief not being prayed for, or, under the circumstances, to order the defendant to pay into Court the sum payable on the dissolution to A., or then to make an order for costs. *Hewitt v. Akehurst*, 4 V.L.R. (E.,) 93.

Winding up.]—Where a plaintiff seeks to have a partnership wound up as dissolved, and the property sold, he must prove that the partnership actually existed, not simply that parties agreed to become partners in a given event, and either that it has been legally dissolved, or that he is entitled to have it dissolved by the Court. *Ogier v. Booth*, 9 V.L.R. (E.,) 160, 164; 5 A.L.T., 109.

VII. Death of Partners.

Purchase of Partnership Property by Surviving Partner.]—*Held, per* the Full Court, that a surviving partner in dealing with the executor of his deceased partner for the purchase of the partnership estate is bound to lay before the executor the fullest information as to the estate, and to conceal nothing material, either purposely or through carelessness; but *per* Privy Council, *quære*, whether this is necessarily so. *Clark v. Clark*, 8 V.L.R. (E.,) 303, 322; L.R., 9 Ap. Cas., 733, 741.

VIII. Suits and Actions between Partners inter se, and between Partners and Third Persons.

Action for Work Done—Partnership Dissolved before Work Done.]—C. sued G. in the County Court for commission for work done in procuring a loan. When C. received instructions for the work he was in partnership with M.; the partnership was dissolved in February; the loan to be procured was not a partnership matter, and was actually procured in March. *Held* that C might sue without making M. a co-plaintiff. *Clarke v. Gouge*, 5 V.L.R. (L.,) 468.

Partnership Deed — Confined to Partnership Matters.]—By a deed between C. and H., C. and H. dissolved partnership, and H. assigned to C. all interest in the partnership assets and effects, and the deed contained mutual releases in respect of all claims "on account of the partnership or any other account whatsoever." C. sued H. on money counts in respect of non-partnership matters, and H. pleaded the release. *Held* that the words "any other account whatsoever" referred to an account *ejusdem generis* with the partnership account and did not refer to the moneys sued for. Judgment for plaintiff. *Cameron v. Hughes*, 1 V.L.R. (L.,) 43.

Partnership Suit—Appointment of Receiver—Extent of Receiver Order.] — *See Moreton v. Harley*, 2 W. and W. (E.,) 74; *post* under Receiver—Powers, Functions and Liabilities of.

Parties in Suit by Shareholder against Managers and Trustees.]—*Per* the Full Court—Where one person, a member of a mining partnership, complains of a special injury to himself, done by defendants, managers and trustees of the partnership, it does not follow because he is one of several shareholders and it is possible all the others might have been injured in a like manner, that all should be joined as co-plaintiffs in a suit in equity against the defendants. *Ogier v. Smith*, N.C., 3.

Suit for Account of Partnership Affairs—Joinder—Trustees of Share of Partner.]—E., M., and L., trading under the name of E. M. & Co., contracted to construct a railway. In 1859, L. by deed covenanted that N.G., R.G., and J.W. should be entitled each to a third of L.'s share of the profits and of his interest in the property of the firm, and that he would hold the same in trust for them. In February, 1860, N.G., R.G., and J.W. assigned all their property to three trustees (H., W., and C.) in trust for their creditors. In March, 1860, the firm of E. M. & Co. was dissolved, and a fresh partnership formed between L. and the defendant (W.), under the style of L. W. & Co. In the deed by which the firm of E. M. & Co. was dissolved, and to which N.G., R.G., J.W., and their trustees, L., W., and the Bank of New South Wales were parties, was a covenant that the share of L. in the new partnership should be held in trust for the persons entitled thereto under the deed of 1859. A bill was filed by L., N.G., R.G., and J.W. against W.W., praying (*inter alia*) that it might be declared that N.G., R.G., and J.W. were each beneficially interested in one-third of the capital and net gains of the business of the firm of L. W. & Co. reserved to L., on the ground that their beneficial interest did not pass to their trustees H., W., and C. by the assignment of February, 1880, and for an account of the dealings of the firm of L. W. & Co., and of the monies received, &c. The bill also contained an allegation that the Bank of New South Wales had been paid off and made no claim on the funds or the

parties. Demurrer by defendant for (*inter alia*) misjoinder and want of parties, *Held* that N.G., R.G., and J.W. might properly join L. as co-plaintiffs, being his ultimate *cestui que trustent*, subject to a charge for the creditors for whom H., W. and C. were trustees, that H., W., and C. ought to have been joined as plaintiffs, since the bill did not allege that they made no claim, but that they had no right, and in order to dispense with the making them parties this latter allegation would have to be shown by clear detailed facts, whereas it was merely stated as a conclusion of law; and that the allegation that the bank had been paid and made no claim rendered it unnecessary that it should be a party. *Little v. Williams*, 1 W.W. & A'B. (E.,) 32.

Partnership Accounts—Dealings with a Ship—Re-opening Settled Accounts when not Allowed—Account of Receipts and Disbursements Directed.]—*Smith v. Knarston, ante column 5.*

Simple Account between Partners within Rule 19 of Cap. VI. of Supreme Court Rules.]—*Taylor v. Southwood, ante columns 5, 6.*

Action at Law by Member of a Company against the Company—Special Agreement Taking Case out of Rule that Partners Cannot Sue their Co-partners at Law.]—*Bennett v. Solomon, ante column 162.*

Sale by One Partner of Share to Other—Fraudulent Misrepresentation—Jurisdiction of Equity.]—*Longstaff v. Keogh, ante column 404.*

IX. Insolvency of Partners.

See ante columns 599, 600.

PATENT.

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(1) *To Whom and for What Granted.*

Prior Publication.]—The use of an invention by the inventor for the purposes of his trade, and the sale of work produced by such invention, amount to a prior publication of the invention, and are sufficient to avoid a subsequent grant of a patent for the invention. *Ellis v. Geach*, 4 A.J.R., 163.

Design, What is—"Copyright Act 1869," Sec. 3.]—A new shape for an iron frame for the door of a safe, is not a "design" within the meaning of Sec. 3 of the "*Copyright Act* 1869," so as to be capable of registration under that Act. *Regina v. Radke, ex parte Dyke*, 8 V.L.R. (L.,) 23.

Semble that it would form the subject of a patent. *Ibid.*

(2) *Assignment Sale and License to use.*

Sale under Execution.]—A patent cannot be sold under a *fi. fa.* *Brown v. Cooper*, 1 V.R. (L.,) 210; 1 A.J.R., 162.

Permanent Interest when Given.]—A person possessed of a secret invention for a medicine, a trade mark for its sale, and a market established for it, entered into an agreement with another, for an indefinite time for the making of the article by the other, and sales were conducted on a joint account, and the profits divided. The agreement was terminable at the pleasure of either. *Held* that the patentee had not given a permanent interest to the other person in either the secret or the trade-mark. *Weston v. Hemmons*, 2 V.L.R. (E.,) 121.

(3) *Infringement.*

(*a*) *What is.*

Publication—Want of Novelty—Infringement.]—Suit instituted by a plaintiff company to restrain the infringement of a patent. The plaintiff company purchased from S. his patent for making composition pavement. The specifications described the process as consisting of four layers, the ingredients of each of the three lower layers being stone, tar and lime; of the top layer, stone and lime. *Held* that the patent was bad, because, taking lime as the only novelty, the patent claimed much which was not new, without discriminating between new and old; also, that though the defendants, in making their pavement in a place where some mortar had been left, accidentally mixed some lime with their compound, this was no infringement of the patent even if it were a valid patent. *Patent Composition Pavement Coy. v. Mayor, &c., of Richmond*, 1 V.L.R. (E.,) 50, 55.

Using Patented Article Purchased in Another Country.]—Where a patent was taken out in Victoria for an American windmill, with improvements, and K. purchased in New South Wales and used in Victoria an American windmill with those improvements, *Held*, that K.'s user was an infringement of the patentee's rights, although there was no evidence that he knew of the patent or of the improvements. *M'Lean v. Kettle*, 9 V.L.R. (E.,) 145; 5 A.L.T., 107.

(*b*) *Restraining Infringement.*

Injunction—Where Validity of Patent not Established.]—On motion, in October, 1871, for injunction to restrain the sale and manufacture of a specific alleged to be an infringement of the plaintiff's patent, the patent having been granted in August, 1870, and its validity impeached by the defendant, order refused until the patent should be established at law. *Lande v. Lawrence*, 2 V.R. (E.,) 171.

Suit by Assignee—Copyright Act (No. 350,) Sec. 55.]—The assignee of a patent may, under Act No. 350, Sec. 55, sue in the County Court

any one infringing the patent. *Shepherd v. The Patent Composition Pavement Coy.*, 4 A.J.R., 143.

Novelty.]—In a suit by an assignee of a patent against the patentee for infringement the latter cannot dispute the novelty of the invention. *Shepherd v. Patent Composition Pavement Coy.*, 5 A.J.R., 27.

Injunction—Accounts—Costs.]—Where a patent had been taken out in Victoria for an American windmill, with improvements, and K. purchased in New South Wales and used in Victoria an American windmill with those improvements, an injunction was granted to restrain him. During the suit several issues had been sent to a jury, and were all found against K., who persisted in litigating the matter, which was to him of very small importance. *Held* that the patentees were not entitled to an account of the profits, or to a delivery up of the windmill; and, upon the facts, that they were not entitled to the costs of the suit, although they were entitled to their costs of issues found by the jury in their favour. *M'Lean v. Kettle*, 9 V.L.R. (E.,) 145; 5 A.L.T., 107.

(4) *Extension and Prolongation of Term.*

On what Grounds Granted.]—On an application for the renewal of a patent to one H. for the manufacture of ice, the commission arrived at the conclusion:—1. That the invention was meritorious. 2. That it had proved useful to the public. 3. That the fact of its not having been brought into operation at an earlier date during the original term of the patent was satisfactorily explained. 4. That neither the original patentee nor his assigns had been able to obtain a due remuneration for the money and labour expended in perfecting such invention, and that those conditions existed which entitled the petitioners to the favourable consideration of the Crown. They therefore recommended:—1. That the original term of fourteen years be extended for seven years more. 2. That in the new letters-patent granting such extension there should be a recital that the further remuneration payable by the petitioners to the inventor formed part of the consideration of the grant, and a proviso that the said letters-patent should be void if the terms of such remuneration were not duly observed. 3. A limit on the price to be charged to the public. 4. Provision for the costs of the Crown and the opposers of the application. *In re Ice Company's Patent*, 1 A.J.R., 9.

PAWNBROKER.

"Pawnbrokers Statute 1865" (No. 248,) Sec. 29—Refusing Pledgor Inspection of Entry of Sale.]—Where a pawnbroker refused to allow a pledgor to inspect entry of sale as to goods pawned which he alleged had been sold, and was summoned and fined under Sec. 29 of Act No. 248, the Court refused to issue an order of prohibition. *Regina v. Tucker, ex parte Aarons*, 3 A.J.R., 69.

Lien on Stolen Goods Pledged—"Criminal Law and Practice Statute 1864," Ssc. 399.]—B. obtained goods by means of valueless cheques, and pledged the goods. After B.'s conviction for obtaining goods by false pretences one of the original owners applied to have the goods returned. *Held* that, notwithstanding Sec. 399 of the "*Criminal Law and Practice Statute* 1864," the pawnbroker was entitled to retain the goods as against the owner till he had been paid the amount he advanced on them, on the ground that the contract between the person who sold the goods and B., who bought them, was voidable only and not void, and that if, before the contract was rescinded by the seller, B. parted with the goods to a pawnbroker, without any notice of the manner in which they were obtained, the pawnbroker was entitled to a lien as against the original owner for the sum advanced on the goods. *Regina v. Clarke, alias Bonnefin*, 1 A.L.T., 116.

Application for License—Power of Justices—"Pawnbrokers Statute 1865," Sec. 5.]—Under Sec. 5 of the "*Pawnbrokers Statute* 1865" justices, if satisfied with the character of the applicant, must grant him a license, without taking into consideration whether a pawnbroker's shop be required in the locality or not. *Ex parte Mendelssohn*, 2 A.L.T., 45.

Jurisdiction of Justices—Under "Pawnbrokers Statute 1865," Sec. 5.]—The words of Sec. 5 of the "*Pawnbrokers Statute* 1865" are mandatory, and upon an application for a pawnbroker's license, the justices, if satisfied that the character of the applicant is good, must grant him a license. If being so satisfied, they refuse to grant a license, no appeal will lie, but a *mandamus* may issue to compel them to hear and determine according to law. *Ex parte Nyberg, in re Nicholson*, 8 V.L.R. (L.,) 292; 4 A.L.T., 78.

See S.C. *post* under STATUTES—Construction and Interpretation—General Rules.

Pledge-ticket — Signature of Pawnbroker — "Pawnbroker's Statute 1865," Sec. 21.]—A pledge-ticket contained the particulars inserted in the original entry in the pawnbroker's book; but at the bottom, by way of signature, there were printed the words "Lewis M. Myers, *per*," followed by the written signature "F. O'Farrell," being the signature of the person employed by Myers at the establishment. Myers was summoned under Sec. 21 of the "*Pawnbrokers Statute* 1865" for neglecting to give a pledge-ticket with the pawnbroker's signature attached, and convicted. On order *nisi* to quash, *Held* that, where a Statute merely requires that a document shall be signed, the Statute is satisfied by proof of the making of a mark upon the document by, or by the authority of the signatory, and that the signature was a sufficient compliance with the section. *Regina v. Moore, ex parte Myers*, 10 V.L.R. (L.,) 322; 6 A.L.T., 151.

PAYMENT.

(1) *General Principles.*

When it Should be Pleaded.]—*See King v. Levinger*, 2 A.J.R., 113, *ante* columns 1043, 1044.

Voluntary—What is.]—*Ibid.*

What is—Payment after Date Specified in Bond.]—It is no answer to an action on a covenant for non-payment of money on the date mentioned in the covenant that the money was paid on a subsequent date and before action, and the plaintiff in such an action may recover damages for the breach. *Anderson v. Stewart*, 4 A.J.R., 170.

What Amounts to.]—A company, whose current account at a bank was overdrawn to the extent of £5600, gave a mortgage to the bank to secure £6000 and interest. The bank placed £6000 to the debit of a new account called the "secured account," and credited the current account with £6000, thus placing it £400 in credit. *Held* that this transferring the amount from one account to the other did not amount to a payment, and did not discharge a surety responsible to the bank for the overdraft. *Bank of Australasia v. Cotchett*, 4 V.L.R. (L.,) 226.

A debtor paying in money may apply it as he pleases, but, having paid it in generally, it rests with the creditor to apply it in the liquidation of the debt as he pleases, and the transferring the amount from one account to another does not in any way dispose of the debt; the debt is not paid. *Ibid.*

What Amounts to—By Agent—Question for Jury.]—Plaintiffs were in the habit of occasionally employing the secretary of the defendants, a public body, to collect their accounts, and had more than once signed, at the request of such secretary, receipts in blank upon official forms of account without reading them, in order to enable him to obtain payment for them of accounts due from the defendants. The secretary, after his resignation as secretary, received payment from the defendants of an account due to the plaintiffs, giving them the usual receipt, and misappropriated the money. *Held* that it was a question for the jury to determine whose agent he was, so as to decide whether a plea of payment was proved. *Davies v. Swan Hill Shire Waterworks Trust*, 10 V.L.R. (L.,) 48; 5 A.L.T., 179.

Attorney—Receipt by.]—An attorney is not an agent to receive a demand for payment or to pay money. *Lee v. Melbourne and Suburban Ry. Coy.*, 1 W. & W. (L.,) 34.

See S.C., *post* under SOLICITOR—Relations with respect to Clients.

Part Payment of an Account—Acknowledgment.]—P. was attended by R., a medical practitioner, R. being sent for by P.'s partner while P. was unconscious. P. refused to ratify his partner's conduct, but paid a small part of the account sent in by R. *Held* that that afforded evidence of an admission of a liability to pay the whole amount. *Patten v. Rudall*, 7 V.L.R. (L.,) 148.

Person Making Payment not Authorised by Decree.]—*See Phair v. Powell*, 6 V.L.R. (E.,) 177; 2 A.L.T., 71; *post* under PRACTICE AND PLEADING—IN EQUITY—Decree and Order.

(2) *Appropriation of Payments.*

What is.]—A bank sued C. and B. to recover £377, the balance due on a promissory note for £500 in favour of the bank. C. allowed judgment to go by default, and B. defended on the ground that the bank had been already paid. It appeared that the bank had proceeded against C. and had obtained an order for attaching sufficient moneys in the hands of a debtor of C. to pay the note. The debtor applied to set the order aside, and eventually an order was signed by consent for payment of the sum. On the day such order was signed, but before it was served, C. signed an order directing his debtor to pay the sum due to C. to one M., for C., and the debtor paid it to M., who paid it into the bank to C.'s credit. The bank appropriated it in payment of other debts of C., and then proceeded against B. for the balance due on the note. *Held* that the money had not been paid under the attachment order, but under the order from C. and on his behalf, and as he had not appropriated it in payment of the note, the balance was still due and unpaid, and that B. was liable upon it. *Commercial Bank v. Cowland*, 4 A.J.R., 162.

Offer of Money as Stakes for a Race—Acceptance with a Warning that all Forfeits Due were to be Paid.]—Money paid is to be applied according to the intention of the party paying it, and money received according to that of the receiver. When nothing is said by the payer the recipient dictates the ground on which he receives the money. F. entered a horse for a race and tendered £20 as the amount of the stakes, and told the secretary he paid it for his right to run his horse in the race. The secretary accepted it, but said that the horse would not be allowed to run unless F. paid certain forfeits which F. disputed. F.'s horse was not allowed to run, and F. recovered a verdict for £20 on a count of money had and received. On rule *nisi* to set aside verdict, *Held* that as the secretary had not declined to accept the money, he must be taken to have received it in the spirit and subject to the terms in which it was paid, and that therefore he could not appropriate it to the payment of the forfeits. Rule discharged. *Filgate v. Thompson*, 5 A.J.R., 124.

Set-off Against Rates—Appropriation of Payments.]—A corporation sued M. to recover £182 for rates, and defendant pleaded a set-off. The plaintiff corporation met this by showing that the money was appropriated to rates due prior to October, 1863, when the old municipal council was abolished and a new council established. It was contended that some of these rates prior

to October, 1863, were not properly recoverable as the proper formalities had not been observed. *Held* that in this case the creditor had appropriated the payment of the old debts and the debtor had assented to that; that unlawful debts cannot be liquidated by appropriation, but only those barred by the Statute of Limitation. Set-off allowed to a certain extent, *Mayor of Fitzroy v. Mahony*, N.C. 68.

Money Paid-in generally may be Appropriated by Creditor as he pleases.]—*Bank of Australasia v. Cotchett, ante column* 1143.

Appropriation of Payment Indicated by Debtor—Sheriff Need not Regard.]—*See Slack v. Winder*, 5 A.J.R., 72; *post* under SHERIFF.

(3) *Payment of Money Into and Out of Court.*

In County Court Action for Conversion—Effect of.]—In an action in the County Court the particulars of demand stated a conversion of specified goods, and the defendant paid a certain sum into Court. *Held* that the payment admitted the conversion complained of, and not merely a conversion to the extent of the sum paid in. *Lawes v. Price, Warren v. Same*, 8 V.L.R. (L.,) 250; 4 A.L.T., 59.

Suit to Recover Amount of Policy from Insurance Society—Interpleader—Payment into Court—Motion to Put Matter in Course of Inquiry—Injunction—Costs.]—*Australian Mutual Provident Society v. Broadbent, ante column* 734.

And *see* cases *ante columns* 257, 258.

Payment Into or Out of Court under Equity Procedure.]—*See* cases *post* under PRACTICE AND PLEADING—In Equity—Transfer of Funds into and out of Court.

Defendants obtaining leave to defend action on bill of exchange and paying money into court, money treated as if they paid in under plea of payment. *Young v. Dellar*, 1 A.L.T., 87.

Suit to Restrain Enforcement of Contributions.]—In December, 1871, an injunction was granted restraining defendant C. from further proceeding with execution of warrants of distress against certain plaintiffs, on condition that they should lodge £235 with the Master. In March, 1872, the bill was argued on demurrer, and dismissed as against C. Motion by plaintiffs for payment out of Court of the £235. Order made for payment out of the sum without prejudice to the rights, if any, of the plaintiffs to be recouped, if the sums levied on them were in excess of their contributions to a certain company. *Smith v. Seal*, 3 A.J.R., 19.

Payment out of Court—Rule nisi to Rescind Order for Where Returnable.]—*See Bell v. Stewart*, 1 A.J.R., 92. *Post under* PRACTICE AND PLEADING—AT LAW—PRACTICE—Rules and Orders.

Payment out of Court—Insolvency of Defendant—Plaintiff having Recovered Verdict Entitled to Payment Out—Act No. 204, Sec. 20.]—*Playford v. O'Sullivan, ante column* 99.

PENALTY.

Penalty or Liquidated Damages.]—B. contracted with the defendant shire to execute certain works within a certain time, payment to be made monthly with a condition that if, in the opinion of the engineer, B. should employ bad materials, or execute the matter imperfectly, the defendant might take the work out of B.'s hands, and retain as "ascertained damages for breach of contract all monies in their hands due to the contractor." B. sued the shire for breach of contract in not making monthly payments and other counts, and recovered £1296 damages. It appeared by defendant's plea that the engineer had been of opinion that B. had broken his contract, and that the contract had been taken out of B.'s hands, and money due to him retained. On rule *nisi* to enter verdict for defendants, *Held* that the penal sum was to be regarded as a penalty to be assessed by a jury, and not as liquidated damages. Verdict entered for defendant on so much of the plea as justified the discharge of the plaintiff from his contract. Otherwise judgment for plaintiff. *Blair v. Shire of Leigh*, 4 W.W. & A'B. (L.,) 281.

When Penalty Amounts to a Prohibition.]—An act, for doing which a penalty is prescribed, is thereby prohibited. *Attorney-General v. Mayor of Emerald Hill*, 4 A.J.R., 135.

On Covenant—Penalty or Liquidated Damages.]—A contract for the sale of a draper's business contained a covenant that the vendor would abstain for ten years from carrying on the business of a draper in the town, or within five miles of the town in which the business sold was carried on, and would not sell or let a certain other store of the vendor to any person who should carry on such business, and that in the event of a breach of the covenant by the vendor, he should pay £2000 to the vendee by way of liquidated damages, and not as a penalty. *Held* that the £2000 was recoverable as liquidated damages. *Gleeson v. Kingston*, 6 V.L.R. (L.,) 243; 2 A.L.T., 33.

Per Stawell, J.—In such cases as the present the Court is not influenced solely by the words used; calling the sum liquidated damages will not make it so; the Court looks at the intention of the parties, and at all the circumstances, and regards the amount as a penalty, however strong the language selected, if the covenant comprises various contingencies differing in importance, and the sum is made payable on the occurrence of any of them; as it will not be supposed that the parties contemplated the committing an act of injustice. *Ibid.*

How Enforced.]—Where the power to award immediate imprisonment in default of immediate payment is not expressly given by Statute, it is necessary, in all cases where the Statute authorising the infliction of a penalty either directs a levy by distress or is silent as to the mode of levying for the penalty, that distress should precede imprisonment. *Ex parte Fat Tack, ex parte Ah Poon*, 6 A.L.T., 37.

For Practising as a Legal Practitioner without due Qualification—Acts 5 Will. IV., No. 22; 11 Vict. No. 33; Sec. 13, No. 159.]—The Act 11 *Vict.* No. 33, Sec. 13, enacts by reference the provisions of the Act 5 *Will. IV.* No. 22, relating to the recovery of forfeitures and payments for offences under the Act No. 33, relating to persons practising as legal practitioners without due qualification; and the repeal of No. 22 by the Act No. 159, left the provisions incorporated from the Act No. 22 in the Act No. 33 in full force as if they had been enacted in full in the last-mentioned Act. *Fenton v. Dry*, 1 W.W. & A'B. (L.,) 64.

Under "Electoral Act 1865," Sec. 133—Who may Recover—Qui tam Action.]—A private prosecutor upon a *qui tam* information cannot recover the penalty imposed by the "*Electoral Act* 1865," Sec. 133, upon a returning officer who has been guilty of dereliction of duty; but the prosecution must be instituted by the Attorney or Solicitor-General, or by a prosecutor for the Queen. *Regina v. Cope, ex parte Willder*, 4 V.L.R. (L.,) 397.

PENSION.

"Constitution Act," Sec. 51—Order-in-Council.]—An order was made under the "*Constitution Act*" for regulating the granting of pensions to persons retiring or being released from office on political grounds, and a patent for a pension was issued under the order. Sec. 51 of the Act provided that the amount should be so granted, that the same should, so far as might be, accord with 4 & 5 Will. IV., c. 24. The fund limited by the Legislature for pensions was £4000, and the number of pensioners was limited, while under the English Act the fund was practically unlimited. The order provided that the pension incidental to certain offices should not exceed £1000, and to other offices £700. *Held*, by *Stawell, C.J., and Williams, J.* (*dissentiente Barry, J.,*) that the order had been framed to accord, as far as might be, with the English Act, and a demurrer to a *scire facias*, to repeal the patent on the ground that the order had not been well made, overruled. *Regina v. Ireland*, 2 W. & W. (L.,) 291.

And *see* cases *ante column* 133, under CIVIL SERVICE.

PERPETUITIES.

Semble, per Molesworth, J., that an absolute assignment of land, with a verbal promise to reconvey on payment of a debt and interest, is not void as against the law of perpetuities, but gives the assignor a right of redemption. *Hasker v. Summers*, 10 V.L.R. (E.,) 204, 210; 6 A.L.T., 80.

Under Wills.]—*See* WILL.

PERSONATION.

Fraudulently Personating Owner of Land in Application to Bring Land under the Act.]—*Fotheringham v. Archer*, 5 W.W. & A'B. (L.,) 95 *post* under TRANSFER OF LAND—Remedies in Respect of Deprivation of Land.

Personating a Voter.]—*Regina v. Keating, ante column* 305.

Personating an Elector—Offence not Within Jurisdiction of General Sessions—Act No. 502, Sec. 15 (vii.)]—*Regina v. Hynes*, 6 V.L.R. (L.,) 292; 2 A.L.T., 45; *post* under SESSIONS—Jurisdiction of Court of General Sessions.

PHOTOGRAPHS.

See COPYRIGHT.

PILOT AND PILOTAGE.

See SHIPPING.

PLEADING.

See PRACTICE.

PLEDGE.

See BAILMENT—PAWNBROKER.

POLICE.

Contract to Serve—"Police Regulation Statute 1865," Secs. 10, 11.]—The contract of a policeman, under the "*Police Regulation Statute* 1865" (No. 257,) Secs. 10 and 11, to serve the Crown is unilateral, and no corresponding obligation on the part of the Crown to retain him in the service is implied. *Power v. The Queen*, 4 A.J.R., 144.

Inspector Opposing License under "Licensing Act 1876"—Right to Costs.]—*Per Higinbotham, J.* (In Chambers)—An inspector of police who has successfully opposed the issue of a license under Sec. 38 of the "*Licensing Act* 1876" is entitled to his costs of successfully opposing a rule *nisi* for a *mandamus* to compel the issue of a license. *Ex parte Slack*, 6 A.L.T. 23.

POLICY (FIRE, &c.).

See INSURANCE.

PORTIONS.

Advancement.] — *See* INFANT — TRUST AND TRUSTEE—WILL.

POSTEA.

See JUDGMENT—NONSUIT—PRACTICE.

POUNDS AND IMPOUNDING.

Statutes:—

"*Pounds Statute* 1865," 28 Vict. No. 249.
"*Pounds Act* 1874," 32 Vict. No. 478.
"*Land Act* 1869" (No. 360,) Part IV., Sec. 60.

"Pounds Statute 1874" (No. 478,) Sec. 18—Shooting Goats Trespassing.]—Goats were trespassing on W.'s land. W. shot at one and wounded it, and it did not die for nine days afterwards. *Held* that Sec. 18 did not impose any obligation to kill the animal instantaneously or any liability for injuring the animals. *Bagshaw v. Wills*, 5 A.J.R., 115.

See S.C. *ante column* 28.

"Pounds Act 1874"—Effect of—Common Law Right.]—The "*Pounds Act* 1874" does not do away with the common law right to impound animals trespassing. *Main v. Robertson*, 2 V.L.R. (L.,) 25.

Pigs—Cannot be Impounded for Trespass under Act No. 237, Sec. 48.]—The manager of a common is not empowered, by virture of Sec. 48 of the "*Land Act* 1865" (No. 237,) to impound pigs for trespass upon the common. The words "cattle, sheep, and goats," in the section, do not include pigs. *Geoghegan v. Talbot*, 5 W.W. & A'B. (L.,) 187.

[*See* now Sec. 60 of Act No. 360.]

Cattle Trespassing from Highway.]—The owner of land adjoining a highway is not necessarily bound to fence it off; but, if cattle stray upon the land, when unfenced, from the highway, the owner of the land is not entitled to impound such cattle until their owner has had a reasonable time for driving them off. *Butcher v. Smith*, 5 W.W. & A'B. (L.,) 223.

Adjoining Owners of Unfenced Land.]—Both adjoining owners must know their own boundaries, and must keep their cattle within them, though there be no fence between; and either may impound in case of cattle trespassing. *Ibid.*

Sheep "under the charge of a shepherd" may be impounded for trespass. *Brough v. Wallace*, 2 W. & W. (L.,) 195.

Cattle Damage Feasant — Detention—"Pounds Act 1874," Sec. 14.]—An owner of land may, in the absence of any enactment to the contrary, seize and drive off or impound cattle, *damage feasant*, or may drive them to a convenient place for the owner, and so far detain them, and, under the "*Pounds Act* 1874," Sec. 14, he may under certain circumstances detain them to give the owner an opportunity of taking them on payment or tender of trespass rates; but the detention must be for the purpose of impounding, if they are not so taken away by the owner. *Jones v. Campion*, 4 V.L.R. (L.,) 473.

Sheep Damage Feasant — Detention.]— Sheep seized as a distress, *damage feasant*, need not be conveyed to the nearest pound immediately and without any delay, but may be detained for a reasonable time; and a person lawfully seizing sheep, *damage feasant*, and detaining them for an unreasonable time previously to impounding them, or treating them in an improper manner after seizure, *e.g.*, driving them too fast, does not thereby become a trespasser *ab initio*. *Sanderson v. Fotheringham*, 10 V.L.R. (L.,) 289; 6 A.L.T., 122.

Illegal Impounding.]—G. had a license from Board of Land and Works to graze his cows in the South Park from 6 a.m. till 6 p.m., and on condition that no cows should be in the park at night. G. afterwards obtained permission to enclose and use a portion of the land to be used at night as a stockyard. R., a servant of the board, found some of G.'s cows at 7.45 p.m. outside the stockyard and impounded them. G. summoned R. for illegally impounding. *Held*, reversing the justices, that the board could legally impound, and were not put to their remedy for breach of the conditions of the license, and that cattle should not have been in the park outside the stockyard after 6 p.m. *Ritchie v. Gillespie*, 2 W. & W. (L.,) 40.

Illegally Impounding—What is.]—M. seized sixteen horses of plaintiff, put them in his yard, demanded trespass-money and said he would send the horses to the pound if the trespass-money were not paid. The poundkeeper refused to impound the horses, and M. thereupon let them go. *Held* that there was a seizure only, and not an impounding, and that a conviction, which had been made against M. for illegal impounding, was wrong. *In re Rawlings*, 1 W.W. & A'B. (L.,) 22.

Notice of Impounding—"Pounds Statute 1865" (No. 249,) Sec. 11.]—Where an impounding agent delivered to the poundkeeper a written memorandum in the form of a letter headed "Loddon, 2nd November, 1868," *Held* that the memorandum was not in accordance with Sec. 11 of the Act, as it did not express whether the land was enclosed and cropped, nor did it express the place of trespass. *Wingfield v. Glass*, 6 W.W. & A'B. (L.,) 4.

[Compare Sec. 19 of Act No. 478.]

Notice of Impounding—What Sufficient.]—A notice of impounding was given by defendant to plaintiff at the time of impounding as follows:—"Impounded by the manager of the

L. and W. Farmers' Common, on 4th October, 1870, 1415 sheep (describing the sheep) mostly belonging to Mr. P. (plaintiff). Trespass damages on the lot. M. (defendant)." *Held* that this was a sufficient notice, since the fair inference was that the sheep were impounded from the common by the managers; and a reference to the schedule of the "*Pounds Statute*" would show the scale of rates which should be tendered for trespass on that description of land. *Pettett v. Mellies*, 1 A.J.R., 164.

[Compare Sec. 19 of Act No. 478.]

Notice of Impounding—Description of Land.]—A notice of impounding was headed "Meredith, 6th January, 1871," and contained no other description of the situation of the land. *Held* a sufficient description. *O'Keefe v. Behan*, 2 V.R. (L.,) 16; 2 A.J.R., 19.

[Compare Sec. 19 of Act No. 478.]

"Pounds Act" (No. 478,) Secs. 14, 19, 33, Sub-sec. 3—Memorandum given to Poundkeeper.]—Sec. 33, Sub-sec. 3, creates the offence of illegal impounding, and Secs. 14 and 19 declare what illegal impounding is, but non-compliance with the latter part of Sec. 19 as to the memorandum to be furnished to the poundkeeper is not an offence within Sec. 33, Sub-sec. 3. Conviction of justices quashed. *Robertson v. Main*, 1 V.L.R. (L.,) 5.

"Pounds Act 1874," Sec. 14—"Place Trespassed upon."]—The "place trespassed upon" in Sec. 14 of the "*Pounds Act* 1874" means the place where the cattle trespassed by feeding without authority. *Sanderson v. Fotheringham*, 10 V.L.R. (L.,) 289; 6 A.L.T., 122.

Per Higinbotham, J.:—The actual spot where the seizure took place and the actual place of residence of the owner, agent, or overseer must be taken in every case to be the true termini of the statutory limit of distance (within five miles of the place trespassed upon.) *Ibid*, p. 295.

"Pounds Statute 1865"—Construction.]—The provisions of the "*Pounds Statute* 1865," as to driving to the "nearest pound," are merely directory and not mandatory, the language used being affirmative and not negative. *Butcher v. Smith*, 5 W.W. & A'B. (L.,) 223.

[Compare Sec. 19 of Act No. 478.]

Act No. 478, Sec. 14—Illegal Impounding—Burden of Proof of Exceptions.]—An information was laid for illegally impounding certain sheep known by defendant to belong to an owner resident within five miles, without giving forty-eight hours' notice. *Semble* that the onus of proving that the case was or was not within the exception of Sec. 14 did not lie on the defendant. *Mack v. Murray*, 5 V.L.R. (L.,) 416.

Act No. 478, Sec. 28—Illegal Impounding—Notice to Poundkeeper.]—Although Sec. 28 directs that notice of intention to complain should be given to the poundkeeper at the time of releasing the sheep, the only object of such notice is to get a fund in hand to satisfy the owner's claim, it is not a condition precedent to the right to sue for illegal impounding. *Stephen v. Gill*, 3 V.L.R. (L.,) 178.

"Pounds Act 1855" (No. 39,) Sec. 25—"Illegal."]—The word "legality" in Sec. 25 means legality under that Act; *i.e.*, to say that all the requirements of that Act as to impounding have been complied with. A person impounds "illegally" if he has not complied with the requirements as to the *modus operandi* prescribed by the Act, and magistrates have no jurisdiction to decide questions of title under that Act. *Degraves v. Bennett*, 2 W. & W. (L.,) 191.

[Compare Sec. 29 of Act No. 478.]

"Pounds Statute 1865" (No. 249,) Sec. 25—Notice of Appeal.]—Where K., on paying pound fees and damages, released his cattle and gave notice to poundkeeper of his intention to appeal, but such notice was not lodged at the time of release, but two days afterwards, *Held* that the words "at the same time," in Sec. 25, must be strictly complied with, and that K. was too late. *Parker v. Kelly*, 4 W.W. & A'B. (L.,) 28.

"Pounds Statute 1865" (No. 249,) Sec. 26—Practice on Appeal.]—M. impounded sheep belonging to P. P.'s superintendent (C.) gave notice of appeal in P.'s name, but proceedings were instituted, and a conviction against M. was obtained in C.'s name. *Held* that the conviction could not be sustained, that the same name must be used throughout. Prohibition granted. *Regina v. Taylor, ex parte Macdonald*, 3 V.R. (L.,) 13; 3 A.J.R., 31.

[Compare Sec. 28 of Act No. 478.]

"Pounds Statute 1865" Sec. 26—Legality of Impounding—Question for Justices.]—On a complaint for illegally impounding, the question of "the legality of the impounding," which the justices have to try under Sec. 26 of the "*Pounds Statute* 1865 (No. 249,) is not whether the seizure has been legal or not, but whether the requirements of the "*Pounds Statute* 1865" have been complied with, and they have no power to enter into a question of title. *Rowe v. Middleton*, 2 V.R. (L.,) 59; 2 A.J.R., 54 (*sub nom. Middleton v. Rowe.*)

[Compare Sec. 29 of Act No. 478.]

Order for Damages for Illegally Impounding—Notice to Poundkeeper—"Pounds Act 1874," Secs. 28, 29.]—Before an order under Sec. 29 of the "*Pounds Act* 1874" finding that an impounding was illegal and giving damages in respect thereof, can be valid, there must have been a notice to the poundkeeper, under Sec. 28 of the Act, of intention to complain against the impounder for illegally impounding, though the owner may not seek to have the cattle released before such order. *Regina v. Taylor, ex parte Hailes*, 8 V.L.R. (L.,) 149.

"Pounds Act 1874"—When Notice under Sec. 28 Necessary.]—*Per Higinbotham, J.* (in Chambers) —When a complaint for an illegal impounding is lodged against an impounder it is not necessary that strict proof of the notice in writing

to the poundkeeper, under Sec. 28, of intention to complain should be given, since by neglecting to give the notice the complainant only deprives himself of the right to claim from the poundkeeper the trespass rates paid to and retained by him. It is only in proceedings against the poundkeeper for the illegal detention of the cattle impounded that it is necessary to give such proof of notice. *Regina v. Littleton, ex parte Kirk*, 6 A.L.T., 21.

"Pounds Act 1874," Sec. 29—Words Necessary to give Justices Jurisdiction—"Justices of the Peace Statute 1865," Sec. 113.]—*Per Higinbotham, J.* (in Chambers)—It is unnecessary that the particular nature of the illegality under Secs. 14 or 19 of the "*Pounds Act* 1874," should be set forth in an order of justice for illegally impounding made under Sec. 29 of that Act. The order is valid and sufficient, according to Sec. 113 of the "*Justices of the Peace Statute* 1865," if the subject matter is set forth in the words of the Act on which the order is framed. *Ibid.*

Where an order alleged that the defendant "did illegally impound eight head of cattle" without adding the words "contrary to the provisions of the '*Pounds Act* 1874,'" *Held* that the order was bad; and prohibition granted. *Ibid.*

"Pounds Statute"—Jurisdiction of Justices on Summons for Illegally Impounding.]—*See O'Keefe v. Behan*, 2 V.R. (L.,) 16; 2 A.J.R., 19; *ante column* 746 under JUSTICE OF THE PEACE.

18 Vict. No. 30—"Land Act 1862," Secs. 68, 122, 129—Remedy for Trespass.]—D. was appointed herdsman of a Farmers' Common, and impounded two horses belonging to the defendant for trespass on the common. The magistrate held that the only remedy was under the "*Land Act* 1862," Sec. 129, and ordered poundage to be repaid. *Held*, on appeal, that the remedy provided in Sec. 129 was inadequate, and did not deprive an owner of his rights, independently of the section, and that as Act 18 Vict. No. 30 is silent as to particular persons who may impound, D. might, as the person in possession, impound animals *damage feasant*. Appeal allowed. *Douglas v. Reynolds*, 2 W. & W. (L.,) 1.

[Compare Sec. 60 of Act No. 360 with the provisions in "*Land Act* 1862."]

Poundage Fees—How Recoverable.]—The right to recover any deficiency in poundage fees, charges, and expenses in the proceeds of impounded animals given by the "*Pound Act*," 18 Vict., No. 30, Sec. 22, to poundkeepers, can only be enforced by the specific remedy given by the Act, viz., before Petty Sessions, and the County Court has no jurisdiction in the matter. *Bourne v. Jones*, 3 W.W. & A'B. (L.,) 45.

Damages for Trespass by Sheep—Jurisdiction of County Court—"Pounds Statute 1865," Sec. 33.]—Sec. 33 of the Statute does not take away the jurisdiction of the County Court to give damages for trespass by sheep. *Mulhare v. Lindsay* N.C. 14.

Damage for Trespass—Special Damage—Jurisdiction of Justices—"The Pounds Statute 1865."]—Where trespassing cattle were given up to the owner, instead of being impounded, upon his promising to pay what should be due, and the justices awarded a sum for special damages over and above the ordinary rate allowed by the "*Pounds Statute* 1865" (No. 249,) *Held* that the justices had no power to make such an order, and decision reversed. *Wilson v. Powell*, 5 W.W. & A'B. (L.,) 249.

Trespass Rates—Agreeing upon Higher Rates than those Provided—Offence—"Pounds Act 1874," Secs. 17, 33 (viii.).]—Although the parties may have agreed upon higher trespass rates than those provided for by Sec. 17 of the "*Pounds Act* 1874," the rates to be tendered are those provided for by that section, and a refusal to release the animal seized on tender of the lower rates, even where a higher rate has been agreed upon, constitutes an offence within Sec. 33 (viii.) of the Statute. *Persse v. Smith*, 4 V.L.R. (L.,) 201.

"Pounds Act 1874," Sec. 15—Order for Trespass Fees and Fine in One—Amendment—Costs.]—Justices have no power to order the payment of trespass damage, and also to impose a penalty for illegally impounding, in one and the same proceeding. Should justices, however, do so, the Court has power to amend the proceeding by striking out the order as to damages and fees; but where the respondent did not appear, the Court, in amending the order and discharging a rule to prohibit, ordered him to pay the costs of the application. *Regina v. Heron, ex parte Jones*, 8 V.L.R. (L.,) 140; 4 A.L.T., 6.

Receiving Evidence—"Pounds Act 1874," Sec. 15.]—On a complaint, under Sec. 15 of the "*Pounds Act* 1874," for the amount of trespass rates in respect of trespassing cattle delivered to some person for the owner, the justices must hear evidence, and determine whether such person was a person having authority to receive them. *Schneider v. Wright*, 4 V.L.R. (L.,) 62.

"Pounds Act 1874" (No. 478,) Secs. 14, 15—Recovery of Trespass Fees—Demand.]—In order to enable a complainant to recover trespass fees it is not necessary for him to make a demand of them personally to the owner; and restoration of sheep trespassing to the owner's agent or overseer is sufficient. A selector under the "*Land Act*" (No. 360,) who has not fenced his land, may drive off trespassing sheep, and recover trespass fees on restoration of them, although he may not "impound" until his land is fenced. *M'Millan v. Gove; Regina v. Puckle, ex parte Ware*, 1 V.L.R. (L.,) 142.

"Pounds Statute," 18 Vict. No. 30, Sec. 32—"Owner" and "Occupier."]—F. was manager of a Farmers' Common duly proclaimed under the "*Land Act* 1862," and he seized and impounded sheep found on the common. G., the owner, sued F. for illegal impounding. *Held* that F. was not the "occupier" under Sec. 32 of the "*Pounds Statute*," but was the "owner" under that Statute solely by force of the "*Land Act* 1865" (No. 237,) Sec. 48, and that F. was entitled to impound the sheep. *Goldsbrough v. Fletcher*, 6 W.W. & A'B. (L.,) 213; N.C., 14.

As to managers of commons *see* now "*Land Act* 1869," Sec. 60.

Trespass Rates—Who may Recover—"Pounds Act 1874," Secs. 12, 15.]—A licensee of land, under the "*Land Act* 1869," Secs. 19 and 20, is debarred from recovering trespass rates or damages under the "*Pounds Act* 1874," Secs. 12, 15, unless he has enclosed his land with a substantial fence. *Allan v. M'Intyre*, 8 V.L.R. (L.,) 133; 4 A.L.T., 4.

Occupier—Manager of a Common—"Land Act 1869," Part iv.—"Pounds Act 1874," Sec. 15.]—The managers of a common under Part iv. of the "*Land Act* 1869" cannot sue for trespass rates under Sec. 15 of the "*Pounds Act* 1874," not being occupiers within the meaning of that section. *Regina v. Carr, ex parte Sanderson*, 10 V.L.R. (L.,) 178; 6 A.L.T., 53.

Act No. 478, Sec. 15—Owner.]—It is only the owner of trespassing cattle who can, under Sec. 15, be sued for the trespass rates, after restoration of the cattle to him or his servant; and a manager of a station is not an "owner" to be sued for trespass rates. *Lewis v. Green*, 9 V.L.R. (L.,) 354; 5 A.L.T., 121.

Seizure and Detention for Purposes of Impounding—Plea—"Pounds Act 1874," Sec. 14.]—In an action for trespass and detinue for seizing cattle if the defendant pleads, under Sec. 14 of the "*Pounds Act* 1874," that the cattle were seized and detained for the purpose of being impounded, the plea must state the existence of the conditions specified in that section, otherwise it will be defective. *Jones v. Campion*, 4 V.L.R. (L.,) 170.

Action for Trespass in Seizing Sheep—Justification under Sec. 14 of the "Pounds Act 1874"—Plea.]—A plea to an action for trespass for seizing sheep which justifies, under Sec. 14 of the "*Pounds Act* 1874," must deal with all the conditions stated in that section. If it omit to deal with those in the latter part of the section, on the assumption that they are for the benefit of the defendant, and may therefore be waived by him, the plea will be bad. *O'Shea v. D'Arcy*, 6 V.L.R. (L.,) 142; 1 A.L.T., 170.

Seizure of Sheep by Managers of a Common—What must be Pleaded in Action for—"Pounds Act 1874."]—In an action against the managers of a common for seizing and impounding sheep, the defendant managers must in their plea, as any other owner of land must, allege all that is necessary to show that the impounding was done in such a manner as to conform to the conditions imposed by the "*Pounds Act* 1874." It is not sufficient merely to plead that the defendants were managers of the common, and in that capacity impounded the sheep as trespassing upon the common. *Sanderson v. Fotheringham*, 10 V.L.R. (L.,) 17; 5 A.L.T., 172.

"Pounds Act" (No. 478,) Sec. 33, Sub-sec. 1—"Rescue."]—To constitute a "rescue," there must be something amounting to a breach of the peace, or an act likely to provoke a breach of the peace, and in the presence of the poundkeeper. Where, therefore, a person took his horse out of an enclosed paddock belonging to the poundkeeper, but outside of the limits of the pound, there being at the time no one in charge of the horse, *Held* that there was no "rescue" or "pound breach." *Lodge v. Rowe*, 1 V.L.R. (L.,) 65.

"Pounds Act," 18 Vict. No. 10—Offence Against—Conviction.]—It is not necessary that a conviction for the offence of impounding cattle out of the police district in which the cattle were distrained, should be had at the "nearest petty sessions" to the pound. *Ex parte Beilby*, 1 W. & W. (L.,) 281.

"Pounds Statute" (No. 249,) Sec. 20—Proceeding for an Offence under the "Pounds Statute" (No. 478,) Sec. 31.]—Under the Act No. 249 it is not an offence for a poundkeeper to assist in driving cattle to pound, though it is under No. 478. No. 478 is not retrospective in this section (31.) *Anderson v. Deasy*, 5 A.J.R., 14.

Jurisdiction of Justices to Determine what is a "Substantial Fence" within Act No. 478, Sec. 14—Not Governed by Meaning of "Sufficient Fence" in "Fences Statute" (No. 479,) Sec. 4.]—*See Regina v. Hutchinson, ex parte Jessell, ante column* 458.

POWERS OF APPOINTMENT.

Defective Execution—Wife in Favour of Husband—Formalities.]—Where a marriage settlement reserves to wife a power of appointment by deed to be executed by two witnesses and with husband's consent in writing, *Held, per Molesworth, J.*, that Court will not aid, as an intended execution of it, a deed executed by wife in favour of husband unattested, and without husband's consent in writing. *Bennett v. Bennett*, 1 V.L.R. (E.,) 280.

POWER OF ATTORNEY.

Filing of—"Instruments and Securities Statute" (No. 204,) Sec. 98.]—The word "unless" in Sec. 98 must be taken in its usual signification, and must not be read as "until." Therefore a power of attorney must be filed before or at the time of executing a conveyance, which is executed under such a power, otherwise the deed is of no effect unless confirmed in the way pointed out in the Act. *Pratt v. Williams*, 6 W.W. & A'B. (L.,) 22.

Death of Principal before Registration of Power—"Instruments and Securities Statute" (No. 204,) Secs. 95, 99.]—The first portion of Sec. 95 ending with the words "until the death, &c., shall have been registered as hereinafter provided" must be read as explained by the subsequent portion beginning "every act within the scope, &c.;" in that way all the parts of the section are consistent with each other, and the section itself is consistent with the subsequent sections, particularly Sec. 99. Where the Registrar of Titles refused to register a transfer

of certain land, the title to which depended on a deed purporting to have been executed under a power of attorney, on the ground that evidence must be given of the principal being alive at the date of the registration of the power, *Held* that he was right. *In re Woods*, 6 W.W. & A'B. (L.,) 233; N.C., 26.

When Person Contracting with Attorney Need not Require Production of Power.]—A person contracting with an attorney under power, if the power be not referred to during the negotiations, need not require the production of the power, more especially where the agent holds himself out as possessing other authority to contract. *Brown v. Hardy*, 5 W.W. & A'B. (L.,) 245.

Attorney Acting in Excess of—Ratification.]—An attorney under power to grant leases upon certain terms acted in excess of his power, but the principal on becoming aware of it, did not repudiate the contract made in excess of the power. *Held* that the other party to the lease was entitled to enforce his remedy for breaches on the part of the principal. *Ibid.*

Authority Conferred by—Non-Registration—Creditors' Deed.]—The registration of a power of attorney is not necessary to the validity of a creditors' deed which has been executed by the attorney under power of a creditor. *Stacpoole v. Glass*, 1 V.R. (L.,) 195; 1 A.J.R., 154.

Authority to Take out Letters of Administration.]—*See post* under WILL—Probate and Letters of Administration.

Petition for Winding-up Company Presented by Attorney under Power—Insufficiency of Authority.]—*See In re Provincial and Suburban Bank, ante column* 166.

Power of Attorney—Filing of.]—Where an applicant for administration holds a power-of-attorney for the next-of-kin, which has been registered under Sec. 98 of Act No. 204, such power-of-attorney need not be filed in the Supreme Court. *In re Mitchell*, 3 A.J.R., 18.

Verification of Execution of Power—Affirmation.]—Where the execution of a power-of-attorney was verified by affirmation before a commissioner, the Court refused to accept such in the absence of evidence that the person verifying had conscientious scruples against taking an oath. *In the Estate of Talents*, 9 V.L.R. (I.P. & M.,) 27.

Verification of Power of Attorney.]—The Court will not accept verification by a notary public where the party is resident within access to a commissioner of this Court. *In the Goods of Crowther*, 3 V.L.R. (I.P. & M.,) 63.

Affidavit Verifying Power—Defect in Affidavit how Cured.]—*In the Estate of Downing, ante column* 23.

Execution of Power made in England Attested by Notary, and Not by Commissioner—Matter Affects Court only, and not Parties.]—*In re Chaplin, ante column* 23.

Verification of Power of Attorney.]—The practice of the Court is to require the due execution of a power-of-attorney to be verified before a commissioner of the Court in the county where it is executed, or proof from some person in Victoria as to the handwriting of the grantors of the power. *In the Will of Taylor*, 1 A.L.T., 45.

Power of Attorney—Limited to Personal Property.]—In an application for administration with an exemplified copy of the will annexed, the power of attorney only referred to personal estate. *Held* that this was insufficient, and that the power must refer to both realty and personalty. *In the Will of Sutherland*, 9 V.L.R. (I. P. & M.,) 29; 5 A.L.T., 120.

PRACTICE AND PLEADING.

(A) IN EQUITY BEFORE JUDICATURE ACT.
(B) PRACTICE AT LAW BEFORE JUDICATURE ACT.
(C) PLEADING AT LAW BEFORE JUDICATURE ACT.
(D) PRACTICE UNDER JUDICATURE ACT, 1883.
(E) PLEADING UNDER JUDICATURE ACT, 1883.

In Mining.]—*See* MINING.

In Probate and Administration.]—*See* under WILL.

In County Court.]—*See* COUNTY COURT.

In Suits between Mortgagor and Mortgagee.]—*See* MORTGAGE.

In Administration Suits.]—*See* ADMINISTRATION.

In Ejectment, Trover, Trespass, Attachment, &c.]—*See* under various titles in the book.

Statutes :—

19 Vict., No. 13—Secs. 3, 4 and 5, repealed by No. 761. "*Common Law Procedure Statute* 1865" (No. 274,) in great measure repealed by Act No. 761.

"*Equity Practice Statute* 1865" (No. 342,) Secs. 3, 4 and 5, 6 and 7 repealed by Act No. 761.

"*Judicature Act* 1883" (No. 761.)

(A) IN EQUITY BEFORE THE JUDICATURE ACT 1883.

(1) *Abatement*—*See* ABATEMENT.
(2) *Account*—*See* ACCOUNT.
(3) *Administration Suit*—*See* ADMINISTRATION.
(4) *Affidavit*—*See* AFFIDAVIT.
(5) *Amendment, column* 1159.
(6) *Answer, column* 1160.
(7) *Appeal*—*See* APPEAL.
(8) *Bill, column* 1162.
(9) *Contempt*—*See* CONTEMPT.
(10) *Costs*—*See* COSTS.
(11) *Damages*—*See* DAMAGES.
(12) *Decree and Order, column* 1171.
(13) *Demurrer, column* 1176.
(14) *Discovery*—*See* DISCOVERY.
(15) *Evidence*—*See* EVIDENCE.
(16) *Foreclosure*—*See* MORTGAGE.

(1) *Abatement—See* ABATEMENT.

(2) *Account—See* ACCOUNT.

(3) *Administration Summons, and Suit—See* ADMINISTRATION.

(4) *Affidavit—See* AFFIDAVIT.

(5) *Amendment.*

Amendment of Bill—Supreme Court Rules, Cap. VI., R. 20.]—Rule 20 does not permit of a suit being converted, so as to urge a totally opposite view by amendment of the bill. *Officer v. Haynes*, 3 V.L.R. (E.,) 115.

Misjoinder, Objection for—When Bill Requires Amendment.]—*See Graham v. Gibson, post* under sub-heading *Parties.*

Amendment of Record.]—*See Bailey v. Wright, post* under sub-heading *Parties.*

Amendment of Bill—Striking out Averment that a Necessary Party was out of the Jurisdiction.]—*See M'Donald v. Rowe, post* under sub-heading *Parties.*

Amendment of Bill after Answer—Costs.]—An order was made for amendment of bill by inserting new allegations charging wilful default, but defendants' costs of appearing on the summons for the order were allowed them, as the amended bill required no further answer. *Harding v. Smith*, 5 V.L.R. (E.,) 118.

Amendment of Decree by Inserting Direction Omitted from Original Decree—Interval of Six Years—Supplemental Order.]—*See Attorney-General v. Huon*, 6 V.L.R. (E.,) 184; 2 A.L.T., 73, *post* under DECREE AND ORDER.

(6) *Answer.*

Signature of Counsel.]—If the original draft of an answer be signed by counsel, the engrossment, sworn by the defendant and delivered to the plaintiff, need not have upon it any copy of such signature. *Lee v. Robertson*, 1 W. & W. (E.,) 374, 380.

Signature of Counsel.]—The rule is that the answer should have the signature of counsel. Order made directing defendant's solicitor to be at liberty to annex name of counsel to the copy delivered, defendant paying costs of motion to set answer aside for irregularity. *Flanner v. Williams*, 5 V.L.R. (E.,) 327; 1 A.L.T., 113, *sub nom. Flannery v. Williams.*

Putting in without Oath or Signature—Defendant out of Jurisdiction.]—Before the Court will make an order for leave to put in the answer of a defendant out of the jurisdiction without oath or signature it must be satisfied that defendant is aware of what is being applied for, and that he concurs in the application. *Green v. Sutherland*, 2 W.W. & A'B (E.,) 134.

Putting in without Oath or Signature—Power of Attorney.]—Where a defendant was in England, but had left a very full power of attorney with a solicitor to appear and defend and answer in all suits, on motion by the plaintiff that the defendant's answer might be taken without oath or signature, *Held* that as there was a full power of attorney the motion should be granted. *Munroe v. Munn*, 2 A.L.T., 25.

Endorsement of Name and Address—Supreme Court Rules, Cap. V., R. 32—Costs.]—Where a defendant, pleading in person, delivered his answer without an endorsement, as required by Supreme Court Rules, cap v., r. 32, of his name and address, upon motion to set it aside as irregular the Court permitted him to endorse his name and address, but ordered him to pay the costs of the motion. *Bowman v. Bowman*, 4 V.L.R. (E.,) 114.

Time for Answering—Plea Overruled.]—A plea put in to an information and bill had been overruled, no time for answering had been fixed by the Court in its judgment overruling the plea and no application had been then made for time to answer although the time for answering had elapsed. The plaintiff then set down the suit as undefended. On motion that the setting down be set aside as irregular, *Held* that the provision in the rules as to the Court allowing time to answer on disposing of a plea does not import that a defendant should necessarily have time to answer; that the obtaining time is a privilege which the Court gives the defendant, and he should be the moving party for obtaining it and not the plaintiff. Motion refused. *Note: the cause was subsequently heard as undefended. Attorney-General v. Prince of Wales Coy.*, 6 W.W. & A'B. (E.,) 27.

Admissions.]—Where an answer erroneously admits a sum of money mentioned in the bill, the defendant making such an answer cannot as to his liability to account for wilful default contradict his own answer, though the error in the bill appears by evidence in the suit. *Allan v. Lane*, 2 W.W. & A'B. (E..) 1, 8.

Admissions Contained in—How Avoided.]—*Per Full Court*—The admission of a defendant in his sworn answer is unimpeachable by cross bill, or by evidence in contradiction; and the only course which a defendant, wishing to avoid the effect of such an admission, can take is to move for leave to amend by putting in a supplementary answer. *Cuningham v. Platt*, 8 V.L.R. (E.,) 55, 67; 3 A.L.T., 126.

Facts not Traversed by—Further Evidence.]—In equity facts not traversed, *e.g.*, the incorporation of a company, are not necessarily taken as proved. But if the plaintiff be taken by surprise by an objection of this kind, the Court will allow the case to stand over for further evidence. *London and Australian Agency Coy. v. Duff*, 5 W.W. & A'B. (E.,) 19.

"Statute of Frauds."]—A defendant denying an agreement stated in the bill may rely on the "*Statute of Frauds*" without pleading it. *Jennings v. Tivey*, 6 W.W. & A'B. (E.,) 152, 153.

Semble, that the defence of the "*Statute of Frauds*" may be relied on although not pleaded. *Randall v. Mau*, 2 V.R. (E.,) 158, 163; 2 A.J.R.,, 103.

Supplemental Answer—Proof of Facts occurring after Bill Sealed.]—In a suit for specific performance of an agreement to lend money on mortgage, after evidence had been taken, a *lis pendens* against the property was removed, and the mortgagor executed a further security over the property. On motion for leave to put in a supplemental answer, leave was given to prove these facts at the hearing. *Phelan v. O'Shanassy*, 2 V.R. (E.,) 120, 121; 2 A.J.R., 67.

Summons for Information Sought by Bill—Registrar of Titles.]—In a bill in a suit relating to registration and bringing land under the Act No. 301, the Registrar was as a defendant interrogated as to the title laid before him of a defendant who was applying to bring the land under the Act and how the same was made out. The Registrar answered, refusing to give the information. Upon summons for a full answer, *Held* that the Registrar must answer fully. *Hodgson v. Hunter*, 3 A.J.R., 64.

Insufficiency of—Interrogatories as to Documents in Possession of Defendants—"Evidence Statute 1864," Sec. 19.]—The bill sought for discovery of a list of certain books, plans, &c., in the possession of defendants. The defendants refused to answer this interrogatory. On summons under Supreme Court Rules, cap. v., r. 34, by way of exception for insufficiency, *Held* that as Part II. of "*The Evidence Statute*" (No. 197,) afforded a simpler and less expensive remedy for discovery by a summons in Chambers, the Court would not compel an answer as to the documents in the defendants' possession. Motion refused. *Learmonth v. Bailey*, 5 A.J.R., 93.

Insufficiency — Negative Pregnant — Accounts.] —Suit by infant next-of-kin against administrator of an intestate, with other next-of-kin defendants. The answer of the administrator admitted the grant of administration; but, to a paragraph stating that the intestate died seised and possessed of real and personal property exceeding £1000 in value, and including certain specified lands and chattels, merely replied:—"Save as hereinafter set forth, I deny the allegations in the 4th paragraph of the bill mentioned." Also, in answer to an allegation that after the sale a considerable sum remained available for distribution, the defendant merely denied that a considerable sum remained, &c. To an allegation that the defendant kept back certain chattels from sale and used them himself, whereby the said chattels became depreciated in value, and the defendant caused a considerable loss to the estate, the defendant replied admitting the keeping and using the chattels, but denying that they were depreciated in value, "or caused a considerable loss to the said estate." The defendant denied generally that he had used part of the moneys for his own business, and had permitted another person to use the residue. A paragraph in the bill alleging that the plaintiff from time to time applied for an account and distribution, and that the defendant neglected and refused, &c., was met by a general denial. The bill also required the defendant to furnish accounts of the property and of his application thereof, and instead of doing so the defendant set out a story from which it was to be inferred that the intestate held the land mentioned in the bill as a trustee for the defendant and his brother, who allowed the intestate to have a home on the land as long as she lived, and it was submitted that it was an unnecessary and useless expense to set out accounts. *Held* that the answer was not full enough, that the defendant ought to have stated distinctly that the land mentioned in the 4th paragraph did or did not belong to him, or he might set out the circumstances and state his belief as to who was entitled; that in denying a *considerable* loss, the defendant should have answered that the loss, if any, did not exceed a certain sum, or have given some intelligible restriction; that it was not proper to deny a whole paragraph, and that the defendant should have set out the accounts required, notwithstanding that accounts had been filed in the Master's office under the Rules of Court. *Dick v. Dick*, 2 A.L.T., 17.

(7) *Appeal—See* APPEAL.

(8) *Bill.*

Writs of Summons.]—There can be no copy of the seal on the sealed writ of summons endorsed on a bill in Equity, and the omission of the usual letters, "L.S.," from a served copy of the writ does not vitiate the copy. *Jamieson v. Allen*, 1 W. & W. (E.,) 19.

The Master's name need not be added to the copy for service of the sealed writ. *Ibid.*

The writ must contain the name of every plaintiff; but need not contain the "place of business" or "address" of the plaintiffs, except when they appear in person. *Ibid.*

Writ of Summons—Duration of Service—Supreme Court Rules, Cap. V., R. 4.]—The period for which a writ of summons remains in force under Supreme Court Rules, Cap. V., R. 4, cannot be extended by the effect of an order for leave to serve the bill out of the jurisdiction. *Young v. Dickson*, 4 W.W. & A'B. (E.,) 56.

Writ of Summons—Supreme Court Rules, Cap. V., R. 3.]—Where, on a motion for an injunction, the plaintiff's name was omitted from the writ of summons, and defendant took a preliminary objection at the hearing on that ground, *Held*, following *Jamieson v. Allen*, 1 W. & W. (E.,) 19, that such objection was fatal. *Smith v. Blacker*, 3 V.L.R. (E.,) 1.

Writ of Summons.]—Where an order had been made directing an amendment of the suit by making G. one of a class on behalf of whom the plaintiffs were suing a co-defendant, on the day when the writ was endorsed on the bill expired, upon application to the Court in Chambers an order was made directing the issue of a new writ to the new defendant endorsed on the amended bill. *Graham v. Gibson*, 5 V.L.R. (E.,) 103, 108; 1 A.L.T., 8.

Service of Printed Copies.]—If the original bill, bearing the seal of the Court, be in writing, there is nothing to prevent the service upon the defendants of printed copies. *Dancker v. Porter*, 1 W.& W. (E.,) 313, 332.

Facts taken Against Pleader — Illegality.]—The rule is that every fact left doubtful is taken most strongly against the pleader; and though there may be an exception where one aspect of the doubt would make facts alleged illegal, such illegality amounting to a crime or breach of public duty, yet the rule holds good where a conveyance is at one time authorised and at another not. Where, in a bill to enforce an equitable mortgage of a lease under "*Land Act* 1865" (No. 237,) the bill did not state the date of the lease, it was assumed against the pleader that the mortgage was made within three years after the date of the lease and was, therefore, illegal under Sec. 15. *M'Nicoll v. Ferguson*, 5 A.J.R., 67.

Allegations of Fraud.]—If the relief sought by the bill is based on fraud, the failure to prove it is fatal; but if by striking out of the bill the charge of fraud there is sufficient equity stated and proved, and the charge of fraud is only subsidiary, it is a matter only affecting costs. *London Chartered Bank v. Lempriere*, L.R. 4, P.C. 572.

Allegations of Fraud.]—*Per the Full Court*—When a bill charges fraud, and also makes an alternative case apart from fraud, relief on the alternative case may be given, although the charge of fraud fails on the evidence. The true test is, whether the bill contains an equity, independent of, or only dependent on the fraud alleged. *The Creswick Grand Trunk G.M. Coy. v. Hassall*, 5 W.W. & A'B. (E.,) 49, 79.

Allegations of Fraud.]—It is sufficient if a bill states a case of fraud by allegations of information and belief merely as to fraudulent use of documents and as to fraudulent pretence. *Hofer v. Silberberg*, 3 V.L.R. (E.,) 125.

As to costs where bill contains allegations of fraud *see* cases *ante columns* 235, 236.

Allegations of Part Performance.]—A plaintiff alleging in his bill an agreement and acts of part performance need not state in terms that he relies upon them as such. *Jennings v. Tivey*, 6 W.W. & A'B. (E.,) 152, 158.

Allegation that Land is Dedicated as a Highway.]—It is not sufficient, in a bill for the use of a highway, to state facts which may be evidence of the dedication of land to the public. The bill should also state that the land is dedicated. *Webb v. Were*, 2 V.L.R. (E.,) 28.

Necessary Allegations.]—If bill alleges possession by a plaintiff, seeking a declaration of trust against one defendant, and a conveyance from another defendant as purchaser with notice, such allegation is sufficient for sustaining a charge of constructive notice from plaintiff's possession without alleging the inference that such possession is constructive notice. *Wilson v. Boyd*, 3 V.L.R. (E.,) 98.

What Should be Set Forth—Inferences not Necessary.]—It is only necessary that a bill in Equity should set forth a narrative of the material facts and circumstances on which the plaintiff relies, the specific relief sought, and general relief. It is not necessary that the inference which the plaintiffs desire to be drawn from the facts should be indicated otherwise than by the prayer. *Clark v. Clark*, 8 V.L.R. (E.,) 303, 330.

Prayer for General Relief.]—Under a prayer for general relief, relief warranted by the facts put in issue may be given, although the prayer does not properly distinguish the relief to be had under different aspects. *United Hand-in-Hand and Band of Hope Coy. v. National Bank of Australasia*, 2 V.L.R. (E.,) 206.

Relief Included in Prayer.]—If a plaintiff fails to establish one case, but states and proves another, he may have any relief to which he is entitled, if it is comprised specifically or generally in the prayer. S.C., 3 V.L.R. (E.,) 61, 67.

Multifarious—Defendants Claiming in Different Rights.]—A. and B. mortgaged certain land, sold to C. by agreement in writing, and afterwards paid mortgage off and obtained a reconveyance to themselves as tenants in common in fee. C. sold part of the land to various purchasers, A. and B. conveying. C., in 1842, sold all his right, title, and interest in the land unsold to D. by memo. in writing. In 1843, D. executed a declaration of trust in writing in favour of his sister E., the plaintiff. In 1870, C., by deed, conveyed his interest in unsold land to E. E. entered into possession in 1843. E. sold part of her interest to co-plaintiffs, and mortgaged other parts to certain defendants.

In December, 1871, the Registrar of Titles gave notice, by advertisement, of an application by defendant F. to bring this unsold land under the "*Transfer of Land Statute.*" Caveats were lodged. Amended bill alleged false allegations by F. as to his purchase of land from A. and B., and that he had never been in possession and alleged possession by E. and co-plaintiffs since 1843. A. died intestate, and left G. his heir, in whom was the legal estate in one moiety of the land. B. had died, and his legal estate in the other moiety became vested, by mesne assignments, in H. and K. Bill by E. and her purchasers for declaration of right to land subject to E.'s mortgages as against F., and for conveyances by G., H., and K., and to restrain the Registrar of Titles and F. from registering or bringing the land under the Act. *Held* that the bill was not multifarious as against F., G., H., and K., or as against the Registrar. *Hodgson v. Hunter*, 3 A.J.R., 41.

Multifarious.]—A bill to restrain an act of a grantor of land, as a public nuisance, especially injuring the plaintiff, and also as an act inconsistent with the grant of land under which he derives his title to relief, is not multifarious. *Webb v. Were*, 2 V.L.R. (E.,) 28.

A bill claimed relief as to two allotments of land held under different grants, but confirmed by a deed coupling the titles. *Held* not multifarious, as the rights arising out of the separate grants closely resembled one another, and there was no other defendant interested in only one of the matters in the bill. Multifariousness is now treated as a question of convenience, and it certainly is more convenient to have rights closely resembling each other dealt with between plaintiff and defendant in one suit rather than in two. *Ibid.*

Multifarious.]—Two brothers R. were in partnership and agreed to purchase land for tannery purposes, and certificate of title issued to a son of J.R. (one of the partners.) J.R. deposited certificate of title as partnership property to secure an overdraft with the plaintiff bank. J.R. died and his wife became administratrix; S.R., the other partner, carried on the business on his own account and incurred fresh liabilities. Bill by bank against S.R. and administratrix to enforce a banker's lien on the partnership assets generally and in particular on the land. *Held* that in the absence of evidence of partnership between S.R. and J.R.'s widow there was no colour for greater part of relief, yet the interests of the two defendants were so far blended that bill was not multifarious. *Bank of Victoria v. Rawling*, 6 V.L.R. (E.,) 111; 2 A.L.T., 9.

Injunction against Mining on Private Property—No Consent of Crown—Bill and Information joining Attorney-General held Multifarious.]—*Attorney-General v. Scholes*, *ante column* 912.

And for a similar case where the bill was held to be not demurrable, *see Attorney-General v. Gee*, *ante column* 912.

See also *United Hand and Band Coy. v. National Bank*; *Merry v. Hawthorne*; *Learmonth v. Bailey*; *Simson v. Scallan*; *post* under sub-heading *Demurrer*.

Signature of Counsel—Insufficient Allegation of Fact—Objections Taken by Demurrer.]—Allegations of fact in a bill in the form "The plaintiff is informed and believes that" are not positively stated, and are insufficient, and the bill should be signed by counsel. The foregoing objections may be taken by demurrer. *M'Donald v. Board of Land and Works*, 1 V.L.R. (E.,) 90.

Demurrer—Crown Lands—Want of Parties.]—*Palmer v. Board of Land and Works*, 1 V.L.R. (E.,) 80, *ante columns* 329, 330.

Demurrable Bill—Defence of "Statute of Limitations"—Defence not Raised by Demurrer or Plea—Defendant Required to Answer only Part of Bill.]—Where a bill was demurrable by reason of "*Statute of Limitations*," and the defence was not raised by demurrer or plea, but in the answer, and was taken as a preliminary objection, bill dismissed with costs as upon objection. Bill dismissed with costs as against a defendant who was only required to answer two paragraphs and not to consider the rest of the bill, on which power to demur turned. *Kemp v. Douglas*, 1 V.L.R. (E.,) 92.

Demurrable—"Statute of Limitations."]—In 1837 C. purchased Crown lands, and in the same year by lease and release, conveyed them to B. for consideration. The Crown grant was subsequently issued to C., and bore date 30th November, 1838. By lease and release, dated 1839, C. conveyed to T. for consideration, a portion of the same lands. B. died in 1839, having by will devised all his real estate to trustees, who in 1861 brought a suit against a purchaser from T. for recovery of the part of the allotment C. had conveyed to T. The bill, after stating the above facts, alleged that both T. and the defendant had notice of the prior sale to B., that such sale was valid and effectual to pass C.'s interest to B., and had priority over the sale to T., but did not allege that B. had ever entered into possession of the property, but averred that the defendant "obtained and took possession and occupation at some time unknown to the plaintiff within six years now last past, and has ever since been and now is, in such possession and occupation." Demurrer by defendant that it appeared from the allegations of the bill that the suit had not been brought within the period limited by the "*Statute of Limitations*." *Held* that on the pleadings it must be taken that those through whom defendant claimed were in possession from the date of T.'s purchase, down to the time when defendant himself took possession within the last six years, and that B. never was in possession at all; and that if it had been intended to rely on the fact that defendant had not been in possession any more than the plaintiff, during the earlier years of the period of limitation, the bill should have pleaded that fact. Demurrer allowed, leave given to amend. *Dalton v. Plevins*, 1 W. & W. (E.,) 81.

Demurrable—Want of Parties—Dissolution of Partnership.]—Suit by one of the shareholders or partners in an association or partnership, which was unincorporated, against the directors and other shareholders, praying that an account might be taken of all the transactions of the

partnership, and for a dissolution, and also for other relief. The bill (*inter alia*) alleged that "the plaintiff and defendant are the present shareholders and partners, and the only shareholders and partners in the said association." The bill, however, disclosed other persons who, at some former period, were shareholders and partners in the association, and these were not shown by the bill to have transferred their shares in accordance with the deed of settlement executed by the partners. On demurrer, for want of parties, *Held* that the general allegation that the plaintiff and defendants were the only partners was not sufficient, and demurrer allowed with costs. *Dancker v. Porter*, 1 W. & W. (E.,) 313.

For other instances of demurrable bills *see post* under sub-heading *Demurrer*.

Cross Bill where Requisite—Defence of Drunkenness.]—To a suit for specific performance of an agreement which the defendant alleged that he signed when drunk, the drunkenness is available as a defence without a cross bill. *Scates v. King*, 1 V.R. (E.,) 100; 1 A.J.R., 71.

Cross Bill.]—If a defendant sets up a defence to the enforcement of a plaintiff's rights under his deed, and it is inequitable that the plaintiff's rights should be suspended unless the deed is totally set aside upon terms, then a cross bill is necessary, but not in cases where a third person or the Crown has by deed affected to grant an interest inconsistent with the defendant's rights. *Aladdin G. M. Coy. v. Aladdin and Try Again G. M. Coy.*, 6 W.W. and A'B. (E.,) 266, 278.

Bill of Review—Co-ordinate Jurisdictions.]—The rule of practice requiring that before a bill of review or bill in the nature of a bill of review is filed in a Court of Equity, the leave of the Court in which the original suit was instituted should be obtained, does not apply to courts of co-ordinate jurisdiction. In cross suits in a Court of Mines between the W. company and the P. company the decree fixed a boundary line, and restrained the companies, respectively, from mining on opposite sides of it. On appeal to the Chief Judge he varied the decree by declaring that the boundary line should be deemed to determine the rights of the parties only with regard to their claims on the Frenchman's Lead, and so far as was shown by their present discoveries as to the course of the leads. A bill in equity was filed by the W. company against the P. company, alleging that since the decree it had been discovered that all the gold removed by the plaintiff company, south of the boundary line, was upon the Golden Point Lead, and within the plaintiff's claim on that lead, and seeking an injunction to restrain defendants from prosecuting the decree in the Court of Mines or mining within the plaintiff's claim on the Golden Point Lead. On motion to set bill aside as irregular, *Held*, by *Molesworth, J.*, that leave of the Court in Equity was necessary in order to enable the plaintiff company to bring a bill which sought to vary and delay decree of Court of Mines. Motion granted. *On appeal to the Full Court—Held* that the practice as to obtaining leave of Court did not apply to Courts of co-ordinate jurisdiction; that if the leave of any Court was necessary it was the leave of the Court of Mines; that the decision of *Molesworth, J.*, abridged the jurisdiction of the Supreme Court, which could only be done by express statutory enactment. Appeal allowed. *United Working Miners' Coy. v. Prince of Wales Coy.*, 6 W.W. & A'B. (E.,) 8.

Service of Bill out of Jurisdiction.]—*See* cases collected *post* under (36) *Service of Process on Parties out of the Jurisdiction.*

Substituted Service.]—*See* cases collected *post* under *Substituted Service.*

Motion to Set Aside a Bill—"Supreme Court Rules," cap. vi., r. 1 — Cap. x., r. 7.]—Rule 1 of cap. vi. is only intended for the protection of the next friend, and the omission to file such an authority cannot be taken advantage of by a defendant. *Semble*—Rule 7, cap x., requiring the numbering of folios in the margin of the bill, though dealing with a trivial matter will be regarded by the Court, and a bill offending in this particular will be set aside, but generally upon terms as to costs. *Mahood v. Odell*, 2 W. & W. (E.,) 73.

Where defendant's solicitor has accepted service of bill, and has undertaken to demur, plead, or answer, this is a waiver of a technical objection under cap. vi., r. 1. *Attorney-General v. Cant*, 2 W. & W. (E.,) 113.

Motion to Set Aside.]—Where a defendant, two days after time for answering had expired, gave notice of motion to set aside bill and writ of summons, as the latter did not contain the name and address of the plaintiff, the Court dismissed the motion as being made too late. *Held* that generally applications of that nature by defendant should be made in the time given him for answering. *Wills v. Ogier*, 5 V.L.R. (E.,) 317.

Dismissal for Want of Prosecution.]—Defendant gave notice of a motion to dismiss for want of prosecution. Plaintiff, before this motion came on, set down the cause, and gave defendant notice of the step. Defendant moved to dismiss, and mentioned to the Court that the cause had been set down since the motion to dismiss. Plaintiff did not appear on the motion to dismiss, and the cause was dismissed. On motion by plaintiff to reinstate, and that defendant should pay the costs, *Held* that the defendant was not, after learning that the cause was set down, bound to call the attention of the Court to that fact, or bound to suit his motion to it; that he was regular in what he did; and that the bill was rightly dismissed. However, under the circumstances, bill reinstated on terms of plaintiff paying costs both of the motion to dismiss and of the motion to reinstate. *Thompson v. Tullidge*, 1 W. & W. (E.,) 108.

Dismissal for Want of Prosecution.]—Where notice of motion to dismiss a bill for want of prosecution as not being set down for evidence within the time prescribed by Supreme Court

Rules cap. vi., rr. 13, 14, is served upon the plaintiff, it is not sufficient for the plaintiff to pay the costs of the notice of motion, he should give the defendant an enforceable undertaking to speed the cause and pay the costs. *Govett v. Crooke*, 5 V.L.R. (E.,) 30.

Motion for Dismissal for Non-Prosecution—Effect of Order of the Privy Council.]—Pleas put in by defendant were overruled with costs by the Primary Judge and the Full Court, and pending an appeal to the Privy Council, the defendant had answered, and the case was set down for evidence April. 1878. The Privy Council, 25th January, 1879, reversed orders, saving to the defendant the benefit of his plea with liberty to amend pleadings. On 18th June, 1879, the defendant moved to dismiss for want of prosecution. *Held* that as the Privy Council order gave the plaintiff liberty to amend under leave of the judge by Supreme Court Rules, cap. v., r. 11, and as the judge might direct further answer from the defendant, the setting down for evidence was inoperative, and the motion refused. *Brougham v. Melbourne Banking Corporation*, 5 V.L.R., (E.,) 110; 1 A.L.T., 29.

[NOTE.—The Court having intimated that plaintiff should be called upon to make his election to amend or proceed without amendment, notice of motion for such an order was given, and by consent an order was made accordingly.]

Notice of Motion for Dismissal—Service on Assignee—Costs.]—A notice of motion for dismissal of a bill for want of prosecution, after the insolvency of the next friend of the infant plaintiff, should ask for costs generally, and not against the testator's estate, and need not be served upon the official assignee. *Flannagan v. Flannagan*, 6 V.L.R. (E.,) 77; 1 A.L.T., 183.

Dismissal for Want of Prosecution—Delay.]—A plaintiff has a right, without assigning a reason for his delay, to have a first motion to dismiss the bill for want of prosecution dismissed, on undertaking to speed the cause, and pay the costs of the motion. *Hoff v. Hoff*, 8 V.L.R. (E.,) 187.

Dismissal—Time—Delay.]—Each of several co-defendants stands by himself as regards the time for dismissing a bill for want of prosecution. But the Court refused to dismiss a bill for want of prosecution where the delay was caused by another defendant not having answered. *Healey v. Mason*, 8 V.L.R. (E.,) 301.

Dismissal—Plaintiff to Speed the Cause.]—In a suit the answer had been delivered on the 8th December, 1879, and at the time of the motion (17th June, 1880) the suit had not been set down for evidence. By consent, the answer was deemed to be delivered as on 4th May. On 6th June, a summons had been taken out for insufficiency of answer, but was delivered too late. *Held* that the bill should not be dismissed if the plaintiff undertook to speed the cause and pay the costs of the application to dismiss; in default, bill to be dismissed with costs. *Virtue v. Cameron*, 1 A.L.T., 196.

Motion to Dismiss—Receiver not Previously Discharged.]—In a suit between plaintiff and the Crown and other defendants, in which a receiver has been appointed on the motion of the plaintiff, it is no bar to a motion by the plaintiff to dismiss as against the Crown that the receiver has not previously been discharged on motion. *Barber v. Barter*, 1 W. & W. (E.,) 153.

Dismissal—Non-appearance of Plaintiff.]—If the plaintiff does not appear upon a cause being called on for hearing, upon proof of service upon the defendant of notice by the plaintiff of his having set the cause down for hearing, the bill will be dismissed with costs. *Mouatt v. Kaye*, 1 W. & W. (E.,) 312.

Compromise not Carried out.]—In a suit in reference to a dispute about a mining lease, a compromise was agreed to by which the land was to be divided. The defendants were to receive £75, and the bill was to be dismissed without costs. The land had been divided, but the £75 had not been paid. The plaintiff filed affidavits setting out that there was a difficulty in obtaining the money, as many persons were interested, and they lived at long distances from each other. The defendants contended that they were entitled to have the bill dismissed with costs, leaving it to the plaintiffs to enforce the compromise. Bill dismissed with costs, not to exceed £75; defendants to have the costs of the motion. *Molony v. Spence*, 1 A.J.R., 14.

Motion to Dismiss — Insolvency of Plaintiff before Hearing—Delay of Trustee in Electing whether to Proceed.]—S. filed a bill which was set down for hearing, but before it was heard S. placed his estate in a trustee's hands in trust for creditors. Defendant applied to have the suit dismissed, but the Court let it stand over for six weeks for the trustee to elect whether to proceed or not. At the expiration of the time, an application was made for an extension of the time and refused, the Court directing notice to be served on the trustee binding him to elect within a given time. On the day the notice expired the trustee elected to proceed, and the case was set down for hearing, the trustee having entered a suggestion that he was plaintiff. At the same time the defendant gave notice of a motion to dismiss. On motion for that purpose, *Held* that defendant should have served notice to bring the case to a hearing; and, since the trustee had, during the pendency of the notice, elected to go on, there was no unreasonable delay. Motion refused. *Smith v. Knarston*, 3 A.J.R., 82.

Dismissal.]—*Quære*—Whether, when the only witness of the plaintiff has taken a half interest in the subject matter of the suit as a speculation, that fact is not in itself a reason for dismissing the bill. *Atkinson v. Lansell*, 4 V.L.R. (E.,) 236.

Dismissal—Consent in Administration Suit after Decree.]—Where the usual administration decree had been made in a suit by a creditor, the Court refused to dismiss the bill as of course, upon the consent of all the parties to the suit, but required an affidavit showing the circumstances

and stage of the suit, and the proceedings, and who were the parties then interested in the estate, also that the parties consenting to the dismissal were the only parties interested. *Bank of New South Wales v. Strettle*, 6 V.L.R. (E.,) 116; 2 A.L.T., 2.

Dismissal—Liberty to Apply to Amend—Notice.]—When an objection that the husband of a married woman should be joined as a party has been upheld, and it was ordered that case should stand over with liberty for plaintiff to apply to amend by adding the husband, and no such application has been made, the proper course is for the defendant to move on notice that plaintiff within a given time apply for liberty to amend or in default that bill be dismissed. *Howe v. Crisp*, 7 V.L.R. (E.,) 24.

Dismissal—Written Consent by Solicitor for Defendant.]—On the day on which suit was set down for evidence, counsel for plaintiff applied to have case dismissed, stating that defendant's solicitor was prepared to give a written consent thereto. *Per Holroyd, J.*—Such consent must be given by counsel in open Court. Afterwards on application by plaintiff's counsel the case was struck out. *Barry v. Kennedy*, 7 V.L.R. (E.,) 108.

Dismissal before Answer—Notice.]—Where a plaintiff seeks to dismiss his bill without costs after the time for answering has expired, and no answer has been delivered, he should serve notice of motion upon the defendant. If such notice be not served, the bill will be dismissed with costs. *Blair v. Palmer*, 9 V.L.R. (E.,) 133.

Dismissal—Motion by Some of Defendants.]—Where a motion to dismiss a bill is made by two only of several defendants, the Court will make an order of dismissal as against them only, and not as against the other defendants. *Treacy v. Watson*, 9 V.L.R. (E.,) 140.

Dismissal—Notice of Motion.]—Where one of the defendants in a suit moves that the bill be dismissed as against him, notice of the application must be served on the other defendants, and an affidavit of the service filed if they do not appear. *Cohen v. Lintz*, 10 V.L.R. (E.,) 149, 151.

Bill in the Nature of a Supplemental Bill—Where Necessary.]—*See Watson v. Kyte, post column* 1172.

(9) *Contempt—See* CONTEMPT.

(10) *Costs—See* COSTS.

(11) *Damages—See* DAMAGES.

(12) *Decree and Order.*

Service of Notice—Form—Necessary Parties.]—The only necessary parties under the Supreme Court Rules, cap. v., r. 7, are persons interested within the jurisdiction. There is no power under the rule to bind persons out of the jurisdiction. *Fawkner v. Fawkner*, 1 V.R. (E.,) 140; 1 A.J.R., 121.

Construction.]—Where a decree orders the defendant to execute at the plaintiff's expense a proper memorandum of discharge, it impliedly means him to deliver it up to the plaintiff when executed. *M'Clure v. Marshall*, 10 V.L.R. (E.,) 1.

Demand by a solicitor's clerk of a document ordered to be delivered up is not sufficient, it should be a demand by the plaintiff himself or his solicitor. *Ibid.*

Declaratory.]—The Court has no jurisdiction to make a purely declaratory decree, but when the bill in addition seeks the appointment of a guardian this renders the suit maintainable. *Stephen v. Stephen*, 3 V.L.R. (E.,) 94.

Delay in Procuring Appointment from Master—"Supreme Court Rules," Cap. VI., R. 22.]—A decree was pronounced in a suit. The plaintiff, who had carriage of the suit, finding that defendants were poor, did not within the time limited by Rule 22, procure an appointment from the Master. Afterwards some of the defendants acquired property. On a motion twelve months afterwards by defendants that decree might be declared abandoned and proceedings stayed, and, on summons by plaintiff, that plaintiff might be at liberty to obtain an appointment from the Master under Rule 22, notwithstanding the delay, *Held* that the delay by both the plaintiff and defendants in coming to the Court was, in the discretion of the Court, a bar to the relief they sought respectively, and that the rule applied only to interlocutory orders, and not to the main progress of the suit. Motion and summons respectively, refused. *Reeves v. Croyle*, 3 A.J.R., 15.

Taking Out—Administration Suit—Decree never Taken Out—A Defendant, being a Creditor of Estate, allowed to have Carriage of Suit.]—A decree was made in an administration suit but the decree was never taken out. On motion by a defendant, a creditor in the estate, after a long delay on account of his poverty, *Ordered* that defendant should have power to take out decree and have carriage of the suit. *Palmer v. Palmer*, 5 A.J.R., 130.

Assignment by Plaintiff after Decree of Amount Due—Motion for Conduct of Cause by Assignee.]—W. instituted a suit against trustees and executors of his wife's will and settlement to obtain repayment of a sum advanced by him, and after decree assigned his interest to H., who, on W.'s refusing to prosecute the suit or attend for cross-examination in the Master's office, moved for leave to have the conduct of the suit. *Held, per Molesworth, J.*, that the motion was irregular, and the assignee could only effect what he wished by an original bill in the nature of a supplemental bill. Affirmed on appeal, on the principle of refusing to interfere in a matter of practice, but, *semble*, that the Primary Judge might have granted the application. *Watson v. Kyte*, 2 V.R. (E.,) 61; 2 A.J.R., 41.

Effect of Order of Court—Receiver.]—Where the Court made an order authorising the expenditure of £2500 by a receiver on improvement of testator's property, and the receiver

spent £2532 without any further order, and then applied for a credit of £32 to be allowed him in his accounts, motion refused. Where the Court sanctions a certain sum to be expended that sum is not to be exceeded. *Simson v. Simson*, 2 W. & W. (E.,) 97.

Person making Payments not Authorised by Decree.]—Where under an administration decree directing the sale of a testator's estate, and investment of the proceeds in Government debentures, and payment of the income to a guardian for future maintenance of infants, the property had been sold and the proceeds paid into Court, *Held* that the guardian was not entitled to the payment thereout of past maintenance, or of repairs to the property, or rates thereon paid by her, or of costs of probate to the executors undertaken to be paid by her; none of these payments having been provided for by the decree. *Phair v. Powell*, 6 V.L.R. (E.,) 177; 2 A.L.T., 71.

Liberty to Apply—Application.]—Applications under a liberty to apply reserved in a decree, must be as to matters consonant with the decree. *Ibid.*

Liberty to Apply.]—Liberty to apply refers only to subject of the suit. In a suit by two legatees under a will, which the trustees resisted on the ground that it would be unsafe to distribute the assets owing to liability of deceased to a company, an administration decree for accounts of assets was made. An application under liberty to apply was made as to whether accumulations of income of an infant's share went to her on attaining majority, or went to swell the *corpus*. Application refused, the question not having been raised originally in the suit. *Pinnock v. Hull*, 7 V.L.R. (E.,) 186.

Consent Order—Motion to Commit for Breach of an Injunction.]—The bill was sealed on 16th November, 1860. On the 29th November a rule *nisi* was made absolute for an injunction restraining the defendants, their servants, agents, and workmen from trespassing or encroaching upon the premises of the plaintiffs, and from taking any quartz or other material therefrom; and a writ of injunction in these terms was thereupon issued, bearing date the 1st December, 1860. The defendants demurred to the bill, and the demurrer was allowed. The plaintiffs appealed against the order allowing the demurrer; but pending the appeal an arrangement was made between the parties whereby the defendants consented to a perpetual injunction, upon the plaintiffs abandoning their appeal, and paying costs of the demurrer; and by an order of the 14th March, 1861, made upon motion of plaintiffs' counsel with consent of counsel instructed by defendants' solicitor upon the record, it was (*inter alia*) ordered that the defendants should be restrained from encroaching upon the premises in the plaintiff's bill mentioned, &c. This order was drawn up under the signature of the Master-in-Equity, and the seal of the Master's office, and was served upon all the defendants about the 28th of March; but no writ of injunction was issued except that of the 1st December, 1860. The case came before the Court on notice of motion that the defendants therein named should stand committed for breach of the injunction issued in the cause under the seal of the Court, and bearing date the 14th day of March, 1861. At the hearing the motion was granted, but attachment was ordered to lie in the office for one month. Upon appeal by defendants, *Held* that for those who chose to consent, the suit was still in court, and that this order by consent substantially withdrew the demurrer and judgment thereon, and bound the defendant. *Lane v. Hannah*, 1 W. and W. (E.,) 66.

Consent Decree—Affidavit of Personal Service of Bill upon Defendant.] — Where a bill was served personally upon the defendant, upon motion for decree by consent, signed by the defendant, the Court, before making the decree, required an affidavit of personal service of the bill upon the defendant. *Brown v. Brown*, 6 V.L.R. (E.,) 36; 1 A.L.T., 122.

Decree pro confesso — When Made.] — *See Mitchell v. M'Dougall, post* under (40) SUIT—*Suit Generally.*

Amendment of Decree.] — A decree for administration directed the usual accounts, but omitted to direct an account of the proceeds of real estate sold by the administrators, and six years after, the next-of-kin, having the carriage of the decree, but not parties to the cause, moved to amend the decree by inserting the omitted direction. *Held*, at that distance of time, and the decree being the property of the parties to the cause, the amendment could not be made at their instance, but a supplemental order was made to the effect desired. *Attorney-General v. Huon*, 6 V.L.R. (E.,) 184; 2 A.L.T., 73.

Decree Cannot be Varied on Motion in the Suit.]—A decree had fixed a certain sum as the rate to be allowed for the past maintenance of an infant. Motion, on notice, that it might be referred to the Master to inquire by whom the infant had been maintained prior to the decree, and what portion of the sum per annum to which she had been declared entitled had been expended in her maintenance, and to whom the same should be paid. The motion was made on affidavits which stated that owing to the infant's being afflicted with a disease more had been expended by her mother than was allowed by the trustees and had incurred debts, and that the rate allowed was insufficient. *Held* that while the motion was one which on the merits should be regarded with favour, it was an application seeking to go behind the decree, and that the Court was bound by the decree and could not vary it, and motion refused. *Green v. Sutherland*, 3 W.W. & A'B. (E.,) 74.

Of Primary Judge—When Full Court will not Vary.]—Where a decree is, in other respects, unobjectionable, the Full Court will hesitate to disturb the conclusions of the Primary Judge upon conflicting evidence. *Bonshaw Freehold G.M. Coy. v. Prince of Wales Coy.*, 5 W.W. & A'B. (E.,) 140, 162.

Varied on Motion.]—Where difficulty was caused in obeying the terms of a will through the illness of some of the objects under the will, the Court took cognisance of the fact, and accordingly varied a decree ordering the terms of the will to be carried out. *Kearney v. Lowry*, 1 A.J.R., 95.

Varying or Discharging.]—A testator directed that his property should be converted and transmitted into the hands of trustees in Ireland, and that his children should be sent to Ireland to be educated. The testator's widow instituted a suit to have the will set aside on this point, alleging that it would be prejudicial to the children's health if they were sent to Ireland. The Court ordered the terms of the will to be complied with, but directed that maintenance should be provided for the widow and children pending their departure to Ireland, but that maintenance was not to be allowed for more than six months from the date of the decree. When the six months were nearly up the widow moved for an extension of the period of maintenance on the ground that the children were too ill to be sent to Ireland, and the Court took cognisance of the fact and varied the decree by directing that maintenance be paid for three months from the date of the order for variance. *Ibid.*

Varying or Discharging—Supreme Court Rules, Cap. VI., Rule 21—Variation as to Costs—Effect of Exhibit not Read.]—A decree was made ordering plaintiff to pay defendant's costs. A motion was made under r. 21 of Rules, cap. vi., and on the ground that a certain letter (Exhibit Q) had not been read. *Held* that rule 21 applies only to cases in which a party insists that the Master has not correctly taken the order of the Court, and that the question of costs should be argued with the rest of a case, but the Court entertained the application because of Exhibit Q, as having not been in fact read. Motion refused on the merits of the case. *M'Kean v. Francis*, 5 A.J.R., 158.

Varying or Discharging—Supreme Court Rules, Cap. VI., Rule 21.]—An application which is virtually an application that as a point of law decided in the decree would have an operation on both sides, the decree should be rectified by applying the same principle to both sides, is not within the letter and spirit of rule 21 of Rules cap. vi., and will be refused. *Porteous v. Oddie*, 1 V.L.R. (E.,) 148.

Varying or Discharging—Supreme Court Rules, Cap. VI., Rule 21.]—*Semble*, a mistake in a decree may be rectified although the eight days mentioned in Rule 21 may have expired. *Hunniford v. Horwood*, 5 V.L.R. (E.,) 250; 1 A.L.T., 65.

Motion to Vary—Supreme Court Rules, Cap. VI., Rule 21.]—Where a decree was pronounced on the 14th of February, and on the 10th of March following, an appeal being pending, a motion was made to vary it under rule 21 of cap. vi. of the Supreme Court Rules, and there was nothing to show when the decree was drawn up, the motion to vary was dismissed, with costs. *Attorney-General v. Lansell*, 8 V.L.R. (E.,) 155; 3 A.L.T., 107.

Varying—Costs.]—After a decree has been passed and entered, the Court will not alter or vary it, on motion, by giving costs to one of the parties. *Cohen v. Lintz*, 10 V.L.R. (E.,) 222; 6 A.L.T., 63.

Sale under Decree.]—A motion for liberty to the plaintiff to bid at a sale under a decree should not be made *ex parte*. *Royce v. Parker*, 2 W. & W. (E.,) 1.

Sale under Decree.]—Where under a decree the property had been put up for sale by public auction, and the biddings had not reached the reserve fixed by the Master, on motion, *Ordered* that Master be at liberty to sell by private contract, based upon tenders for which advertisements should be inserted; such tenders to be forwarded direct to the Master. *Gordon v. Campbell*, 4 W.W. & A'B. (E.,) 47.

Further Directions and Exceptions.]—Where a suit comes on, on exceptions and further directions together, the exceptions should be disposed of before the further directions are considered. *Colonial Bank of Australasia v. Pie*, 6 V.L.R. (E.,) 186, 187.

Decree on Further Directions in Administration Suit where Master was Ordered to Report as to Debts, &c., becomes Property of Creditors and not merely of Parties—Not Made unless the Master Advertised for Creditors, and None Appeared.]—*Orton v. Prentice*, *ante column* 16.

Decree directing Accounts to be Taken—Report in pursuance of Decree—Objection should Not be Taken by Exceptions to the Report, but by Appeal from the Decree.]—*Dallimore v. Oriental Bank*, *ante column* 1070.

Irregular Order.]—Where one of two defendants entered into a liquidation by arrangement before an order was made directing them each to pay certain sums, and making them jointly liable for costs, *Held* that defendant was not entitled to have the order discharged for irregularity. *England v. Moore*, 6 V.L.R. (E.,) 48; 1 A.L.T., 114.

Order—Sufficient though not Showing Jurisdiction upon Face.]—Where an order does not show upon its face the jurisdiction to make it, it is sufficient if the facts, showing jurisdiction, appear in the affidavits upon which the order is drawn up. *In re The Belmore Silver and Lead M. Coy.*, 2 V.R. (E.,) 126, 129; 2 A.J.R., 76.

Order Nisi.]—It is not obligatory on persons applying for an order *nisi* to set out facts which may be used against them. *Ex parte Lonie*, 9 V.L.R. (E.,) 128, 133; 5 A.L.T., 94.

(13) *Demurrer.*

Setting Down for Hearing.]—Where a plaintiff did not set down a demurrer for argument within eight days after its delivery, order made *ex parte* that plaintiff should pay the costs of the demurrer, together with the further costs of the suit. *Fisher v. Jacomb*, 1 W.W. & A'B. (E.,) 97.

Accidentally not Set Down in Time—Prevailing by Default—Application to Reinstate—Supreme Court Rules, Cap. VI., Rule 8.]—A bill was served upon C., a defendant, and also notice of motion for an injunction on 8th December, 1871. C. delivered a demurrer on 12th December. The pendency of the demurrer was urged as an objection to hearing the motion, and, by consent, an order for an injunction was obtained on 13th December, the plaintiffs alleging that the demurrer was set down for 5th February, 1872, certain moneys having been paid into Court. The plaintiff failed to set down demurrer within eight days under rule 8 of the Supreme Court Rules, cap. vi. On 1st February, the defendant C. obtained an order *ex parte* that plaintiffs should pay costs of demurrer, and that the bill should be dismissed with costs. On motion to set aside this order, *Held* that the principle of an allowance of a demurrer putting a bill out of Court does not apply to a constructive allowance by neglecting to set it down in time, and the Court, acting in its discretion, should relieve the plaintiffs in this case on the ground that the money paid into Court under the injunction motion showed the *bonâ fides* of the plaintiff's intention to prosecute the suit. Order of 1st February set aside. *Smith v. Seal*, 3 V.R. (E.,) 22; 3 A.J.R., 3.

Time for Arguing — Pendency of Notice of Motion for an Injunction.]—Pending a notice of motion for an injunction, a demurrer was delivered. *Held* that plaintiff was not entitled to have the demurrer argued *instanter*, but had the option of proceeding at once with the argument on the motion, or of postponing it until after the demurrer had been argued. *Merry v. Hawthorn*, 6 W.W. & A'B. (E.,) 329.

Proceeding to Hearing pending Appeal from Judgment on Demurrer—19 Vict. (No. 13,) Sec. 5—"Supreme Court Rules," Cap. VI., Rule 7.]—Proceeding to hearing pending the appeal from a judgment on a demurrer in the suit is irregular, and the defendants who have demurred may put in their answer after the appeal is decided. *Attorney-General v. The Mayor of Emerald Hill*, 4 A.J.R., 135.

Defendants' Names by Initials only—Objection.]—An objection that defendants are described by initials only and not by full names may not be taken by demurrer. *Attorney-General v. Gee*, 2 W. & W. (E.,) 122, 132.

Laches.]—*Per Molesworth, J.—Laches* is not available on demurrer. *Longstaff v. Keogh*, 3 V.L.R. (E.,) 175.

"Statute of Limitations"—Raising by Demurrer.]—In Equity a defence under the statute may be raised by demurrer. *Urquhart v. M'Pherson*, 6 V.L.R. (E.,) 17, 23; 1 A.L.T., 126.

Bill not Signed by Counsel—Insufficient Allegations of Fact—Objections that may be Taken by Demurrer.]—*See M'Donald v. Board of Land and Works, ante column* 1166.

Suit for Specific Performance — Prayer that Defendant might Answer Requisition on the Title if Expense would not be Incurred—No Allegation that Expense would not be Incurred.]—*See Mudie v. Kesterson*, 4 A.J.R., 172, *post* under VENDOR AND PURCHASER—THE CONTRACT—Conditions of Sale, &c.

When not Sustainable.]—Where a bill seeks some variation in a decree of the Court of Mines, and also makes out a case for relief independently of the variation of the decree, on the ground of irreparable mischief, complication of accounts, difficult ascertainment of boundaries, specific performance of contracts or some of them, a demurrer will not lie. *Semble* that if a bill is objectionable on the ground of indistinctness, a demurrer to it will not lie unless that indistinctness is a ground of demurrer specifically taken. *United Working Miners' Coy. v. Prince of Wales Coy.*, 6 W.W. & A'B. (E.,) 8.

When not Sustainable.]—For circumstances in which a demurrer for want of equity, want of title, inconsistency, want of parties, bar by the Statute of Limitations, no offer to do equity, and insufficient allegations of notice was disallowed, *see Hunter v. Rutledge*, N.C., 61. Appeal *Ibid* 74, 6 W.W. & A'B. (E.,) 331.

For Want of Equity—When Overruled.]—A demurrer for want of equity should be overruled, if any of the relief sought is sustainable. *Webb v. Were*, 2 V.L.R. (E.,) 28.

Want of Equity.]—F. and H., owners of a gold mine, entered into an agreement with the plaintiff, by which plaintiff was to float a company to purchase the mine, in which F. and H. should have a certain number of shares, the sale was to be effected within a certain time fixed, or otherwise the agreement was to be void, and, if plaintiff succeeded, he was to get a certain commission. Plaintiff agreed with defendants to join with him in floating the company. The defendants, before the expiration of the time, entered into an agreement with F. and H. to buy the mine for themselves, and after the expiration of the time purchased the mine for themselves. On a bill by plaintiff against defendants for a share in the benefit of their purchase, *Held*, on demurrer, that the plaintiff had no equity to maintain his bill. *Per Molesworth, J.*, that there is no contract express or implied that co-adventurers in a contemplated purchase to be completed within a given time shall not deal singly with the vendor for a bargain to come into operation after the original bargain has expired by effluxion of time. *Pokorney v. Ditchburne*, 6 W.W. & A'B. (E.,) 284, 291.

Want of Equity—Multifariousness—Want of Parties—Prayer for General Relief.]—Bill stated the existence of the A. company holding a mining lease from the Crown, plant, and machinery, which were mortgaged to the defendant bank to secure £15,000; an arrangement between the A. company and the defendant, that a new company should be formed to mine on the land; that plant, &c., should be transferred to new company (plaintiff) subject to mortgage—in the following way, that the mine should be sold under a *fi. fa.* to C. as a trustee for defendant, C. to transfer to the new company for £3750. This was carried out and plaintiff entered,

expending £3749 in mining, and paying £2055 to defendant on account of mortgage. The defendant, on non-payment of the residue, entered and sold to L. In a suit by the A. company against the bank and L., this sale was set aside, and the A. company declared entitled to redeem, and the sum of £3749 was credited to defendant. The bill was to set aside the sale by defendant to the plaintiff company, and for payment of the sums of £3749, £3750, and £2055. *Held*, on demurrer by *Molesworth, J.*, and affirmed, that though the pleadings did not show plaintiff to be entitled to the special relief sought, yet the facts disclosed an equity which might be enforced under the prayer for general relief; that the bill was not multifarious by setting out the proceedings with the A. company, and that the A. company was not a necessary party. *United Hand and Band Coy. v. National Bank of Australasia*, 5 V.L.R. (E.,) 74.

For Want of Equity.]—For circumstances in which a demurrer for want of equity was allowed, see *Merry v. The Queen*, 6 V.L.R. (E.,) 7; 1 A.L.T., 137.

When Sustainable.]—For circumstances in which a demurrer for want of parties for multifariousness, and that there was a remedy at law, was sustained, see *Merry v. Hawthorn*, N.C., 41.

Multifariousness — Want of Equity — Sale of Mine.]—B., manager for the plaintiffs, as their agent, and knowing its value, sold a mine belonging to the plaintiffs nominally to defendant C., but really to B., C., D., and E. B., C., D., and E., with F. and G., formed a company to work the mine, no others being shareholders. Suit by plaintiffs against B., C., D., E., F., and G., and the company, charging first four with a fraudulent conspiracy, and treating F. and G. as trustees or purchasers with notice, and seeking to set sale aside, accounts, and, as against B., a return of commission on the sale. Demurrers for want of equity and multifariousness. *Molesworth, J.*, allowed both. *Held*, on appeal, that the individual relief sought against B. was only incidental to the real object of the suit, and that the bill was not multifarious; but demurrer for want of equity allowed, there being no allegation that the mine had been assigned to the company, or that the motive for which the company was alleged to have been formed was carried out. *Learmonth v. Bailey*, 1 V.L.R. (E.,) 34.

Offer to Redeem Mortgagee.]—Where the plaintiffs prayed for a sale of mortgaged land, and the defendants demurred on the ground that the plaintiffs did not offer to redeem a mortgagee, *Held* that as the plaintiffs would not have a partition the offer to redeem would be merely formal, and that the omission did not constitute a sufficient ground of demurrer. *Hunter v. Rutledge*, N.C., 61, 74; 6 W.W. & A'B. (E.,) 331, 357.

Demurrer—Mortgage—Equitable Assignment—Mistake—Amendmsnt—Question of Legal Title—Costs.]—A sugar company by deed, 4th July, 1873, mortgaged to defendants S.E. and W., the plant, buildings, machinery and effects then employed by the company in its business, and comprised in a schedule to the deed, and all the plant, buildings, machinery, &c., which might be erected or brought on the land during the continuance of the security, and all sugars, syrups, "spouts," roots, charcoal, and other assets which were or might be brought upon the land during the continuance of the security. On 22nd August, 1874, mortgagees sold to plaintiff all property comprised in mortgage, and in written contract for sale certain silent spirits belonging to company, but in possession of defendants B. and C., warehousemen, were expressly mentioned. These silent spirits were in August, 1873, drawn out of a vat then on the land into 47 casks and the casks deposited in B. and C.'s warehouse, being composed of spirits upon the land at the time of the mortgage, and of spirits subsequently manufactured by the company, which were mixed together. On a bill by plaintiff against company, mortgagees, and B. and C., to recover the 47 casks, alleging that "spouts" was used for "spirits" in the mortgage deed, *Held*, by *Molesworth, J.*, on a demurrer by B. and C. on ground of want of equity, that the bill made no case to have the deed rectified, and demurrer allowed with costs. *Held* by Full Court that bill should be deemed amended by substituting "spirits" for "spouts," and demurrer overruled, costs of demurrer and appeal to be costs in cause. *Per Stephen, J.*:—As to part of demurrer that remedy was at law and not in equity, that equitable assignment is not confined to assignment of a chose in action, but if a third party is under a liability to the assignor and the bill alleges that assignor will not allow assignee to use his name to sue at law, then assignee may sue third party directly in equity. *Per Full Court*:—That Courts are disinclined to decide a matter of legal title upon demurrer, thus entering into construction of a document, without seeing the instrument itself or hearing evidence relating to it. *Ross v. Blackham*, 1 V.L.R. (E.,) 220.

Demurrer—Multifariousness—Mining Claims—Conversion into Shares—Official Assignee—Insolvent's Executors.]—An insolvent was at time of insolvency possessed of certain mining claims; after his death these became converted into shares in companies registered in the names of his executors. On a bill by official assignee against executors for transfer of shares and account of dividends, *Held*, on demurrer by defendants on grounds of want of parties and multifariousness, that the companies were not necessary parties, and that there was such a perfect parallelism between all classes of shares that they might be joined in one suit without making it multifarious. A plaintiff who has a right which another has improperly possessed himself of, is not bound to sue the persons who have acceded to that other person's claim of right. *Simson v. Scallan*, 1 V.L.R. (E.,) 255.

Want of Equity--Want of Parties.]--H. assigned all his property to trustees in trust for creditors. He was sued at law on certain promissory notes given by H. to the plaintiffs as a security for their debt, the plaintiffs refusing to execute the deed of assignment. H. pleaded the assignment and applied for and obtained a commission to

examine a certain witness in Liverpool, proceedings in the action being meanwhile suspended. The trustees advertised an offer of £1250 for the estate, and the other creditors sanctioned the acceptance of that offer. Plaintiffs brought a bill in equity against H. and the trustees to have the assignment declared void, and to restrain the trustees from accepting the offer. *Held*, on demurrer, that the action at law could not determine the validity of the deed, and there were no particular averments to support a charge of fraudulent misrepresentation, and that the executing creditors were necessary parties. *Held*, also, that there is no equity for a person having a demand against another, and bringing an action for it to prevent, during the pendency of the action, the proper disposal of the debtor's property in order that something may be left upon which to levy at the close of the action. *Lord v. Hewitt*, 2 W. & W. (E.,) 108.

See also cases collected under BILL, *ante columns* 1166, 1167.

(14) *Discovery—See* DISCOVERY.

(15) *Evidence—See* EVIDENCE.

(16) *Foreclosure—See* MORTGAGE.

(17) *Hearing of Causes and Setting Down for Hearing.*

Who May not be Heard.]—A defendant, who has not answered, cannot be heard at the hearing without a special application for leave. *Walduck v. Dane*, 5 W.W. & A'B. (E.,) 8.

No Affidavit of Service of Notice of Setting Down.]—At the hearing of a suit, two defendants who had not answered did not appear, and there was no affidavit of service upon them of notice of the suit having been set down for hearing. The plaintiff's counsel stating that he was instructed such notice had, in fact, been served, option given to the plaintiff to have the case stand over to give time for filing the affidavit, on payment of the costs of the day, or to have the bill dismissed with costs. *Reeves v. Croyle*, 2 V.R. (E.,) 42, 43; 2 A.J.R., 13.

Proper Time for Taking Objection for Non-service of Notice of Setting Down.]—The proper time to take an objection as to non-service of a co-defendant with notice of the suit having been set down for hearing is after the pleadings have been opened. *Reeves v. Croyle*, 2 V.R. (E.,) 42, 44; 2 A.J.R., 14.

After Trial of Issues.]—Where a plaintiff after the verdict on issues sent to a jury fails to set down the cause for further hearing, the proper course for the defendant is to apply by motion on notice to have the cause re-entered on the list for hearing. *Pickett v. De La Hunty*, 3 V.L.R. (E.,) 7.

Suit Standing Over—Fresh Notice.]—Where the hearing of a suit is ordered to stand over for want of sufficient affidavit verifying bill against certain defendants who had not answered, it is not necessary to serve fresh notices of the setting down for hearing upon the defending defendants. *Phelps v. Pusey*, 5 V.L.R. (E.,) 1.

Setting Down for Hearing on Further Directions on a Special Report.]—*Per Molesworth, J.*—"A cause may be set down for hearing on further directions on a special report, or in any stage of the proceedings." *Brown v. Meldrum*, 1 W. & W. (E.,) 129.

For facts *see* S.C., *post columns* 1204, 1205.

(18) *Infants.*

Suit on behalf of Infant by Stranger—Reference.]—Suit by one D., as next friend of an infant aged nineteen, for the administration of the estate of the infant's father, the defendant being the infant's step-father. Motion by defendant, before answer, that D. be restrained from further prosecuting the suit, and that the bill be dismissed with costs to be paid by him; or that it be referred to the Master to enquire whether it would be for the benefit of the infant that the suit should be prosecuted, and if so, then that he might appoint some other next friend in place of D. The affidavit of defendant stated that D. and the solicitor by whom the bill was filed were unknown to him (defendant), to his wife, to the infant, or to any other member of his family, and that he was a man in needy circumstances. *Held, per Chapman, J.*, that though there were *primâ facie* grounds for the suit, since it appeared that D. was an utter stranger to the infant, and a mere volunteer, and it did not appear that he was a man of substance, there should be a reference to the Master in the terms sought, with liberty to the Master to report special facts. *Rose v. Monahan*, 1 W. & W. (E.,) 193.

Appointment of Guardian ad litem—Infant's Assent—Age of Discretion.]—Motion for the appointment of a guardian *ad litem* to infant defendants. *Per Molesworth, J.*—If any of the infants are of an age of discretion, I should wish to have an affidavit of their assent to the proposed guardian being appointed. It appearing that the eldest infant was seventeen years of age, motion directed to stand over for an affidavit of his assent to the proposed guardian. *M'Crae v. Rutherford*, 1 W.W. & A'B. (E.,) 164.

Guardian ad litem.]—Where infant defendants have arrived at years of discretion, their consent to the appointment of a guardian *ad litem* should be obtained and filed. *M'Vean v. M'Vean*, 7 V.L.R. (E.,) 156.

When Application for Appointment of Guardian ad litem Should be Made.]—An application for the appointment of a guardian *ad litem* for infant defendants should be with the concurrence of the infants, if of sufficient age, or of those having charge of them; or if by plaintiffs, then after the time for answering has expired, upon notice to the infants and those in charge of them. Where, therefore, an order appointing a guardian *ad litem* to infant defendants had been made before the time for answering had expired, and at the instance of the plaintiff's solicitor, as on behalf of the infants, but without any communication with them or their relatives, it was set aside. *Bouchier v. Dawson*, 2 V.R. (E.,) 24; 2 A.J.R., 8.

Appointment of Guardian and Next Friend.]—On the death of the guardian and next friend of an infant another next friend must be appointed before a motion for a new guardian can be made. *Denny v. Vickers*, 4 A.J.R., 6.

Infant Defendant Out of Jurisdiction—Guardian ad litem.]—Where an infant defendant was out of the jurisdiction, and an order had been made directing service out of jurisdiction, an application made for appointment of guardian *ad litem* before service of the bill was refused. *Dodgson v. Ginn*, 3 V.L.R. (E.,) 74.

Guardian ad litem—Two Applications for Appointment Pending.]—An application was made for the appointment of a guardian *ad litem*, but no order was made thereon. Subsequently another application was made by the same parties, and on the like materials for the appointment of another person as such guardian. *Held* that, there being thus two applications pending, the Court must decide between them, or one must be withdrawn with the written consent of the person therein nominated as the proposed guardian. *James v. James*, 4 V.L.R. (E.,) 32.

Guardian ad litem—Affidavit of Fitness.]—Where the appointment is sought of a guardian *ad litem*, the affidavit of fitness should be made by a solicitor. *Ker v. Hamilton*, 6 V.L.R. (E.,) 172; 2 A.L.T., 13.

For appointment of and practice as to next friends, *see post* column 1187.

Substituted Service on Infant Defendant out of Jurisdiction.]—*See Colley v. Colley*, 1 W. & W. (E.,) 101, and *Ross v. O'Callaghan*, 2 W. & W. (E.,) 157; *post columns* 1196, 1197.

(19) *Information.*

Relator who may Be.]—An infant cannot be a relator. *Attorney-General v. Scholes*, 5 W.W. & A'B. (E.,) 164, 173.

Amendment.]—Leave may be given to amend an information and bill, by converting it into an information only, and substituting some proper person as relator, instead of an infant relator. *Ibid*, p. 174.

What Matters may be Joined.]—In an information and bill by the Attorney-General and a plaintiff, it is not proper to join matters in which both have not a common interest. *Ibid*, p. 172.

(20) *Injunction.—See* INJUNCTION.

(21) *Inquiries.*

At the hearing an inquiry will not be directed as to special matters unless some ground is laid for it in the bill, or by the pleadings. *Bailey v. Wright*, 7 V.L.R. (E.,) 111; 3 A.L.T., 53.

(22) *Interrogatories.—See* DISCOVERY.

(23 *Investments.—See* TRUST AND TRUSTEE.

(24) *Issues at Law.*

When Directed.]—In an administration suit where the evidence is clear as to the fact of defendant's bigamy, which bigamy shows that she has no legal interest in the suit, and no right to litigate, an issue will not be directed. *Graham v. Graham*, 3 A.J.R., 55, 58.

When Notice is not Proved the Court may Direct an Issue.]—*See Niemann v. Weller*, 3 W.W. & A'B. (E.,) 125, 133. *Post* under VENDOR AND PURCHASER — THE CONTRACT — Notice, Effect on Purchaser, &c.

Trial of Issues of Fact.]—Upon directing an issue the Court does not state the opposing reasons which cause its doubt upon the facts. *M'Cahill v. Henty*, 4 V.L.R. (E.,) 68.

(25) *Married Women.—See* HUSBAND AND WIFE.

(26) *Masters' Report and Proceedings in Master's Office.*

Confirmation.]—The confirmation of a Master's report not excepted to, though not absolutely of course, neither demands nor receives any examination by the Court, and is not equivalent to previous leave to do an act stated by the report to have been done. *Larnach v. Alleyne*, 1 W. & W. (E.,) 342, 363.

Presentation for Confirmation.]—*Per Molesworth, J.* It has been the usual practice of this Court when reports are to be presented for confirmation, for the Master-in-Equity to attend personally for that purpose. This seems an unimportant ceremony, and the Master-in-Equity is put to some inconvenience. I think the business could just as well be performed by his sending the report by some officer, and I intend for the future to follow that course. The Master-in-Equity will commit the report to be confirmed to one of the officers of his department, who will hand the same to me, and I will announce in open Court that it has been presented for confirmation. This course of practice has been decided upon after consultation with His Honour the Chief Justice. 9 V.L.R. (E.,) 152.

Master's Report—Affidavit taken as Part of Report.]—Where an affidavit was filed, with the permission of the Master, stating that he was in fact making a report in accordance with what he considered the "directions" of the judge making the reference, but not according to his own opinion, the Full Court considered the affidavit as being in effect part of the Master's report, and so received it, inasmuch as the case involved the interests of an infant not before the Court otherwise than through the contest for her guardianship. *In re Pennington*, 2 V.L.R. (E.,) 49.

Where Referred Back.]—The Master's report, if his finding be unauthorised by the decree, and opposed to the case made by the bill, will be referred back on the application of a party to the suit. *Kendell v. Thomson*, 1 W.W & A'B. (E.,) 141.

Reference to Master for Accounts of Receipts and Disbursements—No Reference as to Share or as to Marriage Settlement of Administratrix—Statement in Report of Retention by Administratrix of a Certain Sum as Her Share.]—A suit was commenced for administration of an estate against an administratrix. Ordinary administration accounts decreed with a reference to the Master to account. The report was presented, and a decree made in 1866, on further directions, as to continuance of the accounts. In October, 1867, a supplemental bill was filed bringing before the Court the fact of a marriage settlement made on the marriage of the administratrix. This suit did not ask for administration of the estate of the administratrix, who had died shortly before, it simply brought the persons interested under the settlement. The Master continued the accounts, and presented a report containing a statement that there was a sum of £11,000 retained by the administratrix as her share. On exceptions to the report, the objection being that the Master should have reported that, by the marriage settlement, the sum belonged to the trustees, report amended by inserting a declaration that it only referred to the accounts of her receipts over expenditure without stating whether she was entitled to the £11,000 as her share or not. *Ware v. Ware*, 3 A.J.R., 127.

Exceptions to where Allowed.]—Exceptions to the Master's report will *not* be disallowed when the defect is in the decree itself. *Sawyers v. Kyte*, 4 A.J.R., 144.

Confirmation — Exceptions — Notice — Rules of Court, Cap. VI., Rule 29.]—In a creditor's administration suit the ordinary decree had been made, and under the decree G. had carried in his claim before the Master, who disallowed it. On 23rd September, the Master verbally informed G.'s solicitor of his intention to report against the claim, and on 25th September, without further notice to G. or his solicitor, the Master's report of (*inter alia*) the disallowance of the claim was presented for confirmation and confirmed. Motion by G. that he might, notwithstanding the confirmation, have leave to except to that part of the report whereby his claim was disallowed. Motion granted upon condition of G. paying the costs and taking the next step within eight days. *Per Chapman, J.* It appears by rule 29 of cap. vi. of the Rules of Court that, in all cases where creditors come in in the Master's office, they are entitled to notice of the intended presentation of the report for confirmation, the language of the rule being "the parties interested," and a creditor becomes a party in a creditor's suit the instant he comes in, though not named. *Clough v. Gray*, 1 W. & W. (E.,) 308.

Exceptions—Objections—Draft Report—Supreme Court Rules, Cap. VI., Rules 22, 23, 29—Costs.]—A draft report by the Master was settled, and the defendant lodged a document headed "Objections," but did not lodge any exceptions. The Master initialled the report, and presented it for confirmation, stating it was objected to, and the objections were set down for hearing. The plaintiff gave notice of motion that the objections should be overruled, and defendant thereupon gave notice of abandonment of objections. *Held* that English practice distinguishing between objections and exceptions was not in force here, and that the Master had pursued the right course, and his report was confirmed; but no costs were given, as the matter had arisen from a confusion of practice. *Breese v. Fleming*, 5 V.L.R. (E.,) 22.

Conclusions—Evidence—"Supreme Court Rules," Cap. VI., R. 28.]—Where a decree directed the Master "to inquire and report the circumstance" of a sale, and whether defendant had notice of transaction, &c., and the Master in his report set out the evidence taken, and his conclusions thereon, *Upon Exceptions, Held* that he was right in stating his conclusions; but should not have set out the evidence, but merely referred to it. *Colonial Bank of Australasia v. Pie*, 6 V.L.R. (E.,) 186.

Decree directing certain Accounts to be Taken—Report consistently following Decree—Objections must be Taken by Appeal from Decree, and not upon Exceptions to Report.]—*Dallimore v. Oriental Bank, ante column* 1070.

Decree for Redemption—Agreement that Parties should Depart from Ordinary Course of Dealing as between Mortgagor and Mortgagee—Agreement must be Distinctly Stated in Writing in the Office by way of Objection, Surcharge or otherwise—Court cannot upon Exceptions reopen the Matter.]—*Ross v. Victorian Permanent Building Society, ante column* 1069.

Exceptions to—Notice of Setting Down—Service.]—*Per Molesworth, J.*—Notice of the setting down of exceptions to the Master's report need not be served upon the other parties to the suit. *United Hand-in-Hand and Band of Hope Coy. v. National Bank of Australasia*, 4 V.L.R. (E.,) 173, 176.

Party Intending to go Behind on Further Directions.]—Where a party, on further directions, intends to go behind the report in regard to costs, and rely on evidence or documents taken in the Master's office, he must give notice to the other parties that he intends to do so, otherwise he can refer only to the report. *Pickles v. Perry*, 4 V.L.R. (E.,) 66.

Hearing on Further Directions — Evidence taken before the Master.]—On a hearing on further directions, evidence taken before the Master cannot be referred to, unless special notice of the intention to read it has been given. [*Pickles v. Perry*, 4 V.L.R. (E.,) 66, adhered to]. *Sichel v. O'Shanassy*, 4 V.L.R. (E.,) 250.

Master's Discretion in Receiving Evidence.]—There is nothing in the rules or practice to restrict the Master's discretion in receiving evidence after hearing all the parties, and reserving his decision until the report is settled, or a warrant to settle is issued, and in any case the proper remedy is not by an exception to his report. *Board of Land and Works v. Ecroyd*, 1 V.L.R. (E.,) 304.

Evidence Received by Master—Exceptions.]—It is not the usual course for parties to obtain the direction of the Court as to what evidence

the Master should receive or reject. Therefore, where the Master has determined that he will not, upon an inquiry, receive evidence by affidavit, the Court will not, before such inquiry, entertain a motion for liberty to tender to him an affidavit of a deceased person, and for liberty for him to receive it as evidence. The proper course is for the parties to except to his report when made. *Attorney-General v. Huon*, 4 V.L.R. (E.,) 62.

Jurisdiction of Master to Receive Evidence by Affidavit.]—The Master-in-Equity has no jurisdiction to receive evidence by affidavit, except by consent. *Ibid.*

Order under Act No. 197, Secs. 7, 8—Accounts—Opportunity to Respondent to Answer—Affidavits not the Most Fitting Evidence.]—*In re Wharton, ex parte Smith, ante* column 7.

(27) *Motions and Rules.*

Notice.]—Though more convenient, yet it is not the practice to specify grounds in a notice of motion. *Musson v. Bourne*, 1 W. & W. (E.,) 1, 2.

Notice—Computation of Time.]—Sunday does not reckon in the computation of the two clear days required for a notice of motion. *Brown v. Healey*, 1 W.W. & A'B. (E.,) 47.

Notice of—Service.]—Where a notice of motion had been served as for a defendant by a solicitor not his solicitor on the record, the motion was dismissed upon this objection being taken at the hearing. *Tiernan v. Nolan*, 6 W.W. & A'B. (E.,) 73.

Before Answer.]—*Per Molesworth, J.*—Although where a defendant makes a motion before answer he should by affidavit prove service of the bill upon him, that is a formal matter which may be supplied by affidavit at hearing of motion, if the bill has been in fact served. *Graham v. Gibson*, 5 V.L.R. (E.,) at page 104.

(28) *Next Friend.*

It is not the practice in Victoria to set out the address of the next friend in the bill, and the omission to do so will not entitle defendant to insist upon security for costs. *Graham v. Gibson*, 5 V.L.R. (E.,) 103.

Authority of Next Friend—Defendant Cannot take Advantage of Omission to File—Supreme Court Rules, Cap. VI., R. 1.]—Rule 1 of cap. vi. is only intended for the protection of the next friend, and the omission to file such an authority cannot be taken advantage of by a defendant. *Mahood v. Odell*, 2 W. & W. (E.,) 73.

Suit by Next Friend for Own Purposes—Staying Proceedings.]—*See Murphy v. Kelly, post column* 1199.

When Next Friend may make Affidavit Verifying Bill in Undefended Suit.]—*See Cameron v. Macnamara, post columns* 1202, 1203.

(29) *Order.*—*See* Decree, *ante column* 1171.

(30) *Parties.*

Necessary and Proper—Principal and Agent.]—Where a plaintiff disaffirms the acts of a person purporting to act as his agent, it is not necessary to make such person a co-defendant. *Walduck v. Dane*, 5 W.W. & A'B. (E.,) 8, 14.

Suit by Principal against Agent for Account—Sub-Agent who cannot set up Principal's Title against Agent not a Necessary Party.]—*Hofer v. Silberberg*, 3 V.L.R. (E.,) 125, *post* under PRINCIPAL AND AGENT—Rights, &c., *inter se*—Account and Fiduciary Position.

Mortgagee—Litigation as to Equity of Redemption.]—A mortgagee is not a necessary party to a suit where parties are litigating as to the equity of redemption. *Dallimore v. Oriental Bank*, 1 V.L.R. (E.,) 13.

For facts *see* S.C., *ante columns* 1067, 1068.

Trustee of Equitable Interest—Out of the Jurisdiction.]—The trustee of a voluntary settlement, if an equitable interest only, need not be joined as a co-plaintiff with the beneficiaries in a suit against a third person relative to the settlement, and, if out of the jurisdiction, need not be served as a defendant. *Ibid.*

Contractor for a Road Board.]—In an injunction against a road board and its contractor, *Held*, by the Full Court reversing *Molesworth, J.*, that a person authorised by another is as much bound by a decree as an agent would be; that if the contractor did do the wrong complained of, *qua* contractor, and not with the authority of the board, the decree should have been against him, but if he did so under the authority of the board, he was their agent, and was an unnecessary party. *Mayor of Ballarat v. Bungaree Road Board*, 1 V.R. (E.,) 57, 63, and 73; 1 A.J.R., 33.

Information against Town Council.]—Where an information was laid against a town council for improperly accepting a tender, and councillors who had voted against the acceptance were made parties defendant, *Held* that they were unnecessary parties, and entitled to their costs. *Attorney-General v. Mayor of Emerald Hill*, 4 A.J.R., 135.

A councillor who had voted for the acceptance of the tender but against whom no improper motives, *e.g.*, being interested in the contract, were charged, and who admitted that he intended to join in completing the contract, was also made a defendant, *Held* that he was properly made a defendant. *Ibid.*

Suit to Compel Assignment of Mining Lease in which two Companies were Interested—Companies Necessary Parties—Amalgamation of Companies.]—Certain land was held by the A. company as a claim, and M., a shareholder in the company, having purchased an adjoining claim, agreed to place both claims under the management of a new company to be formed (the B. company). The B. company was incorporated, and a lease was issued over both claims to persons as trustees for the B. company. Subsequently an

execution creditor, the purchaser at a sheriff's sale, sued the trustees to compel the assignment of the lease. *Held* that both the A. company and the B. company were necessary parties. *Randall v. Mau*, 2 V.R. (E.,) 158; 2 A.J.R., 81.

Suit to have Name Restored on Register by a Shareholder whose Shares had been Forfeited—Amalgamation of Companies.]—*See Cushing v. Lady Barkly G.M. Coy.*, 9 V.L.R. (E.,) 108, 124, 125; 5 A.L.T., 98, *ante columns* 163, 164.

Company—Claims Converted into Shares in a Company — Executors.] — Where an insolvent's mining claims were after his death converted into shares in a company registered in his executors' names, on a bill by official assignee against executors seeking a transfer of shares, *Held* that the company was not a necessary party to the suit. A plaintiff who has a right which another has improperly possessed himself of, is not bound to sue the person who has acceded to that other person's claim of right. *Simson v. Scallan*, 1 V.L.R. (E.,) 255.

Necessary and Proper.]—A mining company registered under No. 228, and mining on private property alienated from the Crown, was ordered to be wound-up in July, 1868. The plaintiff, R., was appointed official agent of the company. Prior to the winding-up order, the company had been sequestrated by order of the Court for breach of an injunction. The plaintiff R. filed a bill against the directors and managers of the company charging misappropriation by them of the company's gold and other assets, mutilation and concealment of books and improper payment of dividends out of borrowed money and not out of profits, and sought accounts, declaration, and enforcement of liability. *Held*, on demurrer, for want of parties, that the sequestrators and the creditor obtaining sequestration, and the Attorney-General, were not necessary parties. *Per totam curiam*, reversing *Molesworth, J.*, that the shareholders who had received these improper dividends were not necessary parties. *Reeves v. Croyle*, 6 W.W. & A'B. (E.,) 302.

Necessary and Proper.]—W. and B. purchased mining leases from H. and H. for the nominal sum of £26,840, consisting partly of cash, partly of promissory notes, and partly of paid-up shares in a mining company to be formed by W. and B. W. and B. formed the company, stating the purchase-money to have been £36,640, and appropriated the excess, which consisted of shares. Some of these shares were issued to B., who divided them between himself, W., and one S., who joined in endorsing the promissory notes to H. and H. On suit by a shareholder on behalf of himself, &c., against W. and B., H. and H., and the company, an objection was taken that S. was a necessary party, *Held* that S. was not a necessary party, since the bill did not and could not seek to impugn his rights. *Benjamin v. Wymond*, 10 V.L.R. (E.,) 3; 5 A.L.T., 153, 155.

Effect of Reading Passage from Answer—Trustee and Cestui Que Trustent.]—In a suit by an official assignee of an insolvent to set aside the purchase of a policy of assurance on the insolvent's life, made by the defendant a few hours before the assured's death, charging fraudulent concealment of the insolvent's illness, the answer denied concealment, but stated that the defendant had purchased as trustee for insolvent's wife, and disclaimed all beneficial interest. The plaintiff read this passage from the answer. *Held*, at the hearing, that the plaintiff had, by reading this passage, precluded himself from taking the view that the defendant was not an obligatory trustee, and that, therefore, the insolvent's wife was, as *cestui que trust*, a necessary party to the suit. *Shaw v. Sterling*, 4 W.W. & A'B. (E.,) 84.

In Suit for Accounts against Agent of Trustees.]—A testator, after expressing his confidence in M., directed his trustees to employ him as their agent and solicitor. The trustees P. and B. so employed M., who furnished accounts from time to time to the acting trustee, P., including charges for commission as agent and costs as solicitor. The costs were taxed *ex parte*, and allowed M. in account without investigation. In 1867, at the instance of a *cestui que trust*, objecting to M.'s accounts, an order for retaxation was obtained, and had been partly acted upon, when M. died, 3rd May, 1867. A suit was instituted 13th July, 1869, against M.'s administrator, seeking an account of his receipts. P. sued alone. B. not having acted, and being out of the jurisdiction, was named a defendant, but not served. *Held* that the recommendation in the will was directory only, and not imperative, and so rendered M. merely the agent of the trustees, and did not place him in privity with the *cestui que trusts;* that P. having acted alone, the case was one merely of principal and agent between M. and him; and that neither B. nor the *cestui que trusts* were necessary parties. *Phelan v. Macoboy*, 1 V.R. (E.,) 85; 1 A.J.R., 3. Confirmed on appeal, *sub nom. Macoboy v. Phelan*, 1 A.J.R., 52.

Remaindermen—Out of Jurisdiction.]—Where an administration suit is brought by tenants for life against executors and annuitants, the infants entitled in remainder, out of the jurisdiction, were held to be necessary parties. *Chadwick v. Bennett*, 1 V.R. (E.,) 109.

Cestui Que Trustent Suing.]—One of several *cestuis que trustent* cannot sue without either making all the other *cestuis que trustent* parties, or suing as on behalf of all. Where one *cestui que trust* sued the trustee and another *cestui que trust*, the suit was, at the hearing, converted into a suit by the plaintiff on behalf of all the other *cestuis que trustent* except the defendant. *Fawkner v. Fawkner*, 1 V.R. (E.,) 48; 1 A.J.R., 41.

Suit to Set Aside Assignment to Trustees for Benefit of Creditors, and to Restrain Trustees from Accepting Offer for Estate—Executing Creditors Necessary Parties.]—*Lord v. Hewitt*, *ante columns* 1180, 1181.

Trustees of a Creditors' Deed.]—Where in an administration suit, it was sought to enforce a claim by the trust estate upon the joint estate of a firm, the partners of which had been

parties to a breach of trust, and subsequently to the breach of trust the partners had executed a creditors' deed, *Held*, that the trustees of such deed were properly made parties to the suit. *Jones v. Taylor*, 2 V.R. (E.,) 15.

Suit to Set Aside Assignment in Favour of Creditors—Trustees do not Represent Creditors.]—*Goodman v. M'Callum*, *ante column* 627.

In a Suit between Trustee and Cestuis Que Trustent.]—A testator charged his real estate with payment of his debts, and subject thereto devised it to P. and B. in trust for L. for life, with remainder over to her children as she should appoint, remainder in default of appointment to her heirs. No power of appointment had been exercised. On a bill by the trustees of a settlement executed on the marriage of one of testator's daughters, against P., B. and L., seeking to charge the real assets, *Held* that P. and B. would, under Rules, cap. v., sec. 10, represent all the *cestuis que trustent*, but that B. being out of the jurisdiction, and only a nominal defendant, all L.'s children were necessary parties. *Bullen v. Phelan*, 2 V.R. (E.,) 11; 2 A.J.R., 6.

Suit for Declaration of Trust against Mortgagee Only—Mortgagor a Necessary Party.]—*See Kennedy v. Phillips*, 2 W. & W. (E.,) 140. *Post* under VENDOR AND PURCHASER—PARTIES.

Where plaintiff sought to enforce a declaration of trust in favour of himself and his brother, who died intestate, and to whom no representative had been appointed, his next-of-kin being out of the jurisdiction, and no relief being prayed for as regarded his interest, *Held* that it was not necessary to raise a representative to him as a necessary party to the suit. *White v. Hoddle*, 6 V.L.R. (E.,) 82, 95; 2 A.L.T., 9.

Partners—Joint and Several Liability—Supreme Court Rules, Cap. V., R. 29.]—Where a trustee brings a suit against one member of a partnership firm, who has received trust monies with notice from a deceased co-trustee and misapplied them in his firm's business, he may proceed against one of the partners jointly liable without making the other partner a party, but the bill should state the joint liability or facts from which it may be inferred. *Mackay v. Caughey*, 1 V.L.R. (E.,) 56.

Suit to Set Aside Transfer to Married Woman—Husband.]—In a suit to set aside a transfer of real estate to a married woman, as fraudulent and void, the husband is not a necessary party. *Shiels v. Drysdale*, 6 V.L.R. (E.,) 126; 2 A.L.T., 14.

Necessary and Proper.]—A mere grantee to uses, without any legal estate, need not be joined as a party. Therefore, where land was by indenture released to A. to hold to such uses as B. should appoint, and subject thereto, to the use of B., B. granted the land to C. to the use of D. In a suit against B. and D. to affect the land:—*Held* that C. was not a necessary party, as the legal estate was not vested in him. *White v. Hoddle*, 6 V.L.R. (E.,) 82, 95; 2 A.L.T., 9.

Necessary and Proper.]—A mortgagee of the equitable interest of a devisee under a will, is not a necessary, though not an improper party to a suit by a person claiming the property devised as having been acquired by the testator's fraud. The executor sufficiently represents the property. The Court is very unwilling to burden the plaintiff with the costs of such a party. *Bennett v. Tucker*, 8 V.L.R. (E.,) 20; 3 A.L.T., 108.

Who Should be Plaintiffs.]—*Semble*, that the Attorney-General should not be joined with other plaintiffs in a bill and information to restrain persons from mining on private property where the defendants are committing different injuries to the different plaintiffs, *e.g.*, where the Attorney-General is injured by the removal of gold, a municipal corporation, that had been joined as a plaintiff, by the damage to streets, and a private land-owner, also a co-plaintiff by damage to his property. *Attorney-General v. Rogers*, 1 V.R. (E.,) 132; 1 A.J.R., 120, 149.

Joinder.]—*Per* Full Court.—The Attorney-General and freehold owners of land may join in a suit to restrain a trespasser from mining for gold on the land. *Attorney-General v. Lansell*, 8 V.L.R. (E.,) 155, 172; 3 A.L.T., 141.

And *see Attorney-General v. Gee*, and *Attorney-General v. Scholes*, *ante column* 912.

When Objection for Misjoinder should be Taken.]—In an administration suit by some on behalf of themselves and a class, against executors charging loss of the estate, which had been occasioned by the misconduct of one of the class, G., employed by executors as their agent, on motion by executors before answer insisting that such agent should be separated from the class, and made a co-defendant, *Held* that the executors as principals might be sued alone, and that in any case the objection as to the misjoinder of G. should not be raised at that stage, as if sustainable the bill would require amendment, and as to propriety of making G. a defendant, that could be raised better after evidence taken. On the hearing an order was made making G. a co-defendant, not upon ground that defendants were of right entitled to it, but upon its appearing on the facts more convenient. *Graham v. Gibson*, 5 V.L.R. (E.,) pp. 103, 108.

Misjoinder—Amendment—Supreme Court Rules Cap. VI., Rule 20.]—In a creditor's suit for administration, it appeared on the taking of evidence that J., one of the two plaintiffs suing as creditors, was a partner in a firm, and that the debt in respect of which he was joined as a plaintiff, was a debt due to the firm. *Held* at the hearing that J. was misjoined as a plaintiff, and his partner could not then be joined; that J.'s name must be struck off the record; that such amendment must at once be made on the record, and that the decree should recite that the record was amended by consent. *Bailey v. Wright*, 7 V.L.R. (E.,) 111.

Defendant Objecting that Parties are not Joined not Precluded from Objecting to their being Joined.]—A defendant who has objected that

certain persons are necessary parties to a suit, which persons are afterwards joined as co-plaintiffs, is not precluded from afterwards objecting that such persons have no equitable rights in the subject matter of the suit, and are improperly joined as co-plaintiffs. *Per Stawell, C.J.*:—"He (the defendant) may properly object that the owners of land were, so far as appeared from the pleadings, necessary parties; and yet afterwards when those persons had been made parties, and all the facts had been proved, consistently object that their interests and those of the Attorney-General were diverse, and that all could not be joined in the same bill." *Attorney-General v. Lansell*, 8 V.L.R. (E.,) 155; 3 A.L.T., 141.

Misjoinder—Transferor of Mining Lease Suing with Transferees.]—A., a lessee of a mining lease, was convicted of forgery 16th March, 1882, and B. was under Sec. 8 of Act No. 627 (abolition of forfeiture for felony) appointed curator and, on 31st August, applied to be registered as proprietor of the lease. Early in September, A. having served his sentence, lodged a caveat and, on 13th September, transferred his estate and interest in the lease to B. and D. Suit by A., C., and D. to restrain B.'s registration. *Held*, on demurrer, that A. as a registered proprietor who had parted with his interest, but the transfer of which was not registered, should be a party to the suit in order to convey, and that he was not misjoined as plaintiff. *Mitchell v. M'Dougal*, 9 V.L.R. (E.,) 13; 4 A.L.T., 114.

Objection for Want of, when Sufficient.]—An objection by answer for want of parties is sufficient if the answer unequivocably designates the class of persons who ought to be made parties, although their names are not mentioned. *Cushing v. The Lady Barkly G.M. Coy.*, 9 V.L.R. (E.,) 108, 124; 5 A.L.T., 98.

Objection to Misnomer.]—In equity, as at law, the only person who can take advantage of the misnomer of a defendant is the person misnamed, and it is no objection in the mouth of a co-defendant. *Dancker v. Porter*, 1 W. & W. (E.,) 313, 331.

Plaintiffs Suing for Interest which they have Mortgaged.]—Where plaintiffs are claiming an interest they have mortgaged to others, the mortgagees are necessary parties, for it is a general principle that if a plaintiff has transferred his own rights of suing to another person, he shall not sue without making that other person a party. *Evans v. Guthridge*, 2 W. & W. (E.,) 83, 88.

Persons Possessing Paramount Rights—Rights the Subject of an Account.]—It is not necessary to make persons whose rights are confessedly paramount, parties to litigation between persons having claims subordinate to those rights; and the mere fact of the rights of those paramount persons being the subject of an account, does not render it necessary to make them parties. *Ibid*, p. 89.

Objection for Want of Parties Raised in Answer, and Disregarded—Costs.]—Where an objection for want of parties is raised by answer and disregarded, and is taken at the hearing and allowed with liberty to amend, the Court will only give leave to amend upon terms of paying costs of and occasioned by the setting down for hearing. *Ibid.*

Where a Party is out of the Jurisdiction.]—In a trespass suit by a mortgagee and one of two mortgagors of a mining claim, the other mortgagor being out of the jurisdiction, it is sufficient to allege that fact without naming him as a defendant; and where such an allegation was not supported by the evidence, the Court referred it to the Master to inquire whether the co-mortgagor was out of the jurisdiction, and if so, to take the accounts directed by the decree. *Mulcahy v. The Walhalla G.M. Co.*, 5 W.W. & A'B. (E.,) 103.

Averment in Bill of one Defendant being out of Jurisdiction—Return of Defendant.]—In an injunction suit against two mortgagees, R. and B., to restrain them from transferring certain land sold irregularly under the Act No. 301, the bill averred that R. was out of jurisdiction. R. returned before hearing. *Held* that R. was a necessary party, and that the pleadings should be amended by striking out an averment that R. was out of the jurisdiction, and that a summons should issue to R. to answer, &c. *M'Donald v. Rowe*, 3 A.J.R., 90; 4 A.J.R., 67.

Parties in Administration Suits.]—*See* cases *ante columns* 16, 17.

When Attorney-General a Necessary Party.]—*See* cases *ante columns* 69, 70.

When Board of Land and Works a Necessary Party.]—*See* cases *ante columns* 115, 116.

In Suits and Actions by and against a Company.]—*See* cases *ante columns* 161, 162, 163.

In Suits and Actions by and against a Corporation.]—*See* cases *ante column* 232.

In Suits to Set Aside Fraudulent Conveyances and Settlements.]—*See* cases *ante columns* 476, 477.

In Suits in respect of Mining Matters.]—*See* cases *ante columns* 907, 910, 912, 913, 914.

In Redemption and Foreclosure Suits.]—*See* cases *ante columns* 1067, 1069.

In Partnership Suits.]—*See* cases *ante columns* 1138, 1139.

In Suits for Specific Performance.]—*See post* under SPECIFIC PERFORMANCE and VENDOR and PURCHASER.

(31) *Petition.*

Petition under "Statute of Trusts."]—*See post* under TRUST and TRUSTEE.

(32) *Plea.*

Validity of—Bill Alleging Fraud and not Pleading Facts as Evidence thereof.]—Bill by contractor against the Board of Land and Works

alleging that the plaintiff entered into a contract under seal with the board; that the plaintiff had been paid some of the moneys due to him, but that the board refused to pay the balance on the ground that the plaintiff did not produce the certificate of C., the chief engineer, as required by the contract; that C. withheld the certificate because plaintiff refused to do certain work, which the bill alleged was not comprised in or required by the contract. The bill alleged collusion between the board and C., and fraud on the part of the latter in not giving the certificate; and it prayed for a declaration that the withholding the certificate was a fraud on the plaintiff, and that the plaintiff was entitled to receive all moneys which he would have been entitled to if such certificate had been granted, and for an account and payment. Plea that no moneys were due till the certificate had been given; that no certificate had been given; that it was not by C.'s default that the certificate had not been given, and denial of charges of fraud and collusion, or that defendants were endeavouring to compel plaintiff to perform works not included in the contract. The plea was accompanied by an answer denying any default in C., or any aiding or abetting or collusion. *Held* a good plea, none of the facts alleged in the bill being alleged as evidence of the alleged fraud. *Ramsay v. Board of Land and Works*, 5 W.W. & A'B. (E.,) 16.

Overruled.]—Where a plea supported by an answer is overruled, the defendant is bound by the answer so far as it goes, but may have liberty to answer such parts of the bill as are not answered. *Brougham v. Melbourne Banking Corporation*, 3 V.L.R. (E.,) 190.

When a plea is simply overruled it is conclusive, and the same defence cannot be raised again at the hearing. *Ibid*, p. 202.

(33) *Receiver—See* RECEIVER.

(34) *Revivor and Supplemental Order.*

Upon Marriage and Birth of Parties—Rules of Court, Cap. V., Rules 13, 24.]—After a decree for sale in an administration suit, under which decree a number of infants were interested, another child in the same interest was born. More than three months after the birth of the child an application was made on behalf of the plaintiffs to revive the suit. *Held* that the jurisdiction of a judge in Chambers under the Rules of Court, cap. v., rules 13 and 24, to make an order to revive a suit which has abated by reason of change or transmission of interest on the birth of a child, cannot be exercised after the expiration of the three months limited by the rule; and where the parties come too late, they are driven to what was the practice prior to the rules, and must proceed by supplemental bill in the nature of a bill of revivor. *Bank of Australasia v. Balbirnie Vans*, 1 W. & W. (E.,) 85.

Supplemental Bill where Necessary.]—*See Watson v. Kyte, ante column* 1172.

Supplemental Answer.]—*See Phelan v. O'Shanassy, ante column* 1161.

Supplemental Suit—Evidence—Parties.]—In a supplemental suit, of the nature of a bill of revivor, to bring before the Court an infant born after, but interested in the decree in the original suit, the regular course is to set the supplemental suit down for taking evidence, and to obtain a supplemental decree; but the evidence need only be the former proceedings and the date of the birth of the child, and the parties need only be the plaintiff in the original suit and the infant. *Bank of Australasia v. Gibb*, 1 W. & W. (E.,) 95.

Liberty to Revive.]—Liberty will be given to a creditor to revive a creditor's administration suit in which a decree has been obtained unless the plaintiff does so within a limited time. *Lonsdale v. Batman*, 1 W. & W. (E.,) 341.

Decree in Suit Revived after taking Evidence.]—After evidence taken in a suit by a legatee against executors, one executor died, and the suit was revived against his representatives, who admitted assets of his and of the original testator. Notwithstanding that the defendants had had no opportunity to answer, a decree was made against them and the surviving executor, for payment of legacy and interest, and plaintiff's costs of suit. *Baylee v. Morley*, 4 V.L.R. (E.,) 33.

Order for Revivor.]—In a suit for administration by a sole beneficiary against trustees, a new trustee was appointed after decree, and an order made vesting the estate in him in place of one of the original trustees; the other original trustee applied for an order of revivor. With the consent of plaintiff, order made. *Grant v. Grant*, 5 V.L.R. (E.,) 314.

Death of Party between Argument and Judgment.]—Where a party to a suit dies after judgment reserved, the Court may proceed to give judgment without any revivor being necessary. *Colonial Bank of Australasia v. Pie*, 6 V.L.R. (E.,) 186, 191, 193.

Supplemental Order—Amendment of Decree.]—*See Attorney-General v. Huon, ante column* 1174.

(35) *Security for Costs—See* COSTS.

(36) *Service of Process on Parties out of the Jurisdiction, and Substituted Service.*

Infant Defendant.]—The Court will, under 13 Vict. No. 31, Sec. 1, make an order for personal service of an infant defendant residing in England, and without any guardian. *Colley v. Colley*, 1 W. & W. (E.,) 101.

Substituted Service—Infant Defendant out of Jurisdiction—Trustees.]—Upon motion for leave to substitute service upon an infant defendant out of the jurisdiction by serving trustees of property the subject matter of the suit, and in which the infant was beneficially interested, *Held* that the trustees were not the agents of the absent infant, or persons selected by him, and order refused; but order made to serve infant out of jurisdiction to be verified before a commissioner, such service to be accompanied by a notice that if no application were made on

infant's behalf to appoint a guardian, the plaintiff would apply to have a nominee of his own appointed guardian. *Ross v. O'Callaghan*, 2 W. & W. (E.) 157.

The Court has no power to make an order for service of the bill out of the jurisdiction where the cause of suit arose out of Victoria, and the relief sought was entirely personal against the defendant out of the jurisdiction. *Loring v. Brown*, 3 W.W. & A'B. (E.,) 94.

Service Out of Jurisdiction.]—The Court has no jurisdiction to order service out of jurisdiction of a bill in a partnership suit where the business is carried on out of Victoria, and even if business were carried on partly in Victoria and partly out of it, the Court would have no jurisdiction. *Buttner v. Hallenstein*, 3 V.R. (E.,) 25; 3 A.J.R., 9.

Service to be Verified before Commissioner.]—Motion for leave to serve defendants resident in Ireland granted; the order directed service to be verified before a commissioner of the Supreme Court of Victoria in Dublin. *Solly v. Atkinson*, 5 A.J.R., 19.

Service Out of Jurisdiction.]—Upon an application for an order for leave to serve a defendant out of the jurisdiction, it should appear that there is at the place where service is sought to be effected a proper person before whom the fact of service may be duly verified. *Dodgson v. Ginn*, 4 V.L.R. (E.,) 9.

Service of Bill Out of Jurisdiction— "Equity Practice Statute," Sec. 3—Time for Answering.]—In a foreclosure suit affecting land in Victoria, subsequent mortgagees were made parties. The affidavit of plaintiff's solicitor stated that the defendant to be served was resident in London, and that commissioners of the Supreme Court resided there. An order for service was made, the service to be verified before a commissioner, and the answer to be delivered within three months of service. *Rhind v. Clarke*, 1 A.L.T., 179.

Substituted Service—General Jurisdiction.]—Upon a motion under the general jurisdiction of the Court, leave was given to substitute service of the bill and summons upon an agent under power who was empowered by the defendant to receive the rents of the property, the subject matter of the suit, and bring or defend any actions or suits referring to it. *Duhig v. Shannon*, 1 W.W. & A'B. (E.,) 25.

13 Vict., No. 31, Sec. 1—Agent.]—The 13 Vict., No. 31, Sec. 1, enabling the Court to authorise substituted service "upon the receiver, steward, agent, or other person receiving or remitting the rents of the premises, if any, the subject matter of the suit," does not, where the property is in fact producing no rent, authorise substituted service upon an agent empowered to receive the rents of the property in question. *Ibid.*

Service upon the attorney-at-law of one of the defendants in an equity suit out of the jurisdiction, deemed good service. *Lonsdale v. Batman*, 1 W. & W. (E.,) 341.

Substituted Service.]—In a partnership suit substituted service of the bill will not be ordered upon a person holding merely a general power of attorney from a defendant out of the jurisdiction. *Buttner v. Hallenstein*, 3 V.R. (E.,) 25; 3 A.J.R., 9.

Substituted Service—Service on Defendant in Vacation before he left the Jurisdiction.]—Motion for leave to substitute service on defendant C., who was in England. He had been served before leaving, but such service was set aside as having been made during vacation. *Ordered* that bill be served on C.'s solicitor by way of substituted service. *M'Phee v. Croaker*, 5 A.J.R., 4.

Substituted Service — Lunatic Defendant.] — Where a lunatic defendant was resident out of the jurisdiction, an order for substituted service of the bill upon his committee within the jurisdiction was refused, but an order was made for service upon the lunatic in England under Act No. 242. ("*Equity Practice Statute* 1865," Sec. 3.) *Allan v. Wilkie*, 1 V.L.R. (E.,) 6.

Substituted Service—Amended Bill—Appeal—Discretion—"Supreme Court Rules," Cap. V., Rules 11, 12, 33.]—When an order is made allowing a demurrer and giving plaintiffs liberty to amend within a month, and in default that bill should be dismissed with costs, that does not, in the absence of amendment within time limited, deprive the Court of its inherent jurisdiction to allow substituted service of an amended copy of bill after the time limited. Where plaintiffs amended bill within the time limited but did not serve one of the defendants till after the time, and after the time applied by motion for leave to serve this defendant's solicitor, *Held*, by *Molesworth, J.*, that the Court had jurisdiction to entertain application, but exercising his discretion he should refuse motion. By *Full Court*, that court had jurisdiction and had power to control discretion of Primary Judge, and, exercising its discretion, it allowed motion, extending time for amending to six months from date of order, but made no order as to service. *Semble, per Molesworth, J.*, that personal service of an amended bill is not necessary under rule 33, cap. v. of "*Supreme Court Rules.*" *Learmonth v. Bailey*, 1 V.L.R. (E.,) 191.

Substituted Service—Notice of Motion given to Agent.]—*Semble*, that where a defendant is out of the jurisdiction, and the plaintiff wishes to serve the bill upon his agent, notice of motion for substituted service on his agent should be given to the agent. *Clarke v. Were*, 2 V.L.R. (E.,) 43.

Substituted Service—Defendant Out of Jurisdiction.]—S., a defendant, was out of jurisdiction. B. was his attorney under power. Motion for substituted service upon B. refused. Court requiring an application to accept service to be first made to B. *Sargood v. Rutherford*, 5 V.L.R. (E.,) 187.

Substituted Service—Form of Order—Costs.]—In making an order for substituted service of the bill upon a defendant, the Court followed the form adopted in substituted service of an

order *nisi* in insolvency—*i.e.*, by delivery of bill on any adult at the dwelling-house, or by posting on the door. Costs of such an order are usually costs in the cause. *Danby v. O'Keefe*, 6 V.L.R. (E.,) 69; 1 A.L.T., 178.

Substituted Service—Defendants out of Jurisdiction.]—Order made for substituted service of bill on persons who had acted as solicitors for defendants in a prior suit with reference to the same estate, and who were now in communication with them with reference to the matter. *O'Sullivan v. Huon*, 7 V.L.R. (E.,) 109.

Substituted Service.]—The plaintiff, not being able to find the defendant at his last known place of abode, and having reason to believe that he had left the colony to avoid being served with the bill, moved for leave to substitute service of the bill and writ upon a solicitor who had acted for defendant in a former transaction relating to the land, the subject of the suit, and who was believed to be in communication with the defendant. Leave granted. *Howse v. Campbell*, 7 V.L.R. (E.,) 145.

Substituted Service—"Equity Practice Statute 1865" (No. 242,) Sec. 4.]—*Quære*, whether it is competent for a person on whom an order for substituted service has been made to move to set such order aside. *Held* that where a defendant cannot be served and there are reasons for believing that he is keeping out of the way to avoid service and an order for substituted service has been made upon a solicitor who had acted for him in a prior transaction relating to the subject matter of the suit, such solicitor on moving to set aside the order must show that he is not able to communicate with the defendant. *Ibid.*

(37) *Settled Estates—See* SETTLEMENTS.

(38) *Staying of Proceedings.*

In a Suit by Next Friend of Infants.]—Where the Court was of opinion that a suit had been instituted by a mother, as next friend of infant plaintiffs, for her own purposes, and to work out her own private feelings and motives, and not for the benefit of the infants, order made on motion by the defendants staying all further proceedings, but without costs. *Murphy v. Kelly*, 2 V.R. (E.,) 139; 2 A.J.R., 128.

On Appeal to Privy Council—Security.]—*See United Hand-in-Hand and Band of Hope Coy. v. National Bank of Australasia, ante columns* 36, 37.

(39) *Stop Order.*

When Granted or Refused — Administration Suit — Assignment — Creditor of Assignor.]—J.G.W. died intestate in 1859, leaving a widow and children, and possessed of realty and personalty. The widow was entitled to dower out of the real estate. The widow administered to the estate, and in 1860 one of her children instituted a suit for the general administration of the estate. In 1862 the widow married W.M.A., and prior to the marriage executed a settlement of her interest as doweress and next-of-kin, by which she reserved to herself an absolute power of appointment over the sum of £15,000. She died in 1867, having appointed £5000 to her husband, and having appointed him and the trustees of her settlement, executors and trustees of her will. By deed, in 1868, W.M.A. mortgaged the legacy of £5000 to the National Bank of Australasia to secure a debt due by him to the bank. After the death of the widow the suit which had been instituted in 1860 for administration of the intestate's estate was revived against W.M.A., the administrator *de bonis non* of J.G.W., the trustees of the widow's settlement and executors of her will. A receiver was appointed, and decree and order on further directions made, but the share to which the widow was entitled had not been ascertained, nor had dower been assigned, or any assets distributed amongst the next-of-kin entitled, and nothing had come to the hands of the widow's trustees or executors. In the progress of the suit large sums of which the widow was entitled to a share had been paid into court, amounting to £58,000, which was standing to the credit of the cause. On motion by the National Bank, upon affidavit of the above facts, and upon notice to all parties, for a stop order, *Held* that the order sought by the bank would embarrass the administration of funds in which many people besides W.M.A. were interested, and motion refused with costs. *Ware v. Ware, Ware v. Aitken*, 1 V.R. (E.,) 1; 1 A.J.R., 3.

Administration Suit—Privy Council Decree.]—An administratrix, widow of the intestate, obtained an overdraft from a bank, the bank relying upon a lien upon her share of the intestate's estate; but her share and dower were upon her second marriage vested in trustees. In a suit, which on appeal went to the Privy Council, the Privy Council directed that the bank was entitled to a lien upon all arrears of dower and upon the widow's share of personalty, and should be allowed to apply for payment thereout in the administration suit. The bank applied for a stop order to prevent payment to the trustees of the settlement, and the Court with much hesitation and in deference to the decree of the Privy Council made the order as required. *Ware v. Ware*, 4 A.J.R., 121.

Where a fund is standing in the name of the Master to the credit of a cause, the Court will, upon the application of a mortgagee of a part thereof, with the consent of the mortgagor entitled thereto, grant a stop order thereon. *Chadwick v. Bennett, in re Chadwick and Robinson*, 4 V.L.R. (E.,) 227.

The Supreme Court in its Equitable jurisdiction adopts the practice of the Court of Chancery, as in the Orders of 1841, with reference to stop orders. *Ibid.*

When Granted.]—Plaintiff, entitled for his life to the income of debentures standing to the credit of the cause, moved, in conjunction with his mortgagees, for a stop order and for an order directing the future income to be paid to the attorney under power of the mortgagees, who were out of the jurisdiction. The Court granted the stop order, requiring the attorney, who was also plaintiff's agent for receiving the income, to be liable for any costs or expenses occasioned to any party to the cause thereby; but refused

the order for the payment of future income to the mortgagees. *Green v. Sutherland*, 6 V.L.R. (E.,) 1; 1 A.L.T., 122.

(40) *Suit.*

(*a*) *Supplemental Suit—See* REVIVOR, *ante column* 1195.
(*b*) *Generally.*
(*c*) *Undefended Suit.*

(*b*) *Generally.*

Compromise of Suit—Consent of Party.]—Where an order was made for the compromise of a suit subject to the consent of a party for whom there would probably be nothing in any event, the Court refused to dispense with such consent. *London Chartered Bank v. Lempriere*, 4 A.J.R., 173.

No Affidavit of Service of Notice of Setting Down for Hearing—Costs.]—Where upon a suit being called on for hearing the plaintiff was not prepared with an affidavit of service of notice of having set the suit down for hearing upon a defendant who did not appear, the cause was ordered to stand over, plaintiff to pay the costs of the day to a defendant who had appeared. *Yandell v. Hector*, 3 W.W. & A'B. (E.,) 173.

Non-Appearance of Certain Defendants—Defendants out of Jurisdiction.]—A suit by a single plaintiff against a number of defendants came on for evidence. Some of the defendants appeared, others did not. There was no allegation in the bill that any of the defendants were out of the jurisdiction. On an objection being taken by defendants under Supreme Court Rules cap. vi., r. 14, that plaintiff had not proved service of bill upon all the defendants, or service of notice of suit being set down for hearing, *Held* that the defendants, who had appeared, could not at that time take the objection, and that plaintiff might go on with his case, but he must prove proper service on the defendants before the hearing; that where a defendant is out of the jurisdiction, it should be averred in the bill, and proved as part of the plaintiff's case. *Honey v. Bucknall*, 6 W.W. & A'B. (E.,) 327.

Judgment pro confesso—Making up Roll—Order Striking out Co-Plaintiffs.]—Motion that a bill be taken *pro confesso*. One defendant had demurred to the bill, but the demurrer was overruled in February, 1883, but up to the date of the present motion (December, 1884) no copy of the order overruling it had been served on the defendant, who, with the other defendants, in consequence concluded that the suit was abandoned. An order had been made by the Court to have the names of two out of three plaintiffs struck out. The remaining plaintiff set the suit down to be taken *pro confesso*. *Held* that a decree *pro confesso* would not be made since the case had been allowed to sleep so long, but that the case should stand over, defendants being at liberty to answer; and that the order for striking out the names of the plaintiffs should be endorsed on the roll of pleadings. *Mitchell v. M'Dougall*, 10 V.L.R. (E.,) 340.

(*c*) *Undefended Suit.*

Verification of Bill—No Answer Required from Defendant—Affidavit.]—Though no answer is required by the plaintiff from a defendant who has left a suit undefended, it is still necessary that the bill should be verified against him, since he will be bound by the decree. The affidavit verifying the bill should be made by the plaintiff himself, unless owing to his absence or to the facts stated being more immediately in the knowledge of others, the affidavit of some other person is necessarily or properly substituted. *Palmer v. Bronckhorst*, 1 W.W. & A'B. (E.,) 61.

Verification—Supreme Court Rules, Cap. VI., Rule 12.]—Under the Rule of Court, requiring the bill to be verified by affidavit in the case of an undefended suit, an affidavit against the non-defending parties is as necessary, when some only of the defendants answer, as if the suit were wholly undefended. Where there are several plaintiffs, all should join in the affidavit or should assign reasons in the affidavit made by some of them why the others do not join. *Evans v. Guthridge*, 2 W. & W. (E.,) 83, 85.

Standing Over—No Affidavit to Verify Bill—Costs.]—Where, upon a suit being called on for hearing, the plaintiff was not prepared with an affidavit verifying the bill as against a defendant who had not answered, the cause was directed to stand over, and the plaintiff ordered to pay the costs of the day to the defendant, who did appear. *Stratford v. Glass*, 3 W.W. & A'B. (E.,) 162.

Foreclosure Suit.]—In an undefended foreclosure suit the bill must be verified by all the plaintiffs. *Ronald v. M'Pherson*, 1 A.J.R., 105.

Verification—"Supreme Court Rules," Cap. VI., R. 12.]—The plaintiff in an undefended suit should always make the affidavit verifying the bill against defendants who do not appear, unless there are some special reasons appearing why he cannot, or unless some other person is a more competent witness. *Phelps v. Pusey*, 4 V.L.R. (E.,) 258.

Verification by Formal Defendant.]—Where a formal defendant, *e.g.*, the Registrar of Titles, leaves a suit undefended, the bill must be verified by affidavit against him. *Archibald v. Archibald*, 5 V.L.R. (E.,) 181.

Affidavit Verifying Bill.]—Where a bill by a banking company is undefended, an affidavit by an inferior officer, upon information and belief, is insufficient. The bill should be verified by an affidavit by an officer having the best means of information. *Bank of Victoria v. Rawling*, 6 V.L.R. (E.,) 111.

Verification—Defendants in Same Interest as Plaintiff.]—Where defendants leave a suit undefended, it is necessary to have the usual affidavit verifying the bill against them, although they may be in the same interest as the plaintiff. *Attorney-General v. Shire of Wimmera*, 6 V.L.R. (E.,) 162.

Verification—Who may Make Affidavit—Next Friend.]—The next friend of infant plaintiffs is not a proper person to make an affidavit verifying the bill in an undefended suit, unless the

facts are within his own knowledge. It should be done by some person well informed thereon. *Cameron v. Macnamara*, 6 V.L.R. (E.,) 236.

Verification—Infants—Feme Covert.]—Where a bill is filed by several infants, one being a *feme covert*, by their next friend, and some of the defendants do not appear, the bill must be verified, as against them, by the affidavit of the next friend and of the infant *feme covert*, and there must also be an affidavit of the infancy of the plaintiffs. *Swan v. Seal*, 10 V.L.R. (E.,) 57, 60.

Order in Undefended Suit for Payment of Balance Due to Cestuis que Trustent bringing Suit without Prejudice to Rights of other Cestuis que Trustent.]—*Buggy v. Buggy*, *ante* column 16.

Effect of Leaving Suit Undefended as to Statements in the Bill thereby Admitted.]—*Per Molesworth, J.*—When a defendant admits the statements of a bill by leaving the suit undefended, his admission can only be held conclusive for the purpose of granting the relief specifically prayed; the plaintiff is not entitled at the hearing to a different decree to that asked by the prayer. *Henderson v. Ellis*, 3 W.W. & A'B. (E.,) 9.

Costs—Where not Prayed for.]—In an undefended suit for specific performance against the official assignee of one of the contracting parties, where the bill did not specifically pray for costs, the Court refused to make any order for costs against the defendant. *Curwen v. Mullery*, 6 V.L.R. (E.,) 143; 2 A.L.T., 37.

(41) *Taking Evidence.*

Further Evidence after Verdict.]—In an appeal to the Full Court upon an interlocutory application in a cause, issues on certain points were sent to a jury. Subsequently an application was made to the primary judge to set the case down for taking further evidence on certain points which had not been sent to the jury, and as to the question of costs. *Held* that further evidence might be taken, but was to be restricted to the points not sent to the jury, and to evidence affecting costs, the finding of the jury being final and conclusive on the points sent to it, but not as to costs without entering into the further merits or demerits of the case. *Learmonth v. Bailey*, 2 V.L.R. (E.,) 85; affirmed on appeal, *Ibid*, 238.

Taking Evidence.]—The practice in equity is the same as at law, and each party may tender evidence in support of affirmative issues on his side, but plaintiff may forbear to meet affirmative issues lying on defendant, and may, if defendant give evidence on his affirmative issues, rebut it afterwards. *Hicks v. Commercial Bank of Australia*, 5 V.L.R. (E.,) 228.

(42) *Transfer of Funds into and out of Court.*

Payment into Court—Person's Beneficial Interest in Fund exceeding Amount in his Hands.]—In an administration suit in which the administrator of the realty was plaintiff, and the administrator of the personalty was defendant, the accounts showed that all debts had been paid, and that a balance of £400, the proceeds of sale of realty, was in the plaintiff's hands. Certain credits and charges were claimed by the plaintiff as against this sum but were disallowed, although no report had been drawn up. The plaintiff's interest in the whole fund exceeded the balance in his hands. Defendant moved for an order for payment into Court as shown by the accounts and disallowances. It appeared that the costs already incurred and those likely to be incurred by the plaintiff would greatly decrease the balance. Motion refused under the circumstances. *Held* that, generally speaking, if the beneficial interest of a person in an entire fund exceeds the amount of the fund in his hands, that is an answer to an application to compel him to pay that amount into Court. *Semble*, that the existence of the administration bond, there being no imputation of defective security, was also an answer. *Molloy v. Molloy*, 2 V.R. (E.,) 173.

Payment in—Motion for—Premature.]—In a suit for admistration the administrators had certain funds in their hands. The next-of-kin, who were not parties to the cause, obtained an order committing to them the carriage of the decree in the office, and, before they obtained an order for the carriage of the suit before the Court, they applied, on motion, for an order directing the administrators to pay into Court the funds in their hands. *Held* premature and unsustainable. *Attorney-General v. Huon*, 5 V.L.R. (E.,) 119.

Refusal of Partner to Account—When Order for Payment into Court Made.]—*Hart v. Belinfanté*, *ante* column 1135.

Payment into Court—Fraudulent Conveyance of Equity of Redemption Set Aside—Sale by Mortgagee—Motion for Payment in of Surplus.]—A decree having been made setting aside conveyance of equity of redemption as fraudulent against the plaintiff, a creditor, but no order having been made changing possession, the bill not seeking interference with defendant's possession, part of the property was sold under a mortgage by a building society, and a surplus of £90 remained in the hands of the society. The Court refused, on a summary application made *ex parte*, to order the defendant, who had received the surplus from the society, to pay the money into Court. *Colonial Bank of Australasia v. Pie*, 7 V.L.R. (E.,) 28.

Payment Out of Court—Attorney under Power of Person Entitled.]—When the Master has been directed to pay certain moneys to certain persons, the Court will direct him to recognise and pay the duly authorised attorney under power of such persons. *Green v. Sutherland*, 2 V.L.R. (E.,) 71.

Payment Out—To whom Made.]—The Court will only order payment of money out of Court to the party entitled, or his attorney under power. Payment will not be ordered to the solicitor in the suit. *Cameron v. Macnamara*, 8 V.L.R. (E.,) 284; 4 A.L.T., 37.

Payment Out of Court—Application for—Proceeds of Sale under a Decree—Special Report—

Further Directions.]—In a suit instituted by a mortgagee as creditor, on behalf of himself and all other creditors of the deceased mortgagor, a decree had been made, directing an account of what was due to the plaintiff for principal and interest on his mortgage security, and ordering a sale of the mortgaged premises and the payment of the purchase-money into Court. The decree also directed the usual accounts of the personal estate, and an inquiry as to any other real estate. The Master reported specially that £2206 14s. was due to plaintiff on the mortgage, and that the premises had been sold, and realised the sum of £1243, which was paid into Court. On the report being presented for confirmation, the plaintiff, with the consent of the only defendant who defended, applied for an order for payment out of Court to plaintiff of the amount realised by the sale, there being no other estate, real or personal, to bear the expense of prosecuting the inquiries under the decree. *Held* irregular, and that the proper course was to set the cause down for further directions on the special report. The suit being subsequently set down for hearing on further directions, a decree was made as applied for. *Brown v. Meldrum*, 1 W. & W. (E.,) 129.

Per Molesworth, J.—"I think a cause may be set down for further directions on a special report, or in any stage of the proceedings, and I think that is the proper course to be pursued here." *Ibid.*

Payment Out of Court.]—Payment out of Court of a sum of money paid in by executors as the share to which a beneficiary was entitled, such beneficiary not having been heard of for some time, should be applied for by petition under Act No. 234 ("*Statute of Trusts* 1864"); and on petition by executors for payment out to executors who wished to distribute it among other beneficiaries, order for payment out made to executors to distribute it on their own responsibility. *In re Bourke's Trusts*, 5 V.L.R. (E.,) 281; 1 A.L.T., 91.

Payment Out—Application for—"Statute of Trusts 1864," Sec. 56.]—Where money had been paid into Court by the executors of a deceased person under Sec. 56 of the "*Statute of Trusts* 1864," till it was ascertained whether the person entitled was living or dead, and the executors had satisfied themselves that he was dead, and moved to have the money paid out to those entitled, *Held* that there were not sufficient materials to enable the Court to form a conclusion; that the application should be made by petition, as required by the Act, and not by motion; and that the case did not come under the general rule of Court, that an application might be made by notice where a petition was sufficient. *In re Benson*, 1 A.L.T., 75.

"Statute of Trusts 1864," Secs. 56, 57—Moneys Paid in under Sec. 56—Application for Payment Out—O. LV., R. 2.]—Summons in Chambers to have certain payments made out of funds paid into Court by an administrator under Sec. 56 of the "*Statute of Trusts* 1864" (No. 234.) *Per Molesworth, J.*—The application must be made by petition as provided by Sec. 57 of the "*Statute of Trusts.*" *Re Stanton and the "Statute of Trusts,"* 6 A.L.T., 33.

Service of Petition for Payment Out under Act No. 234.]—*In re Edwards*, 4 V.L.R. (E.,) 109; *post* under TRUST AND TRUSTEE—Funds in Court.

Payment Out — Service of Notice of Motion for.]—Upon motion in an administration suit, for payment out of Court of the share of a beneficiary, the parties to the suit were served. *Held*, such service was proper; but that as they had no grounds of opposition to the motion, their appearance was unnecessary, and they were not entitled to the costs thereof out of the share. *Punch v. Punch*, 6 V.L.R. (E.,) 161; 2 A.L.T., 40.

(43) *Writs.*

Habere facias Possessionem—When Notice of Motion for should be Given.]—After execution of a writ of *habere facias* in ejectment, notice of motion for an injunction to restrain execution of the writ is too late. But, *semble*, if possession was taken after service of notice of motion, an order might be made to reinstate the plaintiff in possession. *Innis v. Innis*, 2 V.R. (E.,) 109.

Distringas — Setting Aside.]—For circumstances in which a writ of *distringas* issued against a corporate defendant for an alleged contempt was set aside on motion supported by affidavits, *see United Hand-in-Hand and Band of Hope Coy. v. National Bank of Australasia*, 4 V.L.R. (E.,) 259; *ante column* 237.

Writ of Assistance—When Granted.]—An order had been made for the delivery up to defendant trustees of a certain hotel and chattels by the plaintiff, which plaintiff had not complied with. Upon motion an order was made for grant of a writ of assistance to put the trustees in possession of hotel and chattels. *Bryant v. Patten*, 4 V.L.R. (E.,) 218.

When Granted.]—Where a mortgagor has redeemed his property upon suit, and finds a tenant of the mortgagee in possession, he should, if he desire to recover possession, proceed without delay. But having, after a lapse of time, brought an action against the tenant for use and occupation, and accepted a sum as for rent, *Held* that having treated the tenant as tenant, he could not obtain a writ of assistance or of *habere*. *Slack v. Atkinson*, 6 V.L.R. (E.,) 32; 1 A.L.T., 139.

Not Granted on an Ex Parte Application.]—A mortgagor redeemed his property upon suit, and finding a tenant of the mortgagee in possession, moved *ex parte* for a writ of assistance to turn him out. *Per Molesworth, J.*—"I will only hear any such application, after notice served upon such person, giving him an opportunity of being heard." *Slack v. Atkinson*, 6 V.L.R. (E.,) 32; 1 A.L.T., 113.

Writ Ne Exeat Colonia.]—*See* NE EXEAT COLONIA.

Ex Parte Order for Writ of Assistance—When Granted.]—Where a decree directing a defendant to deliver up possession of land had been disobeyed, the plaintiff was allowed, upon an affidavit of personal service of the decree, to obtain an *ex parte* order for a writ of assistance. *Bamblett v. M'Culla*, 5 W.W. & A'B. (E.,) 133.

(B) PRACTICE AT LAW BEFORE JUDICATURE ACT.

(1) *Jurisdiction.*

See generally under COURT *ante columns* 277 *et seq.*, and under JURISDICTION, *ante column* 741.

Enlargement of Term—No Jurisdiction to hear Matters not Pending at Time of Enlargement.]—When the Court had enlarged a term by two days for the purpose of hearing matters pending on the day when the enlargement was made, *Held* that the Court had no jurisdiction on the two days so added to hear a matter not pending on the day when the term was so enlarged. *In re Lyons*, 1 W.W. & A'B. (L.,) 194.

(2) *Amendment.*

Of Pleadings.]—*See post* under PLEADING AT LAW.

Of Rule Nisi—To raise a Technical Objection.]—*Bank of Australasia v. Pollard, post* under (5) *Rules and Orders.*

Of Special Case—After Judgment.]—*Cohen v. Oriental Bank, post* under (8) *Special Case.*

Of Record.]—*Slack v. Winder, post* under (9) *Trial—Record.*

Generally—Practice.]—The "*Common Law Practice Act*," incorporating into one two Imperial Statutes on the subject of amendments, is of the same effect as those Statutes passed separately, and therefore, as in England, the Court here has not the power to review the discretion of a judge at *nisi prius* refusing an application to amend. The party aggrieved by the refusal should apply to the Court, not to review that decision, but to allow an amendment, and direct a new trial if substantial justice requires such a course. *Appleton v. Williams*, 1 W. & W. (L.,) 292.

[Compare Sec. 177 of Act No. 274.]

Of Writ of Habere—Nunc pro Tunc.]—A motion was made on notice, the other party not appearing, for the amendment of a writ of *habere* in an ejectment action by substituting certain words *nunc pro tunc*. The Court refused to make the rule absolute in the first instance, where there was no appearance on the other side, but granted a rule *nisi*. *Neil v. Whelan*, 5 A.J.R., 77.

(3) *Judgment.*

(*a*) *Entering.*

When for Plaintiff—Damages.]—If the issues of fact have been tried before those of law, and a verdict found for defendant on a plea afterwards held bad on demurrer, and the plaintiff's damages be assessed contingently, the judgment must be for plaintiff on the issues of law, with the damages so assessed. *Connor v. Spence*, 4 V.L.R. (L.,) 243, 261.

(*b*) *Arrest of Judgment.*

When Granted or Refused.]—A declaration stated that the plaintiff had suffered damage and might sustain further damage, and a verdict was found for the plaintiff. On rule *nisi* for arrest of judgment, *Held* that such statement of probable future damage was not a ground for arrest of judgment. *Dickson v. Western Freehold G.M. Coy.*, 5 W.W. & A'B. (L.,) 100.

(*c*) *Judgment non obstante veredicto.*

When it may be Entered.]—In an action of deceit on the sale of land, plaintiff recovered a verdict on first count (for false representations as to title;) defendant recovered on second count (for failing to perform conditions of sale, damages costs of investigating title,) to which he pleaded *not guilty*, and defendant added at trial a plea that plaintiff made default in payment of a bill. *Held*, on rule to enter verdict for plaintiff on second count, that judgment *non obstante veredicto* could not be entered while there was a plea, *i.e.*, the added plea going to the whole of the second count remaining on the record as found for defendant; that unless defendant elected to give up his added plea, the rule must be absolute, as defendant did not make the title contracted for, and that then plaintiff might move for such judgment, for although this added plea was not in avoidance and confession, the first plea was found in favour of plaintiff, which was equivalent to a bad plea in confession and avoidance. *Raeburn v. Murphy*, 5 A.J.R., 23.

(*d*) *Setting Aside and Impeaching.*

Judgment by Consent—Fraud.]—Where on a judgment by consent obtained against defendant as heir-at-law of a person who had given certain bills of exchange held by plaintiff, it appeared that there was collusion between the parties and the plaintiff did not deny a charge of fraud against him, but it appeared that the defendant on being examined by the judge in the usual way had not disclosed the fraud or collusion, but on an application to set aside the judgment the defendant abandoned the charge of the judgment having been obtained by fraud, and relied on the objection that since the passing of the "*Intestates' Estates Act*" no judgment could be signed against a person as heir-at-law, *Held* that a person who took out a summons on one ground could not be allowed to abandon it and take up another; and no order was made and no costs given, but without prejudice to any subsequent application on the part of the defendant. *Slack v. Winder*, 1 A.J.R., 170.

In an action for trespass for seizing sheep the defendant pleaded not possessed, and a special plea to which plaintiff replied and new assigned in respect of other sheep, and to the new assignment the defendant pleaded not guilty. At the trial the plaintiff had a verdict on all the issues, with entire damages, without discrimination between the sheep, the subject of the special plea, and those the subject of the new assignment. A rule *nisi* was obtained to enter a verdict for defendant on the special plea and the plea to the new assignment, and on the special plea a verdict was entered for defendant, who drew up his rule absolute to enter a verdict for him on the special plea only, thus leaving the verdict on the plea to the new assignment untouched. Upon this plaintiff signed judgment for the entire damages assessed by the jury, and the judgment was set aside by an order of a judge. On motion to rescind such order, *Held* that the order was right; that defendant's rule, being drawn up as absolute only in part, should have directed a new trial, but that the mistake could not be set right after the term in which the rule was made absolute, and that a *stet processus* was the proper remedy; and rule to rescind refused. *Main v. Robertson*, 2 V.L.R. (L.,) 135.

Judgment Signed Irregularly.]—S. brought an action of ejectment against W. W. entered an appearance, but S. signed judgment December, 1870. Nothing more was heard of the case till October, 1872, when a writ was issued to sheriff to put plaintiff in possession of land. Shortly afterwards W. moved by summons to set aside judgment as irregularly signed. *Held* that, although the affidavit setting forth defendant's ignorance of judgment being signed was not very clear, judgment should be set aside as having been signed irregularly. *Slack v. Winder*, 3 A.J.R., 106.

Judgment Removed from County Court—"County Court Statute" (No. 345,) Secs. 56, 93.]—Where a judgment in the County Court was signed by default under Sec. 56, and the judgment was removed into the Supreme Court under Sec. 93, and the County Court judge set aside the judgment in the County Court as irregular, the Supreme Court set aside the judgment as of course. *Allison v. McCandlish*, 3 A.J.R., 117.

Setting Aside Judgment Signed after Sequestration—Applying within Reasonable Time.]—*See Proudfoot v. Mackenzie, ante column* 656.

Setting Aside—Forged Guarantee—Costs.]—*Higinbotham, J.* (in Chambers), set aside a judgment regularly entered upon a guarantee, where the defence was that the guarantee was forged, and the reason why the action was not defended was the defendant's mistaken idea that he had not been served with the writ of summons; and ordered that the defendant might appear and defend on payment of the costs of action and execution, and of the application to set aside the judgment. *Colonial Bank of Australasia v. M'Leod*, 6 A.L.T., 114.

(4) *Motions and Summons in Chambers.*

A second motion cannot be made upon the same materials, *i.e.*, affidavits, unless where the first failed merely for a defect in the *jurat* or title. *In re Heron*, 5 A.J.R., 161.

Summons in Chambers.]—A summons in Chambers must show on whose behalf it is issued. *In re "Transfer of Land Statute" and the caveat of Fearnley*, 2 A.L.T., 32.

Emergency Clause—Reference to Court.]—An application to a judge under the emergency clause should be by summons according to the ordinary chamber practice for an order. But if the judge thinks the gravity of the matter exceeds its urgency, he may refer it to the Court. When a matter is referred to the Court by a judge, the question is not open for the production of fresh evidence. *Regina v. Mairs, ex parte Vansuylen*, 7 V.L.R. (L.,) 43; 2 A.L.T., 126.

(5) *Rules and Orders.*

Order of Single Judge Sitting as Full Court—Effect of.]—An order of a single judge sitting in the Matrimonial and Divorce jurisdiction, although a proceeding on summons, has the effect of a rule of Court, just as an order of a single judge sitting in the equity jurisdiction has such effect; and the fact that the proceeding is by summons does not import into a proceeding before a single judge sitting as the Full Court the same incidents that attend proceedings by summons before a single judge sitting in Chambers to dispose of Chamber business; and the order so made of a judge so sitting in the Matrimonial and Divorce jurisdiction may itself be a foundation for a writ of *fi. fa. Hall v. Hall*, 1 W. & W. (L.,) 333.

Date—Heading.]—A rule is properly dated as of the day when it is granted, and not as of the day when it is drawn up. A rule for payment of costs made payable by a rule discharging a rule *nisi* to quash an order of justices need not be entitled in a cause. *Ex parte Kane*, 5 V.L.R. (L.,) 44.

Order Nisi—When Issued.]—*Per Higinbotham, J.* (in Chambers)—An order *nisi* must be issued within a reasonable time. *Graham v. Moylan*, 6 A.L.T., 115.

Reasonable Time—What is.]—Where an order *nisi* for a new trial was granted by the Full Court on behalf of the plaintiff on Friday, 7th November, on the grounds of misdirection, and the plaintiff's solicitor was not aware till Saturday that the rule had been granted, and the following Monday was a public holiday, and the solicitor drafted the rule to submit to counsel at his request, but was unable to see him till the Wednesday following, and attended the Prothonotary on Wednesday morning for the purpose of issuing the rule *nisi*, and found that judgment had been entered up on behalf of the defendant, the judge holding that since the defendant knew that the order was obtained, he ought to have communicated with the plaintiff before signing judgment, was of opinion that the order *nisi* was issued within a reasonable time. *Ibid.*

Returnable on a Holiday.]—An ordinary rule or order is not bad because it is made returnable on a day in term which is a holiday. *Regina v. Broderick, ex parte McMillan*, 4 V.L.R. (L.,) 158.

Rule for Attachment Returnable on a Holiday is Bad.]—*See In re Dryden and Merry v. The Queen, ante column* 67.

Evasion of Service of Rule Nisi—Motion for Rule Absolute in First Instance.]—*Punch v. Punch, ante column* 66.

Rule Nisi to Solicitor to Answer Charges against Him.]—A rule *nisi* to a solicitor calling on him to answer certain statements in an affidavit made by his client may be made returnable on the last day of term. *Re Barrett, ex parte Williams*, 4 A.L.T., 89.

Enlarging Rule.]—A copy of an order *nisi* served on plaintiff was headed "In the County Court," and made returnable in the Supreme Court. *Held* that such error was not a ground for discharging it; the rule might be enlarged in order to serve a correct copy, or the plaintiff might waive his objection on getting his costs. *Haylock v. Shannon*, 3 V.L.R. (L.,) 332.

Rule nisi—Amendment.]—Amendment of a rule *nisi* to raise a purely technical objection will not be allowed, unless under special circumstances, and where substantial justice would require it. *Bank of Australasia v. Pollard*, 8 V.L.R. (L.,) 66; 3 A.L.T., 103; *sub nom. Bank of Australasia v. Follard.*

Rule made Absolute pending Order staying Proceedings—Setting aside—Proceedings under.] If a rule be made absolute pending a judge's order staying proceedings in the cause, it can only be set aside by another rule; but the Court set aside a *fi. fa.* issued under such rule absolute, on a summons to set aside the rule and proceedings thereunder, with costs, if the applicant undertook not to bring an action on the *fi. fa.*—otherwise without costs. *Re Phelps, ex parte Morris*, 6 V.L.R. (L.,) 417.

Setting aside Order made in Vacation—Filing.]—A party who has obtained an order from a judge in vacation under Sec. 19 of the Act 15 Vict. No. 19, ought, on receiving notice of an application to set such order aside, to file such order. *Ex parte Nyberg, in re Nicholson*, 8 V.L.R. (L.,) 292, 294.

Payment Out of Court—Rule to Restrain Order for—Where Returnable.]—A rule *nisi* to set aside an order of a judge in Chambers to pay money out of Court may be made returnable either in Chambers or in Court. *Bell v. Stewart*, 1 A.J.R., 92.

For Rules Nisi for Prohibition and Quashing Orders or Convictions of Justices.]—*See* cases *ante columns* 772, *et seq.*

(6) *Service of Proceedings and Process.*

Service out of the Jurisdiction—Foreigner—"Common Law Procedure Statute 1865," Sec. 90.]—Under the "*Common Law Procedure Statute* 1865," Sec. 90, a writ of summons may be served on a foreigner resident out of the jurisdiction, but within fifty miles of the borders of Victoria. *Banks v. Orrell*, 4 V.L.R. (L.,) 219.

Writ Served on Wrong Person—Defendant's Delay in Applying to Set it Aside.]—In February a writ of summons upon a bill of exchange was served upon the wrong person. In March it was handed to the real defendant, who took no notice of it until execution was issued in May or June. In June defendant moved to set aside writ and subsequent proceedings. *Held* that he was barred by his delay. *Henry v. Smith*, 5 V.L.R. (L.,) 188; 1 A.L.T., 14.

Recovery of Judgment or Verdict.]—Under 18 Vict. No. 42, Sec. 14, the process for the recovery of the amount of any judgment or verdict must be served, and not the judgment or verdict. *Rostron v. Hasker*, 2 W. & W. (L.,) 44.

Personal Service—Statute Requiring Service.]—Where a statute requires service upon an individual, and does not provide any special mode of service—as by delivery at a specified place or otherwise—then no service other than personal service is sufficient, and that must be proved; and personal service is constituted by service upon the individual himself into his own hand, or so that he is enabled to obtain possession of it, or if it be sufficiently shown that the notice or other document has come into his hands. *Regina v. Heron, ex parte Mulder*, 10 V.L.R. (L.,) 314, 316, 317; 6 A.L.T., 143.

(7) *Staying and Setting Aside Proceedings and Process.*

When Permissible.]—The Court has no power to stay a second action brought on a judgment obtained in a former action. *Plevins v. St. Kilda and Brighton Railway Coy.*, 2 W. & W. (L.,) 17.

A plaintiff in a County Court action was nonsuited, he then commenced an action in the Supreme Court on the same cause of action, and proceedings were stayed until he paid costs in the County Court. Plaintiff then commenced a third action of a similar nature in the Supreme Court, and proceedings in that were stayed. On rule *nisi* to set aside the last order staying proceedings, *Held* that the action was rightly stayed; that plaintiff must first pay the costs of the first action in the Supreme Court. *Bowman v. Whelan*, 1 V.L.R. (L.,) 40.

Tender of Debt — Costs of Attorney.] — *Per Williams, J.* (in Chambers): — Where, after action commenced, the defendant tenders the amount of the debt to the plaintiff, he will not be allowed a stay of proceedings unless he also, at the same time, tender to the plaintiff's attorney a sum of money, as payment of his costs; and the fact that the plaintiff's attorney demands an exorbitant sum as payment for his costs does not exonerate the defendant from this duty. *Smith v. Scott*, 6 A.L.T., 46.

Commission to Take Evidence Abroad — Condition—Stay of another Action Pending between the Parties.]—In an action against a bank an order was made in Chambers allowing a commission to examine witnesses on behalf of the defendant to be issued to England, but on the condition that an action brought by the bank against the plaintiffs should be stayed. The action by the bank against the plaintiffs was on a bill of exchange, and leave to defend had been refused in this action, except on conditions, which were not complied with. The action against the bank was for the alleged breach of an agreement by the bank not to issue execution on certain judgments obtained against one of the plaintiffs, on the condition

that the joint bill of that and the other plaintiffs should be given as security for the amount of the judgment debts. The bank had issued execution on the judgments before the bill became due, and when it became due and was dishonoured, commenced proceedings against the joint acceptors. The Court varied the order by allowing the bank to sign judgment in the action on the bill, but to stay execution till after the hearing of the action against it on the agreement. *Kirby v. Bank of Australasia*, 4 A.L.T., 13.

Under Sec. 266 of the "Common Law Procedure Statute 1865"—Costs of Arbitration.]—*See Farrell v. Imperial Fire Insurance Coy.*, *ante column* 49.

Setting aside Declaration—Separation of Writ—Waiver.]—If a declaration be delivered more than twelve months after the writ of summons was returnable, the action is dead, and the declaration may be set aside in default of any precedent process to support it. And *Semble* that if this were merely an irregularity, and not a nullity, the defendant would not have waived his right to set aside the declaration by not objecting to it at the time of delivery and retaining it three days before he took out a summons to set it aside. *De Castella v. De Castella*, 4 V.L.R. (L.,) 468.

Summons to Set aside a Writ of Fi. Fa. on Ground of Irregularity—"Common Law Procedure Statute 1865," Sec. 421.]—A summons to set aside a writ of *fi. fa.* on the ground that more than six years had elapsed from the date of recovering judgment to that of issuing the writ, stated that the writ "was irregularly issued on a judgment over six years old." *Held* that the grounds were sufficiently set out under Sec. 421 of the "*Common Law Procedure Statute* 1865," and that at all events it was merely a matter for costs. *Platts v. Wright*, 1 A.L.T., 131.

Setting aside Rule made Absolute Pending Order Staying Proceedings—Fi. Fa.]—*See re Phelps, ex parte Morris, ante column* 1211.

Setting aside Order made in Vacation.]—*See ex parte Nyberg, in re Nicholson, ante column* 1211.

Writ Served on Wrong Person—Defendant Moving to Set aside Bound by Delay.]—See *Henry v. Smith, ante columns* 1211, 1212.

(8) *Special Case.*

Duty of Court—Case for Jury.]—On a special case stated for the opinion of the Court on a point of law, the Court is not bound to decide for the plaintiff if, in the case, anything appears which ought to be left to a jury. *Munro v. Shire of St. Arnaud*, 6 V.L.R. (L.,) 217.

Amendment — After Judgment.]—The Court granted a rule *nisi* to amend a special case after judgment thereon. *Cohen v. Oriental Banking Corporation*, 6 V.L.R. (L.,) 278, 289.

(9) *Trial.*

(*a*) *Notice of Trial.*

What Sufficient.]—Notice of trial eighteen days before the civil business is sufficient notice in a cause in a Circuit Court. *Hunt v. Ford*, 1 W. & W. (L.) 115.

Act No. 274, Sec. 138.]—*Per Higinbotham, J.* (in Chambers).—Notice of trial under Sec. 138 must be reckoned exclusive of the first day and inclusive of the last. *Griffiths v. Holmes*, 2 A.L.T., 146.

New Notice of Trial.]—A new notice of trial is necessary where a rule of Court has been made as that it is supposed to be *in invitum*, but it is not necessary where both parties consent to a postponement. Where a cause was made a *remanet* from one sittings to another, and then postponed by order of a Judge in Chambers on consent to another sittings, the Court granted upon an affidavit as to merits, a new trial upon terms as to costs. *Whitelock v. Hancock*, 2 W. & W. (L.,) 202.

Notice of Trial before Issue Joined—New Trial—Costs.]—A plaintiff's attorney served a notice of trial upon a defendant before issue was joined upon a replication, and proceeded to a hearing, and obtained a verdict, the defendant not appearing. On rule *nisi* to set aside notice of trial and subsequent proceedings, *Held* that defendant was entitled to have a new trial, but (*dissentiente Higinbotham, J.*) that if he chose to take a new trial under the circumstances, the costs of the first trial must abide the event of the second. *Palmer v. Wilson*, 7 V.L.R. (L.,) 101.

(*b*) *Place of Trial—Venue.*

Venue—Plaintiff's Right to Choose.]—Except in a local action, the plaintiff has a right to lay the venue where he pleases, unless there is a preponderance of inconvenience occasioned to the defendant by his choice. *Simson v. Guthrie*, 4 A.J.R., 76.

Change of Venue.]—A defendant can change the venue on the common affidavit if he has obtained time to plead, not if he has been put on terms to plead issuably. *Lane v. Victoria Q.M. Coy.*, 1 A.J.R., 118.

Change of Venue—Preponderance of Convenience as to Trial.]—W., a trainer of racehorses at Geelong, sued S. for a libel published in his paper at Melbourne, to the effect that W. ran his horses unfairly in order to suit his betting transactions. W. laid the venue at Geelong where he resided and had his stables, and where most of his witnesses were employed. S. pleaded a justification, the particulars of which specified many races, nearly all of which were run in Melbourne, and applied for a change of venue to Melbourne on the ground, which he proved, that he would have to call a great many witnesses who were to be found only in and around Melbourne. *Held* that the principle on which such applications are dealt with is that of the preponderance of convenience for the purposes of the trial, and that, as W. would launch his case by simply proving publication of the libel, while the burden lay on S. to prove his plea of justification, which would require a multitude of witnesses residing in and about Melbourne, W.'s right to choose the venue must give way. *Wilson v. Syme*, 6 V.L.R. (L.,) 200; 2 A.L.T., 21.

Change of Venue—After Trial.]—Where after a trial in which the jury has disagreed it is sought to change the venue the Court will not do so except on very strong grounds. *Paterson v. Luke*, 6 A.L.T., 140.

(c) *Verdict.*

Leave to Set Aside—Leave Reserved for Court to Draw Inferences of Fact.]—The Court has, under a reservation of leave for one of the parties to enter a verdict, with leave reserved for the Court to draw inferences of fact, the power to draw inferences of fact, with the view of avoiding a new trial, in the event of their being of opinion that the jury has arrived at a wrong conclusion; but, unless the jury have drawn a wrong inference the Court will not draw another, merely because they would themselves have given a different verdict. *Hasker v. Moorhead v. Blackwood v. McMullen,* 2 V.L.R. (L.,) 160, 168.

Setting Aside.]—A verdict will be set aside on the ground that it was given on a trial where the order for a trial before a jury was drawn up *ex parte,* no summons having been served upon the defendant to bring him before the judge who made the order, and the trial which took place on such order being consequently irregular. *Plummer v. Fletcher,* 4 A.J.R., 36.

Amount Recovered in Excess of Sum Claimed in Particulars of Demand.]—Where a plaintiff had recovered more than was stated in his particulars of demand, which were not annexed to the record, or proved to have been delivered by his attorney, he was held not bound by such particulars, and was allowed to retain the sum recovered. *Simson v. Mitchell,* 5 W.W. & A'B. (L.,) 114.

(d) *Record.*

Delivery of Record — Ne Recipiatur.] — *Per Stawell, C.J.* (in Chambers):—A record may be delivered to the Prothonotary for trial at a sittings, unless a *ne recipiatur* has been entered. *Rosenthal v. Union Steamship Company of New Zealand,* 1 A.L.T., 131.

Withdrawing Record—Counsel without Brief—Nonsuit.]—A case put at the bottom of the list was unexpectedly called on; counsel for the plaintiff stated that he had no brief, and that plaintiff was not present, and applied to withdraw the record. *Held* that counsel without a brief could not withdraw the record, and the plaintiff being nonsuited, the Court set aside the nonsuit on terms of the attorney himself paying the costs of the rule and of the day; *Held* also that plaintiff's attorney might have withdrawn the record. *Bishop v. Martin,* 1 V.L.R. (L.,) 33.

Withdrawing Record — Costs — Setting Aside Rule for Defendant's Costs.] — Where several actions by different plaintiffs against the same defendants for the same cause of action are set down for trial at the same sittings, and one of such actions has been already tried, and a rule obtained for a new trial, an apparent conflict between the charge of the judge on the new trial of the first case, and the opinion expressed by the Court in making absolute the rule for the new trial, is a sufficient excuse for the withdrawal of the record by the plaintiffs in the subsequent actions, and the defendants in such actions will not be entitled to their costs of the day. *Searle v. Hackett,* 6 V.L.R. (L.,) 442; 2 A.L.T., 88.

Per Stephen, J. :—An application to set aside a rule as of course obtained by the defendants in such actions ought to be made to the judge who was to try the case. *Ibid.*

Per Higinbotham, J. :—There is no impropriety in making the application to another judge. *Ibid.*

Amendment of Record where Verdict Incorrectly Stated.]—A Judge in Chambers has power to amend the record of the verdict by adding "s" to the word defendant where the record incorrectly stated the verdict to be entered for "defendant" instead of for "defendants." *Slack v. Winder,* 5 A.J.R., 19.

Adding to Record—Power of Judge.]—A judge has power to add to the record at the trial a plea of leave and license after the case is closed; and where this added plea makes no difference one way or the other in affecting the verdict of the jury, it does not form a ground for a new trial. *Ireland v. Chapman,* 3 V.L.R. (L.,) 242.

(e) *Practice Generally.*

Practice where English Courts do not Agree—Queen's Bench.]—Where the Superior Common Law Courts at Westminster differ in their practice, the Supreme Court in its common law jurisdiction will follow the practice of the Queen's Bench on all occasions. *M'Mullen v. Phillips,* 1 W. & W. (L.,) 15.

Right to Begin—New Trial.]—H. and another sued on a policy of life assurance for the amount of the policy and bonuses not ascertained and for interest. Defendant pleaded that the company had bought the policy, and offered at the trial to admit the interest and bonuses. At the trial the judge intimated that the defendant had the right to begin, but the plaintiffs disregarded this opinion and began. On rule *nisi* for a new trial, *Held* that the defendant had the right to begin since the damages were liquidated, and the plaintiff was bound to accept the admission as to the interest and bonuses; and that the plaintiffs, having begun, did so at their own risk, and rule for a new trial made absolute. *Hardy v. Anderson,* 2 V.R. (L.,) 41; 2 A.J.R., 36.

Address of Counsel where Defendant has not Pleaded to the Declaration—Common Law Procedure Statute (No. 274,) Sec. 433.]—If a defendant do not plead to the declaration, his counsel, though he may call evidence, cannot sum it up in a second address to the jury unless the plaintiff consents. *Elms v. Melbourne and Hobson's Bay Ry. Coy.,* 1 A.J.R., 112.

Addresses of Counsel—Assessment of Damages—Common Law Procedure Statute (No. 274,) Sec. 433.]—Sec. 433 of the Statute, which gives the right of summing up the evidence, or of reply "upon the trial of any cause," does not include a mere "assessment of damages," on which the old practice applies. Rule *nisi* for a new assessment, on the ground that plaintiff's counsel was not allowed the right of reply, discharged. *England v. Melbourne and Hobson's Bay U. Ry. Coy.,* 3 V.R. (L.,) 9; 3 A.J.R., 28.

Counsel Withdrawing.]—During the trial of an action for malicious prosecution, plaintiff's counsel threw up his brief, and defendant's counsel claimed a verdict for defendant, which was entered, plaintiff and his solicitor being present at the time and saying nothing. Plaintiff obtained a rule *nisi* for a new trial. *Held* that the verdict was irregular, and must be set aside, and the Court being of opinion that the evidence showed reasonable and probable cause of belief, ordered a nonsuit to be entered, leave having been reserved at close of plaintiff's case to move for a nonsuit. *Hall v. Blackett*, 1 V.L.R. (L.,) 216.

"Common Law Procedure Statute No. 274, Sec. 88—Expiration of Writ—Renewal.]—There is no provision in Sec. 88 for the renewal of a writ after its expiration, and a judge has after such expiration no power to order its renewal. *Hepburn v. Dawbin*, 6 A.L.T., 129.

Declaration on Agreement.]—If an agreement be declared on, the plaintiff must either produce the agreement or give satisfactory evidence as to its non-production. *Wilson v. Holmes*, 1 V.R. (L.,) 53; 1 A.J.R., 117.

Evidence Admissible under Plea of "Not Guilty."]—A declaration originally in case, and to which "Not Guilty" only was pleaded, was allowed to be amended by striking out the averments of negligence, thus becoming a declaration in trespass. No amendment was, however, made, and the defendants made no application to add a plea of "not possessed" (of the engine which caused the damage.) *Held* that the defendants could not be allowed to give evidence under the plea of "not guilty," which would have been admissible under the plea of "not possessed." *Tobin v. Mayor, &c., of Melbourne*, 8 V.L.R. (L.,) 41; 3 A.L.T., 78, 100.

Rebutting Case — When Plaintiff may Make Out—Unexpected Defence.]—If the defendant raises an unexpected defence the plaintiff has a right to make out a rebutting case; but, in order to do so, the witnesses to prove it should be ready, and the evidence should be tendered, or an adjournment should be asked for in order to enable the witnesses to be present, otherwise the plaintiff will lose his right. *Bishop v. Stone*, 6 V.L.R. (L.,) 98; 1 A.L.T., 168.

Issues.]—An issue at law was taken by demurrer on some pleadings, and an issue of fact on others. *Per Stawell, C.J.* (in Chambers.)—It is a matter of discretion resting with the plaintiff whether he will proceed first with the demurrer or issues of fact. *Daily Telegraph Coy. v. Berry*, 1 A.L.T., 69.

When Immaterial Issue Raised.]—In a contract for the sale of ground comprised in an application for a mining lease, readiness and willingness on the part of the vendor to assign or convey not being a condition precedent to his right to recover the purchase-money, an allegation to that effect, if traversed, raises an immaterial issue. *Cane v. Sinclair*, 10 V.L.R. (L.,) 60; 5 A.L.T., 186.

(C) Pleading at Law Before Judicature Act.

(1) *Declaration.*

Embarrassing, not Bad.]—A declaration alleged that plaintiff delivered to a carrier (defendant,) as such carrier, certain goods to be carried by defendant from M. to S., and to be delivered "for" one *Ah Chong*, of S., for reward by plaintiff. *Held*, on demurrer, that, though the declaration, as framed, might be embarrassing with respect to the meaning of the word "for;" yet as it was quite consistent with the declaration that the goods were intended for delivery to *Ah Chong*, not on his behalf, but on behalf of the plaintiff, it could not be held bad. *Ping Kong v. Robertson*, 1 V.R. (L.,) 141; 1 A.J.R., 124.

Inconsistent with Evidence—Amendment—Costs.]—A declaration in an action for damages for injury caused by neglect, stated that the injury was caused by the negligence of a servant, W., in defendant's employ. The jury found that W. was not in defendant's employ, and that the injury was caused by the negligence of one B., in defendant's employ. *Held* that the declaration should be amended; that the verdict should stand; but that plaintiff should pay the costs of the rule to enter a verdict for the defendant, and the costs of the witnesses called by defendant to prove that W. was not his servant, and that plaintiff should not be allowed the costs of the witnesses called by him to prove that W. was in defendant's service. *Atkinson v. Dehnert*, 6 A.L.T., 10.

Counts.]—Tort and contract cannot be joined in one count of a declaration. *Young v. Ballarat Water Commissioners*, 4 V.L.R. (L.,) 306, 314, 317.

In a declaration a count setting out a contract, and averring generally performance of all conditions precedent, except in so far as the defendants waived the performance of such conditions, and alleging a breach of the contract, contained a subsequent breach sounding in tort in that the defendants had prevented the plaintiff from fulfilling certain of the conditions precedent. *Held*, on general demurrer, that the count in tort was bad, and that it ought to have been struck out on summons. *Ibid.*

Counts—Breaches.]—Where several breaches are laid in one count, every breach must be a legitimate conclusion from the whole of the statements contained in the count, or in the declaration, if there be only one count. *Ibid*, p. 314.

Action on Bond—Setting out Breach—"Under the Declaration."]—*Day v. Union Gold Mining Company, ante column* 118.

Per Stawell, C. J. (in Chambers)—The two counts of trover and detinue cannot stand together in a declaration unless the Judge in Chambers sees peculiar circumstances justifying such a combination. *Dougharty v. Dougharty*, 2 A.L.T., 147.

Form and Construction of Declarations in Actions of Libel.—*See ante columns* 364, 365.

Declaration on Policy of Insurance—Negativing Exceptions.]—*Osborne v. Southern Insurance Company, ante column* 732.

Inference of Fact—No Power of Court to Draw.]—A declaration set out a lease containing a covenant as to sale by assignees to lessor of certain fixtures and movables, and set out facts not expressly averring a contract, but facts from which it might be inferred. *Held* that the Court had not, on demurrer, power to draw inferences of fact, but that the jury might on trial. *Malmsbury Confluence Gold Mining Company v. Tucker*, 3 V.L.R. (L.,) 213.

On Covenant—Inference—Averment of General Performance — Special Demurrer.] — Where a declaration does not set out a covenant *verbatim*, but sets out the legal effect of it, without, however, setting out a condition which the Court would infer if the covenant were set out *verbatim*, and there is an averment of general performance on the part of the plaintiff, the averment will be held, on demurrer, to cover the implied condition, it being a defect of form, not of substance: but *semble* that on special demurrer it would have been held bad, and the plaintiff would have had to amend, on summons by the defendant, by inserting a statement of the implied condition, or, if the plaintiff refused to amend, the declaration would have been struck out. *Kreitmayer v. Kennedy*, 4 V.L.R. (L.,) 215.

S.P., *see Connor v. Spence. Ibid*, pp. 243, 254.

General Averment of Performance of Conditions Precedent with a Negative Clause—Exceptions Not Negatived in one of the Breaches.]—A declaration upon a contract set out a general averment of all conditions precedent, and a negative averment that nothing happened or was done to prevent the plaintiff from maintaining the action. *Held* that this was not sufficient, that the breaches should negative the exceptions contained in certain conditions of the contract; that where an express exception having reference to the subject of the breach is introduced into the obligatory clause of an instrument upon which the defendant is charged, such exception should be negatived in the averment of the breach, otherwise the breach is bad on demurrer. *Hobart v. Victorian Woollen Company*, 7 V.L.R. (L.,) 30; 2 A.L.T., 120.

(2) *Plea.*

(*a*) *Generally.*

Plea—To Action for Money Received—No. 265, Sec. 51—Gaming and Wagering.]—A plea, under the "*Police Offences Statute* 1865," Sec. 51, to an action for money had and received that the contract was by way of gaming or wagering, must, to render it good, negative every hypothesis which, consistently with the pleadings, would tend to show that the contract was valid. *Miller v. Harris*, 1 V.R. (L.,) 91; 1 A.J.R., 83.

Plea of Illegality.]—A plea of the illegality of a contract must negative every hypothesis under which the contract could be legal. *Clarke v. Pitcher*, 9 V.L.R. (L.,) 128; 5 A.L.T., 17.

Plea of "Never Indebted"—Does not Put in Issue the Incorporation of a Company.]—*Bank of New South Wales v. Moyston Grand Junction Company, ante column* 164.

Husband Suing in Trespass for Surgical Operation on Wife—Plea Bad for not Alleging that Operation was Necessary for Preserving Wife's Health or Life.]—*Tate v. Fisher, ante column* 535.

Pleading Act of Parliament—Waiver.]—A party in an action cannot waive one part of a section of an Act of Parliament, and rely on the other part, though the part waived would be advantageous to him. *O'Shea v. D'Arcy*, 1 A.L.T., 170.

Plea of Justification in Action of Libel.]—*See* cases *ante columns* 366, 367.

Action of Trespass—What Plea of Impounding must Specify.]—*Jones v. Campion, Sanderson v. Fotheringham, ante column* 1155.

Plea of Fraud in Action on Contract.]—*M'Millan v. Sampson, ante column* 463.

When Invalid—Not Traversing.]—In an action on a policy of marine assurance over the hull and furniture of a ship, the declaration averred a custom concerning the carriage of sheep for hire by ships from Newcastle, New South Wales, to New Zealand, to load on the deck a reasonable number of the sheep so carried; and that a reasonable number were so loaded on the deck of the ship in question, and further averred that the sheep so loaded on the deck were necessarily jettisoned for the safety of the ship from the peril of the seas, and that the plaintiff had to and did pay a large sum for general average. The fourth plea set up another and different custom—when sheep were loaded on deck, not to pay general average for any of them jettisoned; and alleged that by reason of this custom plaintiff had not become liable for general average. *Held*, on demurrer, that the plea was bad for not traversing the policy or the custom set up by the declaration. *Lindsay v. Hopkins*, 3 W. W. & A'B. (L.,) 5.

And for instance of a bad plea to a declaration on a policy, *see Clough v. Hopkins, ante column* 732.

Defence of Forfeiture for Felony—How Pleaded.]—A plea to an action of trover in the Supreme Court, raising the defence that the defendant had committed a felony, and had been tried for it before an inferior Court, and that his goods had been forfeited, need not aver that the offence committed was within the jurisdiction of the lower Court; and if such plea do not expressly state that the plaintiff was convicted, but contains averments which shew that a conviction must have occurred, it is not a ground for general demurrer, but merely for applying to have the plea amended or struck out. *McCrae v. Isaacs*, 1 V.R. (L.,) 27; 1 A.J.R., 36.

Plea of Statute of Limitations by a Banker.]—*See O'Ferrall v. Bank of Australasia, ante column* 83.

Action on Bond.]—To a declaration on a bond for breach of the conditions contained in it, the defendant pleaded that, since action brought, the bond had been rectified under a Decree in Equity, and his subsequent compliance with the condition of the bond so rectified. On demurrer, *Held* no answer to the action, since the breach was before action brought. *Barber v. Cobb*, 1 W. & W. (L.,) 18.

Condition Precedent—Non-Performance of—When Defendant Allowed to Plead.]—*Withers v. Greenwood, ante columns* 200, 201.

A plea of "leave and licence" is no answer to an action on contract. *Robertson v. English*, 4 W. W. & A'B. (L.,) 238.

Tender.]—A plea of tender is only applicable to cases where the party pleading it has not been guilty of any breach of his contract. *M'Ewan v. Dynon*, 3 V.L.R. (L.,) 271.

Plea of tender does not bar subsequent plea of want of jurisdiction. *In re The Ferret*, 8 V.L.R. (A.,) 1, 6, *post* under SHIPPING—Practice and Procedure in Vice Admiralty Court.

Plea of Acquiescence—In Action for a Nuisance.]—*Cooper v. Dangerfield, ante column* 1102.

Mutual Credit and Set Off.]—C., the official assignee of J., sued K. to recover money had and received to the use of C., and found due on accounts stated between C. and K. K. pleaded (1) never indebted; (2) mutual credits between J. and K. which showed before J.'s sequestration a balance in K.'s favour, and offered to allow C. to set off against the moneys owing them by J. the money they owed to J. *Held* on demurrer that as the money was in fact received by K., before sequestration, the plea (No. 2) might be deemed an argumentative form of the traverse "never indebted" which on general demurrer would be a good plea. *Courtney v. King*, 6 W. W.& A'B. (L.,) 36.

Pleading Set Off to Action on Bill of Exchange.]—*Nisbet v. Cox, ante column* 99.

What Amounts to Plea of Paymsnt in Action on Bill.]—*Saunders v. Matthews, ante column* 101.

Severing—When Proper.]—To a count in a declaration that defendant did not, would not, and could not grant to the plaintiff a lease, the defendant pleaded as to so much as alleged that he did not and would not grant to the plaintiff the said lease, that plaintiff never tendered the lease for execution. On objection that the plea, being pleaded only to part, was bad because it admitted part not pleaded to, *Held* that the plea dealt with the breach in the only way possible; that the breach was properly severed, and one plea properly pleaded to the willingness which implies ability, and the other to the ability; and plea upheld. *Pinn v. Barbour*, 1 V.R. (L.,) 136; 1 A.J.R., 127.

Stating Matsrial and Immaterial Facts.]—Where a plea states two facts, one material to the defence, and one immaterial, the defendant need not prove the whole of the plea; it is sufficient if he prove that part of it which constitutes a good defence. *Main v. Robertson*, 2 V.L.R. (L.,) 25.

In an action of trespass for seizing sheep, the defendant pleaded that the sheep were trespassing upon his land, and that he took them to the nearest accessible pound, and there impounded them in accordance with the "*Pounds Act* 1874." The plea also alleged that the sheep had been found trespassing on the same land within twelve months previously. *Held* that the defendant need not prove the allegation as to the previous trespass, since the common law right to impound remained, and in order to show that defendant had no right to impound, the plaintiff would have to show that the case came within the terms and conditions by which such common law right has done away with. *Ibid.*

Plea—"Not Guilty"—Action for Negligence.]—A declaration averred that defendants were possessed of a certain locomotive, which was being driven along a highway under the management of the defendants, and that the defendants had so unskilfully and negligently managed the said locomotive, that sparks issued from the locomotive, and injured the plaintiff by burning her eyes. The defendants pleaded "Not guilty." *Held* that such plea did not amount to a denial of the ownership of the locomotive by the defendants, so as to put it in issue. *Tobin v. Mayor, &c., of Melbourne*, 7 V.L.R. (L.,) 488; 3 A.L.T., 78.

General Issue—What Admitted by.]—In an action for trespass for injuries occasioned to the plaintiff on a highway, by an engine containing fire, the general issue admits the truth of an averment that the defendants had an engine there at the time alleged, and the defendants will not be allowed to produce evidence to disprove such averment. *Tobin v. Mayor, &c., of Melbourne*, 8 V.L.R. (L.,) 41; 3 A.L.T., 100.

(b) *Equitable Plea.*

Avoiding Circuity of Action.]—Declaration on a policy of life insurance. Equitable plea that there had been an agreement between the insured and the insurance company that the insured should sell and the company should buy the policy. *Held* a good plea, as avoiding circuity of action. *Hardy v. Anderson,* 1 V.R. (L.,) 193; 1 A.J.R., 159.

Equitable.—Where a replification is pleaded on equitable grounds, and cannot be sustained as an equitable defence, owing to the absence of necessary parties in a suit which should be brought to sustain the equity, the Court will not reject the words, "on equitable grounds," where such plea is put forward substantially, as well as in terms as a replication in equity. *Goldsborough v. McCulloch,* 6 W. W. & A'B. (L.,) 113, 123.

Equitable Plea—"Stat. of Limitations."] — A pleading on equitable grounds must state facts showing that a Court of Equity would give the relief which the party pleading claims. Where, therefore, to a plea of the "*Stat. of Limitations,*" plaintiff put in a replication that he brought his action within six years after he had notice of a certain fraud, on account of which he sought to impeach a contract, *Held* that that fact alone would not entitle him to an injunction in Equity. *Urquhart v. M'Pherson,* 3 V L.R. (L.,) 65, 76.

Plea in Action on Guarantee—Plea of Principal Creditor not Proving an Insolvency of Guaranteed Debtor—Not a Good Plea.]—*National Bank v. Plummer, post* under PRINCIPAL AND SURETY—Discharge of surety.

Action on Bill of Exchange—Equitable Plea that Matters in Dispute in Agreement under which Bill was given had been Referred to Arbitration and Award made in favour of Defendant.]—*See Murphy v. Glass, ante column* 100. And *see* other cases, *ante column* 100.

Action for a Nuisance—Plea of Acquiescence when not good on Equitable Grounds.] — *Cooper v. Dangerfield, ante column* 1102.

Action of Trespass—Pleading Equitable Title in Defendant, but Plea alleging no Notice thereof to Plaintiff.]—*Hunter v. Hodgson,* 3 A.J.R., 31, *post* under TRESPASS—To Land, &c.

(c) *Plea puis darrein continuance.*

Adding after Verdict.]—An uncertificated insolvent sued for work done, and one of the pleas (which defendant obtained leave to add, and which was added without altering the date of the pleas) was to the effect that the assignee had served on the defendant notice of his claim after the date of the other pleas, but not in the form of a plea *puis darrein continuance. Held* that the Court, after verdict, would not allow a plea *puis darrein continuance* to be added. *Nott v. Robertson,* 9 V.L.R (L.,) 163; 5 A.L.T., 32.

(3) *Replication.*

When Demurrable.]—P., by written agreement, "let and rented unto" W. an hotel, calling it "my house" throughout the agreement, and signing simply in his own name, and not as agent for anyone. P. became insolvent, and his assignee sued W. for a balance of rent. W. pleaded that P. made the agreement as agent for B., and not otherwise, and that after the making of the agreement, and both before and after the rent was due, and before suit, B. gave W. notice not to pay the rent to P. The replication to the pleas simply set out the agreement. W. demurred for that the replication neither traversed nor confessed, and avoided the matter pleaded. *Held* that the replication was bad, and the pleas good. *Jacomb v. Wrigley,* 3 W. W. & A'B. (L.,) 137.

Husband Suing for Trespass for Surgical Operation on Wife—Replication Bad for Omitting to State that Plaintiff did not Sue for Grievances Justified in Pleas.]—*Tate v. Fisher, ante column* 535.

How Easement Alleged in Pleadings—Replication Must Aver its Essentials, e.g. its Termini.]—*Butcher v. Smith,* 5 W.W. & A'B. (L.,) 223. *Post* under TRESPASS—To land, &c.

Departure.]—A replication which excuses the not doing what a plaintiff ought to have done, by stating that the declaration by implication alleges that it has been done, is a departure. *Campbell v. Bent,* 5 V.L.R. (L.,) 337.

Action on Bond—Replication Should Assign Breaches.]—*Miller v. Tripp, ante column* 118.

Departure—Declaration for Breach of Contract—Plea of Waiver—Replication Setting up False Representations by Which the Waiver was Obtained.]—*O'Shanassy v. Littlewood,* 10 V.L.R. (L.,) 117, *post* under VENDOR AND PURCHASER—THE CONTRACT—Conditions of Sale, Inquiries, &c.

Departure.]—To a count in trespass, defendant pleaded that the subject matter of the trespass was not the plaintiff's as alleged; plaintiff, in his replication, alleged that the plaintiff was proprietor of the land under the "*Transfer of Land Stat.,*" and was induced by the fraud of the defendant to transfer to the defendant. *Held* that the replication was a departure, and could not be sustained. *Frawley v. Ewing,* 9 V.L.R. (L.,) 197; 5 A.L.T., 66.

(4) *Demurrer.*

Demurrer—Objection for Non-delivery of Points for Argument.]—The parties are not at liberty, on argument of a demurrer, to take the objection that points for argument have not been delivered under Sec. 74 of "*The Common Law Procedure Stat.* 1865," (No. 274.) *Bateman v. Connell,* 5 W. W. & A'B. (L.,) 203.

General Demurrer — When Sustainable.] — A declaration alleged that R. and S. G. were drawers of a bill accepted by C.; that they endorsed the bill to one S. without recourse;

that S. endorsed the bill to R. and S. G., and it was dishonoured, &c. S. put in a general demurrer that the declaration did not disclose any liability on the part of S., and it was not shown that he was the "S." who endorsed the bill. *Held* that the objection was not one for general demurrer; but that S. should have applied in Chambers to have the declaration amended. *Gibbs v. Shappard*, 2 A.J.R., 108.

Where General Demurrer will not lie.]—*See M'Cras v. Isaacs*, 1 V.R. (L.,) 27; 1 A.J.R., 36, *ante column* 1221.

No Power of Court to Draw Inferences of Fact.]—*Malmsbury Confluence Gold Mining Company v Tucker, ante column* 1219.

(5) *Amendment of Pleading.*

Writ of Summons and Declaration—Mistake in Plaintiff's Name.]—Plaintiff was named *Jabes* in original writ of summons and in the declaration, but *James* in the copy writ served on defendant. Defendant moved to set aside declaration as irregular. Motion dismissed, leave given to amend copy served. *Plevins v. St. Kilda and Brighton Railway Company*, 2 W. & W. (L.,) 17.

By Adding a Statement which is Not True—"Common Law Procedure Statute" No. 274, Sec. 377.]—W. sued as administrator of his son to recover damages from the company for the death of his son. Defendants pleaded *inter alia* that W. was not administrator. It appeared at the trial that administration was granted to W. subsequently to the date of the writ, and the plaintiff was non-suited. Rule *nisi* to set aside nonsuit and amend the declaration by inserting as the date of the writ a day subsequent to the grant of administration. *Held* that the Court could not amend the record so as to make it bear a false statement. Rule refused. *Wilks v. Australian Trust Company*, 6 W. W. & A'B. (L.,) 78.

Of Declaration—Declaration Inconsistent with Evidence.] — *Atkinson v. Dehnert, ante column* 1218.

"Common Law Procedure Statute 1865," Sec. 377—Misjoinder of Defendant—Amendment.]—N. was misjoined in an action against executors. As a matter of fact N. had never acted. After verdict N. applied to have his name struck out on the ground of misjoinder. *Held* that though such amendment must be applied for at the time, and cannot be entertained after verdict, yet where the application is made at the trial and liberty is reserved by the Judge to the Court to make the amendment, the Court may do so after verdict. *Harker v. M'George*, 9 V.L.R. (L.,) 104.

Of Plea — Ambiguity.] — In an action on a bond entered into by a surety that S., the Curator of Intestate Estates, "should duly pay, or account for, all monies which should come into his possession, or be under his control," the surety pleaded that S. did "duly pay or account for all moneys which came into his possession, *and which* were under his control," and a second plea identical with former, save that it omitted the second "which." *Held*, on demurrer, that the first plea was good, but that the second should be amended to prevent ambiguity. *Regina v. Shovelbottom, Regina v. Sandars*, 5 W. W. & A'B. (L.,) 188.

Amendment of Declaration in Action of Libel.]—*Clegg v. Bryant, ante column* 368.

Defective Plea — Who Must Correct.] — The tendency of the Court is to accept as valid a plea, which by reasonable construction can be held sufficient in substance, casting upon the opposing party the necessity of applying to a Judge in Chambers to correct the pleading if defective in form. *Commercial Bank of Australia v. Grassy Gully Company*, 2 V.R. (L.,) 23; 2 A.J.R., 18.

Of Plea.]—On an action to recover damages for injury to a horse and waggonette hired on Sunday, the plea stated that the contract was made on a Sunday, but the jury found that the contract was not made on Sunday. On a motion for a new trial or nonsuit, the Court refused to allow the plea to be amended, so as to state that the contract was to be, and was carried out, on Sunday. *Garton v. Coy*, 4 A.J.R., 115.

Application to Amend Plea, and for New Trial Thereupon.]—In an action for breach of a contract to let a public-house, the defendant pleaded that the plaintiff had represented himself as a respectable married man of good fame and character, which he was not, and the plaintiff recovered a verdict. On rule for leave to set aside verdict and amend plea, by adding that plaintiff was living in open adultery, *Held* that as it did not appear that what was represented or what defendant believed was the inducement for entering into the contract, and that the desired amendment would not, on the facts alleged, entitle the defendant to a verdict, the rule should be refused. *Bartlett v. Hoskin*, 5 A.J.R., 69.

Adding Plea—"Common Law Procedure Statute, 1865," Sec. 377.]—H. sued as mortgagee, or unpaid vendor of certain goods, upon a policy of fire insurance. At the trial H. set-up a claim for part as being still his own goods, and was given a verdict for the whole amount claimed. The defendants applied for leave to amend, by adding a plea to the effect that no claim had been made by H. as owner, within the time prescribed by the policy, and for a new trial, alleging that they had been taken by surprise by H's claiming as owner. *Held* that there could be no amendment since this was not a question in controversy between the parties at the time of the trial, within the meaning of Sec. 377 of the "*Common Law Procedure Statute*, 1865;" but that, since the defendants were taken by surprise, a new trial should be allowed. *Haynes v. Royal Insurance Company*, 2 V.L.R. (L.,) 125.

A trial had taken place in which the jury had disagreed, and the case was set down for a new trial. *Per Higinbotham J.*, (in Chambers,) Neither party is to be allowed in such a case to amend the pleadings without paying the costs of the first trial. *Ferguson v. Thomson*, 3 A.L.T., 15.

(D) PRACTICE UNDER THE JUDICATURE ACT OF 1883.

(1) *Jurisdiction.*

"Judicature Act 1883" (No. 761) Secs. 10, 19—Supreme Court Rules 1884, Order 63, Rule 2.]—By Sec. 19 of the Act provision is made for rules empowering a Judge to entertain all applications whatsoever, whether within his jurisdiction as a Judge of the Court or not, provided such application, was such as requires to be promptly heard, and therefore under Order 63, Rule 2, of the Supreme Court Rules, a single Judge may, under circumstances of urgency, hear an application which otherwise would be properly heard by the Full Court. *In re Transfer of Land Stat., ex parte Peck*, 10 V.L.R., (L.,) 328; 6 A.L.T., 162.

(2) *Parties.*

Substitution of Plaintiffs—Costs—Order 16, Rule 2.]—In an action brought by a bank to recover possession of land of which it was alleged that the defendant was caretaker, it was discovered, after the action was commenced, that the legal estate was vested in M., the bank's manager, as trustee for the bank. Application in chambers under Order 16, Rule 2, by the plaintiffs, to have M. substituted as plaintiff. Order granted by *Higinbotham, J.*, on terms of plaintiff's paying costs occasioned. *Bank of Victoria v. M'Lay*, 6 A.L.T., 27.

Third Party Proceeding—Wrongdoer Seeking Contribution Against Another Wrongdoer—Order 14, Rule 48—Person Out of Jurisdiction.]—In a case where a defendant sought to bring a third party before the Court, in an action against the defendant, by the representative of a person who was killed by the breaking of a rope—the third party being the person who supplied the rope, *Held, per Holroyd, J.*, that Order 16, Rule 48 only applies to cases of contribution or indemnity, under neither of which cases the present application fell; that the application should be dismissed on the ground of simplicity, *i.e.*, it was simpler for the defendant, if defeated, to bring an action against the person who supplied the rope. *Semble* that third party proceedings do not apply to a person resident out of the jurisdiction. *Round v. Victorian Stevedoring and General Contracting Company*, 6 A.L.T., 88.

(3) *Writ of Summons.*

Specially Endorsed Writ on a Cheque—Order 3, Rule 6—Appendix C., Sec. 4.]—*Per Higinbotham, J.*—A cheque is only an accepted bill of exchange, and as the drawer of a bill is, under Appendix C., Sec. 4, entitled to notice of dishonour, so a maker of a cheque is entitled to notice of dishonour; that the endorsement should contain a statement that the cheque was presented and dishonoured in order to make it a specially endorsed writ. *Nathan v. Turnbull*, 6 A.L.T., 139.

Practice Under "Judicature Act"—Order 20, Rule 1 (a,) (c)—Order 26, Rule 1, Appendix C., Sec. 4—Act No. 204, Sec. 19, Schedule 2.]—An action was brought as on a specially endorsed writ on a bill of exchange—the writ being endorsed according to the form given in Schedule 2 to Act No. 204 (*"Instruments and Securities Stat."*) *Held, per Williams, J.*, that the writ was a specially endorsed writ within the meaning of Appendix C., Sec. 4, and that defendant must deliver a statement of defence. *Goodwin v. Heanchain*, 6 A.L.T., 160.

"Judicature Act 1883," Sec. 59—Appendix A, Part I., No. 5—Writ to be Served Out of the Jurisdiction.]—*Per Higinbotham, J.* (in Chambers.) Where a party wishes to issue a writ of summons, to be served on a British subject out of the jurisdiction, the proper method is to apply to the Judge before the writ is issued, who will insert the number of days allowed for appearance in the original and the copy, and will initial both documents, the copy ought then to be lodged with the Prothonotary. *Priestly v. Davis*, 6 A.L.T., 18.

(4) *Judgment and Proceedings Thereunder.*

Signing Final Judgment—When Plaintiff Allowed—Order 14, Rules, 1, 3.]—*Per Higinbotham, J*, (in Chambers.) By the words of Order 14. the plaintiff is not to be allowed to sign judgment merely because the defendant's affidavit does not show a complete "defence," and the power given by Order 14, Rule 3, to order the defendant to attend and be examined on oath should only be exercised in exceptional cases. *Wainman v. Hansen*, 6 A.L.T., 24.

Where a plaintiff, the surviving partner of a building firm, claimed a balance of £163 6s. to be due to him from the defendant, who alleged a payment by him to the deceased partner of £200 beyond the amounts acknowledged by the plaintiff, and contended that he had over-paid the defendant's firm by £36 14s., *Held* that the

defendant's affidavit contained sufficient allegations and facts to entitle him to defend the action, and summons under Order 14, Rule 1, for liberty to sign final judgment, or that the defendant might be ordered under Rule 3 to attend and be examined on oath, dismissed with costs. *Ibid.*

Application to Sign Final Judgment on Writ Specially Endorsed—Order 3, Rule 6—Order 14, Rule 1—Order 3, Rule 6 (F.)]—Order 3, Rule 6, (F.) only applies to cases where the relationship of landlord and tenant exists, and does not apply to a case where the owner of land seeks to recover possession from a trespasser. Application under Order 14, Rule 1. Dismissed with costs. *Davies v. Herbert*, 6 A.L.T., 70.

Application to Sign Final Judgment—No Defence to Writ—Order 14, Rules 1, 4.]—In an application to sign final judgment on the ground that there is no defence, plaintiff must show that the money is owed legally; but plaintiff was allowed to sign final judgment as to certain items which were not in dispute. *Traders' Company v. Sutton*, 6 A.L.T., 113.

Act No 761, Sec. 41—Order 16, Rule 40—Service of Notice of Decree Upon a Person out of the Jurisdiction.]—Application to serve notice of decree upon interested persons resident in Sydney granted. Six weeks fixed as the time within which they must apply to vary the decree. *Hayes v. Wilson*, 6 A.L.T., 87.

"Judicature Act 1883," Sec. 8, Sub-secs. 4, 64,—Charging Order—Equitable Claim.]—Application for an order under Sec. 64 of the "*Judicature Act* 1883" charging certain mining shares held by the defendant, for a debt due by her for calls to the plaintiff company, for which she had given a cheque, which was dishonoured. The defendant alleged that she held the shares in trust for her husband. *Higinbotham, J.* (in Chambers,) took into consideration the equitable claim, under the power conferred by Sec. 8, Sub-sec. 4, of the Act, and considering that on the facts the claim was not established made the order absolute. *Long Tunnel Gold Mining Company v. Zimmier*, 6 A.L.T., 25.

(5) *Intermediate Proceedings.*

(*a*) *Summons for Particulars.*

Action for Fraudulent Representation—Statement of Claim—Particulars—Order 19, Rules 4, 5, 6, 7—Appendix C, Sec. 6, No. 14.]—In an action for fraudulent representation the statement of claim was that the defendants fraudulently represented to the plaintiffs that certain land was of a "certain value," knowing the same to be untrue, and that plaintiffs were induced to lend money on such representation, &c. On summons, in Chambers, by defendants, under Order 19, Rule 7, for a further and better statement of claim, *Held, per Higinbotham, J.*, that in an action for fraudulent representation the precise nature of the alleged representation is a material fact which should not be omitted from the statement of claim; that even if it were not included in the form of claim in Appendix C, Sec. 6, No. 14, the defendant would be entitled in an action of this nature to particulars; and he might be entitled to special particulars beyond those contained in the forms, if it should appear to be necessary (*vide* Order 19, Rule 6); and summons allowed with costs. *Desailly v. Ham*, 6 A.L.T., 21.

Particulars—Application for when made—Order 19, Rule 7.]—*Per Higinbotham, J.* (in Chambers)—Applications for particulars under Order 19, Rule 7, ought to be made by the defendant before he has delivered his statement of defence, and by the plaintiff, if the statement of defence is such as would entitle him to particulars, before he has delivered his reply. In future, applications for particulars after the party applying has pleaded, will not be granted, unless under special circumstances. *Taylor v. Port*, 6 A.L.T., 155.

(*b*) *Receiver and Equitable Execution.*

Equitable Execution by Appointment of a Receiver—Act No. 761, Sec. 9, Sub-sec. 8.]—Before granting equitable execution by appointing a receiver under Sec. 9, Sub-sec. 8, the Court must be satisfied that plaintiff has tried all he can to get satisfaction at law, and that means that he must do all he can in Victoria to get satisfaction of his judgment. *Ettershank v. Russell*, 6 A.L.T., 140.

(*c*) *Staying Proceedings.*

Staying Proceedings—Action under "Instruments and Securities Stat. 1864," Part I—Service of Writ—"Supreme Court Rules, 1884," Order 10, Rule 6; Order 16, Rules 4, 6, 14.]—Action against H. and K., who were partners, upon a cheque drawn by them. They were not sued in the name of the firm, but as joint contractors. The writ was served upon the manager of the two partners. The service, which was defective under Sec. 19 of the "*Instruments and Securities Stat*, 1864," was treated by K. as good service, and he took steps to defend the action. H. was out of the jurisdiction, and so was not served. Application, in Chambers, by K. that all further proceedings as against him should be stayed until the writ was served upon H., and he had appeared, or judgment had been signed against him. *Held, per Higinbotham J.*, that K., having accepted the service, was in no better position than he would have been in if, under the old procedure, he had been sued alone for a debt jointly due by him and another person, in which he could only have compelled the joinder of the other contracting party by giving the plaintiff a better writ; that, under the new rules, even this limited right is taken away, for under Order 16, Rule 6, a plaintiff is at liberty to join one or more only of the parties liable, and under Rule 4 of the same Order judgment may be signed against one or more defendants who may be found to be liable without amendment, and application dismissed with costs. *Oriental Bank v. Halstead*, 6 A.L.T., 30.

(6) *Trial.*

Filing Memorandum of Close of Pleadings—Order 23, Rule 5.]—It is only the plaintiff who can file the memorandum, and he should not file it until issue has been joined between all the parties, and the whole of the pleadings have been thereby closed, and not merely the pleadings between particular parties referred to in Rule 5. *Freehold Investment Company v. Thompson,* 6 A.L.T., 126.

Application for Action to be Tried with a Jury—Order 36, Rule 6.]—Applications to have an action tried with a jury should (*Per Holroyd, J.,*) be made *ex parte,* and do not require an affidavit as to the nature of the action. The Judge will look at the pleadings, and decide thereupon, *Pralle v. Slater,* 6 A.L.T., 70.

Per Williams, J.—Where pleadings are produced, no affidavit as to nature of the action is necessary, but where they are not, an affidavit is necessary. *Coulson v. Campbell,* 6 A.L.T. 89.

Coulson v. Campbell, followed by *Higinbotham, J. Green v. Embling,* 6 A.L.T., 98.

Application for Trial by Jury—Order 36, Rule 6.]—*Per Williams, J.* (in Chambers)—In all applications for trial with a jury an affidavit stating the nature of the action is necessary. *Simmons v. Hall,* 6 A.L.T., 45.

Reservation of Law Points—Order 25, Rule 2.]—In an action against a Justice for issuing a warrant on a Sunday, certain points of law raised in the defence were ordered to be tried before the trial of the action. *Graham v. Haig,* 6 A.L.T., 158.

(7) *Causes Pending under Old Procedure.*

Action Under Old Procedure—Cross Action Under New Procedure — Costs—"Judicature Act 1883," Sec. 8 (V.,) Order 65, Rule 27, Sub-sec. 12.]—Action for balance of a banker's account commenced before the coming into operation of the "*Judicature Act*;" cross action on the same subject matter by the defendants against the plaintiffs under the Act. Application in Chambers on behalf of the defendants in the cross action under Sec. 8 (V.,) of the Act to be allowed to set up, by way of counter claim, equitable facts entitling the defendants to a stay of proceedings, defendants offering, if the application were granted, to abandon their cross action, ordered *per Higinbotham, J*, that the action be carried on under the "*Judicature Act,*" that the defendants be at liberty to set up equitable facts by way of counter claim, and that the defendant have a week from the date of the order to deliver his counter claim. The costs of the cross action to be paid by the defendants to the plaintiffs, the costs of the application and of the order to be costs in the action. *Ettershank v. Russell,* 6 A.L.T., 19.

New Procedure Ordered to be Adopted after Commencement of Action on Affidavit of Counter Claim —Costs.]—Where an action was commenced under the old procedure, and the defendants put in an affidavit stating that there was a cross claim for damages, and that this cross claim could, under the "*Judicature Act,*" be set off against the claim of the plaintiffs, ordered, *per Higinbotham, J.* (in Chambers,) that the action should be carried on under the ordinary proceedings under the "*Judicatare Act.*" Costs of the application to be costs in the cause, and defendant to have six days to deliver his counter claim. *Langton v. Gillespie,* 6 A.L.T., 20.

(8) *Proceedings in Chambers.*

Summons — Signature of Judge — Service — "Judicature Act, 1883," Secs. 36, 41, Order 54, Rules 4, 10, Order 64, Rule 11—"Common Law Procedure Stat. 1865," Sec. 420.]—Summons (in Chambers) calling upon the defendant to show cause why an order of *Williams, J.,* should not be set aside on the grounds—1st, that the copy of the summons upon which the order was made was not signed by a judge, and, 2nd, that the copy summons was served upon the plaintiff's attorney after the hour of two o'clock on the day previous to the date at which, by the copy, it was directed that all parties should attend the Judge in Chambers. *Held, per Williams, J.,* that as Order 54, Rule 10, provides that these summonses should be in the form No. 1 in Appendix K, and that appendix not providing for the name or signature of a judge, no signature was required by the Judge or his associate in his name; and that Secs. 36 and 41 of the "*Judicature Act* 1883," repealing Sec. 420 of the "*Common Law Procedure Act* 1865," Order 54, Rule 4, was in force, and copy summonses must be served before two o'clock, as there provided. *Rudduck v. Clarke,* 6 A.L.T., 46.

Affidavit in Support of Summonses—Order 38, Rule 10—Order 66, Rule 7—Order 70, Rule 1.]—Objections were made to the affidavit in support of a summons in Chambers—1st, that it did not show on whose behalf it had been filed, in accordance with Order 38, Rule 10; and, 2nd, that the folios were not numbered in accordance with Order 66, Rule 7 (*m.*) *Williams, J.* (in Chambers) upheld the first objection, but allowed an amendment under Order 70, Rule 1, and dismissed the second on the ground that Order 66, Rule 7, did not apply to such an affidavit as this, which was not required to be printed. *Ibid.*

Affidavits—"Supreme Court Rules, 1884," Order 38, Rule 23.]—Rule 23 of Order 28 of the "*Supreme Court Rules,* 1884," applies to affidavits in Chambers only. *Regina v. Birkett, ex parte Chambers,* 10 V.L.R. (L.,) 313.

Application for Leave to Defend—"Supreme Court Rules, 1884," Order 38, Rules 23, 24—Copy of Writ and Summons should not be Annexed to the Affidavit, but must be Referred to as an Exhibit.]—*London Discount Bank v. Prendergast, ante column* 99

Power of Judge in Chambers to fix Costs.]—*See Freehold Investment and Banking Company v. Thompson, Fahey v. Ivey and Kennedy, Coulson v. Campbell, ante column* 240.

(9) *Terms.*

Abolition of Terms—Act No. 761, Sec. 13.]—For effect of Sec. 13 in abolishing terms, *see in re Husbands and Husbands*, under ARBITRATION, *ante column* 53.

Terms—15 Vic., No. 10, Sec. 19.]—*Per Higinbotham, J.* (in Chambers.) "The Judicature Act 1883," Sec. 13, which abolishes terms, except as a measure for determining time, repeals Sec. 19 of 15 Vic., No. 10, commonly called the "emergency clause." *Regina v. Bailes, ex parte Pickup*, 6 A.L.T., 29.

(E) PLEADING UNDER THE JUDICATURE ACT OF 1883.

(1) *Statement of Claim.*

Statement of Claim—Insufficient—Appendix C.' Sec. 7, No. 2—Order 9, Rule 4.]—In an action for the recovery of land the statement of claim was as follows: "The plaintiff is entitled to recover possession of Crown allotments 5 and 6, Sec. 14, town and parish of Dandenong, County of Bourke. The plaintiff claims possession." *Williams, J.* (in Chambers,) *Held* this not to be in accordance with the rules, and ordered it to be struck out, but subsequently, because the summons was not properly served, refused the application to strike out or amend, defendant to pay the costs of the summons, and allowed the plaintiff to amend within a week.—*Rudduck v. Clarke*, 6 A.L.T., 45, 46.

Statement of Claim—Insufficient—Amendment—Order 70, Rule 1.]—*Holroyd, J.* (in Chambers,) ordered a statement of claim in an action for breach of agreement and non-payment of salary, to be amended, under Order 70, Rule 1, by inserting the dates and sums in figures, by adding the signature of the counsel who drew the statement, the place of trial, and by stating the particulars as to the salary the plaintiff was to receive, and the expenses he had been put to by the breach of the agreement. *Vail v. Gilmour*, 6 A.L.T., 64.

(2) *Statement of Defence and Counterclaim.*

Statement of Claim—Statement of Defence—Set Off and Counterclaim.]—A statement of claim was for arrears in rent due by defendant, for rates paid on the property, and for damages for breach of contract, and covenants contained in a lease to keep in repair. Statement of defence alleged a set off for work done and money paid, and defendant counterclaimed for damages caused by the trespass of the plaintiff. *Holroyd, J.* (in Chambers,) *Held* that the defendant ought with regard to the set off to give the particulars of the work done and money paid, and with regard to the counterclaim ought to give the dates of the trespass and the items. *Freehold Investment and Banking Company v. Thompson*, 6 A.L.T., 65.

Pleading—Statement of Defence—Order 19, Rules 4, 5, 7, 19, 27—Appendix D, Sec. 6.]—Action for wrongs. The statement of defence denied the "material allegations" in the statement of claim. The second paragraph of the statement of defence alleged that the alleged injuries were occasioned by a certain instrument, and that the defendant had not the care and management of or any property in such instrument. *Held, per Higinbotham J.* (in Chambers,) that the first statement was insufficient, though *semble* had it followed the form in Schedule D, Sec. 6, it would have been sufficient; but that the second was not only an allowable but a very proper one to put on the record, and was not in any way embarrassing. *Blackburn v. Mayor of Melbourne*, 6 A.L.T., 154.

Defence and Counter Claim—Order 21, Rules 10, 11.]—Where a defendant mixed up a defence and counter claim without distinctly separating the counter claim, the Court *held* that the pleadings were embarrassing and must be struck out, and that it was proper to apply before trial to strike out such pleadings. *Ballarat Banking Company v. Wall*, 6 A.L.T., 157.

(3) *New Assignment.*

For circumstances in which a reply was ordered to be struck out or amended on the grounds that it raised a "new assignment,' contained inconsistent statements, and did not clearly raise the points of law which it intended to raise, thereby violating Rules 6 and 7 of Order 23. *See M'Kenzie v. Hanham*, 6 A.L.T., 153.

PRINCIPAL AND AGENT.

I. Rights and Liabilities of Principal with Regard to Third Persons and Vice Versa.

(a) *When Agent Entrusted with Indicia of Property.*

Agent Entrusted with Goods — Storage.] — A factor, or person entrusted with goods, with power simply to sell and deliver them, is not presumed to have authority to stipulate for his principal with the buyer for storage of the goods by the principal on the buyer's behalf, in the absence of evidence of an authority in that behalf by the principal. *Brebner v. Birkett*, 1 W. & W. (L.,) 205.

Not Within Factor's Act—6 Geo IV., Cap. xciv., Sec. 2.]—The word "person" in Sec. 2 of 6 Geo. IV., cap, xciv., must be construed as "factor" or "agent," and applies only to factors or agents having mercantile possession, so as to be within the mercantile usage of getting advances, and not to persons where the relation is that of master and servant, or employer and clerk. A bill of lading of goods landed, but not delivered to the consignee, was endorsed by him for a specific purpose, and on a subsequent day handed by him to B. for the purpose merely of enabling delivery of the goods to be expedited, and freight to be paid. B. held the bill of lading. *Held*, that B. was merely a clerk to the consignee, and not the consignee's agent "entrusted" by him with the bill of lading, within the meaning of Sec. 2 of 6 Geo. IV., cap. xciv. *Levi v. Learmonth*, 1 W. & W. (L.,) 283.

(b) *Undisclosed Principal.*

Suing in Own Name.]—W. and H., as agents for undisclosed principals, joined with R. in a joint purchase of Crown lands. W. and H. advanced to R. £1024, being one-fifth of the purchase money, out of their principals' moneys. R. signed a declaration of trust as to the land he purchased in favour of W. and H. as to one-fifth. R. had no notice that W. and H. were only agents. The representatives of some of the principals brought a suit against R. to enforce their equity to one-fifth of the land. *Held* on demurrer that the plaintiffs suing on behalf of sufficiently affirmed the investment on behalf of all the undisclosed principals, and that W. and H. were not necessary parties. Demurrer overruled. *Hunter v. Rutledge*, 6 W. W. & A'B. (E.,) 331.

Husband Acting as Agent for Wife Without Disclosing Principal—Right to Sue Wife When Ascertained to be Principal.]—*See M'Intosh v. Tonkin, ante column* 547.

(c) *In Other Cases—Authority of Agent.*

Excess of Authority — Ratification — Contract Made on Sunday.]—An agent who is authorised to sell partly for cash, partly on credit, exceeds his authority if he sells for cash only, and similarly where the agent arranges a sale which is conditional upon approval of title by purchaser's solicitors; but if the principal acquiesces with knowledge of authority having been assumed by agent this affords strong evidence of the power in the agent: where defendant (vendor) having distinct early knowledge of an agreement made on his behalf, though in excess of authority as above stated, subsequently wrote to the purchaser stating that he would be bound if a contract was made, this is a sufficient ratification of such a contract if made (*per Molesworth, J.*, and affirmed.) *Semble, per Molesworth, J.*, if an agent without authority signs a contract as on behalf of principal, the latter may adopt it without writing, and make it good under Stat. of Frauds. *Per Molesworth, J.*—A contract made by land agents on a Sunday is not binding on principal by 29 Car. 2, Cap. 7, and such objection may be taken at hearing, though not stated in answer if it appears that fact only became known to principal on taking of evidence. *Per totam curiam.* A land agent is not within the Stat. 29, Car. 2, Cap. 7, since "other person" means a person *ejusdem generis* with "Tradesman, artificer, workman, labourer," and therefore a contract made by land agents on behalf of principal on a Sunday does bind a principal. *Ronald v. Lalor*, 3 A.J.R., 11, 12, 87.

Agent Exceeding His Authority.]—N. held an island under a lease for purpose of exporting guano, and gave C., his agent, a power of attorney to do all that N. could do "in gathering, collecting and exporting guano." C., as such agent, chartered a ship, of which H. was master, simply for purpose of sending to N. "samples of guano and despatches." H. sued N. on the charter party. The pleadings did not aver that the despatches bore upon "the gathering, collecting and exporting of guano," and the plea stated that "samples" were not commonly sold as merchandise. *Held* that the agent had exceeded his authority, and that N. was not liable. *Hort v. Nicholson*, 2 W. W. & A'B. (L.,) 183.

Agent Acting in Excess of Authority—Government Officer.]—By Rule 17 of the Civil Service Regulations, no officer may incur any liability on behalf of the Crown without the authority in writing of the Minister of his department; and, by Rule 20, no information out of the strict course of official duty is allowed to be given by any officer without the express direction or permission of the responsible Minister. C., the Chief Engineer, wrote to the Minister of his department, requesting authority to so far depart from the regulations of the service as to obtain the professional opinion of independent engineers upon some points raised by the Engineer-in-Chief in his report of some works executed under C.'s direction. The Minister replied that he had no objection to C.'s so doing. The engineers requested by C. to give their opinion did so, and addressed their report to C. Afterwards the Minister wrote to the Treasurer requesting him to make provision for the payment of the engineers for their report, but this was not done. On suit by the engineers against the Crown, *Held* that there was

no agency proved by reason of these letters on the part of C. to incur the liability for the Crown, since the letter from C. to the Minister was under Rule 20, and not Rule 17, and the letter from the Minister to the Treasurer was merely an expression of opinion; and plaintiffs nonsuited. *Adams v. The Queen*, 2 V.R. (L.,) 145; 2 A.J.R., 96.

Liability of Corporation for Illegal Seizure by Inspector of Licenses—Excess of Authority.]—*See Henderson v. Mayor of Melbourne, ante column* 214, under CORPORATION.

Extent of Agent's Authority — Delivery — Acceptance.]—An authority given to an agent to purchase goods for his principal, for use upon the principal's premises, does not impliedly authorise him to direct delivery of the goods elsewhere. If the agent, after selecting and purchasing the goods, order their delivery elsewhere than at the principal's premises, delivery at the place so directed does not amount to an acceptance to satisfy the Statute of Frauds. *Mitchell v. Watson*, 6 V.L.R. (L.,) 493; 2 A.L.T., 99, *sub nom., Watson v. Mitchell.*

Agent Drawing Drafts—Change of Authority.]—As a general rule a person, without inquiry, taking drafts drawn by an agent as agent for a principal, does so at his own risk; but this does not apply where on former occasions drafts so drawn and taken have been honoured. Where, therefore, Y., a squatter, authorised his overseer to draw drafts without restriction as to the manner up to June, 1868, and after that time imposed the restriction on him that the drafts should be endorsed by Y., and a person who had taken drafts from the agent before took drafts drawn payable to bearer after that date without Y.'s endorsement, which were dishonoured, *Held* that Y. was bound to communicate the restriction of the overseer's authority to draw by ordering him to draw payable to bearer, subject to Y.'s endorsement; and that not having altered the form of the drafts when he changed the nature of the overseer's authority, there was evidence to go to the jury of Y.'s liability, and a rule *nisi* for a nonsuit which had been obtained discharged. *Fletcher v. Youl*, 1 V.R. (L.,) 61; 1 A.J.R., 101.

Authority of Agent—Breach of—What is.]—Where an authority is given to an agent to sell for cash, and he sells giving a month's credit, that is a breach of his authority, and specific performance cannot be enforced. *Breese v Lindsay*, 8 V.L.R. (E.,) 232; 4 A.L.T., 20.

See S.C., VENDOR AND PURCHASER—Specific Performance.

An authority to sell real estate does not extend to receiving purchase money. *Laughton v. Munro*, N.C., 31.

Authority of Agent—Breach of.]—*Per Molesworth, J.*, following *Hamer v. Sharpe*, L.R., 19, Eq. 108. A general authority to an agent to sell land does not authorise him to enter into an open contract. But, *per Stawell, C. J.*—Where land is entrusted to an agent to sell without instructions as to conditions, and he enters into an open contract, *quære*, whether as between vendor and purchaser, that contract is absolutely void. *Ross v. Victorian Permanent Building Society*, 8 V.L.R. (E.,) 254, 266, 270; 4 A.L.T., 17.

Agent Acting Contrary to Authority—Refusal of Principal to Ratify.]—*Oppenheimer v. Oppenheimer, ante column* 1130.

Bank Manager, Authority of.]—*Colonial Bank v. Ettershank, ante column* 83; *Harrison v. Smith, ante columns* 79, 80.

Agency — Philanthropic Society — Liability of Committee-men for Overdraft—Authority not Withdrawn.]—An action was brought by a bank to recover from the members of a committee of a society for the promotion of temperance the amount of an overdraft. At a meeting of the committee in June, 1874, the treasurer was empowered to operate upon the account at the bank, and his signature on cheques was accepted as sufficient guarantee. The account then became overdrawn. *Held* that the authority given to the treasurer being unrevoked, the members who were aware of the overdraft and did not express their dissent, were liable; and that members assenting to one overdraft would, until such assent was revoked, be liable for future overdrafts. *English, Scottish and Australian Chartered Bank v. Adcock*, 7 V.L.R. (L.,) 157.

Liability for Orders of Manager of Company as to Goods Supplied.]—Where goods were delivered to H., and were afterwards seen on the company's premises, and it was proved that H. had been at one time manager of the company, *Held* that there was no evidence of agency, or of H.'s being manager at the time the goods were ordered. *Maxwell's Reef Company v. Irving*, 3 A.J.R., 26.

Overseer of a Station — Authority.] — The situation of overseer on a sheep station does not necessarily authorise him to draw drafts for station purposes, his position being completely analagous to that of the manager of a mine. *Fletcher v. Youl*, 1 V.R. (L.,) 61; 1 A.J.R., 101.

Authority of Agent — Authority to Complete Verbal Agreement as to Cancellation of Policy—Recission.]—An agent of a life assurance company, who has been entrusted with a cheque to purchase a policy, which it was agreed should be cancelled, has no authority, in the absence of an express authorisation to rescind the agreement. *Hardy v. Anderson*, 1 A.J.R., 136.

Authority of Agent—Verbal Recission of Contract for Sale of Land by Agent of Vendor.]—A person appointed as attorney under power with authority to sell land, and "to rescind any contract for sale," has power verbally to rescind a contract entered into for sale of land, and such verbal recission is binding on his principal. *Bartlett v. Looney*, 3 V.L.R. (E.,) 14.

Evidence of Election to Sue Principal—Evidence to go to Jury.]—H. authorised C., as his agent, to buy cattle for him, furnishing C. with one or more drafts for a certain amount, in which the name of the drawer and payee were left blank, and on the side of each draft was a written statement by the manager of the bank, that the draft would be honoured in favour of any payee. C. purchased cattle from M. and B., disclosing his principal in each case. C. filled in his own name as drawer in each draft, and M.'s name as payee in one, B.'s in the other. The cattle were delivered, and on the drafts being dishonoured the vendors sued H. At the trial the Judge nonsuited each plaintiff on the ground that there was conclusive proof that each elected to give credit until the draft should be honoured by C. alone. *Held* by *Stawell, C. J.*, and *Barry, J.*, (*dissentiente Williams, J.*,) that there was no such conclusive evidence of election, but only facts, from which the jury might or might not have inferred the election. Rule absolute to enter verdict for plaintiffs in each action. *Mate v. Herbert, Bardwell v. Herbert*, 2 W. and W. (L.,) 258.

For Acts of Foreign Agent—Shipowners—Negligence.]—*See Goddard v. Tasmanian Steam Navigation Company*, 9 V.L.R. (L.,) 360; 5 A.L.T., 120, *post under* SHIPPING—Owners, their Liability and Rights.

Liability of Principal Under Order of Injunction.]—*Lane v. Hannah, ante column* 562.

Wrong Committed by Agent—Fraud.]—A principal is liable for every wrong of the agent committed in the course of his employer's business, and for his benefit, though no express command or privity of the principal be proved; and no sensible distinction can be drawn between the case of fraud and that of any other wrong. *Stevenson v. Bear*, 2 V.R. (L.,) 220; 3 A.J.R., 23.

Liability for Tort of Agent—Malicious Prosecution.]—*See Lennox v. Langdon, ante column* 880.

For Illegal Distrase by Agent—Ratification.]—*See Sherwood v. Courtney, ante columns* 382, 383.

Insurance Agent—Knowledge of Agent Deemed to be Knowledge of Insurer.]—*Jones v. Queen Insurance Company, ante column* 719.

Husband and Wife—Contract by Wife—Ratification.]—W. sued H. for breach of agreement to lease a hotel. It was proved that Mrs. H., acting on H's. behalf, had contracted to sell the business, but that H. himself had subsequently executed the lease. *Held*, reversing County Court Judge, that there was evidence to go to the jury to sustain plaintiff's case; nonsuit set aside, new trial directed before Supreme Court. *Whitesides v. Hayes*, 3 A.J.R., 32.

Selling Liquor Without a Licence—Wife not Deemed to be Husband's Agent.]—*Hettenbach v. Isley, ante column* 833.

Person Fraudulently Altering a Bill Made Agent by Negligence of Drawer.]—A bill was drawn on E. for £60 on a printed form and handed to him for acceptance. E., whose sight was weak, was under the impression that the sum was properly written in writing and in figures, and accepted as for £60. After E.'s acceptance, the drawer or some one with his consent altered the sum to £160 and made the necessary additions in the writing and figures on the bill. The alteration was rendered perfectly easy by the manner in which the words and figures representing the original amount were filled in. The bill as altered, was endorsed and delivered to a bank, which had no notice of the fraud. The bank sued on the bill for £160 and recovered a verdict. On rule *nisi* to set aside the verdict, *Held*, that E., by his negligent conduct, must be deemed to have made the drawer, or the person who altered the bill with the drawer's consent, his agent to alter the bill; and verdict upheld. *Bank of Australasia v. Erwin*, 1 W. W. & A'B. (L.,) 70.

Contracts for Sale of Land Made by Agents.]—*See* VENDOR AND PURCHASER.

II. RIGHTS AND LIABILITIES OF AGENTS TO THIRD PERSONS AND VICE VERSA.

(*a*) *Generally.*

Liability on Contract—Signature.]—A contract was worded "As agents for Mr. B. we have this day sold Mr. A. 3000 sheep at the rate of 11s. 6d. per head" and was signed "Powers, Rutherford and Co., per W. A. Torrance," and A. brought an action against P., R. and Co., for non-delivery of the sheep. The plea set out the contract. *Held* upon demurrer to the plea that the defendants being described "as agents for Mr. B." did in the sale act as such agents and their signature "per W. A. Torrance," was a signature in such a capacity; that there was no distinction between the limitation as agents, being placed at the beginning or at the end of the contract. Judgment for defendants. *Aitken v. Power*, 2 W. W. & A'B. (L.,) 172.

Personal Liability of Agent on Contract.]—H. sent his horse to B., a horse-dealer, to sell. B. sold the horse and signed a sale note as follows:—"Sold this day, to S., through W. C. S., chestnut horse, belonging to H., branded ——, which I guarantee all right, for the sum of £30. £30 received same date—B., on account of H." *Held* that B. did not render himself personally liable on the guarantee, but had acted on account of H. in giving it. *Sprent v. Bowes*, 1 A.J.R., 111.

Sale as Agent for Named Principal—Receipt for Deposit on Same Paper Without Stating Agency.]—An agent made a sale note as follows:—"As agents for Mr. J. R., we have this day sold to P. the lease of the R. Hotel—W. H. and Co.," and on the same paper, at the foot of the note,

drew up a receipt for the deposit as follows: — "We acknowledge having received cheque for £50, being deposit on the above sale, from P. W.H. and Co." *Held*, that the whole note must stand together, and that on the document as a whole the agent acted as agent for R., who was the proper party to be sued for return of the deposit, after the sale had gone off. *Groom v. Parkinson*, 10 V.L.R. (L.,) 14; 5 A.L.T., 171, *sub nom*, *Parkinson v. Groom*.

Person Acting as Agent for Company not then in Existence.]—Persons professing to act as agents for companies not then in existence must be treated as principals, and are personally liable for breach of the contract, one to the other. *Cane v. Sinclair*, 10 V.L.R. (L.,) 60; 5 A.L.T., 186.

Certain bills of lading, invoices, &c., of a consignment of champagne were handed to A. on agreement with D. to the effect that A. was to dispose of the goods to M., and to share in the profits. A. disposed of the goods, and by a letter accepted the terms as to sharing profits, and stated that he acted as agent for W. (the shipper.) In an action by D. against A. as principal for a share in the profits, *Held* that A. could not dispute his own liability, and was liable as principal in the arrangement made. *Danby v. Adet*, 5 V.L.R. (L.,) 17.

Untrue Representations of Authority—Plaintiff's Knowledge—Burden of Proof.]—In an action by a purchaser of land for untrue representations as to the authority of an agent to sell the land, it is necessary for the plaintiff to show not merely that the agent made such representations, but also that the plaintiff was induced by such representations to enter into the contract; the *onus* of proving that the plaintiff was aware, at the time of the contract, that the agent had not the authority alleged, lies on the agent. *Adamson v. Morton*, 7 V.L.R. (L.,) 307; 3 A.L.T., 31.

Right of Agent to Sue for Non-delivery of Mining Shares.]—C., a broker, as agent for W., bought shares in mining companies from M. The bought-note was made out in the following form:—"C., stock and share broker, 8th January, 1872. Sold by order, and on account of M., 100 Great Success at 16s. 6d., £82 10s." M. refused to deliver, and C. had to buy other shares to supply his customers at an advanced rate. C. brought an action in his own name for non-delivery against M. The County Court Judge non-suited C. *Held* an appeal that there was evidence both ways as to whether plaintiff acted as principal or agent. Nonsuit set aside. *Clarke v. Mellor*, 3 A.J.R., 39.

Transmission of Bill from Principal to Agent—Duty of Agent as Regards Obtaining Acceptance.]—*Bank of Van Dieman's Land v. Bank of Victoria, ante columns* 94, 95.

Admissions by Agent—"Without Prejudice."]—*Goodman v. Hughes, ante column* 415.

(*b*) *Undisclosed Principal.*

A defendant B., really acting as agent for the purchase of land on behalf of A., but representing himself as agent for S. (A. being anxious not to appear as purchaser,) bought land from plaintiff, and signed contract as on his own behalf. On a bill by plaintiff against B., *Held* that defendant was liable on the ground that the signed contract would have no effect if it did not bind defendant. *Clarke v. Byrne*, 3 A.J.R., 20.

Refusing to Disclose Principal.] — S. sued D. for delivering wool which was not equal to the sample. Two bales were shown as samples, but the plaintiff, on opening other bales, found they were of inferior quality, and asked D. to disclose his principal, which D. refused to do. The Judge of the County Court gave S. a verdict. The Court, on appeal, affirmed the decision, thinking there was sufficient evidence to prove that the wool was not equal to the sample. *Synnot v. Douglas*, 5 A.J.R., 165.

Agent Signing Guarantee to Creditors—Signature Among Those of Creditors.] — G. signed a contract to guarantee a sum to the creditors of a person, of which creditors his firm was one. The contract was as follows:—"We, the undersigned creditors of P. S———, hereby agree to accept the lump sum of £80 as offered by Mr. G. for another party. . . . (Signed.) B. and G. (G.'s firm,) C., A., P., G." *Held* that G. must have signed as a contracting party, and not as a creditor, and that he must be the "Mr. G." referred to in the contract; and that his principal not being disclosed he was personally liable on the contract. *Coote v. Gillespie*, 6 V.L.R. (L.,) 56; 1 A.L.T., 155.

III. Rights and Liabilities of Principal and Agent Inter Se.

(*a*) *General Principles.*

Land Purchased by Agent in Mistake—Principal's Right to Deposit Money Paid by Him to Agent.]—A instructed B. to purchase for him land at the corner of two streets containing 110ft., and paid B. £50 for deposit money. B. purchased land in King-street, but two lots from the corner mentioned, and A. repudiated the purchase. *Held* that A. was entitled to recover the £50 from B. as money had and received. *Allison v. Byrne*, 3 V.R. (L.,) 155; 3 A.J.R., 67.

Factor—Selling After Countermand of Authority—Advance Equal to Value of Goods Sold—Damages.]—Where a factor entrusted with goods with an authority to sell them in order to recoup himself for advances made by him to the principal, equal in amount to the value of the goods so entrusted, sells such goods after his authority to sell has been countermanded, but before he has been repaid his advances, the damages in an action of trover by the principal will be only nominal. *Osborne v. Synnot*, 2 V.L.R. (L.,) 209.

Countermand of Authority—Sale—Measure of Damages.]—Wool was consigned to a factor for sale, but before the sale the authority was countermanded. The trustee in insolvency of the principal sued the factor in trover. *Held* that the defendant had no right to sell after the countermand of authority; and that by the wrongful sale the factor's lien for a debt owing him by the insolvent principal was extinguished, and the measure of damages was the value of the wool. *Osborne v. Synnot*, 3 V.L.R. (L.,) 148.

Suit by Principal to Compel Agent to Transfer Shares — Necessary and Proper Parties — Third Parties.]—Where a principal brings a suit to enforce the transfer of shares in a company purchased by the defendant as his agent, which transfer the defendant refuses on the ground that the company may impeach the purchase as invalid, neither the company nor the former owners are necessary parties. *Hardy v. Cotter*, 7 V.L.R. (E.,) 151.

An agent cannot set up as against his principal in a suit between them the rights of third parties to impeach the validity of a transaction which was the subject matter of the suit. H. employed C., the manager of a mining company, to purchase for H., as his agent, certain shares in the company which were forfeited for non-payment of calls, and about to be sold by auction. C. purchased accordingly, and the purchase money was subtracted from certain costs due by the company to H., as its solicitor. C. had the scrip issued in his own name, and gave them to H., but refused to transfer them to H., alleging that sale was invalid, the proper preliminaries for forfeiture not having been taken. *Held* that C. could not set up the right of the company to impeach the sale as against H. Decree for transfer. *Ibid.*

Parol Agreement to Purchase Land for Principal —Agent not Provided with Funds.]—A verbal agreement by an agent not provided with funds to purchase for another, cannot be enforced against the agent having got a conveyance. *Pain v. Flynn*, 10 V.L.R. (E.,) 131.

(*b*) *Commission.*

A company borrowing money on debentures, employed the plaintiff W. to place them in the market under the following terms: "For disposal for three months from date of £30,000. Your commission to be 1½ per cent. by whomsoever sold, but it is understood that, should the whole of the debentures not be disposed of at this time, no commission is to accrue until they are sold." Within the three months tenders were sent in for £6000, but no further tenders being received these were not accepted. *Held* that the words, "*at this time*," meant at the end of the three months, and that W. was not entitled to any commission, such right only arising under the contract when all were sold. *Were v. South Melbourne Gas Company*, 3 V.L.R. (L.,) 352.

(*c*) *Account and Fiduciary Position.*

Manager of a Station—Purchase of Land Thrown Open for Selection.]—*Per Molesworth, J.*—An agent in the management of a squatting station is not, as such, disqualified from purchasing land on the station put up for sale by the Government; although his agency might give him peculiar means of knowing its value. *Lempriere v. Ware*, 2 V.R. (E.,) 1.

Sale of Mine — Vendor and Purchaser — Sub-purchase by Agent for Sale.] — Motion for injunction against disposing of shares in a company, and for a receiver over the shares of certain defendants. (The facts as stated by the bill appear in 1 V.L.R. (E.,) 34.) In addition to those facts it appeared from affidavits in support of the motion that the defendant B., as agent for plaintiff's vendors, had signed a sale note, 15th September, 1873, by which the mine was to be sold for £13,500, half cash, remainder when transfer was completed. The half of the purchase-money was paid to B. on signing of note, and the remainder on 19th September, 1873, when defendant C. was put into possession of the mine. After possession was delivered, B. and defendant C. entered into an agreement by which B. purchased a quarter share in the mine for £3348. *Held* that after B., as plaintiff's agent had signed contract for sale, all his discretionary powers as agent, all those in which he would be warped by intention to benefit himself, were over; all that remained to be done was the execution of the transfer and payment of the balance of the purchase-money, as to which it did not appear by the bill that B. had to do anything, and that therefore his sub-purchase was good. Motion refused. *Learmonth v. Bailey*, 1 V.L.R. (E.,) 122. Affirmed on appeal, 2 V.L.R. (E.,) 228, 241.

Suit by Principal Against Agent for Account.]—Where C. acts as sub-agent for B., who is agent for A., and is in such a position that as between him and B. he cannot set up A.'s title as against B., and there is sufficient evidence to show that B. is responsible to A. for money received by C., and recovered from him by B. in an action at law, in a suit by A. against B. for an account, C. is not a necessary party. *Hofer v. Silberberg*, 3 V.L.R. (E.,) 125.

Suit by Principal Against Agent for Account.]—Generally speaking a principal may proceed against his agent in Equity as well as at law, and especially where there is complexity in the matter. The plaintiff became entitled to large sums of money coming to him from Guernsey, and by two instruments appointed S., his attorney, under power to receive it, and he did receive some small sums under it. S. then informed the plaintiff that it would be necessary for him to sign another document, which he represented came from B., the German Consul, and plaintiff signed it, and the bill charged that this document was in reality an assignment of plaintiff's interest to S. B. received £950 from Germany, and S. brought an action for this amount, and it was paid into Court, and taken out by S. *Held* on demurrer that a bill against S. for an account would lie. *Ibid.*

PRINCIPAL AND SURETY.

1. *Discharge of Surety.*

By Insolvency, &c. — Principal Creditor not Bound to Prove.] — P., in consideration that plaintiff bank would make cash advances to H., guaranteed to pay such advances to the extent of £600. The bank made advances to H. to the extent of £5000. The bank sued P. on his guarantee. P. put in an equitable plea to the effect that, after the guarantee and advances, H. gave certain mortgages, &c., to the bank as security, and that H. became insolvent, and that the bank did not value its securities or prove upon H.'s estate, and that H.'s estate being discharged from insolvency, P.'s guarantee was improperly increased. *Held*, upon demurrer to the plea, that the bank was not bound to prove; and that the plea was bad, as P. could not show that the bank had violated any duty, a thing which he must prove, in order to entitle him to a perpetual injunction in equity. Judgment for plaintiff. *National Bank v. Plummer*, 6 W. W. & A'B. (L.,) 165.

When Surety not Affected by Principal Creditor's Acts.]—Defendant became surety for G. to a company for £3000, portion of a debt due by R. G. to the company on a mortgage. G. became insolvent, and obtained his certificate, and the company, without defendant's knowledge or consent, proved their debt at a certain amount against G.'s estate, put a smaller value on their securities, and received a dividend on the residue. *Held* that defendant was not discharged as surety by the acts of the company, nor did their acts amount to an acceptance by them of the mortgage securities in full satisfaction of the value they had placed on them; that the fact of the company having proved their debt, valued their securities and received a dividend on the residue, did not prevent defendant afterwards proving for the sum he might have to pay as surety, and thus, by injuring him, discharge him from his liability, and that he was not bound by the valuation of the securities made by the company. *Trust and Agency Company of Australia v. Greene*, 1 V.R. (L.,)171; 1 A.J.R., 142.

Guarantee for Overdraft—Amount of Guarantee Exceeded—Surety not Discharged.]—M., in consideration that a bank would allow F. to overdraw from time to time on her current account with a bank, to an extent not exceeding £150, promised the bank to pay them on demand the amount of any overdraft to the extent of £150, with the usual bank interest. F. overdrew to an amount exceeding £150. *Held* (*dubitante curia*) that M. was not discharged from his liability. *Commercial Bank v. Moylan*, 1 A.J.R., 123.

Further Security Taken by Creditor.]—A surety is not discharged by the creditor taking a lien on the next clip of wool in the ordinary form, of sheep over which he already held a mortgage payable on demand. The creditor, by taking such a security, does not impliedly contract to give time to the mortgagee. *Swan v. The National Bank*, 4 A.J.R., 42, 43.

By Concealment of Alteration of Security.]—K., being in difficulties, altered acceptances of F.'s, which he held, so as to increase the amount, and had also misappropriated moneys of F.'s. F. agreed to take up the altered acceptances if K. would provide security for their amount. K. induced B. to give a promissory note for the amount, and to sign an agreement to mortgage a station as security if required. F. did not inform B. of K.'s forgery and misappropriation. B. went insolvent, and F. filed a bill against his official assignee for specific performance of the contract to mortgage the station. *Held, per Molesworth, J.*, that the surety was discharged by the concealment of the forgery and misappropriation. On appeal, *Held*, that in contracts of guaranty, the same candour was not required as in contracts of insurance; that B. was not released by F.'s reticence; but that F. was not entitled to the relief prayed, and must prove upon the estate with other creditors, and appeal dismissed. *Fitzgerald v. Jacomb*, 4 A.J.R., 111. On appeal *Ibid*, 189.

By Dealings Between Creditor and Principal.]—A surety for payment for goods sold to the principal is not discharged by the vendor taking bills for the amount in the ordinary course of business from the principal without the knowledge of the surety. *Dodgshun v. Moss*, 4. A.J.R., 118.

By Giving Time.]—All the makers of a bill of exchange being primarily liable, giving time to one does not discharge the others. *Colonial Bank v. Ettershank*, 4 A.J.R., 94, 185.

By Supineness of Creditor.]—Forbearance or even supineness on the part of a creditor will not release the surety. And if the creditor be inactive or supine in realising upon his securities, the surety should pay off the creditor, and take over the securities, and realise upon them himself. *M'Mahon v. Young*, 2 V.L.R. (L.,) 57.

S. obtained a loan on a policy of insurance on his life, and assigned an East Indian pension to the company by way of security, and executed a power of attorney to their agent to enable him to receive payment of the pension. Y. became surety, and executed his covenant after receipt of a letter from the company's agent, stating that Y.'s liability would cease upon the assignment of the pension, and the power of attorney being recognised and registered at the India office, and a defeasance to that effect was endorsed on the deed, but not executed by the company. The India office did not recognise the assignment, but recognised the power of attorney, and several payments of the pension were made under it to the attorney. The pension was then allowed to fall into arrears. S. subsequently granted another power of attorney to another person to receive the pension and all arrears, and they

were accordingly received by such person. In an action by the company against Y., *Held* that the letter from the company's agent was not an agreement, and could not therefore be set up as a defence; that the power of attorney was not a security; and that, if the pension were assignable, Y. had his remedy against the grantors who improperly paid the holder of the second power of attorney, and if it were not assignable Y. had not been injured, so that in neither case was he discharged. *Ibid.*

By Payment—What is Payment]—*See Bank of Australasia v. Cotchett, ante column* 1143.

Guarantee of Fidelity of a Clerk—Alteration of Course of Clerk's Business—Alteration Not Carried Out.]—A contract of guarantee of the fidelity of a clerk, which is expressly based upon representations amounting to a promise as to the manner in which the dealings of the clerk will be checked and supervised, is vitiated by an alteration in the course of such clerk's business by the insured, without the insurer's consent; but if the instructions of the insured as to such alteration be not, in fact, carried out by his servants, the guarantee will not be vitiated. *Dougharty v. London Guarantee and Accident Company*, 6 V.L.R. (L.,) 376; 2 A.L.T., 79.

Act of Creditor Producing Injury to the Surety.]—There is no principle that an act by a creditor producing a small injury to the surety shall operate as a total discharge of the surety; it only operates as a discharge *pro tanto*. *Attorney-General v. Huon*, 7 V.L.R. (E.,) 30, 43; 2 A.L.T., 130.

2. *General Principles.*

Suretyship for Whole of Debt with Liability Limited to Less Amount—Surety's Rights to Proportion of Dividends Under Insolvency of Principal Debtor.]—F. having an overdraft with defendant bank wanted further advances, which bank made on A. endorsing a promissory note for £2500 to the bank as security. F.'s estate was sequestrated, he being then indebted to the bank in the sum of £3900. Defendant bank proved on this debt, receiving a dividend, and commenced an action against A. on his promissory note, and the bank received payment of it by an arrangement made. Bill by A. for recovery of the sum received by the bank in dividends as upon £2500, *Held* by the Full Court, on appeal, affirming (*Molesworth, J.,*) that the plaintiff was entitled to recover as surety a proportionate amount of the dividend as on the note. *Ford v. London Chartered Bank of Australia*, 5 V.L.R. (E.,) 328; 1 A.L.T., 66, 117.

Surety's Title to Securities—Further Security.]—A debtor who had mortgaged lands to his creditor to secure a certain sum, had also obtained a surety for that sum. Wishing to obtain a further advance, he mortgaged other lands to his creditor. The surety claimed to be entitled to the further security. *Held* that though a surety was entitled to all further securities for the guaranteed debt, he was not entitled to further securities for an additional debt. *Swan v. The National Bank*, 4 A.J.R., 42.

Debt Recovered From Surety—Right of Surety to Assignment of Securities—"Instruments and Securities Stat. 1864," Sec. 55]—J. recovered judgment against H., who was surety for a debt, as sole defendant, and execution was issued and H. paid the amount of the judgment and costs. H. then brought an action against J. to compel the latter to assign to him the judgment, and the indenture of guarantee upon which H. and others had become sureties. *Held* that H. was entitled to judgment as to the indenture, but not as to the judgment, since that could not be regarded as a security or of any use in enforcing contribution, and Sec. 55 of the "*Instruments and Securities Stat.* 1864," only allows the surety to have assigned to him what may be useful in enforcing contribution. *Hardy v. Johnston*, 6 V.L.R. (L.,) 190; 2 A.L.T., 19.

Surety's Right to an Assignment of Securities—Act No. 204, Sec. 55—Promissory Note.]—A surety who has paid his principal's debt is entitled under Sec. 55 of Act No. 204 to an assignment by deed of the securities which the creditor holds, including a promissory note or bill of exchange, and is not bound to accept such promissory note or bill of exchange endorsed by the creditor without recourse. *Everingham v. Waddell*, 7 V.L.R. (L.,) 180; 3 A.L.T., 16.

Proving for Balance on Insolvency.]—*See Trust and Agency Company of Australia v. Greene, ante column* 1245.

Valuation of Securities—Surety When Not Bound by.]—*See Trust and Agency Company of Australia v. Greene, ante column* 1245.

Principal Creditor Not Bound to Prove on Insolvency of Debtor.]—*See National Bank v. Plummer, ante column* 1245.

Amount of Liability.]—In an action the defendants were ordered to bring into Court the sum of £165 as security, and they were then to be allowed to take it out again on giving a bond with sureties for the payment to the plaintiffs of any sum the plaintiffs should recover in the action under the declaration to the extent of £165. The plaintiffs recovered against the defendants in the action the sum of 1s., together with £171 9s. 10d., for taxed costs. Before the plaintiffs recovered this amount the defendants had paid directly to the plaintiffs the sum of £217. In an action against the sureties on the bond, *Held* that the £217 paid directly was not money "recovered" in the action, that the money paid into Court was not to be deemed included in the direct payment; and that the costs were part of the damages recovered, and should be paid by the sureties to the extent of their bond. *Day v. Union Gold Mining Company*, 2 V.L.R. (L.,) 11.

Liability of a Surety to Administration Bond—Damages Recoverable Against—"Administration Act 1872," Secs. 26, 28.]—In an action against a surety of an administration bond, the breach

assigned was that the administrator had misappropriated moneys of the estate, but not that he had failed to furnish true accounts. *Held* that the form of the pleadings debarred the plaintiff from recovering as damages the costs of an administration suit to prove the breach assigned, such suit not being shown by the pleadings to be necessary; but that, apart from the pleadings, the effect of Secs. 26 and 28 of the "*Administration Act* 1872," which did not contemplate the necessity of a suit, prevented the plaintiff recovering such costs as damages. *M'Carthy v. Ryan*, 8 V.L.R. (L.,) 189; 4 A.L.T., 33.

The costs of procuring an assignment of the bond, under Sec. 28 of the "*Administration Act* 1872," cannot be recovered as damages in such an action—*Quære*, whether they may not form part of the costs of the action. *Ibid.*

Indemnity—Bills Endorsed by Plaintiffs as Security for Payment for Certain Articles by a Third Person and Discounted by Defendant Who Became Responsible and Obtained a Bill of Sale From Such Third Person—Plaintiffs Entitled to Indemnity Out of Proceeds.]—A., wishing to start in business as a hotelkeeper, the plaintiffs endorsed bills of exchange in favour of the seller of the goodwill and furniture, to secure payment by A. The defendant had these bills discounted, making himself responsible to a bank which discounted them, and taking a bill of sale over the furniture from A. for security. Defendant held the bills, and sold A.'s interest in the hotel to B., taking a bill of sale from B. to secure part of the purchase money, without plaintiffs' consent or concurrence, and afterwards freeing B. from her contract as to the hotel, entered into possession and received and applied the profits to his own use. The defendant compelled some of the plaintiffs to pay the moneys they had guaranteed on the bills of exchange, and recovering part from one of them brought an action on the bills to recover the balance. On bill by plaintiffs against defendant for indemnity, and for an injunction staying the action, *Held* that defendant was liable to indemnify plaintiffs against the bills out of the proceeds, and to pay back to same the moneys he had recovered. Injunction restraining action granted. *Davidson v. M'Carthy*, 5 A.J.R., 101.

Contribution and Recoupment—Assignment of Judgment Debt—Damages—"Instruments and Securities Stat." No. 204, Sec. 55.]—McE. & Co. recovered against E., and fifteen others, a judgment, of which E. paid the greater part, including damages and costs, the residue being recovered out of funds belonging to the defendants. E. requested McE. & Co. to assign the judgment, to enable him to enforce contribution from his co-debtors, and on their refusal to do so brought an action. *Held* that the measure of damages in such an action, which would lie under Sec. 55 of No. 204, was the loss of the full amount, the *onus* of proving that any of the co-debtors were insolvent lying on the defendants; and that the plaintiff need not lay special damage. *Embling v. McEwan*, 3 V.R. (L.,) 52; 3 A.J.R., 36.

Defence to Action Against Surety—Act Increasing Liability of Principal.]—An information against a surety to a bond that the Curator of Intestate Estates would duly discharge his duties alleged that the Curator held the office from 1861 till 1st July, 1864, and stated general breaches. On an objection that on the 1st of July, 1864, the Act No. 230 came into force, and enlarged the liability of the Curator, and discharged the surety, *Held* that, though the Court could take judicial notice of the Act No. 230, still the matter was one that ought to have been pleaded; and that the breaches being assigned without any date, the information was substantially good. *Regina v. Shovelbottom, Regina v. Sandars*, 5 W. W. & A'B. (L.,) 188.

Defence to Action Against Surety by Principal Creditor—Equitable Plea—Surety must Show Violation of some Duty by Plaintiff to Support such Plea.]—*See National Bank v. Plummer, ante column* 1245.

PRIVILEGED COMMUNICATIONS.

Non-Actionable.]—*See* DEFAMATION.

Inadmissible in Evidence.]—*See* EVIDENCE.

PRIVY COUNCIL.

Appeal to and Practice Thereunder.] — *See* APPEAL, *ante columns* 30-39.

Making Decree of Privy Council an Order of Court—Variance.]—The Court has only power to make the decree an order of Court, it cannot vary it in any way. *London Chartered Bank v. Lempriere*, 4 A.J.R., 92.

Accounts Directed by Decree of Privy Council.]—Where a Privy Council decree has directed accounts, and certain facts not contemplated in it have happened subsequently, the Court cannot go beyond the letter of the decree to adapt it to such facts. *Ibid*, p. 102, affirmed on appeal to Supreme Court, p. 136.

Making Decree an Order of Court—No Application Necessary.]—After the decision of the Privy Council on appeal, no application is necessary to make the order of the Privy Council an order of the Supreme Court. *Urquhart v. McPherson*, 4 V.L.R. (L.,) 290.

Order of not Necessary to Make an Order of Supreme Court.]—It is not necessary to make an order of the Privy Council an order of the

Supreme Court in an Equity suit (following *Urquhart v. Macpherson*, 4 V L.R. (L.,) 290.) *Brougham v. Melbourne Banking Corporation*, 5 V.L.R. (E.,) 110; 1 A.L.T., 5.

Order of as to Costs—How Order Enforced by Court in Victoria.]—Where a plea had been overruled, with costs, by the primary Judge and the full Court, and the decision was reversed on appeal by the Privy Council, saving the benefit of the plea, and directing that costs of the plea should be costs in the cause, upon motion by defendant, Order made for repayment to defendant by plaintiff of the costs occasioned by the orders made in Victoria on the pleas, without interest. *Ibid.*

Making Privy Council Order as to Costs an Order of Court—Notice to Respondent.]—It is necessary to serve the respondent with notice of motion to make the Privy Council order an order of the Court, and it is the better course to move for taxation of those costs. *M'Millan v. The Queen*, 1 V.L.R. (E.,) 253.

Adding Costs of Appeal to Judgment of Supreme Court.]—The Court has power to add the costs of an appeal to the Privy Council to the judgment of the Supreme Court. *See Regina v. Dallimore, ante column* 39.

PROBATE.

The cases as to the instruments entitled to probate, and the practice on the grant of probate and letters of administration, are digested under the title of WILL.

PROHIBITION.

Practice on—Stay of Proceedings—Rule to Rescind—Omission of Date of Issue.]—A rule *nisi* for a prohibition to a Court of Mines against putting the respondents in a suit in possession, was granted on an *ex parte* motion, returnable in the following term, with a stay of proceedings. Two days' notice of the motion for the rule was not given to the respondents, and the Court, on the motion of the respondents, granted a rule *nisi* to rescind the stay of proceedings, and referred the rule, on its return, to a Judge in vacation. A lease had been promised by the Minister of Mines of the claim in dispute, to the complainants, who were to be put out by the order of the Court of Mines, to which the prohibition had been obtained, and this lease was to issue in a few days. The rule to rescind the stay of proceedings omitted to state the day of the week on which it issued, but amendment was allowed as regards this omission on terms of adjournment, in order to allow the complainants to produce affidavits, showing that they had made their application for prohibition promptly after the last proceedings in the suit. On the adjourned hearing of the rule to rescind, it was made absolute, as there was no reason why the two days' notice could not have been given, and no sufficient cause had been shown for granting the stay of proceedings on an *ex parte* motion. *Regina v. Cope, in re Moore*, 4 A.J.R., 82, 98.

Rule Nisi for—Abandonment—Costs.]—After the issue of a rule *nisi* for prohibition, if the respondent offers to abandon the proceedings sought to be prohibited, the relator will not be allowed his costs of proceeding further with the rule. *Regina v. Leech, ex parte Shire of Tullaroop*, 2 A.L.T., 19.

When Issued or When Not—Common Law.]—In order to sustain a prohibition at common law, the Court sought to be restrained must have no jurisdiction whatever in the matter. In the case of a statutory prohibition, the Superior Court can interfere, although the Judge restrained had jurisdiction, if he did not exercise that jurisdiction correctly. And where a prohibition at common law was sought to restrain the Judge of a County Court, whose order was bad on the face of it, and no attempt was made to support it, *Held* that, though the order could be quashed on *certiorari*, since there was jurisdiction in the Judge to make it, no prohibition could issue at common law. *Regina v. Pohlman, ex parte Patterson*, 5 W. W. & A'B. (L.,) 122.

Prohibition to Order for Payment of Rates—Court will amend Order.]—*See Regina v. Mayor of Richmond, ex parte Hegarty, post column* 1267.

To Judge of County Court—Nonsuit—Appeal Proper Remedy where Judge has Jurisdiction.]—*Mau v. Weightman, ante column* 265.

To Judge of County Court.]—Where a Judge of the County Court had granted an application for a new trial more than seven days after the first trial, the Court granted a prohibition. *Regina v. Skinner, ex parte Freame*, 3 A.J.R., 126.

To Warden.]—*See Regina v. Philps, ex parte Granya Company, ante column* 975.

To Courts of Mines.]—The Supreme Court will not issue a prohibition to a Court of Mines where it has acted within its jurisdiction, although it may have decided wrongly. *Regina v. Cope, re Moore*, 4 A.J.R., 113.

Defendants Failing on a Point of Law Not Allowed Afterwards to Fall Back Upon Merits.]—M. and party sued W. and party before a warden to obtain possession of a claim, and the warden decided in favour of the defendants. Plaintiffs appealed to the Court of Mines, the Judge of

which reserved a case for the opinion of the Chief Judge. The defendants joined in stating the case, but adduced no evidence in support of their claim, relying merely on the defects of the plaintiff's title. The Chief Judge decided, on the facts before him, in favour of the plaintiffs. When the case was returned to the Court of Mines, to have the decision of the Chief Judge registered, the defendants applied to be allowed to call evidence to rebut the plaintiff's case, but the Judge of the Court of Mines refused to allow them to do so, made a decree against the defendants, and refused a re-hearing. On rule *nisi*, for a prohibition to restrain the Court of Mines from enforcing the order, *Held* that the defendants were not entitled to fall back upon the merits of their case after the course they had taken, since that would be to allow them to have a double chance of obtaining a decision on the point of law, and of falling back afterwards on the merits; and rule discharged. *Ibid.*

For cases of Prohibition to Justices, *see ante columns* 772 *et seq.*

Grievance as to Service of Debtor's Summons—Appeal, Not Prohibition, Proper Remedy.]—*Ex parte M. S. Levy, ante columns* 581, 582.

PROMISSORY NOTE.

See BILLS OF EXCHANGE.

PROMOTER.

See COMPANY.

PROOF OF DEBTS.

See INSOLVENCY.

PROSPECTUS.

See COMPANY.

PROTECTION ORDER.

See HUSBAND AND WIFE.

PROTHONOTARY.

The prothonotary is the proper officer to sign informations in the nature of *quo warranto*. *Regina v. Pethybridge*, 6 W. W. & A'B. (L.), 66.

PUBLIC HEALTH.

See HEALTH (PUBLIC.)

PUBLIC-HOUSE.

See LICENSING ACTS.

PUBLIC WORKS.

STATUTES—"*Public Works Stat.* 1865," No. 289.

Part III., Secs. 78-94.—Repealed by Act No. 344 "*Lands Compensation Stat.*"

Part III., Secs. 95-101.—Repealed by Act No. 767, Sec. 2.

Part VI.—Repealed by "*Post Office (Amendment) Act*," No. 455.

Part VII.—Repealed by Act No. 344.

Roads—Tolls on Roads.]—*See post* under TOLLS.

Indemnity of Board of Land and Works Against Works Constructed Under Sec. 52.]—*Hepburn v. Mayor of Hawthorn, ante column* 857.

Railways—Taking Land For.]—*See* under LANDS COMPENSATION, *ante columns* 820-825.

Management of Railways.]—*See ante columns* 1078, 1079, under NEGLIGENCE, and *Sweeney v. Board of Land and Works, ante columns* 116, 117.

Lands Compulsorily Taken by Board of Land and Works.]—*See Hunter v. Hunter. In re Bear's Estate. In re Thompson, ante column* 117, and also under LANDS COMPENSATION, *ante columns* 820-822, 825.

Imposing Penalties for Breach of By-Laws of Government Railways—Proof of By-law.]—On an information for breach of a by-law of the Government Railways, proper proof of the making and publication of the by-law is a necessary preliminary to the jurisdiction of the justices to impose a penalty for its infraction. *Regina v. Nicholson, ex parte Pufflett,* 8 V.L.R. (L.,) 44.

Water Races, Water Rates, &c.]—*See post* under WATER.

QUO WARRANTO.

Rule Nisi for—What it Must Show.]—A rule *nisi* for a writ of *quo warranto* must state the grounds upon which it was obtained. *In re Municipal Council of Smythesdale,* 1 W. & W. (L.,) 117.

To Oust from Office—"Boroughs Stat.," No. 359, Secs. 137, 138—Delay of Relator.]—The Court, having regard to the simple mode of redress given under Secs. 137 and 138 of Act, No. 359, requires, before granting a writ of *quo warranto,* to be satisfied that the relator has had good reason for his delay in not applying under those sections, which he must do within six months of the election. The Court, even though the election was held irregularly, exercised its discretion by refusing the writ. *Regina v. Laurens,* 3 V.R. (L.,) 73; 3 A.J.R., 46.

When Applicable.]—When an office is *de facto* full, the proper mode of procedure to settle the rights of rival claimants is by *quo warranto. Regina v. Robinson, ex parte Torrance,* 1 V.L.R. (L.,) 50.

When an officer has been elected to an office, and has held it for more than *six* months, the proper process to oust him is by *quo warranto,* and not by a rule to oust. *Regina v. Donaldson,* 1 A.J.R., 162. *See* S.C., *ante column* 227.

To Remove County Court Judge—Who May be Relator.]—Any domiciled inhabitant of Victoria may be relator in an application for a *quo warranto* to remove a County Court Judge, although such person may not reside within any district of the County Court of which the respondent purports to be Judge. *Regina v. Rogers, ex parte Lewis,* 4 V.L.R. (L.,) 334, 338.

Order Granted in Vacation not Returnable in Term.]—An order *nisi* for a *quo warranto* granted by a Judge in vacation, under the emergency clause, must not be made returnable before the Court in Term, but before the Judge in vacation. *Regina v. Mouatt, ex parte Sargeant,* 4 V.L.R. (L.,) 450.

Information in Nature of—Who Should Sign.]—*See Regina v. Pethybridge, ante column* 1254.

And as to Practice as to Rules to Oust from Office.]—*See* cases, *ante columns* 227, 228.

RACING.

Victoria Racing Club—Authority of Stewards—Rules 22 and 23.]—Although by Rules 22 and 23 of the Victoria Racing Club, the authority of the stewards is supreme in all matters connected with a race, and their decision final, yet the stewards are not authorised to order a race to be run over again, in the absence of any protest, or inquiry, or evidence on both sides, or personal knowledge on the part of the stewards of anything wrong, but merely because they think the time too slow. *Cole v. Chirnside,* 6 V.L.R. (L.,) 68.

Victoria Racing Club—Rule 30—Construction.]—The stewards have no power, under Rule 30 of the Victoria Racing Club Rules of Racing, to award the prize to the owner of a horse, where his jockey has been expressly declared to be wanting in weight, without deciding that the horse has won the race. When acting as referees, they should expressly decide the matters submitted to them. *Powell v. Savage,* 6 V.L.R., 293.

Flemington Race Course—Liable to be Rated not being used solely for a Public Purpose.]—*Blackwood v. Mayor of Essendon and Flemington, post columns* 1260, 1261.

Offer of Money as Stakes for a Race—Acceptance with a Warning that all Forfeits due were to be Paid—Money held to be Paid for Stakes.]—*Filgate v. Thompson, ante column* 1144.

RAILWAY.

See COMPANY—LANDS COMPENSATION—PUBLIC WORKS.

Arrest by Engineer of a Workman of a Municipal Council Using Railway Company's Rights-of-Way—"Melbourne and Hobson's Bay Railway Company Act," Sec. 63.]—*Jenkyns v. Elsdon,* 1 W. W. & A'B. (L.,) 145, *post* under TRESPASS—To the person.

RAPE.

See CRIMINAL LAW.

RATES AND RATING.

STATUTES:

6 *Vic., No.* 7.
8 *Vic., No.* 12.
"*Road Act*" (*No.* 40.)
"*Municipal Institutions Act* 1863" (*No.* 184,) *repealed by Act, No.* 359.
"*Shires Stat.* 1863" (*No.* 176,) *repealed by Act No.* 358.
"*Shires Stat.* 1869" (*No.* 358,) *repealed by Act No.* 506.
"*Boroughs Stat.* 1869" (*No.* 359,) *repealed by Act No.* 506.
"*Local Government Act* 1874" (*No.* 506.)
"*Amending Act* 1881" (*Rate Surplus, No.* 687.)

1. *Persons Liable for Rates.*

"Person Occupying" — Official Assignee of Occupant—6 Vic., No. 7, Sec. 67; 8 Vic., No. 12, Sec. 19.]—B., tenant and occupant of a hotel and premises in Melbourne, rateable to the city rate, became insolvent, and his official assignee attached chattels of B.'s in the hotel. After the attachment, rates became due from "the persons occupying the premises," and the Mayor and Corporation distrained on the chattels for these rates. The official assignee replevied before sale. Upon a special case being stated, *Held* that the Act 6 Vic., No. 7, Sec. 67, only gave power to levy upon the goods of the person occupying the premises, and that the official assignee was not such a person within the meaning of that section or section 19 of 8 Vic., No. 12, and that the Mayor, &c., had no power to distrain upon the chattels attached. *Goodman v. Mayor, &c., of Melbourne*, 1 W. & W. (L.,) 4.

[Compare Sec. 257 of Act No. 506.]

Road Act, No. 40—Rates Due from Occupant—Proof of Occupancy.]—H., collector for a road-board, sued L. for rates due on certain land, alleging that L. was the occupant as official assignee of the former proprietors. The only evidence of L.'s occupancy was that the amounts due were ascertained in the middle of September, and the fourteen days' notice of demand required by the "*Road Act*," No. 40, was served on L.'s agent on 26th September, and that L.'s agent informed H. that L. was in possession at this time. L.'s agent told H. that L. was in possession previously to the service of the notice, and after, and that was the only knowledge H. had of L.'s occupancy. *Held* that the authority to L.'s agent to enter into occupancy did not include an authority to admit the fact that he had so entered so as to bind L., and that the admission by L.'s agent was not proof of L.'s occupancy sufficient to fix L. with payment of the rates due from the occupant. *Laing v. Herbert*, 1 W. & W. (L.,) 155.

[Compare Sec. 257 of Act No. 506.]

Weekly Tenant—Rates Payable in Advance—Occupier—Act No. 184, Sec. 208.]—A rate was made by a borough for the year 1865-6, payable in advance by two equal moieties on 1st February, and 1st August, 1866. In the rate, an occupant of certain premises was rated, and on 1st March, 1866, a weekly tenant subject to a week's notice to quit succeeded the original occupant, and paid his share of the rates up to 31st July, 1866. The tenant had paid all rent due to his landlord up to date, and he was summoned to pay in advance the second moiety of the rate due on 1st August, 1866. He contended that on the construction of Sec. 208 of the "*Municipal Corporations Act* 1863" (No. 184,) that he was only liable to pay rates for the period that he actually was in occupation, and as he might receive notice to quit at any time during the coming six months, was not liable to be rated till the actual period of his occupancy was determined. The magistrates so held, and dismissed the case. On appeal, *Held*, that the proper construction of the section is, that the person actually in occupation when a period for which rates are made commences, is liable to pay the whole rate, and that the tenant was liable to pay it. *Mayor, &c., of Ballarat East v. Davis*, 3 W. W. & A'B. (L.,) 146.

[Compare Sec. 289 of Act No. 506.]

Purchaser's Liability for Rates Under Prior Occupancy—"Boroughs Stat.," Sec. 237.]—A subsequent purchaser of rateable property is personally liable for unpaid rates, accrued due before he purchased the land, made under the Acts Nos. 15 and 184, by virtue of the provisions of Sec. 237 of the "*Boroughs Stat.*," No. 359, which provides that such unpaid rates shall be a charge upon the property, and may at any time be recovered, with interest, from the owner of the property. *Mayor, &c., of Newtown and Chilwell v. Batten*, 2 V.R. (L.,) 142; 2 A.J.R., 86.

[Compare Sec. 294 of Act No. 506.]

Owner for Time Being—"Local Government Act 1874," Sec. 294.]—Under Sec. 294 of the "*Local Government Act* 1874" the owner, for the time being of land, is liable in an action for arrears of rates due long before he became owner, and without any previous demand. *Mayor, &c., of Wangaratta v. Meighan*, 6 V.L.R. (L.,) 170; 2 A.L.T., 5.

Act No. 506, Secs. 19, Sub-sec. 5, 20, 285—Severance of District.]—A borough council made a rate on the 13th December, 1875, for the year ending 31st December, 1875, payable on 4th January, 1876. After 4th January, but before demand was made, that portion of the borough in which W.'s property was situated was severed and attached to the Shire of Caulfield, under Sec. 19, Sub-sec. 5. *Held* that, as the rate was payable when W.'s land formed part of the borough, he was liable for the rate, and that Secs. 19 and 20 only applied to adjustment of rights and liabilities between the municipalities, and that Sec. 285 did not affect W.'s indebtedness. *Woolcott v. Mayor of St. Kilda*, 3 V.L.R. (L.,) 5.

Resident on Railway Reserve—Act No. 184, Sec. 182.]—*Regina v. M'Lachlan, post column* 1261.

Resident on Railway Reserve—Act 289, Secs. 4, 101.]—*Regina v. Mayor of Sandhurst, post column* 1261.

2. *Property Rateable.*

Land Exempt from Rating—Mines—Act No. 176, Sec. 181.]—All machinery on the surface of the land used for purposes strictly subservient to the working of the mine should be regarded as part of the mine, and within the exemption from rates under Sec. 181 of No. 176. Machinery for separating the metal from the ore does not, however, come within this exemption, as the process may be carried on near the mine, or far removed from it, and such machinery cannot be regarded as a necessary adjunct to the working of a mine. *Davidson v. The Stawell Road Board*, 1 W. W. & A'B. (L.,) 79.

[Compare Sec. 253 of Act No. 506.]

Mining Company—Rateability of Machinery—"Municipal Institutions Act 1863," No. 184, Sec. 182.]—The C. Company were assessed by the defendant corporation for property described as "Engine and battery of twelve heads, blacksmiths' shop, office, and store." *Held*, it appearing on the special case that the engine and battery were used exclusively for crushing quartz taken from claim, and extracting the gold, that the office was on the claim, and was the registered office of the Company, and that the blacksmiths' shop was used exclusively for keeping in working order the tools and machinery used in the mine; that the engine and battery as a necessary adjunct to the mine were exempted under Sec. 182, but *aliter* as to other property assessed. *Clunes United Company v. Clunes Borough Council*, 2 W. W. & A'B. (L.,) 96.

[Compare Sec. 253 of Act No. 506.]

"Boroughs Stat. 1869," No. 359, Sec. 197—Smithies Upon a Mine—How Amount of Rate to be Altered.]—A mining company was sued for rates. Their property comprised *inter alia* three smithies used for the purposes of the mine. The company did not appeal against the assessment, but resisted payment. *Held* that the smithies were rateable, and that in the form of proceedings the amount of the rate, if excessive, could not be altered. *Carlisle Company v. Mayor of Sandhurst*, 5 A.J.R., 14.

[Compare Secs. 53 of Act No. 506.]

Auriferous Land—Mines on Private Property—"Local Government Act 1874," Sec. 253.]—The Court cannot recognise mining for gold on private land, and therefore cannot regard a gold mine on private property, worked without licence from the crown, as a "mine" for the purpose of exempting it from rating under Sec. 253 of the *"Local Government Act* 1874," which, in the case of gold-mining, applies only to land held under miner's right, or under lease from the Crown. *Shannahan v. President, &c., of Shire of Creswick*, 8 V.L.R. (L.,) 342; 4 A.L.T., 85.

Auriferous Land—Tenant of Surface—Minerals.] A person in possession of the surface of auriferous lands, under a lease, reserving the minerals, and providing that any part of the surface may be resumed for the purpose of working them, can claim no exemption from rating in respect of the minerals, but is liable to be rated upon the whole value of the fee simple of the land including them. *Ibid.*

Description of Property—"Works."]—Describing merely as "works," land on which there are mines, is, at most, an insufficient description; and insufficiency of description in a rate does not form a valid objection to a demand for payment of such rate. If the words used may include what is rateable, as well as what is not, then they must be taken to mean property rateable. *Councillors, &c., of Bulla v. Allison*, 1 V.R. (L.,) 79; 1 A.J.R., 77.

Bridge—Whether Used for Public Purpose Only.]—H. built a bridge for Her Majesty on contract, and was under the contract to receive payment by collecting tolls for seven years; and was rated by a Road Board as occupant of the bridge. H. appealed, first to General Sessions and then to the Supreme Court, on the ground that the bridge belonged to the Crown and was "used for public purposes." *Held* that in order for bridge to be "used" for public "purposes," it must be purely and solely used for such purposes; and that, as public had a right of passage over the bridge, only on payment of a toll, it subserved private purposes also, and was therefore rateable. *Hanna v. Seymour-road Board*, 2 W. W. & A'B. (L.,) 93.

[Compare Sec. 253 of Act No. 506.]

What Property — Flemington Racecourse.]—Under the *"Victoria Racing Club Act* 1871," Crown lands were leased to the Victoria Racing Club for ninety-nine years, at a peppercorn rent, for the purpose of maintaining a racecourse. *Held* that the land so leased was not rateable, since it was land, the property of Her Majesty, used for public purposes under Sec. 253 of the *"Local Government Act* 1874." On appeal to the Privy Council, *Held* that it was rateable, as it was not shewn that the

land was used solely for a public purpose, and that individuals had no beneficial interest in it. *Blackwood v. Mayor, &c., of Essendon and Flemington*, 2 V.L.R. (L.,) 87; on appeal, 2 App. Ca. 574; 46 L.J., P.C. 98; 38 L.T., 625; 25 W.R., 834.

Semble, that a racecourse, for admission to which the public are charged, is not land used for a public purpose so as to exempt the occupiers from rates under the "*Local Government Act* 1874," Sec. 253. *Mayor, &c., of Essendon and Flemington v. Blackwood*, 2 App. Ca. 574; 46 L.J., P.C. 98; 36 L.T., 625; 25 W.R., 834.

Police Inspector's Quarters—"Local Government Act 1874," Sec. 253.]—The liability to, or exemption from, rating under Sec. 253 of the "*Local Government Act* 1874," of the quarters provided by the Government for one of its officers, depends upon whether it is optional with the officer to reside in the quarters provided for him by the Government. If he is obliged to occupy, as a part of his duty, he is not the occupier, and the premises are not rateable; if he is not under such an objection, he does occupy, and the premises are rateable. *Mayor, &c., of Sandhurst v. Chomley*, 2 V.L.R. (L.,) 207.

Building Vested in the Ministsr of Public Instruction—Not Rateable.]—*Shire of Warnambool v. Rawe*, 10 V.L.R. (L.,) 347; 6 A.L.T., 164, *see post column* 1269.

Resident on Railway Reserve—Act No. 184, Sec. 182.]—R. was an engine-fitter employed on Victorian Railways, and "had permission to reside" on the railway reserve at Sandhurst; the rate book in the column "Owner" had the entry "The Crown." The magistrates ordered R. to pay the rate levied. On rule *nisi* for a prohibition, *Held* that under Act No. 184 it is the property which is made rateable or exempted and not the person; that R. was not exempted under Sec. 182, as he was in occupation for himself, and not for the Crown. Rule *nisi* discharged. *Regina v. M'Lachlan*, 4 W. W. & A'B. (L.,) 57.

[Compare Sec. 253 of Act No. 506.]

Act No. 289, Secs. 4, 101—"Railway."]—The Court held that under Sec. 4 the word "railway" includes all within the railway fence, and that, therefore, a railway servant occupying a tenement on a railway reserve was exempted from paying rates under Sec. 101. Rule absolute for prohibition. *Regina v. Mayor of Sandhurst*, 4 W. W. & A'B. (L.,) 197.

3. *Valuation of Property and Assessment and Apportionment of Rate.*

Act No. 506, Secs. 264, 269.]—The "*Local Government Act*," No. 506, shows a distinct general intent that all rates shall be based on valuations made by valuers under declaration, which are to be binding unless appealed from, and municipal corporations have no power under Sec. 264 to make any alterations in such valuations. *Attorney-General v. Shire of Hampden*, 2 V.L.R. (E.,) 138.

See S.C., *ante columns* 219, 220.

Mode of Assessing a Gas Company's Property—Act No. 184, Sec. 191.]—Where a gas company has its retorts and gas works in one borough, and its mains and pipes extending over a number of boroughs, the proper basis on which to estimate the valuation is to take the gross receipts, deduct from them the gross expenditure, and so arrive at the profits, and the average of these profits extending over a short period of years will give the net annual value of the whole property; this net annual value is to be apportioned over the whole number of boroughs through which the pipes or mains pass, the value in each borough being ascertained by the value of the land on which the pipes rest, regard being had to the purpose for which it is granted. *Mayor, &c., of Fitzroy v. Collingwood Gas Company*, 6 W. W. & A'B. (L.,) 72; 1 A.J.R., 82.

[Compare Sec. 265 of Act No. 506.]

Valuation of Property—£5 per cent. on Capital Value—"Shires Statute," No. 358, Sec. 209.]—Section 209 of the "*Shires Statute*" is compulsory, and under that section property must be assessed at not less than £5 per cent. on its capital value, irrespective of its yearly rental. *Shire of Metcalfe v. Degraves*, 1 A.J.R., 124.

[Compare Sec. 265 of Act No. 506.]

Valuation—Improved Land—"Shires Stat. 1869" (No. 358,) Sec 209.]—Improved land which could not be let at a profit is "other rateable property" within Sec. 209 of the "*Shires Stat.* 1869," (No 358,) and is therefore to be valued at not less than 5 per cent on its fair capital value. *Shire of Bungaree v. Ballarat and East Ballarat Water Commission*, 4 A.J.R., 80.

[Compare Sec. 265 of Act. No. 506.]

Valuation — Improved Property — Act No. 358, Sec. 208.]—Under the last proviso of Sec. 208, all improved property must be rated at five per cent. on its capital value; and therefore improved property in a borough must be so rated, although its annual rent would not produce so much as five per cent. on the capital value. *Bennett v. Mayor of East Collingwood*, 4 A.J.R., 81.

[Compare Sec. 265 of Act No. 506.]

Semble, it is no objection to the validity of a rate that the rate is struck before the valuation is made. *Menzies v. Councillors of Newstead*, 1 V.R. (L.,) 88; 1 A.J.R., 97.

Water Commission—How Rated—Property in Different Districts—"Shires Statute 1869," Sec. 209.]—The property of a Water Commission in any district is not to be rated by taking the capital value of the land, and adding to it the amount expended on works in that district, since the outlay of capital furnishes no criterion of value. The principle of rating, whether

the works are or are not all in one shire or borough, is the same. If an apparatus occupied by one occupier, consisting of several parts, lies in one shire, the rate is on the whole and is received by that shire; and if such an apparatus lies in several shires, the occupier is liable for the same amount of rateable value, but it must be apportioned among the several shires in which the apparatus lies. To ascertain of what the apportionment should be made, a hypothetical tenant should be assumed, with permanent occupation of the whole, with all requisite capital and land, with sub-tenants of the profitable part at a rack rent, and of the rest as contractors at a remuneration; that, from the gross receipts of the commissioners, deductions should be made for working expenses, insurance, maintenance, &c., for interest on working capital, at the rate of from five to eight per cent., for tenants' profit at from fifteen to twenty-five per cent. on working capital, for remuneration for superintendence of the whole apparatus, for interest on the value of the stock of plant necessarily kept on hand, at the rate of about ten per cent., and for shire and borough rates chargeable; and the balance, after such deductions, would be the "rent at which the same might reasonably be expected to be let from year to year, free of all usual tenants' rates and taxes, and deducting therefrom the probable annual costs of insurance and other expenses (if any) necessary to maintain such property in a state necessary to command such rent" ("*Shires Stat.* 1869," Sec. 209;") and no deduction should be made for interest on borrowed money. For the purpose of distributing the rateable value thus arrived at between the different shires, the works must be divided into the parts directly productive of rateable value, *e.g.*, service pipes, and those which are only indirectly productive, *i.e.*, the rest of the works bringing the water to the service pipes; and the latter must be rated as mere land, buildings, and fixtures, with some additional value from their application to such purposes; the latter rates (of the indirectly productive parts) must then be deducted from the net annual value arrived at as above; and the deduction must be distributed among the respective shires in which such part lies, according to the value, and not according to the quantity of the land; the residue of the rateable value arising from the directly productive parts should be distributed to each shire in which such parts lie, in such proportion as the gross receipts in each district bear to the gross receipts in all the districts. If the value so arrived at be less than five per cent. upon the fair capital value of the property, the case is within the last proviso of Sec. 209 of the "*Shires Stat.* 1869," and the property must, under that proviso, be rated at five per cent. on the fair capital value of the fee simple thereof. *Shire of Bungaree v. Ballarat Water Commission*, 4 A.J.R., 160, 187.

[Compare Sec. 265 of Act No. 506.]

Apportionment of Rates of Waterworks—Act No. 358, Sec 209.]—Where a Justice had calculated the apportionment of rates, and arrived at the "fair capital value," omitting to notice the amount of profits made by commissioners, and not allowing any increase on the value of buildings and fixtures by reason of their capacity to be used for water supply, the Court refused to disturb his decision. *Shire of Bungaree v. Ballarat Water Commission*, 5 A.J.R., 79.

Apportionment of Rates—Particular Period—No Particular Period—Act No. 176, Secs. 183, 208.]—The Legislature, in passing Act No. 176, contemplated (Sec. 183) the making of rates for "a particular period," and the making of them for "no particular period." Sec. 208 only gives apportionment of rates made for "a particular period," and the title of the rate alone must be looked at for its description in this respect. Declaration seeking to recover a portion of a rate. Plea that the rate was intituled, "An assessment to the general district rate made this 16th day of December, 1863, after the rate of twelve-tenths (*sic*) in the pound, by virtue of Act No. 176." On demurrer to the plea, *Held* that it was a rate made for "no particular period," and demurrer overruled, and judgment for defendant. *Springfield Road Board v. Clarke*, 4 W. W. & A'B. (L.,) 53.

Apportionment of Rates—Act No. 184.]—The plaintiff, Borough Council, sued G., as occupant, for proportionate part of the "general town rate for the year 1365-6." During G.'s occupation no notice was served on him, he had paid his rent and left the house, and after he had so left he was served with a notice to pay the rates sued for. The case being remitted to the magistrate, it appeared on restatement that the two rates sued for were the following: Rate made 27th February, 1865, for year ending 30th November, 1865; rate made 18th December, 1865, for year ending 30th November, 1866, and that G. had left on the 10th January, 1866, having been in residence since 17th July, 1865. *Held* that G. was liable for his proportion of the first rate up to 30th November, 1865, but not for any portion of the second rate. *Mayor, &c., of Ballarat East v. Gaskell*, 4 W. W. & A'B. (L.,) 51.

[Compare Sec. 289 of Act No. 506.

Assessment—18 Vic. No. 15, Sec. 30.]—The words "fair average value" in Sec. 30, mean a fair average during a number of single years, and not an average number of terms greater than a single year. *Gurner v. Municipal Council of St. Kilda*, 2 W. & W. (L.,) 124.

[*See* now Sec. 265 of Act No. 506.]

Assessment of Rate—Railway Company—Act No. 506, Sec. 265.]—A railway company appealed to Petty Sessions from a rate. It contended that it was entitled to a deduction—in addition to an allowance for the annual repair of movable stock, rails and framework, so as to maintain the line in an efficient state—of certain other allowances for the ultimate renewal and reproduction of the permanent way, for which it had reserved, out

of the annual revenue, a fund as for all contingencies. The Justices disallowed the allowances for reproduction and renewal. *Held* that the allowance for renewal was correct, there being nothing to shew that the same deductions were made twice over; that if the use of the rolling-stock is taken into consideration as enhancing the rateable value of the line, repairs to the rolling stock should be allowed. *Melbourne and Hobson's Bay United Railway Company v. Mayor of Prahran*, 3 V.L.R. (L.,) 206.

4 Validity of Rate.

Formality of Rate Book—Act No. 176, Sec. 187.]—Where a shire summoned P. for rates, and it was objected that the rate was bad, because it was not in the form required by Act No. 176, in three respects, viz., (1) that the amount in each column was not added up, and set down at the foot of each column; (2) there was no date to the signature of the signing councillors; (3) the president and councillors had not added to their signatures any designation importing membership, *Held* that none of the objections were fatal. *Shire of Ballan v. Partridge*, 4 W. W. & A'B. (L.,) 245.

[Compare Sec. 262 of Act No. 506.]

Validity—Evidence of—Rate Books.]—The rate books of a Road Board are, under Sec. 206 of the "*Local Government Act*" No. 176, merely *prima facie*, and not conclusive evidence of the validity of a rate. *Lindsay v. Tullaroop District Board*, 1 W. W. & A'B. (L.,) 61.

Sec. 287 of Act No. 506 Expressly Makes the Rate Book only prima facie Evidence.

When Rate Valid—Advertising Notice of—Act No. 176, Sec. 186.]—Sec. 186 of Act No. 176, is only directory and not mandatory, and a rate assessed, even without notice being advertised in pursuance of that section, is a good rate. *Shire of McIvor v. Nolan*, 6 W. W. & A'B. (L.,) 259, N.C. 68.

Any person aggrieved by non-compliance with the section may institute proceedings against councillors for a misdemeanour. *Ibid.*

[Compare Sec. 261 of Act No. 506.

Semble, a rate struck before the valuation of the property on which it depends is good. *Menzies v. Councillors of Newstead*, 1 V.R. (L.,) 88; 1 A.J.R., 97. *Sub-nom., Shire of Newstead v. Menzies.*

Amount of Rate—Not Exceeding 2s. in the £—Act No. 184, Sec. 183.]—The "one year" of the Act, No. 184, Sec. 183, reckons from the 1st of January to the 31st of December in each calendar year. Therefore, where a rate had been struck on the 26th October, 1866, and a previous rate on the 16th November, 1865, and the two rates struck within twelve months of each other, together amounted to more than 2s. in the £ of the net annual value of the property, but only one rate was struck in each of the calendar years 1865, 1866, and such rate separately was under 2s. in the £, *Held* that the rates were good under Sec. 183 of No. 184. *Scantlebury v. The Mayor of Tarnagulla*, 3 W. W. & A'B. (L.,) 69.

[Compare Sec. 254 of Act No. 506, where 2s. 6d. in the £ is the amount.]

"Retrospective" Rate—Act No. 184, Secs. 186, 200—Ratepayer Omitting to Appeal.]—A general rate was levied by the M. Corporation. The corporation sued N. in the County Court for rates. The corporation had obtained an overdraft from a bank of £793, and the "estimate" showed as the first item of "expenditure" a sum of £1224 6s. 6d. "by bank overdraft," and so far the rate was to have a retrospective effect in paying off the difference, viz., £431. In the County Court, N. objected to the rate as being invalid as being retrospective. The County Court held that the rate was *pro tanto* invalid, but not wholly invalid; but that as N. had omitted to avail himself of the right of appeal to General Sessions, given by Sec. 200 of the Act, his objection to the validity of the rate should be overruled. On appeal, *Held* that "retrospective" rates were forbidden as effectually under Act No. 184, Sec. 186, as under No. 176, Sec. 184; and that, as this objection was not capable of being amended or set right on appeal under Sec. 200, N.'s right to object was not waived by his failing to appeal. Appeal allowed judgment to be entered for N. in the County Court. *Newman v. Mayor, &c., of Maryborough*, 4 W. W. & A'B. (L.,) 153.

[Compare Secs. 260 and 276 of Act No. 506.]

Retrospective Rate—"Waterworks Loan Amendment Act," No. 500, Sec. 6.] — The Water Commissioners had made a by-law on the 7th January, 1875, purporting to make a rate for the year ending 30th September, 1875, and sued W. before the justices to recover such a rate for the half-year ending 30th March, 1875. *Held* that the by-law was valid, and the rate made under it, though retrospective, was good. *Semble, per Fellows, J.*, that a "year" in Act No. 500 means a calendar year. *Clunes Water Commission v. Winchester*, 1 V.L.R. (L.,) 298.

How Council Should Provide for Expenditurs by Levying Rates.]—*Attorney-General v. Mayor of St. Kilda, ante column* 218.

Rate Made to Satisfy Past Liability—"Local Government Act 1874," Secs. 248, 260.]—The "*Local Government Act* 1874," Secs. 248, 260, authorises the making of a rate to satisfy past lawful debts and liabilities. *Regina v. Oakleigh Shire, ex parte Wilson*, 10 V.L.R. (L.,) 67; 5 A.L.T, 195, *sub nom Wilson v. Shire of Oakleigh.*

W., who had obtained judgment against a municipal corporation, levied execution, but obtained little more than would satisfy the expenses of the levy. W. thereupon obtained a rule *nisi* for a *mandamus* to compel the council to make a rate for the purpose of satisfying such judgment, such rate, together with the other rate previously made for the current year, not to amount to more than 2s. 6d. in the £. *Held* that the rule should be made absolute. *Ibid.*

Ratepayer Not Paying Invalid Entitled to Rate ie to be on Burgess List—Duty of Town Clerk.]—*Lennon v. Evans*, *ante column* 220.

5. *Recovery of Rates and Procedure and Practice thereon.*

Complaint for Non-payment of—Period of Limitation—"Municipal Corporations Act 1863," Sec. 205—"Justices of the Peace Stat. 1865," Sec. 51.]—A borough rate was struck on the 5th of May, 1865, a demand was served on B., in writing, under Sec. 205 of No. 184 ("*Municipal Corporations Act* 1863," on the 4th April, 1866, and B. failed to pay for the space of fourteen days after such demand. In August, 1866, a complaint against B. for non-payment was heard before justices, who dismissed the complaint for want of jurisdiction on the ground that the complaint was not made under the Act No. 267 (*Justices of the Peace Stat.* 1865") Sec. 51, within twelve months from the time when the matter of such complaint arose. *Held*, on appeal, that a demand being necessary under the Act No. 184, the period of limitation ran, not from the striking of the rate, but from the expiration of fourteen days after demand in writing; and that the period not having expired, the justices had jurisdiction. *Mayor, &c., of Sandhurst v. Broderick*, 3 W. W. & A'B. (L.) 108.

[Compare Sec. 285 of Act No. 506.]

Suing for—Complaint Must be in Council's Name.] The collector of a borough council cannot, under Sec. 73 of No. 267, sue for rates in the Police Court in his own name; but the Council must be named as the complainant. *Regina v. Carr*, 1 V.R. (L.,) 1; 1 A.J.R., 23.

Corporation Not Suing in Full Corporate Name—Not Barred.]—*Hearn v. Council of Borough of Essendon*, *ante column* 220.

Council Must Sue as Complainant—Act No. 506, Sec. 285.]—A summons was taken out in the name of a collector of rates as complainant. *Held* that the summons in that form was bad, that the collector might demand the rate, but section 285 only authorised the council to recover, and that the collector was not entitled to sue as complainant. *Regina v. Templeton ex parte England*, 3 V.L.R. (L.,) 305.

Property Exempt Included in a Rate.]—On a complaint in the Police Court for rates, if it appear on the face of the rate that that has been rated which is exempt, the justices can take notice of such an objection. *Councillors, &c., of Bulla v. Allison*, 1 V.R. (L.,) 79; 1 A.J.R., 77.

Complaint for Rates—Different Rates—Amendment—"Local Government Act 1876, Sec. 285.]—The inclusion of the amount of several rates made under different Acts in one complaint before justices, is not authorised by Sec. 285 of the "*Local Government Act* 1874." The Court will, however, on a rule to prohibit an order made for payment of rates on such a complaint, amend the order. *Regina v. Mayor of Richmond, ex parte Hegarty*, 6 V.L.R. (L.,) 437; 2 A.L.T., 87.

No Summons for Payment of Rate—Notice that Warrant would be Applied for not Sufficient.]—T. was rated, but declined to pay. A notice was then served upon him by the rate collector to the effect that a warrant would be applied for against him, and requiring him to show cause why execution should not issue for the amount and costs. T. did not attend, and under a warrant his goods were seized. T. then brought an action of replevin. *Held* that the notice was not equivalent to a summons, and, without a summons to pay, the justices could not issue a warrant; and that as no summons had been issued the justices could not in replevin justify under the warrant. Judgment for plaintiff. *Taylor v. Patterson*, 2 W. & W. (L.,) 32.

Semble, *per Stawell, C. J.*—As to resisting payment of rates, a resident in a municipal district who derives all the benefits therefrom, ought not to be allowed to impugn the incorporation of the municipal council, and the creation of the municipality. *Ibid.*

[Compare Sec. 288 of Act No. 506.]

Demand—Purchaser's Liability for Rates Under Prior Occupancy—Prima facie Case.]—B. purchased rateable property, and was sued by the corporation for rates unpaid for eleven years, which had all accrued due before B purchased the property. The corporation proved the rates by the rate books, and the town clerk and rate collector deposed, from the books and documents and inquiries, that, to his belief, the rates had not been paid. A demand of payment, in compliance with Sec. 229 of the "*Boroughs Stat.*," was proved to have been made upon B., and non-payment by B. for 14 days after demand was also proved. *Held* that the corporation had made a *prima facie* case, and were entitled to recover unless B. could prove that the former owner had paid the rates. *Mayor, &c., of Newtown and Chilwell v. Batten*, 2 V.R. (L.,) 142; 2 A.J.R., 86.

[Compare Sec. 285 of Act No. 506.]

Demand—Owner for Time Being Liable for Past Arrears without Previous Demand—Act No. 506, Sec. 294.]—*Mayor of Wangaratta v. Meighan*, *ante column* 1258.

Demand for Payment—No. 184, Sec. 205.]—Payment of shire rates cannot be enforced by justices unless a demand in writing be made upon the ratepayer before summons, in accordance with Sec. 205 of No. 184. *Regina v. Thompson*, 1 V.R. (L.,) 2; 1 A.J.R., 23.

[Compare Sec. 285 of Act No. 506.]

Demand for Payment of Rates.]—A demand for payment of rates is sufficiently served by sending it through the post, properly addressed, if it reach the person to whom it is addressed. *M'Kenzie v. Shire of Swan Hill*, 4 V.L.R. (L.,) 299.

Demand for Rates—Sufficient Service what is—"Local Government Act 1874," Sec. 290.]—Placing a demand for payment of rates in the post,

properly addressed, affords *prima facie* sufficient evidence of service within the "*Local Government Act* 1874," Sec 290. *Regina v. Mayor, &c., of Hotham, ex parte Bent*, 4 V.L.R. (L.,) 409.

What is Sufficient Demand within the "Local Government Act 1874," Sec. 290.]—If a demand for payment of rates give sufficient information, having regard to the knowledge already possessed by the person to whom it is addressed, to enable him to ascertain the amount really due, it will not be vitiated by want of form or claiming too much, and will be sufficient demand under Sec. 290 of the "*Local Government Act* 1874." *Ibid.*

Demand—Notice to Ratspayer—Act No. 506, Secs. 286, 290.]—S., in September 1879, entered into occupation of certain premises at a time when there were arrears of rent from 1875. A demand was made for all the rates, and S. only consented to pay for the time he had been in occupation. It appeared that the demand had not been made by personal service or by notice in the ways provided for in Sec. 290, and the Council relied upon Sec. 286. *Held* that the notices in Sec. 286 did not refer to the notices in Sec. 290, but to the notices before making the rate and as the notices required by Sec. 290 had not been given, S. was only liable for the rates during the time he had been in occupation. *Schafer v. Mayor of Sandridge*, 3 A.L.T., 41.

Defences Available—Rateability of Property, not Rate Itself—Act No. 506, Sec. 285.]—R. was rated in respect of a building vested in the Minister of Public Instruction, a portion of which R. occupied. *Held*, on appeal, that under Sec. 285 by necessary implication, a person may complain of the liability to be rated in respect of the person or the property, though he cannot assail the rate itself, and that he could raise, as a defence in proceedings to recover the rate, the fact that theproperty was not rateable; and appeal allowed. *Shire of Warrnambool v. Rawe*, 10 V.L.R. (L.,) 347; 6 A.L.T., 164.

Enforcing Payment—Objection cannot be taken at Hearing by Justices—Person Sued must Appeal.]—On a proceeding before a justice, to enforce payment of a rate, the ratepayer cannot raise the objection that the valuation on which the rate depended had not been made till after the rate had been struck; the principle being applicable that, when the ratepayer had an opportunity of taking the proper course, viz., appealing to the General Sessions and getting the rate quashed, and has not done so, he cannot be allowed to take an objection which he might have taken on appeal. *Menzies v. Councillors, &c., of Newstead*, 1 V.R. (L.,) 88; 1 A.J.R., 97, *sub. nom. Shire of Newstead v. Menzies.*

Person Resisting Payment and not Appealing—No Alteration Permitted in Value of Rate if Excessive.]—*Carlisle Company v. Mayor of Sandhurst, ante columns* 1259,1260.

Failure to Appeal—Objection not Capable of Being Set Right by Appeal—Person not Prejudiced by Failing to Appeal.]—*Newman v. Mayor of Maryborough, ante column* 1266.

Act No. 359, Secs. 216, 217, 219—Person not having Appealed to General Sessions Against the Rate Entitled to Resist Payment.]—H. was assessed for rates for property within defendant borough, and was summoned before justices for payment. He proved that he was not the occupier of any land within the borough and the justices made an order for payment. H. had not appealed to General Sessions against the rate. *Held*, that as to Secs 216, 217, and 219, there was a distinction between exemption and absence of liability, and where a person was not in occupation, he need not take any notice of the rating. Appeal allowed. *Heller v. Mayor of Essendon*, 5 A.J.R., 165.

[Compare Secs. 272, 273, 275 of Act No. 506.]

Appeal against Rate to Petty Sessions—Stay of Proceedings—"Shires Stat. 1869" (No. 358,) Secs. 217, 218.]—Although an appeal to General Sessions under Sec. 218 of the "*Shires Stat.* 1869," No. 358, on account of any matters omitted from or included in the rate does not prevent the recovery of any such rate, yet an appeal to Petty Sessions, under Sec. 217 of the Act against the assessment of a rate, operates as a stay of proceedings, and, pending the appeal, no action can be taken by the shire council for the recovery of the rate appealed against. *Shire of Bungaree v. Ballarat Water Commission*, 4 A.J.R., 158.

[Compare Secs. 273, 274 of Act No. 506.]

6. *Appeal from Rates.*

Where Appeal Lies.]—In rate cases appeal cases are allowed from the decisions of Petty Sessions. *Mayor, &c., of Fitzroy v. Collingwood Gas Company*, 6 W. W. & A'B. (L.,) 72.

Appeal to Petty Sessions under Sec. 217 of Act No. 358 Operates as a Stay of Proceedings.]—*Shire of Bungaree v. Ballarat Water Commissioners supra.*

Where Appeal Lies, and Who may Appeal.]—*See Attorney-General v. Shire of Hampden, ante columns* 219, 220.

Who may Appeal—Act No. 184, Sec. 199.]—H., the owner of certain property, had it assessed at a high value in order to qualify himself to be a councillor, to which office he was elected. B., another ratepayer, and not the owner, appealed against the assessment as being too high. *Held*, reversing the justices, that B. was a person "aggrieved" within the meaning of No. 184, Sec. 199, and might maintain an appeal against the assessment. *Brown v. Mayor, &c., of Footscray*, 6 W. W. & A'B. (L.,) 168.

[Compare Sec. 273 of Act No. 506.]

When Notice of Appeal should be Given—Act No. 176, Sec. 199.]—G. appealed to justices, under the Act No. 176, Sec. 199, against a road rate. The respondents (before the justices) objected that the notice of appeal was not given in time. A notice had been originally given which fixed no date for the hearing, and at the hearing the objection was made that the notice had no date. The justices adjourned, to allow another notice with a date for the hearing to be given, and a second notice with a date was given. On this date the appellant attended, and took part in the proceedings. The second notice was objected to on the ground that it was too late—more than a month after the rate. The first notice had been within the month. The justices heard the appeal, and decided against the rate. They stated a case on the appeal of the Road Board. On the appeal, the Road Board took a third objection, that the original notice did not show the appellant to be the party within the Act. *Held* that the respondents waived the first objection as to the want of date at the adjourned hearing, and were stopped from taking the second, and could not take the third, which might have been taken at the original and adjourned hearings, at the present hearing. *Corio Road Board v. Galletly*, 1 W. W. & A'B. (L.,) 85.

[Compare Sec. 273 of Act No. 506.]

Notice of Appeal—Jurisdiction of Justices.]—A notice of appeal against a rate given within one month from the time the rate was made, but which gives, as the date for hearing the appeal, a time outside of one month from the date of making the rate, is a good notice of appeal within the Act No. 176, Sec. 199, and Justices in Petty Sessions have jurisdiction to hear such an appeal. *Regina v. M'Lachlan*, 3 W. W. & A'B. (L.,) 120.

[Compare Sec. 273 of Act No. 506.]

What Notice should Contain—Hearing—No. 176, Sec. 199.]—A notice of appeal to justices in Petty Sessions from a road rate, under the Act No. 176, Sec. 199, should name a date for the hearing, and the hearing may be the first after the day named, on which the justices actually sit in Petty Sessions. The notice of appeal should also show, on the face of it, that the person appealing against the rate is a party aggrieved thereby within the meaning of the Act No. 176, Sec. 199; and *semble*, that if the notice describe such person as the "owner or lessee," and not as the "occupant" of the land, he will not appear to be a party aggrieved within the Act. *Corio Road Board v. Galletly*, 1 W. W. & A'B. (L.,) 85.

[Compare Sec. 273 of Act No. 506.]

Time for Appeal—No Court of Sessions—"Local Government Act 1874," Sec. 281.]—Where, on an appeal from a rate, there was no Court of Sessions sitting within the time directed by the "*Local Government Act* 1874," Sec. 281, as that to which the appeal was to be made, a time for the hearing of the appeal was allowed to be fixed at the next available Sessions. *Melbourne and Hobson's Bay United Railway Company v. Town of Richmond and Borough of Sandridge*, 4 V.L.R. (L.,) 81.

Notice of Appeal, Act No. 506, Sec. 274.]—A notice of appeal to General Seasions set out various grounds as to misdeacription of the property. *Held* that the proper test as to the sufficiency of a notice of appeal is whether the respondents were actually, or might reasonably have been misled, and, if the property was described in the rate book before the justices that was sufficient to enable them to alter the rate. *Russell v. Shire of Leigh*, 5 V.L.R. (L.,) 199; 1 A.L.T., 18.

Jurisdiction of Justices on Appeal—Act No. 176, Sec. 199.]—The words in Sec. 199, Act No. 176, "Court of Petty Sessions holden nearest to such rateable property," are mandatory, and are descriptive of certain justices, and give jurisdiction to those alone. *Regina v. McLachlan*, 2 W. W. & A'B. (L.,) 171.

[Compare Sec. 273 of Act No. 506.]

Jurisdiction of Justices Under Sec. 31 of Act No. 18—Only as to Amount of Assessment.]—*Blair v. Council of Ballarat, ante column* 752.

7. *Other Points.*

Action for Excessive Rate Paid Under Protest—Money Had and Received.]—A. Road Board demanded payment of a road rate from K. The rate had been properly struck, but K. contended that certain pasture land, on which a lower assessment was proper, was treated as arable land, on which a higher rate was proper. K. paid the whole demand, under protest, and brought an action in the County Court for the excess due to him, as money had and received to his use. On appeal by the Road Board, *Held* that K. could not have quashed the rate on *certiorari*, or have replevied for the excess paid under protest; that K. was bound to tender the amount really due, and might, after such tender have brought his action if a distress were issued for any excess beyond the sum really due and tendered; that "money had and received" did not lie in such a case, as the validity of a rate could not be inquired into in such an action; and that money had and received, not lying, the judgment for K. was erroneous; and appeal allowed. *Belfast Road Board v. Knox*, 1 W. W. & A'B. (L.,) 133.

Mandamus to Rate Collector to Compel Acceptance of Amount to which Justices had Reduced the Rate—"Shires Statute 1869," (No. 358,) Secs. 57, 68, 220.]—Rule *nisi* for a *mandamus* to compel the rate collector of the Shire of R. to receive the sum of £114 tendered to him in payment of rates due on the property of T. T. was the owner of land in the Shire, which was rated by the Council at £2800, on which, at 1s. in the £1, the rates amounted to £140. T. appealed to Petty Sessions, and when the case was first called on, it was adjourned for a month, and at the adjourned hearing there were no representatives on the part of the Council. The justices reduced the rates to £114. Sec. 220 of No.

358 requires that an amendment of a rate by the justices should be made by altering the sum at which any person is rated *therein*. Notice had been served on the Shire secretary to produce the rate book, but it was not produced, so that the justices could not enter the reduced rate therein. T. tendered the sum of £114 to the Shire treasurer and to the rate collector, but neither would take it. Sec. 57 provides that, to entitle a person to be on the ratepayers' roll, he must have *paid* his rates before the 20th June in each year, and no person not entitled to be in the ratepayers' roll could act as a councillor. *Held* that the rule ought not to go, as it would lead to nothing, since the words in the Act being "paid," and not "paid or tendered," and the money not having been paid before the 20th June, a *mandamus* would be useless. *Semble*, that T. would have an action against the rate collector for not taking the rates. *Regina v. Black, ex parte Twomey*, 5 A.J.R., 82.

RATIFICATION.

Whsn Impoesible.]—A father allowed his son, who had the same name as himself, to obtain possession of the title deeds of lands belonging to the father. The son represented himself as owner of the land, and mortgaged it to first and second mortgagees. The father recognised and confirmed the first mortgage, but refused to recognise the second. *Held* that no title passed by either of the mortgages by the son. *Ettershank v. Zeal*, 8 V.L.R. (E.,) 333, 342; 4 A.L.T., 90.

Forgery of a Bill of Exchange—Ratification by Acknowlsdgment of Alleged Signatory that Signature is his.]—*Kernan v. London Discount and Mortgage Bank, ante column* 102.

Of Acts of Directors.]—*See* COMPANY.

Ratification of Company's Solicitor's Acts only Effectual when Under Seal.] — *Shiel v. Colonial Bank, ante column* 231.

Liability of Corporation on Contract Entered into by One Council at Request of Another Council —Ratification.] — *Shire of Leigh v. Shire of Hampden, ante column* 212.

Of Trespass—How Effected.]—A wrongful act, in order to be capable of being ratified, so as to make the ratifier liable for the wrong, must be an act done by a person professing to act for the use or benefit, or by the authority of the party who is afterwards said to have ratified it. *Maudoit v. Ross*, 10 V.L.R. (L.,) 264, 266; 6 A.L.T., 104.

Evidence of Ratification.]—Evidence of ratification consists of proof of acts or words showing an election of the ratifier to adopt as his own act the act of another known to him, and done by that other for his benefit or in his name. Mere knowledge of the act of the agent is not ratification (though knowledge is a necessary element of ratification,) except where there is an intention to adopt the act at all events and under whatever circumstances. There must be evidence either of participation in the advantage resulting from the act, or of express approbation of the act. *Ibid.*

And *see* cases, *ante* under PRINCIPAL AND AGENT.

REAL PROPERTY STATUTE, No. 213.

Acknowledgments—"Real Property Stat. 1864," Ssc. 123 — Disentailing Dsed.] — Where the appointment of a special commissioner to take, under Sec. 123 of the "*Real Property Stat.* 1864," the acknowledgement of tenants in tail to a disentailing deed was sought, *Held* that the Court had power to make the appointment, and a separate order was made for each tenant. *In re Bowman*, 6 V.L.R. (E.,) 180; 2 A.L.T., 73.

Limitation of Actions, Secs. 17-50.]—*See* under LIMITATIONS (STATUTES OF,) *ante columns* 844-847.

Dower.]—*See* under HUSBAND AND WIFE, *ante column* 538.

Alienation by Married Womsn.]—*See* under HUSBAND AND WIFE, *ante column* 550.

Leasss and Sales of Settled Estates.]—*See post* under SETTLEMENTS.

Registration of Documents.]—*See* under DEED, *ante column* 354.

Sals of Infants' Lands.]—*See* under INFANT, *ante column* 558.

Paymsnt of Dsbts Out of Real Estats.]—*See* under DEBTOR, *ante column* 345.

Appointment of Commissioner for Taking Acknowledgmsnt of Married Women—Act No. 112, Sec. 87.]—A commission may issue appointing as commissioner either of two persons in the alternative. *In re Brookfield*, 1 W. & W. (E.,) 110.

[Compare Sec. 75 of Act No. 213.]

RECEIVER.

1. *Appointment and Discharge.*

Motion for Appointment.]—After an order at the hearing, giving liberty to amend for want of parties, and before amendment, a motion by plaintiffs refused as unprecedented. *Gladstone v. Ball*, 1 W. & W. (E.,) 9.

In what Cases Appointed—In Suit for Specific Performance where ex parte Injunction has been Granted.]—In a suit for specific performance of a clause for repurchase in an indenture, where an *ex parte* injunction had been granted against the defendant, the plaintiff moved for appointment of a receiver, and the defendant alleged that the indenture was wrongly prepared in containing the clause of repurchase. *Held* that the document must be taken *prima facie* to express the intention of the parties, and that a receiver was necessary for the purpose of carrying out the injunction. Order made. *Shaw v. Wright*, 2 W. & W. (E.,) 57, 64.

In what Cases Appointed — Partnership — Insanity of a Partner Between Decree for a Dissolution and Report of Master.]—In a suit for dissolution by an insane partner and his committee, a dissolution and accounts had been decreed, no attempt being then made for appointment of a receiver. On application by motion for a receiver before Master's report, *Held* that no case was made, and motion refused. *Gregory v. Welch*, 3 A.J.R., 43.

Partnership.]—Where the defendants had improperly excluded the plaintiff from participating in winding up a partnership, and had treated the assets and effects as their own, a receiver was appointed, notwithstanding that the appointment was injurious to all parties. *Boyle v. Willis*, 1 A.L.T., 189.

For facts, *see* S.C., *ante columns* 1113, 1134.

And *see* also *Barrett v. Snowball*, and *Hewitt v. Akehurst*, *ante columns* 1132, 1137, for cases of appointment of a receiver in partnership matters.

When Appointed.]—Where an application is made for appointment of a receiver, under a covenant to account, irregularities of accounting, unless they lead to an inference of fraud or dishonesty, should not be made a ground for the appointment of a receiver. *Aarons v. Lewis*, 3 V.L.R. (E.,) 79.

Appointment of Receiver in Administration Suits.] *Graham v. Graham*, *ante column* 14, *Dryden v. Dryden*, *ante column* 15.

In what Cases Appointed—Mortgagee in Possession.]—Where a mortgagee in possession is charged with mismanaging the estate, the Court will not appoint a receiver. *Hayward v. Martin*, 9 V.L.R. (E.,) 143; 5 A.L.T., 109.

Equitable Execution by Appointment of a Receiver—Act No. 761 ("Judicature Act 1883") Sec. 9, Sub-sec. 8.]—Before the Court will grant equitable execution by appointing a receiver, it requires to be satisfied that the plaintiff has tried all he can to get satisfaction at law, and that means he must do all he can in Victoria to get satisfaction of his judgment. *Ettershank v. Russell*, 6 A.L.T., 140.

Appointment of—Abuse by Trustee of his Discretion.]—*See Phelan v. Eaton*, 3 V.R. (E.,) 13; 3 A.J.R., 6, *post under* TRUST AND TRUSTEE. *Rights and Powers.*

Who may Move for Appointment of New Receiver—Annuitant—Costs.]—In a suit a decree had been made for the administration of the testator's estate. Prior to the decree, a receiver had been appointed who, about twelve months since, left the colony. The testator's widow, a defendant in the suit, was entitled to an annuity charged on the estate, but which had been left unpaid since the receiver's departure. Motion by the annuitant, on notice to the plaintiff, for the appointment of a new receiver. Motion granted; the applicant to have her costs of the motion; the plaintiff though rightly served with notice of the motion, not to have his costs, since it was through his neglect in leaving matters as they were with reference to the receiver that the necessity for the motion arose. *Pittman v. Townshend*, 1 W. W. & A'B. (E.,) 140.

By Whom He should be Proposed.]—The attorney, under power of one of two co-plaintiffs, not the solicitor on the record, proposed a receiver in the Master's office in opposition to the receiver proposed by the solicitor on the record. *Held* that the Master was right in refusing to receive the proposal as on behalf of one of the plaintiffs. *Graham v. Graham*, 2 V.R. (E.,) 145, 149; 2 A.J.R., 100.

Who should be Appointed.]—It is undesirable to appoint as receiver, a person who has acted as agent of the defendant in the management of the property. *Ibid.*

Who should be Appointed.]—A receiver ought to be indifferent between all parties to the cause, and therefore a motion for appointment of the accountant in the office of the plaintiff's solicitor as receiver refused. *Hunter v. Hunter*, 4 W. W. & A'B. (E.,) 17.

Discharge.]—A receiver will not be discharged immediately upon the nomination of new trustees. The estate must be conveyed and the new trustees must execute the deed before he will be discharged. *Lane v. Phelan*, 2 A.J.R., 10.

2. *Powers, Functions, and Liabilities.*

Powers and Functions of.]—The functions of a receiver are not at all analagous to those of an official assignee. A receiver's duties are those of collection, not of distribution. It is not his business to set about adjusting the creditors' accounts, and if he does so he misconceives his duties as a receiver. *Moreton v. Harley*, 2 W. & W. (E.,) 74, 79.

Partnership Suit—Appointment of Receiver—Undertaking by Defendant during Pendency of Motion—Extent of Receiver Order.] — On 20th May notice of motion for a receiver was given. On that day the motion stood over, the defendant undertaking not to sell. On 27th May order for receiver made. On 15th May—orders having been previously given—a sale of property was made to the net value of £1000, of which £800 had been received by the defendant before 27th May, the rest subsequently. On motion by plaintiff, that defendant should pay whole of this amount to the receiver, *Held* that the undertaking not to sell did not prevent the defendant receiving the proceeds of a sale theretofore made; that the £200 received since 27th May was to be paid over to the receiver. *Held* also, that a receiver order carries existing chattel property and debts continuing due to a firm at the time the order is made, but not money in the hands of one of the partners, which, on an account taken, he might be subject to hand over to one of the other partners. *Moreton v. Harley*, 2 W. & W. (E.,) 74.

Powers of—To Carry on Business.]—Permission will not be given to a receiver of an intestate's estate to carry on a business, although it has been carried on by an intestate and his administration, on the ground that the Court ought not, through one of its officers, to carry on a mercantile establishment. *Graham v. Graham*, 2 V.R. (E.,) 145, 148; 2 A.J.R., 104.

Receiver of Infant's Property has no Power to Sell or Convey under Sec. 6 of "Lands Compensation Statute 1869."]—The Board of Land and Works served a notice to treat under the Acts No. 415 and No. 344, upon an infant's solicitor, which he accepted. A receiver had been appointed of the infant's property. Upon motion on behalf of the infant, that the receiver might be at liberty to treat with the board as to the purchase-money, *Held* that the solicitor had no right to accept service of the notice, and that a receiver was not included among the persons authorised to sell, convey, release, &c., by Sec. 6 of the "*Lands Compensation Stat.* 1869," No. 344; but that he was a mere agent of the Court, concerned only with the rents and profits for the time being, not with the inheritance. *Hunter v. Hunter*, 4 A.J.R., 24.

Upon a subsequent application, the receiver was appointed special guardian of the infant, for the purpose of selling and conveying to the Board of Land and Works. *Ibid.* 65.

Power to Grant Leases of Infants' Estate.—The general power of the receiver in an administration suit to grant leases of the property of infant parties extends to any number of years during the minority; and the Master may, without an express reference by the Court, approve of a lease for more than one year, if during the minority. *Brock v. M'Phail*, 1 W. & W. (E.,) 12.

Receiver of Infant's Estate—Land under "Land Act 1862," Sec. 23.]—A receiver of infant's real estate extended to land selected under the "*Land Act* 1862," Sec. 23. *Brock v. M'Phail*, 3 W. W. & A'B. (E.,) 121.

Land Sold under a Decree—Motion for Leave to Receiver to bring Ejectment against Person in Possession, and for Person in Possession to give up Title-deeds—Costs.]—A decree was made for the sale of certain real estate, of which one P. had been seized, and a receiver had been appointed in the suit. The defendant was the infant heir-at-law of P. Mrs. P., widow of P., and mother of defendant, and who was not a party to the suit, occupied some of the property directed to be sold, and refused either to attorn to the receiver or give up possession. She also refused to deliver up the title deeds, which were in her possession. Motions for liberty to the receiver to bring ejectment against Mrs. P., and for an order upon Mrs. P. to bring into Court, for the purpose of carrying out the decree, the title-deeds in her possession relating to the property directed to be sold. Separate notices of each of these motions had been served on Mrs. P. *Chapman, J.*, made an order as to the first motion, as of course; and as to the second, ordered that Mrs. P., within a week after service of the order upon her, deliver into Court all deeds exclusively relating to the title of P. to the property directed to be sold. No order was made as to costs, because an unnecessary notice was served upon Mrs. P. as to the first motion, His Honour considering that the costs of that might be set off against the costs of the other. *Royce v. Parker*, 1 W. &. W. (E.,) 267.

Attornment to Receiver.]—The Court has no jurisdiction to order a person in possession of land, to attorn to a receiver, where the tenancy is not clear, or where a right of purchase is set up by such person. *Brydon v. Innes*, 5 W. W. & A'B. (E.,) 189.

Appointment as against a Person Subsequently made a Party to Suit.]—Motion for an order for H. and B. to deliver certain property to a receiver. A receiver was appointed before H. was made a party to the suit. *Held* that the Court could not make an order as against H. unless and until an application was made extending the appointment of the receiver to H. as a new defendant. *M'Kay v. Bell*, 3 A.J.R., 53.

RECOGNISANCES.

To Prosecute Appeal—Appearance—Estreating.]—C. was convicted before justices, and sentenced to six months' imprisonment. He appealed to the General Sessions, and H. and T. became his sureties to "prosecute the appeal with effect." At the hearing, the Chairman of General Sessions estreated the recognisances, C. not appearing in person, but counsel appearing on his behalf. *Held* that there is no

practice to appear in person on a recognisance to prosecute an appeal, and that the recognisances were improperly estreated. *Sed aliter* in the case of a recognisance to hear judgment. *Regina v. Hull and Trevarrow*, 3 V.R. (L.,) 143; 3 A.J.R., 29.

"Crown Remedies and Liabilities Stat.," No. 241, Sec. 18—Satisfaction—Costs Against Crown.]—The Court had ordered satisfaction to be entered on a judgment *see supra*, being of opinion that the recognisances should not have been estreated. The Crown applied to have the words "with costs" struck out. *Held* that the words in Sec. 18 did not imply that the subject should be entitled to full costs. Satisfaction entered without costs. *Regina v. Hull and Trevarrow*, 3 V.R. (L.,) 218; 3 A.J.R., 111.

Estreatment—Prisoner Appearing on Day Fixed in Recognizances—Judgment Given on Another Day on which Prisoner did not Appear.]—*Regina v. Moore*, *ante columns* 73, 74.

To Keep Peace—Estreatment by Justices before whom Defendant was not Convicted.]—Rule *nisi* to set aside a judgment recorded against C. on a forfeited recognisance. C. had been bound over to keep the peace for twelve months, and entered into a recognisance. C. committed an assault for which he was fined by one justice, and was summoned to show cause why the recognisance should not be estreated before other justices. In the presence of the sureties, C. confessed the assault to these justices, and judgment was entered on the recognisance being estreated. *Held* that the justices had personal cognisance of the fact that C. had broken the condition. Rule discharged. *Regina v. Cairns*, 5 A.J.R., 36.

To Prosecute Appeal from Justices.]—*See* cases *ante columns* 766, 767.

To Prosecute Appeal to Sessions.]—*See* cases *post* under SESSIONS.—Appeal.

REFERENCE.

To Arbitration.]—*See* ARBITRATION. WORK AND LABOUR.

To Master in Equity.]—*See ante columns* 1184, *et seq.*

REFRESHERS.

See COSTS, *column* 245.

REGISTER OF SHAREHOLDERS.

See COMPANY—MINING.

REGISTRAR.

Of Titles.]—*See* TRANSFER OF LAND (STATUTORY.)

Of County Court.]—*See* COUNTY COURT.

Of Building and Friendly Societies.]—*See* BUILDING SOCIETIES—FRIENDLY SOCIETIES.

Registrar-General—Signature of Deputy—Judicial Notice of—"Stat. of Evidence 1864," Sec. 54.]—*See Teague v. Farrell*, *ante column* 428.

REGISTRATION.

Of Copyright.]—*See* COPYRIGHT.

Of Medical Practitioners.]—*See* MEDICINE.

Of Deeds.]—*See* DEED.

Of Patents.]—*See* PATENT.

Of Trade Marks.]—*See* TRADE.

Of Transfers under "Title of Land Stat."]—*See* TRANSFER OF LAND (STATUTORY.)

Of Marriage.]—*Crowl v. Flynn*, *ante column* 501.

RELEASE.

Construction of Release in a Partnership Deed—Doctrine of ejusdem generis.]—*Cameron v. Hughes*, *ante column* 1138.

f Sureties.]—*See* PRINCIPAL AND SURETY.

Of Trustee.]—*See* TRUST AND TRUSTEE.

Of Debt—Part Payment.]—*Reeves v. Luplau*, *ante column* 344.

Of Joint Debtors—Execution by One of a Creditor's Deed—Release of Others.]—*Glass v. Martin*, *ante column* 344.

Of Insolvent Estate from Sequestration.]—*See* INSOLVENCY.

Release of Equity of Redemption Obtained by Fraud of Mortgagee]—*Brougham v. Melbourne Banking Corporation, ante column* 1055.

Release by cestui que Trust to Trustee.]—A release executed by a female *cestui que trust* to her trustee, immediately after attaining her majority, and without any accounting by the trustee, is not binding. *Bennett v. Tucker,* 8 V.L.R. (E.,) 20; 3 A.L.T., 108.

Quære, whether any release given by a *cestui que trust* to a trustee without any accounting is binding. *Ibid.*

For facts *see* S.C. *post* under TRUST AND TRUSTEE. Rights, &c., of Trustee.

And *see* also S.P. *Westwood v. Kidney,* 5 A.J.R., 25, *post* under TRUST, &c.—Rights, powers and duties, &c., and *O'Leary v. Mahoney, ante column* 559.

When Verbal Renunciation of Claims under Bill of Exchange Effectual as a Release.]—*Glass v. M'Leery, ante column* 95.

Creditors' Deed—Release Operating as a Covenant not to Sue.]—*Glass v. Higgins, ante column* 352.

REMAINDERMAN.

See TENANT—WILL.

RENT.

See DISTRESS—LANDLORD AND TENANT.

REPLEVIN.

When Maintainable—Payment to Two Persons Claiming as Landlords.]—R., in March, 1856, by post nuptial voluntary settlement, settled land upon J. and B. as trustees in favour of himself and wife, and in November, 1856, mortgaged this land to T. In March, 1859, R. leased the land to plaintiff, who continued to pay rent to trustees until T., by threatening ejectment, compelled plaintiff to attorn to him. R. then, as agent for J. and B., distrained upon plaintiff's goods for rent in arrears under the lease. Plaintiff brought his action of replevin; R. avowed for rent in arrear, and as agent for J. and B., and a verdict was entered for plaintiff. A rule *nisi* was obtained to enter a verdict for defendant R. *Held* that plaintiff did not dispute his landlord's title, but merely showed that by his own act the landlord had deprived himself of the title he previously had. Rule discharged. *Taylor v. Robinson,* 2 W. & W. (L.,) 69.

Against whom Maintainable—Married Woman having Separate Property.]—Replevin is maintainable against a married woman having separate property, when the warrant of distress was signed by her daughter in her presence, and by her authority, but was not attested before a Justice or Attorney under Sec. 73 of the "*Landlord and Tenant Stat.* 1864." *Field v. Howlett,* 4 A.J.R., 152.

Warrant for Payment of Rates—Where Justices may not Justify under Warrant—No Summons for Payment of Rates]—*Taylor v. Patterson, ante column* 1268.

Action of Replevin against Justice—Notice of Action—Act No. 267, Secs. 164, 170.]—*Smith v. Cogdon, ante columns* 783, 784.

Act No. 345, Sec. 97—Replevin in Supreme Court—Execution out of County Court.]—H. brought an action against M. in the County Court, and recovered judgment, and issued execution. An application was made to set this aside, but the County Court Judge refused to interfere, and M. then issued a writ of replevin in the Supreme Court. On rule *nisi,* to set proceedings aside, *Held* that Sec. 97 did not create an entirely new jurisdiction, and the jurisdiction of the Supreme Court was not ousted. Rule refused, the Court not thinking the proceedings showed sufficient irregularity to justify them in interfering. *Marie v. Hogan,* 5 V.L.R. (L.,) 160.

REVENUE.

STATUTES.

"*Customs Act* 1857," No. 13.
"*Customs Amendment Act,*" No. 144, and various Amending Acts, Nos. 293, 306, 400, 593, 646, repealed by Acts Nos. 768, 769.
"*Customs Act*" (Excise) or "*Distillations Act,*" No. 147.
"*Customs Consolidation Act* 1883" No. 768.
"*Customs Duties Act* 1883," No. 769.
"*Land Tax Act,* 1877," No. 575.
"*Stamp Stat.,*" No. 355.
"*Stamp Duties Act,*" No. 645.

1. *Excise and Customs.*

Illegal Seizure of Stock—"Distillation Act 1862," No. 147, Sec. 113.]—R. sued M. in trespass for seizing certain stock in a certain paddock. An illicit still had been found in a hut in the paddock, which was rented by R. The hut was occupied by D., and was forty yards away from the house in which R. lived. *Held* that Sec. 113 of No. 147 must be construed strictly; that words "house, building, premises or place" must be read disjunctively, and that the "premises or place" in which the stock was found was not the same "premises or place" in which the still was found, and the seizure was illegal. *Rule* absolute to enter a verdict for plaintiff. *Ryan v. Moody*, 4 W. W. & A'B. (L.,) 99.

Registration Fees on Imported Goods—Transhipment—Act No. 144, Sec. 3.]—The registration fees imposed on goods "on their importation into Victoria," by the Act No. 144, Sec. 3, ("*Customs Amendment Act*") are not payable on goods which are merely trans-shipped without being landed in the colony. *Lorimer v. The Queen*, 1 W. & W. (L.,) 244.

Recovery of Fees Wrongly Levied—Act No. 49.]—*Per Stawell, C.J.*, and *Williams, J.* (*dubitante Molesworth, J.*)—Registration fees wrongly levied, paid under protest, and illegally received by the Customs officers, under the Act No. 144, Sec. 3, may be recovered back by petition against the Queen, under the Act No. 49 (repealed and re-enacted by "*Crown Remedies and Liabilities Stat.*;) there being an implied contract by the Crown to repay such moneys illegally received on its behalf. *Ibid.*

Customs Duty Improperly Paid—Remedy—"Customs Act 1857," Sec. 21—"Crown Remedies and Liabilities Stat., 1865," Sec. 20.]—Where a dispute has arisen between the importer of goods and the Customs officer, as to whether any duty is payable on goods, and the importer has paid the duty under protest, he cannot sue the Crown under the "*Crown Remedies and Liabilities Statute* 1865," Sec. 20. Sec. 21 of the "*Customs Act* 1857," applies to a case of this sort, and the only remedy open to the importer is to pay the amount under protest, and then sue the collector within three months, as provided by Sec. 21 of the latter Act. The remedy given by the "*Customs Act*" is obligatory on the importer, and must be followed. *Sargood v. The Queen, McArthur v. The Queen*, 4 V.L.R. (L.,) 389.

And *see* also *Stevenson v. The Queen, ante column* 325.

Notice of Action against Customs Officer—Act No. 13, Sec. 227.]—*Stevenson v. Tyler, ante column* 10, and compare Sec. 270 of Act No. 768.

Importing Indecent Prints—"Customs Act 1857" (No. 13,) Secs. 34, 165.]—D. was informed against for that he was concerned in importing certain prohibited goods, to wit, a number of indecent prints, paintings, cards, &c. The evidence showed that the defendant applied to clear at the Customs a case of goods, which arrived per ship, and that defendant produced an invoice of a list of goods with their prices without disclosing the names of the vendor, vendee, shipper or consignee; that the case contained in a false bottom a large number of indecent prints, and on the officer remarking "why there's a false bottom," the defendant answered "Oh, no; the case is too large for the goods." Defendant was convicted and fined. *Held*, on appeal, that there was evidence to support the conviction, and appeal dismissed. *Davis v. Sprent*, 2 W. W. & A'B. (L.,) 86.

[Compare Sec. 206 of Act No. 768.]

Act No. 13, Sec. 233—Act No. 306, Sec. 13—Jurisdiction of Justices—Forfeiture.]—*Fellows J.* (in Chambers) granted a rule absolute for a prohibition against proceeding in an order of forfeiture made by justices, on the ground that the justices had no jurisdiction to make such order under Sec. 233 of Act No. 13, where they refused to hear the defendants on their refusal to make an affidavit of ownership. *Regina v. Call, ex parte Callaghan*, 5 A.J.R., 91.

[Compare Sec. 266 of Act No. 768.]

Act No. 646—Watch—Imported in Parts.]—A duty or tax cannot be enforced unless the intention of the Legislature to impose it has been unmistakably expresssed. Where therefore it was sought to enforce payment of duty of watches imported in different packages, so as to be easily fitted together on arrival in Victoria, *Held* that such goods did not fall with the class on which duty is imposed in Act No. 646. *Shaw v. Howden*, 9 V.L.R. (L.,) 102; 5 A.L.T., 7.

[*See* now Act No. 769.]

2. *Land Tax.*

Deduction of £2500—On Estate in which More than One Person are Interested—"Land Tax Act 1877" (No. 575,) Sec. 7.]—If A. and B. are owners of one estate, and B. and C. are owners of another, both over the taxable value, according to the proper construction of Sec. 7 of the "*Land Tax Act* 1877," the deduction of £2500 must be made from the value of each estate before assessing the tax. *Regina v. Cunningham*, 4 V.L.R. (L.,) 320.

Act No. 575, Secs. 5, 45, 46, 55—Covenant by Tenant to Pay Land Tax.]—Sec. 5 places the incidence of taxes upon the owner of the land, and Secs. 45 and 46 taken together point to the conclusion that the landlord is the person who is liable to pay the tax ultimately, and therefore a covenant by the tenant to pay the land tax is void as against the provisions of those sections. Sec. 55, in providing that all "agreements or covenants contrary to the intent of the Act," shall be void, is retrospective, and therefore a covenant in a lease made prior to the Act to pay all taxes present and future is void. *Trenery v. Stewart*, 5 V.L.R. (L.,) 247; 1 A.L.T., 37.

Act No. 575, Sec. 3—One Person Owning Several "Landed Estates."]—An owner of several "landed

estates" is entitled under Sec. 3 of the Act to only one deduction of £2500 on the valuation of the whole of his property, and not to a deduction of £2500 on each of his estates. *Docker v. The Queen*, 5 V.L.R. (L.,) 316; 1 A.L.T., 49.

"Land Tax Act 1877," No. 575, Sec. 4—"Landed Estate" Subject to Mortgage—Valuable Consideration.]—A father bought for his children a station, consisting of freehold land under the "*Transfer of Land Stat.*," comprising a "landed estate," within the meaning of "*The Land Tax Act* 1877," and stock thereon; the land being subject to a mortgage under the "*Transfer of Land Stat.*" He requested the vendor to transfer direct to the children, but the vendor refused, on the ground that some of the children were minors. In a subsequent negotiation a transfer was made, subject to the mortgage to the father, who gave his promissory notes for the payment of the purchase money extending over a period of ten years, except a small amount which he paid in cash. He also gave a second mortgage over the land to secure payment of the promissory notes. He then transferred the land, except a small portion which he reserved for himself, to the children, in such portions that each was under the taxable amount, and the children were registered as the absolute proprietors in fee of those portions. The Registrar, however, put the father's name on the *Land Tax Register* as "owner" of the whole of the land. The stock was not transferred to the children, but depastured on the whole of the land. There was an understanding between the father and the children that the whole of the proceeds, including profit on the stock, were to be applied first in making improvements, and then to make a fund to pay off the liability. The Registrar, though requested to do so, refused to remove the father's name from the *Land Tax Register* in respect of such Transfer. Upon order *nisi* to remove his name in respect of all the lands except the portion reserved for himself, *Held*, *per Molesworth, J.*, and affirmed on appeal, that the liability, under Sec. 63 of the "*Transfer of Land Stat.*," of the transferees to pay the mortgage debt, did not form a valuable consideration for the transfers to the children, and that the whole dealing was not a transfer *bonâ fide* for valuable consideration within the meaning of Sec. 4 of "*The Land Tax Act* 1877," but the transfers to the children were only gifts. *Ex parte Finlay*, 10 V.L.R. (E.,) 68; 5 A.L.T., 182.

Act No. 575, Sec. 24—Lien of Agent—Taxation of Costs.]—Although the Act in Sec. 24 authorises persons to appear by their attorneys or agents, it does not give agents a lien over the papers of their clients to the same extent as if they were attorneys. A Judge of the County Court, in an action by an agent to recover costs of an appeal to the Commissioners, ought, even in the absence of evidence, that the costs claimed are unreasonable, and of a schedule of costs in the Act, to reduce them to what he considers a reasonable amount, where he considers them even under such circumstances too high. *Watson v. Clinch*, 5 V.L.R. (L.,) 278; 1 A.L.T., 40.

Commissioners—Power to Award Costs to Successful Appellant.] — Under Sec. 25 of the "*Land Tax Act* 1877," the Commissioners of Land Tax have power to award costs against the Crown to a successful appellant against the classification of an estate. *Coldham v. The Queen*, 6 V.L.R. (L.,) 102; 1 A.L.T., 166.

The appellant may sue the Crown for such costs under the "*Crown Remedies and Liabilities Act* 1864," as a debt due by the Crown. *Ibid.*

"Land Tax Act 1877," No. 575, Sec. 4—Fraudulent Transfer—Owner.] — Hay Lonie, on the *Land Tax Register*, in 1882, transferred part of his estate to his wife, wrongly describing her as "Jane Lonie, wife of *Henry* Lonie." The Land Tax Registrar refused to remove his name from the *Register* in respect of such transfer. In 1883, Jane Lonie, with the consent of Hay Lonie, transferred the land to her mother, who leased it to Hay Lonie. The Registrar again refused to remove his name. Upon order *nisi* by Hay Lonie to have his name removed, *Held* that the transfer of 1882 was not *bonâ fide*, and Hay Lonie was still the owner under Sec. 4 of "*The Land Tax Act* 1877," the conveyance of 1883, though made with Hay Lonie's consent, was not his transfer, and the transfer of 1882 was the only one with which the Court had to deal. Order discharged, with costs. *Ex parte Lonie*, 9 V.L.R. (E.,) 128; 5 A.L.T., 94.

3. *Stamp Duties.*

"Stamp Duties Act," No. 645, Sec. 68—Re-sale of Portion of Purchased Land, and Payment of Duty direct from Original Vendor to Sub-Purchaser.]—W. sold certain lands under Act, No. 301, to the plaintiff company for £5400, and the company re-sold a portion of the land for £3000, W. transferring to the sub-purchasers, and the sub-purchasers paying duty on the £3000. The registration of the residue to the company was refused unless it paid duty on the whole amount (£5400.) *Held* that the company were liable to duty, to be charged on the proportion of the consideration apportionable to the land to be transferred, *i.e.*, the residue. *National Land Company v. Comptroller of Stamps*, 9 V.L.R. (L.,) 87; 5 A.L.T., 5.

When Bill of Exchange Deemed Duly Stamped—Act No. 645, Sec. 57, Sub-sec. 4.]— *Whitty v. Dunning*, *ante column* 93.

Cancellation of Stamp on Bill of Exchange—Act No. 645, Sec. 47.]—*Harriman v. Purchas*, *ante column* 93.

Praecipe Fee on Petition—No Objection to Petition if Full Fee is Afterwards Paid—"Stamp Stat." (No. 355,) Secs. 4, 10.]—*In re Provincial and Suburban Bank*, *ante columns* 170, 171.

Act No. 645, Sec. 51—Guarantee.]—*Semble* a guarantee to pay an amount of money is not one which requires to be stamped under the Act. *Croft v. Grimbly*, 5 A.L.T., 89.

4. Other Taxes and Duties.

Application of Licensing Fees—Act No. 566, Sec. 111—"New Licenses."]—A renewal of a license to a person previously licensed, and in respect of premises previously licensed, is not a "new license" within Sec. 111, nor is an annual license issued to a transferee of a license in respect to the same premises, in respect of which the fees must be paid into consolidated revenue; but where a licensed person procures a transfer of his license from one house to another, an annual license afterwards issued to him in respect of the latter house is a new license. *The Queen v. Mayor of Melbourne*, 5 V.L.R. (L.,) 446.

RIVER.

Placing Obstructions in Navigable River.]—Every navigable river is a public highway, and one of the incidents common to it, and to a highway on land, is that a permanent obstruction placed in one or the other without lawful authority, which renders it less commodious than before to the public, is a public nuisance at common law which may be punished by indictment, and which is removable by any member of the public whose right of user of the highway is obstructed by it. *Fergusson v. Union Steamship Company*, 10 V.L.R. (L.,) 279, 287; 6 A.L.T., 120.

Negligently Navigating — Vessel Taking the Ground.]—The right of the public in exercising the right of navigation in a navigable river is not limited to the water in the *alveus* of the stream, and the right of user does not cease, nor does the navigation become negligent, if the bed or the semi-liquid matter forming the bed of the river is disturbed by a vessel in motion. *Fergusson v Union Steamship Company*, 10 V.L.R. (L.,) 279, 285-6; 6 A.L.T., 120.

Plaintiff was lessee and occupier of a steam ferry across the Yarra. This ferry was worked by means of chains which lay along the bottom of the river when the ferry boat was drawn in to the bank. The defendants' steamboats, when steaming down the river, caught and carried away these chains while they were resting on the bottom of the river. On these occasions the defendants' vessels, though drawing upwards of seventeen feet of water at the stern, had gone down the river when the guage indicated that there was not more than fourteen or fifteen feet of water in the river, and this was charged against them as negligent navigation. The bottom of the river where the accident occurred consisted for about the first two feet of liquid mud, in which the ferry chains were lying, and through which the defendants' vessels forced their way, causing the damage complained of. At the trial a verdict was given for the plaiutiff. On a rule *nisi* to set aside the verdict and to enter a nonsuit, pursuant to leave reserved, *Held* that the defendants had not been guilty of negligent navigation, and that the plaintiff had no right to put the chains where they were, since they formed an obstruction to a navigable river, and were consequently a public nuisance. *Ibid.*

SALE.

I. Sale of Goods.

(1) *The Contract.*

(*a*) *Generally.*

Resale of Goods not "Cleared" or Paid for.]—On a "resale" of goods at the risk of the purchaser it appeared that one of the written conditions of the sale by auction was that "all purchases must be cleared . . . within twenty-four hours, in default of which the auctioneers will have it in their power or option to cancel the whole of the sale, or such portion of it as may remain uncleared, or to resell the same," when the purchaser "will be held liable for all loss and expenses attending such sale." A purchaser bought some of the goods, but did not "clear" a portion of them, and they were resold by the vendor's order for the account, and at the risk of the purchaser. A sum less than what they were originally sold for was realised, which sum, less the auctioneer's commission, was sued for by the vendor as "loss and expenses." At the "resale" other lots of goods of the same "description, quality, and value" were substituted for the original lots, but the case did not state that they were of the same "condition." *Held* that the goods resold must be substantially identical with those originally sold; and a nonsuit which had been granted to the defendant in the County Court was upheld. *Matthews v. Benjamin*, 3 W.W. & a'B. (L.,) 124.

Conditions of Sale—Catalogue.]—P. purchased salvage goods at a sale by auction, the goods being described as four bales of newspaper, but turned out to be bales of calico, which were of greater value, and which the auctioneer refused to deliver. The conditions of sale contained *inter alia* a clause to the effect:—"If auy error is made in describing the quality of any of the lots it shall not vitiate the sale, but the purchaser shall be bound to take the article sold with all faults as it lies here, packages full or empty not known or guaranteed." On action for non-delivery, *Held* that the catalogue and conditions of sale must be read together, and

that what was sold and bought was a chance, and that defendant was bound to deliver. *Crespin v. Puncheon*, 7 V.L.R. (L.,) 203; 3 A.L.T., 4.

Sale of Goods of a Certain Kind ex a Certain Ship to Arrive—Double Event.]—*See Cohen v. Cleve, post column* 1292.

Conditional Offer to Sell by Letter—When it does not Amount to an Enforceable Contract.]—*Cakebread v. Huddart, ante column* 184.

And for other contracts of sale *see ante columns* 186, 187.

(*b*) *Statute of Frauds.*

Goods over the Value of £10—Acceptance.]—B. was offered sheep for sale by A., and B. agreed to take them if after acceptance he should approve of them. Their value exceeded £10. B. approved of them and they remained in A.'s hands on B.'s application to oblige B. During this time they were attacked by disease and some died. B. sent an agent to take possession of them with written authority naming their number. A. then tendered to the agent a lesser number than those approved of, not only by those which had died but by some lambs which he kept back. B. refused to accept. Action by A. against B. *Held* that there was no acceptance to satisfy the "*Statute of Frauds*;" that B.'s purchase and approval were of the lot mentioned as a whole, and that he did not so approve of every individual of the whole so as to make a new contract concerning the lesser number. *Adams v. Brown*, 2 W. & W. (L.,) 176.

What is Sufficient — Acceptance — Extrinsic Evidence.]—Defendant, of Ballarat, ordered of plaintiff, in Melbourne, iron pipes to be delivered by the railway at Ballarat. Plaintiff accordingly forwarded pipes by train, but defendant not deeming them of the required weight left them lying at the station to the order of plaintiff. In the correspondence between the parties with reference to the sale and delivery there was no identification express or by reference to any particular pipes. Plaintiff brought an action for goods sold and delivered, and goods bargained and sold, and recovered the price of the pipes. On rule for a nonsuit, *Held* that there was no acceptance to complete a sale and delivery; that extrinsic evidence to identify any particular pipes as those bargained and sold under the correspondence was inadmissible; and, the correspondence alone not identifying any particular pipes, that it did not constitute a sufficient memorandum within the *Statute of Frauds*. *Wilkie v. Hunt*, 1 W.W. & A'B. (L.,) 66.

Sec. 17—Act No. 204, Sec. 108—Acceptance by Receipt and Retention.]—S. sold certain goods to W. by means of an auction sale, and the memorandum of sale contained the word "conditionally" which was after the sale struck out by the auctioneer. W. retained the goods for seven days. S. sued W. for the price of the goods in the County Court, and was nonsuited. *Held* that even if there was no sufficient memorandum, W.'s retention of the goods for seven days was sufficient evidence of acceptance to go to a jury. Appeal allowed. *Service v. Walker*, 3 V.L.R. (L.,) 182.

Part Delivery — No Acceptance.] — Where machinery was purchased by a company, and most of it remained on the vendor's premises, but part was removed by a carrier under company's directions, and then stopped *in transitu*, *Held* that there was no receipt or acceptance of the whole, or of part on account of the whole, and without a memorandum in writing to satisfy the "*Statute of Frauds*," there was no sale. *M'Iver v. Duke Coy.*, 5 V.L.R. (L.,) 449.

Part Delivery—Payment of Warehouse Rent.] —Where warehouse keepers, also unpaid vendors, had delivered part of the goods, and had also received payment of warehouse rent, *Held*, per Privy Council, no delivery, the payment of rent not operating as a constructive delivery of the whole. *Lange v. Grice*, 2 V.L.R. (L.,) 251; on appeal *sub nom. Grice v. Richardson*, L.R. 3 App. Ca., 319; for facts *see* S.C. *post column* 1295.

What is Sufficient Acceptance and Receipt.] —Delivery of goods purchased by an agent, who has authority to purchase goods for use at a particular place, but not to authorise delivery at any other place, at such other place, does not amount to an acceptance and receipt which will satisfy the "*Statute of Frauds*." *Mitchell v. Watson*, 6 V.L.R. (L.,) 493. 2 A.L.T., 99, *sub nom. Watson v. Mitchell.*

Sufficiency of Memorandum.]—Bought and sold notes of tea signed by the seller's agent is sufficient evidence to satisfy the Statute. *Moss v. Fowler*, 3 A.J.R., 122.

Sufficiency of Memorandum—Signature by Auctioneer as Agent for Purchaser.]—At a sale by auction the auctioneer had a book containing conditions of sale and columns for entering in a single line the numbered description of each lot, the buyer, and the price. At the end of the conditions and above the columns the auctioneer had signed his own name. The defendant Ross bought several consecutive lots. In the line containing the entries respecting the first lot bought his name was written at full length in the proper column, but underneath the word "Do" was written in the proper column instead of the full name. *Held* that the auctioneer was the purchaser's agent only to write his name at full length, and that the signing of the word "Do" in the respective columns was not sufficient to satisfy the Statute. *Williams v. Ross*, 2 W. & W. (L.,) 285.

Entries by Auctioneer's Clerk of Name of Purchaser—What should be done.]—*Moss v. Cohen, ante column* 71.

Signature by Parties or their Agents—Auctioneer's Clerk.]—*Per Fellows, J.*:—It is doubtful whether an auctioneer's clerk has power to bind a successful bidder by entering his name as purchaser in the sale book. *Service v. Walker*, 3 V.L.R. (L.,) 182.

Entry by Auctioneer's Clerk—Bought Note not Containing Warranty Announced at Sale.]—Certain flour at an auction sale, which was warranted at the sale, was knocked down to R., and R.'s name was entered by the auctioneer's clerk in the sale book. The bought note described the flour as "Rochester," but did not contain a warranty that it was "first-class," as announced at the sale. R. refused to accept the note or to accept a bill for the price, or to take the flour except a small portion for the purpose of testing it. *Held* that there was no evidence to satisfy the "*Statute of Frauds*," and embodying the warranty, and that R. was not liable for non-acceptance. *Pratt v. Rush*, 5 V.L.R. (L.,) 421.

Signature by the Parties or their Agents—Auctioneer's Clerk.]—At a sale by auction, the purchaser is not bound by the auctioneer's clerk writing his name for him in the auctioneer's book, in the absence of evidence to show that he knew of this method of proceeding, and that he, by acquiescence in the practice, authorised the clerk so to write his name. *Hill v. Willis*, 6 V.L.R. (L.,) 193; 2 A.L.T., 20.

(*c*) *When Title Passes by.*

Vendor Remaining in Possession—Subsequent Insolvency—Title of Trustee.]—W. bought of M. ten tons of iron of a certain description provided he had so much in stock, and received invoices for the goods, and paid for them. The goods, however, by arrangement remained in the possession of M., who subsequently became insolvent. The goods had been done up in lots, and this it was contended was a specific appropriation in favour of W. The trustee in insolvency refused to deliver the goods, and W. sued in trover and recovered. On rule to enter a nonsuit or verdict for defendant, *Held* that there had been no specific appropriation, and so the property in the goods did not pass, notwithstanding that M. had no more than the exact quantity bought in his possession, for W. would have been bound to take away ten tons of the description of iron sold; that though W. had seen the iron done up in a stack, in the absence of M., it was unnecessary that M. should have informed them that the stack in question was not intended for them, or that W. should inform M. that he intended to take it, and that M. should assent; and that W. could not recover the price as for money had and received, as the money when paid to M. became his own; and rule absolute for a nonsuit. *Warnock v. Blyth*, 4 A.J.R., 47, 180.

Two Documents Forming one Contract—Agreement for Sale and Agreement for Storage—Postponement of Payment—Right of Possession Remaining in Vendors.]—*See Martin v. Coombs, ante column* 187.

(2) *Warranties and Sale by Sample.*

(*a*) *Warranties.*

(i.) *Implied.*

Fit for Purpose—Question for Jury.]—The article delivered must answer the description contained in the contract or which would be so contained if the contract were accurately drawn out; and if the subject matter purchased be merely the commercial article of that name, it must be that article in a saleable or merchantable condition—fit for some purpose; but, if it be an article purchased to be used for a particular purpose, it must be reasonably fit for that purpose. Where plaintiff purchased a Corbett's reaper and binder, in the absence of an express warranty, *Held* that the plaintiff was to receive an article fit for some purpose, and it is a proper question for the jury to determine whether the article was fit for some purpose, *i.e.*, in fair order, and the Court refused to disturb the finding of the jury on that point. *Corbett v. Taylor*, 5 V.L.R. (L.,) 455.

Sale of Goods of Specific Denomination—Not in esse or Capable of Inspection.]—Where an article of specific designation is sold, and not shown to be *in esse* or capable of inspection, an implied warranty of merchantable quality goes with it. *Thomas v. Marks*, 10 V.L.R. (L.,) 217; 6 A.L.T., 91.

Sale with "All Faults" Rebutting Implied Warranty that Goods are Merchantable.]—*See Service v. Walker, post column* 1294.

Declaration that A. and B. agreed that B. should deliver and A. accept and pay for 45 half-tierces of Barrett's anchor-brand twist tobacco, ex a certain ship called the *R.* to arrive, at the price of 5s. per lb. in bond all round, and on other terms set out in the contract; and alleged as breach, that though the *R.* arrived after the agreement without 45 half-tierces of the tobacco specified, but with 45 half-tierces of an inferior kind of tobacco, yet B. after such arrival and before suit, delivered to A. 45 half-tierces of tobacco, ex the *R.*, of an inferior kind as and for the 45 half-tierces of the kind agreed to be delivered. And A. not knowing, &c., and believing, &c., and that B. was delivering, &c., under and in pursuance of the said agreement, received the said tobacco, and paid for the same at the rate, &c., according to the agreement. And B. has not delivered to A. the 45 half-tierces of the specified tobacco ex the *R. Held*, on demurrer, that the original contract was on a double event—the arrival of the *R.* and her arrival with tobacco of the kind specified; that the original contract was gone when the *R.* arrived without tobacco of the kind specified; that on the subsequent facts of mere delivery and acceptance, no implied warranty was imported; and that in the mere absence of such warranty, and of all fraud, the declaration was bad, and the plaintiff had no remedy. *Cohen v. Cleve*, 1 W.W. & A'B. (L.,) 167.

As to Title.]—A warranty as to the vendor being the owner of the article sold may be implied from the circumstances of the sale. *Smith v. Starling*, 9 V.L.R. (L.,) 178; 5 A.L.T., 65.

Sale "with all Faults"—No Implied Warranty—No Warranty that Bulk was Equal to Sample.]—*Service v. Walker, post column* 1294.

(ii.) *Express.*

As to Title—Sale by Auction.]—*See Robbins v. M'Culloch, ante column* 72.

(iii.) *In other Cases.*

Oral Warranty — Sold Note Containing no Warranty.]—K. sold F. certain horses, orally warranting them to be staunch and sound. The sold note afterwards delivered was silent as to the warranty. *Held* that the contract was oral, and the sale note did not constitute the contract, but was in the nature of a mere invoice, and that F. could recover on the verbal contract. *Faram v. Kerr*, 3 V.L.R. (L.,) 146.

Verbal Warranty—Contract in Writing.]—K. sold a horse to M., verbally stating that it was sound. After the sale a memo. was signed by M. to the effect:—"Sold to K. one bay horse for the sum of £30, for which I have received payment." *Held* that if the statement could be assumed to be embodied in the verbal agreement for sale, the document contained all the necessary elements of a contract, and was the best evidence of the contract; and as it was silent as to the warranty there was no warranty. *M'Devitt v. Kattengall*, 5 V.L.R. (L.,) 89.

Sale by Auction—Sample Produced—Contract not Mentioning Sample—"With all Faults"—No Warranty that Bulk was Equal to Sample.]—*See Service v. Walker, post column* 1294.

Wire of a Certain Size—Breach of Warranty—Plaintiff not Bound to Return Goods.]—Plaintiff purchased from the defendant a quantity of fencing wire of No. 6 gauge. Plaintiff inspected the wire and thought it was No. 6, but whether it was so or not could not be verified without careful application of a No. 6 gauge. Plaintiff, on discovering that the wire was not of the size mentioned, was held entitled to recover as on a breach of warranty, and not bound to return the wire before being entitled to recover. *Duckett v. Belgian Export Coy.*, 10 V.L.R. (L.,) 36.

Right of Purchaser after Receiving and Retaining Goods to Recover for Breach of Warranty.]—A person buying goods with an implied warranty that they are of merchantable quality is at liberty to take the goods, keep them, use them, and then either to set up their inferior quality in answer to an action for their price, or else to institute an action to recover damages for their inferiority. *Thomas v. Marks*, 10 V.L.R. (L.,) 217; 6 A.L.T., 91.

Sale of Sheep—Price Does Not Affect a Warranty.]—B. sold sheep to R.; R. alleged that B. represented that the sheep were free from fluke, and had come from the Bogan River, whereas the sheep were found to be flukey, and came really from the Broken River, which was noted for the presence of fluke, as Bogan River was for its absence. A low price was given for the sheep. R. sued B. for breach of warranty, and the jury found for B. On rule *nisi* for a new trial, *Held* that the price in no way affected the warranty, and though there might be a warranty with a small price as well as with a large price, still the jury might take the low price into consideration. Rule discharged. *Richey v. Birkin*, 3 A.J.R., 121.

(*b*) *Sales by Sample.*

Onus of Proof.]—B. purchased from G. certain tea by sample. B. swore positively to the fact that he had carefully examined the samples, and G. swore as positively that the tea in bulk corresponded with the tea in the samples. *Held* that the plaintiff was not relieved from the necessity of proving the fact affirmatively, even though a verdict for defendant would raise a presumption of fraud on plaintiff's part. *Boyd v. Goulstone*, 3 V.L.R. (L.,) 181.

Warranty—With all Faults.]—Goods were sold by auction, and a sample was produced at the sale, but the contract which was in writing made no mention of the sample; and one of the conditions of the sale was that the goods were to be taken with all faults. *Held* (1) that there was no sale by sample; (2) that there was no warranty that the bulk was equal to the sample, such a warranty only arising upon an express warranty by using words to the effect that the bulk is "equal to sample"; (3) that the words "with all faults" rebutted the presumption of an implied warranty that the goods were merchantable, and in the absence of fraud the buyer took the risk of the quality. *Service v. Walker*, 3 V.L.R. (L.,) 348.

(3) *Performance and Discharge of Contract.*

(*a*) *Quantity and Quality of Goods.*

Sale of Article of Food by Description.]—Where an article of food is sold by description, the vendee is entitled to have, not only merchantable goods, but merchantable goods of the description agreed upon. *Spence v. Duffield*, 1 V.R. (L.,) 49; 1 A.J.R., 74.

Conditions of Sale—Goods Purchased Proving to be of Superior Value—Clause Providing that Error in Describing Quality shall not Vitiate the Sale.]—*See Crespin v. Puncheon, ante columns* 1288, 1289.

Sale of Certain Goods to Arrive ex Certain Ship—Delivery and Acceptance of Inferior Goods does not Warrant Quality.]—*Cohen v. Cleve, ante column* 1292.

(*b*) *Breach of Contract.*

Measure of Damages—Sale of Chattels the Subject of Common Demand and Supply.]—Where a person purchases a chattel which is a subject of common demand and supply, the purchaser of such an article, in the event of the vendor not complying with the agreement, must go into the market and buy it; and there is no instance in which the purchaser of such an article received any more damages than the difference between the contract price and the market price which he has to give for it. *Thompson v. Marshall*, 3 W.W. & A'B. (L.,) 150.

Measure of Damages—On Delivery of Inferior Goods—Difference in Price—Special Damages.]—In an action for damages for delivery of flour of an inferior quality to that contracted for the plaintiffs claimed as damages the difference between the value of that which ought to have been delivered and that actually delivered; and also special damages for the freight paid for transhipment of the inferior flour to another country, and for its passage back after rejection by the consignees. *Held* that they were entitled to recover damages on the first ground; but that in the absence of evidence that the

parties at the time of the contract contemplated that the flour should be exported, they could not recover on the second. *Spence v. Duffield*, 1 V.R. (L.,) 49; 1 A.J.R., 74.

(4) *Rights of Unpaid Vendors.*

(*a*) *Lien.*

Delivery Orders—Payment of Warehouse Rent—Part Delivery.]—Goods remained in the possession of unpaid vendors who were also warehousemen, the vendors gave the usual bonded certificates to the purchasers W. and Co., who resold to L. and Co., and handed them the certificates duly endorsed. L. and Co. obtained delivery of part of the goods on presentation of the certificates, and paid rent in respect of such portion, but on presenting the other certificates were refused delivery on account of W. and Co.'s stopping payment. W. and Co. before their sale to L. and Co. had received the certificates duly endorsed as deliverable to their order, and the goods were transferred into the names of W. and Co. in the warehouse books, and rent charged as against W. and Co. as from the date of the sale to W. and Co. Three days after such transfers into the names of W. and Co. W. and Co. stopped payment, and their trustee in insolvency claimed the goods, delivery of which was refused. *Held* that, as to L. and Co., the defendants had the right to stop delivery, as to W. and Co.'s trustee, the defendants, by specially endorsing the certificates and making the transfers in their books, and by charging rent, had changed their position from that of unpaid vendors to that of warehousemen, and could not refuse delivery to W. and Co.'s trustee. *Held*, per Privy Council, that unless actual possession of the goods sold has been delivered to the purchaser the vendor is not deprived of his right of lien as against the assignees of the purchaser in the event of his insolvency; and (reversing Full Court) that the charging of warehouse rent, and the endorsement by the vendor's clerk of the warehouse certificates, and the transfer into W. and Co.'s names did not amount to such a delivery actual or constructive as would defeat the vendor's lien; and that the goods therefore never having left the possession of the vendors were subject to their lien, which revived upon W. and Co.'s insolvency. *Lange and Richardson v. Grice*, 2 V.L.R. (L.,) 251.

On appeal *sub nom. Grice v. Richardson*, L.R. 3 App. Cas. 319, 47 L.J., P.C., 48; 38 L.T., 677; 26 W.R., 358.

Sale of Goods in Bond—Transfer of Bonded Certificates—Part Payment of Rent.]—D. sold fifty chests of tea to P., and received in payment his acceptance, which was overdue and unpaid. These chests were in a bonded store belonging to D. The usual bonded certificates were delivered to P. at the time of the sale. P. obtained possession of part of the goods, and paid D. a portion of the warehouse rent on account of the goods—viz., the whole rent due on the part delivered and part of the rent due on the remainder. P. executed a creditor's deed, and his acceptance was dishonoured. *Held*, on special case stated, that D. was entitled to a lien as an unpaid vendor. *Fraser v. Dalgety*, 2 W.W. & A'B. (L.,) 227.

Goods Marked in Bonded Certificates but not Separated.] — Defendant, the proprietor of a bonded store, received a number of cases of brandy from S. and Co., and gave them bonded certificates for the goods. S. and Co. then sold a portion of these goods to W., who resold them to plaintiff; and, at plaintiff's request, the proprietor of the store transferred the quantity purchased by plaintiff into his name, and marked an equivalent portion of the certificates accordingly; but the goods represented by the certificates so marked were not selected or ear-marked to distinguish them from the rest of the goods. Plaintiff requested the proprietor to deliver his goods to him, but the latter refused because S. and Co., not being paid by W., had attempted to exercise their right of stoppage *in transitu*, and had given defendant notice not to deliver. Plaintiff sued in trover. *Held* that the admission by defendant in marking the certificates amounted to a change of possession of the proportion of the goods purchased by plaintiff, although they had not been separated from the rest; and that he was estopped from denying plaintiff's right to their possession; and that plaintiff could maintain trover to recover that proportion. *Isaacs v. Skellorn*, 1 V.R. (L.,) 46; 1 A.J.R., 74.

Goods in Bonded Warehouse—Warrants Indorsed in Blank—Indorsee.]—Imported goods were placed by the importers in a bonded warehouse of the defendants. Warrants were given with the words "deliverable to their order by indorsements thereon" on them and signed by defendants. The importers sold the goods to a merchant, indorsed the warrants in blank, and delivered them to the purchaser. The purchaser deposited the warrants with a bank to secure an advance, which was also secured by a promissory note, which was not paid at maturity. The bank, fearing the purchaser's insolvency, delivered the warrants to plaintiff, which, with a written notice to transfer, were presented to defendants, who refused to transfer unless with the permission of the importers, and such permission was refused. Plaintiff tendered the rent, and then sued the defendants in trover. *Held* that, the warrants given to the importers being general and indorsed in blank, the presentation of the indorsed warrants and demand for possession put an end to the unpaid vendor's lien for purchase-money, and that the plaintiff had sufficient special property in the goods to enable him to maintain his action for trover. Rule for nonsuit discharged. *Dredge v. Blackham*, 3 V.R. (L.,) 101; 3 A.J.R., 75.

Bill of Exchange not Paid—Sale by Vendee.]—*See Martin v. Coombs*, 4 A.J.R., 27; *ante column* 187.

(*b*) *Stoppage in Transitu.*

Acceptance of a Bill of Exchange — Sale in Bond.]—L. M. & Co. sold brandy in bond to S.M., took the purchaser's acceptance at three months for the price; and endorsed and handed to him the bonded storekeepers' certificates for goods purchased. S.M. paid no rent for the goods and did not get them transferred into his own name in the books of the storekeeper. Within two months after the purchase, and

during the currency of the bill, S.M. died in insolvent circumstances. S. and B., who represented S.M.'s creditors, obtained from the storekeepers some of the brandy. During the currency of the bill S. and B. were sued by L. M. & Co. in trover. *Held* that, notwithstanding the finding of the jury that a custom existed whereby an unpaid vendor who took a bill of exchange lost his right of stoppage *in transitu*, the plaintiffs were entitled to stop the brandy *in transitu*. *Lorimer v. Cleve*, 2 W.W. & A'B. (L.,) 223.

Sale of Goods in Bond—Acknowledgment of Title by Warehouseman.]—B. & Co. sold tobacco in G.'s bonded store to M., received payment and handed the bonded certificates to M. M. resold to D. and got four bills in payment, handing D. the certificates. D. endorsed the certificates to a bank for value. D. became insolvent, and the bills were dishonoured. M. then gave notice of his claim to the warehouseman by asking for a stoppage, which was not granted because the correct list of the goods was not forthcoming, and the bank by presenting the certificates subsequently obtained a transfer of the goods. *Held* that M. never having had his rights recognised by the warehousekeeper was not entitled to stop the goods *in transitu*. *Moss v. Grice*, 2 W.W. & A'B. (L.,) 230.

SCHOOLS.

See EDUCATION.

SEAMAN.

See SHIPPING.

SECURITY FOR COSTS.

In Actions.]—*See* COSTS.

On Appeals.]—*See* APPEAL.

In County Court Appeals.]—*See* COUNTY COURT.

On Appeals from Justices.]—*See* JUSTICE OF THE PEACE—SESSIONS.

In Mining Appeals.]—*See* MINING.

SEDUCTION.

Proof of Service—Absence from Father's House—Animus Revertendi.]—C. sued M. for loss of services by the seduction of his daughter. The daughter was residing with M., and performing services for him at his residence, but under no contract of service at the time of her seduction; but there was evidence of an *animus revertendi* to her father's house at the time, and she was afterwards delivered there. She was in the habit, during her visit to M., of returning home once a week and assisting in the household duties, on one occasion remaining there to take part in cleaning and arranging the house. *Held* that the evidence of service thus afforded was not neutralised by a mere visit, and that she still remained in the service of her father if she went to plaintiff's house *animus revertendi*; and there being evidence of such an *animus* a verdict for plaintiff was upheld. *Cumber v. Morley*, 4 V.L.R. (L.,) 3.

Action for—Plaintiff not Standing in Loco Parentis—Objection not Taken at Trial—New Trial Refused.]—*Roycroft v. Iago*, *ante* column 1096.

SEPARATE PROPERTY.

See HUSBAND AND WIFE.

SEPARATION DEEDS.

See HUSBAND AND WIFE.

SEQUESTRATION.

For Breach of Injunction—Common Law Procedure Statute, Sec. 243—Corporation—Writ must be Produced.]—On rule *nisi* for sequestration of the property of defendant company for breach of injunction, *Held* that Sec. 243 of "*Common Law Procedure Statute* 1865" applies to the property of a corporation; but the Court discharged the rule because the writ of injunction was not produced in Court. *Parade G.M. Coy. v. Black Hill G.M. Coy.*, 5 A.J.R. 85.

For Breach of Injunction.]—*Seal v. Webster-street G.M. Coy.*, *ante columns* 65, 66.

Sequestration for Disobedience of an Order Refused where Order Bad and Unworkable.]—An injunction against the defendant company was obtained, and there being doubt as to whether an appeal would lie to Privy Council, an order for injunction was made by the vacation judge. This order directed the plaintiff company to keep accounts pending an appeal to the Privy Council. The plaintiffs found this unworkable, and thinking it beyond the power of the judge to make such an order, notified their intention of moving in term to have it set aside, and refused to comply with it. Motion for sequestration of the estate of the plaintiff company for disobedience of the order refused, such order being bad and unworkable. *Alma Consols Coy. v. Alma Extended Coy.*, 5 A.J.R., 2.

Sequestration of Company under 11 Vict. No. 19.]—*In re Provident Institute of Victoria, ex parte Dodds*, *ante columns* 171, 172.

Sequestration of Estate of Insolvents.]—*See* INSOLVENCY.

SERVANT.

See MASTER AND SERVANT.

SERVICE OF WRITS, &c.

See PRACTICE.

SESSIONS.

Statutes:—

"*Justices of Peace Statute* 1865" (No. 267,) Part II., partly re-enacted by Act No. 502.

"*Judicature Act* 1874" (No. 502,) Secs. 13—15.

"*Justices of Peace Amendment* 1876" (No. 565.)

(1) *Appeal from Justices and Petty Sessions to General Sessions.*

When Appeal Lies—Costs.]—There is no appeal to General Sessions under Act No. 267, Sec. 140, against an order made under Act No. 268 against a father for the support of his illegitimate child, and therefore the Court of General Sessions has no jurisdiction to give costs in such an appeal under Sec. 147. *Regina v. Justices of Central Bailiwick, ex parte Moltine,* 1 V.L.R. (L.,) 302.

When it Lies—"Wines Beer and Spirit Sale Statute" (No. 227,) Sec. 67 — Act No. 267, Sec. 140—Whether Adjudication of Forfeiture a Conviction.]—A revenue officer had seized a certain quantity of ale on the ground that it was being sold without a license. The justices before whom the owner appeared adjudged the liquor to be forfeited under Sec. 67 of Act No. 227. The owner appealed to the General Sessions. Summonses were taken out by the City Council for prohibition against the appeal on the ground that the General Sessions had no jurisdiction by the owner for prohibition against the order of forfeiture. *Held* that the "adjudication" of forfeiture was not a "conviction" against which an appeal would lie under Sec. 140 of Act No. 267; and that Sec. 67 provided for forfeiture only where the owner did not appear. Prohibition granted in each instance. *Regina v. Pohlman* and *Regina v. Sturt, in re White,* 5 A.J.R., 22.

Where it Lies—Conviction for Indecent Exposure—Age of Offender.]—Where, in a conviction for indecent exposure under Sec. 36 of the "*Police Offences Statute* 1865," the justices have sentenced the prisoner to be whipped, without any evidence that his age exceeds sixteen years than their own conclusions, and the prisoner succeeds in showing that he is under sixteen, his remedy is by appeal to the General Sessions, and not by a rule to quash the conviction. *Regina v. Benson, ex parte Tubby,* 8 V.L.R. (L.,) 2.

Where it Lies—Act No. 268, Sec. 40—From Maintenance Orders.]—Sec. 40 impliedly gives the right of appeal to General Sessions against the maintenance orders of justices, and the chairman must do his best to carry out the intentions of the Legislature by moulding a system of practice and procedure. *Regina v. Justices of Central Bailiwick, ex parte M'Evoy,* 7 V.L.R. (L.,) 90; 2 A.L.T., 125.

See also *Regina v. King, ex parte King, ante column* 534.

Appeal to General Sessions—Practice—Recognisances not Forwarded by Clerk of Petty Sessions.]—M. sued C. in Petty Sessions and recovered a verdict. C. appealed to the General Sessions, but the recognisances to prosecute the appeal, although lodged with the Clerk of Petty Sessions, had not been forwarded by him. The Chairman of General Sessions ordered the appeal to be struck out and the judgment of Petty Sessions to stand. *Held* that the appellant should not be prejudiced by the default of the clerk; and, in answer to an objection that the fees had not been paid, that the clerk was bound to answer for the fees if he had taken the recognisances without the fee. Rule absolute for *mandamus* to compel the Chairman of General Sessions to hear the case. *Regina v. Pohlman, ex parte Cobb,* 3 A.J.R., 38.

Practice—Quashing Order made on Appeal from Justices — Case Remitted to Justices.] — The Supreme Court has a discretion as to whether, having quashed an order of the General Sessions, it will remit the case to the justices to be heard on the merits. Where, therefore, on an appeal to General Sessions from a conviction by justices the Sessions quashed the conviction on technical grounds, without going into the merits, and stated a special case for the opinion of the Supreme Court, the latter Court quashed the order of the Sessions, and held that, as from the conduct of the appellant and the nature of the objections taken it was evident that he had no case on the merits, the conviction of the justices should be affirmed, and that the case should not be sent back to them to be heard on the merits. *Ah Fan v. Sturt,* 2 V.L.R. (L.,) 201.

(2) *Appeal from and Reviewing Decisions of General Sessions.*

Where the Appeal will be heard.]—The Supreme Court will decline to hear an appeal from a Court of General Sessions, where in the case judgment has not been delivered, but "reserved" in order to obtain the opinion of the Supreme Court. *Fitzpatrick v. Hackett,* 1 W. & W. (L.,) 335.

Practice—Act 28 Vict. No. 267, Secs. 135, 159.]—The proper practice under Secs. 135, 159 of the Act No. 267 is for the Court of General Sessions to make an order, and then state a case for the opinion of the Supreme Court. *Clunes United Coy. v. Clunes Borough Council,* 2 W.W. & A'B. (L.,) 96.

Stating Case for Opinion.]—A Court of General Sessions must hear and determine the whole case before stating a case for the opinion of the Supreme Court. *Blackwood v. Mayor, &c., of Essendon and Flemington*, 2 V.L.R. (L.,) 87, 94.

Stating Special Case—Act No. 565, Sec. 36.]—The Chairman of General Sessions need not since Act No. 565 decide a case before submitting it to the Court. He is (Sec. 36) to state the facts specially for the determination of the Court. *Batchelder v. Carden*, 5 V.L.R. (L.,) 45.

Act No. 565, Sec. 31—Notice of Appeal.]—Notwithstanding Sec. 31 of Act No. 565, where a Chairman of General Sessions decides a matter as to the sufficiency of grounds of appeal in the notice before stating a special case to the Supreme Court, the fact of his having referred the question to the Supreme Court gives it jurisdiction. *Russell v. Shire of Leigh*, 5 V.L.R. (L.,) 199; 1 A.L.T., 18.

Mandamus to State Special Case—Act No. 267, Sec. 135.]—*Semble*, the language of Sec. 135 is compulsory; *mandamus* issued to Chairman of General Sessions to state a special case, even though there was no point of law arising. *Regina v. Pohlman, ex parte Bagshaw*, 1 V.L.R. (L.,) 208.

Stay of Proceedings.]—An appeal to the General Sessions does not operate as a stay of proceedings, although a special case to the Supreme Court does. *Ex parte Baker*, 1 A.L.T., 43.

Case Stated for Supreme Court by General Sessions—Power of Supreme Court—Costs.]—The Supreme Court has no power to award costs on a case stated from General Sessions. *Moncrieff v. Moncrieff*, 5 A.L.T., 192.

Power of Supreme Court on Special Case Stated by General Sessions — Costs — Rehearing.]—The Court, upon a case stated by General Sessions, has no longer (since the passing of the Act No. 565) any power to award costs, nor can it direct a rehearing. *Dobson v. Sinclair*, 8 V.L.R. (L.,) 69; 3 A.L.T., 106; *sub nom. Sinclair v. Dobson.*

Power of Supreme Court to Reverse Record of General Sessions—Habeas Corpus.]—The Supreme Court, or a Judge of the Supreme Court cannot, on an application for a writ of *habeas corpus*, reverse a record of the Court of General Sessions. Where, therefore, prisoners were duly convicted of forgery by a Court of General Sessions, and sentenced, the Court refused to entertain affidavits that the chairman of the Court who had sat alone, had, before the trial, been removed from office and had not been reappointed. *Re Armstrong & Stewart*, 4 V.L.R. (L.,) 101.

(3) *Jurisdiction of Court of General Sessions.*

Jurisdiction to Amend Convictions or Orders of Justices.]—The power of Courts of General Sessions, as to the amendment of convictions or orders of justices, are confined to amendments in matters of form. There is no power to substitute a substantially new and different order or conviction for that which is the subject of appeal, and no power to substitute one sentence for another where the amount of the sentence is discretionary with the justices. *Harrup v. Templeton*, 2 V.L.R. (L.,) 185.

Jurisdiction—Act No. 502, Sec. 15 (vii.).]—The offence of personating an elector at an election of a member of Parliament under the "*Electoral Act* 1865," Sec. 116, is an "offence against either House of Parliament" within the meaning of Sub-sec. vii. of Sec. 15 of the "*Judicature Act*" (No. 502,) and is, therefore, excepted from the jurisdiction of Courts of General Sessions. *Regina v. Hynes*, 6 V.L.R. (L.,) 292; 2 A.L.T., 45.

Jurisdiction—"Judicature Act" (No. 502,) Sec. 15 (xiii.)]—The offence of unlawfully and indecently assaulting a girl under twelve years of age is within Sec. 15, Sub-sec. xiii. of the "*Judicature Act*" (No. 502,) which excepts the defilement of women and girls from the jurisdiction of the General Sessions, which accordingly has no jurisdiction over such an assalt. *Regina v. Herbert*, 8 V.L.R. (L.,) 205; 4 A.L.T., 39.

Jurisdiction — "Marriage and Matrimonial Causes Statute 1864," Sec. 40—Maintenance Order.]—The Court of General Sessions has jurisdiction, on an application to it, under Sec. 40 of the "*Marriage and Matrimonial Causes Statute* 1864" (No. 268,) to review an order of maintenance, when the appellant does not appear, to confirm the order without hearing evidence, and to award costs to the respondent. *Regina v. Chairman, &c., of General Sessions Melbourne, ex parte Kemball*, 10 V.L.R. (L.,) 40; 5 A.L.T., 177.

Act No. 268, Sec. 40—Bastardy Order.]—*Per Judge Macfarland*—Under Sec. 40 the Court of General Sessions has jurisdiction to quash, confirm, or vary a bastardy order, whether an appeal has been entered or not. *Ludgrave v. Belcher*, 5 A.L.T., 72.

Jurisdiction as to Costs—Confirming Order of Justices under Sec. 40 of the "Marriage and Matrimonial Causes Statute 1864"—Costs.]—The Court of General Sessions has power, under Sec. 40 of the "*Marriage and Matrimonial Causes Statute* 1864," when confirming an order of justices made under Sec. 31 of that Statute, to award costs. *Moncrieff v. Moncrieff*, 5 A.L.T., 192.

Jurisdiction as to Fixing Valuation of Property for Rating Purposes.]—*See Regina v. Cope, ex parte Mayor of Essendon, ante column* 126.

Jurisdiction as to Costs—Act No. 310, Sec. 48.]—On an appeal to General Sessions under Sec. 48 of Act No. 310 as to the amount of compensation to be given to occupiers of land taken for the purposes of a drain, the General Sessions as arbitrators can only enter into the amount of compensation, and cannot enter into the question of its necessity, or award costs on the appeal. *Regina v. Pohlman*, 6 W.W. & A'B. (L.,) 109. *See* S.C., *ante column* 497.

Jurisdiction as to Costs—Dispute between two Shires.]—The council of the shire of T. resolved that a bridge at the boundary between

that shire and the shire of N., required repair ing, and gave notice thereof to the council of that shire, with notice to treat. The council of N. declined to join in the work, and the council of T. obtained from the Chairman of General Sessions a summons calling on the other shire council to show cause why the work should not be executed. This was heard and dismissed with £15 15s. costs. The council of T. then obtained a rule *nisi* for prohibition, on the ground that the Chairman of General Sessions had no power under the "*Local Government Act* 1874," Sec. 395, to award costs. The council of N. submitted, and offered to abandon the order as to costs, and to pay all costs of the rule *nisi*. A meeting was held between representatives of the councils to arrange as to the costs, and there were conflicting affidavits as to the arrangement made, the council of T. insisting that the costs were to be paid as between attorney and client. In the correspondence, the latter council had at first met the offer of the other, by a statement that it would be better that the rule should come on to be made absolute, to establish a precedent. The Court made the rule absolute with costs. *Regina v. Leech, ex parte Shire of Tullaroop*, 6 V.L.R. (L.,) 189; 2 A.L.T., 19.

Commitment for Trial at Next General Sessions —Remand to Court of Assize—Act No. 502, Secs. 13, 32.]—M. was committed for trial at General Sessions. The Court of General Sessions sat on 14th November, and there being no business the chairman was about to adjourn when he was informed of M.'s commitment. The case was adjourned until the next day when the chairman refused to discharge M. in the absence of the Crown Prosecutor and remanded him until the next Court of Assize. The warrant was exhausted on the 15th, and no fresh warrant was issued. On a writ of *habeas corpus*, *Held* that M. was not in unlawful custody, that under Secs. 13 and 32 the justices had power to transmit for trial at the assizes a presentment, and that the chairman had no power to discharge M. *In re Marshall*, 7 V.L.R. (L.,) 427; 3 A.L.T., 57.

Petty Sessions.]—*See* JUSTICES OF THE PEACE.

SET-OFF.

Creditor of Insolvent Purchasing Assets—Right to Set-off his Debt against the Price.]—K. owed D. £74, K. called a meeting of his creditors, and prepared an account of his assets and debts; among the former were some goods which D. wished to buy, and among the latter D.'s debt. K. told D. he couldn't sell except for cash as the goods were among the assets. D. said he must have the goods, and at last agreed to pay cash. K. let him have the goods, but did not receive cash on delivery. D. claimed to set-off his debt of £74 against the cash price of the goods. K. assigned all his property upon trust for his creditors. The trustees sued D. for the price of the goods and D. pleaded his set-off; the County Court judge disallowed it as based on fraud. On appeal the Court offered a nonsuit, but this being declined, affirmed D.'s right of set-off in the action. *Donaldson v. Couche*, 4 W.W. & A'B. (L.,) 41.

A solicitor's costs may be set-off against a debt owing by him. *Regina v. Alley, ex parte Twigg*, 5 V.L.R. (L.,) 151; 1 A.L.T., 9.

See S.C., *post* under SOLICITOR—Costs.

Against Official Assignee—Creditor Preferred by Insolvent.]—One of several creditors fraudulently preferred by an insolvent, is not entitled, in an action by the official assignee, to recover the amount of the fraudulent preference, to set-off the original debt, there being no mutuality between the parties. *Courtney v. King*, 1 V.R. (L.,) 70; 1 A.J.R., 86.

Setting-off Payment of Debt against Proof of Debt.]—*Per Molesworth, J.*: "A proof of debt cannot be met by way of set-off by the receipt of payment of another debt by way of fraudulent preference." *In re Groves*, *ante column* 660.

Insolvency Rules, Rule 26—Notice of Wish to Set-off a Claim against a Proof.]—*In re Hickinbotham*, *ante column* 660.

And *see* cases *ante columns* 668, 669.

Set-off under "Justices of the Peace Statute 1865."]—*See Wynne v. Barnard; Regina v. Bond, ex parte Woodhead;* and *Regina v. Heron, ex parte Burnip*, *ante columns* 751, 752.

Set-off.]—The Court refused to allow interlocutory costs to be set-off against final costs. *Board of Land and Works v. Glass*, 2 W. & W. (L.,) 197.

For facts *see* S.C., *ante columns* 372, 373.

Unnecessary Notice of Motion—Set-off of Costs.] —*Royce v. Parker*, *ante column* 236.

On Partnership Liability—On Account Stated.] —One partner cannot recover as against another for money paid to his use, but only on an account stated and settled when the sum due has actually been ascertained, and one of the partners has promised to pay that sum to the other. Plaintiff and defendant were partners in a mine, and the defendant claimed money expended in connection with it as a set-off against an action on a bill of exchange brought by plaintiff. There was only a partial settlement, and no dissolution of partnership. Rule *nisi* to enter verdict for defendant for amount claimed in a set-off discharged. *Perkins v. Cherry*, 3 A.J.R., 51.

Set-off in County Court—Exceeding Limit.]—*See Johnston v. Cox*, and *Regina v. Cope, ex parte Rawson*, *ante columns* 251, 252.

Set-off under Act No. 228 ("Mining Company's Act 1864.")]—*Semble*, there can be no set-off under the Act No. 228. *Wynne v. Barnard*, 5 W.W. & A'B. (L.,) 35; for facts *see* S.C. *ante column* 1038.

Set-off against Rates—Appropriation of Payments.]—*The Mayor of Fitzroy v. Mahony*, *ante columns* 1144, 1145.

Guarantee by Intestate—Debts Owing by Plaintiff to Defendant Administrator—Mutual Debts.]—The N. Bank brought an action against S., as administrator of W., upon a guarantee given by W. to the bank, by which he undertook to pay to a certain extent all advances made to a third person in case of default. S. pleaded that before the time the payment of the advances was due, and before default made, the bank was indebted to him as administrator in various amounts, which he offered to set-off. *Held*, on demurrer to the plea, that a set-off can be pleaded to an action on a guarantee, such guarantee being in the nature of a debt; but that the debts were not mutual, the debt on the guarantee, in the absence of an express promise to pay by S., was a debt of W. on a contract between him and the bank, and not a debt of S. as administrator. Judgment for plaintiffs, demurrer allowed. *National Bank of Australasia v. Swan*, 3 V.R. (L.,) 168, 3 A.J.R., 75.

By Garnishee.]—A declaration was drawn under Sec. 204 of the "*Common Law Procedure Statute*" against a garnishee in respect of a debt due by him to a judgment debtor, containing a special count upon an express contract and common money counts. The defendant pleaded as a set-off a debt due to him from the judgment debtor. *Held*, on demurrer to the pleas, that the pleas were good. *Bishop v. Woinarski*, 1 V.L.R. (L.,) 31.

Married Woman—Joint Hiring with Husband.]—A married woman who was hired jointly with her husband issued a separate summons for wages. *Held* that the defendant could not set-off a joint demand against husband and wife for goods supplied. *Regina v. Bond, ex parte Woodhead*, 5 V.L.R. (L.,) 130; 1 A.L.T., 1.

Bankers—Overdue Promissory Note Deposited for Collection—Bank not Allowed to Set-off as against Liability of Maker.]—*See Ford v. London Chartered Bank, ante column* 87.

Rules of Company Imposing Fines on Nonpayment of Costs—Fines may be Set-off against Dividends.]—*Cotchett v. Hardy, ante column* 161.

SETTLEMENTS.

I. GENERALLY.

(*a*) *Limitations, Construction, and Contents.*

Power to Exchange—Lands Yielding an Equal Rental.]—A settlement contained a clause allowing the trustees to exchange the land settled for other lands "yielding a rental equal in amount to the land exchanged for the same." *Held* that this must be construed strictly, and would not authorise the trustees to exchange the lands for others of greater value but yielding no rental. *Re the "Transfer of Land Statute," ex parte Dougharty*, 4 A.J.R., 71.

"Real Property Statute 1864" (No. 213,) Secs. 79,104—Building Leases—Testator's Intention.]—A testator devised lands to trustees, and a sum of money, upon trust to expend it or a sufficient part of it in building four dwelling-houses with out-offices upon the land, or, if four suitable houses could not well be built, a smaller number; and to invest any surplus upon certain trusts, and, until sale, to demise. Upon petition by the trustees for power to grant building leases, *Held* that such a power was excluded by Sec. 104 of the Act, which excludes from its powers cases in which "an express declaration or manifest intention that they shall not be exercised, is contained in the settlement, or may reasonably be inferred therefrom." *Quære* whether such a will is a "settlement" within Sec. 79. *In re Hall*, 2 V.L.R. (E.,) 156.

Exoneration of Property Mortgaged—Beneficiaries paying off Part of Debt.]—Where a settlor settled certain real estate, and afterwards mortgaged parts of it, with other property, and died leaving the mortgage still subsisting, and the beneficiaries paid off part of the mortgage debt, *Held* that the beneficiaries paying off part of the debt were to stand in the place of the mortgagees so paid off. *Johnston v. Brophy*, 4 V.L.R. (E.,) 77, 89.

Where the settlor as to one part of the settled estate mortgaged it with part of the residuary real property, and died leaving the debt subsisting, *Held* that the mortgage debt should be paid out of the residuary estate comprised therein in exoneration of the settled estate. *Ibid.*

Vested or Contingent Remainder.]—A., by voluntary settlement, conveyed lands to trustees upon trust to pay the rents and profits to B. for life, and after her death the lands were to remain to the use of C., D., E., F., and G., or such of them as should attain twenty-one years, their heirs and assigns as tenants in common, and in case of the death of all of them before attaining twenty-one years without leaving issue remainder to use of A., his heirs and assigns. There were provisions for maintenance during minority, and a power of sale and leasing until sale by the trustees. B. died before C., D., E., F., or G. attained the age of twenty-one years. *Held* that C., D., E., F., and G. were entitled upon A.'s death each to one-fifth of the property comprised in the settlement, although then under age. *Johnston v. Brophy*, 4 V.L.R. (E.,) 77, 88.

See also *re "Transfer of Land Statute," ex parte Leach, ante column* 353.

(*b*) *Setting Aside and Enforcement.*

Suit to Set Aside a Revocation of a Settlement as Procured by Fraud—Representative of Settlor a Necessary Party.]—J.R. executed a

deed of trust, by which certain land and moneys were conveyed and assigned to trustees upon trust to divide the income between the settlor and his father during their joint lives, to pay the income to the survivor, remainder over in trust for certain charities, the deed providing that the deed should not be revoked except by the consent of the father. One of the trustees acted upon the settlor's intemperance and weakness, and induced him to execute a deed of revocation, and the trustee appropriated the moneys. Both father and son executed this deed, not knowing its contents. In a suit after the settlor's death by the father to set aside the deed of revocation, *Held* that the settlor's representative was a necessary party, as he was interested in supporting the deed of revocation. *Richardson v. Arthur*, 1 W.W. & A'B. (E.,) 12.

Suit to Set Aside Conveyance as Against Settlement—By Cestui Que Trust Against Trustees and Stranger—Demurrer.]—A bill alleged that R. died intestate, and seised of land subject to a mortgage to B., that R.'s heir-at-law had agreed to settle the land in trust for R.'s widow and family (including himself) in consideration of his receiving all R.'s personal estate, and paying the debts thereout. This agreement was acted upon by a conveyance to that effect. Afterwards the heir-at law, intending to dispose of his interest in the settled lands, conveyed all the land to D., which was either executed by mistake or procured by D.'s fraud, and D. had conveyed the land to his father for value. On a bill by the beneficiaries under the settlement to set aside the conveyances to D. and D.'s father (the trustees of the settlement refusing to join as plaintiffs, *Held* on demurrer (1) that the pleadings showed that the legal estate was in R. and not in the mortgagees, and so passed to the trustees of the settlement, whose remedy would be at law and not in equity; (2) that no collusion between the trustees and D. being charged, the mere refusal of the trustees to institute a suit did not justify the beneficiaries in suing D. and the trustees. Demurrer allowed. *Ronalds v. Duncan*, 1 V.R. (E.,) 146; 1 A.J.R., 144.

In a suit by *cestuis que trustent* under a settlement to set aside a conveyance by one of the *cestuis que trustent* under a mistaken belief as to how much of the property he was conveying, *Held* that the other *cestuis que trustent* could sue on their own behalf without making the conveying *cestui que trust* or the trustees of the settlement co-plaintiffs. *Ronalds v. Duncan*, 2 V.R. (E.,) 65; 2 A.J.R., 30, 45.

Necessary and Proper Parties—Suit to set Aside a Settlement.]—Where a settlement for a wife's separate use was made in pursuance of an ante-nuptial agreement to settle, and the husband was a party to and signed both deeds, but took no interest under them, *Held* that the husband was not a necessary party to a suit to impeach the settlement. *Sinnott v. Hockin*, 8 V.L.R. (E.,) 205; 4 A.L.T., 10.

Voluntary—Containing no Clause of Revocation—Not Parted with or Disclosed to Beneficiaries—Collusive Sale and Repurchase.]—R., by deed, conveyed certain property to himself and A. upon trust for himself and his family. There was no clause of revocation in the deed, and the other objects of the settlement had no knowledge of its having been executed, R. keeping it in his own possession, and no action being taken upon it. R., wishing to get rid of the deed, effected a collusive sale and a repurchase of the property settled, his solicitor having advised him that he could so get rid of it. By his will he disposed of the property settled in a different manner from that contained in the trusts of the settlement. On suit to establish the deed, *Held* that the settlement was good though not communicated to the objects under it; that the settlor being advised by his solicitor that he could so avoid it, and thus, by mistake, executing it without a power of revocation, was not a ground for relief in equity, but that R. could only get rid of the settlement effectually by a real sale, and that he must be treated as a trustee for the beneficiaries. *Moorhouse v. Rolfe*, 4 A.J.R., 159.

Two Voluntary Conveyances—Conveyance by Grantee under Second Voluntary Deed to a Purchaser—Application of 27 Eliz., C. IV.]—If there are two voluntary conveyances, and the grantee in the second conveys to a purchaser for value, such purchaser has the benefit of 27 Eliz., c. iv., against the first volunteer. *Ibid*, p. 160.

Trustee Adopting a Position Antagonistic to Cestui que Trust.]—*Semble, per Holroyd, J.*—In a suit against the trustee and *cestui que trust* of a settlement to have the settlement set aside, the trustee will not be permitted to take up a directly opposite position to his *cestui que trust*. *Davey v. Pein*, 10 V.L.R. (E.,) 306, 312; 6 A.L.T., 131.

Settlement in Pursuance of Ante-Nuptial Agreement—Refusal of Trustee to Act.]—Where an ante-nuptial agreement to settle property named a person as trustee of the intended settlement, and he refused to act in the trusts of the settlement, *Held* that such refusal, and the fact that the settlement was made without his consent, did not render it void, for the Court will not allow any trust to fail for want of a trustee, and if one refuses to act another can be appointed in his place. *Sinnott v. Hockin*, 8 V.L.R. (E.,) 205; 4 A.L.T., 10.

Setting aside Deeds on Ground of Mistake, &c.]—*See* DEED—MISTAKE.

Setting aside Voluntary Settlements as Fraudulent under 13 & 27 Eliz. and "Insolvency Acts."]—*See* FRAUDULENT CONVEYANCES.

III. SETTLED ESTATES—PRACTICE RELATING TO. *Statutes.*]—

"*Real Property Statute* 1864" (No. 213,) Part V.

"*Real Property Amendment Act* 1867" (No. 318,) Secs. 3-6.

"*Real Property Amendment Act* 1870" (No. 378.)

Leases of Settled Estates—Act No. 213, Sec. 80—Questions as to Fitness of Proposed Lessee.]—Under Sec. 80, the Court requires the proposed

lessee to be a solvent individual, and will not make an order authorising trustees to lease to a company with limited liability. The only way for such a company to obtain a lease is to put forward some solvent person to obtain and hold for them. *In re Bergin's Estate*, 5 V.L.R. (E.,) 131; 1 A.L.T., 5.

Leases of Infants' Lands.]—*See* under INFANT, *ante column* 558.

Sale—Suit by Mortgagee.]—Where, in a suit by a mortgagee of settled estates praying for payment or a sale, some of the parties claiming under the settlement were infants, and it was for the interest of the infants that there should be no delay, the Court held that there should be, with consent of the parties *sui juris*, an immediate sale. *Henty v. Hodgson*, 1 W. & W. (E.,) 250, 260.

Sale—Application for on Behalf of Infants—Guardian.]—Upon an application for sale of a settled estate on behalf of infants, it is sufficient if a guardian be appointed before the hearing of the petition. *Ex parte Dolan*, 1 V.R. (E.,) 30; 1 A.J.R., 22.

Sale—Application for on Behalf of Infants—Advertisements.]—On an application for sale of a settled estate on behalf of infants, advertisements will be directed before the appointment of a guardian. *Ibid.*

Sale—How Conducted.]—The sale of settled estates, upon an order for sale should be by auction and not by private contract. *Ibid.*

Order for Sale—Directions as to Application of Proceeds.]—Directions as to the application of proceeds of sale will not be given in the order directing sale, but should be the subject of a subsequent order. *Ibid.*

Order for Sale—Where a Part of Settled Estate is in Mortgage.]—Where the estate to be sold was originally all in settlement, it will be sold as a settled estate, although part of it may have subsequently become absolutely vested. *Ibid.*

Order for Sale—Investment of Proceeds.]—Petition under Sec. 94 of the "*Real Property Statute* 1864" (No. 213,) praying for a sale of a part of certain settled estate, and an investment of the money received on the sale, in the purchase of another piece of land. It appeared that the land desired to be sold was an outlying piece dissevered from the other portion of the settled estate, and locally situate in the midst of land belonging to C., whilst the piece of land proposed to be bought was the property of C., but locally situate in the midst of the settled estate. The petition was presented by the tenant for life with the consent of the trustees, and the persons entitled for life in remainder. The first tenant in tail was an infant, and his father, who was one of the trustees, had in that capacity consented to the petition. The Court required the father's consent as guardian of his son, and upon that being done made the order for sale, but held that the investment of the proceeds must be the subject of a distinct application. *Ex parte Staughton*, 3 W.W. & A'B. (E.,) 95.

Sale—"Real Property Statute 1864," Part V.—Purchase Money how dealt with.]—Where a sale of settled estate is ordered by the Court, the purchase money should be paid into the hands of the Master-in-Equity, and a subsequent order obtained for its proper application. *In re M'Gregor's Estates*, 4 V.L.R. (E.,) 1.

Sale—Advertisements under "Real Property Act" (No. 213,) Sec. 98.]—Applications under No. 213, Sec. 98, for the direction of the Court as to advertisements under that section, should be made by motion in Court, and not as in England to a Judge in Chambers. *Ex parte Staughton*, 3 W.W. & A'B. (E.,) 95, 96.

Sale—"Real Property Statute 1864," Sec. 98—Advertisements.]—Under Sec. 98 of the "*Real Property Statute* 1864" notice of applications to the Court, under part V. of the Act, is to be inserted in such "newspapers" as the Court shall direct. The Court has a discretion under this section to direct the insertion of the notice thereby required in one newspaper only. *Mahood v. Carnaby*, 4 V.L.R. (E.,) 56.

"Real Property Statute 1864," Secs. 114, 115—Examination of Married Woman.]—The examination of a married woman under the "*Real Property Statute* 1864" (No. 213,) Secs. 114 and 115, will not be taken in open court at the hearing of a petition for sale of settled estates. *In re M'Gregor's Estate*, 4 V.L.R. (E.,) 1.

Sale—Petitioner, Who should be.]—In a petition under Sec. 94 of the "*Real Property Statute* 1864" (No. 213,) for the sale of settled estates, the petitioner should be a person beneficially entitled to the present receipt of the rents and profits. A mere trustee cannot be petitioner. *In re Ellis' Settled Estates*, 8 V.L.R. (E.,) 252.

Sale—Who may Sell—Surviving Executor.]—*In the Will of Crosby, ante column* 450.

Order for Sale since "Judicature Act 1883."]—Petition under part V. of the "*Real Property Statute* 1864" (No. 213,) for the sale of certain settled estates. *Per Molesworth, J.:* The order I will make is such an one as used to be made in Equity, but a question arises whether the Chief Clerk is to have the control of the moneys as the Master used to have. Order made in the usual form except that the proceeds were ordered to be paid into the hands of the Chief Clerk instead of into the hands of the Master. *In the Settled Estates of Quinn*, 10 V.L.R. (E.,) 336.

Exchange—Consent of Settlor and his Wife.]—Where lands were settled by a person upon his wife and children, and it was wished to exchange the lands for others in a manner not in accordance with the terms of the settlement, and the settlor and his wife consented to such exchange, *Held* that such consent could not bind the children who were not of age and not before the Court, and that the Court would not exercise its discretion so as to allow the land proposed to be exchanged to be registered in the name of the proposed transferees, and thus give an indefeasible title, which might at a future time stand in the way of the children, if they wished to object to the exchange. *Re the "Transfer of Land Statute," ex parte Dougharty*, 4 A.J.R., 71.

SHARES.

Sale of Shares—To whom Interim Dividends go—Custom of Exchange.]—On 8th May L. sold shares to D., to be paid by bill at three months; L. to retain scrip until D. paid the bill, and D. to be entitled to dividends. One dividend was declared on 24th May and placed to D.'s credit; on 21st June another was declared payable on the 27th of June. On 25th June D. and L. made another agreement as to the re-sale of the shares to L., and in the memo. of sale L. credited D. with the dividend of 24th May only. *Held* that D. was not entitled to the second dividend, as by the practice of the Stock Exchange L., the purchaser in the new contract of re-sale, was entitled to it. *Dane v. Levinger*, 3 A.J.R., 120.

Sale of Shares—Whether it Carries Shares in Tribute Company.]—*Gordon v. Golden Fleece Coy.*, *ante columns* 1018, 1019.

In Companies.]—*See* COMPANY and MINING—COMPANY.

Calls on Shares Paid by Testator—Dividends.]—Calls paid by a testator on mining shares held by him at his death should be treated as paid out of the *corpus* of the estate, and the dividends on them be added to the income. *Knight v. Knight*, 10 V.L.R. (E.,) 195; 6 A.L.T., 62.

Person instructing Agent to Buy Shares—Agent Purchasing at Increased Price—Fall in Value—Purchaser Declining to take Shares—Jury Finding that Agent had not properly exercised Discretion, but that Purchaser had not Repudiated Purchase, and yet Finding for Purchaser—New Trial.]—*See Were v. Muston*, *ante column* 1092.

SHERIFF.

Sale of Land by—Notice of Sale—19 Vict. No. 19, Sec. 176.]—A month's notice of a sheriff's sale of land was given, and on the proper day the bailiff put up the land for sale. A person bid money, and the land was knocked down to him. He beguiled the bailiff to a distance of some miles from the land, on the pretence of giving him money, and then gave him none. The bailiff left a person in possession, and after a long interval returned on the same day, and sold the land to B. B. brought an action of ejectment, and a rule *nisi* for a nonsuit was obtained, on the ground that the sale was complete when the land was knocked down to the first bidder; and that a fresh month's notice was necessary. *Held*, that the notice already given was sufficient under Sec. 176 of 19 *Vict.* No. 19; and that the sale had taken place substantially under that notice, and was valid. *Beavan v. Chadwick*, 3 W.W. & A'B. (L.,) 127.

Notice of Sale—19 Vict. No. 19, Sec. 176—Place of Sale.]—D. sold land at Bairnsdale to K., who took possession and paid the purchase-money, remaining in possession after doing so. Subsequently D. obtained a judgment against K. for a debt, and execution was issued directed to the sheriff of the circuit district of Sale, and K.'s estate and interest in the premises were sold by the sheriff of the colony of Victoria, who was also sheriff of the circuit district of Sale, to the the plaintiffs. The sale was held in Melbourne. There was no evidence of any notice of sale as required by 19 *Vict.* No. 19, Sec. 176. D. brought an action of ejectment against the plaintiffs, and on bill by the plaintiffs to restrain the ejectment by D., and to have him declared a trustee for the plaintiffs, *Held* that K.'s possession of the land, after the whole of the purchase-money was paid, was part performance of the agreement, and was sufficient to give him an equitable title; that the sale by the sheriff was good, although made out of the bailiwick of Sale, and that no objection as to want of notice having been taken by the owner, due notice should be presumed, and decree made as prayed. *Dreverman v. Dogherty*, 1 V.R. (E.,) 4; 1 A.J.R., 7.

Sale of Land—Advertisement of Sale—Act No. 19, Sec. 176.]—*See In re "Transfer of Land Statute," ex parte Ross*, *ante column* 434.

Certificate of Title under Act No. 301—19 Vict. No. 19, Sec. 176—Notice of Sale—15 Vict. No. 10, Sec. 24—Appointment of Special Bailiff.]—H. sued O'F. for trespass. The leasehold land in question was held by C. as trustee for a company, and on judgment signed against the company, and *fi. fa.* issued, a special bailiff was appointed to levy the debt and costs. The bailiff sold to H., who obtained a certificate of title under the Act No. 301. O'F., as official agent of the company, demanded possession, and being refused took forcible possession. *Held* that the plaintiff was entitled to recover on the certificate of title alone; that the special bailiff's appointment was well made under 15 *Vict.* No. 10, Sec. 24, the *locus in quo* being more than 100 miles from the Supreme Court in Melbourne; that Sec. 176 of 19 *Vict.* No. 19, requiring thirty days' notice of sale, does not apply to a term of years which is only a chattel interest not provided for by the Act. *House v. O'Farrell*, 6 W.W. & A'B. (L.,) 98.

Duty of Sheriff as to Proceeds of Sale of Land—Act No. 301, Sec. 106.]—It is the duty of the sheriff when he sells to apportion the proceeds of the sale of land amongst the writs in the order in which he has received them, and it is not material which of the execution creditors is the first to comply with the provisions of Sec. 106 of Act No. 301. *Beath v. Anderson*, 9 V.L.R., (L.,) 41; 4 A.L.T., 151.

And *see* cases *post* under TRANSFER OF LAND (STATUTORY) — Transfers — Under Sales by Sheriff.

Return to Writ of Fi. Fa.—Deputy Sheriff.]—A return by the sheriff that a seizure had been made by a bailiff acting under a warrant issued to him by a person to whom a writ of *fi. fa.* had been addressed as "the deputy sheriff for the colony of Victoria at Beechworth" was held a bad return, there being, strictly speaking, no such officer as a deputy sheriff for the colony at Beechworth; and return quashed. *Kidd v. Hibberson*, 1 W. & W. (L.,) 384.

"Common Law Practice Act" 19 Vict. No. 19, Sec. 176—Power of Sheriff—Execution Debtor's Judgment in another Action.]—Sec. 176 of the Act authorises the sheriff to seize "bonds, specialties, and other securities of the" judgment debtor, and to hold them as security, and to sue for sums secured thereby. It facilitates the recovery of assets to satisfy a judgment and authorises the sheriff to seize a judgment debt owing to the judgment debtor, and gives him the right to enforce it, but does not give him the right to sell it. Where a sheriff sold a judgment belonging to a judgment debtor, *Held* that the sale was irregular; that the sheriff thereby went out of possession; and that the debtor was thereby entitled to enforce the judgment for his own benefit. *Horwood v. Murdoch*, 5 V.L.R. (L.,) 435; 1 A.L.T., 102.

Several Writs of Fi. Fa.—Goods Sold as under One Writ—Proceeds Applied in Satisfaction of former Writ.]—Several writs of *fi. fa.* were issued, and the goods were taken in execution and sold as under B.'s writ, but the proceeds were applied in satisfaction of a prior writ. B. sued the sheriff for money had and received. *Held* that the sheriff must apply the proceeds in satisfaction of the writs according to their priority of delivery to him, but that he seizes and sells under them all. Rule *nisi* to enter verdict for plaintiff refused. *Barnard v. Wright*, 5 A.J.R., 66.

Payment by Judgment Debtor—Appropriation.]—Where there were several writs of *fi. fa.* issued, and the debtor paid to the sheriff a sum of money, informing him that it was to be applied in satisfaction of a certain judgment, and the sheriff applied it in satisfaction of a prior writ, *Held* that the sheriff had acted rightly; that his duty was that set out in the last case; and that he might disregard the appropriation indicated by the debtor. *Slack v. Winder*, 5 A.J.R., 72.

Duty in Executing Fi. Fa.—Claim to Goods—Interpleader.]—The sheriff is not bound, where notice has been sent to him with a *fi. fa.* that a claim to the goods might be made, and that if made it should be contested, to take interpleader proceedings immediately the claim is made, without further instruction, or to proceed in disregard of the claim on the ground that it is frivolous, unless the plaintiff previously undertakes to indemnify him in so doing. *M'Gee v. Anderson*, 6 V.L.R. (L.,) 414.

Order to pay Proceeds of a Sale under Fi. Fa. into a Bank—Regulæ Generales (1854) Chap. IX., Rules 12, 13.]—*Per Stephen, J.* (In Chambers)—Rules 12 and 13 are repealed by 19 Vict. No. 19, Sec. 2, and therefore the Court has no jurisdiction to order payment as sought. *Ex parte London Discount and Mortgage Bank*, 2 A.L.T., 111.

Fees and Poundage.]—On 28th October, 1862, execution was issued on a writ, with directions by the plaintiff to the sheriff of Victoria to levy at once, and a levy was made accordingly. On the 29th another writ was issued by the plaintiff to the sheriff at Ballarat, with directions to evy, but not to sell until further orders from he plaintiff. On 4th November the persons against whom execution was issued, executed a deed of assignment under 5 Vict. No. 7; and on the same day plaintiff gave the sheriff of Victoria notice to withdraw from possession, which he refused to do unless paid his poundage, and the poundage was paid under protest. The plaintiff contended that the sheriff was not entitled to poundage, on the ground that, though he had "seized" he had not "levied" as required by the Act. *Held* that the plaintiff having, by his own act in requiring the sheriff to withdraw, prevented him from earning poundage, could not resist the claim, and that the sheriff was entitled to his poundage. *Sichel v. Wittowski*, 1 W. & W. (L.,) 394.

Costs of Interpleader Order—"Common Law Procedure Statute" (No. 274,) Sec. 193.]—*Barry, J.*, in Chambers, ordered a bill of costs to be referred back to the Prothonotary, and that he should allow the sheriff his costs of drawing, settling, taking out and serving an interpleader order. *Hamilton v. McCarthy*, 3 A.J.R., 83.

Act No. 274, Sec. 372, Schedule 34—Mileage—Money Paid into Revenue.]—Under Schedule 34 to Act No. 274, the sheriff is only entitled to charge mileage fees one way, back mileage not counting as part of the distance, but the Court will not make absolute a rule for the sheriff to refund money which he has already paid into the general revenue. *Colonial Bank v. Beaconsfield G.M. Coy.*, 9 V.L.R. (L.,) 168; 5 A.L.T., 32.

Liability—Escape of Person Attached—Negligence of Sheriff—Re-arrest—Remedy of a Creditor—15 Vict. No. 10, Sec. 30.]—H., a defendant in an equity suit, obtained an order dismissing plaintiff's bill with costs, and issued a writ of attachment against the plaintiff in usual form commanding the sheriff "to have him in our Supreme Court at Melbourne on the 17th June, or on the first day on which said Court shall sit in equity next after arrest." Plaintiff was arrested but escaped on the morning of 13th June before the Court sat, was re-arrested and lodged in gaol but was discharged on *habeas corpus* by the Full Court *in banco*. On motion by H. to charge the sheriff in regard to the escape from attachment, *Held* that the sheriff was liable in damages only, including costs of motion, and not full amount on writ, following the analogy of the remedy at law in 15 Vict. No. 10, Sec. 30. *Wall v. Hooper*, 1 V.L.R. (E.,) 185.

Action for False Imprisonment—Arrest—Escape through Negligence—Re-arrest—Right to take Prisoner before Court in another Bailiwick.]—W. had been arrested by the sheriff under a warrant for contempt of the Court in refusing to obey its order as to costs, the warrant named as the day on which he should be brought before the court, a certain day on which W. escaped through the negligence of the sheriff's bailiff, but the sheriff rearrested him at A., out of his bailiwick, and lodged him in gaol until W. was discharged on *habeas corpus* on the ground that the warrant was sped and no longer in force. W. brought an action for false imprisonment against the sheriff, and recovered a verdict. On rule *nisi* for a nonsuit, *Held* that the sheriff had power to rearrest W. inside or outside his own bailiwick

wheresoever he might find him, and might also bring an action to recover debts and costs and money he had had to pay owing to W.'s escape, but that the sheriff did not comply with the warrant in placing W., on the re-arrest, in gaol on his own responsibility, and was therefore liable. Rule discharged. *Wall v. Meyrick*, 5 V.L.R. (L.,) 260; 1 A.L.T., 38.

Duty of Sheriff under Writ of Attachment for Contempt.]—*See Re Phelps, ante column* 67.

Liability for Negligence while Levying under Fi. Fa.]—A sheriff levied under a *fi. fa.* for £166, on a mine, plant, &c., of a company; and being told by several persons that there was a mortgage on the property, and that a number of the men had not been paid their wages, he sold the next day for £10. As a matter of fact there was no mortgage, and the purchaser, three weeks afterwards, sold the mine, plant, &c., for £240. The company was wound-up, and the execution creditor sued the sheriff for negligence. *Held* that the sheriff was liable for the difference between the net amount realised by him at the sale, and the amount of the *fi. fa.* *Smith v. Colles*, 2 V.R. (L.,) 195; 2 A.J.R., 117.

Sheriff may Appoint a Bailiff to Execute Writs of Fi. Fa. addressed to Him.]—*See In re Knowles, ante column* 591.

SHIPPING.

(1) *Registration.*

17 and 18 Vict., Cap. 104, Secs. 40, 41—False Declaration in Certificate—New Ship out of Materials of Old.]—W. was informed against before justices for making a false statement in his certificate in having a ship registered as a new ship; the ship was partly built from the materials of an old ship which had been wrecked. The information was dismissed. *Held* that the fact of whether the statement was false was for the determination of the justices. *Semble* that it was not false, as the old ship was broken up and nothing but a few fragments of her reappeared in the new vessel. *Dunn v. Wilson*, 5 V.L.R. (L.,) 465.

Ship—Proof of Ownership.]—*Semble* that a foreign certificate of registration of a foreign ship, when accompanied with evidence of acts of ownership, is evidence of the property in the ship. *Dowsett v. Smith*, 4 V.L.R. (L.,) 58.

(2) *Nationality.*

British Flag.]—The fact of a ship sailing under a British flag is good evidence that she is a British ship to support a conviction for harbouring a deserter under Act 17 & 18 Vict., c. 104, Sec. 257, without production of certificate of registration or an examined and certified copy thereof. *Regina v. Clark, ex parte Doyle*, 5 V.L.R. (L.,) 440; 1 A.L.T., 105.

(3) *Passenger Ships.*

"Passenger Act 1855," Sec. 60—Order in Council, No. 20—Offences against—Who are Amenable to Punishment under.]—The words "any person on board," in Sec. 60 of the "*Passenger Act* 1855," include "the medical officer" of a passenger ship and her third mate, the latter not being at the time in charge of the ship, so as to render them subject to the summary jurisdiction of justices of the peace for offences committed by them against the Order in Council, No. 20, issued under the "*Passenger Act*" on the 7th January, 1864, and gazetted in Victoria on the 18th of March, 1864. *Regina v. Hill*, 3 W.W. & A'B. (L.,) 91.

"Chinese Passenger Act"—Offences against—Where Punishable.]—An offence against the "*Chinese Passenger Act*," 18 & 19 Vict., cap. civ., is triable and punishable in Victoria, although the Act itself refers expressly to no colony but Hong Kong, since the "*Merchant Shipping Act*," part X., relating to procedure for penalties, &c., is applicable to all possessions not expressly exempted, and is imported bodily into the "*Chinese Passenger Act*." *Regina v. Middleton*, 5 W.W. & A'B. (L.,) 182.

(4) *Owners and their Liabilities and Rights.*

Owners need not be Licensed as Passage Brokers—"Passage Brokers Act 1863."]—It was never contemplated by the "*Passage Brokers Act* 1863" (No. 174,) that owners of ships and their managers should be licensed as passage brokers. Where, therefore, S., the manager of the office in Melbourne of the P. & O. S.N. Coy., not being duly licensed to act as a passage broker, let a passage by a ship of the company from Melbourne to Ceylon, and was convicted, *Held*, on appeal, that he was not liable to the penalty

imposed by the Act, and conviction reversed. *Sparkes v. Macfarlane*, 1 W.W. & A'B. (L.,) 90.

Liability of, as Carriers—Where no Proof of Contract.]—W. sued a steamship company for the loss of certain goods, which he stated that he had delivered to the company to be safely carried from Melbourne to Port Albert for freight to be paid by W. Defendants traversed the contract of bailment, and their liability as carriers. The only evidence in support of W.'s case was a receipt for four packages, given by a wharf clerk to the drayman of a person from whom W. had bought the goods, and evidence that three of the four packages had arrived at Port Albert; but there was no mate's receipt or bill of lading signed by the captain, or other evidence of the conditions on which the goods were delivered on board, given in support of the alleged contract. *Held* that to substantiate the charge of liability against the owners, evidence of the terms of the contract must be given, and that on the evidence given the owners were not liable. *Walker v. The Gippsland S. N. Coy.*, 2 A.J.R., 123.

Liability of Shipowner to Charterers—Delivery of Cargo—Part only Put on Board.]—Under a charter-party the charterers undertook to load a full and complete cargo of guano, which the owners agreed to deliver, and upon which they were to be paid freight. The charterers loaded only a small quantity of the guano, and the owners refused to deliver it. *Held* in an action by the charterers against the owners, for not proceeding to the port of discharge and delivering, that the owners, having taken part of the cargo on board, were bound to deliver such part. *Smith v. Beaver*, 2 V.L.R. (L.,) 110.

Carriers–Negligence–Liability for Acts of Agent.] Tasmanian shipowners had undertaken to carry certain goods to Melbourne. On the arrival of the goods in Melbourne, they were carted by a person in the employ of the owners' Melbourne agent to the Custom House, and were injured. *Held* that there was evidence to render the shipowners liable for negligence in respect of the act of their Melbourne agent. *Goddard v. Tasmanian S.N. Coy.*, 9 V.L.R. (L.,) 360; 5 A.L.T., 120.

Liability of Owner—Voyage Abandoned—Sale of Cargo by Master without Authority of Shipper.]—When a voyage is abandoned, the shipowner will be liable in an action of trover by the shipper, if the master sell the cargo without the authority of the shipper, when it is possible to communicate with him. *Connor v. Spence*, 4 V.L.R. (L.,) 243, 262.

For Necessaries—Power of Master to Bind Owner by Contract for Necessaries—Accessibility of Owner.]—For circumstances in which the Court upheld the decision of the County Court that the master of a ship had power to bind the owner by contracting for the services of a tug, *see Smith v. Blair*, 5 A.L.T., 177.

Liability for Acts of Master.]—An owner of a ship is not liable for the acts of the master when there are means of communication between them. *Holmes v. Norton*, 1 A.J.R., 93.

Liability for Collision—Compulsory Pilotage.]—*See* "*The Eden*," *post column* 1323.

What are Necessaries.]—Advances by the master to pay off a mutinous crew are not necessaries, even though it be expedient and for the benefit of the vessel that the crew should be paid off as quickly as possible. *Dunn v. Hoyt*, 4 A.J.R., 3.

Lien of Shipowner on Cargo—Wreck of Ship—General Average.]—*See M'Lean v. Liverpool Association*, *post column* 1322.

Right of Owner to Recover Freight—Delivery at Intermediate Port at Consignee's Request.]—*Hunt v. Barbour*, *post column* 1322.

Liability of Owner for Injuries to Workman Employed about Ship.]—*See McLachlan v. Service*, *ante columns* 893, 894.

(5) *The Master.*

When Entitled to Detention Money as Witness.]—The expenses of a master, who had appeared in his own cause when suing for wages and who was the sole witness examined, for detention money as witness were objected to on the grounds that (*a*) it was not necessary that he should have stopped in the country, as he could have had his evidence taken *de bene esse*; (*b*) he should have obtained employment, for he must have known that the cause would not have come to a hearing for a long time; and (*c*), having acted as his own advocate, he was not entitled to expenses as a witness. *Held* that it was optional whether he should have himself examined *de bene esse*; that since the delay was caused by the respondent, and the master could not obtain employment for any length of time without entailing more delay, and could only obtain an employment for a short time of an inferior nature, he was not bound to obtain employment; and that his being his own advocate did not debar him from his expenses as a witness, since the parties to a suit in the Vice-Admiralty Court, when examined as witnesses, were entitled to such expenses. *Re the* "*E. M. Young*," 2 A.J.R., 85.

See also *Dunn v. Hoyt* (*the* "*Albion*"), 4 A.J.R., 9; *post column* 1328.

Compensation for Loss of Time.]—*Ibid.*

Claim for Disbursements by, before becoming Master—Maritime Lien.]—A master has no maritime lien for disbursements made by him on account of the vessel after an agreement with the owner that he should become master, but before he was actually appointed. *Dunn v. Hoyt*, 4 A.J.R., 3.

Suit by Master for Wages and Necessaries—"Imperial Act," 26 Vict., Cap. 24, Sec. 10—Limited to Time when Placed on Register.]—By Sec. 10 of the "*Imperial Act*" the Court has jurisdiction in claims for necessaries only when the necessaries are supplied in a "British" possession. A master can only claim against his ship for wages and disbursements from the

date on which he is placed on the ship's register as master. "*The Albion*," 3 A.J.R., 72; 27 L.T., 723.

Lien for, Not Lost by Taking Mortgage over Ship.]—A master is not deprived of his lien for wages and disbursements by the fact that he has taken a mortgage over the ship for the balance of his wages and disbursements, especially if the shipowner has fraudulently concealed from him the fact that there was a prior mortgage over the ship. *Ibid.*

Liability for Injuries Caused by Negligence of Crew.]—The master of a ship in harbour is not liable for injuries caused by the negligence of the crew, he being merely a fellow-servant with the crew. *Clancy v. Harrison*, 4 V.L.R. (L.,) 437.

Neither is a ship-master liable for an injury to a passenger by a plank falling while the ship was at sea, there being no evidence of any personal negligence on his part. *Stacpoole v. Betridge*, 5 V.L.R. (L.,) 302; 1 A.L.T., 43.

Suspension of Certificate—Jurisdiction of Victorian S.N. Board beyond Territorial Limits of Colony.]—*In re Victorian Steam Navigation Board, ex parte Allan, post columns* 1326, 1327.

(6) *Seamen.*

Seamen's Wages—Payment of—Discharge—"Merchant Shipping Act 1854," Secs. 209, 210.]—The master of a disabled seaman paid to the shipping master the wages of such seaman, having rendered an account of what wages were due, and obtained from him a discharge. The seaman refused to recognise the payment, and sued the master for his wages and damages for wrongful dismissal, and recovered a verdict. On appeal, *Held* that though under Secs. 209 and 210 of the "*Merchant Shipping Act* 1854" the master is bound to render to the shipping master an account of the wages due before he obtains a discharge, he must pay the wages to the seaman himself, and appeal dismissed. *Pain v. Kneen*, 4 V.L.R. (L.,) 73.

Compensation for Wrongful Discharge — Viaticum.]—A seaman wrongfully discharged in the port of Melbourne is not entitled to receive as part of his compensation an allowance for *viaticum* to his port of engagement, if it be shown that he could have obtained employment on ships bound direct to his port of engagement at higher wages than he was receiving when discharged. *The "Ferret,"* 8 V.L.R. (A.,) 1, 4.

Compensation for Wrongful Discharge—Seamen Participes Criminis in an Attempt to Steal Ship.]—If seamen are *participes criminis* in an endeavour to steal their ship, they are not entitled to recover either wages or compensation for alleged wrongful dismissal. "*The Ferret*," L.R., 8 App. Cas., 329, 337.

Six seamen brought a suit in the Vice-Admiralty Court, to recover wages and damages for wrongful dismissal, and the judge found that a total amount of £203 9s. 8d. was due to them, but that the amount due to each was less than £50, and dismissed the suit for want of jurisdiction. On appeal to the Privy Council, *Held* that under Sec. 15 of the Orders-in-Council passed under 2 Will. 4, c. 51, and Sec. 189 of the "*Merchant Shipping Act* 1854," the judge was wrong in dismissing the suit for want of jurisdiction, and that a decree for £203 19s. 8d. should be made. *Ibid.*

Action for Libel—"Merchant Shipping Act" (17 and 18 Vict., Cap. 104), Sec. 176—Discharge of Seaman — Question for Jury.]— A seaman brought an action of libel against a master of a ship for writing "declined" in the certificate of discharge in each of the columns set apart for certificate of character as to his conduct, capacity, and sobriety. *Held* that the master was not privileged in writing as he did; that the master might have drawn a line across the blank, in which case he would not have been liable, but having written as he did it was a question for the jury whether the word "declined" was really libellous. *Garson v. Jacobsen*, 5 V.L.R. (L.,) 7.

Seaman's Certificate of Discharge—Filling in Column with a Cross.]—*Snewin v. Doherty, ante column* 361.

(7) *Mortgage of Ship.*

Rights of Mortgagee—Freight.]—G. being registered owner of the ship *N.*, of Launceston, Tasmania, consigned and shipped from Launceston certain goods at a certain rate of freight to the plaintiffs. The *N.* arrived in Melbourne, February, 1867, with the goods on board. G. gave plaintiffs' solicitor a written order directing the master of the ship to deliver the goods to the plaintiffs, which order stated that plaintiffs had settled with G. as to the freight. G. being indebted to the plaintiffs, the debt was reduced by the amount of this freight. G. had mortgaged the ship to the defendant company in September, 1866. On 14th February, 1867, the defendants took possession of the ship; but before this the plaintiffs had presented the order for the delivery of the goods and demanded them, but the master refused delivery. The defendants then claimed freight for the goods from the plaintiffs, and refused to deliver until freight was paid. The plaintiffs paid £197 for freight. On special case stated without pleadings, *Held* that the arrangements made between plaintiffs and G. before the defendant mortgagees took possession could not be unravelled and disturbed by them after taking possession, and that plaintiffs were entitled to recover back the freight. *Goldsbrough v. Melbourne Banking Coy.*, 4 W.W. & A'B. (L.,) 105.

Act 17 & 18 Vict., Cap. 104, Sec. 69—Priority of Mortgages.]—Plaintiffs, in May 1875, advanced money to C.J.H., who executed a mortgage over a ship in statutory form to secure it. C.J.H. at that time was registered owner of 32-64ths of the ship, and held an unregistered bill of sale of the remainder. C.J.H. subsequently mortgaged to H.H., who procured the due registration of the bill of sale to C.J.H. over the 32-64ths, and also registered the mortgage to himself. This was done before plaintiffs registered their mortgage. On bill by the plaintiffs alleging the facts and charging fraud, and that H.H. had notice of their mortgage, *Held*, upon demurrer,

that H.H. had priority under 17 & 18 *Vict.*, c. 104, Sec. 69. *Jardine v. Hoyt*, 2 V.R. (E.,) 152; 2 A.J.R., 129.

"Beneficial Interest," as Defined by 25 & 26 Vict., Cap. lxiii., Sec. 3.]—The 25 & 26 *Vict.*, c. lxiii., Sec. 3, declaring that "beneficial interest," when used in "*The Merchant Shipping Act* 1854," includes interests arising under contract and other equitable interests," and that "equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them, irrespective of any other personal property," applies only to equities against them personally, and not as against the ship or persons having acquired good registered titles to it under the contractors; the clause, in fact, saves the powers of disposition conferred by the former Act (17 & 18 *Vict.*, c. 104, Sec. 69) on registered owners and mortgagees; that is, amongst other things, the power of making a good title, notwithstanding their own unregistered acts. *Ibid.*

8. *Bill of Lading.*

(*a*) *Construction.*

Contract Created by—"Factors Act" 6 Geo. IV. Cap. xciv., Sec. 2.]—The contract contained in a bill of lading is not performed by merely landing the goods; that contract is not only to carry, but to deliver, and until the goods have been taken out of the possession of the shipowners, and have been delivered to the consignee, the bill of lading is in force, and remains a symbol of property which may be "entrusted" to a "person," within the meaning of the "*Factors Act*," 6 Geo. IV., c. xciv., Sec. 2. *Levi v. Learmonth*, 1 W. & W. (L.,) 283.

Exceptions from Liability—Rust.]—A bill of lading contained a clause exempting the ship from liability for damages caused by leakage, breakage or rust. The plaintiff sued for damages for the delivery of certain hoop iron in a damaged condition, and the defendants pleaded damage by rust. *Held* that the plaintiffs to recover must prove that the damage was not caused by rust; and that if some of the damage were caused by rust, and there were other damage superadded to the damage by rust, it was for the plaintiff to show how much of the damage was caused by rust, and how much by other causes. *Martin v. Hunter*, 1 V.R. (L.,) 144; 1 A.J.R., 128.

Exceptions from Liability.]—A bill of lading contained the following exemptions:—"Restraint of princes or rulers, accidents, loss or damage from any act, neglect, or default whatsoever of the pilot, master, mariners, &c., in navigating the ship, *or under any other circumstances.*" The ship put into Manilla, by the laws of which port the master ought to have included in the ship's manifest all the goods on board; he failed to do this as to a portion, and that portion of the goods was confiscated by the Custom authorities. *Held* that the words "under any other circumstances" were *ejusdem generis* with those preceding them, and must in some way be connected with the navigation of the ship. *Per Williams, J.*, that even if it would come within the words "restraint of princes or rulers," yet the *causa causans* was the master's default, and that the exemptions were no defence. *Ah Kang v. Australian S.N. Coy.*, 9 V.L.R. (L.,) 171; 5 A.L.T., 29.

(*b*) *Rights and Liabilities of Holders of Bills, and Consignees of Cargo.*

Action by Indorsee against Ship-owner for Short Weight.]—The plaintiff bank as indorsee of a bill of lading, sued the shipowner B. for short weight in bales of wool delivered. The bills were signed before the goods were received on board the ship. *Held* that although there was an irregularity in so signing the bills, yet the jury, who returned a verdict for defendant, had had the opportunity of hearing the evidence of mercantile men as to what ought to be the weight of bales shipped and delivered in London, and the Court refused to disturb the verdict. *Bank of Australasia v. Blyth*, 5 A.J.R., 166.

Wreck of Ship—General Average—Protracted Adjustment—Lien of Shipowner.]—In the case of a wreck where certain holders of bills of lading have to contribute to a general average, and the adjustment is protracted, the shipowner's lien may be satisfied by the consignee tendering his bond for the payment of the contribution when adjusted, and the consignee, when he has tendered such security, is entitled to the delivery of the cargo, and the owner, accepting such security, is relieved from further liability in respect of securing the payment of the contribution. *M'Lean v. Liverpool Association*, 9 V.L.R. (L.,) 93; 5 A.L.T., 1.

(9) *Charter Party.*

Construction.]—A charter party provided that the ship might lawfully carry 252 passengers in the 'tween decks and 9 in the cabin, and should she not be able to carry 252 in the 'tween decks, defendant should pay £5 per head for each less than that number. The ship could not take 252 in the 'tween decks, but could take more than nine in the cabin, and the owner desired to set apart part of that space for their accommodation. *Held* that there were two contracts, and a breach of the first might be separately relied on. *Hart v. Munroe*, 1 W. & W. (L.,) 53.

Liability of Owners to Charterers—Part only of Cargo put on Board—Charter Party Providing for a Full Cargo.]—*Smith v. Beaver*, *ante column* 1317.

Agreement for Hiring Ship—Construction of.]—*See Stewart v. Austin*, *ante column* 190.

(10) *Freight.*

Right of Shipowner to Recover Freight—Delivery at Intermediate Place.]—If goods are delivered to be carried to a certain place, a carrier is not generally entitled to freight until delivery at that place. But where a carrier (by sea), at the special request of the consignee, delivers goods at an intermediate port, and the consignee gives an unqualified receipt upon the bill of lading, the carrier is entitled to recover freight. *Hunt v. Barbour*, 3 V.L.R. (L.,) 189.

Right of Mortgagee of Ship to Freight.]—*See Goldsbrough v. Melbourne Banking Coy., ante column* 1320.

(11) *Demurrage.*

Demurrage—For what Delay Payable.]—A shipowner, by charter party, contracted to bring his ship to "Hobson's Bay, or as near thereto as the ship may safely get," and to deliver "at any wharf where the ship can safely lie afloat." He brought his ship into the Bay convenient to the wharf named by the charterer, and was ready to come alongside the wharf and discharge; but was kept waiting for a berth for four days, and during the time the ship was discharging she was compelled by stress of weather to haul out from the pier for four days. The shipowner claimed demurrage for the eight days so lost. *Held* that he was entitled to demurrage for such days. *Young v. Woolley*, 1 W.W. & A'B. (L.,) 30.

(12) *Pilotage and Pilots.*

Compulsory Pilotage — Liability of Owner.]—Where a ship is under compulsory pilotage, and a collision occurs by the fault of the ship, the owners of the ship will not be exonerated from liability unless the collision was occasioned solely by the fault of the pilot. *The Eden*, 6 V.L.R. (A.,) 8.

(13) *Collision.*

(*a*) *Rules of Navigation, &c.—Neglect of.*

Steamer and Sailing Vessel—"Sailing Rules," Articles 15, 16, 18.]—When a steamer and a sailing vessel meet it is the absolute duty of the steamer to give way, under "*Sailing Rules*" Article 15. If her master is in doubt as to the position or course of the sailing vessel he should slow his engines under Article 16. Though the sailing vessel should then keep her course, under Article 18, that does not necessarily mean the same direction by compass, but the path she ought to take in the particular position in which she then is; in navigating a channel it means following the channel, and, when sailing in a wind, keeping the weather-side. *The Easby*, 6 V.L.R. (A.,) 1.

Steamship meeting Sailing Vessel—"Rules of Sailing," Article 16.]—When the master of a steamer, which a sailing vessel is approaching in a fairway, sees the latter suddenly alter her course without any apparent reason he is at liberty to assume there is some reason for the alteration, and that it will be adhered to, and he is then, on that supposition, to take the necessary steps to get out of the way, not to slow his engines under "*Rules of Sailing*," Article 16. *The Eden*, 6 V.L.R. (A.,) 8.

(*b*) *Damages.*

For Preventible Injury.]—A person is not to stand by and see injury done to his ship which he can prevent, and then to claim damages for the injury which might have been avoided had he taken ordinary precautions. *Holmes v. Lloyd, re "The Greyhound,"* 1 A.J.R., 39.

For Preventible Injury — Onus of Proof.]—Where in a collision it is asserted that any part of the damage might have been avoided, the *onus* of proving such assertion is on those asserting it. *Ibid.*

How Ascertained.]—*Semble*, that the question of damages should be gone into by the parties themselves. *Ibid.*

(14) *Salvage and Towage.*

Salvage—How Recoverable.]—Salvage is recoverable at common law under the common count "for goods saved for and delivered to the defendant." *Buisson v. Warburton*, 4 A.J.R., 43, 119.

Contract to Tow Ship for Fixed Price—Employment of Additional Tug.]—*Holmes v. Norton, ante column* 190.

Services Entitling to Salvage—Recovery of Derelict Property.]—A ship sank with a cargo of copper belonging to M. and N. M. hired a vessel, fitted her out, and sent her to recover the derelict copper. A great part of this copper was recovered under circumstances of great difficulty and danger, and was sold by M. N. filed a bill against M. seeking an account of copper sold after deducting proportionate amount of costs and expenses. *Held* that M. was entitled to a salvage allowance over and above the costs and expenses. *Melhuish v. Miller*, 3 W.W. & A'B. (E.,) 61.

Jurisdiction of Court of Equity in such a Case.]—Such a case for an account and for salvage allowance comes within the equitable jurisdiction of the Court as one for arranging contribution as in cases of average. *Ibid*, p. 66.

(15) *Bottomry.*

Validity—Communication with Owners—Power of Agents to take Bond—Termination of the Voyage.]—A ship owned by a person living in New Zealand was directed to go to Melbourne, discharge there, and proceed thence to Newcastle and load with coals. The vessel reached Melbourne, and the cargo was consigned to the promoters as the owner's agents, and the promoters advanced money to the captain, which was repaid by a draft on the owner duly honoured. The captain then obtained three separate advances from the promoters for repairs and wages. To secure themselves, the promoters took a bottomry bond on 24th January, 1874. On 13th January, the owner became insolvent, which was known to the promoters after the execution of the bond. The respondents seized the ship under a mortgage of September, 1873. *Held* that there was evidence that the voyage was not terminated at Melbourne, and that, therefore, the bond was not invalid on that ground; that the bond was invalid in the absence of communication with the owner, and that the promoters could not convert the advances made upon the personal credit of the owner into bottomry; that agents may, if advances cannot be obtained elsewhere, take the security of a bottomry bond. *The Lady Franklin*, 5 A.J.R., 185.

(16) *Average Contribution on Loss of Ship.*

General Average—Where and How Adjusted.]—A ship was damaged and driven back by stress of weather, and, in an action for contribution to general average, the evidence of an average-stater, who had purported to adjust the general average at a port not being the port of destination or of actual discharge, upon documents sent to him from the port of discharge, was received as that of an expert, and the facts on which the adjustment was based were proved before the jury. *Held*, in an action to set aside such adjustment as being made in an improper place, and consequently before an improper person as adjuster, that this was not an adjustment of average in the proper sense of the term, since the whole question was gone into and there was a finding by the jury of the amount of contribution on facts proved before them, the adjuster being merely called as an expert, and no question as to the law of the port of discharge needing determination; and that the adjustment could not be set aside. *Connor v. Spence*, 4 V.L.R. (L.,) 243, 262, 263.

(17) *Ports, Harbours and Wharves.*

(*a*) *General Regulations relating to.*

Act No. 255, Sec. 5—"Public Works Statute 1865," Sec. 131—"Melbourne and Hobson's Bay United Railway Companys Statute"—Company's Pier Master.]—D. sent his boat alongside a ship moored to the Railway Company's Pier to receive cargo consigned to him. V., who was pier-master to the company, and also assistant harbour-master, on D.'s denying his obligation to pay wharfage rates to the company, cut D.'s boat adrift after giving him notice as on behalf of the company to remove it. D. sued V. in the County Court for seizing and carrying away his boat, and was nonsuited. *Held* that V. had such power, and D.'s appeal dismissed. *Donaldson v. Vine*, 4 V.L.R. (L.,) 6.

Dues, Tolls, and Rates—Act No. 209, Sec. 2—Goods Imported "for use of H.M. Government"—18 Vict. No. 9, Sec. 4.]—Goods imported "for the use of H.M. Government" and received and accepted by H.M. Government, are under Sec. 4 of Act No. 9 exempt from the wharfage rates levied under Sec. 2 of Act No. 209. *Regina v. Bright*, 2 W.W. & A'B. (L.,) 184.

Port and Harbour Regulations Clause 31—Providing a Good and Sufficient Gangway.]—It is not enough, in order to comply with clause 31 of the "*Port and Harbour Regulations*," that the gangway should be ready for use, but it must be attached to the pier. If, however, all who are entitled to be on board are on the ship, it is sufficient if the gangway be ready to be attached to the pier when required. *Mackersey v. Whitcher*, 2 A.J.R., 62.

"Passengers, Harbours and Navigation Statute 1865," Sec. 40—Regulations Inoperative Outside Limits of Port.]—The Governor-in-Council has no power under Sec. 4 of the "*Passengers, Harbours and Navigation Statute* 1865" to make regulations operative beyond the limits of the port for which they are made. A regulation which purports to make one offence continuing within and without the limits of the port is altogether bad, and the offence cannot be separated as to that within and that without the port. *Regina v. Pearson, ex parte Smith*, 6 V.L.R. (L.,) 329; 2 A.L.T., 63.

And *see* also cases *ante column* 493, under HARBOUR TRUST.

(*b*) *Removal of Wreck or Obstruction.*

"Passengers, Harbours and Navigation Statute" (No. 255,) Sec. 45—"Owner."]—The notice under Sec. 45 of the Act is properly served upon the person who is the registered owner of a ship at the time of its wreck, and it is to him the harbour-master must look for repayment of any expenses incurred over what may be realised by the sale of the wreck; the fact that the owner has given notice to the underwriters of total abandonment of the wreck puts him in no better position in respect to the harbour officials. *Ramsden v. Payne*, 1 V.L.R. (L.,) 250.

Notice to Remove Wreck and give Security—"Passengers, Harbours and Navigation Statute" (No. 255,) Sec. 45.]—A notice to the owner of a sunken wreck to remove it within a time mentioned in the notice, and to give security for the removal of the ship within a further time mentioned in the notice, is a proper notice under Sec. 45 of the "*Passengers, Harbours and Navigation Statute*" (No. 255,) for the harbour-master is not to be presumed to know whether the owner will exercise his option of removing the wreck within the original time specified or of giving security for its removal within the extended time, and by such a notice he rightly allows him to exercise his option. *Payne v. Fishley*, 1 A.J.R., 122.

(18) *Proceedings by Steam Navigation Board.*

Suspension of Engineer's Certificate.]—The Court granted a rule *nisi* to restrain the Victorian Steam Navigation Board from depriving an engineer of his certificate on the ground that notice at ten a.m. to attend the board at eleven a.m. the same day was not a sufficient "copy of the report or statement of the case" within Sec. 23 of 25 & 26 Vict., c. 63. *Ex parte Dykes*, 3 V.L.R. (L.,) 162.

Suspension of Master's Certificate—Jurisdiction of Victorian Steam Navigation Board—Beyond Territorial Limits of Colony—17 & 18 Vict., Cap. 104, Secs. 242, 520—25 & 26 Vict., Cap. 63, Sec. 23—Act No. 255, Secs. 76, 77—Act No. 312, Sec. 2.]—The ship *Gulf of Finland* struck on a reef off the coast of South Australia, and the Victorian Steam Navigation Board suspended the master's certificate on the ground that he had omitted to take proper soundings. *Held, per Stawell, C.J.*, and *Stephen, J.* (*dissentiente Higinbotham, J.*,) that the power given to the board by Sec. 242 of 17 & 18 *Vict.*, c. 104, and Sec. 77 of Act No. 255, was to make inquiry into charges of incompetency, &c., there was no power given to exercise jurisdiction, and that the board had no jurisdiction beyond the territorial limits of the colony; that Sec. 520 of 17 & 18 *Vict.*, c. 104, only refers to offences and complaints of a criminal nature. Summons to

prohibit the enforcement of the suspension of the certificate allowed. *In re Victorian Steam Navigation Board, ex parte Allan*, 7 V.L.R. (L.,) 248; 3 A.L.T., 1.

(19) *Jurisdiction and Practice of and in the Vice-Admiralty Court.*

(*a*) *Jurisdiction of Vice-Admiralty Court.*

Claim for Necessaries Supplied in another Possession.]—Under no circumstances can the Court of Vice-Admiralty in this colony take into consideration a claim for necessaries unless they were supplied in the possession in which such Court is established. *Dunn v. Hoyt*, 4 A.J.R., 3.

Claim for Compensation for Wrongful Dismissal.]—The Court of Vice-Admiralty has jurisdiction to entertain a claim by seamen for compensasation for wrongful dismissal. *The "Ferret,"* 8 V.L.R. (A.,) 1.

Claim over £50—Several Claims—"Merchant Shipping Act 1854," Sec. 189.]—Seamen united in an action against a ship for wages, and the amount claimed by each was more than £50, but the Judge of the Court of Vice-Admiralty reduced the sum due to each to less than £50, but the whole amount exceeded that sum. *Held, per Sir W. F. Stawell*, that under Sec. 189 of the "*Merchant Shipping Act* 1854," he had not jurisdiction, but *Held per Privy Council*, that he had jurisdiction. *The "Ferret,"* 8 V.L.R. (A.,) 1; L.R., 8 App. Cas., 329.

Per the Privy Council.—Sec. 15 of an order in Council passed in pursuance of 2 Will. IV., c. 51, gives the Vice-Admiralty Court jurisdiction to entertain a suit brought by any number of seamen not exceeding six, to recover their wages; and such right of suit is not taken away by Sec. 189 of the "*Merchant Shipping Act* 1854," so long as the total aggregate amount claimed by such seamen exceeds £50. *Ibid.*

(*b*) *Practice and Procedure.*

Plea of Tender.]—A respondent in a suit for wages is not barred by a plea of tender from afterwards raising a plea of want of jurisdiction, if it ultimately appear that the amount claimed is less than £50. *The "Ferret,"* 8 V.L.R. (A.,) 1, 6.

Counter Claim.]—A master suing for wages is not allowed, though a counter claim may be raised by the owners, to introduce matters extrinsic to the accounts as between master and owner, since 17 and 18 *Vict.*, c. 104, in effect only allows the bringing forward of a mutual debt. *Dunn v. Hoyt*, 4 A.J.R., 3.

Interest—Where Allowed.]—Interest on sums advanced by the master is only allowed in cases of bottomry and collision, and the rate allowed is 5 per cent. *Ibid.*

Costs—Promoter Appearing in Person.]—A promoter who conducts his case in person in the Vice-Admiralty Court is entitled to the costs of engrossed copies of the pleadings made by his proctor, and for such notes of facts and proofs collected by the proctor as may be requisite to enable the party to save the public time by giving to the Court a clear, connected, and succinct narrative of the case, which his necessity compels him to detail and prove in person. *Re the "E. M. Young,"* 2 A.J.R., 85.

Costs—Of Master Claiming Lien for Wages and Disbursements.]—A master of a ship suing for wages and disbursements made by him, obtained a decree in his favour, with costs, which included his expenses as a witness, his maintenance, and compensation for loss of time during the suit. The Registrar taxed the costs, and on appeal from the taxation, *Held* that where costs are given in an Admiralty suit they are full costs, and that nothing could be struck out for issues on which the promoter had failed; that where, on the pleadings, an admission was made that wages were due, it will not deprive the promoter of expenses as a witness if he fails in other claims, unless the amount admitted to be due for wages be paid into court, or unless the admission be made in such form that application could be made for payment into court; that the amount allowed for maintenance should be what was actually paid for maintenance, and should not be arhitrarily fixed at so much *per diem* or per week; that compensation for time lost should be made at the rates prevailing in or near the jurisdiction; and that nothing could be allowed in respect of a delay by the promoter himself in bringing the suit. The promoter was also allowed his costs of obtaining security to refund money he took out of court. *Dunn v. Hoyt, re the "Albion,"* 4 A.J.R., 9.

Costs.]—Where the owners succeeded on a reference to the Registrar in reducing the claim, but did not produce the ship's accounts, they were not allowed the costs of the reference. *Dunn v. Hoyt*, 4 A.J.R., 3.

Costs—Of Objection to Registrar's Report.]—Where an objector to a report of the Registrar substantially succeeded in his objection, but his application was very informal, *Semble*, that this was a ground for refusing him his costs of the objection. *Ibid.*

Costs—Before Registrar—Counsel.]—Costs of counsel will not be allowed in proceedings before the Registrar to take accounts. *Ibid.*

Attachment for Non-payment of Costs—26 Vict., Cap. 24, Sec. 10—Rules 1, 31, 32, 36.]—The promoter P. was arrested under an attachment for non-payment of costs. On motion to set aside attachment on the grounds (1) that it was granted on a day which was not a Court day; (2) other irregularities, such as no notice to show cause, and that it was issued in a cause for "necessaries," whereas the suit was for "building and equipment," *Held* that there was nothing to show any irregularity after the issue of the attachment, and that it was not a step in the cause but only *in personam*. Application refused. *In re the "Condor,"* 5 A.J.R., 93.

SIGNATURE.

Required by Statute—What is a Compliance with.]—Where a Statute merely requires that a document shall be signed, the Statute is satisfied by proof of the making of a mark upon the document by or by the authority of the signatory. *Regina v. Moore, ex parte Myers*, 10 V.L.R. (L.,) 322; 6 A.L.T., 151.

Pawbroker's Signature to Pledge Ticket—What is Sufficient.]—*See* S.C., *ante column* 1142.

Proof of Signature—Comparison.]—*Regina v. Wright, ante columns* 427, 428.

Evidence as to Signature—Comparison of Handwriting—Document in Dispute—"Evidence Act" (No. 100) Sec. 18.]—*Regina v. Nathan, ante columns* 313, 314.

Forging Signatures.]—*Regina v. Flynn; Regina v. Bourke, ante column* 294.

Special Case Stated by a Deceased Judge—No Signature.]—*Regina v. Duffy, ante column* 321.

Signature of Notice of Appeal—Corporation.]—*Melbourne and Hobson's Bay United Railway Coy. v. Town of Richmond and Borough of Sandridge:* and *Victoria Sugar Coy. v. Borough of Sandridge, ante column* 42.

Signature of County Court Judge to Case for Appeal.]—*Guy v. Peirce, ante column* 270.

Signature of Case on Appeal from Justices.]—*Skene v. Allen, ante column* 768.

Signature of Decree by Judge of Court of Mines when Case Tried by Deputy-Judge.]—*Vallancourt v. O'Rorke, ante column* 992.

Signature of Notice of Appeal in Mining Matters.]—*See ante columns* 995, 1006.

Signature of Petition for Winding-up a Mining Company.]—*Osborne v. Gaunt, ante column* 1029.

Signature of Judge of Court of Mines to Order for Winding-up.]—*Walker v. Jenkins, ante column* 1034.

Signature of Assistant Mining Registrar—How Made.]—*Thomson v. Begg, ante column* 982.

Signature of Notice of Objections to Petition for Sequestration.]—*In re M'Donald* and *In re Brann, ante column* 615.

Signature of Petition for Sequestration.]—*See In re Murray; In re Barry;* and *In re Ritchie, ante column* 604.

Order Nisi—Signature of Judge Necessary in Copy for Service—Act No. 379, Sec. 44.]—*In re Hang Hi, ante column* 611.

Petition for Alimony Pendente Lite—Need not be Signed.]—*Fowler v. Fowler, ante column* 529.

Signature of Deputy Registrar-General—Evidence of.]—*Kozminsky v. Schurmann, ante column* 428.

Signature of Deputy Registrar-General—Judicial Notice of.]—*Teague v. Farrell, ante column* 428.

Signature of Deputy Registrar-General Sufficient as Evidence of Registration of a Company.]—*Regina v. Walters, ante column* 139.

Indenture of Apprenticeship not Signed by Father—"Master and Apprentice Statute" (No. 193,) Secs. 6, 17.]—*Regina v. Templeton, ex parte M'Pherson, ante column* 46.

Signature to Satisfy "Statute of Frauds"—What Necessary.]—*Gladstone v. Ball, ante column* 194.

Signature of Returning Officer to Ballot Papers.]—*In re Lloyd, ex parte Leaker, ante column* 224.

Signature of Voter to Ballot Paper.]—*In re Hutton, ex parte Haynes, ante column* 224.

Distress Warrant—Signature by Agent—What Sufficient.]—*Cowper v. Ninham, ante column* 383.

Distress Warrant—Name of Landlord Written in Body of Warrant by Agent, but No Other Signature—Sufficient.]—*Nicol v. Brasher, ante column* 384.

Student at Law Omitting to Sign Roll-book—Allowed to Sign Nunc pro Tunc.]—*In re Duffy, ante column* 89.

SLANDER.

See DEFAMATION.

SLAUGHTER HOUSE.

See ABATTOIRS.

SOLICITOR.

I. Articled Clerks.

II. Solicitors.

I. Articled Clerks.

(1) *Binding and Service.*

What is Service.]—G. was admitted in 1854 to practise as a conveyancer, and entered into partnership with F. as "conveyancer," and the firm of F. & G. was advertised as a firm of "conveyancers." During the partnership G. articled himself to F. an attorney. On motion for G.'s admission, *Held*, the service must be honest and true, and must be shown by a continuance of the *status pupillaris*, that G.'s acting as a principal in the conveyancing business was not consistent with his being in *statu pupillari*, and his service was not good. Admission refused. *In re Garlick*, 2 W. & W. (L.,) 274.

(2) *Articles.*

Time of Serving Articles.]—Where it appeared that A. had served three years in Melbourne regularly, and had during the remainder of his articles been absent in Castlemaine managing his master's business, and frequently consulted his master as to matters of difficulty, *Held* that A. was not to be credited with the years he had so spent in Castlemaine, and admission postponed. *In re Garrard*, 2 W. & W. (L.,) 229, 277.

Death of Master—No Relation Back of Fresh Articles.]—An articled clerk had served about a year and a half when his master died. *Held* that the fresh articles into which the clerk might enter did not relate back to the death of the master; that the death *de facto* put an end to the former articles, and that the clerk might enter upon new articles without application to the Court. *In re Jones*, 1 V.L.R. (L.,) 57.

Cannot Perform any other Office or Employment during Articles—Clerk a Member of Parliament.]—The fact that an articled clerk has been a member of Parliament during the term of his articles is not an obstacle to his admission as an attorney if it is not shown that his parliamentary duties have occupied him in office hours. *Ex parte Duffy*, 2 V.L.R. (L.,) 142.

Motions for leave to file articles of clerkship *nunc pro tunc* should be made to the Full Court. *In re Crabbe*, 1 W.W. & A'B. (E.,) 66.

Affidavit Verifying Assignment of Articles.]—An affidavit verifying the assignment of articles may be made by any one who is acquainted with the signature of the solicitor assigning. Leave given to file such an affidavit *nunc pro tunc*. *In re Barrett*, 3 V.L.R. (L.,) 126.

(3) *Examination and Admission.*

Practice.]—Where a motion for admission has been refused, and a renewed application is made on further affidavit, express notice of such renewed application should be served on the Law Institute. *In re Garlick*, 2 W. & W. (L.,) 274.

Fees—Attorney Admitted in one Colony and Serving Further Time in Articles in this.]—An attorney who has been admitted in one colony, but who has had to serve a further time in articles before admission in this colony, must pay for admission here the sum of £42 for admission as an articled clerk, and the sum of £10 10s. as a person admitted in another Court. *Ex parte Barrett*, 2 A.J.R., 113.

Notice to Board of Examiners—Rules of Court.]—S. was articled in 1859, and served three years under them. After an interval of some years, during which he did not serve, he entered into new articles with another attorney, subsequent to the making of the new rules, and served about three years. He had passed his University examinations, but failed to give a month's notice to the Board. *Held* that having entered into articles under the old rules, he was entitled to be admitted as under them, even although he had not had his articles assigned by his old master, which was the regular method. *Ex parte E. H. Smith*, 3 A.J.R., 29, 53.

Notice—Supreme Court Rules, Rule 22.]—The Court will not, in the absence of some urgent reason, admit an attorney to practise before the expiration of the notice prescribed by Rule 22 of the Supreme Court Rules of 3rd December, 1872. *In re Bushby*, 4 V.L.R. (L.,) 487.

Posting Notice.]—The rules of 1854, requiring an applicant to post notices at the prothonotary's office, and at the Supreme Court, are repealed by the Rules of 1865, yet the old practice was followed. The Court did not feel justified in refusing admission to an applicant who had so failed to post notice under the words of Rule 24 of 1872. *In re M'Kinley and Williams*, 5 V.L.R. (L.,) 569; 1 A.L.T., 110.

Examination.]—An applicant for admission must pass all four of the examinations prescribed by the Rules. *In re Cowper*, 5 A.J.R., 185.

Examinations.]—Where a person has been admitted to practise in another colony in which the time of service is shorter, he must, in addition to making up the time by serving in Victoria, pass the two examinations in law and history prescribed by Rule 18 of December, 1872 (*In re Barret*, 2 A.J.R., 113, not followed.) *In re Morris*, 1 V.L.R. (L.,) 262.

Examinations—When Passed.]—Examinations at the University to be passed by an articled clerk, with an interval of one academic year between them, may be passed at the beginning and end of the same academical year if the University regulations allow the examinations in respect of two consecutive years to be so passed by students at the University. *Re Wisewould*, 6 V.L.R. (L.,) 60.

Examination Passed after Articles—Rules of 23rd December, 1865, R. 36.]—Where one of the two examinations in law and history prescribed in rule 36 of the Rules of 23rd December, 1865, had been passed after the expiration of the term of the articles, the Court admitted the applicant. *Re Major*, 6 V.L.R. (L.,) 305.

Examination before the Time Appointed by "Reg. Gen." of 16th October, 1882.]—The Court has no power to allow an articled clerk to be examined before the time appointed by *Reg. Gen.* of 16th October, 1882. *In re Gair*, 10 V.L.R. (L.,) 108.

Examinations—Dividing.]—Where the passing of an examination in the same subject more than once during the course is not required by the University in the course for the degree of LL.B., the Court will act on such practice as regards the examination for attorneys; but the prescribed examination must not be passed piecemeal. *In re Moule; In re Skinner*, 2 V.L.R. (L.,) 286, 287.

Certificate.]—Rule 37 of the Rules regulating the admission of attorneys (23rd December, 1865,) which prescribes the delivery of a certificate in the form "E" one year before giving notice of desire to be examined, must be taken to mean one year at least; and the delivery of such certificate a longer time beforehand is sufficient. *Re Kirby*, 2 V.L.R. (L.,) 285.

Duty of Board.]—The board of examiners should not raise any point for the opinion of the Court, by appending it to their certificate; they should decide themselves, and, if necessary, make a special report. *Ibid.*

Leave to File Certificate of Matriculation Examination nunc pro tunc not to be granted unless in very Special Circumstances.]—*In re Morgan*, 5 A.J.R., 69.

"Reg.-Gen.," 11th April 1874—Rule 18.]—An articled clerk who had omitted to produce to the board of examiners, before entering into articles, a certificate of having passed the matriculation examination was allowed to produce it *nunc pro tunc*. *In re Barbour*, 3 A.L.T., 25.

Filing Certificate nunc pro tunc—"Reg. Gen." of 3rd December 1872, R. 20.]—The Court cannot allow the certificate required by *Reg. Gen.*, 3rd December, 1872, rule 20, to be filed after the proper date has elapsed, *nunc pro tunc*. *In re Perry*, 10 V.L.R. (L.,) 47.

II. Solicitors.

(1) *Admission.*

English Attorney—"Supreme Court Rules," Rule 23.]—The Court cannot entertain an application for the admission of an attorney, previously admitted to practise in England, to practise in this colony without having obtained a report from the board of examiners, as prescribed by Rule 23 of the "*Supreme Court Rules*" of 3rd December 1872, *In re Pyman*, 4 V.L.R. (L.,) 486.

(2) *Unqualified Practitioners.*

"Supreme Court (Conveyancing) Act," 11 Vict., No. 33, Sec. 13—Bill of Sale.]—A bill of sale is not within Sec. 13 of 11 Vict. No. 33, and a person, being an unqualified practitioner, is not liable within that section for drawing a bill of sale for a fee. *Franklin v. Drew*, 3 A.J.R., 26.

Liability of Unauthorised Person preparing a Transfer—11 Vict. No. 33, Sec. 13.]—*See re Strong*, *ante column* 179.

Liability of Unauthorised Conveyancer—11 Vict. No. 33, Sec. 13—Practice under the Act.]—*In re Heron*, *ante column* 66.

Commitment for Breach of 11 Vict. No. 33, Sec. 13.]—*In re Thompson*, *ante columns* 180, 181.

Liability under Act 11 Vict. No. 33, Sec. 13—Ignorantia legis neminem excusat, how Applied.]—*In re Strong, ex parte Campbell*, *ante column* 897.

Act 11 Vict. No. 33, Sec. 13—Agreement for Sale of Goodwill and Lease of Hotel.]—W., a hotel broker, drew up an agreement by which W., as agent for C., agreed to transfer the goodwill and lease of a hotel to B., and charged a fee therefor. *Held* that the agreement did not constitute a formal lease, and was not "a conveyance or other deed or instrument in writing" within the meaning of Sec. 13 of Act No. 33. *In re Wayth*, 5 V.L.R. (L.,) 389; 1 A.L.T., 97.

Penalty for Practising as a Legal Practitioner without due Qualification—Acts 5 Will. IV. No. 22; 11 Vic. No. 33, Sec. 13; No. 159.]—*See Fenton v. Dry*, *ante column* 1147.

(3) *Misconduct.*

(*a*) *Striking off Roll.*

22 Geo. II., Cap. XLVI., Sec. 11—Offence against—Power of Court.]—The 22 Geo. II., cap. xlvi., Sec. 11, relating to offences by attorneys, for which they may be struck off the roll, is not in force in this colony; but the Court, in its original jurisdiction, possesses adequate powers to control and punish solicitors, as officers of the Court, to the full extent given under the Statute. *In re Grieve*, 1 W. & W. (L.,) 197.

Rule Nisi to Show Cause against when Granted.]—A rule *nisi* calling upon a solicitor to show cause why he should not be struck off the rolls will not be granted simply on depositions by an insolvent in the Insolvent Court admitting that he was allowed to participate in the solicitor's professional profits. *In re* ———. 1 W. & W. (L.,) 204.

When Allowed—Forgery.]—A solicitor will be struck off the roll on proof that he has been tried for forgery, admitted the offence, and been convicted. *In re* ———, 1 W. & W. (L.,) 211.

For what—Fomenting Litigation.]—The cases in which an attorney will be struck off the rolls are where the attorney has been guilty of felony or gross misdemeanour capable of being tried by a jury, or cases of such misconduct as

amounts to breach of trust, misappropriation of a client's money, or the signature of a name to some document without proper authority. Where an attorney had been guilty of writing letters which could only be construed as being intended to foment litigation, and which were capable of being construed as intending to suborn witnesses to commit perjury, and as containing champertous proposals, the Court visited the offence by condemning the attorney in the costs of the rule to strike him off the rolls, and in the costs as between attorney and client, and by suspending him till the costs were paid. *In re Gresson*, 2 A.J.R., 120.

(*b*) *Suspension from Practising.*

Retaining Client's Money.]—For circumstances under which an attorney was suspended from practice for two years for retaining his client's money for his own use, by mixing up moneys so received and his own moneys in one account. *See In re Dyer, ex parte Pearson*, 3 A.J.R., 125.

Appropriation of Client's Money—Suspension though Money Repaid—Costs.] — Where an attorney had appropriated his client's money, but had subsequently repaid it, nevertheless, on the application of the Law Institute to strike him off the rolls, he was suspended for two years, the Court holding that it was its duty to see that persons whom they accredited did not defraud their clients. As no person was named in the rule to strike off the rolls as liable for costs in the event of its being discharged, the Court gave no costs against the attorney. *Re Scott*, 4 A.J.R., 124.

Remission of Suspension.]—In order to induce the Court to remit a sentence of suspension in whole or in part, it is necessary to show some new matters, some altered circumstances, or some omitted facts which, if they had been presented at the time the sentence was awarded, would have affected the decision of the Court. S.C., 5 A.J.R., 185.

(*c*) *Summary Jurisdiction of Court.*

Attachment—For Non-Payment of Money withheld from a Client.]—G., a solicitor, was ordered to pay over money withheld from his client, and before doing so his estate was sequestrated under the Insolvency Act. After sequestration a rule *nisi* was obtained to attach G. for contempt by disobedience of the order. Against this rule the sequestration was shown as cause. The Court were of opinion that a promise to pay made since the insolvency, though a promise on which an action might well be founded, was no sufficient support to the rule *nisi* to attach granted before the promise, and the rule was discharged without costs, but without prejudice to re-open the rule at the applicant's own risk as to costs, if, after the intimation of the Court, he should choose to do so on the grounds of a promise to pay since the sequestration. *In re Gillow*, 1 W. & W. (L.,) 300.

Attachment—Delivery up of Deeds—Refusal to make an Affidavit.]—A rule *nisi* was moved for attachment of an attorney for non-delivery up of deeds pursuant to an order of Court. *Held* that the applicant must show that the attorney had the deeds in his possession. *Per Stephen, J.*, that an attachment would not be granted, because the attorney refused to make an affidavit. *Re* ———, *ex parte Morris*, 7 V.L.R. (L.,) 202.

Petty Sessions—Wilful Misbehaviour—Act No. 267, Sec. 39.]—A solicitor was fined, or in default imprisonment, under Sec. 39 of Act No. 267 for misbehaviour at Petty Sessions. On a rule *nisi* for *certiorari* to quash the order of commitment, an objection was taken that there was no evidence to sustain it, but the Court held that there was evidence to show that he had persisted in renewing an application which had been struck off for non-appearance, and refused the rule. *Regina v. Mollison, ex parte Faussett*, 3 V.R. (L.,) 3; 3 A.J.R., 26.

Misconduct as Commissioner—Not Acting as Attorney.]—The Court has jurisdiction to punish an attorney for acting as a commissioner for taking affidavits after leaving the district to which his commission was restricted, although he was not acting as attorney in the cause in which the affidavit complained of was sworn. *In re Purcell*, 4 A.J.R., 79.

Application to Punish under 3 Ed. I., Cap. 29.] —An application to the Court to punish an attorney under 3 Ed. I., cap. 29, must be made by counsel if, which is doubtful, the Act be applicable to this colony. *Quirk v. Watson*, 4 A.J.R., 117.

Where an attorney refuses to deliver a bill of costs, and retains a sum of money belonging to his client, the proper remedy is to apply to a judge in Chambers for an order calling upon the defendant to deliver his bill. *Ex parte Crawford*, 1 A.L.T., 103.

(4) *Retainer.*

By Municipal Corporation—How made.]—An attorney who appears for a borough council in a complaint before justices for breach of a municipal bye-law need not show that he was appointed by a resolution of the council, or that the appointment of a previous attorney of the council has been revoked. And, since the enforcement of the municipal bye-laws is one of the every-day purposes for which the municipality was incorporated, an attorney so appearing need not produce any appointment under seal. *Regina v. Freyer, ex parte Mayor of Williamstown*, 4 V.L.R. (L.,) 131.

See S.P., *Regina v. Call, ex parte Gillow, ante column* 231.

A retainer under seal is necessary when a solicitor appears for a municipal corporation to enable him to recover his costs. *Shire of Colac v. Butler*, 5 V.L.R. (L.,) 137; 1 A.L.T., 3.

See S.C., *ante column* 230.

But where the seal is attached the Court will presume it was duly attached. *Jones v. Star Freehold Coy.*, 4 W.W. & A'B. (L.,) 223, *ante column* 160.

When Wife's Retainer Treated as Husband's.]—*Sievwright v. M'Evoy, ante column* 537.

(5) *Change of Solicitors.*

Change of Solicitors—Order for, in Proceeding under "Lands Clauses Consolidation Statute"—What are First Proceedings.]—*See ex parte Wilmot, ante columns* 823, 824.

Change of Solicitors—Effect on Taxation of Costs.]—*Ex parte Mouatt, ante column* 241.

(6) *Liability of.*

For Negligence.]—Where a contract was made by H., in Melbourne, by letter with S., at Newstead, for the delivery of flour by S. in Castlemaine, and on breach of contract a suit was brought in the County Court in Melbourne, and H. was nonsuited on the ground that the suit should have been brought at Castlemaine, and H.'s attorney did not get his costs on the ground of negligence; *Held*, on appeal, that, even assuming the suit to have been brought in the wrong court, still as there was some doubt as to the court in which the suit should have been brought, the attorney was not liable for negligence. *Bullen v. Hooper*, 2 V.R. (L.,) 108; 2 A.J.R., 66.

Practising in County Court—Taking Counsel's Opinion.]—*Semble*, that, as an attorney practises as an advocate in the County Courts, he would not in any case be protected in such courts by acting on the advice of counsel. *Ibid.*

For Acts of Clerks.]—*Per Molesworth, J.*—If solicitors leave the management of their business to their clerks, and receive the profits of that business, they must submit to have their rights bound by the acts of such clerks. *Jamieson v. Allen*, 2 W. &W. (E.,) 47, 54.

For Costs—Liability of Attorney for Costs Recovered against Client after Settlement with Attorney.]—An attorney charged his client for attendance of witnesses "as per account," and in full satisfaction thereof took an acceptance from his client for five shillings in the pound of the sum charged, but did not give his client an indemnity. The witnesses sued the attorney for 25 per cent. of their charges, and the client for the other 75 per cent., and recovered a part of their claim against the client with costs. The client thereupon sued the attorney in the County Court for the sums and costs so recovered as for "money paid and damages sustained in defending actions brought to recover moneys which the attorney undertook so pay," and recovered a verdict; the judge refusing to nonsuit. Against this decision the attorney appealed. *Held* that the action was substantially for money paid; that it was unnecessary to consider whether there was an indemnity given or not, and that the attorney was liable whether he had or had not given an indemnity, having accepted five shillings in the pound as satisfaction in full. *Wisewould v. Lee*, 1 W. & W. (L.,) 388.

Solicitor Instituting Suit without Plaintiff's Authority.]—In a suit which was instituted S.'s name was used as plaintiff without his knowledge or authority. An order had been made in the suit allowing the plaintiffs to proceed and directing that the plaintiffs should pay defendant's taxed costs of the motion for dismissal. This order was served on S., and was the first intimation he received of his name being used as plaintiff. O. D., a solicitor practising at Wangaratta, was named in the bill as plaintiff's solicitor, but the writ was issued by H., a solicitor practising in Melbourne, who had however only acted as O. D.'s agent. S. moved to strike his name out of the bill, and to make H. liable for the costs of the motion and the taxed costs ordered to be paid by S. Motion refused with costs as to H., but granted as to striking out name without costs. *Brew v. Jones*, 2 V.R. (E.,) 59; 2 A.J.R., 42.

Attorney commencing Action without Authority.]—An attorney commenced an action of tort on behalf of a person and his supposed wife on instructions from the wife, and did not ascertain whether the husband had authorised the proceedings. Subsequently the supposed husband, who was not cognisant of and had not authorised the proceedings, and who, in fact, was not married to the woman, and was not living with her at the time the action was commenced, nor had been for ten years previously, took out a summons to have his name struck out of the suit and all subsequent proceedings, and to have his costs paid by the attorney, and the defendant also took out a summons calling upon the attorney, in case the male plaintiff's name should be so struck out, to show cause why he should not pay the costs incurred by the defendant through the action being improperly instituted against him. The Court struck the male plaintiff's name out as asked, and ordered the attorney to pay his costs, as between attorney and client, and also ordered him to pay the defendant's costs as between party and party. *Hill v. Power*, 6 V.L.R. (L.,) 109; 1 A.L.T., 169.

Instituting Suit without Authority.]—A rule *nisi* calling upon a plaintiff's attorney to show cause why he should not pay the costs of the action, as brought without the plaintiff's authority, will not be granted where the materials upon which the application is made disclose some evidence of authority. *Coffee Tavern Coy. v. De Young*, 6 V.L.R. (L.,) 289; 2 A.L.T., 44.

A stranger to the action who is not an attorney is not amenable to this summary remedy. *Ibid.*

No Authority to File Bill.]—Where a solicitor filed a bill by three plaintiffs, instructed by one of them only, and sent a letter to the other two requesting them to sign a written authority for them to proceed in their names, which letter was not answered, *Held* that their not answering was a sufficient refusal to give authority, and an order was made on motion by the two unwilling plaintiffs striking their names out, with costs as against the solicitor. *Mitchell v. M'Douyall*, 9 V.L.R. (E.,) 13.

Solicitor Joining a Plaintiff without his Consent.]—The name of a plaintiff having been inserted in a bill without his knowledge or authority, his name was ordered to be struck out with costs as between solicitor and client,

to be paid by the solicitor inserting it, who also made himself a co-plaintiff. *Lane v. Goold*, 8 V.L.R. (E.,) 236.

Undertaking to Pay Costs.]—In order to make a solicitor liable on such an undertaking, the affidavit must state distinctly that he undertook to pay personally. *In re Moule, ex parte Mitchell*, 1 V.L.R. (L.,) 15.

Motion to Set Aside Order for Substituted Service—Insufficient Grounds.]—Where an order had been made for substituted service upon a solicitor who had been defendant's solicitor in prior transactions in relation to subject matter of suit, and the solicitor moved for an order to set aside order, the Court not being satisfied with the materials on which the motion was made dismissed it with costs against the solicitor. *Howse v. Campbell*, 7 V.L.R. (E.,) 145.

Order to Supply Document to Client—Unsatisfactory Explanation of Inability to do so.]—Where a solicitor was ordered to deliver to his client a bill of costs sent out from England in an appeal to the Privy Council, and failed to do so, giving an unsatisfactory explanation of his inability, and the matter was twice adjourned in order to admit of a satisfactory explanation being given, the Court ordered the solicitor to pay the costs incurred subsequently to the first adjournment, the solicitor having already been ordered to pay the costs of the day of such first adjournment. *Re Hardy & Madden, ex parte Hand and Band Coy.*, 4 A.L.T., 40.

(7) *Their Relations with respect to Clients.*

Attorney not Agent to Pay Money or Receive Demand for Payment.]—The attorney is the agent of the client for all purposes connected with the cause; but is not, merely as the attorney, the agent of his client either to pay money or to receive a demand for its payment. *Lee v. Melbourne and Suburban Railway Coy.*, 1 W. & W. (L.,) 34.

Authority to Bind Client—Compromise.]—An attorney has no power to compromise an action against his clients by an adjustment varying rights of property, unless expressly authorised; and cannot be so authorised by a corporation, unless under the corporate seal. *Shiel v. Colonial Bank of Australasia*, 1 V.R. (E.,) 40, 47.

Power to Bind Client by Consent to Enlargement of Time for Transmission of Appeal Case under Sec. 172 of "Mining Statute 1865."]—*See Odgers v. Waldron, ante column* 1007.

Fraud where Acting for Both Parties.]—K. was entitled to the issue of a Crown grant to certain land under Sec. 33 of "*Land Act* 1862," and agreed to convey to M.B. No grant was issued to K., and M.B. gave N., a solicitor acting for both parties, £20 to complete her title and to obtain the grant. N. failed to do so. Subsequently J. bought K.'s interest in the land at a sheriff's sale under the "*Transfer of Land Statute*" and N., who was acting for him, obtained a certificate of title for him, and also the Crown grant to which K. was originally entitled. On bill by M.B. seeking to have J. declared a trustee for her, on the ground that his certificate had been obtained by fraud and in collusion with N., *Held* that N. had not been guilty of fraud, and bill dismissed against N., but without costs. *Brew v. Jones*, 2 V.R. (E.,) 20; 2 A.J.R., 6.

Disclosure of Confidential Communications to Other Party.]—M. had at one time acted as solicitor for S., and was by her directed to convey a message to the other side. At the trial for nullity of marriage M. gave evidence as to this message in the interest of S.'s husband. *Held* that the evidence being very conflicting as to when M. ceased to act for S., it being a matter of oath against oath, the Court would not interfere by making him answer as to his conduct, and even assuming that the relation of solicitor and client existed, M.'s lips were unsealed by the message given. *In re Moule, ex parte Smith*, 5 A.J.R., 121.

What Papers may be Produced without Breach of Confidence.]—*Bruce v. Ligar, ante column* 430.

Action Instituted without Authority—Costs.]—*See Hill v. Power*, 6 V.L.R. (L.,) 109, *ante column* 1338.

(8) *Costs.*

(*a*) *Generally.*

For what Attorney may Charge or Not.]—A solicitor assisted an insolvent in preparing his schedule and acted as his solicitor at the meetings in the estate. There were items in the bill of costs for "attending insolvent with official assignee." *Held*, that the solicitor could not properly charge for his services in these matters. *In re Amner*, 1 W. & W. (I.E. & M.,) 100.

Dismissal of Bill—Costs.]—Where the parties to a suit agree to compromise without the intervention of solicitors, and a motion is brought for the dismissal of the bill, a defendant's solicitor has no right, in the absence of fraud, to object to such dismissal on the ground that his costs had not been paid. *Younghusband v. De Lacy*, 2 W.W. & A'B. (E.,) 107.

Costs against Municipal Corporation—Retainer under Seal must be Proved.]—*Shire of Colac v. Butler, ante column* 230.

Right of Solicitor to Costs apart from Client.]—In an administration suit defendants were ordered to pay plaintiffs' next friend or solicitor the costs of the suit, but on appeal the defendants were allowed to set off the costs of the appeal against the costs of the suit. The costs of plaintiffs' solicitor were taxed at £497 0s. 10d. and there was a residue of £170 15s. 10d. in the Master's hands not invested. Upon application by the plaintiffs' solicitor for this sum to be paid him as costs, insisting that he had, by the decree on appeal, been deprived of his right to costs as against the defendants to the extent of the costs on appeal, *Held* that as the allowance as to a successful appellant was according to the common practice of the Court, the client would have no reason to object, and the solicitor's rights on the subject

should not be regarded outside his clients', and application refused. *Graham v. Gibson*, 4 A.L.T., 111.

Where Solicitor Liable to Pay Costs.]—*See* cases collected, *ante columns* 1337-1339.

(*b*) *Bill of Costs.*

"Common Law Procedure Statute 1865," Sec. 387—Delivery of when Necessary—Question for Jury.]—Where an attorney has been employed in business not clearly professional, it is a question for the jury whether the employment was as an attorney, so as to render necessary the delivery of a signed bill of costs as a condition precedent to an action by the attorney for remuneration. *Chambers v. Green*, 2 V.L.R. (L.,) 194.

Delivery of Signed Bill—Guarantee of Third Person to Pay—"Common Law Procedure Statute 1865," Sec. 387.]—*Semble* that the provisions of sec. 387 of the "*Common Law Procedure Statute* 1865," as to the delivery by the attorney of a signed bill of costs, merely regard actions between the attorney and client only, and not between the attorney and a third person guaranteeing to pay the bill. *In re Lawler*, 4 V.L.R. (I.P. & M.,) 8.

Delivery of—Order for Delivery of Bill Several Years after Payment.]—On a rule *nisi* to rescind an order of a judge for delivery of a bill of costs five years after payment, the Court thought the balance of probabilities, upon a conflict of evidence as to whether a bill of costs had been delivered before payment, or at all, to be in favour of non-delivery at any time, and refused to disturb the order for delivery, though giving no intimation as to what was to be done with the bill when delivered. *Re Duffett, ex parte M'Evoy*, 8 V.L.R. (L.,) 160; 4 A.L.T., 6.

Bad Item — Recovery on the Rest.] — *Per Stawell, C.J.*—Even supposing there be one bad item in an attorney's bill of costs, the attorney is not thereby prevented from recovering for the rest. *Mathews v. Muttlebury*, 2 W. & W. (L.,) 104.

Action for—Costs of Old Firm—Set-off—Negligence.]—M. and E., solicitors, had delivered to their clients, M. and S., a signed bill of costs in January, 1862, and sued them for the amount thereof in February, 1862. The bill was for a sum of £175, of which £33 was due by M. and S. to an earlier firm, to whose business M. and E. succeeded. Costs were taxed, and the item £33 was struck out, and the particulars of demand amended accordingly. M. and S. pleaded a set-off, and offered to give evidence of facts showing negligence prior to an equity suit, in which the costs were incurred. *Held* by the County Court Judge, and affirmed on appeal, that the finding of the taxing officer was conclusive on the matter of account, and that the evidence of negligence was inadmissible, since it did not furnish an answer to the present action. *Ibid.*

Set-off against Debt.]—Complainant summoned T., a solicitor, for goods supplied, before justices. T. set-off a bill of costs due to him from the complainant. It was objected that no signed bill had been delivered a month before the summons, and the justices disregarded the set-off. *Held* that T. was entitled to set-off his bill, and case remitted to be adjudicated upon as to items in the bill. *Regina v. Alley, ex parte Twigg*, 5 V.L.R. (L.,) 151; 1 A.L.T., 9.

(*c*) *Taxation of Costs.*

Who may not Obtain—Trustees—"Common Law Procedure Statute," Sec. 393.]—H. paid to trustees a sum of money to be applied (*inter alia*) in payment of costs due to his solicitors. The solicitors delivered their bill, and the parties applied to have it referred to taxation, and the application was granted. On rule *nisi* to set aside the reference to taxation, *Held* that the trustees, not being liable either at law or in equity to the solicitors for payment of the bill, could not obtain an order for reference of the bill to taxation, and rule made absolute. *In re Bennett & Attenborough, ex parte M'Mullen*, 2 V.R. (L.,) 203; 2 A.J.R., 116.

What may be Taxed.]—A bill of costs by a company's solicitor incurred in getting a private Act of Parliament passed for the company, is liable to be taxed under the "*Common Law Procedure Statute*," Sec. 387. *Ex parte Hopkins*, 3 V.L.R. (L.,) 115.

After Payment — "Common Law Procedure Statute," Secs. 387, 388.]—An attorney and the trustees to a deed of compromise in a suit expressly agreed that the attorney's bill of costs should be paid subject to adjustment, and it was paid, and the receipt given as follows:—"Received this amount undertaking to supply detailed accounts if required, and subject to adjustment." This adjustment the attorney expressly swore was arranged not to include taxation, and no denial of this was made by the trustees. The detailed accounts were furnished and a release given by the attorney to the trustees. One of the trustees died, and after his death the others obtained an order under Secs. 387, 388 of the "*Common Law Procedure Statute*" to refer the bill to taxation. *Held* that in the absence of exceptional circumstances the bill could not be referred to taxation, and that no exceptional circumstances appeared in the case. *In re Brodribb, Crisp, & Lewis*, 1 V.R. (L.,) 214; 1 A.J.R., 165.

"Common Law Procedure Statute" (No. 274,) Sec. 388.] — A bill of costs will be ordered to be delivered under the Act only in case where a bill, if delivered, could be referred to taxation, and where a bill has been paid and more than a year has afterwards elapsed it cannot be ordered for taxation. *In re Chambers, ex parte Speed*, 6 A.L.T., 125.

After Payment—Act No. 274, Sec. 396.]—Large items which require explanation afford sufficient evidence of special circumstances to justify an order for taxation of payment. Certain costs were demanded from a mortgagor, another sum was offered by his agent, and finally both parties agreed to divide the difference, and the sum so agreed upon was paid. *Held* that it was an arrangement made for the

best at the time, under the pressure to which the mortgagor was subjected, but that it did not preclude the taxation of costs. Order made. *In re Bennett & Attenborough, ex parte Cameron*, 3 V.R. (L.,) 220; 3 A.J.R., 112.

After Payment—Act No. 274, Secs. 388, 396—Lapse of Time.]—The U. Company had been involved in litigation for a considerable time with a bank; in one suit the company was successful, and a second suit was compromised. In January, 1881, the solicitors received the balance due on account of these suits, and a new board of directors considering that the charges were excessive, applied in July, 1881, more than a year since the first bill was paid, to have the costs taxed. *Held* that under Sec. 396 of Act No. 274, the payment of the first bill (relating to the first suit) made twelve months before was an insuperable bar to taxation, owing to lapse of time; but as to the second bill, there were special circumstances, *e.g.*, charges for attendance of country solicitor, as well as town agent, documents used in second suit, which had been used in the first and charged twice over, which led the Court to interfere even after the bill had been paid. Order to tax costs of second suit. *In re Hardy & Madden, ex parte United Hand and Band Coy.*, 7 V.L.R. (L.,) 266; 3 A.L.T., 10.

Effect of—Between Party and Party—Not Conclusive between Solicitor and Client.]—Taxation of costs between the parties to a suit is not binding as between the client and his solicitor. It is quite open for the client to say that as between him and his solicitor there are overcharges. *Re Read*, 1 A.L.T., 130.

Break in Suit.]—A judgment on demurrer, the effect of which is to compel the plaintiffs to amend the bill, and to create a pause in litigation, is not such a break in the suit as would entitle the solicitors to demand payment of their bill of costs up to that time, and make such a payment final unless an application for taxation were made within twelve months. *In re Hardy & Madden, ex parte United Hand and Band Coy.*, 7 V.L.R. (L.,) 476; 3 A.L.T., 76.

Review of Taxation.]—*Per Molesworth, J.* (in Chambers.)—The Court has no jurisdiction under the "*Common Law Procedure Statute* 1865," part 27, to make an order for review of taxation of a bill of costs after twelve months has elapsed from the payment. *Attorney-General v. Huon*, 1 A.L.T., 203.

Inconsistent Taxation—Court Refusing to Interfere.]—*Bowie v. Wilson*, *ante* column 241.

Reviewing Taxation—"Common Law Procedure Statute," Sec. 395.]—The Court will not direct the taxation to be reviewed at the instance of the attorney when he has allowed more than twelve months to elapse, and further steps to be taken, based on the result of the taxation, before making his application for review. *Re Phelps*, 6 V.L.R. (L.,) 344.

Summons to Review.]—A summons should be for a single purpose. It is improper, therefore, to ask in one summons for taxation of some bills of costs and for review of taxation of others. *Re Phelps, ex parte Morris*, 6 V.L.R. (L.,) 417.

Act No. 274, Sec. 440, Sched. 39.]—Costs taxed as between attorney and client were ordered to be reviewed on the ground of one item being in excess of the amount allowed in Sched. 39. On motion to set aside the order, *Held* that the attorney should in such a case state distinctly the whole amount, and the portion which can be recovered from the opposite side; and that the client was only liable when he agreed to pay, having such knowledge. *In re Hardy & Madden, ex parte M'Iver*, 7 V.L.R. (L.,) 145; 3 A.L.T., 1.

(*d*) *Practice on Taxation.*

Solicitors in Partnership.]—G. & E. were solicitors in partnership when an action was commenced by them on behalf of L. E. & G. had since dissolved partnership, and after that L. had obtained an order for G. to deliver a bill of costs for taxation, G. being the member of the firm who acted for L. in the matter. *Held* that, the dealings being with the firm, the firm might have a bill of costs against L., which G. could not set-off if the order were made against him alone. Order set aside. *In re Grave, ex parte Livock*, 3 A.J.R., 46.

Items Allowable or Otherwise.]—(In Chambers) —*Molesworth, J.*—Where the defendant had obtained time to answer on payment of £15,000 into Court, and had obtained an order varying the order which had allowed the further time; but the varying order contained no direction as to costs, *Held* that the costs of the application for the varying order were rightly disallowed. *Breese v. Fleming*, 1 A.L.T., 129.

Where affidavits had been read on a motion by the defendant, but had not been entered as read in the order made thereon, *Held* that the costs of the affidavits were properly disallowed. *Ibid.*

Where the defendant had served notice of motion to dismiss the bill for want of prosecution, and had abandoned the notice, *Held* that if the Master were of opinion that the plaintiff was liable to have his bill dismissed for want of prosecution when the notice of motion was served, and, in order to prevent such dismissal, set the cause down, then the defendant should have his costs of the notice. *Contra* if the Master should not be of such opinion. *Ibid.*

Where the defendant had taken the advice of counsel on the decree, *Held* that the Master was right in disallowing the charges for the advice in the absence of some special reason, the Master being the proper person to judge of the utility of proceedings when the case is in his own office. *Ibid.*

Where a proposal for the appointment of new trustees had been supported in the Master's office by affidavits, and the defendant had filed affidavits in opposition, to which the plaintiff replied by further affidavits, and the Master then directed that the evidence should be taken

by affidavits, but the defendant objected to such evidence when the proposal came on for hearing, and the Master thereupon directed oral evidence, *Held* that the Master was the proper person to decide as to what took place before him, and that the costs of the defendant's affidavits were in his discretion. *Ibid.*

The defendant, though he had not the carriage of the decree, carried in proposals for the appointment of new trustees. *Held* that it was for the Master to decide how far it was defendant's business to carry in such proposals; unless it were his business to do so, the costs incurred could not be costs in the cause. *Ibid.*

Where the defendant had had a conference with counsel as to making objections to the report of the Master, which objections were overruled, *Held* that the Master was right in disallowing the costs of the conference. *Ibid.*

Items Allowed—Barrister's Fees not Paid—Credit.]—A barrister's fees will be allowed on taxation of costs, though such fees have not been actually paid, but where the barrister has received a bill or undertaking from the solicitor, with which he is satisfied. *Breese v. Fleming*, 1 A.L.T., 192.

Reservation of Dispute as to Retainer—Balance in Favour of Client—Attachment.]—An attorney's bill of costs was referred for taxation, with a reservation of a right on the part of the client to dispute the retainer as to certain items. On taxation, the taxing officer certified that a balance was due from the attorney. *Held* that if the client abandoned the reservation of the right to dispute the retainer, it was then open to him to abide by the result of the taxation, and to sign judgment for the amount in his favour, or to obtain a rule of Court for the payment of the amount, upon which rule an attachment for non-payment might issue. *Re Phelps*, 6 V.L.R. (L.,) 344.

Several Bills Referred—Whole Bill Struck Off—One-Sixth Disallowed—"Common Law Procedure Statute," Sec. 389.]—If several bills of costs are referred together for taxation under an appointment obtained within a month after their delivery, a bill which is struck off altogether because it had been paid, is to be computed in ascertaining whether one-sixth has been disallowed. *Re Phelps, ex parte Morris*, 6 V.L.R. (L.,) 417.

Costs of Taxation—Disputing Retainer—More than One-sixth Disallowed.]—Where liberty has been reserved to the client to dispute the retainer as to certain items, or an action has been commenced on one or more of the bills, the client will not be disentitled to his costs of taxation where more than one-sixth of the whole has been disallowed. *Ibid.*

And *see Ex parte Mouatt, ante column* 241.

Costs of Application for Taxation—"Common Law Procedure Statute," Sec. 389.]—An order was made for taxation of costs, and the result was that a sum of £352 was taxed off a bill of £1060. *Held* that the solicitor must pay the costs of the summons and order for taxation. *In re Hardy & Madden, ex parte United Hand and Band Coy.*, 7 V.L.R. (L.,) 450; 3 A.L.T., 75.

Act No. 274, Sec. 398—Judgment on Allocatur—Balance due by Attorney.]—Where, on taxation of costs, a balance is found due by the attorney, the Court, though holding that it could order judgment to be entered upon the *allocatur*, ordered execution to issue only to the extent of a proportionate part, deducting the share of a co-plaintiff who dissented from the application, and also of the solicitor, who was also a co-plaintiff. *In re Hardy & Madden, ex parte M'Iver*, 7 V.L.R. (L.,) 324; 3 A.L.T., 25.

(*e*) *Lien for Costs.*

As against Third Person.]—Generally speaking a solicitor obtaining deeds from a client has a lien upon them for all business done for him, but as against third persons the client can confer no greater rights than he has himself: for a solicitor to be protected against claims of third persons he must show that he gave consideration by acting upon the faith of the possession of the deeds; that he had no notice of rights of third persons, and that his costs remain unpaid. On a motion by a plaintiff in an administration suit that a solicitor bring certain deeds into Court on which he claimed a lien, it appeared that the defendant owed the solicitor a sum of £23 for legal proceedings against M. & D. which were treated in an affidavit prepared by the solicitor as paid, and, in any case, this sum of £23 appeared to be incurred after notice of plaintiff's claim to deeds. *Held* that the solicitor could not enforce his lien by retaining the deeds, and as to costs in the administration suit the plaintiff's rights were paramount as the claim to these costs arose *pendente lite* with most distinct notice of the plaintiff's claim, and if the solicitor received payment from the defendant administrator knowing whence the money came he would be liable to refund as for money misapplied by an administrator. *Semble* that a solicitor is liable to the summary jurisdiction ordering him to produce the deeds. Order made. *Jamieson v. Allen*, 2 W. & W. (E.,) 47, 51.

Solicitor of Assignor—Order for Production of Deeds on Application of Assignee.]—*In re Bennett and Taylor, ante columns* 375, 376.

As against a Trust Estate.]—Persons properly doing business for trustees as solicitors or otherwise have generally no claim against the trust estate; no one can give a solicitor a lien upon deeds against a person from whom he could not himself withhold them. K. and others as trustees of a will employed N. & M. to act as their solicitors, and deeds relating to the property came into N. & M.'s hands. In an administration suit instituted after K.'s death it appeared that K. died indebted to the estate in a sum largely exceeding the costs. *Held* that K. being always indebted to the estate N. & M. had no lien on the deeds for their costs. *Sawyers v. Kyte*, 1 V.R. (E.,) 94, 97; 1 A.J.R., 64.

Upon What—Fruits of Judgment.]—Although an attorney has not a lien, strictly so called,

upon the fruits of a judgment in favour of his client, for costs, yet he has an equitable right, which the Court will sustain, subject to any arrangements which may be made between the parties without an intention of defeating that right. The Court will not only recognise this right, but enforce it if the parties to the cause are obliged to apply to the Court for assistance. If the parties choose, however, to arrange matters between themselves, and without any collusion between them, though that arrangement has the effect of depriving the attorney of his lien, the Court will not interfere. *Rutherford v. Powell*, 4 V.L.R. (L.,) 384.

A defendant entitled to costs of a nonsuit became insolvent before payment, but was indebted to the plaintiffs in a larger amount. *Held* that the plaintiffs before notice of the claim of the defendant's attorney were entitled to prove upon the estate for the balance of their debt after the amount due to the defendant for costs had been deducted; and that the defendant's attorney was not entitled to a lien upon the costs. *Ibid.*

Collusion to Deprive of Lien.]—By a family arrangement unknown at the time to a solicitor several actions were *bonâ fide* settled, under circumstances which showed no collusive intent to deprive the solicitor of his costs. *Held* that such an arrangement would not be disturbed by the Court although the effect was to deprive the plaintiff's attornies of their lien for costs. *Langley v. Hepburn*, 3 V.L.R. (L.,) 119.

Act No. 379, Sec. 133—Examination of Insolvent.] A solicitor claiming a lien cannot refuse to produce documents required for examination of an insolvent's dealings. *In re M'Kay and Bell*, 3 A.J.R., 98; and *see* S.C., *ante columns* 709, 710.

Payment out of Court—Change of Solicitors—Lien claimed by Old Solicitors on a Deposit paid by Railway Company under "Lands Clauses Consolidation Statute."]—*Ex parte Wilmot, ante columns* 823, 824.

(9) *Relations between Country Solicitors and Town Agents.*

Authority of Town Agent.]—It is not within the ordinary duties of the town agent of a country solicitor to consent to the dismissal of the bill on condition of each side paying its own costs. *Cleary v. Macnamara*, 2 V.L.R. (E.,) 49.

Delay of Client in Settling Accounts—Reference to Prothonotary.]—Where a client had allowed more than a year to pass without obtaining a settlement of accounts between himself and his attorney in the country, and such attorney afterwards died, the Court on an application by the client against the town agents to compel them to pay over money to him, referred the matter to the Prothonotary to ascertain the state of accounts between the country attorney and the client. *Re Klingender, Charsley and Dickson, ex parte M'Cullagh*, 8 V.L.R. (L.,) 164.

Town Agent's Lien on Client's Money.]—*Semble* that the town agents of a country solicitor have, as against the client, in respect of a debt due to them by the country solicitor, a lien on moneys of the client received by them, to the same extent as the country attorney has, up to the amount of the debt due by the country attorney. *Ibid.*

Costs of Country Solicitor.]—The costs of the attendance in Melbourne of the country solicitor of a party to a cause will only be allowed, in taxation between party and party, when the Master is of opinion that his attendance was reasonably necessary. *United Hand-in-Hand and Band of Hope Coy. v. National Bank of Australasia*, 4 V.L.R. (E.,) 271, 273.

In no case where the costs of the attendance of the country solicitor are allowed will the costs of the attendance of the town agent of such country solicitor be also allowed. *Ibid.*

Costs of Country Solicitor Ceasing to have Town Agent.]—Where a country solicitor ceasing to have a town agent opens an office in town for pending business, he is not entitled to the costs of attendance as a country solicitor at the taking of evidence and hearing. *Hardy v. Wilson*, 9 V.L.R. (E.,) 135.

SPECIFIC PERFORMANCE.

I. When Granted or Refused.

(a) *Concluded Agreement.*

Agreement with Corporation not under Seal—Important Part left Unsettled—Effect of Resolution of a Corporation—Long Performance of Terms of Agreement.]—The plaintiffs obtained permission from the Gold Fields' Commissioner to take two sluice heads of water from a certain creek for mining purposes. This permission was renewed by the Warden of the goldfields. Then the rights in the water became vested in the defendant council under an Act (Act No. 105) with power to continue to previous holders of water rights granted under such permissions as abovementioned the same average supply as before or to pay them a money compensation. The plaintiffs applied for a supply of two sluice heads of water, and the council passed a resolution granting such supply, and a draft of a guaranty to secure that supply with a qualification as to supply in seasons of drought was tendered to

plaintiffs and rejected. Plaintiffs received their supply for a long time. On bill for specific performance, *Held* that the resolution of a corporation is not a contract, and that as an important part remained unsettled there was no concluded contract; that as the bill rested on that alone the demurrer must be allowed without prejudice to the equities the plaintiff had from a long performance *de facto* of the terms of the agreement. *Connolly v. Shire of Beechworth*, 5 A.J.R., 50.

There is a great difference between the right to bring an action for breach of contract, and the right to bring a suit for specific performance. In the latter case the plaintiff must show a fair, clear, and conscientious case, and not attempt to get the benefit of a contract snatched by surprise. *Rawlings v. Hislop*, 9 V.L.R. (E.,) 25.

(*b*) *Certainty.*

What is.]—Two companies agreed to divide auriferous land in dispute, in equal shares. No surveyors were appointed, but by consent their solicitors marked out on a plan obtained from another company a division line. On the plan the land was bounded by two concentric circles, and two common radii thereof, cutting off common segments thereof; and the division line was drawn midway between the other two. One company receded from the agreement, but was held to it by the Court of Mines. Upon appeal *Held* that the agreement of compromise to divide the land, being assisted by an admitted plan which sufficiently described the land, was sufficiently certain between the parties, and might be specifically enforced, but *Semble* that standing alone without the plan it would not be sufficiently certain to be enforced. *Nicholas v. James*, 1 W. & W. (L.,) 255.

What is.]—An agreement leading to difficulty in its working out, but intelligible, is not too uncertain for specific performance. *Forbes v. Clarton*, 4 V.L.R. (E.,) 22.

For facts *see* S.C., *post column* 1355.

What is.]—D. and R., licensees under the "*Land Act* 1865," held neighbouring allotments, and agreed to exchange each a portion of their respective allotments, and entered into a written agreement, so vague in the description of the lands to be exchanged that it could not be enforced at law. They acted upon the agreement, however, by possession, fencing off and occupation afterwards till R. died. R.'s administratrix obtained a Crown grant of R.'s allotment, and she and plaintiff continued to occupy as plaintiff and R. had done. R.'s administratrix refused to complete, and D. brought a suit for specific performance, untruly alleging that he had obtained a Crown grant of his allotment, but before the hearing he did obtain such a grant. *Held dubitante curia* that specific performance should be decreed on the ground of part performance. *Semble* that had D. not obtained his grant, the Court would not have decreed specific performance, because D. would not have been able to perform his part of it. *Darcy v. Ryan*, 8 V.L.R. (E.,) 36; 3 A.L.T., 108.

What is.]—*Semble*, on motion for injunction that an agreement that a picture which had been painted by one person from notes and information furnished by another, should be the joint property of both, and that they should divide the profits of the sale of lithographed copies, could not be enforced for want of certainty. *Mitchell v. Brown*, 6 V.L.R. (E.,) 168; 2 A.L.T., 67.

Held, after taking evidence, that the agreement to lithograph was too vague and too uncertain to be enforced, there being no terms as to how the picture was to be finished, cost, number of copies, &c.; and that as the picture was joint property, unless the parties could agree as to the disposal, it would be sold, and the profits equally divided, each party to be at liberty to bid at the sale. *Mitchell v. Brown*, 7 V.L.R. (E.,) 55; 2 A.L.T., 154.

"Land Act 1869"—"Subject to my Getting a Lease."]—A., being entitled to a lease under "*Land Act* 1869" (No. 360,) Sec. 20, signed a document:—"I (A.) sell, subject to my getting my lease, my house, land, and all appurtenances, for the sum of £500, to B." B. did not sign any document. A. subsequently obtained his lease, and, with the consent of the Governor-in-Council, mortgaged it to S. Bill by B. for specific performance against A. and S. *Held* that the agreement was uncertain as to A.'s getting the lease, and as to the way the land was to be used in the meantime, and as to the time the £500 was to be paid, and that it was unilateral. *Stewart v. Ferrari*, 5 V.L.R. (E.,) 200.

Where an uncertain written agreement for sale of land is contrary to the actual verbal agreement between the parties, a Court of Equity will not enforce it, but will leave the parties to their remedy at law. *Ibid.*

"Reasonable Compensation."]—A corporation intending to erect a bridge entered into a parol contract with the administrator of a deceased selector to take a portion of the land for the purpose of a road thereto, giving him "a reasonable compensation." An attempt was made to fix the compensation by arbitration, but the time lapsed without an award being made. *Held* that the parol contract being enforceable on other grounds, it was not too vague, and a reference to the Master directed as to amount of reasonable compensation. Specific performance decreed. *Shire of Yea v. Roberts*, 5 V.L.R. (E.,) 223; 1 A.L.T., 52.

(c) *In other Cases.*

Against the Crown—Agreement for Selection—Withdrawal of Land under Reservation "on Account of Improvements"—"Land Act 1862," Sec. 46.]—Certain lands were thrown open for selection by proclamation on 10th September. On 8th September a proclamation was made reserving these lands from selection "on account of improvements," which proclamation was not gazetted till the 11th of September. K. duly applied for one of the allotments and fulfilled all the conditions precedent to entitle him to select under Sec. 16 *et seq.* On a petition by

K. for specific performance, *Held*, and affirmed on appeal, that under Sec. 46 the Governor-in-Council had power to reserve the lands, and that the proclamation was not too late. *Kennedy v. The Queen*, 1 W.W. & A'B. (E.,) 145.

Against the Crown—"Land Act 1862," Sec. 23—"Amending Act 1865," Sec. 7.]—K. selected land under a certificate issued under the "*Land Act* 1862," Sec. 23, and the "*Amending Act* 1865," Sec. 7. His selection was disallowed under a proclamation under Sec. 12 of the last-mentioned Act, on the ground that he had selected as agent for another. *Held*, on a petition under Act No. 241, that this proclamation was void, and *declared* that he was entitled to specific performance of the agreement on the part of the Crown to grant him a lease. *Kettle v. The Queen*, 3 W.W. & A'B. (E.,) 50.

Against the Crown—"Land Act 1860" (No. 117)—"Land Act 1862"—Orders in Council.]—D., C., and B., were pastoral occupants of the Lamplough run. Of this run 13,000 acres were proclaimed a common under the "*Land Act*" (No. 117). The whole of this common was abolished under the "*Land Act* 1862," and a new common of 3000 acres, portion of the 13,000 acres, was proclaimed. D., C., and B. claimed to resume occupation of the 10,000 acres under their pastoral license. This right was denied, and the 10,000 acres were sold as new runs. D., C., and B. refused to give up possession, and an action of ejectment was brought against them by the Crown. They then filed a petition under the Act No. 49, seeking to restrain the action, to obtain specific performance of an alleged agreement made with them by the Crown for a fourteen years' lease of Lamplough, with covenant for renewal under Orders-in-Council; and in the alternative to have it declared that they were entitled to an annual license of Lamplough, including the 10,000 acres, up to 1870, under the "*Land Act* 1862." *Held, per Molesworth, J.*, that the petitioners had no rights legally enforceable under the Orders-in-Council, inasmuch as the Crown was not bound by promises, as to Crown lands, of the Queen herself or any of her officers, though acted upon or partly performed, but only by grants under seal, or conveyances exactly conformable to Acts of Parliament authorising them; but that, as following a supposed decision between the same parties at law, the petitioners were entitled to the alternative relief prayed. *Held*, on appeal, that, conceding the existence of a contract with the Crown which could be enforced in equity, the petitioners had so recognised the "*Land Act* 1862," and availed themselves of advantages under it, that they could not be permitted wholly to reject that enactment, and claim all the benefits to be had by leases under the Orders-in-Council repealed by that Act; and that the remedy, if any, was at law; and as to the alternative relief given below, that the decree arose from a misapprehension of the decision at law, and ought not to stand. *Dallimore v. The Queen*, 3 W.W. & A'B. (E.,) 18, 33, 44, 45.

Against the Crown.]—*Ettershank v. The Queen; Nash v. The Queen; Winter v. The Queen*: *see* under LAND ACTS, *ante columns* 795, 796, 797.

Against Crown—Application for Mining Lease—"Crown Remedies and Liabilities Statute" (No. 241)—"Mining Statute 1865."]—The plaintiff applied for a gold mining lease under the "*Mining Statute* 1865" of certain land and was refused, but no reason was assigned for such refusal. The plaintiff then brought a petition under the Act No. 241 to compel specific performance of the alleged contract to grant a lease. *Held*, by *Molesworth, J.*, and affirmed by the Full Court on demurrer for want of equity, that there was no equity to compel the Crown to grant the lease, and that the fulfilment of preliminaries necessary for the application for the lease gave no rights as against the Crown such as would amount to a claim founded on a contract within the meaning of Act No. 241; that Sec. 39 of the "*Mining Statute* 1865" leaves it wholly discretionary with the Governor-in-Council to grant a lease or not, and with that discretion the Courts will not interfere. *Quære*, whether even if it is the duty of the Government to assign reasons for a refusal a *mandamus* would lie to compel the performance of that duty. *Hitchins v. The Queen*, 4 W.W. & A'B. (E.,) 133.

Against Crown—Suit by a Corporation for Reservation of Land for Public Purposes—"Land Act 1862" (No. 145,) Sec. 6—"Amending Act 1869" (No. 360,) Sec. 38.]—In 1843 the council of the (then) town of Melbourne applied for a reservation of certain Crown lands as recreation grounds, which was approved. In 1855 the Lieutenant-Governor approved of the corporation undertaking the conservancy and planting of the Carlton gardens. Before and after this the corporation was in possession of the Carlton gardens, improving, fencing and maintaining them out of corporation monies and Government monies. Under Act No. 145, Sec. 6, the corporation applied for reservation of the land, and in February, 1864, the land was reserved "for purposes of public recreation" under Sec. 8. Afterwards in March, 1870, the Crown in the *Gazette* proclaimed part of the land as a road under Sec. 38 of No. 360. On petition by the corporation, *Held*, and affirmed on appeal, that although there was no grant to the council and although the reservation under Act No. 145 was only temporary, yet there was a valid contract entered into by the Government capable of enforcement and *decreed* that the whole of the gardens should be reserved. *Mayor of Melbourne v. The Queen*, 2 V.R. (E.,) 183; 2 A.J.R., 76, 125.

Against Corporation — Not under Seal.]—By "*The Beechworth Waterworks Act* 1860" (No. 105,) the municipal council, represented by the defendant corporation, was entrusted with the construction and management of waterworks for the district, with power to continue to previous holders of water-rights granted under the permit of a commissioner or warden, the same average supply as they were previously entitled to, or to pay a money compensation; any dispute as to either to be settled by arbitration. A mining partnership, of which the plaintiffs were at the time of suit the representatives, offered to take a certain supply in compensation of their water-rights, and the council passed a resolution accepting the offer, and the town clerk wrote a

letter to that effect to the plaintiffs, adding a request for a draft of the guaranty proposed in exchange for the prior rights. The guaranty was never executed, but the supply agreed upon was furnished for ten years. The council in constructing the reservoir cut across and utterly destroyed the plaintiffs' races so that it was impossible to reconstruct them. Upon the council discontinuing plaintiffs' supply they filed a bill for specific performance. *Held* that the bargain, though not under seal, was a perfect contract on the part of those acting on behalf of the corporation, and had been perfectly acquiesced in by the corporation; that the corporation, having nothing affirmatively to do for the plaintiffs distinguishable from what they had to do in managing the waterworks, the Court could compel them to perpetually allow the plaintiffs the agreed-upon supply of water. *Connolly v. The Shire of Beechworth*, 2 V.L.R. (E.,) 1.

With Variation—Contract under Seal—Covenant not to Build on Adjoining Land—Subsequent Variation.]—Defendant entered into a contract under seal with plaintiff to sell to plaintiff certain land, the contract containing a covenant by defendant not to build on certain land adjoining. The contract was afterwards varied by plaintiff initialling a memorandum on the contract allowing the defendant to build on this strip of adjoining land from the rear, up to a point a certain distance from the street; defendant understanding this point to be 70 feet from the street, plaintiff under the impression that it was 74 feet from the street. Defendant built up to the point 70 feet from the street. It was then further agreed that plaintiff should use the wall of the building erected by defendant as a party wall. Differences arose as to this, and plaintiff filed his bill for specific performance of original agreement, and for an injunction restraining defendant from continuing a breach of covenant as so varied. *Held* that as the memorandum initialled by the plaintiff specified 70 feet as the distance from the street, it ought not to be varied upon parol evidence of what was understood, and *decreed* that the contract was effectually varied by the consent of the plaintiff to the erection of buildings erected thereon, and that the plaintiff was entitled to use the eastern wall as a party wall. Specific performance with that variation decreed. *M'Kean v. Francis*, 5 A.J.R., 158.

Mining on Private Property—Agreement not Illegal—Effect of a License in Writing not under Seal—Meaning of Words "all Legal Agreements."]—There is no illegality in agreements about mining for gold on private property, the parties dealing remaining subject to the Crown's right being at any time asserted. B. was the owner of certain land, which he leased to L. for five years from January, 1870, L. having a right to purchase the fee at a fixed price. On 15th December, 1871, L., by letter, purported to assign to plaintiff (A.) the right to mine on the property for a certain sum, and for the period of two years. D. was at this time negotiating for the purchase of L.'s interest, and on 2nd January, 1872, D. signed a paper by which he "agreed to recognise all legal agreements made by L. relating to the letting of his land for mining purposes." On 4th January, 1872, L. signed an instrument acknowledging that he had sold to D. all his right, title, and interest in the said land. D. refused to recognise the agreement made by L. in plaintiff's favour, alleging it to be an illegal one. Bill by plaintiff against L. and D. to enforce such agreement. *Held* that although the writing of 15th December, 1871, not being under seal, was revocable at law; yet as a clear contract it would entitle plaintiff to have a specific execution by a grant under seal to the same effect; that the qualification in the instrument of 2nd January, 1872, introduced by the words "all legal agreements" could not be read only as agreements binding in a court of law, or be read with reference to the rights of the Crown or the landlord; that as L. was bound to confirm the contract to plaintiff, and as he had made it a condition precedent in his agreement for sale to D. that such should be affirmed, the plaintiff was entitled as against D., and also as against other defendants, lessees from D., who had notice of plaintiff's claim. *Ah Wye v. Locke*, 3 A.J.R., 84, 85.

Agreement to Transfer Portion of Lease of Crown Lands—Fraud and Acquiescence—Improvements—Privity—Pleading.]—Where A., a lessee of Crown lands under Act No. 237, agrees to transfer a portion of his lease to B., and B. enters into possession, and afterwards sells with A.'s knowledge to C., who enters and improves, B.'s contract with A. is illegal under Act No. 237, Secs. 13, 14, 15; and without a distinct allegation in the bill to the effect that A. had notice of C.'s improvements, A.'s mere knowledge of the sale to C., and allowing him to enter and improve, do not amount to such fraud and acquiescence as will subject him to be compelled to confirm C.'s title, as C.'s improvements are not referable to any contract with A. *Tozer v. Somerville*, 1 V.L.R. (Eq.,) 262.

For facts, *see* S.C., *ante column* 799.

Registered Proprietor under "Real Property Act" (No. 140)—Agreement to Execute Mortgage.]—The "*Real Property Act*" protects persons taking conveyances from registered proprietors, but does not protect registered proprietors from being compelled by Courts of Equity to fulfil their contracts. By a memorandum in writing G.M. agreed to advance to D.M. a sum of money to enable him to select land under the "*Land Act* 1862," and D.M. agreed to select land, and deliver to G.M. the receipt for the purchase-money and rent and the Crown grant, and D.M. agreed to pay the sum advanced at the end of five years, with 20 per cent. interest, and to secure such payments by a legal mortgage of the land selected. D.M. selected land, and paid for it with the money advanced by G.M., and paid rents, and in November, 1864, obtained the Crown grant, and got himself registered as proprietor under the Act No. 140, and refused to execute a mortgage, alleging he had sold to B. In a suit by G.M. against D.M. and B. for specific performance of the agreement to execute a mortgage, *Held* that as B. had notice of the agreement before the purchase, such an agreement was enforceable, and decree made for specific performance. *Maddison v. M'Carthy*, 2 W.W. & A'B. (E.,) 151, 156.

Of Agreement to Lend Money on Mortgage part Performed.]—O. and D. having a mortgage from P. to secure £6102 1s. 2d., agreed to advance him £7000 over the same property, out of which the old mortgage was to be paid off, and a new mortgage was to be given. In pursuance of this agreement, a deed releasing the old mortgage was executed in escrow by O. and D., and a new mortgage executed by P., who received £178 1s. on account of the £7000. The solicitors for O. and D. subsequently objected to the title on the ground of *lis pendens* registered against P., and refused to complete the advance, threatening to enforce their remedies on the old mortgage. On bill by P. for specific performance of the agreement to lend, *Held* that P. having executed the mortgage, and having incurred costs in substituting the new mortgage for the old, was entitled to the advance agreed upon, and to restrain proceedings under the old mortgage; that although a bill does not generally lie for the specific performance of a contract to lend money on mortgage, yet this might be regarded as a bill by a person who has in fact executed a mortgage containing a receipt for consideration, which has been accepted and retained by a defendant refusing to pay the balance of the mortgage-money. *Phelan v. O'Shanassy*, 2 V.R. (E.,) 120; 2 A.J.R., 67.

Of Agreement for Dividing Profits.]—The Court will enforce an agreement between several persons in the same trade, for the purpose of dividing the profits of all business obtained by any of them, so as to avoid competition. *Collins v. Robbins*, 5 W.W. & A'B. (E.,) 194.

Of Agreement for Partnership.]—*See Leroy v. Herrenschmidt, ante column* 1124.

Of Letter of Guarantee.]—Plaintiff's son having taken defendant into partnership for a fixed term of three years, plaintiff guaranteed the defendant against loss from the new firm assuming the liabilities of a former partnership. This was acted upon, and the plaintiff gave the guarantee. Subsequently a deed of partnership was executed, which contained no express provision for the new firm taking the liabilities of the old, but it practically did so, and instead of the guarantee, plaintiff gave defendant a bill for £320. Afterwards the defendant, before the expiration of the term, wished to dissolve the partnership, and the plaintiff, at his request, induced his son to retire, defendant by letter becoming security for the repayment of a sum of £320, borrowed to pay off the bill, and undertaking to pay half profits until that sum was paid, if the profits were not less than £40 per month, and in the event of defendant taking another partner, then half his share of profits, if not less than £40 per month. The defendant took another partner, and resisted all liability on the letter. On bill by plaintiff for specific performance of the letter of guarantee, *Held* that the letter being an express contract in writing, signed by the defendant, it need not show consideration on its face; and that, there being a sufficient consideration disclosed by the collateral facts, the plaintiff was entitled to a decree. *Forbes v. Clarton*, 4 V.L.R. (E.,) 22.

Against Purchaser with Notice—Effect of Registration.]—Specific performance of an agreement decreed against the vendor and a purchaser with notice of the agreement, although the purchaser had obtained and registered her conveyance and the plaintiff's agreement was unregistered. *Vockensohn v. Zeven*, 3 W.W. & A'B. (E.,) 11. Affirmed on appeal. *Ibid*, p. 122.

Of Agreement for Partition.]—*See Arlett v. Kinsella, post column* 1359.

Of Agreement for License to Mine—Not under Seal.]—*See Miller v. Crawford, post columns* 1358, 1359.

Of Agreements for Leases and Option of Purchase.]—*See* cases under LANDLORD AND TENANT, *ante columns* 106—108.

II. MATTERS OF DEFENCE.

(*a*) *Misrepresentation, Fraud, and Delay.*

Fraud — Sale of Claim — Misrepresentation of Purchaser's Agents.]—The plaintiffs were mining on land leased from the Crown, and the defendants were owners of an adjoining claim. The defendants offered their claim for sale to the plaintiffs, and the bargain was concluded on behalf of the plaintiffs by their agent, B., who made some misstatements disparaging the value of the defendant's claim. The contract was concluded. On a suit for specific performance to which a defence was raised, that the vendors had been induced to contract by B.'s representations, *Held, per Molesworth, J.*, that although B. had misstated his opinion to the defendants and generally untruly disparaged the property, and had misstated his authority and used some artifice to mislead the vendors on the subject, yet there was no evidence that defendants had been misled or had relied on his statements, and specific performance decreed without costs. *Held*, on appeal to the Full Court, that although B. did not state fully and truly his opinion on facts which must have been within his own knowledge, yet conceding that B. made misrepresentations, and that the plaintiffs were bound by them, the defendants were not misled or induced to enter into the contract by them, nor were they made for the purpose of inducing the vendors to contract, nor was the contract obtained in consequence of them; that the subject matter was difficult of estimation, and was a fit matter for an equity suit. Decree affirmed. *Learmonth v. Morris*, 6 W.W. & A'B. (E.,) 74.

Fraud—Sale of Mining Claim—Misrepresentations of Vendee's Agent.]—Where there is proof of the misrepresentations of a vendee's agent but no proof of the vendor being misled by them or being induced to enter into the contract in consequence of them, it is not such fraud in the eyes of a court of equity as to disentitle the vendee to a decree for specific performance of the contract. *Ibid.*

Misrepresentation — Exchange of Lands — Puffing.]—A. & B. agreed to exchange leases granted under Sec. 20 of the "*Land Act* 1869." A. represented the land comprised in his lease as well timbered and suitable for the purposes

of B.'s business, who was a sawyer. B. refused to complete the contract on the ground that A.'s land was not well timbered; there was evidence that there was a considerable quantity of timber fit for the purposes required. On a suit by A. for specific performance, *Held* that A.'s representations were within the class of vague and indefinite commendations which amounted to mere puffing and which ought to put a purchaser on inquiry, but that if there had been no timber at all or such a small quantity that the land could not be properly described as timbered at all, A.'s statement, if relied on, might have been a ground of defence. Specific performance decreed. *Bramley v. Parrott*, 7 V.L.R. (E.,) 172.

Misrepresentation—How Defendant Resisting Suit should Avail Himself of.]—In bargains between vendor and purchaser, any representation by the former considered important by the buyer should be incorporated in the contract by way of warranty. In cases where no such warranty is introduced, the representations resting only upon conversations between the parties where wilful falsehood is indulged in by the vendor, the deceit releases the purchaser, but the purchaser must, at the time of the bargain, make the vendor understand definitely that he relies on the representation, and will hold him to it. A. brought a suit for specific performance against B., B., the purchaser, resisting it on the ground of misrepresentations of A. as to certain stock-in-trade being included in the contract, and as to certain average takings in a hotel business being greater than in fact they were. Specific performance decreed, though Court believed that the representations were in fact made, on the ground that B. had never alluded to a rescission of the contract, and by his conduct had led A. to believe that matters were going on smoothly. *Bradshaw v. Goer*, 5 V.L.R. (E.,) 26.

(*b*) *Statute of Frauds.*

What Signature Sufficient.]—D., the mortgagor of gold mining shares, by indenture, 17th October, 1861, conveyed them to defendant for a fixed sum on conditions that W. (defendant) should prosecute certain suits for the redemption of some of the shares, and that D. should have the right to repurchase the shares at a fixed sum within twelve months. D. alone executed the deed. W. prosecuted successfully the suits, and the mortgaged shares so recovered were transferred to him. D. became insolvent in November, 1861, and the plaintiff was appointed his official assignee. On 20th August, 1862, the plaintiff wrote to defendant offering to repurchase the shares, and tendered the fixed sum named in the indenture; but the defendant refused to assign. Bill by the plaintiff for specific performance of the agreement for repurchase in the indenture. The defendant put in an answer pleading the "*Statute of Frauds*," as he never executed any agreement for the repurchase. *Held* that the plea failed; the defendant only took the property under the deed, and he could not use D.'s signature as giving effect to the conveyance, and discard it as to the agreement for a repurchase. *Shaw v. Wright*, 2 W. & W. (E.,) 57.

What Signature Sufficient.]—Plaintiffs, Crown lessees, leased a mine to tributors under a written agreement, and the defendant, a company, by arrangement with the tributors, obtained possession, and worked the mine. Negotiations for a variation of the agreement were carried on between the solicitors for the plaintiffs and defendants, and a new draft was submitted by the former to the latter. The draft was returned with a memorandum by the defendants' solicitor:—"As altered by me, I approve of this draft on behalf of the company." Plaintiffs' solicitors then investigated the title, and had the draft engrossed, which the defendants refused to execute. Upon bill for specific performance, *Held*, *per Molesworth, J.* (affirmed on appeal,) that although on the facts proved the solicitor was authorised to act by the defendant company, and could bind it by a written contract under the "*Mining Companies Act* 1871" (No. 409,) Sec. 40, yet that his signing the draft as approved did not amount to a signing of the contract within the "*Statute of Frauds*," as it was not contemplated by either party that the deed should at once be executed. *Mogg v. Lord Raglan and St. Arnaud G.M. Coy.*, 4 V.L.R. (E.,) 138.

Part Performance—Agreement on Dissolution of Partnership Partly in Writing, Partly Parol—Effect of Honorary Engagement.]—The plaintiff and defendant were partners carrying on business as storekeepers in premises built on certain allotments. They agreed to dissolve partnership on the following terms, viz.:—That the defendant should keep the assets and business, paying plaintiff £1500 for them; that defendant should keep allotments 11 and 12, and plaintiff 10 and 10A, these four allotments being purchased with partnership funds, but the partners took conveyances of them as tenants in common, and not as partnership property; and the plaintiff entered into an honorary engagement not to compete in business. Afterwards they made a written agreement on the above terms, but omitting all mention of the four allotments and the plaintiff's honorary engagement. The defendant kept the assets and carried on the business, and got conveyances of allotments 11 and 12, but on the plaintiff entering into a competitive business refused to convey allotments 10 and 10A, although he had title deeds to them, and had the use and occupation of the land. On a bill for conveyance of allotments 10 and 10A, *Held* that the verbal arrangements as to the four allotments would be an addition to the other terms of the written contract not inconsistent with them; and that as the defendant had got his allotments, and had allowed the plaintiff the use and occupation of the lots 10A and 10 and the title deeds, there was sufficient part performance, and that the plaintiff's engagement not to enter into business was at most an honorary one, and the defendant could not refuse to complete the contract because it had not been carried out. Decree for conveyance of allotments. *Jennings v. Tivey*, 6 W.W. & A'B. (E.,) 152.

License to Mine—Not under Seal—Part Performance.]—A license to mine is an interest in land, and as such can only be created by deed. And where the license is vague, loose, and

indeterminate, the Court will not imply the doctrine of part performance (the licensee having entered and expended money) in such a contract to make up for its want of formality; the relief given on the ground of part performance has been given on the basis of something remaining to be specifically executed. *Miller v. Crawford*, 5 W.W. & A'B. (E.,) 199.

Enforcement of Agreement for Partition—Part Performance.]—Where A. and W. as partners had acquired allotments 23 AB and 24 AB, it was agreed that upon dissolution of the partnership A. should hold in severalty the allotment 24 AB, and the northern half of allotment 23 B; and that W. should hold in severalty allotment 23 A and the southern half of 23 B. The partners acted upon this agreement by building separate houses upon their respective portions. W. died and his widow re-married, and she and her husband K. denied any agreement. *Held* that there was an agreement to the above effect between A. and W., and that the partners having acted upon it by building houses upon their several portions specific performance should be decreed, and that the parties should execute conveyances and releases accordingly. The decree was also made binding upon the infant child of W. unless within six months of coming of age he showed good cause to the contrary. *Arlett v. Kinsella*, 1 A.J.R., 2.

Part Performance—Contract to Sublet part of Leased Ground—Consent of Crown.]—Plaintiffs were lessees under the Crown, and sued defendant in the Court of Mines for trespass. The defendant T. alleged a contract by plaintiffs to sublet part of the ground leased to him, and had erected a house upon the land. There was no evidence in writing of this contract. *Held* that there was nothing to show that the Crown had concurred in the sublease; and that there was no contract under seal by the plaintiffs, who were trustees for a mining company; and that defendant had acted foolishly in erecting a house without any bargain which would justify him in bringing a suit for specific performance in respect of it; that defendant had offered no defence available at law or in equity. *White v. Tippett*, 3 A.J.R., 107.

Part Performance.]—*Per Full Court*—Where a person was mining for gold under a contract with a mining company as to four acres, which he erroneously supposed to be valid at law, and he then entered into a second verbal contract as to ten acres, which included the four upon which he had previously been mining, and continued mining only on the four acres, and in no way varying his manner of working or of money dealing with the company, *Held*, not sufficient part-performance of the second contract to take it out of the *Statute of Frauds*, as the individual was in no way prejudiced, or the company benefited. *Chun Goon v. Reform G.M. Coy.*, 8 V.L.R. (E.,) 128, 152; 3 A.L.T., 137.

Part Performance.]—Possession taken before and irrespective of a contract is not part performance of it. Part performance to take a case out of *Statute of Frauds* must be by acts having reference to a complete agreement, and occurring after it. *Mogg v. Lord Raglan and St. Arnaud G.M. Coy.*, 4 V.L.R. (E.,) 138, 144.

Verbal Contract that Purchase should be for Plaintiff's Benefit—Subsequent Dealings on Faith of Contract.]—*O'Rourke v. Huon, ante column* 195.

Agreement for Compromise—What amounts to Part Performance.]—*Shiel v. Colonial Bank, ante column* 196.

Part Performance—Parol Contract.]—Where a corporation intending to erect a bridge entered into a parol contract with the administrator of a deceased selector to take a portion of the land selected for the purpose of a road thereto, and the administrator approved of the plans and works, and permitted their construction, *Held* that the case was taken out of *Statute of Frauds*, and specific performance decreed. *Shire of Yea v. Roberts*, 5 V.L.R. (E.,) 223; 1 A.L.T., 52.

Part Performance—Agreement to Grant a Further Lease.]—Where a landlord verbally agreed to renew a lease shortly before the old lease expired, and, in pursuance of such agreement, entered and painted the premises causing the tenant much inconvenience thereby, *Held*, on a suit by the tenant for the specific performance of the agreement, that the inconvenience suffered by the tenant amounted to part performance. *Polleykett v. Georgeson*, 4 V.L.R. (E.,) 207.

Part Performance will not Validate a Contract Void by Statute.]—*Chambers v. Chambers, ante column* 799.

For other cases of part performance *see Shiel v. Colonial Bank, ante column* 196; and *see post* under VENDOR AND PURCHASER.

(c) *In other Cases.*

Exchange of Leases—"Land Act 1869."]—A. and B., lessees under Sec. 20 of the "*Land Act* 1869," agreed to exchange leases. B. refused, and to a suit by A. for specific performance, set up as a defence the proviso in the lease, that he should not assign it except by way of mortgage, without consent of the Governor-in-Council. *Held* that this proviso was not a good ground of defence, as the Court may compel both parties to do all they can, and B. had not shown that he had endeavoured to obtain such consent and failed. *Quære* whether a lessee who has covenanted with his landlord not to assign without license, and has afterwards agreed to assign his lease, can resist a suit for specific performance, merely by showing that his landlord has refused to consent. *Bramley v. Parrott*, 7 V.L.R. (E.,) 172.

III. PRACTICE RELATING TO.

Reference to Master.]—Suit for specific performance. The bill averred an agreement for sale to the plaintiffs of land selected under the "*Land Act* 1862," and set out a deed executed in pursuance of the agreement, whereby the defendant granted to the plaintiffs the land and all his interest therein, and covenanted for further assurance that the land was alienated

by the Crown subsequently to the passing of the "*Real Property Act*," and could not be registered under that Act, and prayed specific performance of the agreement, and that defendant might execute the necessary documents for completing the plaintiff's title under the "*Real Property Act*." The defendant denied the agreement with the plaintiffs, but admitted an agreement with H. G., not a party to the suit, and admitted the execution of the deed in blank, and alleged that H. G. had filled in the names of the plaintiffs, whose names appeared as assignees, H. G. having sold to them; the deed of assignment was in evidence. *Held* by the Primary Judge (*Molesworth, J.*) that the matter must be referred to the Master to inquire into the circumstances of the assignment. Further directions reserved. *Held*, on appeal, that the reference if unnecessary should not have been directed, and that if the plaintiffs can establish their title to relief, the Full Court should not abstain from granting relief, merely because a decree adverse in express terms has not been made; and the Full Court made a decree in the terms prayed. *Glass v. Simson*, 2 W.W. & A'B. (E.,) 67.

Parties—Two out of Three Trustees—Suit for Specific Performance.]—S., a testator, made his will, appointing the two plaintiffs and another as trustees. This third trustee renounced, and the widow under a power in the will appointed T. as trustee in his place. After the appointment but before conveyance of the legal estate to the new trustee, the plaintiffs sold certain land to the defendant. The defendant refused to carry out the contract, and the two plaintiff trustees brought a bill for specific performance. *Held* that T. was a necessary party to the suit, and case ordered to stand over with liberty to join T. as a party, the costs of the day to be taxed in the ordinary way and not under General Orders of 1828. *Sargood v. Henry*, 5 A.J.R., 62, 63.

Parties to Suit—Mortgagee.]—A corporation which had the construction and management of waterworks entered into a contract not under seal to supply plaintiffs with water as compensation for depriving them of their water-rights. Subsequently the corporation mortgaged the tolls to the Board of Land and Works. Upon suit by the plaintiff to enforce the contract, the defendant objected that the Board should be made a party. Objection overruled. *Connolly v. The Shire of Beechworth*, 2 V.L.R. (E.,) 1.

Selection under "Land Act 1862"—Costs against Crown.]—On petition under the Act No. 49 by a selector of Crown lands under the "*Land Act* 1862" for specific performance of a contract for sale of Crown lands by the issue of Crown grants for the land selected, *decree* made for issue of grants. *Per Molesworth, J.*:—Where the Crown has not unequivocally admitted the right of a petitioner but has put him to prove his case and put forward certain objections which were given up at the hearing, costs will be given against the Crown. *Allnutt v. The Queen*, 2 W. & W. (E.,) 135.

Costs.]—Where a plaintiff failed clearly to establish acceptance of an offer by defendants for sale of land, bill for specific performance dismissed with costs. *Rawlings v. Hislop*, 9 V.L.R. (E.,) 25.

Costs—Averments in Bill and Answer.]—Upon bill by a bank, prohibited by its Act from purchasing land except for banking purposes, for specific performance of an agreement for sale of land, *Held* that as plaintiff did not aver and prove intention of using land for banking purposes, and as it appeared from evidence that it was plaintiff's intention to use land for other purposes, the bill should be dismissed *without costs*, as the defence of illegality was not raised in the answer. *Colonial Bank of Australasia v. Buckland*, 9 V.L.R. (E.,) 29; 4 A.L.T., 143.

STATUTE OF FRAUDS.

Statutes Incorporating—

"*Instruments and Securities Statute* 1864," Secs. 107, 108.
"*Landlord and Tenant Statute* 1864," Secs. 4, 5.
"*Statute of Trusts* 1864," Secs. 97-101.
"*Common Law Procedure Statute* 1865," Secs. 282-284.

(1) *What Contracts are within the Statute.*

See cases *ante columns* 193, 194.

Parol Agreement to give Executors a Commission.]—*Carter v. Murphy*, *ante column* 438.

Agreement of Hiring—For more than a Year.]—*Dale v. M'Culloch & Coy.*, *ante column* 891.

License to Mine.]—*Miller v. Crawford*, *ante columns* 1358, 1359.

Contract partly in Consideration of Marriage, partly in Consideration of some other Act to be Done.]—*Gordon v. Murphy*, *ante column* 504.

(2) *Forms and Conditions Required.*

See cases *ante columns* 194, 195.

Agreement to Settle Money in Consideration of Marriage—Deed Reciting Psyment when Payment not made.]—*See Gordon v. Murphy*, *ante column* 504.

Agent Ordering Goods to be Delivered Elsewhere than at Principal's Premises—Does not Constitute Acceptance.]—*Mitchell v. Watson*, *ante column* 1237.

Verbal Contract by Licensee under "Land Acts" to Allow Crown Grant to Issue to Creditor as Security.]—*Harrison v. Murphy*, *ante column* 1049.

Letters as to Agreement that Sale of Equity of Redemption should Operate as a Second Mortgage.]—*Mouatt v. M'Kenzie, ante columns* 1050, 1051.

In Reference to Contracts for Sale of Goods.]—*See ante columns* 1289—1291.

As Regards Contracts for Sale of Land.]—*See* VENDOR AND PURCHASER.

Operation on Guarantees.]—*See ante columns* 488, 489.

(3) *Other Points.*

When a Defence to Suits for Specific Performance.]—*See ante columns* 1357—1360.

Need not be Pleaded to be Used as a Defence.]—*See Jennings v. Tivey* and *Randall v. Mau, ante column* 1161.

Person Taking Advantage of Contract may Estop Himself from Denying that Written Contract is not Sufficient within "Statute of Frauds."] *Ford v. Young, ante column* 413.

STATUTES OF LIMITATION.

See LIMITATIONS (STATUTES OF.)

STATUTES.

(1) *Construction and Interpretation.*
  (*a*) *General Rules, column.*
  (*b*) *Particular Statutes, column.*
(2) *Victorian Acts—Validity and Effect of, column.*
(3) *Imperial Statutes—What are in Force in Victoria, column.*

(1) *Construction and Interpretation.*

(*a*) *General Rules.*

Schedule—Enacting Part.]—Where there is any conflict between the schedule and the enacting part of a Statute, the enacting part must prevail. *Goodman v. Mayor, &c., of Melbourne*, 1 W. & W. (L.,) 4.

A schedule may be used to construe an Act if not clearly inconsistent with it. *In re Clerk*, 2 V.R. (M.,) 11; 2 A.J.R., 48.

Provisions of Repealed Act kept in Force by Reference in a Later Act.]—Where an act refers to the provisions of a prior Act, it is the same as if every clause so referred to were set out in *hæc verba* in the referring Act, and although the whole of the prior Act may be repealed by a still later Act, such of its provisions as are referred to in the intermediate Act are, by virtue of such intermediate Act, kept in force for the purposes of such intermediate Act. *Fenton v. Dry*, 1 W.W. & A'B. (L.,) 64.

A later Act does not, by implication, repeal a prior Act when the two Acts are not co-extensive, and do not in fact refer to the same subject matter, and are not inconsistent with each other. *Regina v. Parker*, 2 W.W. & A'B. (L.,) 1.

Conflicting Enactments.]—In a case of conflicting enactments, the Court is bound to hold that view which harmonises with the greatest body of law, especially when such a construction favours the liberty of the subject. *In re Burton*, 3 W.W. & A'B. (L.,) 3.

Duty of the Court.]—*Per Molesworth, J.*—Judges are bound to follow the distinct language of acts without regard to their policy; where language is indistinct, then with regard to policy; and only where the literal distinct meaning of words is absurd to break through it. *Douglass v. Simson*, 6 W.W. & A'B. (E.,) 32, 41.

The duty of the Court is so to interpret Acts of Parliament that they shall have their full effect, and that the manifest intention of the Legislature shall be carried out. And this principle is to be carried out even though it involve the striking out of words in the Act in order to do so. *Regina v. Draper*, 1 V.R. (L.,) 118; 1 A.J.R., 94.

Although it is incumbent upon the Court consistently with the correct rules of interpretation so to construe a Statute as to give effect to the intention of the Legislature, yet the Court is not at liberty to act in direct opposition to a series of decided cases on a similar Statute. *Hedrich v. Commercial Bank*, 1 V.R. (L.,) 198; 1 A.J.R., 155.

The Court is not at liberty to expunge words of an Act according to its caprice. Its duty is to endeavour to make sense of every part of an Act, unless there be a manifest repugnancy, or unless there be an omission, which it is not the province of the Court to fill up. *Regina v. Heron, ex parte Bryer*, 2 A.J.R., 110.

Where an Act (No. 379) contains no recital showing its special object, the Court will not adopt the view that, if an Act intends alteration, every item of the alteration is to be carried as far as possible. *In re Mackay*, 3 A.J.R., 10.

It is the duty of the Court in construing a Statute to make grammar of it as well as sense. *Per Stephen, J.*—It must be construed according to its grammatical meaning, unless such a construction would reduce it to an absurdity, or an impossibility. *Jacobs v. Jennings*, 1 V.L.R. (L.,) 172.

Per Fellows, J.—If it can be prevented, no clause, sentence, or word should be deemed superfluous, void, or insignificant. *Semble*, a marginal note is not part of the Act. *Per Molesworth, J.*—Where the object of the Legislature is plain and unequivocal, Courts ought,

without violence to the words, to adopt such a construction as will best effectuate the intentions of the lawgiver. *Regina v. M'Ilwraith, ex parte Smith*, 3 V.L.R. (L.,) 166.

Comma.]—A comma is not part of an Act of Parliament. *Regina v. M'Cormick, ex parte McMonigle*, 10 V.L.R. (L.,) 268, 272; 6 A.L.T., 105.

Decisions under Former Act—New Act Adopting totidem verbis the Language of Former Act.]—Where there is a new Act passed adopting without alteration the language of a former Act, the Legislature may, in some degree, be regarded as adopting the construction put upon the former Act by previous decisions on it: *per Molesworth, J. Attorney-General v. Shire of Kyneton*, 1 V.L.R. (E.,) 269.

Effect of Recital.]—*Per Fellows, J.*—A mere recital of a point of fact or of law in an Act of Parliament is not conclusive. *Carvalho v. Black Hill South Extended Coy.*, 1 V.L.R. (L.,) 225, 231.

Force of "Headings" of Parts into which an Act is Divided.]—*Semble, per Stawell, C.J.*, and *Williams, J.* (*dissentiente Holroyd, J.*,) that where a Statute expressly enacts that it is to be divided into parts, and assigns a heading to each part, this arrangement is intended merely to facilitate reference, and not to rigidly limit the sections to the subjects specified, excluding all others, even of a cognate character. *Union Steam Shipping Coy. of New Zealand v. Melbourne Harbour Trust Commissioners*, 8 V.L.R. (L.,) 107; 4 A.L.T., 28.

Per Holroyd, J.—Headings are not like marginal notes; but, on the contrary, are themselves enactments, and must be read as substantive parts of the Act. They indicate *primâ facie* that every section in the part, and every portion of such section, has some connection with the subject to which, liberally construed, the heading relates. *Ibid*, p. 184.

"It shall be lawful."]—The question whether the words "it shall be lawful" in an Act of Parliament are mandatory or not, must be solved *aliunde*, and in general it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power. *Ex parte Nyberg, in re Nicholson*, 8 V.L.R. (L.,) 292, 296.

"Pawnbrokers Statute 1865," Sec. 5.]—Sec. 5 of the "*Pawnbrokers Statute* 1865," which provides that "it shall be lawful for the justices . . . . if they shall be satisfied with the character of the person so applying, to grant a license," &c., is mandatory, and if, upon an application for a pawnbroker's license, the justices are satisfied with the character of the applicant they are bound to grant the license; and if, though so satisfied, they determine not to grant a license, no appeal will lie, but a *mandamus* may issue to compel them to hear and determine according to law. *Ibid*; see also S.C. 4 A.L.T., 78.

Per Molesworth, J.—Interpretation clauses must be themselves interpreted reasonably to promote, and not to defeat the purposes of the Act they are intended to elucidate, and the usual restriction "unless there be something in the subject or context repugnant to such construction" must, if not expressed, be of necessity understood. *In re Fourth S.M. Building Society*, 9 V.L.R. (E.,) 54; 4 A.L.T., 182.

Per Higinbotham, J.—Where a leading phrase occurring in an Act of Parliament is of doubtful meaning, and the Legislature has omitted to remove the doubt either by interpretation or recitals, it becomes a necessity to examine the history of the law, and it is permissible to have recourse to all sources of information from which enlightenment can be derived in any degree, great or small, as to the intention of the Legislature. *Renison v. Keighran*, 10 V.L.R. (L.,) 133, 138.

Effect of Interpretation.]—*Per Stephen, J.*—Where the Court interprets a new Act, such interpretation becomes part of the legislation on the subject. *Tommy Dodd Coy. v. M'Clure*, 1 V.L.R. (L.,) 237, 243.

Authority to do an Act.]—Where an Act of Parliament merely authorises a body to do a particular act, it does not authorise such body to do that act in such a way as to create a nuisance, or to injure or interfere with private rights, unless such an intention clearly appears in the Statute itself, either by express words or necessary implication, and even then the *onus* is cast upon those who seek to interfere with private rights of bringing themselves within the qualification of the general principle; in other words, where the terms of a Statute are not imperative but permissive, the fair inference is that the legislator intended that the discretion as to the use of the general powers thereby conferred, should be exercised in strict conformity with private rights. *King v. Mayor, &c., of Kew*, 10 V.L.R. (L.,) 183, 187, 188; 6 A.L.T., 54.

"Building Societies Act 1874."]—Where a Statute ("*Building Societies Act* 1874," No. 493), creates a corporation for a particular purpose, and confers upon it powers for that purpose, such corporation is deemed to have only the powers by Statute conferred upon it expressly or impliedly, and everything else is prohibited. *In re Metropolitan Permanent Building Society*, 7 V.L.R. (E.,) 86; 3 A.L.T., 26.

Overriding Common Law Right.]—To enable that to be done which is expressly in opposition to a clear and absolute common law right, something in the nature of an express authority by Statute would be required. *Fergusson v. Union Steamship Coy.*, 10 V.L.R. (L.,) 279, 289; 6 A.L.T., 120.

"Melbourne Harbour Trust Act 1876," Sec. 50.]—Sec. 50 of the "*Melbourne Harbour Trust Act* 1876" confers no authority on the Trust to interfere with rights of navigation. *Ibid.*

Criminal Statute.]—Apart from any application of the principle *ejusdem generis*, it should be assumed in construing a criminal Statute (Act No. 265) that Parliament intended a similar punishment and an equal mode of legislation for offences classed together as of like nature, unless express words forbid such a construction. *Bergin v. Cohen*, 3 W.W. & A'B. (L.,) 133.

Penal Statute.]—A penal Statute must be construed strictly, and it does not affect this interpretation if the Act is remedial and beneficial as well. *Regina v. Dowling, ex parte Laby*, 5 A.J.R., 74.

Quasi-Criminal Statute.]—The "*Imprisonment for Debt Statute*," being *quasi*-criminal, its provisions must be strictly adhered to. *Regina v. Pritchard, ex parte Smart*, 2 A.L.T., 58; *ante column* 346.

"Duties on Estates Statute" (No. 388,) Sec. 24.]—Sec. 24 is not to be construed strictly against those who seek its benefit, because it is an exception to a general rule. *Armytage v. Wilkinson, ante columns* 389, 390.

"Land Acts 1862 and 1865."]—Statutes affecting the property of the Crown should be construed strictly as to those claiming against it. Acts giving to a class rights in Crown property against the public should be construed strictly as to those claiming against it. *Simson v. The Queen*, 2 W.W. & A'B. (E.,) 113, 125.

Penal Statute.]—*Per Williams, J.* "Where a Statute creates that an offence which was not an offence before and in the section creating the offence prescribes the remedy or penalty attaching to that offence, that remedy or penalty and none other must be followed." *Regina v. Alley, ex parte Davey*, 9 V.L.R., (L.,) 59; 4 A.L.T., 158.

Bye-law.]—The same rule is to be observed in the construction of an Act and a bye-law under it, and a penal provision in either must be strictly construed. *Regina v. Templeton, ex parte Mow Sang*, 1 V.L.R. (L.,) 55.

Statute Authorising Penalty—Levy by Distress Should Precede Imprisonment unless otherwise Provided.]—*See ex parte Fat Tack; ex parte Ah Poon, ante column* 1146.

Enabling Acts.]—Enabling Statutes are to be construed strictly. *Brooks v. The Queen*, 10 V.L.R. (E.,) 100, 109; 5 A.L.T., 199.

Retrospective.]—*Per Molesworth, J.*—In construing Acts of Parliament the intention to be retrospective can only be effectuated by very clear and distinct words, and exception from the retrospective operation should be construed liberally for the exception. *Nash v. The Queen*, 1 V.R. (E.,) 118, 121; 1 A.J.R., 103.

When Construed Retrospectively.]—The Courts will not construe an Act retrospectively so as to impose new conditions unless its language absolutely compels them. *Regina v. Sturt*, 3 V.R. (L.,) 1; 3 A.J.R., 22.

Retrospective Effect.]—Unless the intention of the Legislature is clearly expressed that an Act is to be retrospective it is the duty of the Court to hold that its operation is not to be such as to interfere with existing rights. The presumption in all cases is that the Act regulates the future and not the past, and the maxim—"*Nova constitutio futuris formam imponere debet non præteritis*" applies. Although an Act is not retrospective as to rights, it is retrospective as to procedure. *The Tommy Dodd Coy. v. Patrick*, 5 A.J.R., 14, 16.

Retrospective.]—Although the Court will not generally give a retrospective effect operation unless the intention of the Legislature to that effect is clear and unambiguous, yet, where the effect of holding that an Act is not retrospective would be to cause circuity of action, and would be opposed to the true intent and meaning of the Act, the Court will construe an Act retrospectively even although the interpretation be difficult. *Trenery v. Stewart*, 5 V.L.R. (L.,) 247, 254, 255, 256; 1 A L.T., 37.

For list of retrospective and non-retrospective Statutes *see* under next sub-heading.

Remedies under.]—Where a Statute imposes tolls or other payments (poundage fees), and prescribes the mode in which they may be recovered, no other remedy is to be pursued. *Cotter v. Hann*, 3 V.R. (L.,) 12; 3 A.J.R., 31.

But the remedies in cases of encroachment under the "*Mining Statute* 1865" are cumulative and do not oust the ordinary jurisdiction of the Supreme Court. *Mulcahy v. Walhalla G.M. Coy.*, 5 W.W. & A'B. (E.,) 103, 120.

Imposing Taxes.] — Statutes imposing taxes should be construed strictly against the Crown. *In the Estate of Henty*, 4 V.L.R. (I.P. & M.,) 54.

Time of Passing of Statute.]—When a Victorian Act of Parliament is reserved for the Royal assent it does not "pass" until the proclamation of it in this colony in accordance with 5 & 6 Vict., cap. lxxvi., Sec. 33. *In re Turner*, 2 W.W & A'B. (E.,) 104.

(*b*) *Particular Statutes.*

7 Vict., No. 19, Sec. 18.]—In section 18 of 7 Vict., No. 19, the expression "in contemplation of insolvency," means in contemplation of the sequestration of his estate; whilst the words "knowing himself to be insolvent," mean knowing himself to be incapable of meeting his engagements. The word "or" between the two expressions is used in the disjunctive, separating two distinct states of circumstances, so that the latter expression is not merely explanatory of the former. *In re Handasyde*, 1 W. & W. (I.E. & M.,) 110.

"Land Act 1865."]—An Act of Parliament ("*Land Act*" No. 237,) which provides that certain acts shall be deemed a forfeiture of interest, and that upon the publication of declaration of forfeiture in the *Government Gazette* the terms created by a lease granted by the Crown shall cease and determine, &c., is to be

construed in the same way as a similar clause in a lease between subject and subject, where a lessor attempting to eject a lessee would be called on to prove the act of forfeiture on which he relied. *M'Dowell v. Myles*, 6 W.W. & A'B. (L.,) 16.

"Land Act 1869," Sec. 101.]—*See Ettershank v. The Queen*, *ante* columns 792, 793, 794.

"Land Act 1862," Secs. 26, 31, 125, Schedule 2.]—*Regina v. Taylor*, *ante* column 802.

And for LAND ACTS generally *see* under LAND ACTS.

18 and 19 Vict., Cap. 56, Sec. 5.]—The Statute which transfers Crown lands to the colonial Legislature does not give to imperfect or honorary contracts of the Crown a binding efficacy as against the Crown. *Davis v. The Queen*, 6 W.W. & A'B. (E.,) 106, 116.

Act No. 273, Part 13—Act No. 379.]—The "*Insolvency Statute* 1871" (No. 379,) does not repeal Part 13 of Act No. 273. *In re Knowles*, *ante* column 627.

18 Vict, No. 3—"Constitution Act"—22 Vict. No. 68.]—18 Vict., No. 3, was recited in a schedule to 22 Vict., No. 68, and the preamble to No. 68 recited the schedule, and enacted that certain Acts, enumerated in the schedule as the same should be altered or amended, should be continued in full force and effect. *Held* that, rejecting the schedule, yet as 18 Vict., No. 3, was previously in force for one year only, the effect of No. 68 was to make it perpetual, and that the fact of 18 Vict., No. 3, being specified both by date and title was sufficient to make it valid; and that the *Constitution Act* giving the Legislature power to vary or repeal an existing Act, also gave the Legislature power to continue and re-enact it, and that 22 Vict., No. 68, in making No. 3 perpetual was a re-enactment of it. *Ryall v. Kenealy*, 6 W.W. & A'B. (L.,) 193, 200, 201; N.C., 7.

"Lands Compensation Statute 1869," Sec. 36—"Easement."]—The word "easement" in Sec. 36 of the "*Lands Compensation Statute* 1869" relates to rights of passage only. *Austin v. President, &c., of Shire of Dunmunkle*, 8 V.L.R. (L.,) 224.

"Landlord and Tenant Statute 1864," Secs. 96, 97—Remedy of Tenant where Justices have Issued without Jurisdiction Warrant of Possession.]—*Ex parte Carey; Regina v. Carr; Regina v. Taylor ex parte Blackburn; Ex parte Shaw*; *ante* column 813.

And generally for "*Landlord and Tenant Statute* 1864," *see* LANDLORD AND TENANT.

"Local Government Act 1874," Sec. 418.]—A hole in a street is not a hole near a street within the meaning of Sec. 418 of the Act. *Kensington Starch and Maizena Coy. v. Mayor of Essendon and Flemington*, 6 V.L.R. (L.,) 265; 2 A.L.T., 35.

Instruments and Securities Statute 1864, Sec. 98—Meaning of Word "Specialty."]—*Stackpoole v. Glass*, *ante* column 718.

Non-retrospective Statutes—Act No. 379, Sec. 70.]—Sec. 70 of the "*Insolvency Statute* 1871" (No. 379) is not retrospective. *Dallimore v. Oriental Bank*, *ante* column 469.

Non-Retrospective Statutes—"Married Women's Property Act," Sec. 18.]—Sec. 18 of the "*Married Women's Property Act*" (No. 384,) is not retrospective. *Hutchings v. Cunningham*, 2 V.R. (L.,) 236; 3 A.J.R., 64.

"Administration Act" (No. 427)—"Duties on Instestates' Estates Statute 1870" (No. 388.)]—The combined effect of these Statutes is not retrospective as to succession duty. *In re Quinlan*, 2 V.L.R. (I.P. & M.,) 17.

"Gold Fields Amendment Act" (No. 148.)]—Sec. 4 of this Act is not retrospective. *Ex parte Barclay, in re Pascoe*, *ante* column 918.

"Life Assurance Act" (No. 474.)]—This Statute is not retrospective. *Ettershank v. Dunne*, *ante* column 724.

"Wines, Beers, and Spirits Sale Amendment Act" (No. 390.)]—This Act has not a retrospective effect. *Regina v. Sturt*, *ante* column 830.

Retrospective Statutes—"Duties on Estates Amendment Act" (No. 523.)]—*Per Molesworth, J.*—The Act is in some degree retrospective as to persons who died between its commencement and its passing. *In re Bell*, *ante* columns 390, 391.

"Mining Statute" (No. 291,) Sec. 73.]—This section has a retrospective operation. *Vivian v. Dennis*, *ante* column 915.

"Land Tax Act" (No. 575,) Sec. 55.]—This section has a retrospective operation. *Trenery v. Stewart*, 5 V.L.R. (L.,) 247; 1 A.L.T., 37.

Act No. 409.]—*Held*, overruling *Tommy Dodd Coy. v. Patrick*, 5 A.J.R., 14, that Act No. 409 in its provisions as to forfeiture of shares for nonpayment of calls is retrospective. *Chun Goon v. Reform G.M. Coy.*, *ante* columns 1020, 1021, 1026; and *see* also S.C., *ante* column 1014.

"Married Women's Property Act," Sec. 5.]—*Per Molesworth, J.* (in Chambers.) The words "any husband" in Sec. 5 of the "*Married Women's Property Act*" (No. 384) apply only to the husband in existence at the time the wife acquires the property. *Griffiths v. Griffiths*, 1 A.L.T., 119.

"Marriage and Matrimonial Causes Statute Amendment Act 1883," Sec. 25—"Passing" of Act.]—The "*Marriage and Matrimonial Causes Statute Amendment Act*" (No. 787,) was reserved for the Royal assent on the 3rd November, 1883. The Royal assent was given on the 4th of March, 1884, and was proclaimed on the 7th of May next. *Held* that the Act "passed" on 4th of March, and that a suit commenced on the 2nd of May, 1884, was not "pending at the passing" of the Act within the meaning of Sec. 25 of the Act. *Carlyon v. Carlyon*, 10 V.LR. (I.P. & M.,) 51.

"Mining Companies Amendment Act" (No. 324,) Sec. 9—Meaning of Word "Action."]—The word "action" in Sec. 9 of the Act No. 324 means an action on a contract by a third person against the partnership. *Allardyce v. Cunningham, ante column* 1130.

"Statute of Trusts," Sec. 88—Public Officer.]—Sec. 88 of the "*Statute of Trusts* 1866" (No. 234,) does not apply only to "public officers," but the word "public" has been inadvertently inserted in the section, and the word "officer" must be popularly interpreted. *Regina v. Draper*, 1 V.R. (L.,) 118; 1 A.J.R., 94.

The word "officer" in Sec. 88 of the "*Statute of Trusts* 1864," includes the assistant-manager of a bank. *Ibid.*

(2) *Victorian Acts—Validity and Effect of.*

Colonial Act—Repugnancy to Imperial—When Invalidated by.]—The only repugnancy that will invalidate a colonial Act is a repugnancy to some Act of the Imperial Parliament affecting the colony, or some order or regulation made under such an Act, or to some of the leading principles of the Common Law. *Regina v. Whelan*, 5 W.W. & A'B. (L.,) 7, 18.

The Supreme Court has power to examine the validity of an Act of the Parliament of Victoria. *In re Dill*, 1 W. & W. (L.,) 171, 187.

Colonial—What Imperial Acts they may Repeal.]—Colonial Statutes may repeal Imperial Acts which extend to dependencies of the Crown, being brought into them, together with common law rights by persons who become inhabitants of a colony, but not Imperial Acts which take effect in the colony only. *Regina v. M'Carthy*, 4 A.J.R., 155.

Therefore although the "*Gaols Statute* 1864," Sec. 27, is repugnant to Sec. 9 of the "*Habeas Corpus Act*" (31 Car. II., cap. 2,) the former Act is valid since the "*Habeas Corpus Act*" extends to the whole of the British dominions. *Ibid.*

5 Will. 10, No. 22—11 Vic., No. 33—How much in Force.]—*See Fenton v. Dry, ante column* 1147.

Common Law Practice Act (19 Vic. No. 19)—Effect of.]—*See Appleton v. Williams, ante column* 1207.

(3) *Imperial Statutes.*

5 Richard II., Stat. 1, Cap. 7.]—The Act making forcible entry and detainer an offence is in force in Victoria by virtue of 9 Geo. IV., Cap. 83. *Regina v. Templeton, ex parte Moore*, 4 A.J.R., 20; *see* S.C., *ante column* 754.

32 Henry VIII., Cap. 9.]—This Statute relating to buying of titles is in force in Victoria. *a'Beckett v. Matthewson*, 1 W. & W. (L.,) 29; *See* also *Murphy v. Michel*, 4 W.W. & A'B. (L.,) 13, 22.

22 & 23 Car. II., Cap. 10.]—This Statute (a Statute of Distributions) is in force. *In re Kinderlin*, 1 W. & W. (I.E. & M.,) 11. *See* S.C. *post* under WILL—PROBATE—Practice, &c.—Bonds and Sureties.

22 & 23 Car. II., Cap. 10, Sec. 6—1 Jac. II., Cap. 17, Sec. 6.]—These Statutes (Statutes of Distributions) are in force in Victoria. *Skeeles v. Hughes*, 3 V.L.R. (E.,) 161, *ante column* 385.

29 Car. II., Cap. 7, Sec. 1.]—The provisions of this Act as to the observance of Sunday are in force in Victoria. *Garton v. Coy*, 4 A.J.R., 100, *ante column* 849.

9 & 10 Will. III., Cap. 15.]—This Act giving Courts of Record control over arbitration questions is in force in Victoria. *M'Meckan v. White*, 1 W.W. & A'B. (E.,) 165; *Crooke v. Swords*, 5 W.W. & A'B. (E.,) 136, 139.

4 & 5 Anne, Cap. 16, Sec. 19.]—This Act (a Statute of Limitations) is in force in Victoria. *Griffiths v. Block*, 4 V.L.R. (L.,) 294, *ante column* 849.

33 Geo. III., Cap. 13.]—This Act is in force in Victoria, so that the Court can, under it, take judicial notice of the date of passing of an Act endorsed thereon. *Glass v. The Queen*, 4 A.J.R., 133.

38 Geo. III., Cap. 87.]—This Statute providing for the appointment of an executor *durante absentiâ* is in force but is inapplicable owing to Act No. 427. *In the Will of Ryan*, 7 V.L.R. (I.P. & M.) 38; 2 A.L.T., 143.

2 & 3 Vict., Cap. 15.]—*Semble* that this Act (Custody of Infants) is in force in Victoria. *Murphy v. Kelly*, 2 V.R. (E.,) 139; 2 A.J.R., 128.

8 & 9 Will. III., Cap. 11—3 & 4 Will. IV., Cap. 42, Sec. 32.]—The Act 8 & 9 Will. III., Cap. 11, allowing a judge to certify that there was reason for joining a defendant who succeeds, so as to deprive him of his costs, is in force in this colony; but only applies to actions of pure trespass. The more extensive provision contained in the later Act 3 & 4 Will. IV., Cap. 42, Sec. 32, allowing a judge to certify in actions of trespass on the case, is not incorporated in the "*Common Law Procedure Statute* 1865," and is not in force in this colony. *Dakin v. Heller*, 4 V.L.R. (L.,) 114; *see* S.C., *ante columns* 242, 243.

6 Geo. IV., Cap. 94—5 & 6 Vict., Cap. 39.]—Of these Acts (Factors' Acts) the former is in force, the latter not. *Levi v. Learmonth*, 1 W. & W. (L.,) 283, 289.

32 & 33 Vict., Cap. 33.]—*Quære*, whether this Act (Abolition of Forfeiture for Felony) extends to Victoria. *Johnston v. Kelly*, 7 V.L.R. (E.,) 97; 3 A.L.T., 41.

3 Ed. 1, Cap. 1.]—*Quære*, whether this Act relating to offences by attornies is in force. *Quirk v. Watson, ante column* 1336.

22 Geo. II., Cap. 46, Sec. 11.]—The 22 Geo. II., Cap. 46, Sec. 11, relating to offences by attornies by which they may be struck off the roll is not in force in this colony. *In re Grieve*, 1 W. & W. (L.,) 197.

18 & 19 Vict., Cap. 90.]—This Act relating to costs of the Crown has not been adopted in Victoria, nor has any similar Act been passed. *Barber v. Barter*, 1 W.W. (E.,) 153.

And *see* the following :—

13 Eliz., Cap. 5—
Goodman v. Hughes, column 466.
Richmond v. Dick, columns 466, 467.
Shaw v. Salter, column 467.
Shaw v. Scott, ,, 468.
Goodman v. Boulton, columns 468, 469.
Dallimore v. Oriental Bank, columns 469, 577.
Sinnott v. Hockin, ,, 469, 470.
Smith v. Hope, column 470.
Halfey v. Tait, ,, 474.
Smith v. Smith, columns 475, 540, 541.
Yandell v. Hector, columns 476, 477.
Toohey v. Steains, column 477.
Colonial Bank v. Pie, ,, 477.
Douglas v. M'Intyre, ,, 477.
In re Healey, ,, 577.

27 Eliz., Cap. 4—
Gladstone v. Ball, ,, 470.
Moorhouse v. Rolfe, ,, 470.
Ronalds v. Duncan, ,, 471.
Moss v. Williamson, ,, 472.
Colechin v. Wade, ,, 472.
In re M'Donald, ,, 472.
Droop v. The Colonial Bank ,, 473.
Conole v. Horigan, ,, 473.
Smith v. Smith, columns 540, 541.
Moorhouse v. Rolfe, column 1308.

27 Eliz., Cap. 4, Sec. 2—
Sugden v. Reilly, columns 416, 471.

22 & 23 Car. II., Cap. 10, Sec. 1—
In re Ellis, *post* under Will — Probate, &c. — Bonds and Sureties.

8 & 9 Will. III., Cap. 11, Sec. 8—
Miller v. Tripp, column 118.

9 & 10 Will. III , Cap. 15, Sec. 2—
In re Husbands & Husbands, ,, 53.

13 Geo. II., Cap. 18, Sec. 5—
Ex parte Sayers, ,, 129.

38 Geo. III., Cap. 87—
In the Will of Ryan, *post* under Will—Probate, &c.—To Whom Granted-Executors.

39 Geo. III., Cap. 123—
Regina v. Wood, ,, 290.

52 Geo. III., Cap 146—
Graham v. Graham, ,, 423.

54 Geo. III., Cap. 15, Sec. 4—
a'Beckett v. Matthewson, ,, 345.
M'Ewan v. Moncur, ,, 345.

57 Geo. III., Cap. 19—
Regina v. Wood, ,, 290.

6 Geo. IV., Cap. 94, Sec. 2—
Leir v. Learmonth, ,, 1235.

6 Geo. IV., Cap. 50—
Regina v. Levinger, ,, 308.

9 Geo. IV., Cap. 31, Sec. 9—
Regina v. Mount and Morris, columns 317, 318.

11 Geo. IV. and 1 Will. I V., Cap. 47—
Walker v. Hogan, *post* under Vendor and Purchaser—Enforcement, &c.–Purchase Money.

11 Geo. IV. and 1 Will. IV., Cap. 65, Sec. 17—
In re Dight, column 558.

2 Will. IV., Cap. 51—
The "Ferret," columns 1319, 1320, 1327.

3 & 4 Vict., Cap. 24, Sec. 3—
Laing v. Laidlaw, *post* under Trespass—To Lands, &c.

5 & 6 Vict., Cap. 36—
Woolley v. Ironstone Hill Lead G.M.Coy., column 322.

5 & 6 Vict., Cap. 36, Sec. 3—
United Sir William Don G.M. Coy. v. Koh-i-noor G.M. Coy.,, 918.

6 & 7 Vict., Cap. 34—
In re Levinger ,, 306.

6 & 7 Vict., Cap. 34, Sec. 3—
In re Fishenden, ,, 455.

11 & 12 Vict., Cap. 42, Sec. 17—
Regina v. Ah Pock, ,, 311.

11 & 12 Vict., Cap. 43, Sec. 11—
In re Prince, ex parte Binge, ,, 748.
Broadfoot v. O'Farrell, columns 1030, 1031.
Melville v. Higgins, ,, 1038, 1039.

11 & 12 Vict., Cap. 44, Sec. 13—
Smith v. O'Brien, *post* under Trespass—To the Person.

12 & 13 Vict., Cap. 96—
In re Levinger, column 306.
Regina v. Mount & Morris, columns 316, 317.

12 & 13 Vict., Cap. 96, Sec. 1—
Regina v. Mount & Morris, columns 317, 318.

13 & 14 Vic., Cap. 60—
In re Lewis and Williamson v. Courtney, *post* under Trust and Trustee—Vesting Orders.
Sec. 9—*In re Weston*, *post* under Trust and Trustee—Vesting Orders.

15 & 16 Vic., Cap. 55, Sec. 1—
Williamson v. Courtney, *post* under Trust and Trustee—Vesting Orders.

16 & 17 Vict., Cap. 99, Sec. 6—
Regina v. Mount & Morris, columns 316, 317, 318.

17 & 18 Vict., Cap. 104 ("*Merchant Shipping Act* 1854")—
Dunn v. Hoyt, column 1327.
Secs. 40, 41—*Dunn v. Wilson*, ,, 1316.
Sec. 69—*Jardine v. Hoyt*, columns 1320, 1321.
Sec. 176—*Garson v. Jacobsen*, column 1320.
Sec. 189—*In re the "Ferret,"* ,, 1327.
Secs. 209, 210—*Pain v. Kneen*, ,, 1319.
Secs. 242, 520—*In re the Victorian S.N. Board, ex parte Allen*, columns 1326, 1327.
Sec. 257—*Regina v. Clark, ex parte Doyle*, column 1316.

18 & 19 Vict., Cap. 2, Sec. 79—
Niall v. Page, *post* under Tolls.

18 & 19 Vict., Cap. 4 ("*Chinese Passengers Act*")
Regina v. Middleton, column 1316.

18 & 19 Vict., Cap. 55—
Woolley v. Ironstone Hill' Lead G.M. Coy., . ,, 322.

20 & 21 Vict., Cap. 3—
Regina v. Mount & Morris, columns 316, 317, 318.

21 & 22 Vict., Cap. 108, Sec. 6—
In re Dickason's Trusts, columns 534, 535.

STREET.

See HEALTH (PUBLIC)—CORPORATION—WAY.

SUNDAY.

Sunday Trading—Act No. 265, Sec. 30—Conviction Negativing Exceptions.]—*Regina v. Montford, ex parte Schuh, ante column* 776.

29 Car. II., Cap. 7, Sec. 1—What Trade is within the Statute.]—The trade of a livery stable keeper is within the Act, and no action can be maintained upon a contract for hiring a horse and carriage made on a Sunday. *Garton v. Coy*, 4 A.J.R., 100.

Contract made on a Sunday—Whether it Binds a Principal.]—*Per Molesworth, J.*, a contract made by a land agent on a Sunday is void under 29 Car. II., Cap. 7, and does not bind a principal. *Per Full Court*, a land agent is not *ejusdem generis* with other persons specifically named as tradesmen in Sec. 1, and therefore a contract made by a land agent on a Sunday does bind a principal. *Ronald v. Lalor*, 3 A.J.R., 11, 12, 87; *see* S.C., *ante columns* 1235, 1236.

A bill of exchange made and accepted on a Sunday, if not in the ordinary course of business, is not bad. *Walsh v. Hosking, ante column* 99.

Where Sunday Counts as Time.]—*See In re Counihan, ante columns* 614, 615; and *Regina v. Macoboy, ante column* 998.

Notice of Motion—Two Clear Days—Sunday does not Count.]—*Brown v. Healey, ante column* 1187.

Covenant to keep Water "Constantly" Pumped—Cessation of Work on Sunday.]—*Stevens v. Craven, ante column* 280.

Mistake made in Advertising Meeting of Creditors—Meeting Fixed for a Sunday.]—*In re Brown, ante column* 704.

Justice can only Issue Warrant on a Sunday for an Indictable Offence.]—*Graham v. Haigh, ante column* 755.

Supplying Liquor on a Sunday—Act No. 390, Sec. 29.]—*Cohn v. Sherwood; Regina v. Barry, ex parte Connor, ante column* 834.

TAXATION.

Of Costs.]—*See* COSTS—SOLICITOR.

TAXES.

See REVENUE.

TELEGRAPH AND TELEGRAM.

Liability of Telegraph Department—Non-transmission of a Message—Act No. 455, Sec. 18.]—*Dron v. The Queen, ante column* 327.

The Court will not act on telegrams, as there is no law, or practice making law, that they should be so acted upon. *In re Oriental Bank Corporation*, 10 V.L.R. (E.,) 154, 175.

Copyright in Telegrams.]—*See ante columns* 208, 209.

TENANT.

1 *Tenant for Life and Remaindermen.*

Where Entitled to the whole Income—Liability of Trustees.]—W., by his will, directed that his property (a squatting property and stock) should be sold, and the proceeds invested, and the income thereof paid to his wife for life. The trustees continued the station with great

success, deducted part of the cost of purchasing the pre-emptive section and other portions of the estate, and of building a house, and paid the remainder of the income to the wife. It was contended that the tenant for life was only entitled to the interest at eight per cent. on the capital value of the property at the expiration of one year from the testator's death. *Held*, and affirmed on appeal, that the widow was entitled to the clear income of the station crediting her with sums laid out for purchases and improvements, and that the trustees were discharged from liability as to the amount so fairly found to be receivable by her on taking the accounts. *Waddell v. Patterson*, 1 W. & W. (E.,) 43, 53, 59.

Income—How Calculated upon Property, the Conversion of which has been Postponed.]—Where a testator left the whole of his property to tenants for life with remainder over, and station property, part of the estate, had not been sold till about two years after the testator's death, *Held* that the income receivable by the tenants for life in respect of the station property was to be ascertained by calculating interest upon the amount actually realised by the sales, at eight per cent., from the time of the testator's death until the time of sale. *Chadwick v. Bennett*, 1 V.R. (E.,) 109.

Gift of Bank Deposit Receipts Bearing Interest.]—A testatrix devised property, part of which consisted of bank deposit receipts bearing interest, which was not payable till some months after the date of testatrix' death, to trustees upon trust for A. for life. *Held* that both the sums deposited and the interest thereon were *corpus*, and should be invested and the interest paid to A. for life. *In re Thomas's will*, 10 V.L.R. (E.,) 25.

Chattels not Mentioned in the Will.]—A testator devised his residuary estate upon trust to A. for life, remainder to B. Certain furniture not mentioned in the will, by verbal agreement between A., B. and the trustees, was sold, and it was agreed that the proceeds should be invested, and the income paid to A. for life. After the sale A. claimed the proceeds of sale. *Held* that such proceeds should be invested and the income paid to A. for life. *Ibid.*

Apportionment of Rent—Rent Due at Date of Death not Apportionable.]—*See in re Thomas's will, ante columns* 45, 46.

Advancement to Tenant for Life with Consent of Reversioners.]—An application for payment out of the estate of a sum of £4000 to one of the tenants for life, all those interested under the will consenting, was refused, it being left to the family to make some arrangement among themselves. *Chadwick v. Bennett*, 3 A.J.R., 42.

Liability of Tenant for Life for Waste.]—*Spotswood v. Hand*, 5 A.J.R., 85, *post* under WASTE.

Management of Estate—Repairs.]—A testator provided for the realisation of all his personal estate and its investment, and directed that the income of the securities and the rents and profits of his real estate were to be paid to M. E. D. for his life, and after his death the real and personal estate were to be conveyed to the University. The will contained powers of leasing and managing by the trustees. The real property consisted principally of a house in Bourke-street, which could not be let unless repairs to the extent of £300 were made. Upon petition under the "*Statute of Trusts* 1864," Sec. 61, to obtain the opinion of the Court as to whether M. E. D. was entitled to the management of the real property, and whether the cost of repairs should be borne by the income or the *corpus*, *Held* that the real estate should be let and managed during the life of M. E. D. by the trustees of the will; M. E. D. to receive the rents and produce, subject to arrangements for repairs; that repairs should be effected at the expense of M. E. D., under the management of the trustees, not paid for out of *corpus*; that no repairs should be paid for out of *corpus*; costs of the application to be paid for out of *corpus*, real or personal. *In re Dwight*, 4 A.J.R., 33.

Rents from Houses to be Paid to Person for Life—Repairs, Rates and Expenses of Collection—Insurances.]—*See in re Folk's will*, 6 W. W. & A'B. (E.,) 171, *post* under TRUST AND TRUSTEE—RIGHTS, POWERS, &c.

Tenant for Life with Remainder to Sons in tail Male—Gold Mining Lease with Royalty Reserved—How Royalty should be Applied.]—*See in re Durbridge*, 3 V.L.R. (E.,) 21, *post* under TRUST AND TRUSTEE—RIGHTS, POWERS, &c.

Partnership—Will—Corpus—Income—Profits in Business.]—A testator, prior to his death, had been engaged in a partnership business, and by his will appointed his wife and the surviving partner executors, directing them to carry on the business for so long as the wife should think fit, empowering them to continue capital therein invested, and to invest other capital, and directing executors to pay to the wife "the annual income arising from the estate." The wife had allowed the greater part of the profits which accrued after the testator's death to remain in the business as capital. *Held* that the profits of the business accrued since the testator's death belonged to the wife as income, and she did not lose her rights thereto by allowing part to be invested as capital. *Ball v. Ball*, 7 V.L.R. (E.,) 188; 3 A.L.T., 44.

Liability of Life Estate for Commission and Expenses.]—By his will a testator directed that, as to moneys to be invested as provided for in the will, at least one-half should be invested during the life of his widow, and that the interest and proceeds of a sum equal to a half of such moneys should be paid to the widow during her life, and declared that it should be lawful for the trustees "to retain for themselves a commission at the rate of five per cent. upon all interest, rents and other annual income which shall or may from time to time be gotten in or received by the trustees, &c." The

trustees incurred certain expense in endeavouring to recover arrears of interest upon a sum of money lent on mortgage by the testator. *Held* that the widow's life estate in the moiety was subject to the trustees' commission, but not to the expenses incurred, these being chargeable on the general estate. *In re Mitchell*, 1 W.W. (E.,) 167.

Loss of Corpus on Realisation of Security—How to be Borne by Life Tenant and Remaindermen.]—Certain money was lent by a testator on the security of the A. property. The widow, who was entitled to the interest of the money lent, died, the interest being in arrear. After her death the property was sold, and only about one-third of the principal and interest was recovered. *Held* that the widow's representatives and the remaindermen must bear their shares of the deficiency *pro rata*. *Ibid.*

Premium Received on a Lease.]—In a suit for administration of the trusts of a will, *Held* that the tenant for life was entitled as against the remaindermen to a sum received by the trustees as premium for a lease of the estate, such premium being treated as an incident to the income. *Lane v. Loughnan*, 7 V.L.R. (E.,) 19; 2 A.L.T., 113.

Representatives of a Life Tenant—How Entitled to Income Due but not Received at Time of Life Tenant's Death.]—Interest on a mortgage security accrues *de die in diem*, and is not analogous to rent, not needing the aid of Statute to make it apportionable. Where therefore a life tenant entitled to interest on money lent on mortgage by the testator had died before the interest was received, *Held* that her representatives were entitled to receive her proportionate part of the income accrued due at the time of her death. *In re Mitchell*, 1 W. & W. (E.,) 167.

2. *Joint Tenants and Tenants in Common.*

See Griffith v. Chomley, 5 W.W. & A'B. (E.,) 186, under WILL—WHAT INTEREST PASSES—Generally.

3. *Tenant at Will.*

What Creates a Tenancy at Will.]—S., a father, occupied land as caretaker for J., his son, the owner. On J.'s leaving the colony, he said "If I never come back you are to keep it," but there was no delivery of possession. *Held* that no tenancy at will was created thereby, and that it did not amount to a gift. *M'Cracken v. Woods*, 5 V.L.R. (L.,) 23.

A *cestui que trust* in possession, by permission of the trustee, is a tenant at will, and may therefore bring trespass against a stranger. *Cuvet v. Davis*, 9 V.L.R. (L.,) 390, 396.

What Constitutes a Tenancy at Will.—Agreement to Let Premises "Until Parties Entitled shall Require the Same for the Purpose of Selling."]—*Bowman v. Carnaby*, *ante column* 398.

Tenant at Will—How Far Holder of Miners' Rights is.]—*Munroe v. Sutherland*, *post* under TRANSFER OF LAND (STATUTORY)—Certificate of Title.

Determination of Interest of Mesne Landlord as Tenant at Will—How Effected—Grant of Lease by Head Landlord to Sub-Tenant without Notice to Mesne Landlord.]—*Martin v. Elsasser*, *ante column* 810.

TENDER.

Conditional Tender.]—*Per Molesworth, J.* A condition, to made a tender bad, must be one which, if the money be taken, would preclude the taker from disputing a matter which he has a right to dispute, not the preserving to the person making the tender his rights of litigation. *Shaw v. Wright*, 2 W. & W. (E.,) 57, 70.

Tender of Debt after Action Commenced must be Accompanied by Tender of a Sum for Costs of Plaintiff's Attorney.] — *Smith v. Scott*, *ante column* 1212.

Tender of Lease—When Intending Lessee not Bound to Prove in Action for Breach of Agreement to Execute a Lease.]—*Brown v. Hardy*, *ante column* 808.

Declaration for not Granting a Lease—Plea that Lease was not Tendered for Execution a Complete Answer.] *Pinn v. Barbour*, *ante column* 810.

Bill of Sale Void on Payment on Demand—Subsequent Acceptance — Non-payment — Seizure — Tender of Account on Condition of Bill of Sale and Acceptance being given up—Refusal—Bill for Injunction to Restrain Sale and for Rectification of Bill of Sale—Injunction Granted.]—*Murphy v. Martin*, *ante column* 113.

Powers of Municipal Corporation in Accepting Tenders for Contracts.]—*See Attorney-General v. Mayor of Emerald Hill*, *ante column* 211.

Excessive Distress—Tender—Refusal to Accept—Subsequent Demand not at Once Complied with—Willingness to Pay.]—*Quinlivan v. Darcey*, *ante column* 384.

Distress Warrant—Tender of Part of Amount Recovered—"Justices of the Peace Stat. 1865," Sec. 117.]—*Barry v. Dolan*, *ante column* 763.

Forfeiture under Land Acts—What will Prevent—Tender of Rent before Re-entry.]—*Kickham v. The Queen*, *ante columns* 794, 795.

Plea of Tender—Only Applicable where Party has not been Guilty of Breach of Contract—*M'Ewan v. Dynon*, *ante column* 1221.

Plea of Tender does not Bar a Subsequent Plea of Want of Jurisdiction.]—*In re the Ferret*, 8 V.L.R. (A.,) 1, 6, *ante column* 1327.

What Constitutes a Good Tender in Order to Redeem a Mortgage.]—*Armstrong v. Robinson*, *ante column* 1050.

How Tender Affects Interest on a Mortgage Security.]—*Conroy v. Mason, ante column* 1071.

TERMS.

Abolition of—"Judicatures Act 1883," Sec. 13.]—*See Husbands v. Husbands, ante column* 53; *Regina v. Bailes, ex parte Pickup, ante column* 1233.

Enlargement of Term—Matters pending—Jurisdiction.]—*See in re Lyons, ante column* 1207.

Order nisi for Writ of Quo Warranto granted in Vacation—Not Returnable in Term.]—*Regina v. Mouatt, ex parte Sargeant, ante column* 1256.

THEATRE.

Lease of Theatre, with Right of using Corridor and Ornaments attached to Wall—Corridor and Ornaments not passing under Devise—Conversion.]—*Aarons v. Lewis, ante columns* 459, 460.

Forfeiture of Licsnse by Keeping a Room "to which Persons shall be Admitted by Ticket"—Words do not include a Theatrical Saloon.]—*Smith v. M'Cormick, ante column* 830.

Lease of Theatre—Covenant for Account, and for Affording Facilities for Ascertaining Correctness of Accounts — Construction of Covenant.]—*Aarons v. Lewis, ante column* 280.

THISTLES.

Statute—"*Thistles Prevention Stat.* 1865," No. 250.

"Thistles Prevention Stat.," Sec. 4—Service of Notice.]—Where a service of notice to keep down thistles under Sec. 4 of the "*Thistles Prevention Stat.*," No. 250, was made on a water commission, by leaving it with a clerk at their office, and the justices did not consider it sufficient service, and dismissed the case, the Court granted a rule *nisi* to compel the justices to hear the case, and afterwards made the rule absolute, on the ground that the office of the commission came within the description of "usual place of abode," and that service on the clerk was sufficient. *Regina v. Gaunt, ex parte Drummond*, 4 A.J.R., 20, 79.

"Thistles Prevention Stat. 1865," Secs. 4, 6—Description of Land.]—A notice to destroy thistles on land, which merely describes the land by stating in what shire and parish it is situated, is insufficient, and will not render the owner of the land liable to the penalties imposed under Secs. 4 and 6 of the "*Thistles Prevention Stat.* 1865," No. 250, for failing to comply with such notice. *Lithgow v. Summers*, 4 A.J.R., 90.

"Thistles Prevention Stat." No. 250, Sec. 4—Defendant Using all Reasonable Means to Destroy.]—Where D. had, before notice served, been using all reasonable means to destroy thistles on his land, and continued so doing after the notice, although he did not succeed in destroying them within the fourteen days mentioned in the notice, the justices held that his efforts afforded no answer to the information, and fined him £5, sentence to be deferred for three weeks, and then to be executed whether thistles were destroyed or not. *Held*, on appeal, that they were wrong. Order made for recording in magistrates' book that defendant had used all reasonable means for destroying the thistles. *Dugdale v. Martin*, 5 A.J.R., 28.

Sec 4—"Owner."]—Where the defendant was an equitable mortgagee of the land where thistles were found, who had exercised acts of ownership by leasing the property, *Held* that there was sufficient evidence to show that defendant was the "owner." *Haworth v. Hebbard*, 5 A.J.R., 28.

"Thistles Prevention Stat.," No. 250—Land Forming One Farm, though consisting of various Allotments—Several Convictions.]—L. was in occupation of a large area of ground used as one farm, but consisting of various allotments, and notice was served upon him to clear off thistles, and three summonses were issued, upon each of which he was convicted and fined. *Held* that, as the land formed one farm and one notice was sufficient, there was only one offence and not three; and that the Act being penal, and therefore to be strictly construed, the Court would not infer a power to prosecute for repeated acts, when such power was not expressly given. Rule absolute for *certiorari* to quash second and third convictions. *Regina v. Dowling, ex parte Laby*, 5 A.J.R., 74.

TIMBER.

Covenant in Lease not to Fell Growing or Living Timber or Timber-like Trees—Interim Injunction Granted, but Confined to the Cutting Down or Destroying any Growing or Living Red-gum Trees.]—*Munday v. Prowse, ante column* 817.

Motion for Injunction to Restrain Waste—Ornamental and Timber Trees—Plaintiff should show which Tress are Ornamental, and which are Timber—Admission by Defendant that some Trees were Useful for Building Purposes.]—*Bruce v. Atkins*, 1 W. & W. (E.,) 141. *post* under Waste.

Agreements between Landlord and Tenant as to Timber should be Plainly Stated.]—*Bruce v. Atkins, ante column* 806.

Timber—What the Word Comprises.]—*Bruce v. Atkins*, 1 W. & W. (E.,) 141, 144, 145, *post* under WORDS.

Bailiff taking Timber from Crown Lands without a Licence—Not Necessary to Show his Appointment—"Land Act 1869," Sec. 94.]—*Regina v. Mollison, ex parte Reed, ante column* 803.

Fern-trees not Timber within the Meaning of "Land Act 1869," Sec. 94.]—*Regina v. Rodd, ex parte Bucknall, ante column* 803

TIME, COMPUTATION OF.

Fractions of a Day—Court Takes Notice of]—The Court will take notice of parts of a day. *Chappel v. Moffatt*, 4 V.L.R. (L.,) 189.

Where an appeal case was transmitted to, and received by, the Prothonotary on a Saturday before noon (the office closing at noon on Saturday,) and notice of the appeal was not served on the respondent till 6 p.m. the same day (the Act under which the appeal was made providing that notice of the appeal should *first* be given to the respondent,) *Held* that the Court would take notice of acts being done at different hours of the day, and that the service was insufficient. *Ibid.*

The Court takes notice of parts of a day only where it is necessary to determine which of two acts done on the same day is to have priority. *Regina v. O'Brien, ex parte Dalmatia Gold Mining Company*, 6 V.L.R. (L.) 429; 2 A.L.T., 86.

Where, therefore, justices made an order on the 14th of a month, for payment of a debt, with a stay of proceedings for one week. *Held* that the 14th counted as one day of the week, and that execution could properly issue on the 21st, *Ibid.*

Notice of Motion—Computation of Time—Sunday.]—Sunday does not count in the computation of the two clear days required for a notice of motion. *Brown v. Healey*, 1 W. W. & A'B. (E.,) 47.

TITLE AND TITLE DEED.

Pretended Title—32 Henry VIII., Cap. 9.]—The conveyance of an estate transferred by the decree of the Court from one trustee to another cannot be deemed a pretended title; still less can such a trustee be a purchaser within the meaning of the "*Pretence Titles Act*" (32 Henry VIII., Cap. 9) *A'Beckett v. Matthewson*, 1 W. & W. (L.,) 29, 33.

Parcel or no Parcel—Question for Jury.]—The question of parcel or no parcel is generally one for the jury, but when the whole description, as well as position, are given by a written instrument, the proper interpretation of such a document is for the Court. *Small v. Glen*, 6 V.L.R (L.,) 154; 1 A.L.T., 197.

Title in Actions of Ejectment.]—*See cases, ante columns* 397, *et. seq.*

Certificate of Title—Plan—Falsa Demonstratio.]—The description of land comprised in a certificate of title, which gave the area approximately, was merely a plan on the margin showing the abuttals at each end to be on a street, and on the plan the dimensions in figures of the boundary lines were marked, but those between the streets fell short by some feet of the actual distance between the two streets. *Held* that the position shown by the plan should govern the certificate, and that the land should be considered as abutting on the two streets, the dimensions marked in figures being excluded on the principle that *falsa demonstratio non nocet*. *Small v. Glen*, 6 V.L.R (L.,) 154; 1 A.L.T., 197.

And *see* under TRANSFER OF LAND—Certificate of Title.

Objections to and Requisitions on Title.]—*See post* under VENDOR AND PURCHASER—The Contract.

TOLLS.

[NOTE.—After 31st December, 1875, tolls are abolished by Sec. 419 of Act No. 506 (Local Government).]

STATUTES.

16 Vic., No. 40, repealed by Act No. 176.

"*Shires Stat.* 1863," No. 176, repealed by Act No. 358.

"*Boroughs Stat.*," No. 359, repealed by Act No. 506.

"*Local Government Act* 1874," No. 506.

Proclamation of Common Toll Road, where Bad, No. 176, Sec. 254.]—A road extending from F. to H. was proclaimed a common toll road by the Governor-in-Council under Sec. 254 of Act No. 176. The road branched before reaching H., but the two branches united before reaching H., and both branches were used indifferently for direct traffic from F. to H., and the proclamation did not specify which of the branches was intended to be the common toll road. *Held* that, since it was impossible for the Road Board to know upon which branch to expend the moneys collected for tolls, the proclamation was bad. *Gilchrist v. Meagher*, 1 V.R. (L.,) 116; 1 A.J R., 98.

[Compare Sec. 433 of Act No. 506.]

Altering Lease of—Neglect of Lessors.]—The Shire Council of C. sued R. on a covenant in a lease for the payment of rent for tolls. The lease and counterpart were executed by both

parties in December, and the lease purported to be a lease of the tolls to which the council was entitled; formally, however, the tolls had not been delivered—the proclamation of the tolls not being made till the 14th of January following; and the lease purported to commence from the 1st of February. The council did nothing to enable R. to collect the tolls, by putting up gates, &c., and in the middle of February, R. wrote, complaining of this neglect, and that he could not continue the lease unless steps were taken to remedy what was complained of. Subsequently R. refused to continue the lease, and, in point of fact, if he had not paid a month's rent in advance he would not have taken up the lease at all. The person from whom he had received possession retained possession, and R. was prepared to hand over what he had collected. After the lease was signed by R., a blank left for the date of gazetting the tolls was filled in, with the consent of both parties. *Held* that the lease was good, the council having power to insert the date with the consent of the lessee; but that the council being solely to blame for the non-receipt of the whole of the tolls for the month must bear the loss, and that the damages which had been given to them in respect of five months' rent should be reduced by the amount of the first months' rent. *Shire of Creswick v. Ryan*, 1 A.J.R., 169.

Levying at a Check Gate.]—Where a main road is proclaimed a common toll road, and a scale of fees fixed in respect of it, and subsequently a road diverging from it at the toll gate is declared a common toll road, and no separate scale of fees is proclaimed, but a check gate is erected at the junction, tolls may be properly collected at the check gate. *Leary v. Patterson*, 2 A.J.R., 57.

Second Toll—When Demandable—Acts 16 Vic., No. 40, Sec. 20, No. 176, Sec. 249.]—A second toll is demandable, under the Acts No. 40, Sec. 20, and No. 176, Sec. 249, for the same horses and vehicle going in the same direction on the same day. *Ryan v. Polwarth*, 1 W. W. & A'B. (L.,) 6.

[Compare Sec. 423 of Act No. 506.]

"Boroughs Stat.," No. 379, Sec. 327.]—Under Sec. 327 of the "*Boroughs Stat.*" No. 359 toll cannot be demanded twice within twenty-four hours for the same horse and vehicle returning or going through any toll bar, there being no limitation to the number of times which a person driving the same horse and vehicle may return or go within the twenty-four hours. *Maher v. Mulcny*, 1 A.J.R., 154.

[Compare Sec. 423 of Act No 506.]

In Respect of what Demandable.]—At a toll-gate tolls were payable as follow:—For every gig, chaise, coach, chariot, or other such carriage constructed on springs, if drawn by one horse, 6d.; for every cart, dray, waggon, wain, or other such vehicle drawn by one horse, 1s. Held that an American express waggon suitable for carrying passengers, constructed on springs, was under the first class, although used by the owner for the purposes of his trade as a storekeeper. *Croll v. Linton*, 6 W. W. & A'B. (L.,) 220. N.C. 17.

[*See* Sec. 427 of Act No. 506.]

Exemptions from Tolls—"Road Act," No. 40, Sec. 22—Poundkeeper.]—A poundkeeper is not a person in the service of the Government within the meaning of Sec. 22 of No. 40, whereby such persons are exempted from tolls; and where it did not appear that the personal attendance of a poundkeeper was indispensably necessary at the Treasury to pay in his receipts, *Held* that even if a poundkeeper were a person "in the service of the Government within the meaning of the section, he could not while on such an errand be deemed to be" in the employment *and* service of the Government. *Robinson v. Bonfield*, 1 W. & W. (L.,) 302.

Exemption from—Who not Entitled to—Officer in H.M.'s Service.]—An officer in Her Majesty's service is not exempt from payment of tolls when proceeding on duty, in a carriage or other vehicle, since the Act 18 and 19 Vic. Cap. 2, Sec. 79, only exempts him when on horseback. *Niall v. Page*, 5 W. W. & A'B. (L.,) 38.

27 Vic, No. 176, Sec. 252—"Manure."]—Decayed vegetable matter taken from a swamp and kept in a heap, and which is used as a fertilising agent, may, as a matter of law, be regarded as "manure," and therefore a cart conveying such may be regarded as exempt from tolls under Sec. 252 of Act No. 176. *Cuthbert v. Daley*, 4 W. W. & A'B. (L.,) 195.

[Compare Sec. 423 of Act No. 506.]

Act No. 176, Sec. 252—Bone Dust Partly for Export, Partly for Local Use.]—Two cart loads of bone dust were charged with toll, one of them containing such manure for exportation to Ceylon, the other for local use. *Held* that the cart bearing manure for local use was exempt, that for exportation not exempt. *Jopling v. Lawlor*, 6 W. W. & A'B. (L.,) 3.

[Compare Sec. 423 of Act No. 506.]

Evasion of—What is—No. 359, Sec. 330.]—In order to render a person liable to a penalty, under Sec. 23 of the "*Boroughs Stat.*," No. 359, for evading a toll, there must be proved on his part a fraudulent intention to deprive the toll-keeper of his legitimate revenue. *Ryan v. Roach*, 2 V.R. (L.,) 183; 2 A.J.R., 107.

A., on a certain day, drove a leading horse as far as an inn, sixteen chains distant from a toll-gate, and, on arrival at the inn, unyoked one horse, leaving it at the stable till his return. He remarked that he was going to "slew the tollman," and drove through the gate with one horse only, and on his return the horse left behind was again yoked up, and driven home. A.'s employer stated that he was the person who paid the tolls; that A. was not authorised to say he would "slew the tollman;" that the nature of the roads required two horses as far as the inn; that the loading on the way required two horses as far as the inn; that he had rented a stall at

the inn for the purpose of leaving one horse there; and that the second horse was not taken off for the purpose of evading toll. *Held* that there was evidence from which the justices could properly arrive at the conclusion that no fraud was intended, and that there was no evasion of toll intended. *Ibid.*

[Compare Sec. 426 of Act No. 503.]

Evasion of Toll — Jurisdiction of Justices.]—A person who uses a toll road, but leaves it at a considerable distance from the toll-gate, and passes over a common, thereby contriving to get past the toll-gate without passing through it, commits the offence of evading toll; but the amount of the toll cannot be recovered before justices, for the toll is only payable under Sec. 420 of the "*Local Government Act* 1874," when the gate has been passed through. *Regina v. Call, ex parte Hazard*, 2 V.L.R. (L.,) 107.

Remedy for Recovery of—"Boroughs Stat.," No. 359, Sec. 326.]—The remedy pointed out in Sec. 326 of the statute, viz., a proceeding before a justice, as to recovery of tolls, must be followed. *Cotter v. Hann*, 3 V.R. (L.,) 12; 3 A.J.R., 31.

[Compare Sec. 422 of "*Local Government Act*," No. 506.]

TORTS.

Actions for.]—*See* ACTION—NEGLIGENCE—TRESPASS—TROVER.

TOWAGE.

See SHIPPING.

TRADE.

I. TRADE MARK.

1. *What is.*

Combination of Words—"Aromatic Schiedam Schnapps."]—Plaintiff was the proprietor of a cordial termed "Wolfe's Aromatic Schiedam Schnapps." Defendant, the proprietor of a rival article, described it as "Hart's Imperial Schiedam Schnapps," and "Imperial Schiedam Aromatic Schnapps." Plaintiff prayed for an injunction to restrain defendant from so doing. *Held, per Molesworth, J.*, that from their respective signification, these words "Aromatic," "Schiedam," "Schnapps," and the combination, were public property, and that plaintiff was not entitled to the injunction. *Wolfe v. Hart*, 4 V.L.R. (E.,) 125.

Plaintiff also sought to restrain the defendant from using bottles, labels, and wrappers, similar to, or only colourably differing from, those of the plaintiff. *Held, per Molesworth, J.*, that the combination before referred to being uncommon, ought to be regarded in this part of the motion; and that, although dealers in spirits might not be deceived, yet, there being a probability, by the use of such bottles, labels, and wrappers, of a confusion between the articles, by consumers purchasing from such dealers as vendees of the plaintiff and defendant respectively, the plaintiff was entitled to an injunction to restrain their use. Affirmed on appeal. *Ibid.*

Schiedam Schnapps.]—W. was registered as the proprietor of the trade mark in "Wolfe's Aromatic Schiedam Schnapps." He was in partnership with B., and the deed provided that B. should not use the words, "Aromatic Schiedam Schnapps," after the dissolution. After the dissolution B. manufactured a similar liquor, which he sold as "B.'s Schiedam Schnapps," and affixed to the bottles labels, stating that he had been W.'s partner; but the labels in no way resembled W.'s labels. Injunction motion by W. against A., who was selling as B.'s agent in Victoria. *Held* that there was no trade mark in the name, "Schiedam Schnapps" (following *Wolfe v. Hart*, 4 V.L.R. (E.,) 125;) that those words were *publici juris*, and that B. was perfectly entitled to state on his labels that he had been W.'s partner. *Wolfe v. Alsop*, 10 V.L.R. (E.,) 40.

"Neva Stearine."]—In 1861, plaintiff company, established on the river Neva in Russia, imported into Victoria candles with labels bearing the words, "Neva Stearine." In 1863 German candles, with labels containing the words, "Neva Stearine," were imported and sold; and in 1867 the defendant's predecessor manufactured candles in Victoria, with labels bearing the same words, of which fact, in 1870, plaintiff's agent was cognisant. In 1881 the plaintiff filed a bill to restrain defendant from using the words, "Neva." *Held* (affirmed on appeal) that plaintiff's acquiescense and delay, since 1870, defeated its title; and that the words, "Neva Stearine," had become *publici juris*, and that the distinctive character of the name had gone. *Neva Stearine Company v. Mowling*, 9 V.L.R. (E.,) 98, 104; 5 A.L.T., 9.

Per Molesworth, J.—Title to a trade mark may be lost by acquiescence in its use by others. There is a property in trade names. *Ibid.* p. 102.

"Hop Bitters."]—The term "hop bitters" is a mere description of an article, and may be used by any person who makes bitters from hops, and no person can have an exclusive right to use such term. *Hop Bitters Company v. Luke*, 10 V.L.R. (E.,) 234; 6 A.L.T. 89.

See also S.C., *post column* 1391.

"Hop Bitters."]—Action under the "*Judicature Act* 1883" for an injunction to restrain the infringement of a trade mark. The plaintiffs' trade mark, which was duly registered, was a sprig of the hop vine and a bunch of hops between the words "hop" and "bitters." The defendant manufactured hop bitters, and sold them in bottles of the same shape as the plaintiffs', with a label on them bearing a sprig of the grape vine with a bunch of grapes between the words "hop" and "bitters." *Held* that though the registration of the words "hop bitters" was of no effect, and could not be regarded as giving the plaintiffs any special right to the use of those words, the registration of the design was efficacious, and *prima facie* gave the plaintiff the exclusive right to the use of that design, and that the defendant's label resembled that of the plaintiff so as to be likely to deceive incautious purchasers, and that plaintiff was entitled to nominal damages, an injunction and costs. *Hop Bitters Company v. Wharton*, 10 V.L.R. (L.,) 377; 6 A.L.T, 176.

2. *Proceedings to Restrain Infringement of.*

Imitation of Labels — Corks — Infringement.]—The plaintiffs, H. and Co., brandy manufacturers, exported brandy to Victoria in bulk and in bottle, the latter being of a superior quality, and with a distinctive flavouring from the former. W., the defendant, bought H. and Co.'s bulk brandy, and sold it in bottles which were apparently the same as the plaintiffs'. The labels were alike in shape, colour and design, except that defendant had, as a device, a spread eagle, and the plaintiffs an arm holding a battle axe. The words on the labels were as follow: On plaintiffs' were words, "*Jas. Hennessy and Co.* Cognac," and in small type, "Registered at 304 Stationers' Hall;" on defendant's, "*Jas. Hennessey and Co.*'s Cognac," and in small type, "Bottled by T. and W. White, Melbourne." The plaintiffs' capsules had an amber coloured rim with the device and prominent words of their labels; the defendant's capsules had no such rim, and had the device and prominent words of his labels. The plaintiffs' corks were stamped with the words, "*Jas. Hennessy and Co.*, Cognac," with a small star; the defendant's, "*Jas. Hennessy and Co.*'s *Cognac*," without the star, and both stamps could be seen through the necks of the bottle. *Held* on appeal, distinguishing *Farina v. Silverlock* [6 De G. M. & G., 214] and affirming *Molesworth, J.*, that the mere substitution of one device for another, both being in the same position and of the same colour does not neutralise the effect of the other points of resemblance, and that plaintiffs were entitled to restrain defendant from selling the brandy in bottles, with labels, &c., so colourably imitating the plaintiffs'. Injunction granted. *Per Molesworth, J.*, that the imitation of the brands on the corks afforded very strong evidence of an intention to produce an impression on minds of purchasers that it was H. and Co.'s bottled brandy. *Hennessey v. White*, 6 W. W. & A'B. (E.,) 216.

In a case similar to the last, except that the name of the plaintiffs was not on the corks and capsules, and that defendants used as a device an arm holding a dart, and there appeared on the defendants' labels the words, "Bottled by H. M. & Co." in comparatively large type, *Held*, by *Molesworth, J.*, that although there was no imitation of the cork, and though the words "Bottled, &c.," appeared in larger type than in the last case, yet that the label of the defendants so closely resembled the plaintiffs' that the case was on the whole not distinguishable from *Hennessy v. White*. Injunction granted. *Hennessey v. Hogan*, 6 W. W. & A'B. (E.,) 225.

Old Bottles Re-used.]—The plaintiffs sold bitters in bottles with the words "*Dr. J. Hostetter's* Stomach Bitters" stamped in the glass, and labelled "*Hostetter's* Celebrated Stomach Bitters." The defendants made bitters and sold them in bottles which had been used for the sale of plaintiffs' bitters and stamped as above, and labelled them as "Celebrated Stomach Bitters." The defendants' labels did not in form or colour resemble the plaintiffs', and defendants' bottles were sold in cases branded with the initials of the firm. An injunction was granted to restrain the defendants from selling in bottles so stamped and labelled until further order. *Hostetter v. Anderson*, 1 V.R. (E.,) 7; 1 A.J.R., 4.

Maker's Name—No Patent.]—The plaintiffs had established their right to the sole use of a device and name by legal proceedings in Scotland. Defendant sold articles which had upon them a *fac simile* of the plaintiffs' device and the name used by plaintiffs, the only difference being the addition of another word in small letters. At the time the injunction was prayed for, the defendant had but one article bearing the imitation of plaintiffs' device. Upon these facts the Court granted an *interim* injunction, and upon the consent of the parties a perpetual injunction. *Singer Manufacturing Company v. Harold*, 4 A.J R., 128.

Fraud not Essential.]—In cases of an imitation of a tradesman's packages, labels, &c., it is not necessary to prove fraud or actual deception in order to obtain an injunction. *Wolfe v. Hart*, 4 V.L.R (E.,) 125, 134.

Fraud not Essential.]—*Per Molesworth, J.* To stop the improper use of a trade mark, it is not necessary that there should be an intent to deceive, if the effect of deception be produced. *Neva Stearine Company v. Mowling*, 9 V.L.R. (E.,) 98, 102; 5 A.L.T., 9.

Trade Name.]—H., a testator, carried on a druggist's business as H. & Co., and manufactured and sold a composition known as "H. & Co.'s Soluble Sheep Dip." H.'s executors, upon his death, sold the business, stock-in-trade and goodwill, except the "Sheep Dip," to defendant, and sold the "Sheep Dip" to plaintiff. Defendant carried on the business under the name of H. & Co., and sold a composition under the name of "T.'s Sheep-dipping Composition, manufactured by H. and Co." On a motion for injunction, *Held* that defendant should be scrupulously cautious in using the name "H. & Co." to any sheep and he was to a certain extent reprehensible, but motion refused on ground of delay. *Chinn v. Thomas*, 5 V.L.R. (E.,) 188; 1 A.L.T., 26.

Sale of Inferior Ale as Ale of a Certain Name and Kind — Misrepresentation.] — *See Degraves v. Whiteman, ante column* 568.

Injunction when Granted.]—An injunction will not be granted to restrain the use of a trade mark where the words sought to be protected are merely words of description, and are *publici juris. Hop Bitters Company v. Luke*, 10 V.L.R. (E.,) 234; 6 A.L.T., 89.

The words "hop-bitters" are such words. *Ibid.*

Costs.]—Where the defendant intended to imitate the plaintiffs' labels, so as to deceive the public, though he did not infringe the plaintiffs' trade mark or trade name, the Court, in dismissing a motion against him for an injunction, left him to pay his own costs. *Ibid.*

And *see* S.C. *ante column* 1389.

3. *Registration.*

Act No. 539, Sec. 7—Rectification of Register.]—D. claimed to be the owner of a trade mark, the use of which he had enjoyed without interference or disturbance for 11 years, but in respect of which he was not registered. R. and P. were registered at the end of the 11 years in respect of a trade mark, which so closely resembled D.'s as to be likely to deceive. D. opposed the application for registration. *Held* that the register must be rectified by expunging R. & P.'s trade mark. *In re Rowley and Pyne, ex parte Dalton*, 9 V.L.R. (L.,) 307; 5 A.L.T., 91.

Similarity.]—The word "deceive" means to deceive an incautious person. A trade mark was registered, and an application was made by another person to register a similar trade mark, the application being opposed on the ground that the mark sought to be registered was a colourable imitation of the one registered, and calculated to deceive. The Registrar refused the application. On a rule *nisi* to rectify the register by registering the trade mark, *Held* that the two were so nearly alike as to mislead incautious purchasers, and rule discharged. *In re Eno's Trade Mark, ex parte Kennedy*, 9 V.L.R. (L.,) 335.

4. *Offences against the "Trade Marks Stat."*

Using Forged Mark—No. 221, Sec. 6.]—S. was informed against for forging a trade mark with intent to defraud; but there was no count for uttering. On the evidence, it appeared that S. was merely acting as agent for another, and had sold goods for his principal, bearing the forged trade mark. S. was convicted of forging the trade mark, and appealed. On appeal, *Held* that there was no evidence of forging by S. to go to the jury; that selling was not "using" within the meaning of Sec. 6 of the "*Trade Marks Stat.* 1864," No. 221; and that there being no count for uttering, the conviction must be quashed. *Schemmel v. Cail*, 2 V.R. (L.,) 121; 2 A.J.R., 65.

Counterfeiting Trade Mark—Prosecution for.]—For circumstances in which the Court *held* that there was no evidence that the defendant wilfully and knowingly imitated the plaintiff's trade mark, *see Bowman v. Webster*, 5 A.L.T., 168.

TRANSFER OF LAND (STATUTORY.)

(*d*) *Other Points, column* 1416.

10. *Remedies in Respect of Deprivation of Land, column* 1417.

11. *Miscellaneous Points, column* 1418.

STATUTES—"*Real Property Act* 1862," No. 140, and Amending Acts, Nos. 180, 210, 223, repealed and re-enacted by "*Transfer of Land Stat.* 1866," No. 301; "*Transfer of Land Stat.* 1869," No. 353; "*Amending Act* 1878," No. 610.

1. *Bringing Land under the Act, and Registration as Proprietor.*

(*a*) *General Principles.*

Act No. 301, Secs. 24 and 152—Injunction to Restrain Registration — Demurrer — Jurisdiction of Court.]—Bill by H. and others against Hunter, alleging an equitable title by the plaintiffs under an agreement in writing for a price paid with persons originally seised, an application and advertisement to bring the land under Act No. 301 by defendant, and lodging of *caveats* against such application, and praying for declaration of plaintiff's rights and an injunction to restrain defendant. *Held*, on demurrer, that as the bill did not negative the defendant's possession, did not show strictly that defendant claimed title, and did not show any obligation or relation between the plaintiffs and defendant, the bill would have been demurrable as to want of equity and indistinctness, and that Sec. 24 of the statute does not create a new jurisdiction of Courts of Equity to protect persons having legal or equitable titles against the inconveniences resulting from improper registration: it merely directs such proceedings as would be right before, according to the interest of the caveator being legal or equitable, and makes notice of that proceeding upon the Registrar a stop to him: that Sec. 152 makes it competent for judges to direct the details of any special procedure under the Act. *Hodgson v. Hunter*, 3 A.J.R., 13.

Restraining Registrar—Sec. 24—Tenant for Life in Possession Using the Act in order to Obtain Fraudulently a Fee Simple — Privity between Plaintiff and Defendant.]—The plaintiff, G., lent his mother, who was married again to R., a sum of £100, to go in part payment of the purchase money of certain land. The Crown grant issued to R., and by deed the southern half, was conveyed to G. as for £100 paid. G. entered into possession of this half, and built a house upon it. G. afterwards lost the deed. Disputes arose as to the land, and G. afterwards executed a lease for lives to R. and his wife, August, 1870. This lease remained with R. Defendants, after being in possession for a few years, attempted to bring the land under the Act No. 301, and the plaintiff lodged a caveat, and brought a bill to restrain the Registrar from bringing the land under the Act. *Held* that, as there was a privity between the plaintiff and defendants, and the plaintiff could not bring ejectment because of his lease to the defendants, these facts, coupled with Sec. 24, gave the plaintiff an equity to restrain the Registrar. Injunction granted, also permanent injunction against the defendants attempting to bring the land under the Act under the prayer for general relief. *Geraghty v. Russell*, 5 A.J.R., 89, 90.

Act No. 301, Sec. 24—Possession—Ejectment—Demurrer.]—There is nothing in Act No. 301, generally enabling a plaintiff to transfer a legal right to a Court of Equity, or to compel a defendant to disclose his title. Where a bill was filed by plaintiff, alleging legal title to land sought to be brought under the Act against which plaintiff lodged a *caveat*, but alleging nothing as to possession of the land, and seeking discovery of defendant's title, and an injunction against the defendant and the Registrar, *Held*, on demurrer, that possession by defendant might be assumed, in which case plaintiff could bring ejectment, and demurrer allowed. *Jamison v. Quinlan*, 3 V.L.R. (E.,) 230.

Jurisdiction of Court to Interfere.]—Under Sec. 24 the Court has jurisdiction to interfere and prevent an injustice being done, whether a suit in Equity or an action at law has been instituted or not. *In re "Transfer of Land Stat.," ex parte Beissel*, 5 V.L.R. (L.,) 53, 57.

Order to Restrain—Caveat—Act No. 301, Sec. 24—Adverse Possession.]—B. lodged a *caveat* against M.'s application to bring land under the Act. B. was in possession, and had been so since 1861, and claimed under a conveyance from C. (1861,) who had been in possession from 1850 until 1861. *Held* that B. might remain in possession, and successfully resist an action of ejectment by reason of his adverse possession, and that to entitle a person to invoke the remedy in Sec. 24, he must show good documentary title independently of adverse possession. *In re "Transfer of Land Stat.," ex parte Brown*, 5 V.L.R. (L.,) 5.

Act No. 301, Sec. 24—Power of Court to Restrain Registrar from Bringing Land under the Act.]—Where a person is seeking to oppose the bringing of land under the Act, and after the expiration of his caveat, has no remedy by ejectment or in Equity, the Court will on a rule *nisi* restrain the Registrar under Sec. 24 from bringing the land under the Act. *In re "Transfer of Land Stat.," ex parte, Gunn* 3 V.L.R. (L.) 36.

Act No. 301, Sec. 24—Jurisdiction of the Court where the Crown is Seeking to Enforce an Escheat.]—Where the Crown seeks to establish and enforce an escheat, the Court has jurisdiction to restrain the bringing of the land under the Act at the instance of the Crown, although the information shews a legal title in the Crown, and alleges no special equity. *Attorney-General v. Hoggan*, 3 V.L.R. (E.,) 111.

Act No. 301, Sec. 24—Lost Will—Injunction—Trial of Title at Law.]—A. died in 1853, leaving a widow and six children, two daughters, a son W., the plaintiff, a son T., and the defendant. There was long in the widow's possession a document, purporting to be the will of A., dated ——, 1850, and with an imperfect attestation clause. By this certain land was devised to

defendant. W. died in 1868 (then of age) intestate, without claiming any of A.'s property, leaving plaintiff his heir-at-law. In 1874 widow died, by her will leaving this land to plaintiff, who proved the will. In 1874 plaintiff got administration to W.'s estate, and in 1878 plaintiff obtained a rule to administer A.'s estate. In 1874 defendant got possession of the land, and conveyed it to defendant H. Bill by plaintiff against defendaut, H. and Registrar to restrain land being brought under operation of Act No. 3 1. *Held* that if the document of 1850 was an invalid will, plaintiff's title as heir was clear, and plaintiff was entitled to an injunction until further order without prejudice to the question of title, which should be tried at law.—*Archibald v. Archibald*, 5 V.L.R. (E.,) 180.

(*b*) *Duties of Registrar in Respect Thereto.*

Duties of Registrar—Court Certifying as to "no Probable Grounds for Refusal"—Act No. 301, Sec. 135.]—The Registrar refused to bring certain land under the Act, in consequence of his putting upon a devise a construction put upon it by the Court of New South Wales, the opposite of a construction put upon the same devise by the Court in Victoria. Against the New South Wales decision an appeal to the P.C. was pending. *Held* that the Registrar was not justified in refusing, but that under the circumstances he might have postponed the further investigation of title; that as he was the guardian of the assurance fund, the Court would not certify that "there was no probable ground for such refusal" under Sec. 135. *In re "Transfer of Land Stat.," ex parte Bowman*, 7 V.L.R. (L.,) 314; 3 A.L.T., 25.

Evidence to be Considered by Registrar—Surplus Area.]—An application was made to bring a Crown allotment under the Act, and to include in the certificate of title more land than by admeasurements and parcels was specified in the Crown grant. As to this surplus the applicant tendered evidence to shew that he was entitled, but the Registrar refused to accept such, and refused the application until the applicant could show that the plan was correct by the Lands Department issuing an "adjustment certificate." *Held* that the Registrar was bound to accept all material evidence tendered, and was wrong in insisting upon an "adjustment certificate" as the only evidence which he would receive and act upon. *In re "Transfer of Land Stat.," ex parte Rowan*, 9 V.L.R. (L.,) 286; 5 A.L.T., 87.

And *see* generally as to registration and duties of Registrar, *post column* 1409.

(*c*) *Practice in Applications for.*

"Real Property Act" (No. 140,) Secs. 21, 22, 23, 81—Summons to bring Land under the Act.]—Sec. 81 does not give jurisdiction to a Judge in Chambers to deal with matters of such vast importance as might arise under a *caveat* against the first bringing of land under the operation of the Act. That remedy only applies in the case of *caveats* as to dealing with land under the Act, and not to *caveats* under Secs. 21, 22, and 23. (In Chambers.) *In re Williamson*, 2 W. W. & A'B. (L.,) 110.

[N.B.—Sec. 81 of Act No. 140 did not give the power of summoning the caveator contained in Sec. 23 of Act No. 301.—Ed.]

"Transfer of Land Stat." (No. 301,) Sec. 24—Jurisdiction of Judge in Chambers.]—The "order of a Judge" in Sec. 24 does not mean "of a Judge in Chambers." The only way to read Sec. 24, which entitles the caveator to an order restraining the Registrar from bringing land under the Act, is that the caveator must bring an action of ejectment, or file a bill in Equity. *In re Power*, 6 W. W. & A'B. (L.,) 81.

But *see ex parte Gunn, ante column* 1394.

Application to bring Land under Statute—Notice of Summons under Sec. 25 to Produce Deeds.]—All persons who have any claim upon land which is sought to be brought under the "*Transfer of Land Stat.*" must have notice of a summons under Sec. 25 of the Act to produce the deeds relating to the land for the purpose of bringing the land under the Statute. *In re "Transfer of Land Stat.," ex parte Morgan*, 4 A.J.R., 117.

Act No. 301, Sec. 25—Production of Deeds.]—*Per Stawell, C. J.* (in Chambers.) Where a solicitor retained deeds claiming a lien on them for costs, and an application was made to compel their production under Sec. 25, *Held* that such a matter could not be disposed of in Chambers. *In re Craig*, 5 A.L.T., 54.

Order to Produce Deeds under Sec. 27—Ex parte.]—An order of a Judge to the Registrar to produce the title deeds of land under the Statute, which deeds had been lodged in the Registrar's office, may be made *ex parte*. *Re the "Transfer of Land Stat.," Slack v. Winder*, 4 A.J.R., 117.

Caveat Forbidding Bringing of Land under the Act—Act No. 301, Secs. 23, 24—Writ of Ejectment whether Sufficient to Prevent Lapse of Caveat.]—Rule *nisi* under Sec 23, calling upon S. to show cause why a *caveat* should not be removed. S. had issued within the month allowed under Sec. 24, a writ of ejectment, but he had not served the writ. *Held* that the Legislature referred to the commencement of legal proceedings as sufficient to prevent the *caveat* from lapsing. Rule discharged. *In re Slack, ex parte Winder*, 5 A.J.R., 83.

Caveat Forbidding the Bringing of Land under the Act—Service of Rule Nisi to Remove Caveat.]—A *caveat* was lodged under Sec. 22 of the Act No. 301 and an address of the place at which notices were to be served was duly given. The *caveatee* (W.) summoned S., the *caveator*, by rule *nisi* to show cause why the *caveat* should not be removed, and stating that rule was made absolute upon an affidavit that it had been served at the place mentioned in the *caveat*. It appeared that the service had been effected on Saturday afternoon when the office was closed, but that S. had knowledge of the

service before the rule was returnable. *Held dissentiente, Barry, J.*) that the Act being very strict as to service, there had been no good service of rule *nisi* and that the defect in the service had not been cured by the admission of S. that he had received it two days before it was returnable Rule removing *caveat* set aside. *In re "Transfer of Land Stat." In re Slack*, 1 V L.R. (L.,) 319.

Caveat — Lapse — Restraining Registrar from bringing Land under Statute—"Transfer of Land Stat.," Sec. 24]—The Court or a judge has no power to make an order under Sec. 24 of the "*Transfer of Land Stat.*," restraining the Registrar from bringing the land. the subject of a *caveat*, under the Statute, after the lapse of such *caveat* forbidding such bringing under. *In re the "Transfer of Land Stat," ex parte Aylwin*, 4 V.L.R. (L.,) 116.

Notice of Application to restrain bringing under the Act—Service.]—Service of notice of an application is good if given to the Registrar; it need not be given to the applicant also. *In re "Transfer of Land Stat.," ex parte Beissel*, 5 V.L.R. (L.,) 52, 58.

Order Restraining Registration as Proprietor—Obtained in Vacation—"Transfer of Land Stat.," Sec 24.]—An order, under Sec. 24 of the "*Transfer of Land Stat.*," restraining the registration of an applicant as proprietor, may be obtained from a judge in Chambers during vacation, though the remedy by a bill in equity is open to the caveator. *In re "Transfer of Land Stat.," ex parte Mahoney*, 1 A.L.T., 132.

2. *Certificate of Title.*

(a) *Issuing, Correcting, and Cancelling Certificate.*

When Issued—Act. No. 140—Receipt for Crown Grant.]—A purchaser from a Crown grantee of lands selected by such grantee applied to the Registrar-General for a certificate of title. He held merely the Treasury receipt for the purchase money and an instrument of transfer from the Crown grantee to himself. On a summons calling on the Registrar to substantiate and uphold the grounds of his refusal to issue a certificate of title to him, *Held* that such certificate should not be issued until the Crown grant to the original grantee was delivered up to be cancelled under the Act No. 140. *Fitzgerald v. Archer*, 1 W. W. & A'B. (L.,) 40.

[*See* also Sec. 35 of Act No. 301—Ed.]

Summons to Registrar under Sec. 135—Decision of Court upon.]—*Per Stephen, J.*—On a summons to the Registrar of Titles to show cause why he should not grant an unconditional certificate of title, the Court is not called upon to give an absolute and final decision upon the point submitted, as it might do if the parties adversely interested were litigating it. *In re "Transfer of Land Stat.," ex parte Folk*, 6 V.L.R (L.,) 405.

Mandamus to Registrar.]—Sec. 135 of the "*Transfer of Land Stat.*" renders a *mandamus* to the Registrar to issue a certificate unnecessary, and it is his duty to issue a clear certificate, unaccompanied by a memorandum, stating that it was issued in compliance with the decision of the Court, when called upon to issue a certificate. *Re the "Transfer of Land Stat.," ex parte Paterson*, 4 A.J.R., 26.

Compelling Registrar to issue a Certificate—Act No. 301, Sec. 135.]—*In the matter of the "Transfer of Land Stat.," ex parte Ross*. 2 V.R. (L.,) 10; 2 A.J.R., 19, *ante* column 434.

Correcting Certificate Obtained by Fraud.]—Even if a Court of Equity cannot correct a certificate of title procured by fraud, which is the special relief prayed, it can, under the prayer for general relief, make a decree ordering defendant to transfer and vest in the plaintiff the land included in such certificate. *Campbell v. Jarrett*, 7 V.L.R. (E.,) 137; 3 A.L.T., 49.

Act No. 301, Sec. 132—Issued on Incorrect Representations — Cancellation.] — A bank had a certificate of title to certain land issued to it, and was registered in respect thereof. The certificate of title was issued on the understanding that R., who was then grazing cattle on the land, was only a trespasser, whereas it appeared afterwards in an action of ejectment brought by the bank against R., that R. had been in possession of the land for more than fifteen years, and a verdict was returned in R.'s favour. On a summons under Sec. 132, *Held* that the certificate was issued in error and ordered that it be delivered up to be cancelled. *In re "Transfer of Land Stat.," ex parte Rigby*, 9 V.L R. (L.,) 417; 5 A.L.T., 128.

Error—Sec. 132.]—The error alluded to in Sec. 132 of the "*Transfer of Land Stat.*" does not allude only to a misdescription of parcels; but anything improperly done or omitted to be done may be considered an error under the section. *Re* the "*Transfer of Land Stat.," ex parte Paterson*, 4 A.J.R., 26.

Per Stawell, C. J.—"Error" in Sec. 132 means not only a mistake of fact, but also an error of law. *In re "Transfer of Land Stat.," ex parte Bond*, 6 V.L.R. (L.,) 458, 463.

Certificate of Title Wrongly Issued—Act No. 301, Sec. 132—Right of Equitable Mortgagee to Retain.] —M. was the registered proprietor of two leases of certain Crown allotments. In October, 1871, A. issued a writ of *fi. fa.* against M. On 20th October a copy of the writ was served on the Registrar of Titles, specifying the allotments as those sought to be affected by the writ. Before the three months, before the expiration of which the *fi. fa* could not operate as a charge upon the land, had expired, *i.e*, on 5th January, 1872, A. served an *alias* writ, and under this the land was sold by the sheriff to one P., the transfers from the sheriff, being registered 2nd and 28th March. On 2nd January M. transferred the land to B. for value, and B. obtained a certificate of title.

On application by P. to have his transfers from the sheriff registered, the Registrar refused, but the Court compelled him to register them. The registrar then sought to compel B. to return his certificate of title. B. had deposited the deeds with S. as security for an advance, and S. refused to give them up without payment of this advance. *Held* that, in the absence of fraud, S. was entitled to retain the certificates till his charge upon the land was paid. *Re* the "*Transfer of Land Stat.*," *ex parte Patterson*, 4 A.J.R., 110.

When Mandamus to call in Certificate will be Granted.]—The Court will not grant a *mandamus* calling upon the Registrar of Titles to call in a certificate of title or give his reasons for not doing so, unless it is proved to the Court that it appeared to the satisfaction of the Registrar that the certificate had been issued in error, or contained a misdescription of the land, or had been fraudently or wrongfully obtained. *Re O'Connell* and the "*Transfer of Land Stat.*," 6 A.L.T., 85.

Act No. 301—Sec. 132—Calling in Certificate.]—The Court will not grant a rule to compel the Registrar of Titles to call in a certificate of title granted to the wrong person, upon an analogy to the proceeding under Sec. 132 of the "*Transfer of Land Stat.*" (under which section the Registrar is the applicant) especially where the applicant has not proved his right to a certificate. *The* "*Transfer of Land Stat.*," *ex parte Slack*, 4 A.J.R.,114.

Cancelling Certificate.]—The Supreme Court in its equitable jurisdiction has no jurisdiction to order certificates of title to be cancelled, the proper relief being to order the inequitable holders to transfer. *Gunn v. Harvey*, *ante columns* 403, 980.

(b) Conclusive Effect of Certificate.

Act No. 301, Secs. 47, 49.]—As regards the parcels the certificate is under Sec. 47 incontrovertible, and the "reservations and exceptions" mentioned in Sec. 49 have no reference thereto. *Alma Consols Gold Mining Company v. Alma Extended Company*, 4 A.J.R., 190.

Act No. 301, Sec. 159—Title of Certificate Holder in Ejectment.]—The title of a plaintiff in ejectment which is based on a certificate of title to a lease under "*Land Act* 1865," is not affected as to its conclusive character by Sec. 159 of Act No. 301, and a plaintiff relying on such a certificate without going into evidence *prior* to the title cannot be nonsuited. *Miller v. Moresey*, 2 V.R. (L.,) 193; 2 A.J.R., 115.

For facts *see* S.C. *ante column* 399.

See also *Vallence v. Condon*, *ante column* 399.

Under Act No. 140.]—An owner out of possession who receives a certificate subject to rights subsisting under any adverse possession receives evidence of a good title in ejectment until those rights are proved. *Murphy v. Michel*, 4 W. W. & A'B. (L.,) 13; for facts *see* S.C. *ante column* 844.

Conclusive Effect of Certificate under Sec. 47 of Act No. 301—Selection of Land by a "Dummy."]—Where M. had selected land really as a "dummy" for H., and after obtaining the Crown grant had transferred to H. under the Act, and H. obtained a certificate of title, *Held per Molesworth, J.*, that the certificate conclusively established H.'s title under Sec. 47, although the transaction was set aside as contrary to the policy of the "*Land Act*" (No. 237.) *M'Cahill v. Henty*, 4 V.L.R. (E.,) 68, 73.

Per Stephen, J. (at page 157.)—"The certificate is merely an epitome of a prior title; it is nothing on the question of parcels" and the Full Court held that, where there was a variance between the plan and the figures in the body of the certificate, the description in the plan was to govern, rejecting the figures on the principle "*falsa demonstratio non nocet.*" *Small v Glen*, 6 V.L.R. (L.,) 154, 157, 159; *see* S.C. *ante column* 1384.

To an action for breach of contract for not giving possession of land, it is not a good plea to urge that before breach vendor acquired a certificate of title. *Phœnix Foundry Company v. Hunt*, 5 A J.R., 70.

A certificate of title to leaseholds does not defeat the right of the Crown to determine the lease. *Matt v. Peel*, 2 V.R. (M.,) 27; 2 A.J.R., 133.

In Trespass—Plaintiff Obtaining a Certificate of Title under Sale by Sheriff—Sufficient Title.]—*House v. O'Farrell*, *ante column* 1312.

(c) Exceptions thereto under Sec. 49 of Act No. 301.

Fraud.]—*See* cases *post column* 1404, *et sequitur*.

Prior Grant of Certificate.]—The exception in Sec. 49, viz., "except the estate or interest of a proprietor claiming the same land under a prior grant or certificate," does not apply to the case where a proprietor's land has been sold by the sheriff, a transfer under such sale has been registered, and a new certificate issued to the sheriff's vendee. *Hassett v. Colonial Bank*, 7 V.L.R. (L.,) 380, 389; 3 A.L.T., 38.

For facts *see* S.C. *post column* 1409.

Volunteer Holding a Certificate—Specific Performance Prayed by a Subsequent Purchaser.]—A. was owner of land, and brought it under the Statute, the certificate of title being issued to B., his son. Shortly afterwards A. contracted to sell the land to C. Bill by C. for specific performance and to have transfer declared void as against him. *Held* that the transaction was void as against C. under 27 Eliz., Cap. 4, and that it was not protected by Secs. 49 and 50 of Act No. 301, their protection being intended for real purchasers under the Act, and persons dealing with them, not to sons taking presents from their fathers. *Colechin v. Wade*, 3 V.L.R. (E.,) 266.

Act No. 301, Secs. 49, 51—Certificate Issued to Official Assignee Subject to Rights of Dower and Rights under a Voluntary Settlement.]—Where H., an insolvent, paid part of the purchase money of land before his discharge from his first insolvency, and the balance after discharge, and voluntarily settled land by postnuptial settlement upon trustees in trust for his wife and children, and a certificate of title was issued to J., the official assignee under the first insolvency, subject to the rights of dower in H.'s wife and the rights under the settlement, and the settlement was set aside as void at the suit of the official assignee under H.'s second insolvency, *Held, per Molesworth, J.*, that the vesting of encumbrances on a certificate has no further effect under Sec. 49 than to leave the rights under the settlement unaffected though it might be otherwise under Sec. 51. *Shaw v. Scott*, 3 A.J.R., 16, 17.

Act No. 301, Sec. 49—Who is a "Tenant"—Person in Possession under Unregistered Right.]—Defendant obtained a judgment against W., the registered proprietor of certain land, part of which had been sold to the plaintiff. The sheriff sold W.'s interest under execution to defendant, who registered the transfer in due form, and became registered proprietor. Before and at the time of sale plaintiff gave notice of his protest but did not lodge a *caveat*. Defendant brought an action of ejectment against plaintiff. Bill by plaintiff to restrain proceedings in ejectment, and praying to be constituted proprietor of the land he had bought. *Held* that the provisions of Sec. 49 provide for all cases of possession, distinguishing merely adverse possession and tenancy under non-adverse possession, that the saving of tenants' interests has not reference merely to tenants in ordinary *parlance* as to their tenant interests, but to persons holding under non-adverse possession, and that plaintiff was such a tenant within the meaning of Sec. 49, and relief granted as prayed *Robertson v. Keith*, 1 V.R. (E.,) 11; 1 A.J.R., 14.

See also S.P. *Cunningham v. Gundry*, 2 V.L.R. (E.,) 197, 201.

"Transfer of Land Stat.," Sec. 49—Interest.]—A tenancy-at-will is an "interest" within the meaning of Sec. 49 of the "*Transfer of Land Stat.*" *Colonial Bank v. Roache*, 1 V.R. (L.,) 165; 1 A.J.R., 136.

Tenant's "Interests" under Sec. 49.]—The protection afforded to a tenant under Sec. 49 does not extend to protect the landlord's title. *Cullen v. Thompson, post column* 1400.

Act No. 301, Sec. 49—"Right or Interest."]—The holders of a mining lease of Crown land registered under the "*Transfer of Land Stat.*," of which another person has a grant in fee from the Crown, by mining on such lands, do not interfere with any "right or interest" of the Crown grantee within the meaning of Sec. 49 of Act No 301. *Alma Consols Gold Mining Company v. Alma Extended Company*, 4 A.J.R., 190

Object of Proviso in Sec. 49.]—The object of the proviso in Sec. 49 of the "*Transfer of Land Stat.*," "that the land included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions, and powers (if any) contained in the grant thereof," is to prevent the severance of the relation of landlord and tenant; and where persons were in occupation under a mining licence, and a subsequent mining lease was granted to plaintiffs by the Crown subject to the occupation licence, and afterwards the licensee got a grant in fee and leased to the defendants, *Held* that the plaintiffs were not ousted thereby, but were entitled to restrain the defendants from mining on the property. *Ibid.*

Reservations in Sec 49 of the "Transfer of Land Stat."]—J. E. applied for a mining lease, and went into possession of the land applied for. By mistake the lease, when ready for issue, was taken up and executed by another person of the name J. E. Upon discovery of the error the lease was cancelled, and a new one issued to the original J. E., who obtained a certificate of title under the "*Transfer of Land Stat.*," and transferred it to plaintiff. Between the issue of the two leases defendants had taken up the land under miners' rights, and pleaded that the certificate of title was subject to such occupation under Sec. 49 of the "*Transfer of Land Stat.*" *Held* that the certificate was not subject to such occupation. *Munro v. Sutherland*, 4 A.J.R., 166.

Act No. 301, Sec. 49—"Mining Stat." No. 291, Secs. 5, 24—Holder of Miners' Rights—Certificate not Conclusive as to Mine.]—A holder of miners' rights is only a tenant-at-will with the qualification that the will is not to be determined in favour of another gold miner (Sec. 29, Act No. 291;) he has no title against the Crown (Sec. 3,) and is not a "tenant" within the meaning of Sec. 49 of Act No 301 as to the land. Plaintiffs held a mining lease from the Crown, and succeeded in an action of ejectment as to the *land* against the defendants, who claimed under miners' rights. In an action for the gold as *mesne* profits in which plaintiffs recovered a verdict, *Held* (*dissentiente Stephen, J.,*) on rule *nisi*, that, as the certificate of title was silent as to the mine, and the plaintiffs had to fall back on their lease to show title to the gold, plaintiffs must establish that the gold mine is included in the parcels of the lease, which they could not do, as the defendants claimed under miners' rights, and, therefore, as to the *gold*, the lease was subject to such rights as "rights and interest subsisting at the time of the lease." New trial unless plaintiff consented to a reduction to nominal damages. *Munro v. Sutherland*, 5 A.J.R., 139.

Act No. 301, Sec. 49—Rights of Tenant.]—S. brought ejectment against D. D. was in under a tenancy from A., a former owner, who was decreed to convey to S. S. relied upon a certificate of title issued to him upon a conveyance pursuant to such decree *Held* that under Sec. 49. S.'s certificate of title was subject to the rights of D. *Slack v. Downton*, 1 A.L.T., 2.

Act No. 140—"Adverse Possession" Reserved in Certificate.]—Where a plaintiff in ejectment received a certificate of title subject to "any rights subsisting under adverse possession of the land," *Held* that the plaintiff had a good title until those rights were proved, and that the words "adverse possession" in the certificate referred to the "*R.P. Stat.*," No. 213, Part II. *Murphy v. Michel*, 4 W. W. & A'B. (L.,) 13; for facts *see* S.C. *ante column* 844.

As to what is evidence of adverse possession, *see Chisholm v. Capper*, *ante column* 846, and *Grave v. Wharton*, *ante column* 400.

Act No. 301, Sec. 49—Adverse Possession.]—*Per Fellows, J.*—The words "adverse possession" in Sec. 49 have not the old technical meaning which they had prior to the "*Stat. of Limitations*," and the possession means such an ostensible possession in fact as is sufficient to entitle the defendant to the benefit of the Statute. *Per Stephen, J.*—In order to invalidate a certificate of title, the possession must be shown to be "adverse' within the meaning of the words prior to the "*Stat. of Limitations.*" *Staughton v. Brown*, 1 V.L.R. (L.,) 150, 159, 163. *See* S.C. *ante column* 845.

Act No. 301, Sec. 49—Adverse Possession—Tenancy Previous to Mortgage]—A mortgagee brought an action of ejectment against R., a tenant of the mortgagor. R. obtained his lease from the mortgagor on 14th April, which was not registered; the mortgagor mortgaged to plaintiff 24th April. No demand of possession was made to R., he was merely asked to attorn to plaintiff, which he refused. *Held* that R.'s possession as tenant from the mortgagor was not adverse to plaintiff's title, as it was not to mortgagor's title, and that, under Sec. 49, R.'s right to possession was preserved as against the plaintiff's certificate. *Colonial Bank v. Rabbage*, 5 V.L.R. (L.,) 462.

(*d*) *Other Points.*

Production of Certificate—Necessary.]—Where a mining lessee had obtained a certificate of title under the "*Transfer of Land Stat.*," and relied upon it as conclusive in a suit, the Court *held* that he must produce it in that suit before he could so rely upon it. *Shamrock Company v Farnsworth*, 2 V.L.R. (E.,) 165.

Lien on.]—*Quære*, whether any right of lien can be acquired as to a certificate of title under the "*Transfer of Land Stat.*," No. 301. *Swan v. Seal*, 10 V.L.R. (E.,) 57, 66; 5 A.L.T., 196.

"Transfer of Land Stat."—Duplicate Certificate—Evidence of Title.]—A duplicate certificate of title, under the "*Transfer of Land Stat.*," is admissible as *prima facie* evidence of the claimant's title in ejectment. *Wilkinson v. Brown*, 1 V.R. (L.,) 86; 1 A.J.R., 88.

3. *Transfers.*

(*a*) *Generally.*

When Good.]—*Per Molesworth, J.*—A transfer of land under the "*Transfer of Land Stat.*," executed by the transferror, but not by the transferee, and not registered before the death of the transferror, is, nevertheless, valid, and divests the estate out of the transferror. *Tierney v. Halfpenny*, 9 V.L.R. (E.,) 152, 157.

Registration of Transfer—Act No. 301, Sec. 32—Guarantee Fund.]—Land was vested in trustees with power to sell or mortgage. The trustees executed a mortgage with a power of sale upon default upon one month's notice. The power of sale was exercised, and the purchaser applied to bring the land under the "*Transfer of Land Stat.*;" but the Registrar of Titles, on the recommendation of the Commissioner of Titles, refused the application. Upon summons to the Registrar to show cause, *Held* that this was a case in which the Registrar might exercise the powers conferred upon him by Sec. 32 of the Statute, which provides that the Commissioner may require an additional indemnity to be paid to the Guarantee Fund, if he thinks proper, against any uncertain claim or demand arising on the title; and that the transfer should be registered, on such indemnity as the Commissioner might require being given. *In re Salter*, 2 V.R. (L.,) 113; 2 A.J.R., 73.

Void Settlement under 27 Eliz., Cap. 4—Settlor Acting Collusively—Registration of Settlor's Transferee—Act No. 201, Secs. 49, 139.]—Where a settlor agreed to sell the settled land to M., and the deed of purchase contained false recitals as to the purchase money, although there was some money due to M. at the time of purchase, the Court, while holding that the settlement was void as against M.'s *bonâ fide* debt, upheld the Registrar's refusal to register the transfer under the Statute to M., refusing to make M. proprietor out of regard to the provisions of Sec. 139 of Act 301, but directed the trustee of the settlement to execute a mortgage to M. under the Act. *Moss v. Williamson*, 3 V.L.R. (E.,) 221.

For facts, *see* S.C., *ante columns* 471, 472.

The practice of the Office of Titles of endorsing on a certificate of title issued on a voluntary transfer, "subject to the possibility of the transfer being upset under the "*Insolvency Stat.* 1871," and the Statute of 13 Eliz., Cap. 5," has no good reason to recommend it. *Crow v. Campbell* 10, V.L.R. (E.,) 186, 194; 6 A.L.T., 34.

(*b*) *Special Provisions as to Fraud and Notice.*

What is Fraud within the Meaning of Secs. 49 and 50 of Act No. 301.]—*Per Molesworth, J.*—"I should instance as to what might be deemed fraud under the Act, collusion between proprietor, vendor, and vendee, to defeat an equitable interest, or means taken by the vendee to induce a person having equitable interests not to enforce his right or lodge a *caveat*." *Robertson v. Keith*, 1 V.R. (E.,) 11, 14; 1 A.J.R., 14.

Quære, Whether dealings completed with a person before he becomes a proprietor under

the Act can be protected by the machinery of the Act as to his vendee by making him a proprietor and at the same time a transferor. The immense power the Act gives to a proprietor of completely barring clear equities, presents a reason for Courts of Equity readily interfering by injunction. *Davis v. Wekey*, 3 V.R. (E.,) 1, 11; 3 A.J.R., 1.

For facts, *see* S.C., *ante columns* 570, 571.

Fraud—Act No. 301, Secs. 49, 50.]—Secs. 49, 50 protect a purchaser of land from all incumbrances and trusts, but they do not absolve him from the obligation of performing an express contract into which he has entered, or deprive the Court of the power to enforce such performance. *Cunningham v. Gundry*, 2 V.L.R. (E.,) 197.

Settlement Void under 27 Eliz., Cap. 4—Volunteer Holding a Certificate of Title under Act No. 301.]—A void settlement under 27 Eliz., Cap. 4, is not protected under Secs. 49 and 50 when it is a settlement by a father on a son. *Per Molesworth, J.*—The protection afforded under those sections being intended for real purchasers under the Act, and persons dealing with them, not to sons taking presents from their fathers. *Colechin v. Wade*, 3 V.L.R. (E.,) 266.

For facts *see* S.C. *ante column* 472.

Land was purchased for partnership purposes, and one of the partners transferred the land to his son (an infant,) and a certificate of title was issued to such son. On a bill by a bank to enforce a banker's lien on this land and other partnership assets, *semble* that the certificate of title was not conclusive. *Molesworth, J.*, following his decision in *Colechin v. Wade*. *Bank of Victoria v. Rawling*, 6 V.L.R. (E.,) 111, 118.

Sec. 50—Fraud—Constructive Notice—Breach of Trust—Solicitor and Client.]—*Per Full Court*—Sec. 50 of Act No. 301 should be construed strictly and the exception liberally: the word "fraud" means fraud on the part of either party, and not necessarily of both, and applies equally to cases of fraud by a purchaser as by a vendor. That although a person who purchases from a registered proprietor is not bound to institute inquiries as to vendor's title, yet Sec. 50 is not intended to protect frauds committed by the purchaser himself. *Per Stephen, J.*—The doctrine of resulting trusts arising from the fact that no consideration was paid may be applied to land under the Statute. A., a solicitor, and the survivor of two trustees under a settlement, under which they had power to invest and vary investments, invested moneys of the settlement in mortgages of land under the general law and under Act No. 301, taking mortgages in his own name. A. was also attorney under power of defendants to invest money for them on mortgage. A., being indebted to the defendants, without the consent of the tenant for life, drew and executed conveyances and transfers of the mortgages from himself to the defendants, untruly reciting the receipt of consideration money, and shortly afterwards committed suicide. Bill by the new trustees of the deed of settlement against defendants for a declaration that the conveyances and transfers were fraudulent, and seeking reconveyances and retransfers. *Held, per Molesworth, J.*, and affirmed, that documents in evidence containing A.'s signature comprising instructions for mortgages and accounts of interest on sums invested signed by A., and tendered to the tenant for life were sufficient evidence as to a trust affecting the moneys invested upon mortgage as against the defendants, and that the defendants were affected through A.'s knowledge with notice of his breach of trust, and that transfers of the mortgages under the general law should be ordered: by Full Court reversing *Molesworth, J.*, that the case was the same as to the land under the Statute. *By the Full Court*, that the fact of there being no consideration for the assignment of the mortgages was sufficient to rest the judgment upon. *Chomley v Firebrace*, V.L.R. (E.,) 57.

Secs. 49, 50—Fraud in Acquiring Certificate—Constructive Notice—Tenant.]—"Fraud" does not mean or include fraud of the conveying party in acquiring title; a person innocently taking from another who fraudulently acquired is protected. The protection afforded to a tenant by Sec. 49 does not extend to protect the landlord's title. A., being registered proprietor of certain land under the Statute, and being indebted to B., signed a document in April, 1878, which he believed to be a mortgage, but which was in reality an absolute transfer. B. then obtained a certificate, and was registered as proprietor, and mortgaged to C. on July 12th, 1878. The land was in D.'s possession as a weekly tenant from A. before and since April, 1868. A. detected the fraud, and then brought a bill to have the transfer declared to be by way of mortgage. *Held* that the mortgage from B to C. was good as against A., C. being protected by Sec. 50; decree for redemption made upon payment to C. by A. or B., and in case of payment by A., B. should repay him, deducting the amount of A.'s indebtedness to him as in April, 1878. *Cullen v. Thompson*, 5 V.L.R. (E.,) 147; 1 A.L.T., 15.

Notice of Fraud—Section 50.]—Section 50 of the "*Transfer of Land Stat.*," No. 301 protects from constructive notice, but not from actual notice, of fraud. Therefore, where a transferee had at the time of the sale, and accepting the transfers, and more distinctly by service of the bill before the completion of the transaction and payment of purchase money, actual notice of a fraud in the transfer of the property to his immediate transferor, he was held to be not protected by Sec. 50. *Colonial Bank of Australasia v. Pie*, 6 V.L.R. (E.,) 186, 193; 1 A.L.T., 156.

Executor Giving a Mortgage under the Act—Protection of Mortgagee.]—*Per Molesworth, J.*—An executor cannot under the Act mortgage in a case where the mortgage would be invalid as to land not under the Act, and the mortgagee

is not protected. *Droop v. Colonial Bank*, 6 V.L.R. (E.,) 228, 232.

But *per Stephen, J.*—An executor can under the Act sell or mortgage, and is only accountable to his *cestuis que trustent*. S.C., 7 V.L.R. (E.,) 71, 78.

Sec. 50—Notice—Voluntary Transfer.]—Sec. 50 of the "*Transfer of Land Stat.*" does not apply to a transfer of land without consideration at the time of transfer or previous legal obligation to transfer. *Crow v. Campbell*, 10 V.L.R. (E.,) 186, 194; 6 A.L.T., 34.

For facts *see* S.C., *post* under TRUST AND TRUSTEE — CREATION OF TRUST — In other Cases.

c) *Transfers under Sales by Sheriff.*

Act No. 301, Sec 106—Sale by fieri facias.]—*Semble*, that Sec. 106 of the "*Transfer of Land Stat.*" does not annul a sale by *fieri facias*, as against the execution debtor, but leaves the purchaser exposed to be defeated by his acts, until the execution is by some means brought into registration. *United Hand in Hand and Band of Hope Company v. National Bank of Australasia*, 2 V.L.R. (E.,) 206, 219.

Act No. 301, Secs. 106, 107—Registration of fi. fa.—Sale by Sheriff.]—*Per Molesworth, J.* (following *(United Hand in Hand Company v. National Bank*, 2 V.L.R. (E.,) 206) that Sec. 106 does not avoid a sale by *fieri facias* as to the rights of a debtor, but only as between a purchaser for value from debtor and a purchaser from sheriff; and that an official assignee is not such a purchaser for value. Bill by official assignee against purchasers for value from sheriff under writ of *fi. fa.* to set aside the sale on the ground that, though the *fi. fa.* was duly served on the Registrar under Sec. 106, the transfer was not left for entry under that section within three months, dismissed. *Giles v. Lesser*, 5 V.L.R. (E.,) 38.

Purchaser at Sheriff's Sale whose Transfer is Registered—Rights as against prior Unregistered Purchaser.]—M. B. purchased land from K. before a Crown grant had been issued to K. At a sheriff's sale under an execution against K. J. bought the land. N., a solicitor, who had acted for M. B. in the purchase of the land, and in a mortgage of it to J., procured the Crown grant as for J., and a certificate of title to J., as entitled in fee under the sheriff's sale. On a bill brought by M. B. and her husband to establish their title, *Held* that the purchase at the sheriff's sale was void as against M. B.'s purchase, save as to the balance of purchase money left unpaid to which, with interest thereon, J. was entitled. *Brew v. Jones*, 2 V.R. (E.,) 20; 2 A.J.R., 6.

Act No. 301, Secs. 1 6, 135.]—W., B.'s transferor, on 2nd January, 1872, presented transfers of certain land, and B. obtained registration of the transfers and certificates of title. On 20th October, 1871 (*i.e.*, less than three months previously) a copy of a *fi. fa.*, issued against W., was duly served under the Act. On 5th January, 1872, P. served a copy of an *alias fi. fa.* upon the Registrar. In March P. lodged for registration tranafers of the same land to himself which the Registrar refused to register. *Held* by the Privy Council, overruling the Full Court, that the Registrar was right in refusing to register P.'s transfers; that previously to 5th January B. had acquired a title to the lands which could only be defeated by a sheriff's transfer of them under the original writ; and as P.'s transfers were in pursuance of an *olias* writ, and were made at a time when no valid transfer could have been made in execution of the original writ, the Registrar was right in completing B.'s title by registration on 21st January. *Ex parte Paterson*, 3 V.R. (L.,) 128; 3 A.J.R., 54, 92. S.C. (*sub-nom.*) *Registrar of Titles v. Paterson*, L.R. 2, App. Ca. 110.

Construction of Sec. 106.]—*Per Privy Council.*—The policy of the Legislature in framing this section was evidently to prevent titles from being affected, beyond a limited time, by the operation of unexecuted writs of execution as charges on the land, and to reconcile the rights of judgment creditors with those of a purchaser for value whether with or without notice. *Registrar of Titles v. Paterson*, L.R., 2 App., Ca. 110, 118.

Rights of Judgment Creditor Under, Sec. 106.]—There is nothing in Sec. 106 to prevent a judgment debtor from making a contract for the transfer of his land to a purchaser for value, subject to the rights which the section gives to an execution creditor, or to a possible purchaser through the sheriff. Such a contract can only be perfected through registration, and must therefore remain defeasible till the writ is withdrawn or satisfied, or the term of three months from a day on which the copy was served, has expired. *Ibid.*

Duty of the Registrar as to Transfers under Sec. 106.]—It is the duty of the Registrar, under Sec. 106, to register the first transfer lodged if it is a valid one; if such appears not to comply with a condition in the instrument of title prohibiting transfers, the Registrar must determine for himself whether such condition is a valid one. *In re "Transfer of Land Stat." ex parte Bond*, 6 V.L.R. (L.,) 458; 2 A.L.T., 94.

See for facts S.C., *post column* 1409.

But where the interest of a Crown lessee in a lease, containing a condition not to assign without the leave of the Governor-in-Council was sold under a sheriff's sale, *Held* that the condition referred only to voluntary assignments, and not to sales by aheriff, and Registrar ordered to register the *fi. fa.* and sale. *In re "Transfer of Land Stat.," ex parte Ellison*, 5 V.L.R. (L.,) 59.

Effect of Provisions as to Registration Generally.]—*See Kickham v. The Queen*, *post column* 1409.

Act No. 301—Secs. 49, 50, 106, 117, 130—Equitable Mortgage—Purchaser at Sheriff's Sale—Priority—Unregistered Encumbrance.]—F., being a registered proprietor, deposited his Crown

grant by way of equitable mortgage with plaintiff in January, 1879. B., a creditor, had recovered judgment against F., and on 14th February duly lodged a copy of his *fi. fa.* with the Registrar, under Sec. 106. The plaintiff on 24th February got a mortaage from F., and shortly afterwards lodged a *caveat*, and served notice upon sheriff, who had advertised a sale under the *fi. fa.* The defendant purchased at the sheriff's sale, and claimed to be registered, which Registrar refused. The plaintiff in May applied to have his mortgage registered long after his *caveat* had lapsed. *Held* that defendant, not being fixed with notice of plaintiff's claim, had priority. Persons having security by deposit are protected, but not in inactivity, nor by *caveats* or notices to sheriffs as to intended sales under *fi. fa.* *Patchell v. Maunsell*, 7 V.L.R. (E.,) 6.

Copy of Writ Erroneously Describing Land to be Levied upon—Effect of Sale upon Certificate of Title.]—A copy of a writ of *fi. fa.* erroneously set out as the land to be levied upon, the land of a third person bearing the same name as the judgment debtor, and a person purchased this land at the sheriff's sale. *Held* that the sheriff's sale and the transfer under it put an end to the certificate of title held by such third person. *Hassett v. Colonial Bank*, 7 V.L.R. (L.,) 380; 3 A.L T., 38.

4. *Registration and Duties of Registrar.*

Effect of Provisions as to Registration.]—The provisions of the "*Transfer of Land Stat.*" referring to registration, have merely the effect that until the transfer to the assignee is registered, the original lessee or proprietor may act so as to defeat the title of the assignee. The Statute does not provide that every person registered is to have a title against the whole world. *Kickham v. The Queen*, 8 V.L.R. (E.,) 1; 3 A.L T., 86.

The Statute has nothing to do with rights, but subjects an unregistered person to be defeated by transfers if registered. But otherwise, a sale of land under it is the same as of land under the ordinary law. S.C. 8 V.L.R. (E.,) 250.

Act No. 301, Sec. 42—Registration of Leaseholds.]—As to effect of registration *see Morrissey v. Clements*, *post column* 1413.

Act No. 301, Secs. 42, 87—Registration of Transfer or Sale.]—As to effect of registration *see National Bank of Australasia v. United Hand in Hand and Band of Hope Company*, *post column* 1416.

Duty of Registrar—"Transfer of Land Stat.," Secs. 132, 135.]—The necessary conclusion to be drawn from Secs. 132 and 135 of the "*Transfer of Land Stat.*," is that the Registrar of Titles has imposed upon him the judicial duty of examining into the validity of instruments presented to him for registration. He is not simply to accept all instruments in the order in which they are lodged without reference to whether they are valid instruments or not. *In re "Transfer of Land Stat.," ex parte Bond*, 6 V.L.R. (L.,) 458; 2 A.L.T., 94.

"Transfer of Land Stat.," Sec. 106.]—It is the duty of the Registrar of Titles under Sec. 106 of the "*Transfer of Land Stat.*," to register the first transfer, under a sale from the sheriff, lodged with him, if it be valid. If such transfer appears not to comply with a condition in the instrument of title prohibiting transfer, the Registrar must decide for himself whether such a condition is a valid one. *Ibid.*

Costs.]—Where, on a summons to the Registrar to uphold the grounds of his refusal to register a transfer, the Court is of opinion that there was probable ground for the refusal, the applicant must under Sec. 135 pay the costs. *Re "Transfer of Land Stat.," ex parte Leach*, 5 A.J.R., 72.

Duties of Registrar in Applications to bring Land under the Act.]—*See ex parte Bowman* and *ex parte Rowan*, *ante column* 1395.

5. *Caveats.*

(a) *Forbidding the Bringing of Land under the Act and Registration as Proprietor of Applicant.*

See cases *ante columns* 1393-1397.

(b) *Forbidding Registration of Dealings with Land under the Act.*

Act No. 140, Sec. 80, Forbidding Registration—Cannot be Extended to Include Claims not Referred to—Withdrawal.]—A *caveat* lodged under Sec. 80 of the "*Real Property Act*," No. 140, claiming a lien on land for a specified sum, and forbidding the registration of any instrument affecting the land until after notice to the *caveator*, cannot be extended so as to embrace other claims to which it contains no reference, and so will not be extended to include a claim to the land absolutely, which claim is alleged by affidavit of the *caveator*; and the person applying to be registered as proprietor may on summons to the *caveator* obtain an order from a Judge in Chambers for withdrawal of the *caveat*, upon the terms of paying the *caveator* the sum specified in his *caveat*. *Ex parte Lyons*, 1 W. W. & A'B. (L.,) 119.

N.B.—Sec. 116 of Act No. 301 closely follows Sec. 80 of Act No. 140.

Order to Delay Registration—"Transfer of Land Stat.," Sec. 117.]—If a Judge's order, under "*The Transfer of Land Stat.*," Sec. 117, to delay the registration of a transfer upon the application of a *caveator*, does not show on the face of it that it has been made within fourteen days after notice to the *caveator*, and such fact does not appear upon the affidavit upon which the order is drawn up, and to which it refers, such order is bad. *In re Wise*, 2 V.R. (L.,) 111; 2 A.J.R., 69.

Order Extending Caveat—"Transfer of Land Stat.," Sec. 117.]—An order extending the operation of a *caveat*, headed in the matter of

the "Transfer of Land Stat.," shows an intention to exercise the Statutory jurisdiction conferred by Sec. 117 of the Statute, and may be made without terms as to any undertaking or security by way of indemnity; and it is not necessary that it should show that such undertaking or security has been dispensed with. *In re "The Transfer of Land Stat." and the Caveat of Fearnley*, 2 A.L.T., 32.

Restraining Registration—Pending Dispute as to Mortgage Money.]—Where an application was made by a mortgagor (*caveator*) under Sec. 117 of the Act, to restrain registration of dealing with the land pending a dispute as to the mortgage debt, the Court ordered a delay of the registration for a month, the *caveator* to pay £100 into Court as an indemnity against any loss likely to be sustained thereby. *In re "Transfer of Land Stat.," ex parte Peck*, 10 V.L.R. (L.,) 328; 6 A.L.T., 162.

Restraining Registration—Practice under "Judicature Act 1883"—"Supreme Court Rules" 1884, Order 52, Rule 3.]—An application to delay the registration of dealing with land should be made by motion upon notice under Order 52, Rule 3, and not *ex parte*. *Ibid.*

6. *Dower.*

Acknowledgment of Married Woman—Act No. 353. Sec. 6, Commissioner's Certificate—Onus of Proof that Statute has been Complied with.]—Where the form provided by the "*Transfer of Land Stat.*" for the certificate to be given by a commissioner for taking the acknowledgments of married women to bar dower has not been strictly followed, the *onus* of proving that the requirements of the Act with reference to the taking of such acknowledgment have been complied with, lies on the person claiming under the acknowledgment *In re Kerr*, 1 V.R. (L.,) 199; 1 A.J.R., 163.

For other cases *see* under HUSBAND AND WIFE, *ante column* 538.

7. *Easements and Registration thereof.*

Easements Appurtenant — What are.] — Only easements appurtenant to the land registered can be entered upon the register; where, therefore, the owner of certain land granted by deed, for a consideration, a right-of-way over a certain portion of his land to an adjoining owner, *Held* that this was merely a way in gross, which could not be assigned, and should not be registered. *In re "Transfer of Land Stat.," ex parte Johnson*, 5 W. W. & A'B. (L.,) 55.

Act No. 301, Secs. 17, 64—Easement—Incorporeal Hereditaments.]—Sec. 64 prescribes that when any easement is created over or affecting land under the operation of the Act, a memorial is to be entered upon the folium constituting the title to such land, or, in other words, a blot is to be made in the register on the title to the *servient* tenement; but there is no provision for showing on the title to the *dominant* tenement any easement appurteuant to it, although the use of the word "land" will carry with it any easement to which the owner of the dominant tenement can be shown by evidence external to the register to be entitled. There is no provision for registering easements over land not brought under the Act: only such incorporeal hereditaments as are actual estates in land over land not under the Act can be registered. *In re "Transfer of Land Stat.," ex parte Cunningham, in re M'Carthy*, 3 V.L.R. (L.,) 199.

Act No. 301, Secs. 24, 64—Amending Act, No. 610, Sec. 2—Easement.]—B, the owner of the dominant tenement, was bringing certain land under the Act, and sought to have a right-of-way over the servient tenement, which had been granted by deed some time before inserted in his certificate of title. The servient tenement was already under the Act. A judge in Chambers granted an order, restraining the Registrar from bringing this easement under the operation of the Act. *Held* that under Sec. 24 the Court has jurisdiction to interfere and prevent an injustice being done, whether a suit in equity or an action at law has been instituted or not; and that the owner of the dominant tenement was not entitled under Sec. 64 or Sec. 2 of the Act No. 610, to have an easement over a servient tenement entered on his certificate of title. Rule to rescind order refused. *In re "Transfer of Land Stat," ex parte Beissel*, 5 V.L.R. (L.,) 53.

Right-of-way—Act No. 301, Sec. 64—Act No. 610, Secs. 2, 3.]—J., the owner of the dominant tenement, sued P., the owner of the servient tenement, for obstructing a right-of-way over P.'s land. J put in his certificate of title, showing a right-of-way on the plan in the margin. P.'s certificate of title also on its face showed plaintiff's right-of-way. Certain evidence of Crown grants and defendant's occupation of another adjoining piece of land was rejected, and plaintiff obtained a verdict. On rule *nisi* to enter a verdict for defendant, *Held* that even if Sec. 64 of Act No 301, and Sec. 3 of Act No. 610, referred to the same subject matter, although the requirements in the former referred to an endorsement, and those of the latter to a plan in the margin, yet they were directory and not mandatory; and that a certificate that the person named is entitled to an easement is conclusive evidence that he is so entitled. *Semble* if an error is made as to the width or other particulars of the right-of-way, a new certificate with a correct description may be issued. Rule discharged. *Jones v Park*, 5 V.L.R. (L.,) 167; 1 A.L.T., 10.

Act No. 301, Secs 15, 17, 19, 49—Act No. 610, Secs. 2, 3, 4—Easement Appurtenant to Land sought to be brought under the Act may be Entered upon the Certificate of Title.]—*Per the Full Court*—Although under the Act No. 301, Secs. 15, 17, 19, the Registrar, on bringing the dominant tenement under the Act, is not justified in describing an easement appurtenant to such tenement on the certificate of title, yet under the combined effect of Secs. 3 and 4 of Act No. 610, taken with Sec. 64 of Act No. 301 (overruling *ex parte Beissel*,) the Registrar has power to include by designation in the certificate of title an easement appurtenant to the

dominant tenement sought to be brought under the Act over land already under the Act. *In re "Transfer of Land Stat.," ex parte Metropolitan Building Society*, 10 V.L.R. (L.,) 361; 6 A.L.T., 171.

Quære, per Full Court, whether the Court has any power to direct an inquiry, or to investigate the title to such easement, inasmuch as no rules have been made under the power given in Sec. 152 prescribing the mode of investigating a disputed title to such easement. *Semble* that, inasmuch as the Court must determine the matter if it has jurisdiction, and some course of procedure is necessary for that purpose, the Court is at liberty to prescribe the most convenient course, being one which it would have been empowered to prescribe by rule. *Ibid.*, p. 370.

Registration of—Power of Owner of Servient Tenement already under the Act to stay the Registration of an Easement Appurtenant to a Dominant Tenement sought to be brought under the Act.]—*Per Stawell, C.J.*, and *Holroyd, J.* (*dissentiente Higinbotham, J.*)—The owner of the servient tenement cannot, by virtue of his estate in such tenement, forbid the registration of an easement over such servient tenement appurtenant to the dominant tenement sought to be brought under the Act, because "the land described in the advertisement" mentioned in Sec. 22 of Act No. 301, does not include the servient tenement.—it only includes the dominant tenement and the easement appurtenant thereto, and in neither of these has the owner of the servient tenement any interest—and it is not sufficient that the easement is something incompatible with the rights of the owner of the servient tenement. *Per Higinbotham, J.*—"The land described in the advertisement" really includes the servient tenement, and the owner of the servient tenement has then an interest in "the land described, &c.," and may properly lodge a *caveat* under Sec. 22 against the registration of the easement. *Ibid.*, pp. 371, 375.

8. *Leases under the Act.*

Certificate of Title to Leasehold—Effect of.]—A certificate of title under the "*Transfer of Land Stat.*," that a person is proprietor of a leasehold estate for so many years, cannot defeat the right of the Crown to determine the lessee's estate. *Matt v. Peel*, 2 V.R. (M.,) 27; 2 A.J.R., 133.

Effect of Sec. 42 of the "Transfer of Land Stat." on Unregistered Leases.]—The effect of Sec. 42 of the "*Transfer of Land Stat.*" is not to render a lease, which has not been registered, void, but to make it of no effect as against a subsequent registered conveyance of the land. *Morrissey v. Clements*, 6 A.L.T., 107.

Lease Destroyed—Effect of.]—If a lease be destroyed, so that its registration thereby becomes impossible, it is still valid as between the parties as a contract. *Ibid.*

9. *Mortgages under the Act.*

(a) *Equitable Mortgages.*

Land under the "*Transfer of Land Stat.*" may be equitably mortgaged by deposit of the certificate of title. The policy of the Act being to protect a transferee whose title is completed by the issue of a new certificate when the certificate is issued, not before. *London Chartered Bank v. Hayes*, 2 V.R. (E.,) 104; 2 A.J.R., 60.

Equitable Mortgage—Priority—Purchaser at Sheriff's Sale—Unregistered Encumbrance—Act No. 301, Secs. 49, 50, 106, 117, 130.]—An equitable mortgagee, who does not give notice to the sheriff or lodge a *caveat* until after a creditor lodges a copy of a *fi. fa.* with the Registrar, will, by allowing his *caveat* to lapse, and without taking other steps to protect his interests, lose his priority over the purchaser at the sheriff's sale. *Patchell v. Maunsell*, 7 V.L.R. (E.,) 6.

For facts, *see* S.C., *ante columns* 1408, 1409.

Rights of Equitable Mortgagee to Retain Certificate until his Charge is Paid off.]—*Ex parte Patterson, ante columns* 1398, 1399.

(b) *Rights and Liabilities of Mortgagors and Persons Claiming through them.*

Act No. 301, Secs. 93, 94—Action for Use and Occupation by a Mortgagor.]—The powers conferred by Sec. 93 of Act 301 upon the mortgagee do not prevent the mortgagor from maintaining an action for use and occupation before the mortgagee enters into possession. F. became registered proprietor of land, and mortgaged the land to a bank. F. then transferred the land, subject to the mortgage, to L. One B., a former proprietor of the land, had executed a deed of assignment, comprising the premises, and the trustees under the deed had let the defendant into possession under a verbal agreement. L. sued defendant for use and occupation, and there was evidence that defendant had recognised L.'s title as mortgagor. *Held* that such recognition was sufficient to sustain the action, and that no consent in writing by the mortgagee under Sec. 94 was necessary, as the defendant, having previously recognised L.'s title as the transferee from the mortgagor, the mortgagee himself could not bring the present action. *Louch v. Ball*, 5 V.L.R. (L.,) 157; 1 A.L.T., 10.

Liability of Purchaser of Equity of Redemption from Mortgagor, Secs. 90, 110.]—The language of Secs. 90 and 110 of the "*Transfer of Land Stat.*" must not be taken to mean that the purchaser of an equity of redemption of land under the Statute is personally liable to the mortgagee in the first instance, as upon a covenant to pay the mortgage debt. The object of the Act is not to create new liabilities; it is to make the transferee liable to covenants running with the land. *Australian Deposit and Mortgage Bank v. Lord*, 2 V.L.R. (L.,) 31.

Mortgage under "Transfer of Land Stat."—Action by Mortgagor—Consent of Mortgagee—Act No. 301, Sec. 94.]—*See Griffin v. Dunn*, 4 V.L.R. (L.,) 419; *ante column* 1056.

(c) *Power, Remedies and Liabilities of Mortgagees and Persons claiming through them.*

Power of Sale—Notice—Act No. 301, Sec. 85.]—H. mortgaged land to I. by an instrument under the "*Transfer of Land Stat.*" H. being in arrears with his interest was, before the date of the principal becoming due, served with a writ in ejectment, and also discovered that the land was advertised for sale. Upon motion to restrain the sale, *Held* that I. was not, under Sec. 85, entitled to sell till after a month from date of notice; that the Court would only interfere where an offer had been made of both principal and interest, *i.e.*, where the mortgagee could get all without a sale that he could get with a sale. Motion refused. *Hervey v. Inglis*, 5 W. W. & A'B. (E.,) 125.

Notice of Sale—Sec. 84—Notice by Unregistered Letter Sufficient—Protection of Purchaser under Sale without Notice—Sec. 85.]—Injunction suit against mortgagees transferring certain lands and against H. a purchaser from registering a transfer from the mortgagees. The mortgage given by the plaintiff mortgagor to the defendant mortgagees, was under the Act No. 301, and provided for giving of notice under Sec. 84 in case of default being continued for seven days, and power of sale under Sec. 85 within seven days after service of the notice. In December, 1871, half a year's interest was due, and an agent for the mortgagees sent to the plaintiff a letter, not registered, informing him that unless "the money due under the mortgage be forthwith paid," the mortgagees would proceed to sell. The mortgagees sold part to one purchaser who was not a party to the suit, and part to D., who had no notice of the circumstances. *Held*, upon motion for injunction, that the notice reaching the mortgagor, though by unregistered letter, was sufficient, the provision in Sec. 84 as to registered letters meaning that the precaution of sending a registered letter must be shown to have been observed where the mortgagee is unable to prove actual receipt; that the notice of December, 1871, was defective (1) in not distinctly shewing whether the mortgagees exercised their option of requiring payment of both principal and interest or of interest only; and (2) in requiring payment "forthwith" and not after seven days' default; that, as H. was a purchaser for value without notice, his purchase was protected; that Sec. 85 validates contracts as well as conveyances and transfers, where registered under the Act, and protects contractors knowing nothing at the time of anything to impugn the validity of the contract. Injunction refused as to H., granted as to defendant mortgagees, until after they had given notice as by Sec. 84 provided. *M'Donald v. Rowe*, 3 A.J.R., 90.

At the hearing, *Held* that the mortgagor was entitled to charge the defendant mortgagees at his option with the value of the land at the time of the sale or at the time of the decree. *M'Donald v. Rowe*, 4 A.J.R., 134.

"Transfer of Land Stat," No. 301, Sec. 85.]—*Quære, per Molesworth, J.*, whether the protection given to a purchaser from a mortgagee by Sec. 85 of the "*Transfer of Land Stat.*," exempting him from inquiring as to default or notice of sale, extends to a person having only a contract of purchase. *M'Donald v. Rowe*, 3 A.J.R., 90, doubted. *Ross v. Victorian Permanent Building Society*, 8 V.L.R. (E.,) 254, 265; 4 A.L.T., 17.

A power of sale exercised under Sec. 85 is bad, if with the land under the Statute, there be also sold land under the general law, all being sold under one contract and at one price. *Ibid.*, *see* facts *ante column* for 1060.

Sale by Mortgagee—No Interest Passes to Purchaser till Registration.]—Where the mortgagor is a registered owner of leasehold estate under the "*Transfer of Land Stat.*" and a mortgage is made and registered under Sec. 83 and the following sections, so that the only way in which the mortgagee can extinguish the rights of the mortgagor is by foreclosure, under "*The Transfer of Land Statute Amending Act*," No. 317, Sec. 2, or sale under Secs. 84, 85, and 87 of the "*Transfer of Land Stat.*;" then whether a sale of such leasehold estate is made by the mortgagee under the statutory power of sale, or as absolute owner, no interest therein passes to the purchaser until registration; *see* Secs. 42 and 87. *National Bank of Australasia v. United Hand-in-Hand and Band of Hope Company*, L.R., 4 Ap. Ca., 391.

Remedies of Mortgagee when Principal Debt or Interest Unpaid, Act No 301, Secs. 84, 85, 87—Act No. 317, Sec 2.]—The only way in which a mortgagee can extinguish the rights of the mortgagor, is by foreclosure under Act No. 317, Sec. 2, or by a sale under Act No. 301, Secs. 84, 85, 87. *Ibid.*

Act No. 301, Secs. 98, 99.]—The remedy of a mortgagee as to foreclosure is not in the old way by a suit in Equity for that purpose, but by following the remedies prescribed in Secs. 98 and 99 of Act No. 301. *Greig v. Watson*, 7 V.L.R. (E.,) 79, 84; 3 A.L.T., 13.

(d) Other Points.

Attesting Witness to a Mortgage—Who may be—"Transfer of Land Stat.," Sec. 115.]—The manager of a bank, who is also a Justice of the Peace, is not incapacitated from acting as attesting witness, under Sec. 115 of the "*Transfer of Land Stat.*," to the execution of a mortgage, made under the Statute, to his bank, there being no proviso in the section restraining an interested party from attesting. *Bank of Victoria v. McMichael*, 8 V.L.R. (L.,) 11.

Consolidation of Mortgages—Mortgages of Land under the Act and under the General Law—No Power to Consolidate.]—*Greig v. Watson*, *ante column* 1054.

10. *Remedy in Respect of Deprivation of Land.*

Act No. 140—Actions by and against Registrar of Titles—Secs. 116, 118.]—A person fraudulently personated the owner of certain land, brought it under the "*Real Property Act*" (No. 140,) and had the name of a purchaser from him registered as proprietor thereof. The real owner brought an action for damages, under Sec. 118 of the Act, against the Registrar of Titles. *Held* that the action did not lie against the Registrar but against the person who had personated the owner, under Sec 116 of the Act, though such person had never been registered as proprietor. *Fotheringham v. Archer*, 5 W. W. & A'B. (L.,) 95.

[Note—Sec. 146 of Act No. 301, closely follows Sec. 116 of Act No. 140.—ED.]

Action against Assurance Fund—Omission of Registrar to Endorse Memo. that Land was Brought under the Act—"Transfer of Land Stat.," Secs. 27, 146.]—T. applied to have certain land brought under the "*Transfer of Land Stat.*," and lodged the title deeds. The Registrar omitted to endorse, under Sec. 27, on the last material registered document lodged by T., a memo. that the land was brought under the Act. T. applied to O. to advance money to him, and O. advanced it on mortgage of the land, as under the general law, without notice that the land had been otherwise transferred. T. became insolvent, and the mortgage was discovered to be valueless, whereupon O. brought an action against the assurance fund. *Held, per Stawell, C. J. and Holyroyd, J. (dissentiente Higinbotham, J.)* that Sec. 146 of the Statute only applied to a loss by deprivation of an actual interest in land; that the fund was protected against all claims for which the sufferer could reasonably be required to seek redress against any other person, or which did not directly arise from the operation of the Act; that the section did not apply to a loss of an expectancy of an interest sustained by a person through a fraud which another person was enabled to commit owing to the neglect of the Registrar; that O.'s remedy was against T.; and verdict for defendant. *Oakden v. Gibbs*, 8 V.L.R. (L.,) 380.

Limitation of Action against Assurance Fund for Loss of Dower—Act No 301, Secs. 66, 149—Act No. 353, Sec. 9.]—*See Moyle v. Gibbs, ante columns* 538, 539.

Error or Misdescription of Land—Remedies in Respect of—Act No. 301, Secs. 49, 106, 144, 146.]—The plaintiff was registered proprietor of certain land held by him as a lessee under the "*Land Act* 1869;" his uncle, bearing the same name, was indebted to the defendant bank, and the bank, as execution creditor under a writ of *fi. fa.*, directed the sheriff to get a description of the land to be levied upon, and served the Registrar with a copy of the writ, erroneously specifying the plaintiff's land as the land to be levied upon. The bank bought at the sheriff's sale, procured a transfer from the sheriff, was registered as proprietor, and afterwards sold the land to one F., to whom the plaintiff gave up possession. *Held* that the plaintiff was deprived of his land in consequence of the error or misdescription, and the case fell within Sec. 144; that the sheriff's sale and transfer to the defendant put an end to the plaintiff's certificate of title under Sec. 106, so that the objection of a prior registered certificate made under Sec. 49 could not be sustained, and that, under the circumstances, the plaintiff's remedy was not against the Registrar as the guardian of the assurance fund, under Sec. 146. *Hassett v. Colonial Bank of Australasia*, 7 V.L.R. (L.,) 380; 3 A.L.T., 38.

11. *Miscellaneous Points.*

Misdescription in Application—Fraud—"Transfer of Land Stat.," Sec. 153—How Remedied.]—A misdescription in an application to bring land under the "*Transfer of Land Stat.*," as that the land was unoccupied, when it was not in fact so, is not fraud within Sec. 153 of the Act, which is fraud with a guilty intention. *Wiggins v. Hammill*, 4 V.L.R. (L.,) 63.

Semble, that as regards fraud under Sec. 153, the matter could not be considered incidentally, and the certificate treated as void in a civil suit; but the person charged with fraud should first be convicted as for a criminal offence, and then proceedings might be taken to cancel the certificate of title. *Ibid.*

TRESPASS.

1. *To Lands and Houses.*

What Amounts to—Entry under Contract—Exceeding Terms of Contract.]—An action for trespass is maintainable where the defendant has entered under a contract to cut a certain quantity of timber, and has greatly exceeded the quantity mentioned in the contract. *Bond v. Kelly*, 4 A.J.R., 153.

What Amounts to.]—The party fence between the land of N. and B. was burnt down, and N. and B. each erected half of a new one. During such erection, B. placed some of the half burned logs of his half of the old fence upon the land of N. in order to make way for the new fence, whereupon N. sued B. for trespass, in the County Court, but failed to obtain a verdict. On appeal, *Held* that the verdict should not be disturbed, since the placing of the logs on either side to make way for the new fence did not necessarily amount to a trespass. *Neaves v. Barrett*, 6 V.L.R. (L.,) 165.

Wilful and Malicious—Notice not to Trespass.]—Proof of prior proceedings in ejectment is not proof, in an action for *mesne* profits, of such a

"notice not to trespass" as will make the trespass wilful and malicious, under Sec. 3 of 3 & 4 Vic., Cap. xxiv.; a distinct notice should be served. *Laidlaw v. Laing*, 1 W. W. (L.,) 64.

Who may Maintain Action — Reversioner.]—A reversioner, whose tenants are in possession of the property, may maintain an action for trespass for pulling down a fence upon the land. *O'Grady v. Boulter*, 2 A.J.R., 118.

Purchaser at Sheriff's Sale obtaining Certificate of Title under Act No. 301.]—*See House v. O'Farrell, ante column* 1312.

Suit by Town Council — Occupation of Land Reserved for Public Purposes as a Residence Area—Exemption of Land from Mining—Irregular, but de facto Possession of Council.]—*Mayor of Sandhurst v. Graham, ante column* 945.

No Damage done—Plaintiff Entitled to Recover.]—A plaintiff is entitled to recover damages for a trespass to land, even though no actual damage be done by the trespass; though such damages are merely nominal. *Dumont v. Miller*, 4 A.J.R., 152.

Committed by Stock — Acceptance of Trespaes Rates for One Trespass no Bar to Action for Previous Treapass.]—The accepting by the owner of land of trespass rates for damage done by sheep, is no bar to an action by him for damages in respect of previous similar trespasses. *Mitchell v. Wright*, 4 V.L.R. (L.,) 273.

Trespass by Dog — Liability of Owner.]—*See Doyle v. Vance, ante column* 28.

Adoption of Trespass by Taking Advantage of it.]—A defendant is not liable unless he is shown to have been present at, and taken part in, the trespass, or to have authorised or instigated others to commit it for him. Where third persons committed a trespass without the authority of the defendant, *Held* that he was not liable, though it was done for his benefit, and he took advantage of it when completed. *Doolan v. Hill*, 5 V.L.R. (L.,) 290.

Replication of Private Right-of-Way to Plea that Sheep were Trespassing—What must be set out.]—A replication to a plea, that certain sheep were wrongfully in a close of the defendant, &c., setting forth that the sheep were being driven along a certain road over which the plaintiff had a right-of-way, and that the sheep escaped for want of a fence into the defendant's close without plaintiff's negligence is not sufficient; but must aver the existence of the essentials of the right-of-way, *e.g.*, its *termini*, &c., otherwise it will not appear that the right-of-way existed over the part of the road in question. *Butcher v. Smith*, 5 W. W. & A'B. (L.,) 223.

"Land Act," No. 360, Sec. 30—Sheep Trespassing—Land not properly Fenced.]—A licensee, under Secs. 19 and 20 of the Act, who has fenced with a fence which is not sheep-proof, may sue for damages for sheep trespassing, although, under Sec. 30, he may not, under such circumstances, impound. *Rutherford v Hayward*, 3 V.L.R. (L.,) 19.

Plea of Impounding in Actions of Trespass—What Plea must set out.]—*See Jones v. Campion, O'Shea v. D'Arcy, and Sanderson v. Fotheringham, ante column* 1155.

Equitable Title in Defendant—No Notice thereof to Plaintiff.]—A. brought an action of trespass against B. B. pleaded on equitable grounds that the land belonged to C., who had sold it to E., that E. being in possession, and entitled in equity, assigned his interest by memorandum of agreement to F., who had assigned his equitable interest to B.; but the plea alleged no notice to A. of B.'s equitable interest. *Held*, on demurrer to the plea, that B. being out of possession, and not having given A. notice, had no equity to support his plea. Demurrer allowed. *Hunter v. Hodgson*, 3 A.J.R., 31.

Substantive Trespass—Matter of Aggravation—Pleading.]—In an action for trespass, the declaration was for breaking and entering plaintiff's close, remaining there a long time and driving away plaintiff's cattle therefrom. Defendant pleaded *inter alia* that the land was not the plaintiff's. *Held*, on demurrer to plea, that the driving away the cattle was a separate and substantive trespass, and not a matter of aggravation, and that the plea was not a sufficient answer to the declaration being had as regards the cattle, but good as regards the land. Plaintiff allowed to amend by limiting demurrer to the driving away of the cattle. *Cummins v. Dickson*, 3 V.R. (L.,) 216; 3 A.J R., 111.

Admission of Plaintiff's Title — Estoppel.] — Where a defendant had said that he knew that plaintiff was owner, and offered to give him five shillings a week for the property, the Court discharged a rule *nisi* for nonsuit, thinking it impossible to contend against such an admission. *Byrne v. Bateman*, 5 A.J.R., 78.

Evidence of Possession—Crown Lands—Pastoral License—Parol Evidence.]—In an action for trover for the conversion of sheep, the defendant pleaded that they were trespassing upon land held by him under a pastoral license from the Crown, and put in as evidence in addition to the plan annexed to his license, parol evidence to show that a certain fence over which the sheep had passed was the boundary of his land, and also conversations held in the absence of the plaintiff between the plaintiff's father, who was joint owner of the sheep, and the defendant, which would support defendant's case. *Held* that the parol evidence was admissible, as also were the conversations with the plaintiff's father, even though plaintiff was absent when they took place. *Coutts v. Jay*, 4 V.L.R. (L.,) 10.

Costs—Action to Try a Right].—Certain land was claimed by G., and was also claimed and trespassed on by E. Before action brought,

E. gave up the land, but afterwards contested G.'s title by a plea of "not possessed," and proceeded to a trial on that plea, which resulted in a verdict for G., with 40s. damages. *Held* that it was an action to try a right, and certificate for costs granted. *Gill v. Ellerman*, 2 W. W. & A'B. (L.,) 88.

No Certificate of Costs at Trial—Act No. 274, Sec. 429—Act No. 345, Sec. 41—Order to Tax.]—*Pearce v. Thomas, ante column* 242.

Certificate of Costs—3 and 4, Will. IV. Cap. 42, Sec. 32—81 and 9, Will. III., Cap. 2.]—*Dakin v. Heller, ante columns* 242, 243.

Trespass as an Offence under Act No. 265.]—*See* OFFENCES (STATUTORY.)

Trespass to Mining Claims and Mining Interests.]—*See* MINING.

2. *To the Person.*

False Imprisonment—Action against Justices—11 and 12 Vic., Cap. 44, Sec. 13.]—In Sec. 13 of 11 and 12 Vic., Cap. 44, Sec. 13, the words "no greater punishment than that assigned by law for the offence of which he was so convicted," do not refer to the imprisonment which the justices actually and legally imposed, but to the *maximum* term of imprisonment to which the person sentenced might under the law have been subjected. Where, therefore, S. was fined £20 and £2 2s. costs for assault, but no mention was made by the bench of a term of imprisonment in default, but the clerk in filling up the conviction inserted the usual alternative of one month's imprisonment, and S. was summoned to show cause why he should not be imprisoned, a return of *nulla bona* having been made, and the case coming on before one of the former justices and another who had taken no part in the original adjudication, and they both in ignorance of the clerk having filled up the conviction as described, committed S. for two months, and he was imprisoned for a few days and then paid the fine, and brought an action for trespass in respect of this imprisonment, *Held* that the payment of 2d. into court by the defendant magistrate was sufficient compensation, and, upon a rule for a new trial, confirmed. *Smith v. O'Brien*, 1 W. & W. (L.,) 386.

False Imprisonment—"Melbourne and Hobson's Bay Railway Company's Act," Sec. 63—Nearest Justice—"Management of Railways Act," Sec. 31.]—An engineer of a railway company arrested a workman of a municipal council for using a right-of-way which the council claimed over the railway. To an action for false imprisonment, the engineer pleaded justification under the Company's Act (16 Vic.,) Sec. 63, and under the "*Management of Railways Act*," No. 186, Sec. 31. *Held* that the requirements of the 63rd Section of 16 Vic. were complied with if the person arrested were taken before a justice having jurisdiction in and for the district or place in which the offence was committed, there being no provision expressly requiring the person arrested to be taken before the nearest justice, nor any reason for extending the words "in the district or place" beyond their plain meaning; that the words of the Act No. 186, Sec. 31, which enacts that an officer of the company may seize and detain an offender whose name and address may be unknown to such officer, and give him in charge to a constable, who may without warrant convey him with all convenient despatch before a justice, have as their object the enabling the officer to arrest a transient offender whose name and address the officer does not possess the means of ascertaining; that the section does not require that the name and address of the trespasser should be known personally by the officer before arrest; that if the officer decline to act on information offered on which he ought to act, his declining so to act, with the means of knowledge at hand, will not leave the offender's name and address "unknown" to the officer; that in such case the jury must decide whether the information offered before arrest is sufficient or not; and that the officer must at his own risk arrest a person whose name and address he had the means of knowing. *Jenkyns v. Elsdon*, 1 W.W. & A'B. (L.,) 145.

False Imprisonment—Sequestration before Arrest.]—Defendants arrested plaintiff under a warrant, obtained by them under an order for imprisonment in default of payment of a judgment debt, made on a fraud summons. After the judgment, but before arrest, the plaintiff sequestrated his estate, and defendants had notice thereof. Plaintiff sued in trespass for false imprisonment. *Held* that such an arrest and imprisonment formed no ground for an action of trespass. *Malcolm v. Milner*, 1 V.R. (L.,) 74; 1 A.J.R., 112.

False Imprisonment—Justification.]—An action for false imprisonment will not lie when the plaintiff has been imprisoned under a writ of *capias* issued under a Judge's order, although such order, and all subsequent proceedings under it, have been set aside by an order of the same Judge. *Weston v. Collingwood Gas Company*, 1 V.R. (L.,) 98; 1 A.J.R., 90.

False Imprisonment and Malicious Conviction—"Justices of Peace Stat., 1865" (No. 267,) Sec. 164—Quashing Conviction.]—W. summoned H. for trespass under No. 267. S., the justice who tried the summons, stated an appeal. This case was remitted, and S. decided on the facts, that H.'s claim of title was not made *bonâ fide*, and adjudged that H. should pay a certain fine and costs, or be committed in default. H. was committed and liberated on *habeas corpus*. S. then stated another case, and on that the Supreme Court reversed his determination. H. then sued S. for false imprisonment and malicious conviction, and got a verdict. On rule *nisi* for a nonsuit, *Held* that, under Sec. 164 of Act No. 267, it was necessary to have the conviction quashed before H. could obtain a verdict; that it might have been quashed on *certiorari*, or by appeal to the General Sessions; that the reversal of the magistrates' determination by the Supreme Court was not "quashing." Rule absolute. *Hunter v. Sherwin*, 6 W. W. & A'B. (L.,) 26.

False Imprisonment—Justification—Commitment by Coroner at Inquest for Contempt—"Coroner's Stat. 1865," No. 253, Sec. 4, "Justices of the Peace Stat. 1865," Sec. 39.]—C. sued a coroner for false imprisonment and assault, and the defendant pleaded not guilty and justification; that the trespass was committed by him as coroner, whilst holding an inquest, for contempt of Court. The Judge directed a verdict to be entered for defendant. On rule *nisi* for new trial or verdict for plaintiff, *Held* that such a plea of justification was as available by a Judge of an inferior Court of Record as by a Judge of a superior Court of Record, and that the Coroner's Court is a court of record in Victoria; that the power of imprisonment is limited by Sec. 4 of the Act, and by Sec. 39 of Act 267, to 48 hours, which was not exceeded. Rule discharged. *Casey v. Candler*, 5 A.J.R., 179.

Entire Trespass.]—R. sued M. in trespass, alleging three counts—(1) Assaulting and compelling R. to go on board a ship sailing from Sydney, and imprisoning him there. (2) Keeping him imprisoned until the vessel arrived in Victoria. (3) Compelling him to go to a police station in Melbourne, and imprisoning him until his acquittal. *Held* that the trespass was entire, and was not capable of being severed so as to allow any of its parts being justified severally; and that there was no power in the Legislature of New South Wales to send R. in custody to Victoria. Judgment for plaintiff. *Ray v. M'Mackin*, 1 V.L.R. (L.,) 274.

See S.C., *ante column* 178.

Imprisonment—Sheriff—Arrest—Negligent Escape—Re-arrest out of Bailiwick and Lodging in Gaol.]—*See Wall v. Meyrick, ante columns* 1314, 1315.

False Imprisonment—"Inebriates Act 1872," Sec. 7.]—An action for false imprisonment may be maintained by an inebriate against the superintendent of an inebriate retreat, to which the inebriate has been committed by a warrant under Sec. 7 of the "*Inebriates Act* 1872," not showing jurisdiction, without first having the Judge's order of commitment set aside. Sec. 7 of the Act affords no protection when the commitment has not been strictly in compliance with the terms of the Act. *Langley v. M'Carthy*, 2 V.L.R. (L.,) 278.

False Imprisonment—Act No 265, Sec. 17, Sub-sec. 6—Wilful Trespass.]—B. contracted with H. to build him a house, and H. became dissatisfied with the way in which the work was progressing, and warned B. that unless he left the premises he would be given into custody. H. then gave B. into custody, and brought a complaint against him for wilful trespass under Sec. 17, Sub-sec 6, of Act No. 265, which the justices dismissed on the ground of the complications as to B.'s claim of right. B. sued H. for false imprisonment, and recovered a verdict. *Held*, on a rule *nisi* for new trial, that it was for the jury to say whether B. acted under a fair and reasonable supposition that he had a right "to do the act complained of." Rule discharged. *Bailey v. Hart*, 9 V.L.R. (L.,) 66; 4 A.L.T., 161.

False Imprisonment—Evidence—"Town and Country Police Act 1855" (No. 14) Sec. 15, Sub-sec. 7.]—In an action for false imprisonment against four defendants, in which two, C. and A., took no farther part than to remain in the Police Court silent when a witness said that he had their authority for making the arrest, T., one of the defendants, pleaded a justification under Sec. 15, Sub-sec. 7 of Act No. 14, to the effect that plaintiff was a wilful trespasser. The plaintiff was a schoolmaster, under the management of a board consisting of the defendants, and it was in consequence of his dismissal and persisting in attending the school that the alleged imprisonment took place. *Held* that the silence of C. and A. in the Police Court was not evidence of admission of facts stated by witness, and verdict entered for them. As to T., verdict against him left undisturbed since the cases contemplated in the Act were those of a person in undisputed possession finding a trespasser, and it was not intended that justices should decide such complicated questions as right of property in a school house. *Fisher v. Wheatland*, 2 W. & W. (L.,) 130.

Steam Roller in Street Occasioning Injury—Pleading—Amendment—New Trial.]—In an action of trespass it is sufficient to allege that defendants were possessed of a locomotive containing fire, and brought it into a street, and that fire escaped and injured the plaintiff; that constitutes a good cause of action without averring negligence. A declaration averred as above with a further averment of negligence on the part of the defendants; defendants pleaded not guilty. At the conclusion of plaintiff's case, defendants moved for a non-suit on the ground of no negligence being proved when plaintiff applied to amend by striking out the averment of negligence as being surplusage, and the declaration to be altered to one in trespass. *Held* (*dissentiente Higinbotham, J.*,) that, although the averment of negligence was surplusage in an action for trespass, yet as the issue of trespass had not been submitted to the jury when they returned a verdict for plaintiff, there must be a new trial. *Tobin v. Mayor of Melbourne*, 7 V.L.R. (L.,) 488; 3 A.L.T., 78.

3. *To Goods.*

What Amounts to—Consent—Duress.]—A., accompanied by B., a private detective, called on H., a general servant, and asked her if she objected to having her boxes searched. She replied that she had no objection, and preceded them to the room, and inspected the searching process. Subsequently she sued A. for trespass, alleging that she imagined that B. was a detective, and so acted under duress. *Held* that there was no duress, and that A., having searched the boxes with H.'s consent, had not committed a trespass. *Amess v. Hanlon*, 4 A.J.R., 90.

Seizure of a Weighing Machine under Act No. 215 —"Weights and Measures Stat. 1864."—Inspector not Liable.]—Where an inspector of weights and measures seized a weighing machine on a Government railway station as being incorrect, *Held* that he was justified in so doing, under Sec. 49 of the Act, and was not liable in trespass, it not being necessary to determine what steps should have been taken to cause a forfeiture. *Regina v. Caddy*, 1 V.L.R. (L.,) 38.

Measure of Damages.]—B. wrongfully seized sheep belonging to the plaintiff C., and transferred them to E, who was his creditor. E. sold the sheep, and S., a mortgagee of the sheep, had sued E. for the conversion of the sheep, and recovered as damages their value at the time of the sale. C. then sued B. for wrongfully selling and seizing the sheep, and recovered a verdict. *Held*, on rule *nisi*, to enter a verdict for defendant, that the plaintiff was not attempting to recover damages twice over for the same conversion, as this action was, in effect, an action of trespass, and that plaintiff was entitled to recover the difference in value at the time of seizure and the sale. *Cave v. Beveridge*, 3 V.L.R. (L.,) 302.

Reasonable and Probable Cause—Search Warrant.]—S. was domestic servant of V. H., and left on 27th December, 1866, and had used in her room certain bedding placed there. Shortly after S. left, the bedding was missed. The cabman who drove S. away informed V. H. that he had, under the directions of S., entered her bedroom (*i.e.*, in V. H.'s house,) and removed a certain bundle containing blankets, and that S, on reaching the house where she went after leaving her situation, took the bundle into her bedroom. V. H. procured a search warrant from the justices, and entered and searched the bedroom with a constable. S. sued V. H. for trespass. *Held* that the plea which set out the abovementioned facts did not set forth facts amounting to reasonable and probable cause for issuing the search warrant; that it did not state grounds for believing that the defendant had grounds for believing that blankets taken were the defendant's property, nor that he took steps to exhaust his means of knowledge on the question, as to whether they were plaintiff's or defendant's property. Demurrer to plea allowed. *Saddler v. Van Hermert*, 4 W. W. & A'B. (L.,) 59.

TROVER AND CONVERSION.

What is Conversion.] — Action by official assignee of an insolvent, to recover damages for wrongful conversion of a number of sheep. The defendants set up an agreement made by the insolvent prior to his insolvency, to the effect that defendants should retain possession of the sheep until a mortgage over them, and a lien on the wool, were given, neither of which was given, and, in default, defendants sold. *Held* that, in order to prove the conversion, there must be evidence of actual conversion, which consists in the defendant taking or using the goods with the intent of exercising ownership on his own behalf, or of someone other than the plaintiff, or a conversion by a refusal to deliver on demand; that the defendants here exercised acts inconsistent with the plaintiff's ownership, and so converted the sheep, and that if the defendants were lienees, they committed a tortuous act, which made them responsible for the full value. *Claxton v. Everingham*, 6 A L T., 132.

Plaintiff's Title as against Defendant's.]—C.'s father consigned goods to a firm or their assigns. The firm became insolvent shortly afterwards, and their assignee seized the goods. C. brought an action of trover, and recovered the goods. On rule *nisi* for nonsuit or new trial, *Held* that though it was not clearly proved whether the property in the goods was in C. or his father, still there was some evidence to go to the jury, and, the jury having found for C., the verdict would not be disturbed. *Cooper v. Dodgson*, 2 A.J.R., 117.

Action for Wrongful Conversion of Shares—Plaintiff Parting with His Interest.] — G. purchased shares from C. G. received the scrip, handed it to C., and told him to deliver it to D., to whom he (G.) had sold the shares, and obtain the money from him. A dispute arising as to the delivery, G. brought an action against C. for wrongful conversion, and obtained a verdict. On rule *nisi* for a nonsuit, *Held* that G. had parted with his right to the shares, and could not sue. Rule absolute. *Grant v. Chalk*, 3 A.J.R., 43.

Action for Conversion of Shares Deposited as Security—Plaintiff not Proving Right of Property or Possession, not having Offered to Redeem.]—*King v. Levinger, ante columns* 1043, 1044.

Action for Trover by Grantee of Goods under Bill of Sale Improperly Sold—Property in Grantee.]—*Lockhart v. Gray, ante column* 1045.

Landlord and Tenant — Theatre — Ornaments Attached to Outer Wall.]—L. had leased to A. a theatre, together with the right of using a certain corridor and appurtenances thereto. On the outer wall of a corridor belonging to the theatre, but not within the boundaries coloured on the plan, nor within the parcels of the lease, were certain ornaments, among others a pier glass, attached to the wall. L. removed this pier glass, and A. sued him for conversion. *Held* that the corridor did not pass under the demise nor any of the ornaments adorning it, and that plaintiff could not maintain his action for conversion of goods to which he had no title. *Aarons v. Lewis*, 3 V.L.R. (L.,) 317.

Who may Maintain.]—The owner of goods cannot maintain trover for them if the right of possession in the goods at the time of action brought is in a bailee. *Glen v. Abbott*, 6 V.L.R (L.,) 483.

Owner of Scrip Lent for Illegal Purpose.]—Where scrip had been lent for an illegal purpose, *i.e.*, to enable the borrower to vote at a meeting of a company, the Court refused to assist the lender to recover his property when it had been lent for an illegal purpose. *Cane v. Levey, ante column* 202.

By Mortgagee of Sheep taken by Purchaser with Notice—Measure of Damages.]—In an action of trover by a mortgagee of sheep, which had been taken possession of by the defendant under a contract of sale with the mortgagor, made before notice of the mortgage and default, though possession was not taken until after notice, the Court held that the proper measure of damages was not necessarily the value of the property converted, but the value of such property to him, *i.e.*, the amount of the debt due on the mortgage, with interest. *Donnelly v. Graves*, 6 V.L.R. (L.,) 247.

Where it Lies — Against Warehousemen — For Goods Marked in Bonded Certificate — Change of Possession.]—*Isaacs v. Skellorn, ante column* 1296.

Vendor Taking Bill of Exchange in Payment for Goods—Insolvency of Purchaser—Vendor does not Lose Right of Stoppage in Transitu and may Sue in Trover.]—*Lorimer v. Cleve, ante columns* 1296, 1297.

Goods in Bonded Store—Bonded Certificates Endorsed in Blank.]—*See Dredge v. Blackham, ante column* 1296.

Damages—Nominal.]—*See Osborne v. Synnot, ante column* 1242.

TRUST AND TRUSTEES.

Statutes:

"*Trustee Act* 1856," 19 Vic., No. 20 (incorporating the Imperial Statutes, 13 and 14 Vic., Cap. 60, and 15 and 16 Vic., Cap. 55,) repealed by Act No. 234.

"*Stat. of Trusts* 1864," No. 234.

I. Declaration and Creation of Trusts.

(*a*) *Declaration of Trusts.*

Verbal Declaration of Settlor—Fraud of Trustee—Insolvency of Settlor.]—M., in consideration of marriage, undertook verbally to settle real property on his intended wife for her life, with remainder to his own children by a former marriage. The marriage took place. After the marriage M. executed a deed which he intended and supposed to be a conveyance to S., in fee on the trusts of the ante-nuptial agreement, but which was, by reason of the fraud of S., a conveyance to him in fee simple absolute, expressed to be for a valuable consideration. M. became insolvent. After his insolvency he executed a written declaration of the ante-nuptial trusts on which the land had been, or was to have been, conveyed in fee to S. On a bill by the wife and some of the infant children of M. against S., and all other parties whose interests were affected, or whose conformity was requisite, *Held* that a valid trust had originally been created by M., which took all beneficial interest out of him at the time of such creation; that he retained, after his insolvency, a mere capacity to declare the trusts which before his insolvency he had created, and which he was bound *ex equo et bono* to exercise. Trust established. *Martin v. Stephenson*, 1 W. & W. (E.,) 261.

"Stat. of Frauds"—Relation of Writing to Subject Matter—"Stat. of Limitations."]—W. and H., acting on behalf of undisclosed principals, advanced money belonging to these principals to R., under an agreement they made with R. and others to join equally in the purchase of a special survey in Gippsland, and they paid to R. for that purpose £1024, being one-fifth of the purchase-money. R., with the consent of the contributors, purchased land at Gippsland, and signed a declaration that when the grant was issued, he would hold the land in trust for the co-adventurers. No grant of this Gipsland section was ever issued. R. then, with the consent of the Government, substituted a selection near Geelong for the first section. His co-adventurers protested against this, and W. and H. claimed their money back; the money was not returned, and R. did not acknowledge it as a debt. R. then selected other land at Port Fairy, as a further substitution, and a Crown grant was issued in respect of this to R. In 1869 the representatives of the undisclosed principals of W. and H. brought a bill against R. and other persons, to whom he had mortgaged the land, seeking to establish their right in equity to one-fifth of the land. *Held* by the full Court, reversing *Molesworth, J.*, that the declaration of trust signed by R. as to the land to be granted at Gippsland was a declaration of a future trust

to be impressed on any land granted by the Crown in substitution for the Gippsland section; that, though R. never got the Gippsland section, yet the trust was not inoperative for want of a subject, because he substituted in effect the Port Fairy land for the land described in his written declaration; that the letter of W. and H. demanding the repayment of £1000 had no effect, and that R. being an express trustee, the "*Stat. of Limitations*" did not run against the plaintiffs; that as the mortgages executed by R. were given to the mortgagees without notice of the trust, they could not be disturbed; that all the plaintiffs wished was a sale of the equity of redemption subject to those charges, and there was no need of an offer to redeem; and that W. and H. were not necessary parties. *Hunter v. Rutledge*, 6 W. W. & A'B. (E.,) 331, 353, 354, 356, 357; N.C., 61, 74.

Recitals in Deed Sufficient to Satisfy "Stat. of Frauds" as to Declaration of Trust, but Proved to be Untrue.]—*Moore v. Hart, ante column* 411.

Selecting Land as Trustee for another — When Declaration of Trust not necessary.]—*Raleigh v. M'Grath, ante column* 787.

Lost Deed — Memorial Registered — "Stat. of Trusts 1864," No. 234, Sec. 97.]—A. conveyed land to B. in escrow on condition that B. should execute a declaration of trust in favour of A. A. died, and B. refused to execute such declaration, but the matter was referred to arbitration, and the award declaring trusts, was made a rule of Court. B. executed a declaration of trusts, and the deed was registered; this deed was last in the hands of R., who had gone out of the jurisdiction, and had not been heard of for nine years. After the declaration the sheriff sold under a *fi. fa.* all B.'s interest in the land to D. On bill by one of A.'s children, a beneficiary, *Held* that D. was a trustee for plaintiff, and that the declaration of trust was well executed by B., he having the legal estate; that under the sheriff's sale only B.'s interest as trustee passed, and that the memorial of registration was sufficient evidence to satisfy Sec. 97 of Act No. 234. *Hunniford v. Horwood*, 5 V L.R. (E.,) 250.

Setting aside — Accounts under.] — Plaintiff executed a declaration of trust by which he conveyed all his property to his brother in trust for himself upon certain trusts declared in an indenture of even date. Plaintiff sued to have the declaration set aside, on the ground that he was drunk, and in his evidence stated that he had not professional advice when he executed it. There was a prayer in the bill praying, in the alternative for accounts to be taken under the declaration. *Held* on the evidence that plaintiff was not drunk, and though he had not had sufficient advice, yet that was not made out in the bill, and accounts directed to be taken. *Paholke v. Paholke*, 2 A.L.T., 134.

Gift with Verbal Expectation as to how Beneficiary should Dispose of Proceeds.]—A Roman Catholic priest gave to H. a deposit receipt for some moneys belonging to him in a bank under circumstances which the Court held were sufficient to pass the property as a *donatio mortis causâ*. The donor threw out an expectation that H. should regard herself as a trustee for the poor. H. wrote some ambiguous letters about this as if supposing herself bound by trusts, the sum largely exceeding her expectations, and wrote letters to the archbishop expressing her intention of holding the money for charitable purposes. *Held* that no trust was declared, and that H. had a perfect legal right to do with the money as she pleased. *Tierney v. Hulfpenny*, 9 V.L.R. (E.,) 152.

Husband and Wife Living Apart—What Acts of Husband do not amount to a Declaration of Trust of Property for Wife.]—*Tennant v. Bell, ante columns* 539, 540.

(*b*) *Creation of Trusts.*

(1) *Resulting Trust.*

Land Purchased with Plaintiff's Money.]—Plaintiff agreed to purchase land, and paid half the purchase money. He then left for N.Z., and from time to time remitted moneys to his wife to be expended in completing the purchase. On his return he was informed by his wife that it had been so applied, and that the conveyance was deposited in a bank for safe custody. After her death the bill alleged that he discovered that the land had been conveyed to trustees for the wife and children. On a bill to have the land conveyed to him free from the trusts of the settlement, *Held* that the fact that the plaintiff was an uncertificated insolvent, shortly before the purchase, was no bar to the suit, but considering the fact that, instead of reclaiming the purchase money remitted to the wife he had sanctioned its employment in the purchase, and that he had, at any rate, acquiesced in and confirmed the settlement in the wife's favour, the Court dismissed the bill. *Mason v. Sawyers*, 2 V.R. (E.,) 36; 2 A.J.R., 12.

(2) *In other Cases.*

Manager of Station Property Purchasing Parts of Property Thrown Open for Selection.] —W. died intestate, and his widow took out administration. J. W. was appointed manager of a station of W.'s. Parts of the station were thrown open for selection under the "*Land Act* 1862," and J. W. employed servants on the station to select portions, paying the rents and purchase money out of W.'s personal estate in the first instance, and re-paying the money to the estate out of sums advanced by a bank on the security of the selections. Other parts of the land were put up by auction, and J. W. purchased these on an understanding that he was to purchase as the widow's agent, and hold, on behalf of the estate, the purchase money being provided as mentioned above. On bill by the next of kin against J. W., who claimed to hold the lands so selected and purchased as his own, *Held* that, although J. W. was competent to purchase for himself under other circumstances, yet his claim to the land as his own was a fraud upon the estate under the circumstances, and J. W. was declared a trustee for the personal estate of the lands so selected and purchased. *Lempriere v. Ware*, 2 V.R. (E.) 1.

Volunteer — Trust Executed — Donee Obtaining Adverse Possession under Trust.]—A. sold his equitable interest in land under an agreement for sale in writing made in his favour by X. and Y. to B., who thereupon entered into possession. B., by writing, declared a trust as to said land in favour of his sister C., and by it directed A. to convey to C. A., by deed, conveyed his equitable interest in the land to C., who entered into possession in 1843, and remained in possession until suit brought (1872.) In a suit by C., to seek declaration of right to land against D., who claimed as to part of land by purchase from X. and Y., and for conveyances by E., F., and G., in whom the outstanding legal estate formerly in X. and Y. had become vested, *Held*, on demurrer, that Courts of Equity will not refuse to assist volunteers except where volunteers seek to establish title against donors or those claiming under them; that the gift to C. was executed by the direction made in B.'s memorandum for A. to convey; that no stranger could resist the assertion of C.'s claim, C. entering under a gift and remaining in adverse possession for more than 15 years. Demurrer overruled. *Hodgson v. Hunter*, 3 A.J.R., 41.

Gift of Property with Honorary Obligation to Maintain Donor—Suit for Declaration of Trust after Donor's Death.]—S. for some time had been living with D. and his wife, and was maintained by them out of charity. S received a sum of £3000 under a will, and he drew a cheque for the greater part of this in Mrs. D.'s favour, placing her under an honorary obligation to maintain him during his life, and to let him have back such sums as he wanted. S. continued to live with D., and drew on this fund. S. and D. bought a farm in partnership, Mrs. D. advancing £1600 out of the fund for the purpose. D. shared in the proceeds, and died. The curator administered and brought a suit for a declaration of trust in Mrs. D. as to £500 of the fund remaining and for accounts as against D. and Mrs. D. as trustees. *Held* that there was nothing in the transfer of the sum to Mrs. D. coupled with the conditions in S.'s favour to establish a trust in favour of the next of kin of S. as against Mrs. D. Bill dismissed. *Weigall v. Daubin*, 5 A.J.R., 94.

Defendant Obtaining a Rule to Administer and not Taking it Out.]—Where a defendant, holding real estate, obtains a rule to administer, but fails to take it out, and remains in occupation, he is considered a trustee for a person obtaining revocation, and a rule to administer to himself. *Dryden v. Dryden*, 2 V.L.R (E.,) 74.

When Husband Constructive Trustee of Property for Wife.]—*Smith v. Hope, ante column* 541.

"Stat. of Frauds"—Act No. 234, Sec. 97—Fraud as Taking a Case Out of Statute.]—W. employed L. to purchase land for her, furnishing L. with part of the purchase money for the purpose. L. got a conveyance to himself pretending to W. it was for her, and allowed W. to lay out money on the land on this supposition. Bill by W. against L. to have L. declared a trustee. *Held*, on objection, that plaintiff's title was avoided by "*Stat. of Frauds*," re-enacted by Act No. 234, Sec. 97 ("*Stat. of Trusts*,") as seeking to establish a trust by parol evidence, that there was such evidence of fraud on L.'s part that the case was taken out of the Statute. Decree made. *Wilson v. Boyd*, 3 V.L.R. (E.,) 98.

Constructive Trustee—"Stat. of Trusts 1864," Sec. 77—Administrator.]—An administrator of an intestate dying after the passing of the "*Stat. of Trusts* 1864," No. 234, is not a trustee within section 77 of the Act. *In re Bowman's Trusts*, 6 V.L.R. (E.,) 124; 2 A.L.T., 13.

Land Purchased on Security of Trust Estate.]—A.C. was tenant of lot 7 and registered proprietor of lot 6. After his death intestate his wife took out administration, and purchased the fee of lot 7, securing the purchase money by a mortgage of lots 6 and 7. The wife married again, and her second husband alleged an oral agreement before marriage that if he would spend money in putting the house on lot 7 in repair, and in paying off the mortgage he should have lot 7. she representing that both lots were hers absolutely. The husband did so expend money, and the mortgage was paid off, and lot 7 was transferred to the husband under Act No. 301 as for £5, and the wife was registered in respect of lot 6. In an administration suit by the intestate's children, *Held* that the verbal agreement before marriage was inoperative by the "*Stat. of Frauds*," and that the protection afforded by Sec. 50 of the Act No. 301 did not apply to a transaction without consideration at the time of the transfer, or previous legal obligation to transfer; that the nominal consideration of £5 was immaterial, and that both lots were subject to the trusts of the administration of A.C.'s estate. *Crow v. Campbell*, 10 V.L.R. (E.,) 186; 6 A.L.T., 34.

II. Acceptance and Disclaimer.

Acceptance of Trusts.]—*Per Molesworth, J., and Full Court*—The mere execution of a trust deed is an unconditional acceptance of the estates conveyed and of the trust unless the contrary is expressly said; there is no implied condition that all the trustees are to sign before liability attaches to any one of them signing before the others. *Bennett v. Bennett*, 1 V.L.R. (E.,) 280.

How Disclaimer Effected.]—*Per the Full Court*—Modern decisions leave it doubtful whether a devisee in trust can divest himself of the legal estate by any disclaimer otherwise than by deed or of record. *Clark v. Clark*, 8 V.L.R. (E.,) 303, 320.

III. Rights, Powers and Duties of Trustees.

Power to Purchase Lands—Whether it Authorises Building.]—A power to purchase lands contained in a will does not authorise the trustees to lay out money in building. *In the Will of Russell*, 1 A.J.R., 52.

Power of Trustees — Repairs — Maintenance — Petition by the Executors and Trustees of a Will for the Opinion of the Court.] — The testator devised and bequeathed his real and personal property to the petitioners upon trust during the life of his widow, "to pay to her the rents to be received from the following houses," and the "annual income to be obtained from the sum of £2000 Victorian Government Debentures." He directed the trustees to invest £300 in Victorian Government Debentures, and pay the annual income to his brother for life, and declared it to be his will that the widow, when in receipt of the above-mentioned income, should maintain and educate his infant son, and that after her death or second marriage, which was to determine her interest, the trustees should pay £150 for the maintenance, &c., of such son. The property consisted of £5000 personalty, and the houses, which produced an annual rent of £150. *Held* that the trustees were bound to keep the houses in tenantable repair, but not to improve; that the expenses of repairs, rates, and expenses of collection, should be paid out of the rents payable to the widow; that the trustees might insure the property, the costs coming out of the *corpus* of the estate; that the trustees were not, during the widow's life, to make an allowance for the son's maintenance, and that interest on the £300 and £2000 ought to be paid at the expiration of a year from the testator's death. *In re Folk's Will*, 6 W. W. & A'B. (E.,) 171.

Power to Build — Building Leases — Testator's Intention.]—A testator devised lands to trustees, and a sum of money upon trust to expend it, or so much as should be sufficient, in building four dwelling-houses with out-offices, on the land, or, if four buildings of a suitable character could not be well built, a smaller number; and to invest any surplus upon certain trusts; and, until sale, upon trust to demise. On petition by the trustees for authority to grant building leases, *Held* that, to grant such a power would be in fact to overrule the testator's intention. *In re Hall*, 2 V.L.R. (E.,) 156.

Power to Repair—Whether it includes Improvements.]—A testator left by will his real and personal property to trustees upon certain trusts and the will contained a clause empowering them to repair, and for that purpose to employ a greater amount of rents or interest in their hands on account of the beneficiary whose land "shall be sought to be repaired and improved," and to charge the income of the beneficiary with principal and interest of a sum raised upon mortgage for that purpose. The testator intended to rebuild on certain land, and had begun rebuilding, but the trustees rebuilt partly on his plans, partly on plans of their own, and for that purpose did not apply the rents or borrow on mortgage, but advanced money of their own *Held* by the Full Court, reversing *Molesworth, J.*, that the power must be construed as a power to "repair" and to "improve," and that the trustees were entitled to claim out of subsequent rents a reimbursement of moneys so expended; but that as they had advanced moneys of their own, and had not followed the testator's directions, they were not entitled to interest on moneys of their own so advanced. *Sichel v. O'Shanassy*, 3 V.L.R. (E.,) 208.

Management and Disposition of Property.]—A testator devised all his property, real and personal, to trustees upon trust for his wife until children attained age of 18 and during widowhood, and afterwards upon trust for children if more than one, or to one, for life, with remainder to his sons successively in tail male, remainder to daughters; remainders over. One child survived. The trustees under a power of leasing in the will, leased the real estate, reserving rent and a royalty for gold raised by lessees, and maintained infant and invested surplus. Infant attained age, and applied for conveyance of realty and transfer of investment. Petition for advice of Court under Sec. 61 of "*Stat. of Trusts.*" *Held* that trustees had no duty to perform as to land except to guard it from waste, especially by mining; and that, in event of infant becoming entitled to possession, might be bound to provide against misapplication of proceeds; and that the trustees might have some liability to the Crown or the remaindermen in regard to the gold raised represented by the investment of the proceeds of the royalty which might make it unsafe for them to pay it to the infant. *In re Durbridge*, 3 V.L.R. (E.,) 21.

Direction to Sell whether it Authorises a Mortgage.]—A direction to sell does not warrant trustees in mortgaging a part of the realty to pay a debt to a building society due on another part, though periodical payments to the society were more onerous than the interest on the mortgage, and though there was an unexpected advantage in selling the latter part piecemeal and at different times; the trustees should have sold the property subject to the building society's claim. *Snaith v. Dove*, 4 A.J.R., 140.

Power of Sale—Determination of.]—A mortgage by trustees of property, over which they have a power of sale, does not determine that power. *Ibid.*

Powers of Sale—Under Direction of the Court.]—Upon motion after decree in a suit for execution of the trusts of a will, and for administration, the Court refused to order a sale of the real estate by the executors "under the direction of the Court" unless after hearing on further directions; but gave them liberty, notwithstanding the decree, to sell as under the will. There is a rule that, after institution of a suit, the hands of trustees are stayed in executing the trusts. *Wisemon v. Kildahl*, 6 V.L.R. (E.,) 78, 81; 1 A.L.T., 189.

Power of Sale.]—*Semble, per Molesworth, J.*, that trustees who had power to sell land, either altogether or in parcels, would be justified in selling it in small lots, laying out streets over which proprietors would have rights-of-way

necessarily resulting in the dedication of the land to the public. *In re Bullen*, 4 A.L.T., 63.

Trustees with Powers of Leasing only.]—Trustees with powers of leasing only have not power to charge the land for accomplishing improvements required by local authorities. *In re Fennessy*, 5 A.J.R., 170.

Power to Lease.]—The proper duty of trustees having powers to lease is to execute the power, and not to enter into a contract to execute it. *In re Wills*, 6 V.L.R (E.,) 99; 1 A.L.T., 195.

Confirmation of Agreement in Excess of Powers.]—An agreement for partition entered into by trustees without power to partition, and partly acted upon by conveyance, was confirmed at the hearing, without a reference, it appearing from the evidence that confirmation of the agreement would be beneficial to infant *cestuis que trustant*. *Thomson v. Cunninghame*, 3 W. W. & A'B. (E.,) 91.

Partition of Estate.]—A testator, S., by will, left his property to trustees to divide among his children, either by way of partition, or sale and division of proceeds, or partly in one way, partly in the other. Two children were entitled to their shares, having attained majority. The estate consisted of personal property and station property, and the trustees, thinking it not advisable to sell the station, had it valued, and so ascertained the shares. One of the children wished for his share, and the personalty was sufficient to pay the shares of both, but the other of the adult children did not wish the share to be so ascertained. *Held*, upon petition for advice, that the trustees had power to ascertain and set apart the shares in the way they proposed to do. *In re the Will of Simson*, 5 V.L.R. (E.,) 261; 1 A.L.T., 65.

Discretion of Trustes—Abuse of Discretion—Motion for a Receiver.]—A farm was conveyed to defendant in trust for P. during her life, and after her death in trust for her children. At P.'s death her husband was living on the farm, and refusing to take a lease of it, or to leave, was ejected by the defendant. The defendant sold the crops, as the plaintiffs alleged, at an undervalue. The children (plaintiffs) brought a suit to remove defendant from the trust. On motion for appointment of a receiver, *Held* that, although the defendant might have been guilty of indiscretion, and might be liable for the abuse of discretion, no serious imputation could be cast upon his motives, and motion for receiver dismissed. *Phelan v. Eaton*, 3 V.R. (E.,) 13; 3 A.J.R., 6.

Power of Court over when not Acting Judiciously.]—There is no principle of equity by which trustees for creditors fairly making a bargain for the adjustment of complicated rights representing their *cestuisque trustent*, and acting for them as they would for themselves, are to have their bargains defeated because the person who assigned to them fraudulently induces another party to the bargain to enter into it. *Evans v. Guthridge*, 2 W. & W. (E.,) 2, 35.

E. M. and L., trading under the style of E. M. and Co., entered into a Government contract. In this partnership L. was in fact acting as trustee for R. G., N. G. and J. W., and by the partnership deed it was arranged that E. and M. should each receive one-tenth of the profits made in the contract, and L., as such trustee, eight-tenths without any beneficial share himself. By indenture, February, 1860, R. G., N. G. and J. W. assigned to H., W. and C. their joint and separate estate upon trust for creditors. By indenture, March, 1860, the partnership between E. M. and L. was dissolved, and E and M. assigned all their interest to W. W., and in consideration of such assignment L. was to give to E. and M. bonds to secure certain monthly payments, and after the completion of the contract a sum of money equal to one-tenth of the entire net profits of the contract By indenture, July, 1861, it was witnessed that L. should not take part in a partnership of W. W. and L., but that J. W. should act in his place, and that J. W. should give the last mentioned bonds to E. and M. The bonds given by L. were delivered up to E. and M. and cancelled. E. and M. instituted a suit against N. G., R. G., J. W., H. W. and C., W. & L. charging that the execution of the deed of March, 1860, was obtained by the fraudulent misrepresentations of N. G. and R. G., and seeking to have the assignment of plaintiffs' interest to W. W. set aside. An *ex parte* injunction was obtained, restraining all the defendants from receiving from Government any more moneys payable under the contract. On motion after answer of H. W. and C. only to set aside injunction, *Held* that even if the representations as alleged by N. G. and R. G. were fraudulent, it would not afford a ground for an injunction against H. W. and C., the trustees, neither directly nor indirectly chargeable with such fraudulent misrepresentations; injunction dissolved. *Ibid.*

Interference of Court with Discretion of Trustees.]—A testator, by will, left his real and personal property to his wife and A. as trustees, upon certain trusts, with a power to them or the survivor, or other, the trustees or trustee for the time being, at any time to sell at their discretion the whole or part of the real estate. The wife died. A suit was brought by the beneficiaries against A., seeking to remove him from his trusteeship, and seeking an injunction against a sale contemplated by A. On motion for injunction, based on the ground that the land would fetch a higher price if the sale were postponed, *Held* that the Court would not interfere with A.'s discretion. Motion refused. *James v. Evans*, 3 V.L.R. (E.,) 132.

Discretion of Trustees—Interference of Court—Administration Suit.]—Where a testator in his will gives very large discretionary powers to trustees, and no charges of misconduct are brought, the Court is loth to interfere with their discretion; but the will not being very distinct, in part as to the directions for management, especially as to raising funds to pay debts, a decree for administration and accounts was made in a suit for administration, subject to, and not interfering with, discretionary powers of the trustees. *Johnson v. Nicholas*, 9 V.L.R. (E.,) 78; 5 A.L.T., 51.

Contract by Absent Trustee—Discretion of New Trustee.]—Where, after entering into a contract to grant a ease of trust property, one of the trustees left the Colony, the Court, in appointing a new trustee in his place, would not sanction the contract, but left it to the discretion of the new trustee as to whether the lease was or was not to be granted. *In re Wills*, 6 V.L.R. (E.,) 99; 1 A.L.T., 195.

Allowance of Outlay and Payments by Trustees—Rebuilding Dilapidated Premises.]—A testator left certain property (A) to trustees upon trust to receive the rents and profits during the infancy of his son, and upon trust for the son when he came of age. This property (A) was upon lease at the date of the testator's death; the lease expired shortly after his death, and the tenant was desirous of taking a new lease from the trustees, who had power to lease, and of altering the premises by pulling down the dilapidated buildings, and rebuilding. This was done partly at the expense of the tenant, who paid a higher rent, and partly at the expense of the trustees. *Held* that the trustees were warranted in making this arrangement and should be allowed for the outlay actually made. *Westwood v. Kidney*, 5 A.J.R., 25.

Powers of Trustees.]—A testator by will bequeathed live stock and consumable stores in and about his house. and a carriage and furniture to executors upon trust for an infant if he should attain the age of 21 years. The infant was 18 at the time of the death of the testator. On petition for advice, under Sec. 61, *Held* that the trustees and executors should sell the furniture and carriage and household effects, keeping separate accounts of the proceeds thereof, and invest the proceeds. Also, that the petitioners should sell the live stock and all consumable stores and invest the proceeds. *In the will of George Rolfe*, 3 V.R. (E.,) 29; 3 A.J.R., 10.

In Dealings with Cestuique Trust.]—In the case of adult *cestuisque trustent*, equity will sanction dealings between themselves and their trustees in certain cases, but not so in the case of infants, where the interest of the guardian. next friend, or trustee is clearly in conflict with his duty. It will not be permitted that a person occupying a fiduciary relation of any nature whatsoever towards an infant shall place himself, or be placed, in a position in which his interest can possibly conflict with his duty. *Larnach v. Alleyne*, 1 W. & W. (E.,) 342, 361, 362.

Power of Next Friend and Guardian ad litem to Purchase Trust Estate.]—Of all the persons occupying a fiduciary position, who are not generally permitted to become purchasers, at least without leave, there is none who should be so rigidly excluded as the next friend or guadian *ad litem*, and against whose dealings the objections seem to be so insuperable. *Larnach v. Alleyne*, 1 W. & W. (E.,) 342, 365.

Power of Next Friend to Purchase Trust Estate.]—In a suit in the Supreme Court of New South Wales by infant *cestuisque trustent* by A., their next friend, against their trustees, a decree was made for sale of the trust property, and at the sale the property was purchased by A. without the previous sanction of the Court. On bill in the Supreme Court of Victoria by the infants, praying that the sale might be declared fraudulent and void as against them, and that A. might account with wilful default for all moneys received for a subsequent sale by him of the property, *Held, per Chapman, J.*, that the Court had jurisdiction to deal with the parties to the suit as well as the subject matter thereof, notwithstanding the decree of the Court of New South Wales; that, even if full value were given, and there were no actual fraud, the sale was constructively fraudulent and void, and decree made as prayed, with costs up to the hearing, and with a direction that the account should be taken with annual rests, but without prejudice to the question of whether compound interest would ultimately be allowed. *Larnach v. Alleyne*, 1 W. & W. (E.,) 342, 360, 362, 371.

On appeal, *Held, per Stawell, C. J., and Williams, J.*, that the defendant was not guilty of any moral turpitude, but that he acted in violation of the principle of equity that no person charged with the conduct of a suit ought, without the permission of the Court. to place himself in a position which might be antagonistic to the interests of those for whom the suit was instituted: that his interest as a purchaser conflicted with his duty as promoter of these proceedings, and it was comparatively immaterial whether or not a fair value was given for the property or whether or not all the transactions were properly and honestly conducted; that as a fair value was given, no benefit would accrue to the infants by setting the sale aside: that the infants were entitled to an account of all profits, but the purchaser was not to be treated as a trespasser and liable to account with wilful default.

Per Molesworth, J., that a sale such as this was a violation of the principle that the same person cannot be buyer and seller as trustee, and was properly set aside; that the decree should be varied so far as it directed the defendant to be charged with moneys he might have received but for wilful default, but should in other respects be affirmed. *Larnach v. Alleyne*, 2 W. W. & A'B. (E.,) 39, 46, 55, 63.

Release Obtained from Cestuique Trust on the Day of His Attaining Majority—Set Aside.]—A testator left certain property to trustees upon trust to receive the rents and profits during A.'s minority, and upon trust for him absolutely. The trustees spent money on this property, and kept an account of their disbursements and receipts, charging a commission of 10 per cent. on the latter (this was before the Act No. 427). This account did not treat A. as entitled to the rents during his minority except as a residuary legatee. On the day A. arrived at his majority, they tendered to him a deed to execute, reciting the material part of the will and the improvements on the property, by which deed they conveyed the property to him, and he released them from all liability, declaring his consent to the accounts furnished

by the trustees, and indemnifying them against the claims of others. *Held* that this deed should not stand in the way of A's rights to the rents accruing during his minority, and it was set aside as void, with costs as against the trustees. *Westwood v. Kidney*, 5 A.J.R., 25.

Purchasing from Cestuique Trust—Delay—Costs of Suit to Set Aside.]—Two *cestuisque trustent*, ill-educated young men, and engaged in employments out of town, shortly after attaining their majority, executed a deed 31st August, 1869, without legal advice, and in ignorance of the contents and value of the land, by which deed all their interest was assigned to the trustee as in consideration of his application of the rents in their maintenance, &c., and reciting that the trustee had duly accounted to them. A female *cestuique trust*, who had just attained her majority, joined in the deed. On 10th September, 1869, the plaintiffs conveyed the property to one D., as in consideration of a sum of £300, and D. executed a declaration of trust in favour of the trustee. The trustee afterwards dealt with the land as his own. On a suit in 1882, by the three *cestuisque trustent* to set aside the sale, *Held* that the consideration in the deed of September, 1869, was greatly under the value of the property, and though attributable to a great extent to the carelessness of A. and B., was also brought about by the fraud of the trustee; that in spite of the delay (12 years) the plaintiffs were entitled to set it aside, but plaintiffs' costs refused on the ground of delay. *Bennett v. Tucker*, 8 V.L.R. (E.,) 20; 3 A.L.T., 108.

Release to Trustee—Bargain made Before Infant Came of Age, though Actually Executed Two Days After He Came of Age.]—*O'Leary v. Mahoney, ante column* 559.

Duties of Trustees in Relation to Maintenance—Maintenance not to be Applied to Payment of Past Debts.]—In pursuance of a decree made in this suit, the Master reported that a sum of £100 should be allowed and paid to the mother of infant children for their maintenance, the decree only referring it to the Master to enquire what sum should be allowed for maintenance. A decree, based upon that report, directed the trustees to provide the children with maintenance, pursuant to the directions contained in the will. The trustees at first left it to the mother to apply the money, but, finding she was indebted, subsequently determined to pay for the maintenance themselves. They did not devise a proper scheme, providing how much should be allowed for board and lodging, and how much for clothing, &c., but allowed the mother to bargain for board, and as for clothing, directed her to apply to them when anything was required. The mother, in October, 1871, had exhausted the maintenance for the whole year. On motion for an order, directing the trustees to pay the maintenance to the mother, or to order them to provide for maintenance, the Court refused to make an order in the first alternative, but made an order in the second. *Green v. Sutherland*, 3 A.J.R., 3.

Funds under Direction of Court—Infant—Past Maintenance—Practice.]—An infant was entitled to a share of a fund partly in the hands of trustees under the direction of the Court in a suit *S. v. K.* *Held* that the trustees could not out of such a fund pay any sum for past maintenance of the infant without the direction of the Court, and that such direction could only be obtained by a summary order in the suit of *S. v. K.*, or by a supplemental suit for the administration of the infant's estate, but not by a suit by persons maintaining the infant against the trustees alone. *Mitchell v. Tuckett*, 5 V.L.R (E.,) 31.

Infant—Maintenance—Interference by Court with Discretion of Trustees.]—Where a testator, by will, gave his trustees a discretion as to the amount of maintenance to be allowed to an infant child, the Court refused to interfere or fix a proper sum. *Grant v. Grant*, 5 V.L.R. (E.,) 314.

The Court will not upon motion, when it is not administering the estate, interfere with the discretion of trustees as to the amount of maintenance vested in them by the will, even although the mother is in poor circumstances and there is a posthumous child unprovided for. *In the will of M'Lean*, 5 V.L.R. (E.,) 319.

Trust for Maintenance and Advancement—Power of Trustees.]—A will contained a gift of certain rents upon trust for the widow, directing her to maintain the children, and also a power of advancement during minority. *Held*, in the absence of special evidence, that an advancement by the trustees of a sum of £100 out of one daughter's share for a wedding outfit was not warranted by the terms of the will. *Sichel v. O'Shanassy*, 3 V.L.R. (E.,) 208.

Power to Contribute to Charitable Institutions.]—A testator, a partner in mines, was in the habit of contributing with his partners to local charities. After his death, leaving a large fortune, the Court directed the trustees to be empowered to join the partners in proportionate contributions to such institutions. *Grant v. Grant*, 5 V.L.R. (E.,) 314; 1 A.L.T., 110.

Petition under Sec. 94 of Act No. 213.]—A mere Trustee cannot be a petitioner, under Sec. 94 of Act No. 213, for the sale of settled estates. *In re Ellis' Settled Estates, ante column* 1310.

Distress for Rent.]—It is not necessary that all of several trustees should join in signing a distress warrant for non-payment of rent. *Moore v. Lee*, 2 V.R. (L.,) 4; 2 A.J.R., 16.

Right to Commission.]—A trustee will not be allowed commission on investments made by him, and for collecting interest, in addition to commission on the capital. *Sawyers v. Kyte*, 4 A.J.R., 144.

See also cases under EXECUTOR AND ADMINISTRATOR, *ante columns* 438-446.

Commission Given by Will—Allowed to Substituted Trustees.]—*Green v. Nicholson*, 6 W.W. & A'B (E.,) 147, *post under* APPOINTMENT OF TRUSTEES—In other cases.

IV. Liability of Trustees.

Breach of Trust—What amounts to.]—M. settled land upon trustees in trust for an infant in consideration of a sum of £220, the deed containing powers of sale and of mortgage. The trustees sold the land to the infant's father shortly afterwards for £220, and the father, within a fortnight after his purchase, mortgaged it for £800, the money being advanced in instalments as buildings were erected. *Held* that there was nothing wrong in the trustees selling to the father if for fair value, and that as what had just been given would appear to be fair value, the transaction should not be disturbed. *O'Brien v. Keenan*, 5 A.J.R., 99.

Wilful Default—Improper Investments—Loan on Personal Security.]—W., by her will, gave all her real and personal estate to trustees (K., G., and W.) upon trust for sale and conversion and investment "in Government or real securities in the colony of Victoria, or in or upon shares, stocks, or securities of any company incorporated by Royal Charter, Act of Parliament, or of the Colonial Legislature, paying a dividend." Two of the three trustees (K. and G.) advanced £1100 to B. upou promissory note, K. representing to G. that the testatrix had promised to do so. K. purchased Collingwood gas shares, and shares in a distillery and a mining company. K., G., and W. were appointed executors of the will. On a bill against the trustees and executors of the will for administration and accounts, *Held* that the loan on promissory note to B., and the investment in the distillery and mining company, were all misinvestments, for which the trustees were liable, and that a misapplication of funds does not warrant a decree for account with wilful default. *Sawyers v. Kyte*, 6 W.W. & A'B. (E.,) 61, 69, 70.

See also *Snaith v. Dove*, *post column* 1461.

Continuance of Squatting Property in Opposition to Terms of Will—Successful Adventure—Payment to Tenant for Life of all the Income.]—*Waddell v. Patterson*, *ante columns* 1376, 1377.

For Unauthorised Expenditure—Wilful Default—Lease to a Co-trustee.]—F. owned a hotel which he let at a rent of £240 per year. After F.'s death the trustees under his will reduced the rent to £200 and built a bar at a cost of £215; this bar proved to be an encroachment on the street, and the trustees pulled down the old building and rebuilt at a cost of £1300. During the time of rebuilding the premises were unproductive, and afterwards they let the hotel to one of themselves at rents of £150 and £120 a year. *Held* that as against the tenant for life the trustees were not entitled to credit for sums expended in building the bar, in pulling down and rebuilding the hotel; that the trustees were liable with wilful default for fair rents accruing due during the time of rebuilding and the tenancy of the trustee, but were in the accounts not to be charged with the improved rent owing to the rebuilding. *Davis v. Kelleher*, 1 V.R. (E.,) 175; 1 A.J.R. 149.

Wilful Default—Liability for Acts of Co-trustee.]—A testator devised and bequeathed all his real and personal property to his wife, O., and X. as trustees upon certain trusts to carry on the business of farming until one of his sons should attain his majority. He gave his trustees power to lease his property until his said son attained his majority. He directed that his wife should live on one of the farms until second marriage, that the rents and the income of investments should be paid for the maintenance and education of his children, and for paying his wife £500 on her second marriage. X. disclaimed the trusts of the will but O. and the widow acted. After the testator's death his widow married M. and she and M. lived on the farm above-mentioned, educated the children, managed the property without O.'s interference, and O. and the widow leased the said farm to M. at a rental of £308 per annum, which sum was allowed for maintainence of the children. On a bill by the children seeking administration and accounts, *Held per Molesworth, J.*, that as to account for wilful default some one act of wilful default producing loss must be proved after being charged, and then the general inquiry is directed; that the lease to M. was void and should be disregarded in the accounts: that O. and X. were liable to an account for the value of the land and of all proceeds from it, and since the bill charged that the widow and her husband were allowed to keep possession of the farm stock and implements, and that the stock had greatly decreased in value and number, that such account should be taken on the basis of wilful default. *Held* on appeal that it appeared that the trustees had actually received all the property and that such receipt was inconsistent with wilful default in not receiving. Decree varied by striking out the words making the trustees liable as for wilful default and by inserting words authorising the Master in taking accounts as to maintenance &c., to allow the amount or value of money employed or property expended or employed or a reasonable estimate of what was proper to be allowed for such maintenance. *Hartigan v. O'Shanassy*, 3 A.J.R., 5, 15.

Liability—Wilful Default—Abandonment of Distress.]—*See Officer v. Haynes*, *ante column* 381.

For Acts of Co-trustee.]—An executor obtained the signature of his co-executor to cheques on their joint account as executors, by representing to him that he was going to invest the money at higher interest than the bank allowed; and having obtained the assets of the testator by means of such cheques misappropriated them. *Held* that the co-executor was liable for such misappropriation. *Jones v. Taylor*, 2 V.R. (E.,) 15.

Voluntary Settlement by an Insolvent—Subsequent Mortgage—Receipt of Mortgage Moneys by the Trustees.]—K., by indenture 19th June, 1871, settled lands upon his wife and children and appointed S. and T. trustees. In July, 1872, a sum of £1000 was raised on mortgage of part of lands in settlement, mortgage being signed by K. alone; T. & S. received this sum and applied it under K.'s directions in the

purchase of a part interest in a certain ship. On 26th September, 1873, K.'s estate was sequestrated, and plaintiff appointed assignee. *Held* that trustees were not personally liable for what they had received of mortgage money. *Halfey v. Tait*, 1 V.L.R. (E.,) 8.

Constructive Trustee—Receipt of Trust Moneys with Notice—Investment in Partnership Business—Accounts of Profits—Rate of Interest—Trustee Encroaching on Corpus to meet Necessities of a Lunatic Feme Sole.]—Where a sole surviving trustee sues a member of a firm who had received trust moneys from a deceased co-trustee with notice of trust, and invested them in firm's business, the plaintiff has sufficient equity to sue such member solely as a constructive trustee, and the defendant is responsible for profits made in trade arising from use of such moneys, or at adversary's option to pay interest. *Semble* a higher rate of interest than 8 or 10 per cent. should be charged, but question of higher rate not to be entertained in a suit to which beneficiary is not a party. A constructive trustee and a trustee are neither of them liable for encroaching upon *corpus* of fund of a lunatic *feme sole* to meet her necessities. *Mackay v. Caughey*, 1 V.L.R. (Eq.,) 56.

Barrister or Solicitor Trustee—Custody of Title Deeds—Negligence of Trustee.]—*Per Molesworth, J.*, that generally a barrister or solicitor appointed a trustee incurs no increased liability from his presumed knowledge of the law, and his professional liabilities should be confined to cases where he receives professional emolument or purports to act professionally. A marriage settlement was executed on marriage of defendants H.B. and M.B. on 7th June, 1867—defendants J.B. and M. being appointed trustees. The defendant H.B. was allowed to have custody of title deeds, and the settlement was not registered. H.B. concealed settlement, and mortgaged some of the property comprised in the settlement (St. Kilda property), and in September 1870, conveyed equity of redemption to J.B. for £200. The whole of the St. Kilda property was lost to the estate. M. never executed deed or took part in the trusts. J.B. had no notice of the mortgages by H.B. until April, 1870. *Held per Molesworth J.*, that J.B. was not liable to make good loss to estate, the portion received by H.B., nor for amount of four mortgages, but he was liable since he got notice of mortgages for the £200, or for the true value of the estate subject to the mortgages. *Per Full Court*, that owing to his negligence in not having deed registered and seeing to proper custody of title deeds, J.B. was liable for the whole value of the St. Kilda property. The marriage settlement recited that O. was entitled to the distributive share in a deceased relative's estate, which was settled with the other property on trusts of settlement. M., who was also administrator of the deceased relative's estate, paid this to H.B. with O.'s consent. *Held, per Molesworth J., and the Full Court*, that J.B. was not liable to make this share good to the estate; that J.B. was not bound to serve defendant with a specific caution as the holder of part of the trust property. *Bennett v. Bennett*, 1 V.L.R. (E.) 280.

Where Forbearance, Acquiescence, and Laches of Cestui que Trust does not Relieve from Liability.]—G.G. died November, 1854, intestate, leaving his only brother, F.G., his heir-at-law. In February, 1855, F.G. took out administration. R.S. (the plaintiff), a sister of deceased, for a long time forebore to claim her share in the intestate's personalty, and expressed her intention not to claim it, and R.S. also acquiesced in the distribution of the property by F.G., whereby she was excluded from participation. F.G. died in 1863, leaving a widow and infant child. In May, 1864, R.S. instituted a suit against the widow, who administered to her husband, and the heir-at-law of F.G., for an account of the personal estate of G.G. *Held* that plaintiff's forbearance from enforcing her right to her share, or her expressed intention not to claim it. did not operate as a release; that her delay and acquiescence in the previous distribution did not bar her claim; but that her *laches* disentitled her to interest before the date of her application for an adjustment of accounts prior to the suit. *Shaw* v. *Gorman*, 2 W.W. & A'B. (E.) 18.

Liability to Account—Creditor's Deed—7 Vict. No. 19, Sec. 9—Delay.]—In 1864 A. assigned his estate to trustees in trust for creditors, under which creditors were paid 15s. 6d. in the £. In 1878, after having begun summary proceedings under 7 Vict., No. 19, against the trustees, and obtained some relief, he abandoned those proceedings, and then brought a bill against the trustees for an account, without praying for payment. *Held* that his long delay was a bar to his right, and that though the summary proceedings under 7 Vict., No. 19, did not oust the jurisdiction of the Court, yet plaintiff must show sufficient ground for abandoning those proceedings before seeking aid of Court. Bill dismissed. *Arthur v. Moore*, 5 V.L.R. (E.,) 207; 1 A.L.T. 29.

Liability to Account on Determination of Trust—Acquiescence by Cestuis que Trustent.]—A plaintiff, having a right to account for rents, after a trust of the rents has ceased, and doing nothing for six years, is bound by acquiescence. *Cestuis que trustent* by deed, August, 1869, released a trustee from liability to account for previous rents, and conveyed the estate in the land to the trustee. In a suit in 1882, in which it was declared that they were entitled to set aside conveyance to the trustee, *Held* that they were debarred by their acquiescence for six years after the suit from seeking an account of previous rents, but an account of rents since August, 1869, directed. *Bennett v. Tucker*, 8 V.L.R. (E.,) 20; 3 A.L.T., 108.

Acting upon Erroneous View of a Will.]—Where trustees had spent more money in maintenance than the Master had reported as permissible, *Held* that they ought not to be indemnified because acting upon an erroneous view of the construction of the will. *Osborne v. Osborne*, 6 V.L.R. (E.,) 132.

Liability for not Investing.]—*See post* under sub-heading INVESTMENT.

V. Appointment of Trustees.

(a) *By the Court.*

Who may be Appointed—Near Relative of Beneficiary.]—Although the Court is generally averse to appoint as trustees near relatives of persons interested under the trusts, yet such appointments are sometimes necessary, and will be made by the Court. *Waddell v. Patterson*, 2 W.W. & a'B. (E.,) 36.

Who may be Appointed—Persons out of Jurisdiction.]—The Court is loth to appoint as new trustees persons resident out of the jurisdiction. *In re Mitchell's Trust Estate*, 5 V.L.R. (E.,) 42.

New Trustees—Breach of Trust by Former Trustee.]—Where a settlement contained a power in the trustee appointed to appoint a person or persons to be a new trustee or trustees, and the last trustee committed a breach of trust, and made away with a portion of the estate, the Court after his death, appointed two new trustees, and vested the estate in them, without reference to such breach of trust. *In re Fisher*, 6 V.L.R. (E.,) 73.

Charitable Trust — Diminishing Number of Trustees.]—By indenture certain land was vested in thirteen trustees, upon trust to permit a chapel, &c., to be built thereon. Five of the trustees were dead, two were out of jurisdiction, and three had ceased to be members of the religious denomination, to which the land belonged. Petition by the three remaining trustees for appointment of new trustees seeking to diminish the original number. Order made for appointment, but Court refused to diminish the number fixed by the indenture. *Ex parte Scott*, 7 V.L.R. (E.,) 58.

Where trustees named in a will declined to act, the superintendent and a committeeman of an Orphan Asylum in which the beneficiaries were maintained, were appointed new trustees in their stead. *In the Will of Mitchell*, 3 A.J.R., 43.

In Place of Retiring Executors—Gift to Charitable Institution.]—On petition under Act No. 234, M. and S. appointed by will executors, but not trustees, and directed to pay income of debentures to a charitable institution, were discharged from the trust, and the chairman and treasurer of the institution appointed trustees, such trustees being by the order directed to execute and deposit a declaration of trust as to the debentures. *In re the Will of Sonnenschein*, 5 V.L.R. (E.,) 276.

Retirement of Old Trustees wishing to be Relieved—Infant Trustee.]—A will appointed A. and B., an infant, trustees. A. proved the will, leave being reserved to B. A. and B. then sought to be discharged, and a petition was presented for the purpose, and for appointment of new trustees. A. was allowed to retire on ground of ill-health, and B. on ground of infancy. Order made appointing two new trustees without prejudice to B.'s restoration on coming of age. *In re Will of Phillips*, 5 V.L.R. (E.,) 274.

Appointment by Executor of Last Acting Trustee—Discretion—Interference by Court.]—A., by will, appointed B. and C. executors and trustees, with a power for trustees or the executor of survivor to appoint new trustees, augmenting or decreasing their number. B. predeceased A. C. acted in trusts and died, by his will devising trust estates to D. and E., whom he made trustees and executors. D. proved, but E. did not, though leave was reserved to him. Suit by one beneficiary against D. and other beneficiaries to remove D., and for appointment of new trustees and administration. *Held* that as D. had not been guilty of any misconduct, the Court would not interfere with C.'s appointment of him as trustee, except by referring to the Master for approbation. [Note.—This reference does not appear in the judgment, but was contained in the directions.] *Dredye v. Matheson*, 5 V.L.R., (E.,) 266; 1 A.L.T., 73.

Trustees Declining to Act.]—Petition for appointment of trustees in place of two appointed by the will, who declined to act. Order made appointing new trustees to be trustees not only as regarded the trusts of the will, but also as regarded infant heir. The right to sue for any *chose in action*, subject to trusts of will, to be vested in the new trustees, so far as regarded any *chose in action* resulting from testator's real estate. *In the Will of Mitchell*, 3 A.J.R., 43.

"Statute of Trusts 1864" (No. 234,) Secs. 36, 37—Trustee Insolvent and out of Jurisdiction—Service.]—One of three trustees appointed by a will had become insolvent and had gone abroad, it not being known where. On petition for new trustee, *Held* that a trustee should not be removed without notice being served upon him, unless it was impossible to find him, and the affidavits not stating that anything like a diligent inquiry had been made to discover him, petition refused. *In the Will of Alex. M'Bean*, 5 A.J.R., 64.

New Trustees—Trustee Resident out of Jurisdiction—Service.]—Where a trustee is resident out of the jurisdiction, and it is desired to appoint a new trustee in his place, the applicant should serve him, if practicable, with notice or account; or, in case of not being able to do so, communication by letter is sufficient. *In re Ayres' Trusts*, 4 V.L.R. (E.,) 220.

(b) *In other Cases.*

Construction of Power of Appointment.]—B. purchased land of C., and B., by his will, devised all his real estate to L. and S. on certain trusts therein declared, and directed "that in case any or either of them, the said trustee or trustees," or any future "trustees or trustee," should die, or wish to be discharged, or neglect or refuse to act, it should be lawful for the survivor and survivors of them, and the heirs, &c., "of such survivor" from time to time to appoint "any other person or persons to be a trustee or trustees in the place or stead of the trustees so dying or desiring to be discharged," &c., and to convey the estate, which "should then be vested in the trustee or trustees so dying," &c., so that it might be "effectually vested in the surviving trustee or trustees"

upon the subsisting trusts. In a suit by the then trustees of B.'s will against the representatives of a second purchaser from P. to set aside the second sale by C. as fraudulent and void, *Held* that an appointment of two new trustees by the two original trustees (L. and S.) jointly was not a due exercise of the power of appointment in B.'s will, on the principle that, looking at the terms of the power, the two trustees cannot retire together, and that the new appointment must be done by steps; in other words, that there must be two successive appointments. *Dalton v. Plevins*, 1 W. & W. (E.,) 177, 185.

Under Management of the Court.]—Where the Court has taken the management of a testator's property into its hands, a power in the will to appoint new trustees cannot properly be exercised without its sanction. *Mortimer v. Braithwaite*, 1 W.W. & A'B. (E.,) 139.

Absence of Trustee — Appointment of New Trustee.]—The term "incapable" in the English language does not mean a voluntary inability to act but an involuntary one. Where, therefore, during the absence of a trustee in England his co-trustees appointed a new trustee, and contracted to sell the trust property, *Held* that the absent trustee was still a trustee; that the appointment of the new trustee was bad; and that the contract for sale was void. *Iffla v. Beaney*, 1 W. & W. (E.,) 110, 116, 117.

New Trustee appointed in Excess of Power.]—A settlement contained a power of sale by trustees or the trustee for the time being, with the consent in writing of the persons for the time beneficially interested; and a power to appoint a new trustee, if either of the trustees should die or become incapable, or be unwilling to act. One of the trustees being absent in England, an instrument was executed which recited that he was incapable to act, and appointed a new trustee. A contract was made by the trustees for a sale of the property, with the consent of the person beneficially interested. The purchaser having refused to complete, the trustees brought a suit for specific performance. *Held* that the appointment of the new trustee was bad; that the absent trustee had a duty to exercise an independent discretion as trustee, and that he was not bound by the contract made on speculation of what he would do afterwards; that the sale was made by a person who had no right to sell; and that the whole contract was void. *Ibid.*

Devise of Estates vested in Testator as Trustee —Whether Devisees Trustees.]—A. left by will all his property to B. under an arrangement that B. should hold it upon trust for A.'s widow and children. B. executed a declaration of trust declaring that he held the property upon trust to pay widow "£100 per annum," and remainder in trust for A.'s children. B. died, leaving his property to X. and Y., devising estates vested in him as trustee to X. and Y. subject to trusts affecting same. *Held* that X. and Y. were not the persons to carry out execution of the trusts, and reference to Master directed to approve of fit persons to act as trustees. *M'Kinnon v. M'Innes*, 3 V.L.R. (E.,) 253.

Power to Appoint—Persons Resident out of Jurisdiction—Commission.]—A testator appointed three persons resident in Australia as trustees of his Australian property, and three persons resident in England as trustees of his English property: the will contained a power for the widow to appoint new trustees. One of the Australian trustees died, and the widow appointed two of the English trustees in his place. A suit was instituted to administer the trusts of the will. Upon further directions, *Held* that the appointment though opposed to the testator's intentions was valid, as the power was unfettered, and the two substituted trustees were allowed the commission by the will directed to be allowed to Australian trustees as from the date of appointment. *Green v. Nicholson*, 6 W.W. & A'B. (E.,) 147.

Report of Master as to Proper Persons.]—Where a settlement contained a power for trustees for the time being to appoint new trustees subject to the consent of the tenants for life, and by reason of the disagreement of the tenants for life no appointment could be made, the Court referred it to the Master to approve of and report as to proper persons to be new trustees. *In re Murphy's Trusts*, 4 V.L.R. (E.,) 112.

VI. Vesting Orders.

Vesting Estate in New Trustee in Absence of Old Trustee.]—A deed contained a provision for appointment of a new trustee in the event of any one of the trustees "refusing or declining to act, or going more than ten miles from Kyneton." On an application under the "*Trustee Act*," Sec. 10. the Court would not make a vesting order without proof that the old trustee was not in one of the neighbouring colonies, and was not likely soon to return to this colony; but offered to refer it to the Master to report whether the new trustee had been properly appointed, and whether there were any and what difficulties in obtaining the execution of the conveyance of the trust property by the old trustee. *Per Molesworth, J.*—"I think, if he (the trustee) is in England or anywhere that would occasion great delay and trouble in obtaining a conveyance from him, I should make a vesting order; but if he is in one of the adjoining colonies, or if he is likely soon to return to this colony, I do not think I should make a vesting order." *In re Lewis*, 1 W. & W. (E.,) 118.

[Note.—Sec. 10 of the "*Trustee Act*," 19 Vict., No. 20, corresponds with Sec. 12 of Act No. 234.]

"Trustee Act" 13 & 14 Vict., Cap. 60—"Trustee Extension Act," Sec. 1—"Trustee out of Jurisdiction."]—The interpretation clause of the "*Trustee Act*" (13 & 14 Vict., c. 60), providing that "the word 'trust' shall not mean the duties incident to an estate conveyed by way of mortgage" does not override the 1st Section of the "*Trustee Extension Act*" (15 & 16 Vict., c. 55), which expressly says that every party to a cause shall be within the Act, no matter what his position may be. Where under a decree a sale of land vested in trustees out of the jurisdiction is made, not in execution of the trusts,

but in some respects independent of them, a vesting order under the "*Trustee Act*" is rightly made to vest the land directly in the purchasers, without passing it through a trustee within the jurisdiction. *Williamson v. Courtney*, 2 W. & W. (E.,) 79.

[Note.—The interpretation clause in 13 & 14 Vict., c. 60, corresponds with Sec. 3 of Act No. 234, and Sec. 1 of 15 & 16 Vict., c. 55, corresponds with Sec. 31 of the Act No. 234.]

"Trustee Act 1856" 19 Vict., No. 20—13 & 14 Vict., Cap. 60, Sec. 9—Loss of Title Deeds.]—The Court will not make a vesting order under the "*Trustee Act*" (19 Vict., No. 20,) *i.e.*, Sec. 9 of 13 & 14 Vict., c. 60, merely by way of getting over a difficulty arising from loss of title deeds. *In re Weston*, 2 W. & W. (E.,) 55.

[Note.—Sec. 11 of Act 234 is the corresponding section.]

Discharge of Contingent Interests under "Trustees Act 1856," Secs. 16, 20, and 29.]—V., by will dated in June, 1855, gave to his wife his real estate for her life, and directed that his Flinders-lane property at their mother's death should go in equal proportions to his children and to their children afterwards. One of the children was, at the date of the will, married and had issue. Other children are still (7th November 1861) infants, but are married and have issue. A decree for sale had been made in two suits (*Bank of Australasia v. Vans* and *Bank of Australasia v. Gibb*), instituted by the bank as a creditor of V. On a motion for a purchaser under the decree, all parties appearing and not opposing, the Court, under the "*Trustee Act* 1856," Secs. 16, 20 and 29, made a declaration that the purchased lots be discharged from contingent rights under the will of persons unborn, and that the infant defendants were trustees for the purchaser; and appointed an officer of the Court to convey the interest of each infant defendant to the purchaser. *Bank of Australasia v. Vans; and Bank of Australasia v. Gibb*, 1 W. & W. (E.,) 120.

[Secs. 18, 22 and 30 are the corresponding sections of Act No. 234.]

Heir-at-Law not to be Found—Disputed Will.]—A testator devised all his real estate to B., upon trust, for sale and investment; probate of another instrument purporting to be a later will of the testator was obtained. B. formally disclaimed the trusts of the original will. Upon petition by the beneficiaries under that will averring that they were desirous of testing the validity of the will by commencing actions of ejectment, but were unable to do so by reason of B. refusing to act or to allow his name to be used in any action, and that the heir-at-law of the testator could not be discovered, *Order* made, without confirming the validity of the first will, for the appointment of a new trustee, and for vesting in such new trustee the property devised by the first will. *In re Barnes*, 1 W.W. & A'B. (E.,) 72.

[Sec. 17 of Act No. 234 is the corresponding section.]

"Trustee Act 1856," Sec. 15—Trustee whose Heir cannot be Found—Conveyancing Difficulties.]—Petition for vesting order vesting legal estate then in the heir-at-law of O., deceased, in the applicants as beneficiaries. O. died in England and left a will of which there was no copy in Victoria. *Held, per Molesworth, J.*, and affirmed on appeal, that the "*Trustee Act* 1856" was not intended to obviate conveyancing difficulties which may be got over by a little trouble, delay and expense. *Semble* that the Court will not make a vesting order where there is an absence of conveyancing evidence that a certain person is heir-at-law, but there is no probable doubt of heirship and which fact can be easily proved. *In re Orr*, 2 W.W. & A'B. (E.,) 100.

Per the Full Court—The words "not known" in Sec. 15 of the "*Trustee Act* 1856" imply an uncertainty—an absence of facts of general belief, from which, not regarding the rules of evidence, it may be reasonably inferred who was the heir or devisee. But if this inference may be fairly drawn, an absence of absolute conveyancing proof will not render the fact "unknown." *Ibid.*

[Sec. 17 of Act No. 234 is the corresponding section.]

Intestate Trustee—Notice to Crown.]—T., a trustee of real estate for L., by his will devised all property in which he was beneficially interested; but died intestate as to property vested in him as trustee, and without an heir. Order made under "*Trustee Act* 1856," but without notice to the Crown, vesting the real estate in L. *In re Thornhill*, 3 W.W. & A'B. (E.,) 110.

Trustee Refusing to Convey—The "Statute of Trusts 1864," Sec. 19.]—Where one of two trustees is out of the jurisdiction and the other has been removed by the Court and an order made that he should execute a conveyance to a new trustee appointed in his place, a demand by the solicitor of the new trustee upon such displaced trustee to execute a conveyance is not a sufficient demand upon which to base an application under Sec. 19 of "*The Statute of Trusts* 1864," for an order vesting the estate in such new trustee. *Semble* that one trustee could not apply without the other for such vesting order. *Kendell v. Thomson*, 5 W.W. & A'B. (E.,) 135.

Heir-at-Law of Mortgagee out of Jurisdiction.]—A mortgagee of land died, leaving a will appointing executors, but not devising the legal estate in the land. The heir-at-law being in Scotland, the executors applied under the "*Trustee Act* 1856" for an order vesting in them the legal estate in the land. *Held* that though the section did not appear to contemplate, either in language or spirit, the case which had arisen, yet that the case of *In re Boden's Mortgage Trust* (1 De G. M. & G., 57), on appeal was an authority on all essential points for the application, and was coercive on the Court. *In re McLeod*, 1 W. & W. (E.,) 133.

[Sec. 21 of Act No. 234 is the corresponding section.]

"Statute of Trusts 1864" (No. 234,) Sec. 21—Legal Estate in Heir-at-Law of Mortgagee out of the Jurisdiction—Debt on Mortgage of Real Estate in Victoria—Vesting Order on Payment of Debt—Administration Granted in Another Colony.]—Property in Melbourne was owned by M. G. and Co., of Sydney, the legal estate being in M. M., as if seized in fee solely, executed a mortgage as for £2500 advanced to secure this advance to H. On dissolution of partnership by arrangement, G. took the mortgaged property subject to the debt. H. died in Ireland and M. obtained administration *c.t.a.* in New South Wales to H.'s estate. H. left an infant heir-at-law in England, in whom was the legal estate in the property. M. as for a nominal consideration conveyed the equity of redemption to G., who undertook to indemnify him as to the mortgage debt, and M. as in consideration of the mortgage debt of £2500 paid to him as administrator by G. released the mortgaged land. Petition on behalf of G. to vest legal estate in him. *Held* that the administration granted in New South Wales did not authorise M. to receive the mortgage debt as assets in New South Wales, that the locality of the mortgaged land overruled that of the specialty debt in the covenant to pay, that administration in Victoria was necessary and that the petition should have alleged that G. was entitled, and that the £2500 was actually paid and that there should have been a statement as to who received the proceeds since the date of the mortgage, and that the evidence of the deeds of conveyance of the equity of redemption and of the lease by M. were not sufficient. *In re Montefiore*, 5 A.J.R. 1.

"Statute of Trusts 1864" (No. 234,) Sec. 23—Petition—Trustees Dead or out of Jurisdiction.]—The petitioner, resident in Sydney, was entitled to some shares in a railway company representing certain money granted to her husband by the Government of Victoria and on her account invested by S. and M. in the purchase of the shares. S. and M. paid her the dividends but no deed of trust was ever executed. S. died in 1867 and M. had not been heard of for many years. Upon further materials consisting of order of the petitioner to the Treasury to pay to S. and M., with their receipt, and an affidavit by the manager of the railway company stating payment of dividends to M. and setting out an order from M., in 1868, to remit dividends to petitioner, Order made under Sec. 23 of Act No. 234, authorising petitioner to transfer shares and receive dividends. *In re Mitchell's Trust Estate*, 5 V.L.R. (E.,) 42.

"Statute of Trusts 1864" (No. 234,) Sec. 25—"Stock"—Personal Representative out of the Jurisdiction.]—Shares in a joint-stock mining company are "stock" within the meaning of the "*Statute of Trusts* 1864," Sec. 25, which provides for the transfer of stock standing in the name of a deceased person and, where the surviving representative of such a person is out of the jurisdiction, an order may be made under that section, vesting the right to transfer them. *Bryant v. Saunders, in re Saunders*, 4 V.L.R. (E.,) 215.

"Statute of Trusts 1864" (No. 234,) Sec. 34—Death of Trustee—Land under "Transfer of Land Statute" in Name of Surviving Executor.]—P. devised realty to his wife for life, remainder to children, and appointed two executors, but no trustee. One executor died, and the other brought the unsold land under the "*Transfer of Land Statute*," obtaining the certificate in his own name. Upon petition by the widow and children, praying for a new trustee in the place of the deceased executor, and a vesting order vesting the unsold land in such trustee and the surviving executor, the Court made the order as sought. The death since Act No. 427 vested property in executors as constructive trustees under the will and constructive trusts are within Sec. 34 of Act No. 234. *In re Philpott*, 4 V.L.R. (E.,) 20.

Vesting Orders do not Dispense with Necessity for Conveyances.]—The extraordinary remedy given by Sec. 31 of the "*Statute of Trusts* 1864," *i.e.*, the granting of vesting orders, is not intended to supersede the ordinary conveyances between the parties. *Weigall v. Barber*, 10 V.L.R. (E.,) 90.

But where one of three trustees was out of the jurisdiction and it would have been inconvenient and have caused increased expense to get him to join in a conveyance of trust estate sold under the order of the Court, the Court granted an order vesting his estate in the purchaser. *Ibid*, and *see* S.C., 5 A.L.T., 198.

Trustee out of the Jurisdiction.]—Where an order had been made in a suit that a trustee should convey lands to the plaintiff, and the trustee was out of the jurisdiction and could not be found, the Court refused to make a vesting order, but made an order appointing a person to convey in the stead of the trustee. *Curwen v. Mullery*, 9 V.L.R. (E.,) 151.

Deceased Trustee — Particular Property.]—Where an order is sought appointing a new trustee in place of one deceased, and an order vesting particular trust property in the new trustee, the Court will not make such vesting order without very clear evidence that the deceased trustee held such property as trustee only. *In re Hayward's Settlement*, 10 V.L.R. (E.,) 38.

Not Granted where Devolution of Legal Estate Doubtful.]—A testator devised the income of real estate to certain persons during the life of one of them, and directed that upon the death of such person the estate should be sold and the proceeds divided amongst the others, but did not say by whom the sale and division were to be effected, and appointed three executors, of whom only one was surviving at date of petition; and it was doubtful in whom the legal estate should vest. Upon petition for the appointment of the surviving executor as trustee, and for a vesting order, *Held* that there being a doubt as to the devolution of the legal estate, and as to the concurrence of certain of the petitioners, who were out of the jurisdiction, without evidence that they concurred in the petition and its object, the petition should be dismissed. *In the Will of Crosby*, 6 V.L.R. (E.,) 96; 1 A.L.T., 194.

Practice.]—The Court may, under Sec. 45 of Act No. 234, make a vesting order at the hearing of a cause, although it is not prayed for by the bill. *Flower v. Wilson*, 3 W.W. & A'B. (E.,) 84.

VII. Devolution and Removal from Office.

Jurisdiction of Court—"Trustee Act 1856," Sec. 32.]—The Court has no jurisdiction under the "*Trustee Act* 1856," Sec. 32, to displace a trustee who resides in England, and who, having been served with notice of motion for the appointment of a new trustee in his place, expresses his intention to remain a trustee and to take steps to enable himself to act, although he has allowed some years to elapse without having acted. *In re Postlethwaite*, 1 W. & W. (E.,) 173.

Quære—Whether in any case the Court can, under the "*Trustee Act* 1856," remove a trustee who states that he is unwilling to withdraw from the trust. *Ibid*, 175.

[Sec. 34 of Act No. 234 is the corresponding section.]

Trustee becoming Insolvent—"Insolvency Statute 1871" (No. 379,) Sec. 90.]—Upon a petition, under Sec. 90 of Act No. 379, for removal of trustee on ground of insolvency, it appearing that a firm of which the trustee was a member had sequestrated its estate, and that a business had been carried on in connection with the trust estate, in which liabilities and engagements had been undertaken, *Held* that the official assignee should be before the Court, and that as trustee had asked for an order for accounts, and it being doubtful whether Sec. 90 applied to a complicated case like this, the proper course was by suit. Petition refused. *In re Clarke's Trusts*, 5 V.L.R. (E.,) 28.

"Insolvency Statute 1871" (No. 379,) Sec. 90—Insolvent Trustee.]—*Quære*, whether there is any jurisdiction to remove an insolvent trustee apart from Act No. 379 except in a suit, and as to whether Court could make such an order under that Act as would protect the *cestuis que trustent*. *In re Healey's Estate*, 7 V.L.R. (E.,) 1.

Permanent Absence—Ground for Removal.]—Permanent absence from the colony resulting in injury to the trust estate, in loss of income owing to trust moneys lying idle in a bank, is a sufficient ground for the removal of a trustee, although the testator may have known of such permanent absence when appointing him a trustee, there being at his death two Australian trustees, one of whom had died after the testator. *Knox v. Postlethwaite*, 1 W.W. & A'B. (E.,) 62.

Ground for Removal.]—Where a trustee places himself in a position antagonistic to his duties as trustee, as by taking an assignment of a security given by, and thus obtaining possession of goods of persons who owed rent to the trust estate, and thus making himself unfit to enforce this liability to the estate, he should be removed. *Officer v. Haynes*, 3 V.L.R. (E.,) 115.

Trustee Sought to be Removed a Partner with Testator—Right to Accounts.]—B. and L. were partners in a sheep station in New Zealand. B. died, having by will left all his property to Mrs. B., L., S., and W. as trustees and executors, in trust for infant plaintiffs and Mrs. B. L. failed to account for the partnership assets. On a bill by Mrs. B., S., and the infants against L. and W. seeking a declaration of partnership, partnership accounts, and removal of L. from being a trustee, *Held* that L. was not entitled before removal to a partnership account, but only an account of his own receipts and disbursements. *Bruce v. Liyar*, 6 W.W. & A'B. (E.,) 240, 259.

Discharge of Trustee Appointed and Having Accepted Trusts—Decreasing Number of Trustees.]—On application for advice of court as to power of a trustee to withdraw, the trustee being one of five appointed and having accepted, but proposing to go to England she wished to withdraw, *Held* that the Court would not be justified in sanctioning any diminution of the number of trustees appointed by the testator. Application refused. *In re the Will of James Butchart*, 5 A.J.R., 4.

Practice—Service upon Beneficiaries—Insolvent Trustee—"Insolvency Statute 1871" (No. 379,) Sec. 90.]—Where a petition is presented under the "*Insolvency Statute* 1871," Sec. 90, to remove an insolvent trustee, it should be served upon all parties interested, including children entitled in remainder. *In the Trust Estate of Healey*, 6 V.L.R. (E..) 240; 2 A.L.T., 107.

Practice—Service upon Trustee out of Jurisdiction.]—*Semble*, where it is sought to displace a trustee who has never acted, and who has been for a long time out of the jurisdiction, that it is not necessary to serve such trustee with notice of a petition under the "*Trustee Act* 1856," for the appointment of a new trustee in his place. *In re Postlethwaite*, 1 W. & W. (E.,) 173, 174.

Practice—Parties.]—Where infants are entitled as beneficiaries of certain property; if they are served with notice of petition for removal of a trustee, that is sufficient, and a guardian *ad litem* need not be appointed. On such an application all persons entitled in possession should concur in the petition. *In re Healey's Estate*, 7 V.L.R. (E.,) 1; 2 A.L.T., 107.

Costs.]—The above-mentioned petition being dismissed without costs, the order was made without prejudice to the right of D., the insolvent trustee, whose removal was sought to retain his costs out of the estate. S.C., 7 V.L.R. (E.,) p. 6.

VIII. Proceedings by and against Trustees.

Two Suits—One Friendly, the other Hostile—Reference to Master.]—Where two suits were brought against trustees, one friendly and asking for a continuance of the unauthorised investment, the other hostile, charging wilful default, and praying removal of the trustees and appointment of a receiver, it was referred to the Master to report which would be the most beneficial. *Waddell v. Patterson*, 1 W. & W. (E.,) 43.

Defence—Leave to Defend Second Suit.]—Pending the taking of accounts under a decree in a creditor's suit for administration of the trust estate, a second suit was instituted against the trustees of the deed, relative to a portion of the trust estate conveyed by deed. On motion in the first suit for leave for the trustees to defend the second suit, *ordered* that the trustees be at liberty to act as they might be advised as to defending the new suit, notwithstanding the decree in the first suit. *Heape v. Hawthorne*, 2 W.W. & A'B. (E.,) 13.

Prosecution of Trustee under "Statute of Trusts 1864"—Sanction of Law Officer.]—The consent of a law officer to the prosecution of a trustee under the "*Statute of Trusts* 1864," Secs. 82-96, is sufficiently proved by a document signed, but not *qua* Attorney-General, by a person admitted to have been Attorney-General when he so signed. *Regina v. Taylor*, 1 V.R. (L.,) 84; 1 A.J.R., 80.

[Secs. 82-96 of Act No. 234 are repealed by Sec. 3 of the "*Criminal Law and Practice Amendment Act*" (No. 399.)]

Prosecution for Appropriating Trust Funds—Executor—"Statute of Trusts 1864," Sec. 82.]—An executor is a trustee within Sec. 82 of the "*Statute of Trusts* 1864." so as to be liable to be prosecuted under that section for appropriating trust funds, although there be no express trust created by the will. *Ibid.*

Distress for Rent—All the Trustees need not Sign the Warrant.]—*See Moore v. Lee*, *ante column* 380.

Parties—Supreme Court Rules, Cap. V., Sec. 10.]—*Semble*, that trustees do not sufficiently represent *cestuis que trustent* in suits where rights arising from proceedings against the *cestuis que trustent* are concerned, though they do as to liabilities, &c., arising from acts of the testator or deceased, and perhaps themselves. *Randall v. Mau*, 2 V.R. (E.,) 158, 161; 2 A.J.R., 81.

When Trustees do not Represent Cestuis Que Trustent—Suit to Set Aside a Settlement.]—Where a suit is brought to upset a settlement, the trustees of the settlement do not, under rule 10 of cap. v. of Supreme Court Rules, represent the *cestuis que trustent*. *In re Healey*, 2 V.R. (I. E. & M.,) 34; 2 A.J.R., 132.

Suit to Set Aside Deed of Assignment.]—In a suit to set aside a creditor's deed of assignment the trustees do not represent the *cestuis que trustent*. *Goodman v. M'Callum*, *ante column* 627.

Suit by Trustees of a Marriage Settlement to Charge Real Assets of Testator against Trustees of Testator—When Trustees Represent Beneficiaries.]—*Bullen v. Phelan*, *ante column* 1191.

Suit by Person Claiming Devised Property Acquired by Testator's Fraud—When Executor Represents the Property.]—*Bennett v. Tucker*, *ante column* 1192.

Suit by Cestuis Que Trustent to Set Aside a Conveyance by one of them Made in Mistake—Trustees not Necessary Parties.]—*Ronalds v. Duncan*, *ante column* 1307.

And *see* cases *ante columns* 477, 478, as to Fraudulent Settlements.

Parties—Suit for Account Only—Creditors' Deed—Whether Unpaid Creditors Necessary Parties.]—Where A. assigned his estate to trustees in trust for creditors and afterwards brought a suit against the trustees for an account without praying for any payment, *Held* that unpaid creditors were not necessary parties. *Arthur v. Moore*, 5 V.L.R. (E.,) 207; 1 A.L.T., 29.

Suit Relative to a Settlement—Trustee of Equitable Interest not a Necessary Party.]—*Dallimore v. Oriental Bank*, *ante column* 1188.

Suit for Account by One Trustee against Agent of Trustees—No Privity between Agent and Co-trustee or Cestuis Que Trustent.]—*Phelan v. Macoboy*, *ante column* 1190.

Parties—Representative of Deceased Trustee—Suit by Surviving Trustee against a Third Person.]—Where a surviving trustee brings a suit against a third party participating in a breach of trust by a deceased trustee with notice of trust, the representative of the deceased trustee is not a necessary party. *Mackay v. Caughey*, 1 V.L.R. (E.,) 56.

Procedure—Account—Default.]—In an action by *cestui que trusts* against trustees to entitle the plaintiffs to an account of what trustees received, or without default, might have received, some instance of loss by mismanagement must be alleged and proved. *Snaith v. Dove*, 4 A.J.R., 140.

And *see* cases *ante* under Liability of Trustees.

Costs of Trustees when Allowed.]—Costs are not necessarily withheld from trustees acting irregularly, but not corruptly or mischievously, or given to a *cestui que trust* establishing such irregularity in her own right, and as next friend of other *cestui que trusts*. *Snaith v. Dove*, 4 A.J.R., 140.

Costs of Trustees.]—Suit by official assignee to set aside a voluntary settlement as fraudulent, and to make trustees of settlement liable for mortgage money of insolvent's land received by them. Costs of pleading and hearing, but not of evidence allowed trustees. *Halfey v. Tait*, 1 V.L.R. (E.,) 8; for facts *see* S.C., *ante column* 474.

Costs will not be given against trustees except where they have been guilty of improper conduct. But where unsuccessful on appeal, they may be left to pay their own costs. *Attorney-General v. M'Pherson*, 4 V.L.R. (E.,) 51.

When Trustees Deprived of Costs.]—*Dryden v. Dryden*, *ante column* 245.

Costs against Trustees.]—Costs will not be given against defendant trustees, who do not appear when bill does not pray for them. *Phair v. Powell*, 5 V.L.R. (E.,) 264.

Delay of Cestius que Trustent in Bringing Suit —Costs.]—*Bennett v. Tucker*, *ante column* 1439.

IX. PETITIONS FOR THE ADVICE OF THE COURT.

Under "Statute of Trusts 1864," Sec. 61—Form of.]—The proper form of a petition under the "*Statute of Trusts* 1864," Sec. 61, is a request for advice, and not for directions as to the management of the property. *In re M'Kay*, 2 V.L.R. (E.,) 105.

Construction of Will or Deed—Court will not Advise upon on Petition.]—The Court will not advise upon the construction of a will or deed under Sec. 61, there being no appeal from the opinion, and where there are conflicting interests it might be advisable to appeal. *In re Youngman*, 4 A.J.R., 66.

Will difficult to Construe—Matters which afford Ground for Litigation.]—Where a will is very difficult to construe, and there are materials for litigation between the parties interested, the Court will not answer questions by an executor for advice and direction under the "*Statute of Trusts* 1864," Sec. 61. *In re Mahe, in re O'Neill*, 2 V.L.R. (E.,) 171.

But where the property was small and the children took parallel interests on attaining the age of twenty-one, and there were no conflicting interests the Court answered the questions as to advice though they involved the construction of the will. *In re Stillman's Will*, 1 V.L.R. (E.,) 158.

"Statute of Trusts 1864," Sec. 61—Doubtful Facts.]—Two trustees, A. and B., under a settlement, having entered into negotiations with C. to grant him a lease, B. left the colony, and had not been heard of for some months. Petition for advice whether A. should appoint a new trustee under power in the settlement, and apply for a vesting order. *Held* that Court would not advise on doubtful facts. *In re Wills' Settlement*, 5 V.L.R. (E.,) 292.

Petition under 15 Vic. No. 10, Sec. 16, and Act No. 112, Sec. 51—Court will Not Investigate Facts.]—*See in the Goods of Holdsworth*, *ante column* 451.

Complicated Will—Trustees Appointed by Testator—Others by High Court of Justice—Administrator c.t.a.]—A testator in England made a complicated will and appointed A. and B., resident in England, trustees of Australian property; A. and B. gave a power of attorney to petitioner, who obtained in Victoria administration *c.t.a.* The Court, on a petition for advice, refused to advise under Sec. 61 as to the position of C. and D., who were appointed Australian trustees by the High Court of Justice, or as to apportionment of costs of repairs and other matters relating to application of a fund in his hands. *In re the Will of Ruddock*, 5 V.L.R. (E.,) 297; 1 A.L.T., 89.

When Court will Advise upon.]—The Court will not, on petition under sec. 61, decide between co-plaintiffs in a suit, urging conflicting claims on a legacy which had lapsed, owing to the death of one of the class. Such a question must be brought forward by a supplemental bill. *Osborne v. Osborne*, 9 V.L.R. (E.,) 1.

NOTE.—The supplemental bill was afterwards filed by five infant daughters, through their next friend, against the trustees of the will, the original defendants in the suit, and the four sons who claimed adversely to the daughters, as new defendants.

When Court will Not Advise upon—Construction of Charitable Bequest.]—*See Attorney-General v. Wilson*, 8 V.L.R. (E.,) 215; 4 A.L.T., 14.

"Statute of Trusts 1864" (No. 234,) Sec. 61—Will —Complicated Matters.]—Where, in the construction of a will, advice was sought as to whether a life estate was chargeable with a certain debt, the Court being uncertain as to the facts and considering the matter too complicated, refused to advise. *In re Leon's Trusts*, 9 V.L.R. (E.,) 74.

"Statute of Trusts" (No. 234,) Sec. 61—"Duties on the Estates of Deceased Persons Act" (No. 388).] —The Court will not give advice on a petition under Sec. 61 of Act No. 234 as to construction of Act No. 388, especially in the absence of the Crown, although the Attorney-General has been served with notice of the petition. *In re Williamson*, 7 V.L.R. (E.,) 48.

"Statute of Trusts," Secs. 61, 56—Sum in Hands of Executor of Official Assignee—Payment into Court.]—A sum of money was at the death of C., an official assignee, in his hands, belonging to the estate of an insolvent. No claims were sent in in respect of this in answer to advertisements. Petition under Sec. 61, by C.'s executor for advice as to whether the executor could pay it into Court under Sec. 56. The Court refused to advise. *In re Courtney's Trusts*, 7 V.L.R. (E.,) 149.

Difficult Point—Domicil—"Married Women's Property Act" (No. 384,) Sec. 10.] — Where a testator domiciled in Victoria died, leaving property in Victoria to a sister domiciled in England, the Court refused, on application under Sec. 61 of No. 234, to advise the trustees whether they could pay her share to the sister as being separate property, under Sec. 10 of Act No. 384, or whether the consent of her husband was necessary under the English law, on the ground that the question was one of great doubt. *In re Dickason's Trusts*, 7 V.L.R. (E.,) 184; 3 A.L.T., 85.

Matter Arising in Administration of Estate.]— Trustees were directed by will to purchase land in the Melbourne cemetery for a family grave and to erect a tombstone thereon at a cost of £200. The testator by his wish was buried in the Boroondara cemetery. Upon petition by the trustees under Sec. 61 asking whether they could expend the money in the erection of a tombstone in the Boroondara cemetery, *Held*

that, as the matter was one arising in the administration of the estate, a petition for advice would lie. *In re Campbell*, 9 V.L.R. (E.,) 138.

And *see In re Folk's Will*, *ante column* 1433; *In re Geo. Rolfe*, *ante column* 1437; *in re Durbridge*, *ante column* 1434; and *In the Will of Downing*, 7 V.L.R. (E.,) 22; 2 A.L.T., 133, *post* under WILL—Incidents, &c.—Advancement, for instances where the Court advised upon matters of management and administration.

To Whom Petition should be Addressed.]—A petition under Sec. 61 of the "*Statute of Trusts* 1864" by the trustees of a will seeking the advice of the Court as to whether a proposed investment would be proper, was addressed to all the judges. *Held* that it should have been addressed to a single judge. *In the will of Russell*, 1 A.J.R., 52.

Practice.]—Where the opinion of the Court is sought under Sec. 61 of the "*Statute of Trusts* 1864," unless it is clear that the power sought in the petition exists, the Court answers in the negative. *In re Bowman's Trusts*, 6 V.L.R. (E.,) 124; 2 A.L.T., 13.

Practice—"Trustee Act 1864" (No. 234,) Sec. 61—Evidence of Statements—Complicated Matters.]—The petitioner states facts at his peril and advice is given on the assumption that they are true. The Court will not hear affidavits in reply, as in case of misstatement the order affords no protection. *In re Trusts of Leon's Will*, 9 V.L.R. (E.,) 74.

Costs.]—Upon a petition for the advice of the Court under Sec. 61 as to whether the administrator (the petitioner) of an intestate was a trustee within the meaning of Sec. 77 of the Act No. 234 ("*Statute of Trusts* 1864,") the Court directed that the costs of the petition should be thrown rateably upon the shares of the infant children. *In re Bowman's Trusts*, 6 V.L.R. (E.,) 124; 2 A.L.T., 13.

X. RIGHTS OF THE CESTUI QUE TRUST.

A *cestui que trust* in possession by permission of the trustees is a tenant-at-will of the trustee, and he may, therefore, bring trespass against a stranger. *Cuvet v. Davis*, 9 V.L.R. (L.,) 390, 396.

Cestui Que Trust of Age—Payment to.]—Where a *cestui que trust* is of age the Court may direct that his share he paid to him by the trustee. *Richardson v. Shira*, 6 A.L.T., 48.

XI. FUNDS IN COURT.

Service of Petition.]—Service of a petition under No. 234, Sec. 57, for payment out of moneys paid into Savings Bank, with privity of the Master, under Sec. 56, is not properly effected upon respondents (husband and wife) by leaving it with their daughter at their dwelling-house. *In re Edwards*, 4 V.L.R. (E.,) 109.

Costs.]—A respondent to a petition is entitled to appear and defend himself when the petition prays for costs against him. *Ordered* that the petitioner pay costs of such appearance. *Ibid.*

Direction for Investment—Application of Income.]—Where trustees under a will had paid into Court money to which infants were entitled as tenants in common, the Court, upon petition by them that the Master be directed to invest the sum in Government debentures and pay the income to their father for their maintenance, and, on their respectively attaining twenty-one, to sell the debentures, and pay the proceeds in accordance with the trusts of the will, directed the sum (without any reference) to be invested in debentures and the income paid to the father, who was in poor circumstances, as prayed; but refused to make any order as to the distribution of the sum on the infants attaining twenty-one. *In the will of Cameron*, 6 V.L.R. (E.,) 74; 1 A.L.T., 184.

Payment out of Court—Petition is the Proper Course.]—*In re Bourke's Trusts; In re Benson;* and *In re Stanton*, *ante column* 1205.

XII. INVESTMENTS.

In Squatting Property—Court will not Authorise.]—*Per Molesworth, J.* (p. 64):—The Court will not authorise an investment of the estate in squatting property because such property is not a security; it is a speculative trade subject to many vicissitudes and to a variety of diseases which may sweep off the stock, and (in 1861) owing to the political condition of the country is an investment of peculiar risk and hazard; it is far more difficult to ascertain the honesty of the trustee's dealings in such a case, and the Court has not the same control over the trustee as in other classes of investments. Where a testator had directed the sale of the station property and the trustees had with great success continued the station, and two suits were instituted, one a friendly suit praying for a continuation of the investment, and the other hostile praying for a receiver and charging wilful default, although the former suit was reported to be more beneficial, *Held* and affirmed that the Court would not sanction the investment, and decree made for a sale. *Waddell v. Patterson*, 1 W. & W. (E.,) 43, 55, 57, 64.

Where Settlement is Silent as to Investments.]—Where trustees have made a sale of real estate under a power authorising them to dispose of real estate by sale or in exchange for other hereditaments, but containing no provision for investment, it is the duty of the trustees to invest the proceeds in the purchase of real estate or leasehold premises, in accordance with the "*Statute of Trusts* 1864," Sec. 66; and, until advantageous investments in such property can be found, to invest upon Government stock or debentures, but not upon mortgage. *In re Weir*, 2 V.L.R. (E.,) 168.

Power to Invest in Government Stocks and Debentures.]—Where a testator, by his will, gave his trustees powers to invest in Government stocks and debentures, and upon real securities within the colony, and upon securities of dividend paying companies incorporated by Act of Parliament other than mining companies, the Court, upon motion after decree to administer his estate, continued the discretion vested in the trustees, but limited the investments to Government stocks and debentures in Victoria, and real securities. *Gibbs v. Gibbs*, 6 V.L.R. (E.,) 30.

Liability of Trustees.]—A trustee may be charged with loss arising from a mortgage made in contravention of his powers, without impugning the mortgage. *Snaith v. Dove*, 4 A.J.R., 140.

Improper Investments—What are—Loans on Personal Security—Investments in a Distillery and in a Mining Company.]—*See Sawyers v. Kyte, ante column* 1441.

Mining shares are undesirable and inconvenient as an investment for trust property. *Knight v. Knight, ante column* 449.

Liability for not Investing Trust Funds—Interest.]—Where a trustee retained balances in his hands uninvested, he was charged simple interest thereon at the Court rate. *Sichel v. O'Shanassy*, 4 V.L.R. (E.,) 250.

There is an obligation on trustees to invest moneys in their hands, even where there is no direction in a will for investment, although the will provides for accumulation; and trustees having retained a sum of money in their hands for six months, without presenting any difficulties to excuse their non-investment, were *Held* liable to pay interest thereon not at the Court rate (8 per cent.), but at the rate (6 per cent.), which would have been received had they invested it for that period in Government debentures. *Adamson v. Reid*, 6 V.L.R. (E.,) 164; 2 A.L.T., 69.

UNDUE INFLUENCE.

Voluntary Conveyance—Fraud—Undue Influence—Fiduciary Relationship—Pretended Purchase—False Recitals—Evidence—Onus of Proof.]—W. the male grantee under a deed and S. the female grantor lived together in the same house on terms of the greatest intimacy. By the deed of 30th July, 1874, which purported by its recitals to be a purchase deed, but which was in fact voluntary, S. conveyed certain land to W. S. was at the time prostrated by illness. She had no independent advice, no instructions were given by her for the deed, and no draft was submitted to any solicitor on her behalf. *Held, per Molesworth, J.*, and *Full Court* that devisee under S.'s will who sought to set the deed aside was entitled to do so, as it was procured by fraud or undue influence, the bill setting up both charges. *Held, per Full Court*, that though it is necessary to establish something like a fiduciary relationship to constitute undue influence, yet it is dangerous to attempt a strict definition and Courts of Equity avoid such a definition as might exclude other cases which might afterwards arise; the jurisdiction is founded on the principle of correcting abuses of confidence and should be applied in every case where two persons are so situated that one may obtain considerable influence over the other. By *Full Court* that where there is a variance between the recitals in a deed and actual facts the *onus* of reconciling the facts with the operative part of the deed is always on those claiming under the deed. *Symons v. Williams*, 1 V.L.R. (E.,) 199.

And *see post* under WILL—TESTAMENTARY CAPACITY.

USE AND OCCUPATION.

When Action Lies.]—B. and P. entered into an agreement for a lease. After P. had entered into possession under the agreement, and under the supposition that the lease would be issued, B. wrote to say that instead of P. preparing the lease, he, B., would get the lease prepared for him. He did not do so, however, and no steps were taken to prepare the lease by either party. P. still continuing in possession, and not paying any rent, was sued for use and occupation. *Held* that the action would lie. *Barbour v. Pinn*, 1 V.R. (L.,) 222; 1 A.J.R., 166.

When Action Lies—Jetty.]—Defendant, with the permission of plaintiff, moored his ship to plaintiff's jetty and placed a landing stage from the jetty to his ship, and he and his men used the jetty in passing to and from the ship. The ship's cargo consisting of timber was not discharged on the jetty but into still water under the shelter of the jetty. *Held* that the possession and right to possession were always in the plaintiff and an action for use and occupation would not lie. *Solomon v. Fitzsimmons*, 2 W. & W. (L.,) 42.

Action for by Executors—Title—Defence—Payment to Persons previously Allowed to Receive Rents and Profits.]—In an action by executors for use and occupation, if the defendant have promised to pay, it affords evidence for the jury to infer his liability, and the plaintiffs need not prove title. And it is no defence for the occupier in respect to a period subsequent to a notice not to pay any one but the plaintiffs that he has paid in advance to the widow of the testator, who had been for a long time before such notice allowed to receive the rents and profits of the land. *Mornane v. O'Brien*, 6 V.L.R. (L.,) 61; 1 A.L.T., 161.

Action by Mortgagor before Mortgagee enters into Possession—Recognition of Mortgagor's Title by Defendant—Act No. 301, Sec. 93.]—*See Louch v. Ball, ante column* 1414.

Use and Occupation—Landlord's Title—Unauthorised Occupation of Crown Lands—Act No. 360, Secs. 4, 93.]—A. was in unauthorised occupation of Crown lands basing her claim to possession under a purchase of the interest of a previous holder of a miner's right in the house on the land—the memorandum of sale also specifying a well and other improvements—and she let the "house and premises" to B. A. brought a complaint before justices against B. for use and occupation. On a rule *nisi* for prohibition it was contended that it was contrary to the policy of Act No. 360, for a person in unauthorised possession to traffic in Crown lands. *Held* that A. could not recover, even although the Crown had not attempted to dispossess her, and that B. might take the objection that she was in unauthorised possession to her title. Rule absolute. *Regina v. Hare, ex parte Young*, 9 V.L.R. (L.,) 38, S.C., 4 A.L.T., 152, *sub nom. ex parte Young*, where it appears to have been decided on the ground that A. was the holder of a residence area which it was illegal, under Sec. 5 of Act No. 291, to sublet.

VACATION.

Writ of Prohibition made by Vacation Judge—Practice on—Power of Judge.]—*In re Brewer, ex parte Webster; Regina v. Strutt, ex parte Chatty;* and *Scott v. Ruddock, ante column* 780.

Rule for Prohibition may be Obtained in Vacation—15 Vict., No. 10, Sec. 19.]—*Dennis v. Vivian, ante column* 780.

Application for Prohibition under "Emergency Clause" in Vacation moulded into one under Act No. 571.]—*Regina v. Mairs, ex parte Vansuylen, ante column* 780.

Order Nisi for Writ of Quo Warranto Granted in Vacation—Not Returnable in Term.]—*Regina v. Mouatt, ex parte Sargeant, ante column* 1256.

"Emergency Clause"—Reference to Court.]—*Regina v. Mairs, ex parte Vansuylen, ante column* 1210.

Setting aside Order made in Vacation under "Emergency Clause"—Order should be Filed.]—*Ex parte Nyberg, in re Nicholson, ante column* 1211.

Repeal of "Emergency Clause"—Act No. 761, Sec. 13.]—*Regina v. Bailes, ex parte Pickup, ante column* 1233.

Order Restraining Registration of a Person as Proprietor of Land under the "Transfer of Land Statute" (No. 301) may be Obtained from Judge in Chambers during Vacation.]—*In re "Transfer of Land Statute," ex parte Mahoney, ante column* 1397.

VENDOR AND PURCHASER.

I. The Contract and Matters Relating thereto.

(*a*) *Contract.*

Sale of Station Property—What Passes by—Right to Pre-emptive Section.]—Between ordinary vendor and vendee of a squatting station the vendee of a station has a right to any proviso of preference of purchase from the Government which the vendor may have, unless the contrary be stipulated. It is similar to the case of a tenant-right with a preference of renewal, or a leasehold with an option of purchase, which passes ordinarily with the sale of the tenant-right or leasehold. P. was the licensed occupant of a squatting station, and had applied for the purchase from the Government of a pre-emptive section which was surveyed, but the purchase-money for which was not paid for some years. P. sold the station and cattle thereon, and the pre-emptive section to C., who mortgaged it to P. to secure the purchase money. C. having made default, P., with C.'s concurrence, sold the station to G., the particulars describing certain improvements which were upon the pre-emptive section. After some *mesne* assignments the station became vested in B., who sold the pre-emptive section only to K., B. paying the purchase money to the Government; but the grant of the section was issued in the name of P., who alleged that the amount realised by the sale under the mortgage was insufficient to pay the mortgage debt, and refused to transfer unless the balance were paid. K. filed his bill against P. only, charging that the legal estate was vested in P. as a trustee for him, and prayed for a conveyance. *Held* that G., purchasiug from P. with C.'s consent, was entitled to the full benefit of P.'s preference, since he was entitled to think that everything passed to him which belonged to the mortgagor and mortgagee, and must be taken to know nothing of the accounts between P. and C. *Held*, that C. was a necessary party. Decree made as prayed. *Kennedy v. Phillips*, 2 W. & W. (E.,) 140, 151.

Sale of Hotel—Contract in Two Parts—Difference between Parts.]—Suit for specific performance of a contract for sale of a hotel. The contract consisted of two parts, both signed by plaintiff and defendant. The one part remaining with plaintiff contained an offer for sale of the property on certain terms; the other part, remaining with defendant, contained an acceptance of the offer on the same terms, and, besides, the words "to be completed in eight days from the same date." *Held*, upon the balance of evidence, that the words found only in the second part were put in after the signatures, and specific performance decreed according to the first part of the contract. *Dillon v. M'Leod*, 3 V.L.R. (E.,) 8.

Offer—Acceptance—Letters—"Instruments and Securities Statute 1864" (No. 204,) Sec. 107.]—The defendants A. B. and C. were lessees under the "*Land Act* 1869," Sec. 20, of three allotments used by them as one farm. D. brought a suit to enforce specific performance of a contract to sell the allotments, such contract consisting of letters. A. wrote letter (*a*) setting out allotments, stating that all rents were paid up to

a certain date, and that there would be no difficulty in procuring a Crown grant. D. wrote letter (*b*) referring to offer in (*a*), and accepting it provided it was made freehold as soon as transfers were completed. D. wrote letter (*c*), stating that he had no offer of B. and C.'s land binding on them and requiring such. Letter (*d*) was by A. B. and C. authorising the previous offer by A., offer to stand for eight days, and containing as a postscript the words—"You will, of course, release Crown grants if this be accepted." No further reply was made by D. *Held*, on demurrer, that there was no contract; that letter (*a*) showed that writer did not affect to dispose of the fee, and that *onus* of obtaining Crown grant lay on D., and leaving it uncertain whether there were three sellers or one; that letter (*b*) was no acceptance as it implied that sellers should procure the Crown grant; that letter (c) showed that contract was not yet concluded; and that letter (*d*) contained new terms in the postscript, and this not being accepted in writing there was no contract. *Clarke v. Docherty*, 5 V.L.R. (E.,) 283; 1 A.L.T., 81.

Alternative Offer—Acceptance of one Alternative—Subsequent Correspondence as to Mode of Carrying out Contract.]—*See Morrison v. Neill*, *ante* column 184.

Auctioneer Agent for Purchaser—Revocation of Authority.]—*Ecroyd v. Davis*, *ante* column 71.

Uncertainty.]—*Semble* that a description of a parcel in a contract for the sale of land as "the land in Pine-street purchased by me from H," does not render the contract void for uncertainty, though the vendor had two pieces of land in Pine-street, neither of which were purchased by her directly from H., the vendor having offered to convey both pieces. *Campbell v. Bent*, 6 V.L.R. (L.,) 117, 122.

What it Implies—Fee-Simple—Evidence to rebut Presumption.]—A contract to sell land is *primâ facie* a contract to sell the fee-simple. A contract for the sale of ground comprised in an application for a mining lease, is, *ex vi termini*, not a contract for the sale of the fee-simple, since the application if granted could result in a leasehold interest only. *Cane v. Sinclair*, 10 V.L.R. (L.,) 60; 5 A.L.T., 186.

Provision as to Compensation.]—*See post* under sub-head SPECIFIC PERFORMANCE.

(*b*) "*Statute of Frauds.*"

What Contracts Comply with—Description of Subject Matter.]—A contract for the sale of land described it as having a frontage of 50 feet to P.-street. The depth was not specified, nor was the width at the rear of the land. There was, however, a right-of-way running parallel to P.-street, at a distance of 117 feet from it, and this right-of-way bounded the land at that end. *Held*, *per Molesworth, J.*, that the land was sufficiently described to comply with the "*Statute of Frauds*," since the right-of-way at the rear would define the depth, and the width would ordinarily be the same at the rear as at the front. *Crichton v. Morris*, 10 V.L.R. (E.,) 338.

Interest in Land—What is Not.]—*See Lorenz v. Heffernan*; *Georgeson v. Geach*, *ante* column 193.

Description of Subject Matter—Misdescription of Property.]—Defendant, lessee from the Board of Land and Works of Allotment C. Section 7, and Allotment B. Section 14, agreed to sell them to plaintiff through his agents. The plaintiff agreed to buy, and defendant wrote to plaintiff's agents that he would carry out the contract as soon as he obtained the necessary documents; but he did not complete, and afterwards wrote a letter excusing himself. Plaintiff's solicitor wrote demanding performance, and defendant wrote denying any contract. In the evidence it appeared that in a document which had passed between the parties, and which was regarded by the plaintiff as taking the agreement out of the Statute, Allotment B. Section 14 was described as Allotment B. Section 7, and the defendant contended that, inasmuch as the document misdescribed the property, it could not be relied on as a binding agreement. Parol evidence was given which showed that the land bargained for was the allotment mentioned, inasmuch as it was specially referred to as being adjoining to a certain pre-emptive section, and was otherwise identified. Plaintiff prayed that the contract might be declared binding and the defendant ordered to carry it out. Decree made as prayed. *Cameron v. Avery*, 4 A.J.R., 141.

Description of Subject Matter—Parcels.]—*Per Molesworth, J.* — *Quære*, whether two parcels of land intersected by a road, not the vendor's property, would be properly described as "all that piece or parcel of land," &c. *Ford v. Young*, 8 V.L.R. (E.,) 93, 98; 3 A.L.T., 85.

Description of Parties—Vendor.]—Where an agent contracted to sell land as agent for *David* Young, the vendor's name being *Alexander* Young, *Held*, *per Molesworth, J.*, affirmed on appeal, that parol evidence was not admissible to prove the real name of the vendor, and that there was no sufficient memorandum of the contract within the "*Statute of Frauds*" ("*Instruments and Securities Statute* 1864," Sec. 107). *Ford v. Young*, 8 V.L.R. (E.,) 93; 3 A.L.T., 85, 128.

Sufficiency of Memorandum — Reciprocity.] — Where S. and A., agents for vendors, wrote to purchaser's agent in following terms:—"We as agents for L. and M. hereby sell to R. the land described to you in our letter to you of 16th August, at £2 10s. 6d. per acre cash," *Held* that that was a sufficient memorandum containing all terms necessary, viz., parties, lands (by reference to another writing), and price, and that the word "sell" imports that R. had agreed with S. and A. *Semble* there being no signature by purchaser R. or his agent, that reciprocity under the "*Statute of Frauds*" is not necessary, and that a plaintiff who has not bound himself under the "*Statute of Frauds*" may compel specific performance of a contract signed by the defendant. *Ronald v. Lalor*, 3 A.J.R., 11, 12, 87.

Signature—Blanks in Contract Supplemented by Indorsement.]—Where a contract for the sale of certain land was blank as to the purchaser's

name, the amount of purchase-money and deposit, the date, and the purchaser's signature and that of the witness, but the quantity and position of the land were given in a schedule to the contract, and the conditions prescribed the mode of payment; but on the back of the contract was an indorsement "conditions of sale to P.M., £20 an acre, E.G. & Co., auctioneers, Ballarat." *Held* that this was a sufficient contract in writing to satisfy the "*Statute of Frauds*," since there was evidence that the auctioneers were authorised to sign for the defendant. *Clohesy v. Maher*, 6 V.L.R. (L.,) 357.

Per Stawell, C.J.—The position of a signature on a contract is immaterial; the name of the party to be bound is to be signed, not necessarily subscribed. *Ibid.*

"Instruments and Securities Statute 1864" (No. 204,) Sec. 107—Signature "as Agent for Vendor" —Vendor Signing Replies on Requisitions to Title.]—A signature by an auctioneer as "agent for the vendor," the vendor himself not being named in the contract, is void under the "*Statute of Frauds*" (No. 204, Sec. 107,) but where the vendor signed replies on requisition as to title, although in the replies he disputed efficacy of contract, that was held to be a sufficient signature, the memoranda being sufficiently connected by reference. *Buxton v. Bellin*, 3 V.L.R. (E.,) 243.

(c) *Conditions of Sale, Inquiries, etc.*

Condition giving Power to Rescind—How Construed.]—A condition in a contract for the sale of land, that if the purchaser shall make any objection to, or requisition as to the title or otherwise, which the vendor shall be unable or unwilling to remove or comply with, and such objection or requisition shall be insisted on, it shall be lawful for the vendor, by notice in writing, to annul the sale, is to be construed strictly against the vendor. The vendor is not warranted on receiving requisitions at once to rescind; he is to answer each of them, to say whether he is unable or unwilling to comply and to bring the matter to a point with the purchaser showing how far he is unable or unwilling to comply; and the Court will consider the reasonableness of his conduct in taking advantage of the condition. The vendor is to have a reasonable time to consider whether he will insist upon his objections or take the land withdrawing them, and it is not generally necessary that the vendor should fix a time for the purchaser to consider and answer. *Macgregor v. Templeton*, 8 V.L.R. (E.,) 195; 4 A.L.T., 9.

Objection to or Requisition on the Title—What is—"Transfer of Land Statute."]—A vendor sold land as being under the "*Transfer of Land Statute*." The conditions of sale treated the land as being under the Statute, but contained a clause enabling the vendor to cancel the sale if the purchaser should make and insist on "any objection to or requisition on the title or otherwise, which the vendor shall be unable or unwilling to remove or comply with." The land turned out not to be under the Statute, and on the purchaser demanding production of the certificate of title, in accordance with the conditions of sale, the vendor cancelled the sale. On bill by the purchaser for specific performance, *Held* that inasmuch as a more secure title was given by a certificate than under the general law, demanding the production of the certificate of title was not an objection to or requisition on the title, so as to enable the vendor to rescind the sale; that the whole system of the objections and requisitions was based upon the production of a certificate of title, and the words "or otherwise" in the conditions did not include the demand for the certificate. Specific performance decreed, and defendant ordered to bring the land under the Statute. *Matthews v. James*, 8 V.L.R. (E.,) 188; 3 A.L.T., 146.

Condition that Objection not taken shall be Waived—Compensation.]—In a contract for the sale of land, there was a condition that the purchaser should send in objections to the title within a certain time, or be deemed to have waived all objections to, and to have accepted the title. *Held* that this condition did not prevent the purchaser, who had omitted to send in objections within the specified time, from afterwards suing on a clause in the contract providing for compensation for mistake in description to recover compensation for a deficiency in the quantity of land purported to be sold to him. *O'Shanassy v. Littlewood*, 10 V.L.R. (L.,) 117; 6 A.L.T., 11.

Waiver of Objection—Effect of, how Destroyed —Misrepresentation.]—The effect of a waiver of objections may be avoided by showing that it was obtained by means of false representations. *O'Shanassy v. Littlewood*, 10 V.L.R. (L.,) 117.

Sed quære, per Williams, J.—Whether or not, when the declaration is for breach of contract only, and the plea alleges waiver, a replication setting up false representations by the defendant, by means of which the waiver was obtained, is bad as a departure, and whether the false representations should not have been set up by way of excuse in the declaration. *Ibid.*

Completion of Purchase—Reasonable Time.]—An agreement for the sale and purchase of certain land provided for payment of purchase money in four instalments, the third of £1009 to be paid on 10th October, and the purchase to be completed on 9th October. *Held* that as the date fixed for completion was impossible, the jury must fix a reasonable time after that date for completion. *Campbell v. Bent*, 5 V.L.R. (L.,) 337; 1 A.L.T., 170.

The purchaser also undertook to pay the expenses of preparing abstract of title, copies of deeds, &c. *Held* that such were not recoverable until the time of completion to be fixed by the jury as above. *Ibid.*

Payment of one Instalment before Title Shown, or Purchase Completed.]—*Held* in the same circumstances that a plea denying vendor's readiness and willingness to give title and execute conveyance was no defence to the payment of the instalment of £1009, payable at a fixed time. *Ibid.*

Delivery of Objections within Ten Days—Recovery of Purchase Money though not Complied with—Time of Completion—Objection taken at Trial—Title as "per deeds"—Possessory Title for Fifteen Years.]—Action by purchaser for return of deposit money, and unpaid bills for balance of purchase money. The particulars described the property as sold "as per deeds;" and the condition provided that purchase should be completed upon the last bill becoming due, and that all objections not delivered within ten days after delivery of abstract should be considered as waived. No abstract was delivered, and the objections were delivered after ten days from the time fixed for the delivery of the abstract had elapsed. The action was brought before the last bill fell due, and plaintiff obtained a verdict. Rule *nisi* for nonsuit or new trial. At the trial a new objection was raised by plaintiff that the land sold overlapped by some feet an adjoining property. *Held* that the completion of the purchase meant the execution of the contract, and that objections should be removed or met, and conveyance approved of before time for payment of last bill arrived, and that as a matter of law the vendor had been allowed a reasonable time, and the action was not premature; that the purchaser not requiring an abstract of title, the objections were not delivered too late; that the objection taken at the trial might so be taken at the plaintiff's risk, although not included in the objections or requisitions, and that it was incurable; that defendant's possessory title for fifteen years was not a sufficient title as a title "per deeds." Rule discharged. *Lazarus v. Lowe*, 4 W.W. & A'B. (L.,) 230.

Time of Essence of Contract—Sale of Hotel Property.]—Contract for sale of hotel property, one part of the contract remaining in defendant's possession contained the acceptance and words "to be completed within eight days from the same date," which words were not found in the other part containing the offer, and remaining in plaintiff's possession. Both parts were signed by both parties. *Held* that though as to public-house property time might be more readily essential than in other cases, yet as the business and stock-in-trade were trifling, it was questionable under circumstances which showed an inclination on defendant's part to give time whether rule as to time being essential applied. *Quære* whether the law of transfer of licenses in Victoria presents such difficulty that a contract to complete in eight days should not be read as making time essential. *Dillon v. M'Leod*, 3 V.L.R. (E.,) 8.

Delay in Production of Title Deeds—Deeds not in Possession of Vendor.]—Where conditions of sale provided for production of title deeds in possession of vendor, for objections to title by purchaser's solicitor, and for power of vendor to rescind in case of objections made, and where great delay was made in producing the deeds, owing to their not being in the plaintiff's possession (agent for vendor,) *Semble*, that since the agreement imported the existence of title deeds to which the purchaser could have access, the agreement could not be enforced at law in regard to the restrictions on (*quære* as to) time, the contrary being the fact. *Bartlett v. Looney*, 3 V.L.R. (E.,) 14.

Delivery of Abstract—Land under Act No. 301.]—Upon a contract for the sale of land under the "*Transfer of Land Statute*" (No. 301,) a transfer under the Act is all that the purchaser is entitled to; he cannot insist upon delivery of an abstract of title and copies of deeds and documents relating to the land in defendant's possession. *Davidson v. Brown*, 5 V.L.R. (L.,) 288; 1 A.L.T., 43.

Requisitions on Title—Expense—Demurrer.]—Where a plaintiff prayed that the defendant (vendor) might answer requisitions on the title if great expense would not be thereby incurred, and did not aver that they could be answered without incurring such expense, a demurrer by the defendant was allowed with costs. *Mudie v. Kesterson*, 4 A.J.R., 172.

Reference to a Plan.]—*Per Molesworth, J.*—It is settled law between vendor and purchaser that the latter purchasing land on a plan exhibited by the former has no right to insist that the vendor must dispose of the rest of his property according to the plan unless the contract expressly refers to it. *Per totam curiam*, that the Court will look to the deed of grant itself for the contract; *i.e.*, it will consider only the terms used in the deed and the proper construction to be put on those terms; and if the deed contains no reference to a plan showing the width of a street, the boundary of the land, and no statement of the width, a plan showing the width of the street will not be regarded by the Court in support of the express words of the contract. *Davis v. The Queen*, 6 W.W. & A'B. (E.,) 106, 113, 120.

Right of Vendee to Use of Streets shown on Plans Exhibited at Sale.]—The exhibition to a purchaser, of a plan showing intended streets, does not entitle him to the use of the streets unless his conveyance gives it to him. *Blyth v. Parlon*, 2 V.R. (E.,) 111, 114; 2 A.J.R., 75.

(*d*) *Title.*

Doubtful Title—Dower.]—B., married before 1st January, 1837, was seised of land. He mortgaged this, his wife joining in the conveyance, to P., and afterwards sold the equity of redemption to P. By mesne assignments P.'s estate became vested in W., who mortgaged it to the plaintiff with power of sale. H. sold by auction to defendant E. The defendant's solicitor among other requisitions made one to the effect that B.'s wife's claim to dower must be released, the plaintiff's solicitor then promised to get it released, when defendant's solicitor wrote back that they declined to accept the title. The correspondence continued until the plaintiff's solicitor alleged that there was no claim to dower, and then defendant commenced an action against the auctioneer for return of the deposit-money. Bill by plaintiff for specific performance. *Held* that there was a doubt upon the title, and that the doubt made it bad, and that the Court would not solve a doubt in a suit between vendor and purchaser in which the person having the doubtful claim was unrepresented. Bill dismissed. *Hoyle v. Edwards*, 6 W.W. & A'B. (E.,) 48, 57.

Agreement to Transfer Land—Good Title.]—An agreement to give a good transfer of land

implies an agreement to give a good title. *Eagles v. Blain*, 1 A.J.R., 153.

Objection to Title—Incurable—Land Sold Overlapping Adjoining Property.]—*Lazarus v. Lowe*, *ante column* 1469.

Conditions as to.—*See* preceding sub-head.

(e) *Notice. Effect on Purchaser and Causing Inquiry.*

Allegation of Notice—What is Insufficient to Admit Evidence of Notice.]—A bill contained a general allegation as to notice as follows:—"The land, etc., sold to the defendant was purchased by him with notice of sale to the plaintiff and of the plaintiff having taken possession of the land and expended money thereon and of being in possession." *Held* that this was not sufficient to admit evidence of notice to the defendant's vendor, and that the only notice proved, being notice of plaintiff's equitable title to the defendant, and not to the defendant's vendor, the legal title in the defendant must succeed and that plaintiff was not entitled to the relief he sought. *Avery v. McArthur*, 1 W.W. & A'B. (E.,) 75.

Proof of.]—When notice is not distinctly proved against a purchaser the Court may direct an issue as to notice. *Niemann v. Weller*, 3 W.W. & A'B. (E.,) 125, 133.

When Presumed.]—In a suit to set aside a conveyance as void on the ground that it was executed with notice by the vendee of a prior settlement, the vendee was held to have had notice notwithstanding that he denied it in his answer, because he did not contradict evidence raising a presumption of notice. *Ronalds v. Duncan*, 2 V.R. (E.,) 65; 2 A.J.R., 30, 45.

Constructive—What Amounts to—Breach of Trust—Purchaser for Value—What puts Purchaser on Inquiry.]—A settlement of land was made upon trustees, A. and B., in favour of an infant, containing powers of sale or mortgage as in consideration for a sum of £220. A. and B. conveyed to the infant's father (C.) for the said sum of £220, and C. mortgaged a fortnight afterwards to E. and F. to secure a sum of £800, the money being advanced in instalments as buildings were erected, and in default of payment the land was sold by them to G. for £1020, the conditions of sale precluding inquiry as to title beyond the deed. G. settled the property upon the defendant on the trusts of a certain marriage settlement. *Held* by *Molesworth, J.*, that the sale to the father was not a breach of trust, and by *Molesworth, J.*, and the *Full Court*, on appeal, that G. could not be affected by any knowledge of facts possessed by E. and F., and that the only evidence of notice as against G. was that contained in the various deeds, and that the difference in the price paid by the infant's father for the land and the amount he mortgaged it for shortly afterwards, was not sufficient to put G. on inquiry, and that he was not, therefore, affected with constructive notice of the arrangements, even if they amounted to a breach of trust. *O'Brien v. Keenan*, 5 A.J.R., 99, 149.

Notice of Vendor's Title—Possession.]—W. employed L. to purchase land for her, furnishing L. with part of the purchase-money. L. purchased land and got a conveyance to himself, representing to W., an illiterate old woman, that it was for her. W. remained in undisturbed possession of the land for several years before 1876. In 1876 L. sold to B. *Held* that B., from the fact of W.'s possession, which was well known to him, had constructive notice of W.'s title, and therefore of defect of L.'s title. *Wilson v. Boyd*, 3 V.L.R. (E.,) 98.

Registration by Purchaser with Notice does not Give Priority.]—A purchaser, with distinct notice of the title of a prior purchaser cannot, in Equity, gain priority by registration *Vockensohn v. Zeven*, 3 W.W. & a'B. (E.,) 11, 15. Affirmed on appeal. *Ibid* 122.

II. Parties.

Who are Necessary Parties—Sale of Station Property—Sale by Mortgagee.]—P., the occupant of station property with a preference of purchase from Government of a section, sold to C., and C. mortgaged to P. to secure the purchase-money. C. made default and P. sold to G. The station property became vested after *mesne* assignments in B. who sold the pre-emptive section to K. The grant of the section was issued to P. after the sale. On a suit by K. against P. for a conveyance of the pre-emptive section, *Held* that C. was a necessary party to the suit. *Kennedy v. Phillips*, 2 W. & W. (E.,) 140.

See S.C., *ante column* 1464.

Specific Performance—Parties to Suit for—Subsequent Vendees.]—D. agreed with H. to purchase land and paid part of the purchase-money, but left a balance outstanding. D. died, and after his death H. pressed for payment. S., by arrangement, paid H., and took a conveyance of the property without noticing the sale to D., undertaking upon D.'s heir coming of age to convey to him on payment of the sum paid by him to H. D.'s heir sued H. for specific performance of the agreement made with D., and joined S., as the person in whom the legal estate then was. *Held* that S. was properly made a defendant. *Daggett v. Hepburn*, 4 A.J.R., 103.

III. Enforcement, Discharge, and Rescission.

(a) *Specific Performance.*

See ante under Specific Performance.

When Granted—Speculative Purchase—Misrepresentation.]—A., having contracted for the purchase of certain land, refused to complete, alleging a misrepresentation as to its value. The vendor then filed a bill for specific performance, and A. subsequently inspected the land for the first time and found it unfenced, and by his answer set it up as a defence, alleging that the vendor's agent had, at the time of the contract, represented the land as fenced, and that but for this representation he would not have purchased. *Held*, under the circumstances and considering the nature of the bargain, a

gambling transaction between the mortgagee, vendor, and a speculator, that the plaintiff was entitled to a decree and costs. *Embling v. Whitchell*, 4 V.L.R. (E.,) 96.

When Granted or Refused.]—Where a vendor had by his conduct estopped himself from denying the sufficiency of the memorandum, but there was a subsequent sale by him to a purchaser for value, the Court dismissed a bill for specific performance of the contract, without costs as against the vendor, but with costs as against the subsequent purchaser. *Ford v. Young*, 8 V.L.R. (E.,) 93; 3 A.L.T., 85, 128.

When Decreed.]—Land, portion of a larger piece of which the defendant was proprietor, was offered for sale by auction. The land in question was described as having a frontage of 50 feet to P.-street. There was no statement as to what the depth of the land was, or as to the width at the rear. There was a right-of-way at the back at a distance of 117 feet from P.-street, and running parallel to it. After the sale, defendant proposed to convey to the purchaser a block having a frontage of 50 feet to P.-street, with a depth of 117 feet to the right-of-way, and a frontage to the right-of-way of 31 feet only. Plaintiff refused this, claiming to be entitled to a conveyance of a rectangular piece of land 117 feet by 50 feet. Action by plaintiff for specific performance. *Held, per Molesworth, J.*, that the contract was sufficient within the "*Statute of Frauds*," since the right-of-way at the rear would define the depth, and the width would be the same at the rear as at the front; that where the back and front streets are parallel, a person buying a frontage to one street is, in the absence of an agreement to the contrary, entitled to a rectangular block going back to the other street; and specific performance decreed as claimed. *Crichton v. Morris*, 10 V.L.R. (E.,) 338.

Misdescription in Advertisement—Falsa Demonstratio at law—Question in Equity whether the Purchaser was Deceived.]—Land was advertised for sale, and in such advertisement it was correctly described in parcels as at the corner of two streets, and being part of Government Sec. 63, in a certain parish, and adjoining M.'s residence. It was quite a quarter of a mile away from M.'s residence, and this mistake was corrected by the auctioneer, who handed round the auction-room slips of paper containing a more accurate description; but the misdescription was transferred into the contract of sale which the purchaser signed. Bill by vendors for specific performance. *Held* that the misdescription as to the land adjoining M.'s residence showing a correct description of the land in parcels was at law a *falsa demonstratio*, and would not afford a defence to an action at law, but that it was open to a defendant in equity to say that he was misled; and if he were actually deceived, the Court would not enforce the contract. Issue directed to a jury as to the fact of defendant's being deceived. *Sargood v. Henry*, 5 A.J.R., 87.

Town Property—Error in Admeasurement—Contract—Rescission—Costs.]—Suit by H. for specific performance. By contract 23rd October, 1874, the defendant agreed to buy a piece of land having a frontage of 100 feet to a certain street in Melbourne, "be the same a little more or less, together with the buildings erected thereon." The buildings, in fact, occupied a frontage of 100 feet 5 inches, but the description in the certificate of title held by plaintiff showed a frontage of 100 feet. The plaintiff subsequently procured a certificate of title to the extra 5 inches, and demanded an increase in the purchase-money for the extra 5 inches. The defendant formally presented the transfer for signature, which the plaintiff refused to sign unless paid for the 5 inches. The plaintiff then changed his mind, and wrote to say he did not insist upon extra payment. The defendant refused to re-open the question, and commenced an action at law to recover the deposit. The plaintiff sought specific performance, and to restrain action at law. *Held* that minute descriptions in town property are of material importance, and that the purchaser was not bound to accept title for 100 feet only, but that the vendor was not entitled to charge for the extra 5 inches; that though at law the purchaser was entitled to treat the contract as rescinded by plaintiff's refusal to execute the transfer, yet in equity the contract is not to be determined in such a sharp manner when persons could get and give substantially what they contracted for; and that plaintiff was entitled to specific performance on paying the costs of the action and the suit. *Heath v. Allen*, 1 V.L.R. (E.,) 176.

When Refused—Mistake of Vendee and his Principal as to Lots, the Fault of Defendant Vendee but Unintentionally Contributed to by Plaintiff.]—C., the plaintiff, wished to sell lots 4, 5, 6, 7, and 8, of which 4, 5, and 6 had clay on them fit for brickmaking, the clay from 7 and 8 having been removed. A. wished to buy, but being anxious not to appear as purchaser, employed defendant B. to buy for him. B. bargained as for a dummy principal, S. A contract was drawn as for sale of those lots, and signed by B. and C., and a deposit paid. Afterwards A. and B., on comparing notes, found that they had not bought lots 2, 3, 4, 5, and 6, which lots A. thought he was buying. Lots 2 and 3 had clay on them, but they had been previously sold, and it was A.'s object to buy lots with clay on them. B. refused to complete. On suit by C. against B. for specific performance, *Held*, that as to removal of clay, that B. and his principal were under a mistake not intentionally produced by plaintiff; that his conduct contributed to it, but as between them comparatively, the misapprehension was their fault, not his. Specific performance refused, there having been a mistake on defendant's part, though the plaintiff was innocent of causing such mistake. *Clarke v. Byrne*, 3 A.J.R., 20.

Uncertainty as to Land Sold—Cured by Vendee's Possession.]—A written agreement for the sale of land was so uncertain as to the land intended to be sold that it could not be enforced at law, but the vendee entered into possession. Subsequently the vendor sold to a third person, who had notice of the prior agreement. *Held*, that the possession of the vendee, coupled with the agreement, was sufficient to give the prior

purchaser a good title as against the second purchaser, notwithstanding sections 49 and 50 of the "*Transfer of Land Statute*," and specific performance decreed. *Cunningham v. Gundry*, 2 V.L.R. (E.,) 197.

When Decreed—Contract not too Vague to be Enforced—Compensation.]—M., as agent for S., a vendor of property which he held as lessee under the "*Land Act*," wrote to F., the purchaser, stating that F.'s offer was accepted as to the "30 acres of land," at a fixed price, the land to be converted into freehold; possession to be given as soon as tenant was got rid of, S. reserving to himself all right to compensation for any part of the land taken for railway purposes or allowing F. to pay half in cash and the balance on completion of title, and in a postscript adding that S. would arrange with the tenant to give F. immediate possession. F. wrote, 18th July, to both M. and S., agreeing to the terms of the letter and sending a cheque for half the purchase-money. S. then, in the course of correspondence, threw difficulties in the way, alleging the tenancy and the right to compensation; but ultimately F. was put into possession and laid out money on the land. As to the compensation, a line of railway then contemplated did not pass through the land, and F. offered a small sum to get rid of this right of compensation, which was endorsed on the transfer as an encumbrance. S. refused to complete. *Held* that the contract was not too vague, that S. was bound to obtain the freehold and make title, and that the Court would decree specific performance, and that the compensation was capable of adjustment by subsequent inquiries. *Foreman v. Sinclair*, 4 A.L.T., 65.

Part Performance—Possession by Vendee after Payment of Purchase Money.]—Possession by the vendee after the whole of the purchase-money has been paid is part performance of a verbal agreement and sufficient to give the vendee an equitable title. *Dreverman v. Doherty*, 1 V.R. (E.,) 4; 1 A.J.R., 7.

For facts *see* S.C., *ante columns* 1311, 1312.

Purchasers Remaining in Possession of Purchased Land—Vendor's Lien.]—M. offered in 1859 certain premises to the defendant council for sale which had been previously leased to the council. The council, by a resolution to which the seal of the council was not attached, agreed to purchase for £1000, and afterwards certain councillors present at a meeting paid one-third of the purchase-money and accepted two bills for the residue; afterwards, in 1860, the election of these councillors was set aside on *quo warranto*. M. executed a conveyance of the land, and the council remained in possession, not paying any rent after 31st August, 1860. The council refused to pay the first bill, and M. sued the ousted councillors on the bill, which they were compelled to pay. Suit by the councillors seeking to enforce a lien on the land for the moneys so paid on the first bill and indemnity against the second bill. *Held*, *per Chapman, J.*, that the council having kept possession of the land without paying rent, and having made no disclaimer, constituted such a completion of the contract, or such a part performance amounting almost to a completion, as would have enabled M. to have obtained relief in respect of the unpaid purchase-money even though the contract was not under seal, and that the council had so far adopted the act of the councillors as its agents that it was in equity compelled to pay the bills. *Per Full Court*, that there was no part performance in the proper sense of the term, and that a decision of the case on that ground would involve a violation of the spirit of the "*Municipal Institutions Act*," but that it must be presumed that they took the land as under the conveyance and so it was unjust for them not to pay for it, and that the plaintiffs having paid for part of it were entitled to a lien on the land so far as their payment extended. *Trainor v. Council of Kilmore*, 1 W. & W. (E.,) 293, 301, 303, 306.

When Refused—Delay of Purchaser—Forfeiture of Deposit.]—On 3rd August, 1870, M. purchased from S. land and house for £1240. S. died on the following day, and A.S. (the defendant) on 30th August obtained a rule to administer the freehold estate. One of the conditions of the sale was that the contract should be completed by the purchaser paying the money within a month. Owing to various delays the money was not paid within the time. M. attributed the cause of delay to A.S. The land was mortgaged to G., and M. made some objection about accepting the title till the mortgage was paid off. A.S. contended that M. was aware when he entered into the contract that the mortgage was to be paid off out of the purchase-money. The mortgage was paid off, but no reconveyance was obtained, and notice was given to M. that there would be a resale at his risk if he did not at once pay his purchase-money. Two days after M. replied to this by sending a draft conveyance for perusal, but A.S.'s solicitor returned the deed, and as M. did not pay the money, a resale was made to F., and £150 deposited by M. was retained as forfeited. *Held* that M. was not entitled to specific performance on account of his delay; but that as the resale to F. was of a somewhat different property (the mortgage having been paid off), the deposit should not be forfeited; defendant to pay F.'s costs of suit. *Martin v. Sims*, 2 A.J.R., 50.

When Refused—Ambiguous Contract—Offer by Plaintiff to accept Interpretation most Unfavourable to Himself—Land Previously Sold by Defendant to Another.]—Agents for the defendant signed a memorandum of agreement for sale also signed by plaintiff as purchaser, in which it was doubtful whether the contract to pay "12s. per foot fronting that street" referred to one of two streets mentioned, or the other. The defendant had previously sold to B., another purchaser, and not a party to the suit. The plaintiff offered to give the defendant the benefit of the doubt in the contract, and pay for the larger frontage. In a suit for specific performance, *Held* that the contract being ambiguous, could not be enforced, even though the plaintiff had made the offer above mentioned, and that matters would be complicated by directing the defendant to convey land which he had previously sold to

another. Bill dismissed. *M'Carthy v. Monahan*, 5 A.J.R., 5.

Sale made by Trustee whose Appointment was Bad.]—Where trustees, one of whom was appointed in excess of the powers contained in the settlement, contracted for a sale of a house, and the purchaser refused to complete, and denied that he had contracted with the trustees as trustees of the settlement, *Held* that the sale was made by a person who had no right to sell, and that the whole contract was void. *Iffla v. Beaney*, 1 W. & W. (E.,) 110.

Proviso for Compensation in Case of Mistake.]—Where a contract for sale contains a proviso for compensation in case of a mistake in the particulars, this proviso does not apply to a case where particulars are correct, but one party thought they were different. *Clarke v. Byrne*, 3 A.J.R., 20.

Deficiency—Compensation.]—Where a contract for sale of land described it as "more or less, 80 feet 6 inches by 41 feet 3 inches," and it was discovered that the land had only a frontage of 40 feet 3 inches to a certain street, *Held* that the deficiency of one foot was covered by the words "more or less," and that it was not a subject for compensation. *Buxton v. Bellin*, 3 V.L.R. (E.,) 243.

"More or Less"—Town Property.]—A deficiency of five inches in town property is of material importance, and not covered by words "more or less." *Heath v. Allen*, *ante columns* 1473, 1474.

Misrepresentation that Unfenced Land was Fenced—Subject for Compensation and Not for Rescission. *See Embling v. Whitchell*, *post column* 1479.

Purchase through Agent—No Knowledge of Intended Reservation of Part of Property.]—Plaintiff, through his agent, agreed to buy 168 acres of land at £4 per acre, and paid part of the purchase-money, and entered into possession. The defendant, however, refused to sign the conveyance on the ground that it gave more to plaintiff than the defendant had agreed to sell; and that out of the allotments sold it had been intended to reserve a road for the convenience of adjoining owners. Plaintiff acted through an agent, and there was no distinct evidence that the agent had any knowledge of the intended reservation, and there was evidence that the plaintiff had simply given him money to purchase so many acres of land. The Court held the defence insufficient, in that if the bill were dismissed and the plaintiff went to law, he would have no clear remedy against the agent; and defendant ordered to execute a conveyance without reservation. *Young v. M'Connell*, 1 A.J.R., 96.

Authority of Agent Exceeded.]—A., purporting to act as agent for B., a vendor, but really authorised to find a purchaser merely, and being authorised to sell for cash, sold B.'s property to C. on credit eighteen months after he was first constituted an agent, during which time property increased in value. B. repudiated the contract. *Held* that A. had exceeded his authority, and specific performance at suit of C. refused. *Breese v. Lindsay*, 8 V.L.R. (E.,) 232; 4 A.L.T., 20.

Contract made by Agent—Parol.]—A contract for the purchase of land, made by an agent, will be enforced though the agent were appointed by parol. *Pain v. Flynn*, 10 V.L.R. (E.,) 131; 6 A.L.T., 15.

Defence—Drunkenness of Vendor.]—To a suit for specific performance of an agreement which the defendant vendor alleges that he signed when drunk, the drunkenness is available as a defence without cross bill. *Scates v. King*, 1 V.R. (E.,) 100; 1 A.J.R., 71.

Pleadings—Variation—Want of Mutuality.]—A purchaser filed a bill for specific performance of a written contract signed by defendant's agent for sale of land for £725. The defendant alleged that her agent was not authorised to sell for £725, but for £735, and set up a written offer made by her to plaintiff for sale at £735, which plaintiff refused. The bill did not in the alternative seek specific performance at £735. *Held* that as the bill did not make out the alternative case, the Court at the hearing could not decree specific performance as for £735, because the plaintiff if unwilling could not be compelled to take such a bargain. *Boyce v. Lapish*, 3 V.L.R. (E.,) 75.

Pleadings—Demurrer—Covenant for Continuous User of Land for Specific Purpose—"Transfer of Land Statute" (No. 301), Sec. 42—"Local Government Act" (No. 506), Secs. 165, 169.]—The defendant being registered as proprietor under the Act No. 301, agreed to sell land to the plaintiff corporation, on which plaintiff agreed to erect buildings for council chambers and agreed to continue the use of them for that purpose. The plaintiff erected the buildings, which had been used for that purpose for more than a year, but the defendant refused to execute a transfer. Bill by plaintiff for specific performance without any offer in the bill to perform the agreement or to secure to the defendant the benefit of it. *Held*, on demurrer, that the defendant was bound to execute the transfer with such security as she could legally get. *Semble* that the agreement to bind the corporation's successors to use the land for a particular purpose was effectual under Act No. 506. *Semble* that such a covenant might be entered as an encumbrance under Act No. 301. Demurrer overruled. *Mayor, &c., of Brunswick v. Dawson*, 5 V.L.R. (E.,) 2.

Costs.]—Where plaintiff prior to suit sent letters to defendant stating he had purchased property from a person as agent for him, and defendant did not reply denying the authority, the Court while dismissing the bill on the ground that the authority was not proved, did so without costs. *Breese v. Lindsay*, 8 V.L.R. (E.,) 232; 4 A.L.T., 20.

(*b*) *Rescission of Contract.*

When Vendor Fails to Make Title as to Part of the Land Sold.]—Land was described as "41 feet 6 inches fronting to Brunswick-street, Collingwood," and was sold by that description, but

on survey it proved that 1 foot 10 inches of this frontage was under a neighbour's house. The buyer rescinded the contract and sued the auctioneer who conducted the sale for paying the purchase-money to the vendor without his authority before the title was approved of, and recovered a verdict. On rule *nisi* for a nonsuit, *Held* that this was not a case of misdescription in respect of which the buyer was entitled only to compensation, the purchase being of frontage to a particular street, but was a failure to make title to 1 foot 10 inches of the land sold, entitling the buyer to a rescission; that even if it were a misdescription, yet as the land was sold by frontage in feet and inches, the seller could not compel the buyer to take less than he had purchased; that the case not being one in which a Court of Equity would compel specific performance, the Court as a court of law would act on the same lines and permit the buyer to rescind. *Fergie v. Byrne*, 3 W.W. & A'B. (L.,) 56.

And *see Heath v. Allen*, *ante* columns 1473, 1474.

Recovery of Deposit Money on Defect of Title.]—McC. sold to E. certain land sold as lot 2, "on which is erected the Ship Inn, &c.," the admeasurements being given. E. alleged that McC. could not make a title as the Inn encroached upon a street, this street was marked on the Government maps, but as no *termini* were fixed, and the street was not formed, and houses subsequently erected did not give the same alignment, E. sued to recover his deposit money and recovered a verdict. *Held* on rule *nisi* for a nonsuit or new trial that the house itself could not give the alignment of the street, and that it was a proper case for a rescission of the contract and not for compensation; that the plaintiff's knowledge of the encroachment is disregarded at law; and *per Stephen, J.*, that the vendor must show an unassailable title. Rule refused. *Enwright v. M'Caw*, 1 V.L.R. (L.,) 196.

Question of Title—Noncompliance with Requisitions.]—Where land sold was in the contract described as having a house on it and the purchaser was under an obligation under an agreement made by a former owner with a city council to set back his house, when rebuilding or altering, nine inches from a certain street, *Held* that this was not a question of conveyance involving compensation, but of title, and that vendor might, on objection to title being taken, rescind the contract under a condition giving him power to do so when an objection was raised which he was unable or unwilling to remove. *Buxton v. Bellin*, 3 V.L.R. (E.,) 243.

Misrepresentation—Compensation.]—A misrepresentation that land, unfenced, was fenced, would afford matter for compensation only, and not for rescission of the contract, because the land unfenced would not be useless to the purchaser. Issue upon the question of misrepresentation therefore refused. *Embling v. Whitchell*, 4 V.L.R. (E.,) 96, 98.

(c) *Rights and Duties of Vendor and Purchaser.*

Obligation to Execute Conveyance—Payment of Purchase-Money.]—It is the duty of the vendor to execute the conveyance when tendered for execution. If he sue upon the contract he must assert that he was ready and willing to execute the conveyance if tendered; he has not to allege a performance or tender of anything by him. The execution of the conveyance and the payment of the purchase-money are concurrent acts. In an action upon a contract for sale the declaration set out that it was agreed that W., the plaintiff and purchaser should pay the vendor the residue of the purchase-money on the completion; that the vendor should on payment execute a proper conveyance; and that the vendor did not make title, and refused to execute until after payment. *Held* that a plea by defendant that plaintiff did not pay the residue of the purchase-money was bad, it being unnecessary under the circumstances for the plaintiff to tender the money, such payment not being a condition precedent to the obligation to execute a conveyance. *Wiper v. O'Shanassy*, 5 A.J.R., 137.

Construction of Conditions—Condition Precedent.]—A contract for the sale of land provided that certain portions of the purchase-money were to be paid in a certain manner, and that upon payment of the final balance upon a certain day the vendor would sign a transfer and execute a conveyance. *Held* that payment of the balance on the date fixed was not a condition precedent to the vendor making title or being ready and willing to sign the transfer and execute the conveyance; but that the payment of the money and the execution of the transfer and conveyance were to be concurrent and independent acts. *Campbell v. Bent*, 6 V.L.R. (L.,) 117; 1 A.L.T., 170.

Insurance by Purchaser before Title Given—Rescission of Contract—Right to Policy-moneys.]—A purchaser after contract for purchase of land, but before title given or possession taken, insured the premises on the land in her own name for £200. Before the conveyance was executed the houses were burned down, and the purchaser recovered the money from the insurance company; she afterwards rescinded the contract. Suit by vendor for specific performance of contract, or in alternative for payment of moneys recovered on policy. *Held* that purchaser's right to insurance moneys was a matter between herself and the insurance company in which the plaintiff had no interest. *Bartlett v. Looney*, 3 V.L.R. (E.,) 14.

Deterioration between Sale and Possession.]—The vendor is not liable for deterioration (removal of fixtures) of the property between sale and possession where it is occasioned by a third person. *Smith v. Hayles*, 3 V.L.R. (L.,) 237.

(d) *Purchase-money and Lien.*

Overpaid Purchase-money—Partners effecting a Partition of Partnership Land.]—Where land has been sold and the relation of vendor and purchaser established, not only has the vendor a lien for the unpaid purchase-money, but the vendee has a lien for his deposit; in fact there is a mutuality of lien. And there is no distinction in cases which come nearer to cases of exchange between unpaid purchase-money and overpaid

purchase-money, and where upon a computation of value one is found to have to pay one sum and one another, and if such double lien be adjusted by a balance which shows there has been an over-payment, there is an equitable duty to pay it back which keeps the lien alive till it is satisfied. M. and Y. being in partnership agreed to divide partnership land on the assumption that M.'s portion was worth £700 more than Y.'s, and that Y. in the division should get the *whole* benefit of this excess. On a valuation Y.'s portion was found to be worth £655 more than M.'s, and M. sold part of this land to Y. for £461, and paid Y. the balance of the £655. On a suit by M. to rectify the mistake and offering to take back the land conveyed to Y. by the deed of partition on a proper adjustment, *Held* that M. was entitled to a lien for his overpaid purchase-money, and *decreed* that M. should be repaid by Y. the sum lost by M. in the adjustment, or *in the alternative* that Y. might rescind his purchase, in which case M. would pay to Y. the difference between the sum he lost on adjustment, and the £461. *Manson v. Yeo*, 1 W. & W. (E.,) 187, 189, 191.

Purchase-money—How Raised under 11 Geo. IV., and 1 Will IV., Cap. 47.]—In a suit by a vendor of real estate devised to infants, praying a sale in satisfaction of his lien for unpaid purchase-money, the Court has no jurisdiction under 11 Geo. IV. and 1 Will IV., Cap. 47, to direct that the amount charged shall be raised by mortgage instead of by sale. *Walker v. Hogan*, 1 W.W. & A'B. (E.,) 88.

Councillors Paying Purchase-money of Land Purchased for Council—Council Remaining in Possession of Land, but Repudiating Contract—Councillors Entitled to a Quasi-Vendor's Lien upon Land for Money Paid.]—*Trainor v. Council of Kilmore, ante columns* 1475, 1476.

Interest on.]—S. purchased land from defendants under a contract which provided that "if *from any cause whatever* the purchase should not be completed at the time stated, the purchaser should pay interest on the unpaid residue until the time of completion." The purchaser did not pay the balance on the day fixed, and afterwards tendered a conveyance for execution, but one of the vendors (defendants) being absent from the colony, the execution was delayed for four or five months. *Held* that the plaintiff (S.) was bound to pay the interest until delivery of the conveyance. *Shilton v. Nutt*, 3 V.L.R. (L.,) 323.

Interest on.]—In a suit for specific performance by a purchaser in possession against the vendor, the Court allowed the vendor interest upon the unpaid purchase-money at 8 per cent. per annum from the date of the contract. *Macgregor v. Templeton*, 8 V.L.R. (E.,) 195; 4 A.L.T., 9.

Mortgage Paid Off by Purchaser—Set-off against Purchase-money.]—Plaintiff obtained a decree for specific performance in the County Court, with liberty to apply. The land was subject to a mortgage, as to which no direction was made in the decree. Plaintiff paid off the mortgage, and moved in the suit for liberty to set-off the amount of the mortgage against the purchase-money, but the County Court Judge refused to make the order. Upon appeal, affirmed, as the plaintiff could only obtain the relief sought by substituting fresh substantive proceedings with reference thereto. *Warren v. Perry*, 6 V.L.R. (E.,) 103; 1 A.L.T., 195.

Contract to "Give Acceptances."]—In a contract for the sale of land the purchaser agreed to pay a certain proportion as deposit and to give acceptances for the balance. *Held* that the contract meant that the purchaser was to accept the bills when the vendor submitted them for acceptance, and that the purchaser was not liable to be sued for a breach of the contract until the bills had been tendered to him for acceptance and refused. *Universal Permanent Building Society v. Kilpatrick*, 7 V.L.R. (L.,) 58; 2 A.L.T., 127.

Lien does not Extend to Subsequent Advances.]—D. contracted with H. for the purchase of land, and paid part of the purchase-money, but left the balance unpaid, and no rate of interest was specified. Frequent transactions took place between H. and D., in which the balance was always in favour of H. After D.'s death H. pressed for payment, which, by arrangement with D.'s widow, was made by S., who took a conveyance of the property without noticing the sale to D., undertaking to convey to D.'s heir upon coming of age and upon payment of the amount paid by S. D.'s heir sued H. for specific performance of the contract with D., and H. set up a parol agreement with D. that his lien should be extended to cover subsequent advances. *Held*, that H.'s lien for unpaid purchase-money could not be extended to cover subsequent advances by such an agreement. Upon appeal, *Held* that a vendor's lien for unpaid purchase-money is not equivalent in all respects to an equitable mortgage by deposit of deeds, and cannot be extended by parol evidence to comprise subsequent advances, and that D.'s heir was entitled to specific performance of the agreement with D. by conveyance to him on payment of the balance of the purchase-money unpaid at D.'s death, independently of the current accounts between D. and H. *Daggett v. Hepburn*, 4 A.J.R., 103; on appeal, *ibid* 191.

Condition Precedent—On Sale of Ground comprised in an Application for a Mining Lease Readiness to Assign or Transfer is not a Condition Precedent to Vendor's Right to recover Purchase-money.]—*Cane v. Sinclair, ante column* 201.

(e) *Breach of Contract and Damages therefor.*

Misrepresentation as to Title — Measure of Damages.]—A contract was entered into between A. and B. for the sale of land in possession; title, Crown grant. The title made by B. (the vendor) was to a reversion expectant upon the determination of an equitable term of five years. A. sued B. in an action of deceit, and recovered a verdict for £139 on the first count that the title was not Crown grant, but B. got a verdict on the second count, which was for failing to perform conditions of sale,

damages, and costs of investigating title. On rule *nisi* for new trial on ground of excessive damages, *Held* that the general rule was that the measure of damages in such a case was the difference between the actual value and the purchase-money, and the difference between the costs of investigating a title from the Crown (that given in contract) and the costs of investigating the title actually made, but that as the damages, as given at the trial, did not fall under either of those heads, the damages must be reduced to 1s., or else rule absolute for new trial. *Raeburn v. Murphy*, 5 A.J.R., 23.

Failure to Make Title—Consent of Third Person Necessary.]—C. was a devisee in trust of certain land, with a power of sale, with the consent of one M., a beneficiary. C. sold without consent, which he was unable afterwards to obtain. The purchaser (W.,) at C.'s instigation, took possession. C. died, and O'S. was his executor. The new trustee appointed on C.'s death brought ejectment, and W. was ejected. W. then sued O'S., and the jury gave him a verdict of £127, and contingently assessed at £416 the difference between the contract price and the present value of the land. On rule *nisi* for a new trial, *Held* that C. contracting to sell land, and knowing he had no title to it, nor any means of acquiring it, the only damages recoverable by W. were the expenses incurred; other damages must be obtained in an action of deceit; and that W. was not entitled to a verdict for the £416. Rule discharged. *Wiper v. O'Shanassy*, 1 V.L.R. (L.,) 10.

Failure to give Possession—Plea that Purchaser became Registered Proprietor under Act No. 301.] To an action for breach of contract to give possession on a certain day of land sold by contract, defendant pleaded that before breach plaintiff procured a transfer under Act No. 301 and a certificate of title in his own name. *Held*, on demurrer, that the plea was bad, that it was no answer to the failure to give possession. *Phœnix Foundry Coy. v. Hunt*, 5 A.J.R., 70.

See also S.P., *ibid* p. 144.

Failing to Give Possession.]—A transfer of a certificate of title had been made to the purchaser by the vendor, the vendor's solicitor giving a letter of guaranty that no encumbrance existed. The purchaser was obliged to proceed in ejectment, and to pay certain costs. *Held* that the purchaser could recover as damages the costs of ejectment. *Whelan v. Hannigan*, 5 V.L.R. (L.,) 35.

Rsmoteness.]—In an action for breach of contract on failing to give possession of land on a certain day, *Held* that damages claimed for storage of an extra quantity of coke ordered by plaintiffs in anticipation of their having possession were too remote, not flowing naturally from the breach and not being within defendant's contemplation; that damages for the price of an iron girder for a bridge on the land were not too remote, the defendant being aware of the purpose for which the plaintiff bought the land. *Phœnix Foundry Coy. v. Hunt*, 5 A.J.R., 144.

Action of Deceit—Mistake as to the Land Purchased—Caveat Emptor.]—*See Hunt v. Johnson, ante column* 897.

Interest on Purchase-money— Dilapidation—Consent Decree in Equity.]—A. and B. formed a binding contract as to the sale of land, but the completion was delayed through the default of the vendor, there being tenants of his in possession whom he had difficulty in turning out. During this delay the purchaser had the purchase-money ready, having borrowed it on mortgage, and the property became dilapidated through deliberate acts of the vendor's tenants. There had also been a consent decree in equity as to the same land which was silent as to compensation. *Held* that the purchaser was entitled to recover as damages:—(1) the interest on the purchase-money; (2) the amount claimed for dilapidation; and that the consent decree not being pleaded was no defence; and, *per Stephen, J.*, such a decree does not preclude an action for damages at law. *Morrison v. Neill*, 1 V.L.R. (L.,) 287.

VENIRE DE NOVO.

Damages Assessed on Several Breaches and One Bad—Proper Remedy Venire de Novo, not New Trial.]—*Nolan v. Chirnside, ante column* 341.

VENUE.

Changing Venue in Criminal Trial.]—*See ante columns* 307, 308.

Venue in Ejectment—Local.]—*Fairbairn v. Monaghan, ante column* 397.

Venue in Margin of Conviction by Justices—"Colony of Victoria to Wit"—Body of Conviction Stating Particular Place—Sufficient to show Jurisdiction.]—*Batchelder v. Carden, ante column* 762.

Conviction for Selling Liquor without a License—No Venue in Margin.]—*Ex parte Tribble, ante column* 833; and *see ante column* 1214.

VOLUNTEERS.

"Volunteers Statute" (No. 266,) Sec. 12—Detention of Arms without Order from Commanding Officer.]—*Hitchins v. Mumby, ante column* 1111.

WAGES.

Of Servants.]—*See* MASTER AND SERVANT.

Of Seamen.]—*See* SHIPPING.

WAIVER & ACQUIESCENCE.

Bill of Exchange — Waiver of Notice of Dishonour.]—*See In re Levy, ante column* 97.

Waiver as a Defence to Actions on Bills and Promissory Notes.]—*See Colonial Bank v. Ettershank*, and *Bank of Australasia v. Cotchett, ante columns* 103, 1091.

Waiver of Objection to Invalid Nomination Paper at Election for Office in a Shire Council.]—*See Regina v. O'Dwyer, ex parte Wilson; Regina v. Jones, ex parte Darcy, ante columns* 221, 222.

Waiver of Want of Sufficient Security on Appeal from County Court.]—*See Churchward v. Lyons, ante column* 269.

Trial of Action of Ejectment by County Court—No Jurisdiction—Consent does not Operate as a Waiver.]—*See Mason v. Ryan, ante column* 254.

Waiver of Objections to Special Case on County Court Appeal.]—*See Cooke v. Coward*, and *Rucker v. Lyall, ante column* 271.

Irregularity of Plaint Summons in Court of Mines —Appearance of Defendant held not to Operate as a Waiver.]—*See Mitten v. Spargo, ante column* 990.

Enforcement of Notice of Appeal to a Court of Mines may be Waived.]—*See Crocker v. Wigg, ante column* 997.

Waiver of Demand for Satisfying Writ of Execution—Act of Insolvency.]—*See In re Whitesides, ante column* 592.

Waiver of Irregularity in Service of Order Nisi in Insolvency.]—*See In re Harry, In re Newbigging, ante columns* 611, 616.

Irregularity in Rate—Failure to Appeal—Right to Object to Irregularity not Waived.]—*See Newman v. Mayor, &c., of Maryborough, ante column* 1266.

Appeal from Rate—No Date in Notice of Appeal —Waiver of Objection.]—*See Corio Road Board v. Galletly, ante column* 1271.

Waiver of Irregularity on part of Justices.]—*See Regina v. Browne, ex parte Sandilands, ante column* 760.

Waiver of Irregularity of Proceedings under "Absent Debtors' Act."—*See Nicholson v. Robertson, ante column* 346.

Fraud Summons—Examination of Debtor not Taken Down in Writing—Waiver of Objection.]—*See Smith v. Manby, ante column* 346.

Fraud Summons—Waiver of Objection as to Want of Service cannot be Made.]—*See Regina v. Cookson, ex parte Collins, Regina v. Jones, ex parte De Portue, ante column* 347.

Waiver of Irregularity in Proceedings on a Debtor's Summons.] — *See In re Fisher, ante columns* 580, 581.

Waiver of Irregularity in Proceedings in Attachment.]—*See Main v. Kirk, ante column* 60.

Order to Tax Costs a Nullity — No Waiver Possible.]—*See Pearce v. Thomas, ante column* 242.

Matrimonial Proceedings—Setting down Suit before at Issue—Waiver.]—*See Maxwell v. Maxwell, ante columns* 518, 519.

Waiver of Right to Sst aside Declaration—When Delay does not Operate as.]—*See De Castella v. De Castella, ante column* 1213.

Act of Parliament—Party in an Action cannot Waive one Part and Rely on other, though Part Waived be for his Benefit.]—*See O'Shea v. D'Arcy, ante column* 1220.

Time Fixed by Act of Parliament for Doing an Act cannot be Waived.]—*See Hodgson v. Mayor of Fitzroy, ante column* 216.

Waiver of Technical Objections under Supreme Court Rules, Cap. 6, Rule 1—What is.]—*See Attorney-General v. Cant, ante column* 1168.

Waiver of Innkeeper's Lien—*See Goodyear v. Klemm, ante column* 574.

Waiver of Forfeiture of Leases under the Land Acts.]—*See Ettershank v. The Queen, Evans v. The Queen, ante column* 794; and *Russell v. Parkinson, ante column* 795.

Waiver of Forfeiture of Lease by Landlord.]—*See Parker v. Eve; Balls Headley v. Ambler; Barwick v. Duchess of Edinburgh Company; ante columns* 813, 814.

Waiver of Breach of Covenants in a Lease.]—*See Carson v. Wood, ante column* 818.

Acquiescence—General Principles.]—There is an important distinction depending upon whether the plaintiff has or has not an interest; if the plaintiff has any interest his conduct must amount to abandonment. In order to deprive a person of an estate on the ground of estoppel by acquiescence, his conduct must be such that the person misled acts upon a belief which is encouraged, or at all events known to exist by the other; and it is not enough if the defendant acted upon a belief that he had a good title when he had no right so to believe, and when the infirmity of his title arose out of his own wrongful act. *Atkinson v. Slack*, 2 V.L.R. (E.,) 128.

Acquiescence—What is.]—Acquiescence means a standing by with knowledge of one's right both in fact and law. *Clark v. Clark*, 8 V.L.R. (E.,) 303, 327.

Acquiescence—Contribution among Shareholders of a Company—Silence of a Shareholder when it does not Amount to Acquiescence.]—C. and others, directors of a company, had signed a letter to a bank, authorising a manager to draw cheques on it. P., a shareholder, but not a director, was present when the directors agreed to that course, and expressed no dissent, but did not sign the letter. C. was made to pay the amount, and sued P. for contribution. *Held* that the defendant's (P.'s) silence did not amount to acquiescence,

as he was only present at the meeting as a shareholder, and had no authority to protest against the course adopted. *Cherry v. Perkins*, 3 V.R. (L.,) 87; 3 A.J.R., 51.

Acquiescence — Shareholders Barred by.]—A shareholder in a mining company whose shares had been forfeited, lying by for six years, alleging that he had received no notice of forfeiture, but making no inquiries, and bringing his suit after the company proved successful, was *Held* by *Molesworth, J.*, not barred by laches or acquiescence, but disentitled to costs. But *Semble, per* the Full Court, he would be barred. *Cushing v. Lady Barkly G.M. Coy.*, 9 V.L.R. (E.,) 108, 116, 122; 5 A.L.T., 10, 98.

Acquiescence of Shareholder, who at time of Sale had been a Director, to Sale of Company's Property by Directors.]—*See Youl v. Lang, ante column* 1015.

Acquiescence in Balance-sheet and Directors' Returns—How it Affects a Resolution to "Write off" Capital.]—*See In re Provincial and Suburban Bank, ante column* 152.

Acquiescence by Wife in Husband's Receipt of Interest and Rents.]—*See Woodward v. Jennings* and *Brown v. Abbott, ante column* 545.

Acquiescence by Plaintiffs in Injury sought to be Enjoined.]—*See Broadbent v. Marshall, ante column* 563.

Injunction to Restrain Mining Encroachment—Acquiescence Disentitling to Relief.]—*See Band and Barton United Coy. v. Young Band Extended Coy., ante column* 969.

Acquiescence in a Nuisance—Plea of—What it must Show to be Good.]—*See Cooper v. Dangerfield, ante column* 1102.

Acquiescence by Plaintiff to Defendant's Erecting Buildings to Endeavour to Abate a Nuisance—Plaintiff not Barred from Suing if Attempt to Abate be Unsuccessful.]—*See Cooper v. Dangerfield, ante column* 1104.

Acquiescence in Nuisance—Plaintiff not Bound by if Unaware that it will cause Injury to his Property.]—*See Kensington Starch and Maizena Coy. v. Mayor of Essendon and Flemington, ante column* 1101.

Loss of Rights by Acquiescence.]—*See Johnson v. Colclough, ante column* 1134.

Agreement to Transfer Portion of Lease of Crown Lands—Sale by Transferee—Mere Knowledge of Sale on part of Lessee, and Allowing Vendee to Enter and Improve, does not Amount to such Fraud and Acquiescence as will Compel him to Recognise Vendee's Title.]—*Tozer v. Somerville, ante column* 1354.

Title to Trade Mark—Loss of by Acquiescence in its Use by others.]—*See Neva Stearine Coy. v. Mowling, ante column* 1388.

For cases of Laches, *see ante columns* 784, 785.

WARD.

See INFANT.

Contempt by Marrying a Ward of Court.]—*See Ware v. Ware, ante column* 182.

WAREHOUSEMAN.

Liability.]—If a person placing goods in a warehouse interfere and direct where the goods are to be placed in the warehouse, he may thereby, in the event of damage being done to them, reduce the responsibility of the warehouseman. *Harper v. Jones*, 4 V.L.R. (L.,) 536.

Warranty by Warehouseman as to Safety of Warehouse.]—*See Harper v. Jones, post* under WARRANTY.

WARRANT.

Delivery Warrants.]—*See ante columns* 1295, 1296.

Warrant of Commitment by Parliament.]—*Ante column* 177.

Warrant of Commitment for Contempt of Court.]—*Ante columns* 180, 181.

Warrant or Order for Committal under "Debtor's Act."]—*See* cases, *ante columns* 348, 349.

Warrant under Proceedings for Extradition of Criminals.]—*Ante column* 455.

Warrant by Justices of the Peace.]—*See ante columns* 759, 760, 761 *et seq.; and In re Cornillac, columns* 1118, 1119.

And *see* under HABEAS CORPUS, *ante column* 492.

Informal Warrant for Confinement of Lunatic.]—*Ex parte Wilson, ante column* 866.

WARRANTY.

Breach of—When an Answer to an Action to Recover the Purchase-money.]—A breach of a contract of warranty is not an answer to an action brought on a contract of sale to recover the purchase-money, unless the defendant is able to show that the goods, for the price of which the action is brought, were not, at the time they were delivered, of any value whatsoever, and that the consideration for the defendant's contract has, therefore, wholly

failed. A plea to a declaration after delivery for the price of goods sold, stating breach of warranty that they were sound, and by reason of such breach they were diminished in value to the extent of the plaintiff's claim and were of no value, is not an answer to the action. *McMillan v. Sampson*, 10 V.L.R. (L.,) 74; 5 A.L.T., 193.

Sale of Sheep—Price does not Affect a Warranty.] —*See Richey v. Birkin, ante column* 1293.

And for cases of Warranties on Sale of Goods *see ante columns* 1291—1293.

Implied—On Sale of Land.]—A description of land in the conditions of sale as having a frontage of so many feet to a certain street, by a certain depth to another street, is not an implied warranty that the street to which the land has the depth is an open street, but is merely a description of the land. And if the vendee before the sale was aware that the street was obstructed, he is in the same position as if the vendor had told him of it. *Moss v. Cohen*, 2 A.J.R., 108.

By Person in Skilled Occupation of Soundness of his Opinion.]—No person in a skilled occupation, *e.g.*, a medical practitioner, is required to warrant the soundness of his opinion. *Roberts v. Hadden*, 4 A.J.R., 167, 181.

Implied—Of Seaworthiness of Ship in Special Contract to Carry Goods.]—A warranty of seaworthiness is implied by law in a special contract guaranteeing to carry goods by ship. *Connor v. Spence*, 4 V.L.R. (L.,) 243, 254, 255, 256.

By Warehouseman—Safety of Warehouse.]—A warehouseman, by receiving goods in the ordinary way for storage, does not thereby warrant the safety of his warehouse against sudden and extraordinary floods. *Harper v. Jones*, 4 V.L.R. (L.,) 536.

Contract for Executing Works Suitable for a Bathing Establishment—To what Warranty refers.]—*Hosie v Robison*, 5 A.J.R., 176. *See post* under WORK AND LABOUR — GENERAL PRINCIPLES.

Implied Warranty by Directors of a Company that Manager had Power to Bind the Company.]—*Cherry v. Colonial Bank, ante column* 84.

WASTE.

By Tenant for Life and Administratix—Quarrying for Stone—Measure of Damages.]—On further directions in a suit for administration of the trusts of a will where the trustees had all renounced and the tenant for life had obtained administration, *Held* that the administratrix having quarried for stone, she being tenant for life without power of waste, should be charged with the loss the land had sustained and not the actual amount she had received, the former being the larger sum. *Spotswood v. Hand*, 5 A.J.R., 85.

Injunction to Restrain—Parties.]—A. let land to B., who sublet part to C. C. entered into an agreement with D., under which D. entered and committed waste. On a bill by A. against B. and D. only to restrain waste, *Held* that C., not being a party to the suit, no injunction could be granted as to the land sublet to him. *Cruthers v. White*, 1 W.W. & A'B. (E.,) 133.

Cutting Timber—Motion to Restrain—Injunction.]—On a motion by plaintiff to restrain defendant from cutting all trees, he did not show what were ornamental by the contract, nor what were timber trees in the locality; but the defendant admitted that some of the trees growing on the land were useful for building purposes. *Held* that the plaintiff ought to have shown which trees were either ornamental or timber; but that the admission of the defendant was sufficient material for an injunction as to the sort of trees admitted by him to be timber; and an injunction was granted as to these only. *Bruce v. Atkins*, 1 W. & W. (E.,) 141.

WATER, WATER COMPANY, AND WATERCOURSE.

Water Company—Duty to Supply Water—22 Vict. No. 69, Secs. 41, 68 (ii.)]—Under Sec. 41 of the "*Bendigo Waterworks Act*" (No. 69,) on the completion of the waterworks, all persons complying with the provisions of the Act are entitled to require the company to supply them as Sec. 41 directs; and where service pipes have been laid on to premises, the occupier of the premises is entitled to be supplied with water at the price specified in Sec. 68 (ii.,) although the water may not be required for mining or domestic purposes. *Bendigo Waterworks Coy. v. Thunder*, 1 V.R. (L.,) 76; 1 A.J.R., 87.

"Bendigo Waterworks Act," Sec. 45—Construction—"Charged."]—The word "charged" in Sec. 48 of the "*Bendigo Waterworks Act*" (No. 69,) must be taken to mean that there must be sufficient pressure in the pipes to allow of the water flowing from them through the plugs which the company had fixed. *Bendigo Waterworks Coy. v. Fletcher*, 2 V.R. (L.,) 43; 2 A.J.R., 40.

Complaint for not Keeping Pipes Charged—"Bendigo Waterworks Act," Sec. 45—Evidence.] —F. sued the Bendigo Waterworks Company for not keeping their pipes charged. Sec. 45 of the "*Bendigo Waterworks Act*" (No. 69,) under which the company was incorporated, imposed a penalty on the company if they failed to keep their pipes "charged" with water except in cases of drought, while the pipes were being repaired, or through other unavoidable cause or accident. *Held* that it was optional for the

complainant to give evidence direct or rebutting or not at all, in order to show that the case in respect of which he sued did not fall within the exceptions mentioned in the Act; and that it lay upon the company to prove affirmatively that the failure was within such exceptions. *Ibid.*

Rates—When Enforceable—No. 59, Sec. 5.]—The Board of Land and Works caused notice to be given, in accordance with the Act 21 Vict., No. 59, Sec. 5, and in compliance with that notice, F., owner of a messuage, and referred to in such notice, caused a pipe and stop-cocks to be laid so as to convey water within such messuage. F. paid rates, duly made, up to 12th February, 1864, when he gave notice that he intended to discontinue using the water so supplied, and paid his rates up to the end of the then current half-year. Before the end of the half-year (30th June) he removed the pipe and stop-cocks so that water could no longer be supplied, unless the pipe and stop cocks were again laid down. F. used no more water, but the board were always ready and willing to supply him. F. refused to pay rates for a period subsequent to June, 1864, and the board distrained for such rates. On case stated, *Held* that under the Act No. 59, the laying down of a pipe and stop-cocks was equivalent to an actual supply of water, the use of the words "premises so supplied" showing that it is the premises that are supplied, wholly irrespective of the individual wants of each owner, and of whether he chooses to use what is so supplied; that the rates were payable whether the water were used or not after such supply, and that the distress was legal. *Fellows v. The Board of Land and Works*, 1 W.W. & A'B. (L.,) 198.

Rates—Sliding Scale—Act No. 500, Sec. 5—Bye-Law.]—Under Sec. 5 of the "*Local Government Bodies Loan Act* 1872 *Amendment Act*" (No. 500,) which enacts that a water rate "may vary in amount upon a sliding scale according to the valuation of the various rateable properties," a municipal council made a bye-law imposing a rate upon the annual value of each house above £10 and not exceeding £100, and a lesser rate on the annual value of each house above the annual value of £100 and not exceeding £200, and a still less rate on the annual value of a house above £200 and not exceeding £300. Under this bye-law the council rated the respondent's house, by rating it *pro tanto* under such subdivision of the bye-law in turn, rating the surplus over £10 at the rate between that and £100, and the surplus over £100 at the rate between that and £200, and so on. *Held* that the rate must be such that each property is rated on its own valuation as a whole, and must not be rated piecemeal under each of the lower grades up to that under which it properly falls. *Mayor, &c., of Ararat v. Grano*, 6 V.L.R. (L.,) 7.

Watercourse—In Charge of Municipal Council—"Local Government Act 1874," Sec. 400.]—A watercourse which passes through private land within a municipality is not taken under the charge of the council so as to render it a "watercouse" within the meaning of Sec. 400 of the "*Local Government Act* 1874" (No. 506,) merely because the council constructs a crossing over such watercourse where it flows over a street; and the owners of the private land will not be liable for obstructing such a watercourse. The section only applies to artificial watercourses, or to natural channels which the council may have improved, and upon which they may execute work for the purpose of making them more effective. *Moloney v. Drought*, 2 V.L.R. (L.,) 180.

Interference with Creek—Creek Managed as a Road, not as a Watercourse—Jurisdiction of Justices—Question of Title—Mining Claim—"Local Government Act 1874," Sec. 400.]—*See Regina v. Mayor of Walhalla, ex parte O'Grady, ante column* 747.

Power of Council to Construct a Reservoir—Act No. 506, Sec. 446.]—*Smith v. Shire of Lexton, ante column* 215.

"Waterworks Statute" (No. 288)—License to Work Puddling-mill under Sec. 15 confers no Easement as regards Flow of Sludge—Section is Prospective—Jurisdiction of Justices.]—Sec. 15 of the "*Waterworks Statute*" (No. 288) confers no easement as regards the flow of sludge over Crown lands, but such flow is merely tolerated as a necessary adjunct of the license. If the holder of such a license be ordered to stop the flow of such sludge the licensee is bound to do so, and the section being prospective affects such flow already allowed by him; and the continuance in allowing such flow, after being ordered to discontinue, is a fresh committing of the offence; and the fact of having allowed such sludge to flow before gives no right to do so after an order to discontinue, and no question of right or title is involved to oust the jurisdiction of justices in such a case. *Regina v. M'Intyre*, 5 W.W. & A'B. (L.,) 25.

WAY.

1. *Creation and Dedication of, column* 1492.
2. *General Principles, column* 1494.
3. *Rights, Powers, Duties, and Liabilities of Local Bodies in Respect of Ways, Streets, &c., See ante under* LOCAL GOVERNMENT.
4. *Costs of Making and Repairing Pavements, column* 1494.

(1) *Creation and Dedication.*

Creation.]—The plaintiffs took up a claim on vacant Crown land under miners' rights. On the subsequent sale of the Crown land above and below the claim, spaces for roads were reserved between the land sold and the claim in parallel lines, which would, if produced, have included a portion of the claim including that portion on which the shaft was sunk, and such a road was in fact delineated on the plan of sale. A proclamation in the Government *Gazette*, under No. 225, Secs. 11 and 12, fixed the roads as shown in the plan, and the municipal corporation of the district began to form

the road across the claim. The plaintiffs thereupon sued the corporation for trespass. *Held* that the plaintiffs' rights could only be defeated by an express act of the Crown, that a direct intervention by effectually making a road would defeat the title; but that the land in dispute had never legally been made a road. *Mayor, &c., of Eaglehawk v. Waddington*, 5 W.W. & A'B. (M.,) 6.

By Proclamation—Over Railway.]—A Crown grant of certain lands was made to a railway company "subject to the trusts, conditions, uses, and provisoes hereinafter contained." One of the provisoes so contained was as follows:—"Provided nevertheless and we do hereby reserve unto us, our heirs, &c., all mines of coal and such parts or so much of the said land as may hereafter be required for making public ways, canals, railroads, sewers or drains in, over, and through the same, to be set out by our Governor for the time being of our said colony of Victoria, or some person by him authorised in that respect." By proclamation the Governor set out a public right-of-way across the railway. The company arrested a person for using the right-of-way, who sued the officer arresting him for trespass for such arrest. *Held* that the reservation was good. *Jenkyns v. Elsdon*, 1 W.W. & A'B. (L.,) 145.

Evidence of.]—A Crown grant of land adjoining a road describing it as a Government road accompanied with evidence of user of the road as a public road is evidence of dedication. *House v. Ah Sue*, 2 W. & W. (L.,) 41.

What Amounts to Dedication—27 Vict. No. 178, Sec. 60—14 Vict. No. 20.]—A right-of-way, if not made in accordance with the notice under 14 Vict. No. 20, and the plan exhibited previously to its formation, does not become the property of the corporation so as to be a right-of-way; and the Act No. 178, Sec. 60, does not apply to such a right-of-way, nor will any action lie against a person, part of whose land has been taken in by the right-of-way, for obstructing such right-of-way. *Strong v. Smith*, 1 A.J.R., 89.

"Land Act 1869"—What is Sufficient Proclamation—Notice Signed by Minister.]—A notice signed by a Minister of the Crown (but not by the Governor or any person by his command, and not under the seal of the colony), purporting to proclaim a road under the "*Land Act* 1869" (No. 360,) Sec. 38, is not a valid proclamation of such road. *Mayor of Melbourne v. The Queen*, 2 V.R. (E.,) 183; 2 A.J.R., 125.

Creation.]—An owner of land may, without deed, dedicate a portion of it to the public as a highway, and, if the public accept it, it becomes irrevocably such; but there is no authority showing that other public easements can be similarly created. *Webb v. Were*, 2 V.L.R. (E.) 28.

Bill for the Use of a Highway—What must be Stated—Not Sufficient to State Facts which may be Evidence of the Dedication of Land to the Public.] —*Webb v. Were, ante column* 1164.

(2) *General Principles.*

Width.]—*Semble*, that there is no legal limit to the width of a highway. *Webb v. Were*, 2 V.L.R. (E.,) 28.

Presumption as to Width of Street.]—*See Drought v. Schonfeldt*, 5 A.J.R., 82; *ante column* 863.

Right to Road ad Medium Filum Viae.]—By presumption of law the land forming the highway *ad medium filum viae* passes under a Crown grant to the grantee. *Davis v. The Queen*, 6 W.W. & A.B. (E.,) 106.

Followed in cases set out, *ante column* 487.

Property of Crown in—Grant of Land Adjoining Way.]—*Held, per Higinbotham and Williams, JJ.*, overruling *Davis v. The Queen* [6 W.W. & A'B. (E.,) 106], that property in the soil "*ad medium filum viae*" in a public street, road, or highway in Victoria cannot be and never has been created by virtue merely of a grant by the Crown of land adjoining such road, street, or highway. The property in such street, road, or highway remains in the Crown. *Garibaldi Coy. v. Craven's New Chum Coy.*, 10 V.L.R. (L.,) 233; 6 A.L.T., 93.

Per Holroyd, J.—I think the decision is wrong; but I am not prepared to overrule a decision of the Court without hearing arguments upon it. *Ibid.*

Materials for Road-Making—Right of Contractor of Road Board to take from Crown Lands Temporarily Reserved for a Water Supply.]—*See Mayor of Ballarat v. Bungaree Road Board, ante column* 853.

(3) *Rights, Powers, Duties, and Liabilities of Local Bodies in Respect of Ways, Streets, &c.*

See cases *ante columns* 854-863 under LOCAL GOVERNMENT.

(4) *Cost of Making and Repairing Pavements.*

Adjoining Owners—Liability for Expenses of Repairing Road—"Melbourne Corporation Amending Act" (No. 178,) Sec. 59—Flagging Footpaths.]—In the case of an owner of a corner allotment where the footpath at the corner extends further than his frontage, the Court held that half the expenses of such excess was to be borne by all the owners of tenements before whose frontages the footpath ran in proportion to their respective frontages. *M'Kean v. The Mayor of Melbourne*, 5 A.J.R., 129.

Cost of Paving—Act No. 359, Sec. 317.]—Where flagging has been laid down in front of the property of several owners before any one of them can be proceeded against for his share, he is entitled to know not only the particulars of what was done opposite his own house, but also of the total expenditure. *Semble*, it would be sufficient if he were told that the price of the whole was so much per yard. *Regina v. Marsden, ex parte Lazarus*, 1 V.L.R. (L.,) 23.

Repairing Pavement—"Melbourne and Geelong Corporations Amendment Act" (No. 178,) Secs. 59, 60—Ratification of Demand.]—W. was summoned for half the expenses of flagging a pavement in front of his house; the pavement had been flagged before and half the expense of such had been borne by adjoining owners. The notice containing the demand was made and signed by the town treasurer. *Held* that Sec. 59 of the Act authorised the recovery of half the expenses of repairing or relaying a pavement previously laid down; and that though the treasurer was not authorised to make the demand yet the council by its acts had ratified the agency and the ratification related back to the time of demand. *Wright v. Town Council of Geelong*, 3 V.L.R. (L.,) 313.

WEIGHTS AND MEASURES.

Act No. 151—Examination and Comparison of Weighing Machines.]—Under Act No. 151 the owner of every weighing machine is compelled to have his machine true and accurate, and provision is made for any machines being examined and compared, on payment by the owner of the proper fees. In comparing a machine capable of weighing over 56 lbs., the inspector may use other weights besides the standards supplied by the Government, if such extra weights have been first verified by the standards. *Council of Ballarat v. O'Connor*, 1 W.W. & A'B. (L.,) 1.

Act No. 151—Comparing and Stamping Machines Capable of Weighing over 56 lbs.]—Although so far as the inspector of weights and measures is concerned, he is bound by the Act No. 151 (repealed and re-enacted by "*Weights and Measures Act* 1864") to compare every machine, no matter of what sort, and to stamp it when necessary, *quære*, whether, so far as the owner is concerned, such machine need be compared and *stamped* by the inspector. *Ibid.*

"Weights and Measures Statute 1864" (No. 215,) Sec. 49—Forfeiture Under not within the Meaning of Sec. 8 of "Interpretation Statute."]—*Regina v. Caddy*, *ante column* 736.

Inspecting—Post Office—"Weights and Measures Statute 1864," Sec. 49.]—A post office being conducted under the authority of the Crown, is not within the operation of the "*Weights and Measures Statute* 1864," since the Crown is not named in the Statute, and is not bound by it. A post office is not, therefore, a place which an inspector has a right, under Sec. 49 of the Act, to enter for the purpose of inspecting the weights and weighing machines. *Pollard v. Gregory*, 2 V.L.R. (L.,) 260.

WIFE.

See HUSBAND AND WIFE.

WILL.

I. Testamentary Capacity.

(a) *Soundness of Mind.*

Mental Infirmity—Undue Influence—Son obtaining Devise of Share of Intemperate Brother on Honorary Trust for Him.]—A testatrix made a will, December, 1871, by which her son H. received a share in her realty, the defendant G. being an executor. In July, 1872, she became very ill, and the doctor advised her to make her will. The interest left to H. in the former will was not to be disposed of except with the written consent of the trustees, this being put in on account of H.'s intemperate habits. On 31st July G. took the old will to a solicitor, with alterations written in pencil, the chief alteration being the devise of H.'s share to G., which G. explained was to be held upon honorary trust for H. The solicitor prepared a new will following the alterations, which were read over to the testatrix and assented to by her, and then executed. The whole weight of evidence was in favour of the mental capacity of the testatrix, though she was in a weak state of health. There was also evidence that special mention was made in H.'s presence of the alteration, viz., H.'s share going to G., and of G.'s intention to execute a declaration of trust in H.'s favour, to which the testatrix assented. *Held* that the will of 31st July, 1872, was duly executed, and that the testatrix was competent at the time, and that G. had not procured her signature by undue influence. *Waugh v. Waugh*, 3 A.J.R., 115, 116.

Illusions.]—Where a testator had a severe fall from his horse and received injury to his spine, from which he suffered from temporary illusions but to which the medical evidence did not point as permanent, the Court granted probate to a will made in an apparently lucid interval, being of opinion that there were no permanent illusions so as to render it incumbent to show that they had ceased. *In the Will of Doolan*, 5 A.J.R., 155.

Delusions.]—The Court set aside probate of a will made by a testator, who was proved to have had delusions as to the chastity of his wife, and as to intentions on her part to murder him, and who had based his will on such delusions, and granted administration to the widow. *In the Will of Lecerf*, 6 V.L.R. (I. P. & M.,) 9; 1 A.L.T., 173.

Insanity—Drunkenness—Delusions—Intelligence as to Actual Execution of Will.]—The will of a person who shows at times decided symptoms of insanity, and whose mind is being gradually impaired by drunkenness, and who has delusions on certain points, is valid, if the proceedings as to the actual execution show full intelligence of such proceedings. *In re Kerr*, 2 A.L.T., 41.

Permanent Delusions.]—A man having delusions, even permanent, may make a will to be admitted to probate, if the Court is satisfied of his mental capacity on the subject of the will at the exact time of the execution, and that the delusions could not be the cause of the will. *In the Will of Abel*, 8 V.L.R. (I. P. & M.,) 34, 41; 4 A.L.T., 73.

Intelligence of Testator Deficient as to Value of Property and Disposition thereof.]—Where a testator, who had acted as a madman or idiot on several occasions shortly before he made his will, but had carried on the ordinary business of life before and after it, so as to cause no doubt of his sanity in those with whom he dealt, and who was not able distinctly to recollect or understand the value of his property or his disposition of it, made his will, the Court held that there was sufficient evidence of insanity to justify it in setting aside the will. *In re Burns*, 2 A.L.T., 15.

(*b*) *Married Women.*

Will made during Coverture—Assent of Husband.]—A married woman whose husband had deserted her, maintained herself by her own earnings, and made savings, which she deposited in a Savings Bank. By will she bequeathed a few trifling legacies, and bequeathed the remainder of her personal estate to one W.G., her adopted son. After her death, her husband, on being informed of the will, claimed by letter all the personal estate she had at her death; but authorised the executors named in the will "to turn everything over to W.G., and get the cash transferred to his name." The will was never proved, and the husband subsequently dying abroad intestate, and leaving no property in Victoria other than that purporting to be bequeathed by his wife, a suit was instituted by the husband's next-of-kin claiming to administer this property as part of the husband's estate. *Held* that the husband had not assented to the wife's will so as to make it valid; and that his next-of-kin was entitled to administration of the property in the wife's possession at her death. *Grimmett v. Grimmett*, 2 V. R. (I. E. & M.,) 63; 2 A.J.R., 101.

Licenses under "Land Act 1865," Sec. 42, by Feme Sole—Marriage—Subsequent Fee Simple under "Land Act 1869"—"Married Women's Property Act," Secs. 2, 3, 4.]—A testatrix before marriage obtained licenses under Sec. 42 of the "*Land Act* 1865" to occupy Crown lands, and during their currency, and before the passing of the "*Married Women's Property Act*" (No. 384) she married. After the passing of that Act she acquired the fee simple under the "*Land Act* 1869," Sec. 31, and the Crown grant was issued to her, with her husband's assent, but in her maiden name. *Held* that the land passed by her will as if she had been a *feme sole*. *In the Will of M'Losky*, 4 V.L.R. (I. P. & M.,) 24.

Act No. 301, Sec. 60.]—Certain land under the Act No. 301, was conveyed to a married woman with her husband's consent, and paid for out of her separate estate. *Held* that as to the land she had a disposing power. *In the Will of Tregurtha*, 10 V.L.R. (I. P. & M.,) 89.

(*c*) *Undue Influence.*

Suspicions which do not Exclude every other Hypothesis than that of Undue Influence.]—Suspicions that leave any other hypothesis open than that of undue influence are not sufficient to set a will aside. Appeal from the County Court against a decision setting aside a will as obtained by undue influence. The testatrix had made a former will wholly in favour of her daughter, but the daughter left the mother (testatrix,) who was suffering from a loathsome disease, and the testatrix made another will—the one in question—by which she gave half of her property to the daughter, and half to M. with whom she had been residing. It appeared that the testatrix had proper disposing power at the time, and that the will was duly executed; but that the daughter had not been sent for at the time of execution, and that M. had said she never wished to take away all the property from the daughter, and that half would satisfy her. *Held, per totam curiam*, that there was no evidence of constraint over the testatrix, and that the circumstances, though suspicious, did not negative every other hypothesis but that of undue influence. Appeal allowed. *Miller v. Farr*, 3 A.J.R., 129.

Power of a Mesmerist—Exclusion of Visitors.]—In order to set a will aside in respect of the exclusion of visitors from a testator, it should appear probable that the will was the result of such exclusion. For observations on the circumstances which will induce the Court to set aside a will as obtained by the undue influence of a person claiming great and almost supernatural power over people as a mesmerist, *see In the Will of Lamont*, 7 V.L.R. (I. P. & M.) 86.

And *see* as to what was not held to be undue influence, *Waugh v. Waugh*, *ante* column 1498.

II. Testamentary Instruments, What Entitled to Probate, &c.

(*a*) *General Principles.*

Of Person going through Form of Marriage.]—Where a person had gone through a form of marriage with a woman whose husband was then alive, and a copy of his will which was made in duplicate was proved in England, and on the motion in this colony for probate to the other copy, nothing appeared in the affidavits about the marriage ceremony, *Held* that the Court would only act on the materials before it; and probate granted. *In the Will of Montgomery*, 4 A.J.R., 5.

Forged Will—Admissibility of Statement of Deceased Witness to Will.]—*See In the Will of P. C. Buckley*, 5 A.J.R., 5.

Omission of Date.]—Though the omission of the date of a will may be immaterial as to its validity, the Court requires evidence as to the date of execution. *In the Will of Turner*, 5 V.L.R. (I. P. & M.,) 71.

Error in Date of Will—Date in Order.]—A will was dated 22nd December, one thousand eight hundred and eighty. . . . The real date of execution was 22nd December, 1882, the testator omitting to fill in the blank space. The Court granted an order specifying the true date of the execution in the order and the probate. *In the Will of Mason*, 9 V.L.R. (I. P. & M.,) 37.

Will Dealing only with Real Estate in another Colony.]—A testatrix by will left all her property to her husband, and by a subsequent will appointed certain real estate in Tasmania equally among her children. *Held* that the second will operated as a declaration of trust of freehold in Tasmania, and that the Court had not anything affirmative to do with it, and could not grant probate of it. *In the Will of Lilley*, 8 V.L.R. (I. P. & M.,) 32; 4 A.L.T., 81.

Old Will.]—The Court is not inclined to grant probate of an old will for the purpose of giving greater facility for making title. *In the Estate of Mather*, 8 V.L.R. (I. P. & M.,) 24; 3 A.L.T., 134.

Will not Following Instructions.]—A solicitor received instructions from a testator to leave his property to his wife and daughter, but instead of so drawing the will the solicitor drew up one leaving the property to the wife and daughter for their joint lives, with remainder to the daughter, and the will was not read over to the testator owing to the danger of his becoming unconscious. *Held* that, the solicitor not having followed the instructions given him, probate should be refused. *In the Will of King*, 10 V.L.R. (I. P. & M.,) 34.

If an attorney goes beyond the precise instructions it must be shown that the testator, when he executed the will, was conscious that he had done so. *Ibid.*

Joint Will of Husband and Wife—Wife Dying First—Husband still Alive.]—Where a joint will was made by husband and wife, the wife dying first, and the will providing for the survivor having a power of appointment by deed, but not by will, so as to effect a different disposition, *Held* that, as the will contemplated that the executor should in some degree come into office upon the death of either party, he was entitled to probate even although the husband was still alive. *In re M'Laren*, 5 A.J.R., 81.

(*b*) *Foreign and Colonial.*

English and Colonial.]—A testator, domiciled in England, made a will there relating exclusively to property in Great Britain, and appointed executors resident in England. He then came to Victoria and made a will relating exclusively to property in Victoria and Tasmania, and appointed executors of it resident in Victoria. He subsequently returned to England, and made a codicil to his first will, such codicil also relating exclusively to property in England. Probate of the first will and codicil was granted by the Court of Probate in England to the executors named in the first will, and without any reference being made to the second will. *Held* that probate should be granted to the second will without at all referring to the first will and codicil. *In re Ruffhead*, 1 W.W. & A'B. (I. E. & M.,) 70.

Will Executed in Victoria—Codicil Executed in Japan—Domicile.]—M. had resided many years in Melbourne, and whilst there duly executed a will; he went to live in Japan and died there. Before his death he executed a codicil not attested by two witnesses. *Held* that M. was domiciled in Victoria, and that the codicil not being executed conformably to Victorian law was inoperative. *In the Will of Marks*, 3 A.J.R., 43.

Probate How Granted—Translation.]—Probate of a will in a foreign language should be granted of a duly authenticated translation of it, but the original should also be included in the grant in case of any difficulty arising thereafter, or any mistake in the translation. *In the Will of Schneider*, 6 V.L.R. (I. P. & M.,) 8; 1 A.L.T., 144.

Will in England—Practice.]—Before probate can be granted here of a will proved in England, either the original English probate or an exemplification under the seal of the English Court must be produced and lodged in this Court. *In the Goods of Whittaker*, 2 W. & W. (I. E. & M.) 114.

And *see* for Practice *post* under sub-heading PROBATE, &c.—Administration with exemplified copy annexed.

(*c*) *By Married Women.*

Will under Power and Limited to Real Estate.]—The will of a married woman, made under power, and limited to real estate only, is not entitled to probate. *In re Trethowan; In re Elliott*, 2 V.L.R. (I. P. & M.,) 93.

Per Molesworth, J.—Generally speaking the Court exercises its probate jurisdiction over wills affecting to deal with personal property and not real property alone. Probate refused to a will of a married woman made under a power and dealing with real estate only. *In the Estate of Dyer*, 5 V.L.R. (I. P. & M.,) 67.

Will—Revocation by Marriage—Confirmation—"Wills Statute 1864," Secs. 16, 20.]—A widow executed a will of real and personal estate, and remarried. By ante-nuptial settlement she settled the property, reserving a power to appoint by will. Subsequently she executed a confirmation of the will. *Held* that in the view of Secs. 16 and 20 of the "*Wills Statute* 1864," the confirmation might be regarded as a codicil, and probate granted of the will and of the confirmation as a codicil. *In the Will of Patchell*, 4 V.L.R. (I. P. & M.,) 52.

And *see ante column* 1499.

And for affidavits and evidence of separate property *see* cases *post* under PROBATE, &c.—*Husbands and Wives.*

(*d*) *Where Several Instruments.*

(1.) *Probate Granted to Two Wills.*

Two Wills of Same Date Dealing with Different Properties.]—Where a testator had made two wills dealing with different properties on the same day, which were in no way repugnant but no executor was appointed in the second, the Court granted probate to the two as one will. *In the Will of Meehan*, 5 A.J.R., 61.

Duplicate Wills.]—A testator having property as well in England as in Victoria executed his will and also added a codicil in duplicate appointing one set of executors for his English property and another set for his Victorian property. The High Court of Probate in England having granted probate of one of the duplicate wills and codicils forwarded to the executors there so far as related to property in England, the Court in Victoria granted probate of the duplicate will and codicil to the Victorian executors so far as related to the property in that colony. *In the Will of Holl*, 3 A.L.T., 95.

A married woman executed a trust disposition and settlement in the Scotch form, which was duly attested, and afterwards executed a will confirming such disposition and settlement. The Court granted probate of the two documents as constituting one will. *In the Will of Dewhurst*, 7 V.L.R. (I. P. & M.,) 105.

A testator made a will appointing no executors, dealing only with personalty, and making specific bequests of live stock and chattels. Afterwards he made a second will commencing "This is my last will and testament," appointing executors and disposing of the realty, and leaving one legacy. *Held* there was no revocation of the first will, and probate granted to the two documents as together constituting the will of the testator. *In the Will of Christie*, 9 V.L.R. (I. P. & M.,) 46.

Will Disposing of all Testator's Property—After-acquired Property—Second Will.]—A testator made a will disposing of all the property he then possessed, and appointed executors. Having subsequently acquired other property, he made a will disposing of it only, not revoking or in any way mentioning the first will or appointing executors. *Held* that probate of the two documents should be granted to the executors of the earlier will. *In the Will of North*, 10 V.L.R. (I. P. & M.,) 36; 6 A.L.T., 4.

The advertisement was for "the will and codicil."

(2) Probate Granted to One Only.

One Will referring to another Not Produced.]—S. made two wills, one disposing of property in Fiji, and one disposing of property in Victoria. Both wills were of the same date and each referred to the other. At the time that probate was applied for of the Victorian will the Fijian one had not been shown to the executors of the other. The Court granted probate during the absence of the Fijian will. *In the Will of Smith*, 2 V.L.R. (I. P. & M.) 100.

Duplicate Wills.]—A testator executed duplicate wills at the same time, the *testatum* being:—"In witness whereof I have hereunto and to a duplicate hereof set my hand, &c." Probate granted to one of the wills only, but it was intimated that the grant must contain the words "of which said will there is a duplicate." *In the Will of Cust*, 9 V.L.R. (I. P. & M.,) 53.

(3) Codicils and Wills.

Codicils—Original Will in Scotland.]—Where an original will affecting only property in Scotland was in Scotland, and no copy could be obtained, and the testator made two codicils which in effect revoked the will, and disposed of all the testator's property in Victoria, the Court granted probate of the codicils as codicils, without the will. *In the Will and Codicils of Wise*, 6 W.W & A'B. (I. E. & M.,) 39.

Document Styled a Codicil, but Revoking all Former Wills.]—Where at the end of a will there was an instrument styled "a codicil to the above-written will," but revoking all former wills, and declared to be the last will, and containing devises and bequests to the widow inconsistent with those in the will, *Held* that the codicil must be taken as confirming gifts to the widow in the will, as altering the will by substituting her for the devisees and legatees in the cases of inconsistency, and as giving her the residue, and both documents admitted to probate as a will and codicil. *In the Will of Butler*, 5 A.J.R., 64.

Will—Separate Papers—Codicil—Date.]—A will was written on two sheets of paper not fastened together in any way and not referring to each other, but the second sheet read as a continuation of the first. They were found in a closed envelope deposited with a bank for safe keeping. The will contained no appointment of executors and no date except after the attestation clause, viz., 25th July, 1874. A codicil referred to a will bearing date 20th March, 1874. The Court granted administration *c.t.a.* of the will and codicil to the widow. *In the Will of Mount*, 3 V.L.R. (I. P. & M.,) 57.

Reference to Prior Will by Mistake.]—A testatrix executed a will November, 1876, and a second December, 1876, revoking the former. There were two codicils as to the "last will and testament," dated July, 1877, and September, 1877, respectively, both referring to the will of November, 1876, as her last will. The solicitors who prepared the codicils made an affidavit stating that the reference was a mistake and explaining the circumstances. There was no evidence of any intention to revive the former will. *Held* that the second will and the two codicils were entitled to probate. *In the Will of Hodder*, 3 V.L.R. (I. P. & M.,) 115.

Execution of Codicil—Lost Will.]—A testator, in 1864, executed a codicil to his last will, by which he bequeathed all his estate to his wife for life, and subject thereto directed that it should devolve according to the terms of the will, save that any provision made by such will in the wife's favour should lapse, and appointed the wife sole executrix. By a further codicil, made ten years afterwards, he confirmed the first, and made provision for his sister-in-law. Before dying he gave directions as to where the will was to be found, but, after his death, all efforts to find it were fruitless. The Court granted probate of the two codicils to the widow, and administration of the estate subject to the two codicils, and to any previous will which might be found or of the contents of which evidence should be forthcoming. *In the Estate of Henty*, 4 V.L.R. (I. P. & M.,) 54.

(e) *Incorporation of Unattested Documents.*

Codicil Referring to Previous Will not Duly Executed.]—A will had been made which was not duly executed. A subsequent codicil was made, and duly executed, which contained a reference in general terms to a previous will. *Held* that parol evidence might be admitted to connect the unattested will with the will spoken of in the codicil; and probate granted to both instruments. *In the Goods of Hill*, 1 W.W. & A'B. (I. E. & M.,) 63.

Will not Duly Executed—Codicil Duly Executed.]—In a case where a will was not properly executed, but the codicil was, and one of the attesting witnesses to the codicil made an affidavit that the testator held both documents in his hand at the time of executing the codicil and said—"This is my last will and testament," the Court admitted both to probate. *In the Will of Sidebottom*, 3 V.L.R. (I. P. & M.,) 40.

Codicil on Two Sheets of Paper Pinned Together—Affidavit.]—The Court refused to grant probate of a codicil which was on two sheets of paper pinned together, and required an affidavit showing what the state of the two sheets was when the codicil was executed. *In the Will and Codicil of Munyard*, 6 A.L.T., 28.

Letter Unattested.]—Where a testator appointed an executor and in his will directed him to act with regard to certain property according to instructions in a letter, and the letter was headed—"This is the letter referred to in my will of this date," but was unattested, the Court granted probate of the will and letter. *In the Will of Stephen*, 1 V.L.R. (I. P. & M.,) 30.

(f) *Alterations and Additions.*

Date Altered—Unattested.]—Where in a will the date was originally 1851, but had been altered, in the same handwriting in the rest of the will, to 1853, but the alteration was unattested, and one of the attesting witnesses made an affidavit respecting the alteration, administration *c.t.a.* was granted of the will. *In the Will of Bostock*, 1 A.J.R., 100.

"Wills Statute" (No. 222,) Sec. 19—Interlineations.]—A testator made a will, which was duly executed, and, after execution, made some material interlineations, and in the margin were the words "witnesses to the interlineation," followed by the names of the original witnesses to the will, but the interlineation was not subscribed by the testator. The Court granted probate of the will without the interlineation. *In re Delves*, 1 V.L.R. (I. P. & M.,) 33.

Interlineations—Obliterations.]—A will contained a number of interlineations, all initialled by the testator and attesting witnesses, and certain obliterations, none of which were so initialled. The interlineations, obliterations, and signatures of execution seemed to be written with the same pen and ink and at the same time. The Court granted probate of the will with all initialled interlineations, excluding obliterations, the beginnings of which were under interlineations, but other obliterations not connected with interlineations were retained. *In the Will of Purvis*, 3 V.L.R. (I. P. & M.,) 37.

Codicil—Obliterations and Alterations.]—On an application for a grant of probate to a will and codicils, where part of one codicil had been obliterated and had alterations made in it by the testator, the Court directed the codicil to be examined by two persons with microscopes, and upon their report as to its entire legibility, granted probate of all the instruments, including the codicil as set out by them. *In the Will of Riddell*, 6 V.L.R. (I. P. & M.,) 5; 1 A.L.T., 143.

Name of Trustee Struck Out after Attestation.]—Testator, by his will, left his wife sole executrix, and appointed two trustees to act only in case of his wife dying before him. The name of one of the trustees had been struck out after attestation. The affidavit of the executrix stated that the alteration had been made by her at the request of the testator and in his presence. The Court granted probate of the will as it originally stood. *In the Will of Harvey*, 6 A.L.T., 4.

Unimportant Alterations.]—A testator left a holograph will in which there were uninitialled alterations. The only one of the attesting witnesses who could be found swore that the alterations were in the handwriting of the testator, but could not say whether they were made before or after execution. The alterations being unimportant, the Court granted probate of the will. *In the Will of Armstrong*, 6 A.L.T., 48.

Expert's Evidence that they were Made Before Execution.]—The Court on the evidence of an expert that certain slight alterations and interlineations, made in a holograph will, had been made before execution, and on examining the will granted probate, with such alterations, &c. *In the Will of Stephen*, 7 V.L.R. (I. P. & M.,) 69; 3 A.L.T., 53.

Evidence as to.]—An affidavit stating that certain alterations were made before execution should specify them one by one, and not *in globo*. *In the Will of Thomson*, 9 V.L.R. (I. P. & M.,) 33.

(g) *Lost or Destroyed Wills.*

Administration Act (No. 427,) Sec. 8—Administration c.t.a.]—L. died in August, 1860, leaving real estate, a widow and six children. L. left a will, which was lost before proof. The widow died, and probate of her will was granted to her executors, who applied for administration *c.t.a.* to L.'s estate. There was evidence of the contents so uncertain that the Court could not determine whether the children took as joint tenants or not. *Held* that the real estate (the testator having died in 1860) passed by the will without probate, and the devisees could recover in a Court of Equity, notwithstanding Sec. 8 of the Act No. 427 (the subject matter being an equity of redemption); and the Court is not disposed to establish a will to remove conveyancing difficulties. Application refused. *In the Will of Lynch*, 1 V.L.R. (I. P. & M.,) 35.

Application for Probate — Affidavits must be Explicit.]—Applications for probate to lost wills are not regarded with favour, and the affidavits in support should be explicit as to the circumstances attending the loss, and on the contents and making of the will. *In the Will of Hallet*, 4 V.L.R. (I. P. & M.,) 50.

Lost Will—Evidence of Contents.—A will, after execution, was handed to the solicitor who prepared it, but was lost by him. The Court granted probate of its contents as set out from memory by persons who were present and heard the will read over to the testator before he signed it, on their affidavits, and on the affidavit of one of the attesting witnesses who deposed that the will was duly executed and attested. *In the Will of Dignan*, 6 V.L.R. (I. P. & M.,) 3; 1 A.L.T., 143.

Lost Will—English Grant—Evidence—Practice.]—The Probate Division of the High Court of Justice in England, in a contested suit, granted administration with a draft of a lost will annexed, but the Court here, nevertheless, declined to grant probate upon an exemplification of the English grant, and required that independent evidence of the facts brought before the English Court should be given. Upon the production of a verified copy of the shorthand notes of the evidence in the suit and of the judgment of the English Court, the Court, after requiring that the advertisement that probate was to be applied for should indicate that the probate was based upon an act of the English Court, granted probate upon the exemplification. *In the Will of Malcolm*, 6 V.L.R. (I. P. & M.,) 102; 1 A.L.T., 201; 2 A.L.T., 3.

Lost Will—Second Will Revoking Prior One—Notice of Application for Probate.]—A testator executed a will, which he subsequently, by a second will, revoked. The second will could not be found, but its contents were sworn to by the solicitor who prepared it. *Held* that notice of an applicatian for probate of the second will should be served on the persons entitled under the first will. *In the Estate of Wallace*, 8 V.L.R. (I. P. & M.,) 22.

Lost Will — Probate Granted to Codicils — Administration Granted to Estate subject to Codicils and to Will being Found.]—*In the Estate of Henty, ante* column 1504.

Practice on — Presumption of Destruction — Limited Administration.] — Where a will was proved to have been in existence shortly before the testator's death, but could not be found after his death, and the evidence showed that the testator had showed no inclination to destroy the will, the Court granted administration limited in point of time till the will should be found. *In the Estate of Twigg*, 7 V.L.R. (I. P. & M.,) 59; 3 A.L.T., 18.

Draft Copy of Lost Will—Statement in Advertisement—Notice to Next-of-Kin.] — *See In the Will of Smith, post* under PRACTICE—Advertisements.

Burnt Will.]—Where a testator made a will which was deposited by the executrix with a solicitor, and the solicitor's office was burnt and all papers (including the will) were destroyed, the Court granted probate of a copy made from memory. *In the Will of Hood*, 5 V.L.R. (I. P. & M.,) 78; 1 A.L.T., 19.

Two Wills—Second Destroyed by Mistake—Draft Copy.]—An illiterate testator made two wills, the second revoking the former, and expressed an intention of destroying the earlier will; only the earlier will could be found, it being presumed that the later one had been destroyed by mistake. Upon notice served upon the interested parties, and upon evidence showing the similarity of the two wills in external appearance, and of the testator's intention, the Court granted probate of a fair copy of the draft of the second will. *In the Will of Healey*, 9 V.L.R. (I. P. & M.,) 43.

Destroyed—Proving Contents and Execution—Revocation of First Will.]—A testator in 1857 executed a will, and in 1866 executed a second one. At the testator's death the first will only was in existence, the other having been destroyed by the testator. Probate of the will of 1857 was applied for, and was opposed on the ground that the testator had revoked this will by the will of 1866; and, having subsequently destroyed the latter *animo revocandi*, had died intestate. The execution and date of the will of 1866 were proved by two clerks, the attesting witnesses, one of whom proved that, during the testator's lifetime, he discovered the will lying in the testator's waste-paper basket, in pieces, and that he took the pieces away, gummed them together, and read the whole will, and that it disposed of all the testator's property, and in a different manner to the first will, but did not contain any express clause of revocation of former wills. This was the only evidence of the contents of the second will. *Held*, and affirmed on appeal to the Full Court, that the contents of the will of 1866 were sufficiently proved, and that they operated as a revocation of the first will. *Macoboy v. Madden*, 5 W.W. & A'B. (I. E. & M.,) 38.

Destroyed — Proving Contents — Evidence.]—Statements of the testator to a witness as to the contents of a destroyed will, set up in opposition to another will, were held inadmissible. *Ibid.*

(*h*) *Appointment of Executors.*

Will and Codicils—Codicil appointing Additional Executors.]—J.S. left a will and three codicils, and appointed executors by his will. The second codicil revoked certain legacies, confirmed others, and revoked the appointment of one executor, and appointed two additional executors. The third codicil mentioned the first codicil, but not the second, revoked certain legacies, and again revoked the appointment of the executor mentioned by the second codicil, and revoked a legacy to him left by the will and second codicil, but confirmed the will in every other particular. *Held*, reversing *Molesworth, J.*, that the revocation of legacies by the third

codicil in no way affected the appointment of executors by the second codicil, and that probate should be granted to the applicants, who were two executors—one appointed by the will and the other by the second codicil. *In re Stephenson*, 1 W.W. & A'B. (I. E. & M.,) 73.

Mistake—Evidence to Explain—Signature by Legatee and Executor.]—A testator left all his property to J.H., his wife and family, appointing "J.H. my testator to carry out the effect of my will." The will was attested by W., the wife of J.H., and J.H. also signed it. *Held* that under Sec. 13 of the "*Wills Statute*" neither J.H. nor his wife could take any interest, and upon an affidavit by W. that he had at the testator's request drawn up the will and had written *testator* instead of *executor* thinking the words meant the same, the Court granted probate to J.H. omitting his signature from the probate copy of the will. *In the Will of Bannister*, 3 V.L.R. (I. P. & M.,) 114.

Limited Appointment.]—A testator died in Western Australia appointing an executor and providing that "if it should be requisite or convenient to have an executor in Melbourne" in order to deal with Victorian property—"I request that S. should act." Probate granted to S., limited to Victorian property. *In the Will of Landor*, 5 V.L.R. (I. P. & M.,) 66.

Substituted Executorship.]—A will appointed J.M. executor in case he should have to sell certain property devised, and in case he should not so have to sell, appointed A.B. executrix. Administration *c.t.a.* granted to A.B. upon J.M.'s concurrence. *In the Will of Barclay*, 3 V.L.R. (I. P. & M.,) 59.

A will appointed testator's wife executrix during widowhood, and "on her death (or if she shall marry again, then on her marriage) M'M. executrix, executor, and trustees." The Court granted probate to the widow during widowhood, reserving leave to M'M. to come in and prove upon her death or re-marriage. *In the Will of Fitzpatrick*, 3 V.L.R. (I. P. & M.,) 62.

Probate—Testamentary Paper—No Operative Words appointing Executors.]—Short notes of instruction for a will which had been duly signed, contained as the only words appointing executors the following:—Trees. and Exors.—*Louis Kitz*, of Geelong, watchmaker; *Robert M'Donald*, of Geelong, chemist. *Held* that the question as to whether probate or administration *c.t.a.* should be granted being unimportant, probate might be granted. *In re Amiet*, 1 W.W. & A'B. (I. E. & M.,) 65.

Executors according to the Tenor—Trustees—No Executor Named.]—G., by will, bequeathed all his property to A. and B., in trust for his wife and children, but appointed no executor. *Held* that probate could not be granted to A. and B. as executors according to the tenor, and that if all the children of G. were infants, the widow was entitled to administration *c.t.a.* Upon production in the Master's office of the written consent of the widow verified by affidavit, and of an affidavit that all the children were infants, administration *c.t.a.* was granted to A. and B. *In re Grant*, 1 W.& W. (I. E. & M.,) 193.

Executors according to the Tenor.]—Where a testator devised real estate to trustees, and certain personal estate to the widow, but made no general bequest of other personal estate, the Court refused probate to the trustees as executors according to the tenor, but granted administration *c.t.a.* to the widow. *In the Will of Bermingham*, 5 A.J.R., 159.

Where a testator bequeathed and devised all his personal and real estate to the widow for life, remainder to children, and appointed two persons "to act as trustees to carry out this my will," the Court thought that the appointment related to the real estate only, and that they were not executors according to the tenor. Administration *c.t.a.* to the widow. *In the Will of Rowley*, 5 A.J.R., 160.

Executors according to the Tenor—Trustees—Estate not Disposed of.]—A testator by his will appointed his widow and two of his sons his "trustees," but did not purport thereby to dispose of the whole of his property. *Held* that the widow and sons could not be considered as executors according to the tenor, since the will did not purport to dispose of the whole of the property; and that the applicants were entitled to a grant of administration *c.t.a.*, and that if an affidavit were filed stating that the will did in fact dispose of all the property, the usual security would be dispensed with. *In the Will of Brown*, 4 V.L.R. (I. P. & M.,) 47.

Executor according to the Tenor—"Trustee."]—A testator bequeathed all his real and personal estate to D. and his heirs, to hold the same according to the nature and tenor thereof respectively upon certain trusts. D. was referred to as "trustee" throughout the will, and the term executor was not used. *Held* that D. was executor according to the tenor. *In the Will of Chellew*, 6 A.L.T., 17.

Contingent Appointment—Provision for Substitution on a Certain Event.]—*See in the Will of Ogilvie*, 5 A.J.R., 170; *post column* 1527.

Limited Executorship—Executors according to the Tenor.]—Z. bequeathed all his personalty to his wife authorising her to pay debts, but directed in case of his wife's re-marriage the whole property was to go over to the children, appointing trustees to act for them. The Court granted the widow probate during widowhood as executrix according to the tenor, saving the rights of the trustees. *In the Will of Zeis*, 3 V.L.R. (I. P. & M.,) 110.

And *see* cases *post column* 1532.

Executor according to the Tenor—Sole Devisee for Life not entitled to Probate as Executrix.]—A testator by his will left all his property to his children in equal shares, subject to a life estate in favour of his widow, to whom he entrusted during her life all his properties, &c., for the

maintenance of herself and children, and left the management to her, with the advice of trustees named. *Held*, that probate could not be granted to the widow as executrix according to the tenor, but administration *c.t.a.* granted to her, with leave to enter into the administration bond without sureties. *In re Cooper*, 1 W.W. & A'B. (I. E. & M.,) 68.

According to Tenor when Granted.]—The appointment of a person as universal legatee does not, of itself, constitute such person executor according to the tenor. There must be some duties to perform, such as to pay debts, &c., in order to constitute a universal legatee executor according to the tenor. *In the Will of Clark*, 2 V.L.R. (I. P. & M.,) 16.

Executor according to Tenor—Universal Legatee.]—A universal legatee is not entitled to a grant of probate as executor according to the tenor, but to a grant of administration *c.t.a.* *In the Will of Cochrane*, 4 V.L.R. (I. P. & M.,) 36.

Executor according to the Tenor—Universal Beneficiary.]—A testator made his brother universal devisee and legatee, and named no executors, and there was no affidavit as to the testator's debts. The Court refused to make an order for probate to him as executor according to the tenor, but granted administration *c.t.a.* to him, dispensing with sureties; the administrator, however, to enter into the ordinary bond. *In the Will of Keane*, 6 V.L.R. (I. P. & M.,) 18; 1 A.L.T., 201.

Executor according to the Tenor—Universal Legatee.]—Where a will made certain provisions as to the disposal of the real estate, but did not dispose of personal estate, and there was nothing in it about legacies, *Held* that the universal legatee was not executor according to the tenor. *In the Will of Smith*, 4 A.L.T., 81.

Universal Legatee.]—Where a testator leaves all his property to his widow, that does not constitute her executrix according to the tenor, but the Court will, in granting administration *c.t.a.*, dispense with the administration bond. *In the Will of Dohrmann*, 7 V.L.R. (I. P. & M.,) 18.

Executors according to the Tenor—Duties to be Performed.]—A testator, after providing for the payment of his debts, bequeathed his property to his wife in trust for her and her children during the wife's life, and after her death to P. and C. in trust for the children, until the youngest attained twenty-one, when he directed a sale and division, and directed P. and C. to collect the rents and deduct all legal claims therefrom, but appointed no executors. *Semble*, that after the wife's death P. and C. were entitled to probate as executors according to the tenor. *In the Will of Coleman*, 4 V.L.R. (I. P. & M.,) 22.

Executors according to the Tenor.]—*Semble*, that where persons are to be deemed executors according to the tenor there must be duties to be entered upon by them immediately. *In the Will of Pallett*, 4 V.L.R. (I. P. & M.,) 33.

Where a testator, after directing payment of debts, gave all his property to his wife *durante viduitate*, and, after her re-marriage, to trustees for conversion and investment after payment of his debts, *Semble*, that this did not make the trustees executors according to the tenor. There being in the will, however, a power of leasing and dealing with infants' shares for maintenance, which would be exercised immediately, *Held* that the trustees were entitled to probate as executors according to the tenor. *Ibid.*

Executor according to the Tenor—Duties to be Performed.]—To constitute persons executors it is not necessary to use the word "executors;" it is quite sufficient if it appears by the will that they have to perform the duties of the office. *In the Will of Hollings*, 4 V.L.R. (I. P. & M.,) 46.

A bequest of all a testator's estate to persons named in the will, to be distributed and apportioned as the will directs, constitutes such persons executors according to the tenor. *Ibid.*

Executors according to the Tenor—Duties to be Performed.]—A testator made a simple bequest of all his property to four children to be equally divided between them, the *trustees* to be two persons named. *Held* that "trustees" meant "executors," and probate granted to the persons named as executors according to the tenor. *In re Gaunt*, 2 A.L.T., 4.

Executors according to the Tenor—Duties to be Performed.]—A bequest of all the testator's property "to be managed by" A. and B., constitutes A. and B. executors according to the tenor. *In the Will of Stephens*, 4 V.L.R. (I. P. & M.,) 36.

And the Court granted probate, even although the advertisement was for administration *c.t.a.* only. *Ibid.*

Executors according to the Tenor.]—Where a testator left all his property to his widow "to be used by her according to her judgment," the Court refused to grant probate to her as executrix according to the tenor. *In the Will of Sullivan*, 3 V.L.R. (I. P. & M.,) 43.

Executors according to the Tenor—Payment of Debts.]—Where a testator left all his property, "after payment of the debts, &c.," to his wife and children, the wife "to have entire control and management of the same for herself and children's use." the Court granted probate to her as executrix according to the tenor. *In the Will of Keane*, 3 V.L.R. (I. P. & M.,) 49.

Direction to Pay Debts.]—A will merely directing payment of debts, and making a person universal legatee, does not make that person executor according to the tenor. *In the Will of Phillips*, 2 V.L.R. (I. P. & M.,) 29.

Executors according to the Tenor—Payment of Debts.]—A testator bequeathed part of his personalty absolutely to his widow, devised certain real estate to trustees upon trust for his wife for life, and then left the residue of his property absolutely to his widow, directing

debts to be paid out of the portion left to his wife. The Court granted probate to the widow as executrix according to the tenor. *In the Will of Cluxton*, 3 V.L.R. (I. P. & M.,) 55.

Executor according to the Tenor—Payment of Debts.]—A testator devised and bequeathed after payment of debts, &c., all his property to his wife. *Held* that as there was no direction to the wife to pay debts, she was not executrix according to the tenor. *In the Will of Sell*, 5 V.L.R. (I. P. & M.,) 63.

Executor according to the Tenor—Direction to Pay Debts.]—The Court granted probate of a will to two persons as executors according to the tenor, such persons having been appointed trustees and universal devisees and legatees in trust, with a direction to pay debts. *In re Whitehead*, 1 A L.T., 201.

Executors according to the Tenor—Payment of Debts.]—Subjecting property in the hands of a sole legatee to payment of debts does not compel the latter to pay them, or constitute such legatee executrix according to the tenor, but the Court will, in granting administration *c.t.a.* in such a case, dispense with sureties to the administration bond. *In the Will of Robertson*, 7 V.L.R. (I. P. & M.,) 22; 2 A.L.T., 107.

Executor according to the Tenor—Payment of Debts.]—A will provided "after payment of all my just debts and testamentary expenses, I bequeath to my wife all my real and personal estate for her sole use and benefit, to bring up my family, till my youngest child attains the age of twenty-one years." On the youngest child attaining twenty-one the wife was to get £50 per annum, and the property was to go to the children in certain proportions; but there was to be a change in the management of the estate if the widow married before the youngest child attained twenty-one. *Held*, notwithstanding the provision for change in the management of the estate, that the wife was executrix according to the tenor. *In the Will of Addinsdale*, 10 V.L.R. (I. P. & M.,) 27.

"After Payment of my Just Debts"—When Legatee not Executor according to the Tenor.]—*In the Will of Gordon*, 6 A.L.T., 84; *see post column* 1524.

Executor according to the Tenor—Direction to Pay Annuities.]—An annuity is a legacy payable from time to time, and follows the same rule as if it were a legacy payable at once. Where a will vested property in trustees, directing them to pay annuities, *Held* that there was an implied direction to pay debts first, and such direction constituted the trustees executors according to the tenor. *In the Will of Azzopard*, 7 V.L.R. (I. P. & M.,) 30; 2 A.L.T., 136.

Executor according to the Tenor—Direction to Pay Legacies.]—A testator devised and bequeathed all his property to two trustees upon trust to pay legacies, and there was evidence that the testator intended to make the trustees executors. *Held* that the Court would only regard the language of the will in the matter, and probate granted to the two trustees as executors according to the tenor. *In the Will of Donegan*, 9 V.L.R. (I. P. & M.,) 26.

III. Execution.

(*a*) *Signature of Testator.*

Position of Signature—"Wills Act 1864," Sec. 8.]—Where the signature of a will was on the opposite side of the page to the will and was turned upside down, *Held*, by Full Court, reversing *Molesworth, J.*, that the "*Wills Act Amendment Act*" provided for the case of signature on the opposite side of the paper, and there being no suspicion that improper practices were resorted to to obtain the signature, probate was granted. *In the Goods of Campbell*, 2 W. & W. (I. E. & M.,) 119.

Signature of Testator and Witnesses across Body of Will—"Wills Act 1864," Sec. 8.]—Where a will was signed by the testator and witnesses across the body of it although there was room enough to render it possible for testator and witnesses to sign outside the attestation clause, the Court granted probate. *In the Will of Pople*, 5 A.J.R., 80.

Position of—In Attestation Clause—Affidavit of one Attesting Witness—"Wills Act 1864," Sec. 8.]—Where a testator signs his will by putting his signature in the attestation clause, an affidavit of one of the attesting witnesses only, that he saw the testator write his name, is insufficient to explain the singularity. There should be an affidavit by both witnesses that they saw the testator write his name there, and that it was written with the intention of signing the will. *In the Will of Coleman*, 4 V.L.R. (I. P. & M.,) 22.

Signature of Testator in Attestation Clause—Affidavit of Witnesses—"Wills Act 1864," Sec. 8.]—A testator signed his name in a blank intended for the attestation clause on a printed form. On application for probate, *Held* that there must be affidavits of both attesting witnesses as to the execution, or if that were impossible, of one of them, and an affidavit stating why that of the second could not be obtained. Further, that the affidavit should state the circumstances under which the testator signed, and the witness's reasons for concluding that the testator intended, by putting his name in the blank, to sign the will. *In the Will of Gordon*, 10 V.L.R. (I. P. & M.,) 25.

S.P.—*See In the Will of M'Gregor*, 6 A.L.T., 17.

Printed Form—Signatures in the Middle of the Disposition—"Wills Act 1864," Sec. 8.]—A testator used a printed form, at the foot of which was a printed attestation clause, where the testator signed his name, and the witnesses signed theirs beneath his signature. The space above the attestation clause not being sufficient, the testator continued his dispositions beyond the clause on the next page, so that the signatures appeared in the middle of the dispositions, and there were no fresh signatures at the end of the dispositions. On an affidavit explaining the circumstances, the Court granted administration *c.t.a.* (there being no appointment of executors). *In the Will of Holley*, 9 V.L.R. (I. P. & M.,) 52.

Initials.]—A will was headed "This is the last will and testament of A. H. Senior," and was signed simply A. H. *Held* that the will was properly signed. *In the Will of Harrington*, 6 A.L.T., 84.

Testator Only Signing in One out of Two Christian Names—Advertisement should Notice Discrepancy.]—*In the Will of Schneider*, 6 V.L.R. (I. P. & M.,) 8; 1 A.L.T., 144. *Post* under Practice—Advertisements.

When Signature Should be Made, "Wills Act 1864," Sec. 7.]—*Per Molesworth*, J., affirmed on appeal.:—To render a will valid it must be signed by the testator before the attesting witnesses affix their signatures. *In the Goods of Kelly*, 3 W.W. & A'B. (I. E. & M.,) 80.

Testator a Marksman.]—Where a will is executed by a marksman the affidavit of the attesting witnesses should state whether the testator was permanently unable to write by physical defect or want of education, or whether he only affixed his mark by reason of temporary inability to write from physical weakness or otherwise. *In the Will of McConville*, 4 W.W. & A'B. (I. E. & M.,) 19.

Marksman—Testator being too Ill to Write.]—Where a testator who was too ill to write signed his name as a marksman, the Court granted probate, although his name was misspelt, owing to improper instructions being given to the solicitor who prepared the will. *Re Hammon*, 5 A.J.R., 19.

Will—Codicil Signed by Mark—Testator too Ill to Write.]—A testator had signed a codicil by putting his mark. The affidavit stated that the reason for his so doing was because he was too ill to write his name, but did not state that the codicil was read by or to the testator before signing. *Held* that a fresh affidavit was necessary stating whether the testator was able to read or not, and also whether he did in fact read the codicil or had it read to him before affixing his mark. *In the Will and Codicil of Rae*, 6 A.L.T., 17.

Execution by Mark—Maiden Name.]—A married woman executed her will by a mark against her maiden name, that name being used because she had money deposited in a bank under that name. *Held* that the execution was sufficient. *In the Will of Hurd*, 9 V.L.R. (I. P. & M.,) 23.

(*b*) *Witnesses.*

Signature of Attesting Witness before Last Clause of Will—"Wills Act 1864," Sec. 8.]—Probate was granted of a will in which one of the attesting witnesses' signature was before the last clause of the will, on the ground that Sec. 8 of the "*Wills Act*" did not require the signature of the attesting witnesses to be at the bottom of the will. *In the Will of Hughes*, 1 A.J.R., 2.

Signature of Attesting Witnesses Across the Body of the Will.]—*See in the Will of Pople, ante column* 1514.

Subscribing before Acknowledgment of Testator.]—A testator signed his will in the presence of one witness only, who attested the signature. He then called in a second witness, read the will over to her, and said—"This is my will—be good enough to sign," and he and the first witness acknowledged their signatures to her and the first witness also stated that the signature was that of the testator, and she signed as witness. *Held* that since the acknowledgment of his signature by the testator was made after the signature of the first witness had been made, the execution of the will was insufficient. *In the Will of Braithwaite*, 4 V.L.R. (I. P. & M.,) 37.

Act No, 222, Sec. 7—Witnesses not Subscribing in Each Other's Presence.]—The fact that the two witnesses are not present at the time of each other's execution of the will does not invalidate the execution. But the Court required an affidavit that the second witness (who signed in the absence of the other) was requested to sign; that the testator was conscious that he had signed; and that he signed at the request and in the presence of the testator. *In the Will of Foley*, 5 V.L.R. (I. P. & M.,) 95; 1 A.L.T., 83.

Lands Refsrred to in Schedules — Witnesses Signing by Initials—"Wills Act 1864," Sec. 7.]—Where a testator disposed of the beneficial interest in real estate by reference to schedules, these following the attestation clause which did not refer to them, and each sheet being signed by the testator and initialled by the attesting witnesses, probate was granted to the schedules on an affidavit stating that all formalities were observed subject to the initials being a sufficient signature. *In the Will of Dyer*, 6 W.W. & A'B. (I. E. & M.,) 43; N.C. 12.

Witnesses not Signing at the Same Time—"Wills Act 1864," Sec. 7.]—It is necessary for the effectual execution of a will that it should be signed or acknowledged by the testator before two witnesses present at the time of the signature or acknowledgment who shall after that signature or acknowledgment subscribe their names. Where a testator signed in the presence of one witness who subscribed as such, and some time afterwards acknowledged it in the presence of the same and another witness, and the second witness subscribed but the first did not renew his subscription, probate refused and administration granted as upon an intestacy. *In the Goods of Lacey*, 6 W.W. & A'B. (I. E. & M.,) 44; N.C. 42.

(*c*) *Other Points Relating to.*

When Probate Granted.]—In order to admit a will to probate the Court must be satisfied that the execution of the will was a sane act. *In the Will of Abel*, 8 V.L.R. (I. P. & M.,) 34, 41; 4 A.L.T., 73.

Upholding Will in Opposition to Evidence of Attesting Witnesses.]—For circumstances under which the Court upheld a will against the evidence of an attesting witness which went to show that the testator did not sign before the attesting witnesses, *see In the Will of Cook*, 4 A.L.T., 176.

Evidsnce—Lapse of Time.]—A will was executed in 1866 and application for administration *c.t.a.* was made in 1883. The evidence as to its execution was an affidavit identifying the signatures of the attesting witnesses, stating that one was dead and the residence of the other not known. *Held* that the will was not sufficiently proved as a testamentary act, and in view of the time that had elapsed and the absence of evidence as to whether the will had been acted on, application refused. *In the Estate of Mary King*, 9 V.L.R. (I. P. & M.,) 19; 4 A.L.T., 114.

Will Consisting of Several Sheets but only Last one Signed—What Affidavit in support of Probate should Allege.]—In the case of a will consisting of several sheets, of which the last only is signed by the testator, the affidavit in support of an application for probate ought to specify and by some mark indicate that each sheet was the subject matter of the testator's discretion, and each sheet should be marked by the commissioner before whom the affidavit is sworn as being referred to by the affidavit of the witness. *In the Goods of Black*, 1 W.W. & A'B. (I. E. & M.,) 72.

IV. Revocation.

(*a*) *What may be Revoked.*

Mutual Wills.]—Mutual wills are revocable, and the will revoking a mutual will is entitled to probate. There may, perhaps, be a liability with reference to the contract, but the redress must be sought in some other Court than a Court of Probate. *In the Will of Nesbit*, 2 V.L.R. (I. P. & M.,) 61, 65, 66.

(*b*) *Methods of Revocation and when Wills deemed Revoked.*

By Marriage.]—S., domiciled in Victoria, made his will in 1867. He went to Scotland with his deceased's wife's sister (also domiciled in Victoria), and while in Scotland they were married. *Held* that, though by Scotch law such a marriage might be void and not voidable only, the marriage operated to revoke the will. *In the Will of Swan*, 2 V.R. (I. E. & M.,) 47; 2 A.J.R., 5.

Cancellation of Signatures—Memorandum by Witnesses of Intention to Revoke.] — The cancellation by the testator of his own name, and those of the witnesses to a testamentary instrument, but not so as to obliterate them, is not such a destruction of the instrument as is required by the "*Wills Statute*," Sec. 18, in order to revoke the instrument; and a memorandum at the foot of the instrument signed by the witnesses, but not by the testator, stating that it had been revoked by the testator in their presence, will not operate as a revocation. *In the Will of Barrett*, 2 V.L.R. (I. P. & M.,) 98.

Sole Devisee and Legatee Dying in Testator's Lifetime—Effect of.]—Where the sole beneficiary predeceased the testator, *Held* that the will was not thereby revoked, revocation only resulting from change of intention or from changes in the testator's circumstances of which the death of the object of his bounty is not one. Administration *cum testamento annexo* granted. *In re Churchyard*, 5 A.J.R., 102.

Inconsistent Clauses—One Clause Absolute and Express not Revoked by one of Doubtful Meaning.]—*Briant v. Edrick*, 1 V.R. (L.,) 35; 1 A.J.R., 49, *post* under Construction and Interpretation—General Principles.

Subsequent Testamentary Instrument—Appointment—Revocation of all Former Wills—Act No. 222, Sec. 18.]—A testatrix by will left all her property, or property which she might dispose of, to her husband, and by a subsequent will, which contained a clause revoking all former wills, she exercised a power of appointment over certain real property in Tasmania, appointing it to her children equally. *Held* that the second will, having only for its object the exercise of the power of appointment, did not revoke the prior will. *In the Will of Lilley*, 8 V.L.R. (I. P. & M.,) 32; 4 A.L.T., 81.

And *see Macoboy v. Madden*, *ante* column 1508.

Evidence.]—The executors of a will were about to proceed for probate when they received information of a subsequently executed will from an attesting witness to it. This second will was left in the possession of the testator. There was no evidence that this second will, which could not be found, revoked the first will. Probate granted to the first will. *In the Estate of Burgess*, 9 V.L.R. (I. P. & M.,) 34.

Revocation of Will by Cutting Out Testator's Signature—Notice of Application for Administration.]—Where a motion is made for administration, the testator's will having been revoked by the signature being cut out, it is necessary to serve special notice of the application upon the executors and beneficiaries under the will. *In the Estate of King*, 7 V.L.R. (I. P. & M.,) 26.

V. Revival.

Will Appointing "Executors to my Will."]—*Semble*, that a will simply appointing executors "to my will in the event of my husband being prevented from doing so either by illness or death," would operate as a revival of a revoked will. *In the Will of Lilley*, 8 V.L.R. (I. P. & M.,) 32; 4 A.L.T., 81.

VI. Probate and Letters of Administration.

(i.) *Probate and General Letters.*

(1) *To Whom Granted.*

(*a*) *In the Case of Husbands and Wives.*

To Husband.]—Where a married woman had made savings out of house allowances made to her by her husband, and had thereby acquired separate property, the Court granted administration of her estate to her husband. *In the Estate of Beaty*, 4 A.L.T., 81.

Administration—Husband of Divorced Wife—Curator.]—Where a husband and wife had been divorced, but there were children of the marriage, the Court considered the husband, as guardian of the children, entitled to administration of the wife's estate in preference to the Curator, and granted administration, during the minority of the children, to the husband. *In the Estate of Khoon Soon*, 8 V.L.R. (I. P. & M.,) 47; 4 A.L.T., 93.

Administration—Executor of Husband Surviving Wife—Wife's Estate Unadministered.]—Administration of the wife's estate will be granted to the executor of a husband who survived his wife, but died without having taken out administration to her estate, and in such case the administration bond will be allowed to be entered into with one surety only. *In the goods of Crawford*, 1 W. & W. (I. E. & M.,) 192.

Administration de bonis non—Contest between Husband and Surety of Original Administratrix.]—*See in the Goods of M'Vea*, 2 W.W. & A'B. (I. E. & M.,) 44; *post columns* 1532, 1533.

To Attorney of Husband.]—Administration of the property of a married woman was granted to the attorney under power of the husband—though the husband was an infant at the time of his marriage, and had not disclosed the fact—the Court considering that it would be going out of its province to enter into the legality of the marriage, and no one appearing to oppose the application. *In re Bellamy*, 1 A.J.R., 4.

What will Disentitle a Wife.]—Administration will be refused to a wife who misconducts herself as wife of the intestate; but there is no authority to prevent a wife getting administration for ante-nuptial want of chastity. *Cawley v. Cawley*, 6 W.W. & A'B. (I. E. & M.,) 41; N.C., 11.

Widow an Infant—Administration Revoked.]—Where administration had been granted to a widow who was only eighteen years of age, the Court revoked the administration, intimating it would be more inclined to grant the administration to a respectable nominee of the widow's than to a sister of intestate's, whose husband was in embarrassed circumstances. *In the real estate of M'Millan*, 3 A.J.R., 101.

Married Woman living Separate from her Husband—Husband's Consent.]—Where a married woman applied for administration of R.'s estate, the Court required her husband's consent, notwithstanding the fact that she had been living apart from him for years and he was at present, and had been for some time, out of the colony. *In re Reddin*, 3 A.J.R., 15.

Where the applicant, under circumstances similar to the above-mentioned, has not a subsisting protection order, the Court will not dispense with the husband's consent. *In re Wall*, 5 A.J.R., 5.

Husband's Consent.]—A testator, who died in 1866, appointed his widow to be executrix, and devised and bequeathed to her all his estate beneficially. The widow, in 1868, married again, and applied for probate in 1878, all the testator's debts having been paid, and his outstanding estate consisting of realty only, of which her husband was in possession. The husband refused to consent to the application. Application refused. *In the Will of Armstrong*, 4 V.L.R. (I.P. & M.,) 30.

Married Woman—Living Apart from her Husband.]—The fact that a married woman appointed executrix is living apart from her husband is no reason for granting her probate without his consent. *In the Will of Lynch*, 7 V.L.R. (I. P. & M.,) 19.

Married Woman—Protection Order—Act No. 268, Sec. 46.]—Notwithstanding Sec. 46 of Act No. 268, a married woman, the sole devisee and legatee under a will of which she is appointed executrix, and having obtained a protection order, cannot obtain probate without her husband's consent. *In the Will of Woodhead*, 7 V.L.R. (I. P. & M.,) 42; 3 A.L.T., 18.

Married Woman—Consent of Husband.]—A will left all the personal estate to a married woman, to her separate use, and appointed her executrix. At the time of application she had no other separate property. *Held* that her husband's consent was necessary. *In the Will of Swalling*, 9 V.L.R. (I. P. & M.,) 24; 4 A.L.T., 168.

Married Woman—Protection Order.]—A married woman obtained a protection order, and separated from her husband, and afterwards acquired a house in which she carried on a separate business. During the lifetime of her first husband she married a man named S. *Held* that an order *nisi* for administration to a creditor, describing her by her name of S. only, and asking for general administration, and not administration of property acquired since the separation, was bad on both grounds. *In the Estate of Smith, alias Peate*, 7 V.L.R. (I. P. & M.,) 27; 2 A.L.T., 114, 135.

No Evidence of Separate Property.]—Probate was granted to the will of a married woman, who had thereby disposed of a policy of life assurance on her own life, and to which after her death, her husband had assented, though there was no evidence that the policy was her separate estate. *In the Will of M'Millan*, 6 V.L.R. (I. P. & M.) 86; 2 A.L.T., 17.

Practice—Deceased Wife's Separate Estate—Affidavit.]—A husband applied for administration of his wife's separate estate. *Held* that the affidavits must state the date of marriage, and how and when she acquired such separate estate. *In the Estate of M'Pherson*, 9 V.L.R. (I. P. & M.,) 40; 5 A.L.T., 81.

It is not sufficient in such a case for the affidavit to state that the wife had at the time of her death real and personal property to her separate use, which she obtained subsequent to the "*Married Women's Property Act*" out of her savings; the affidavit must specify how and when this was acquired and set out particulars of the gifts forming part of such estate. *In the Estate of Hudson*, 9 V.L.R. (I. P. & M.,) 45.

Affidavit as to Separate Estate of a Married Woman—Act No. 736, Sec. 2.]—Where a married woman's estate consisted of money deposited in her name in a bank, being her separate property under Sec. 2 of Act No. 736, the Court granted administration in the absence of the usual affidavit as to separate property. *In the Estate of Lythgoe*, 9 V.L.R. (I. P. & M.,) 21.

Probate to Married Woman—Affidavit as to Separate Estate.]—The affidavit as to separate estate, on an application for probate to the will of a married woman, stated that the real estate was acquired in 1878, and that the personal property consisted of furniture and mining shares, partly given to her by friends and partly acquired by her out of the rents and profits of the real estate. *Held* that a fresh affidavit, setting forth with more particularity, how and at what date the testatrix acquired the personal property, was necessary. *In the Will and Codicil of Boundy*, 6 A.L.T., 16.

Married Woman—Property to Separate Use.]—In cases where administration is sought to the estate or probate to the will of a married woman, the Court requires that some property at all events should be shown to be her separate property. If that be shown the Court will grant probate, and leave the question of how much is separate estate for future consideration. *In the Will of Joliffe*, 10 V.L.R. (I. P. & M.,) 37; 6 A.L.T., 4.

Property lodged in a savings bank in the name of a married woman is *primâ facie* her separate property under Sec. 6 of the "*Married Women's Property Act*," and where a married woman has such a deposit the Court will grant probate, or administration of her estate, subject to any question as to the ownership that the husband may thereafter raise under Sec. 12 of the Act. *Ibid.*

(*b*) *To Creditors.*

Subject to higher rights, a creditor is entitled to administration, notwithstanding the provisions of the Act No. 99 ("*Curator's Act.*") *In the Goods of Bergin*, 1 W.W. (I. E. & M.,) 190.

Administration *cum testamento annexo* will be granted to a creditor although the Rules of 1853 provided for a grant to a creditor only in cases of intestacy. *In the Goods of Brasher*, 2 W. & W. (I. E. & M.,) 117.

Administration, with an exemplified copy of will annexed, was granted to a creditor where the testator died out of the jurisdiction and probate was granted out of the jurisdiction. *In the Will of Farley*, 9 V.L.R. (I. P. & M.,) 42.

Administration to a Creditor—Next-of-Kin Appearing but not Advertising—Costs.]—On motion by a creditor for administration to him, the next-of-kin had been served with a summons to show cause under Supreme Court Rules 1853, cap. viii., sec. 6, and appeared and claimed administration, but had not advertised his intention to apply for administration. *Held* that the creditor was entitled, but that the Court might revoke the letters, if the next-of-kin had any substantial cause to show, and grant others to the next-of-kin on payment by him of the creditor's costs. *In re Twist*, 1 W. & W. (I. E. & M.,) 17.

Compare Rules 1873, Sec. 6.

Contest between Executors and Creditor Seeking Administration cum testamento annexo—Costs.]—A testator left a will appointing two executors; no application for probate having been made by them, M., a creditor, proved his debt, and obtained an order for a summons to call upon executors, widow and next-of-kin to take out probate or administration *c.t.a.*, or show cause why such administration should not be granted to M. Advertisements to that effect were duly published, but the application was not heard for some time, owing to the suspense of business during vacation. During the interval one of the executors advertised for grant of probate to him, and both applications came on on the same day. *Held* that the executor was entitled to probate, and under circumstances showing that M. had not directly communicated with the executors as to their intentions no order was made for executors to pay M.'s costs. *Semble*, the grant of probate in such a case is generally conditional upon the executor paying the creditor's costs. *In the Goods of Heffernan*, 2 W.W. & A'B. (I. E. & M.,) 38.

Application by Creditor—Caveat Lodged—Mistake in Order Nisi.]—A caveat to an application by a creditor was lodged, and a rule *nisi* was granted directing, according to advertisement, the next-of-kin to show cause why administration should not be granted to the creditor "*within* fourteen days after the first publication," instead of "*after* fourteen days after, &c." The Court delayed the grant for some time, and then made it. *In the Estate of Quish*, 10 V.L.R. (I. P. & M.,) 95; 6 A.L.T., 171.

Administration c.t.a.—Application by Creditor—Reg. Gen., 23rd June, 1873, r. 6.]—A creditor wishing to apply for administration *c.t.a.* proved a debt before the Master, and obtained an order from a judge that she should be at liberty to issue out of the Master's office a summons calling upon the executrix and widow, if any, and next-of-kin of the deceased to show cause why, on a day not less than fourteen days after the first publication of the summons, letters of administration *c.t.a.* should not issue to the creditor. *Held, per Molesworth J.*, that this was the regular course under a liberal construction of Rule 6 of the *Reg. Gen.* of 23rd June, 1873. *Re Spinks*, 6 A.L.T., 36.

The summons issued by the Master was commanding "the executor," &c., "*within* fourteen days after the first day of publication of this summons you do appear before this Court to show cause," &c. *Held* that the summons was irregular. *Ibid.*

The summons was advertised in a newspaper, and in the same paper, not immediately after, was a notice that after the expiration of fourteen days after the publication an application would be made by the said creditor for administration *c.t.a.* The next-of-kin, who had published an

advertisement of his intention to apply for administration *c.t.a.* some time previously, but had withdrawn, lodged a *caveat* against the application, and the creditor then obtained a Rule *nisi* as usual against the caveator. The next-of-kin left the Rule *nisi* to be dealt with, refusing to admit anything, and putting the creditor to the expense of proving the will, and then expressing a wish to take out administration himself. *Held* that had the next-of-kin applied under his former advertisement, as next-of-kin having a better right than a creditor, he might have been in the right, but that, acting as he had done, the rule *nisi* should be made absolute, but without costs, since the caveator had been misled by the manner of the advertisement into lodging the *caveat*, and contesting the Rule. *Ibid.*

Administration de bonis non—Surety.]—The Court granted administration *de bonis non* of an intestate's estate to one of the sureties to the administration bond entered into by the intestate's administratrix, whose creditor the surety was, but intimated that a more regular course would have been to apply as a creditor of the administratrix, and that the application was granted only because there was no other applicant. *McKay v. Edwards*, 3 W.W. & A'B. (I. E. & M.,) 75.

Contest between Curator and Mortgagee whose Debt was not Due at Death of Intestate—Act No. 230, Sec. 12.]—Creditors, *i.e.* mortgagees whose debts were not due at time of death of intestate, applied for administration and so, also, did the curator. *Held* by the Full Court, overruling *Molesworth, J.*, that such mortgagees were creditors within the meaning of Act No. 230, Sec. 12, and as such entitled to administration and ready to take the grant and as such to be preferred to the curator. *In re Patrick Coady Buckley*, 3 A.J.R., 60, 131.

Act No. 230, Secs. 4, 12—Contest between Curator, Eldest Son of Intestate by a Former Husband, and Creditor, Administrator to Second Husband, who had obtained Administration to the Intestate—Son Preferred.]—*See In re Gallogly*, 5 A.J.R., 49; *post column* 1531.

Administration during Absence of Will Granted to Creditor where Executrix Refused to Prove or Renounce.]—*See In the Estate of Jones*, 3 V.L.R. (I. P. & M.,) 26; *post column* 1529.

(c) *To Guardians.*

Administration cum testamento annexo durante minore ætate—Guardian.]—It is not necessary in order for a guardian to obtain such administration to be first appointed guardian of an infant executrix, it is sufficient to advertise in the ordinary way for administration *c.t.a. durante minore ætate. In the Goods of O'Shea*, 2 W. & W. (I. E. & M.,) 116.

Administration cum testamento annexo—Trustee of Part of Property, Guardian of Infant Beneficiary.]—W. devised certain property to an infant, and the residue of his personal property to his brother who was out of the jurisdiction, and appointed P. trustee and guardian of the infant till she came of age. The Court refused to grant administration *c.t.a.* to P. *In the Will of Walker*, 5 V.L.R. (I. P. & M.,) 74.

Administration durante minore ætate—Infant Next-of-Kin—Administration de bonis non.]—Where the only next-of-kin of an intestate were infants, and there were no other relatives in the colony, the Court granted administration *de bonis non* to one of their testamentary guardians *durante minore ætate. In the Estate of Stanton*, 6 V.L.R. (I. P. & M.,) 99.

Infancy of Next-of-Kin of Intestate—Administration durante minore ætate to Guardian.]—A testator by will left his estate to his wife for life, and then to one M. in trust for the testator's children, appointing M. guardian of the children. The widow died intestate, leaving separate personal estate. The Court granted administration during the minority of the children to the guardian. *In the Estate of Robertson*, 4 A.L.T., 94.

Divorced Husband as Guardian Preferred to Curator as Administrator of Wife's Estate.]—*See in the Estate of Khoon Soon. Ante column* 1519.

(d) *To Legatees and Beneficiaries.*

Administration c.t.a.—No Executor Named in Will—No Next-of Kin.]—A testator left a will as follows:—"After payment of my just debts I give £100 for the benefit of Court Sherwood Forest, £150 to L., and the residue for employment for three weeks off and on with—." No executors were appointed. L. with the consent of her husband, applied for probate as executrix according to the tenor, or for letters of administration *c.t.a.* Her affidavit stated that deceased was unmarried and left no next-of-kin. The Court held that L. was clearly not executrix according to the tenor, and granted administration *c.t.a. In the Will of Gordon*, 6 A.L.T., 84.

Conditional Grant of Administration c.t.a. to a Beneficiary under a Will upon Exemplification being filed.]—*In the Estate of Severne*, 6 V.L.R. (I. P. & M.,) 1; 1 A.L.T., 123; *post* under subheading—Administration with Exemplified Copy of Will Annexed.

(e) *To Attorneys.*

When.]—Administration may be granted to the attorney under power of a creditor resident out of the jurisdiction. *In re McConochie*, 5 W.W. & A'B. (I. E. & M.,) 36.

Where one executor has obtained probate, with leave reserved to another executor to come in and prove, administration *c.t.a.* will not be granted to the attorney under power of such other executor. *In the Will of Kennedy*, 1 V.R. (I. E & M.,) 19.

For circumstances under which Court granted administration to attorney under power of an infant husband, *see In re Bellamy, ante column* 1519.

Substituted Attorney.]—Administration will not, unless any special facts appear, be granted

to a substituted attorney appointed by the original attorney under a power of attorney containing an express power of substitution. *In the Will of M'Combie*, 1 V.R. (I. E. & M.) 18.

Substituted Attorney.]—The Court granted administration *c.t.a.* to the substituted attorney of an executor who was abroad, where the estate was large, the necessity for administration urgent, and the original attorney refused to act. *In the Will of Labilliere*, 2 V.R. (I. E. & M.,) 51.

Substituted Attorney.]—The Court refused to grant administration to a substituted attorney, appointed under an express power of substitution contained in the original power of attorney from the next-of-kin. *In the Goods of White*, 4 W.W. & A'B. (I. E. & M.,) 19.

Substituted Attorney of Attorneys under Power.]—In a case where the Curator had administered as upon an intestacy and a subsequent will was found, and the persons interested had sent out a power of attorney to A., who, being about to leave the colony, appointed B. as his substitute by virtue of authority in the power, the Court refused, in the absence of special circumstances, to grant probate to B. *In the Will of Henderson*, 5 A.J.R., 49.

Substituted Attorney.]—An intestate died in New South Wales, leaving as his only next-of-kin his father, resident in England. The father appointed B., a person in New South Wales, his attorney under power to administer, and B., under the power given him, appointed C., in Victoria, as his substitute. The Court refused to grant administration to C., and intimated that the father should nominate some one in Victoria. *In the Estate of Hussey*, 1 V.L.R. (I. P. & M.,) 43.

Two Attorneys—Administration c.t.a. Granted to One.]—A grant of administration *c.t.a.* will be granted to one only of two attorneys under power of the original executors, and not to the two jointly. *In the Estate of Donald*, 4 V.L.R., (I. P. & M.,) 46.

See S.P., *In the Will of Macdougall*, *In the Will of Eastwood*, 7 V.L.R. (I. P. & M.,) 23; A.L.T., 114.

Foreign Will—Foreign Executor not having Proved—Administration c.t.a. to his Attorney.]—Where a testator died in England and the executor appointed had not proved in England, the Court granted administration *c.t.a.* to the executor's attorney under power. *In the Will of Soper*, 5 V.L.R. (I. P. & M.,) 79.

15 Vict. No. 10, Sec. 15—Executors out of Jurisdiction—Attorney of One.]—Where a testator appointed two executors out of the jurisdiction and one of them nominated and appointed an attorney under power, the Court granted administration *c.t.a.* to such attorney, reserving leave to the other executor to come in and prove. *In the Will of Gunning*, 5 V.L.R. (I. P. & M.,) 80.

Where One Executor out of the Jurisdiction—Attorney.]—Where one of two executors was out of the jurisdiction and had appointed an attorney under power to join in taking out administration with the co-executor within the jurisdiction, the Court refused to grant administration *c.t.a.* to the agent and the executor within the jurisdiction; but granted probate to the executor within the jurisdiction with leave to the other to come in and prove. *In the Goods of Hickman*, 3 W.W. & A'B. (I. E. & M.,) 72.

Administration c.t.a. in England—Attorney in Victoria.]—The grant of administration *c.t.a.* of the estate of a testator domiciled here to a person in England, will not entitle the attorney under power of such person to a similar grant out here, if there be more eligible persons capable of applying. In such a case the Court granted the application upon an affidavit of there being no relatives of the testator out here, and the grant having been made in England to a person as near in kin as any other person entitled. *In the Estate of Tarraway*, 4 V.L.R. (I. P. & M.,) 53.

Executors Resident in England—Attorney under Power.]—The Court will not grant probate of a will to executors resident in England, and (*semble* that) the Court will grant administration with an exemplified copy of the will annexed, to the attorney under power of such executors who have proved the will in England personally, and not as attorney of the executor. *In the Will of Slack*, 8 V.L.R. (I. P. & M.,) 23.

And *see* generally cases *post* under sub-heading—Administration with Exemplified Copy of Will annexed.

Administration c.t.a.—Trustees, Executors, and Agency Company.]—The Court granted administration *c.t.a.* to the Trustees, Executors, and Agency Company, as the attorney under power of an executor resident out of the colony. *In the Will of Reynolds*, 7 V.L.R. (I. P. & M.,) 61; 2 A.L.T., 142.

Verification of Will.]—*Per Molesworth, J.*—There should be a verification of the will by some one in a position to do so. *Ibid.*

Trustees, Executors and Agency Company—Act No. 644, Sec. 2—Persons Resident in the Jurisdiction.]—An infant son, the sole devisee and legatee of a testator, whose executrix had died intestate, concurred in the application by the "Trustees, Executors, &c. Co." for administration *de bonis non*. *Held* that Sec. 2 did not authorise persons in Victoria entitled to administration to substitute the company for themselves, and application refused. *Semble*, the application would be refused if a private individual similarly recommended were applying, the Court leaving it to the person recommending, or any other eligible person to apply. *In the Estate of Payne*, 10 V.L.R. (I. P. & M.,) 91; 6 A.L.T., 116, *sub nom. In the Will of Payne*.

(*f*) *Executors and Administrators.*

Power to Executor to Nominate Another or Substituted Executor—Grant without Prejudice to Power.]—A testator appointed an executor,

with power to appoint another person to act with him or instead of him. The Court granted probate to the executor without prejudice to his right to nominate another person, and intimated that if the power were exercised a subsequent application might be made by the nominee to be substituted. *In the Will of Hill*, 6 V.L.R. (I. P. & M.,) 16 ; 1 A.L.T., 179.

Where leave has been reserved to one executor to come in and prove, it is not necessary for him to move the Court for that purpose, such probate may be taken out in the office. *In the Will of M'Donald*, 4 W.W. & A'B. (I. E. & M.,) 17.

Separate Application by Executors.]—Where one application was made for probate to two executors reserving leave to the third to come in and prove, and at the same time application was made for probate to the third executor, the Court refused to make two orders but would grant one order for probate to the three executors. *In re Taylor*, N.C., 32.

Wife Appointed Executrix—Trustees Appointed to Advise Executrix.]—Where a testator made a will leaving his property to his wife (the executrix) for life, the remainder to the children, and appointed two persons as trustees merely to advise her, the Court granted probate to the executrix reserving leave for trustees to come in and prove as in the event of her death before the children came of age they might have to act. *In the Will of Davey*, 5 A.J.R., 130.

Wife Appointed Executrix—Gift to Trustees if they should Prove the Will.]—A testator appointed A. and B. trustees, and bequeathed a sum to be equally divided between them if they should prove the will, and appointed his wife sole executrix. Probate granted to wife solely. *In the Will of Gillibrand*, 5 V.L.R. (I. P. & M.,) 94.

Contingent Appointment of Executor—Provision for Substitution on a Certain Event.]—Under a will C. was appointed executor "if he shall have attained the age of twenty-one at my decease," and then followed a provision for trustees being appointed executors in the event of C. not being of age. C. was not twenty-one when the testator died but was when he applied for probate, the trustees having renounced. The Court granted administration with the will annexed to C., not granting him probate because there was no absolute appointment followed by a provision for substitution on a certain event. *In the Will of Ogilvie*, 5 A.J.R., 170.

And *see* generally as to Appointment of Executors' Cases *ante columns* 1508—1514.

On Renunciation of Executors.]—Where executors had filed a deed of renunciation, February, 1879, but no one had applied for probate in the meantime, probate was granted to them in April, 1879, the deed being left on the file. *In the Will of Boardman*, 5 V.L.R. (I. P. & M.,) 70.

Renunciation—In Tasmania.]—A testator died in Tasmania, and in Tasmania an executor appointed duly renounced, the renunciation being duly filed in Tasmania. *Held* that the Court was not bound by such renunciation, and probate granted, reserving leave to him to come in and prove. *In the Will of Wherrett*, 9 V.L.R. (I. P. & M.,) 25.

Renunciation of Probate by Executors Abroad—Effect of.]—The renunciation by an executor of the trusts of a will in another colony does not affect proceedings for probate in this colony, and probate will be granted in this colony of an exemplified copy of the will, with leave reserved to the executor who has renounced to come in and prove. *In the Will and Codicils of Levey*, 6 A.L.T., 117.

Renunciation When Allowed.] — An executor may be allowed to renounce probate when he has never acted, the order has not been taken out, and probate has not passed the seal of the Court. *In the will of Parnell*, 2 V.R. (I. E. & M.,) 56.

Executor of Executor—Renunciation.]—An executor of an executor, who has taken out probate to his testator, cannot renounce the executorship of his testator's testator. *In the Will of Pirie*, 10 V.L.R. (I. P. & M.,) 43; 6 A.L.T., 33, *sub nom. In the Estate of Pirie.*

Executors out of Jurisdiction.]—Where executors appointed by the will were resident in Albury, N.S.W., and the property was all situate in Victoria, the Court granted probate to them in the usual form. *In the Will of Burke*, 5 V.L.R. (I. P. & M.,) 69.

One Executor out of Jurisdiction—Attorney—Probate not Granted to Attorney but Granted to Executor within the Jurisdiction with Leave to the Other to Come in and Prove.]—*See In the Goods of Hickman, ante columns* 1525, 1526.

Executors in Sydney—Security—Justifying.]—The Court, in granting probate to an executor resident in Sydney, required the security usual in the case of a grant of administration, and allowed the executor and his sureties to justify in New South Wales before a Commissioner of the Supreme Court of Victoria. *In the Will of Neville*, 8 V.L.R. (I. P. & M.,) 29; 4 A.L.T., 15.

See S.P., *In the Will of Cullen*, 9 V.L.R. (I. P. & M.) 30.

Executor Resident in England.]—The Court will not grant probate of a will to an executor resident in England. *In the Will of Slack*, 8 V.L.R. (I. P. & M.,) 23.

Separate Executors to Different Portions of Property in Victoria.]—Where a testator's property was situate in Victoria, and he appointed his wife executrix so far as a certain business was concerned, and A. the executor of the residue, the Court refused to grant separate probates, but offered to grant probate to A. subject to the wife's consent. *In the Will of Davies*, 5 V.L.R. (I. P. & M.,) 93.

To Executors according to the Tenor.]—*See* cases *ante columns* 1509—1514.

Where Executors or Administrators are Entitled to Grant of Administration de bonis non.]—*See* cases *post columns* 1532—1534.

Application for Grant on Coming of Age—Notice to Administrator durante minore ætate.]—On an application for a grant of probate to executors upon their coming of age, notice of the intended application should be served upon the administrator *durante minore ætate*. *In re Patten*, 2 V.L.R. (I. P. & M.,) 97.

Executrix Marrying—Executor Coming in Pursuant to Leave Reserved.]—Upon the marriage of a person who was appointed executrix during widowhood, probate was granted to an executor coming in under leave reserved upon her marriage without revocation of the probate to her. *In the Will of Fitzpatrick*, 4 V.L.R. (I. P. & M.,) 45.

Executor durante absentia—38 Geo. III., Cap. 87—Act No. 427.]—38 Geo. III., cap. 87, providing for the appointment of an executor *durante absentiâ*, only applies to personalty, and the Court refused to make an appointment of an executor *durante absentiâ* of an executor appointed under Act No. 427. *In the Will of Ryan*, 7 V.L.R. (I. P. & M.,) 38; 2 A.L.T., 143.

(*g*) *To Persons under Special Circumstances.*

What are Special Circumstances.]—*Semble*, that immorality is not a ground for withholding a grant of letters of administration from the nephew of an intestate. *In the Goods of Peebles; Hall v. Nelson*, 2 V.R. (I. E. & M.,) 52; 2 A.J.R., 38.

Joint Administration.]—The Court under circumstances which showed that sureties could not be obtained if administration were granted to a widow alone, granted a joint administration to widow and eldest son. *In the Estate of Kernan*, 3 V.L.R. (I. P. & M.,) 50.

Executrix Refusing to Prove or Renounce—"Administration Act 1872," Sec. 36.]—On an application under Sec. 36 of the "*Administration Act* 1872," it appeared that the executrix had possessed herself of the will, and refused either to prove it or renounce probate, and moreover, would not bring it into Court. The Court made an order for administration during the absence of the will to a creditor applying under the section with costs against the executrix. *In the Estate of Jones*, 8 V.L.R. (I. P. & M.,) 26.

Donee of a donatio mortis causa.]—Administration granted to the donee of a *donatio mortis causâ*, but order to stand over till an advertisement settled by the Court had been inserted twice in a certain newspaper, such advertisement calling attention to the *donatio mortis causâ*, and the donee's claim to it. *In the Goods of Tully*, 4 W.W. & A'B. (I. E. & M.,) 15. *See* S.P., *In the Goods of Holton*, 6 W.W. & A'B. (I. E. & M.,) 40.

(*h*) *In other Cases.*

Person not Proving Himself of Full Age.]—Where plaintiff filed his bill for the grant to him of letters of administration, and the defendant pleaded the infancy of the plaintiff, and the only evidence that the plaintiff was of age was his own statement: *Held* that the plaintiff's statement did not amount to proof of his age; and that not having proved his age the bill should be dismissed without costs. *In the Goods of Peebles; Hall v. Nelson*, 2 V.R. (I. E. & M.,) 52; 2 A.J.R., 38.

Letters of Administration—Mother Entitled before Brother.]—The mother of an intestate is entitled to administration in priority to the brother. Before administration can be granted to the brother, there must be a consent by the mother, or an affidavit that she declines to take out administration. *In the Goods of M'Farlane*, 3 W.W. & A'B. (I. E. & M.,) 66.

Joint Grant—Widow and Son.]—A joint grant of administration will not be made to the widow and son of an intestate, although the widow consents. *In the Goods and Real Estate of Moylan*, 2 V.R. (I.E. & M.,) 69.

Nephew of Intestate Improperly Using Assets.]—Where an intestate had during his life become lunatic, and upon his so doing, his nephew took possession of his stock-in-trade and shop, and continued to carry on the business in it, and kept no proper or distinct accounts as to the stock-in-trade as it stood at the time he took possession, and as it stood at the time of his applying for administration, having sold some of the stock, and added other stock, *Held* that the confusion thus created would in itself be a ground for refusing the nephew administration of the estate. *In the Goods of Peebles; Wall v. Nelson*, 2 V.R. (I. E. & M.,) 52; 2 A.J.R., 38.

Heir-at-Law.]—An intestate died in 1864, and left a widow and two sons, and from his death the real estate had been in the joint occupation of the widow and two of the intestate's brothers, and was used for the benefit of the widow and the sons. The Court refused a motion by the eldest son and heir-at-law for a grant of administration of the real estate to him on the ground that by giving him the grant a conclusive title would be given to him to a matter which might be disputed. *In the Real Estate of Cropley*, 4 V.L.R. (I. P. & M.,) 61.

Son—Daughter.]—A son is entitled to administration as against a daughter, especially if the latter be married. *In re Dunn*, 1 A.L.T., 60.

Eldest Son—Affidavit.]—The affidavits, in an application for administration to an eldest son, should distinctly state that there was no widow, or she should consent to the application. *In the Estate of Trail*, 3 A.L.T., 27.

Next-of-Kin within Jurisdiction Preferred to one Resident Without—Married Woman.]—Letters of administration will be granted to a next-of-kin resident within the jurisdiction in preference to one temporarily resident out of it, although the former may be a married woman. *In the Estate of Chambers*, 4 V.L.R. (I. P. & M.,) 21.

One of Next-of-Kin—Sole Legatee and Executor Predeceasing Testator.]—Where P., appointed sole legatee and executor under a will, had predeceased the testator, the Court granted administration *c.t.a.* to one of the next-of-kin. *In the Will of Plummer*, 5 V.L.R. (I. P. & M.,) 81.

Act No. 230, Secs. 4, 12—Contest between Curator, Eldest Son of Intestate by a Former Husband, and Creditor Administrator to Second Husband who had Obtained Administration to the Intestate.]—G., a married woman, died intestate, her second husband obtained a rule to administer and died leaving a will but no executor, M., a creditor of G., took out administration *c.t.a.* to the second husband's estate, D., a son of G. by her first husband, also applied. *Held* that as between curator and others the curator was not entitled under Sec. 12 of the Act, and as between M. and D., although under Sec. 4 G.'s husband might have been entitled to half G.'s property, yet M.'s right to be preferred as representative to G. only arose where G.'s next-of-kin took no beneficial interest, and as D. was first in the field with his advertisement he should be preferred. Rule to D. *Quære* whether the rule as to husband's preference to children to administration of personalty applies to obtaining a rule to administer realty under Sec. 4 of the Act. *In re Gallogly*, 5 A.J.R., 49.

Contest between Foreign Administrator and Persons nearer of Kin.]—C. died in India, leaving a brother and a mother. The brother obtained administration in India. *Held* that that did not give him or his attorney under power a better right than the mother. *In the Estate of Crowe*, 5 V.L.R. (I. P. & M.,) 65.

Administration c.t.a.—Trustee of Part of Property and Guardian.]—Where a testator devised certain property to an infant and the residue of the personal property to his brother out of the jurisdiction, and appointed P. trustee and guardian of the infant till she came of age, the Court refused to grant administration *c.t.a.* to P. *In the Will of Walker*, 5 V.L.R. (I. P. & M.,) 74.

Trustees, Executors, and Agency Company—Person Entitled to Administration Substituting the Company.]—If a person who would be entitled to administration, resides within the jurisdiction of the Court, he cannot substitute the Trustees, Executors and Agency Company, or any other person for himself; though if he resided out of the jurisdiction he could do so by power of attorney, &c. *In the Will of Payne*, 6 A.L.T., 116.

To Nominee of a Company.]—A testator appointed as executors such persons, being directors of the company, as the Trustees and Agency Company might under its seal nominate; the company duly nominated two of its directors as executors. The Court granted probate to them as individuals. *In the Will of Hadden*, 5 V.L.R. (I. P. & M.,) 91; 1 A.L.T., 74.

Power to Appoint new Trustees.]—A will appointed two persons "executors and trustees" and contained a power to appoint new trustees. The trustees and executors disclaimed, and the person appointed by the will for the purpose appointed two others as trustees. The Court refused to grant probate to these persons, on the ground that the power was not to appoint executors. *In re Campbell*, 1 V.L.R. (I. P. & M.,) 32.

(2) *When Grant Limited.*

Limited Administration—Equity Suit.]—For form of order where administration was granted to a nominee of plaintiffs in an equity suit touching the rights of the intestate under the will of another person, the object of the suit being to determine the construction of the will, *see In the Estate of Morton*, 3 A.J.R., 102.

In what Cases.]—*See In the Will of Brown*, 4 V.L.R. (I. P. & M.,) 47; *ante column* 1510.

Separate Executors to Different Portions of Properties in Victoria—Probate only Granted to One, with Consent of Other.]—*In the Will of Davies, ante column* 1528.

Executor also Husband and Father of c.q.t.s.—Conditional Grant.]—C. died domiciled in N.S.W., having by will appointed H. and another his executors. They proved the will in N.S.W., and H. applied for probate in Victoria, the other executor being resident in N.S.W., and not joining in the application. Some time before his death, C., by deed poll, declared himself trustee of a mortgage under the "*Transfer of Land Statute*" in favour of H.'s wife for life, and after her death for her children. C. left no other real or personal estate in Victoria. The Court made the grant to H., upon his undertaking to have new trustees of the settled property, and to convey to them, such undertaking being incorporated in the order granting the probate. *In the Will of Cameron*, 6 V.L.R. (I. P. & M.,) 87; 2 A.L.T., 16.

(3) *Of what Instruments.*

See ante column 1500 *et seq.*

(ii.) *Particular Kinds of Administration.*

(*a*) *Administration de bonis non.*

Administration de bonis non—Contest between Husband and Surety of Original Administratrix—"Divorce Act" (No. 125,) Secs. 7, 11, 48.]—M'V. died intestate, and letters of administration were granted to his widow, A. joining in the bond as one of her sureties. The widow subsequently married M., and after marriage M. deserted her, and she obtained a protection order under the "*Divorce Act*" (No. 125,) Sec. 7. During the desertion she carried on business as a *feme sole*, and became indebted to A. Cohabitation was resumed which continued till her death, A.'s debt being still unpaid. A. published notice of his intention to apply for administration *de bonis non* of M'V.'s estate, to which no *caveat* was lodged, and M. applied for administration to the widow's estate, against which A. lodged a *caveat*. *Held* that under Secs. 7, 11, and 48 of Act No. 125 the resumption of cohabitation

after a protection order based upon desertion places the parties in the same position as to liabilities and rights of separate estate as in the case of a man and woman originally marrying; that the property acquired during the separation became the husband's on resumption of cohabitation, and there was no need for him to take out administration. Administration *de bonis non* to M'V.'s estate granted to A. *In the Goods of M'Vea, Murray v. Aitken*, 2 W.W. & A'B. (I. E. & M.,) 44.

Administration de bonis non—Nominee of Sureties—Nominee of Infant Children of Intestate—Costs.]—A. died intestate, and his widow took out administration and died shortly afterwards. D., the sister of A. and nominee of the sureties to the widow's bond, applied for administration *de bonis non* to A.'s estate. B., the maternal grandmother of A.'s infant children and their nominee, also applied. The Court granted administration to B., B. to pay D.'s costs of application as between party and party, D. being first in the field, and B. during the argument agreeing to pay her costs if B. got administration. *Semble*, if there is no imputation of misconduct a surety is a fit and proper person to be entrusted with administration *de bonis non*. *In re Austin*, 3 V.L.R. (I. P. & M.,) 111.

When Granted to Surety of Administratrix.]—*See M'Kay v. Edwards, ante column* 1523.

When Granted to Testamentary Guardian.]—*In the Estate of Stanton, ante column* 1524.

Administration de bonis non—Executor of an Executor.]—A. appointed B. C. and D. executors, of these only B. proved; B. died having partially administered, and appointed E. F. and G. executors. Application was made for administration *de bonis non* to E. with the consent of F. and G. The Court refused the application as being unnecessary. *In the Will of De Little*, 9 V.L.R. (I. P. & M.,) 32.

Next-of-Kin—Executors of Administratrix.]—The next-of-kin of an intestate are entitled to a grant of administration *de bonis non* in preference to the executors of the administratrix of the intestate. The Court, moreover, is disinclined to appoint more than one administrator of an estate. *In the Estate of O'Flaherty*, 6 V.L.R. (I. P. & M.,) 17; 1 A.L.T., 183.

Death of Administrator—Who Entitled to Administration of Intestate's Estate.]—Where an administrator dies without having fully administered, the next-of-kin of the intestate are entitled to administration *de bonis non*, in preference to the executors of the administrator. *In the Estate of Stanton*, 6 V.L.R. (I. P. &. M.,) 99.

Administration de bonis non—Contest between Next-of-Kin and Executor of Administratrix.]—The Court will grant administration *de bonis non* to the next-of-kin of the intestate in preference to the executor of the administratrix. *In the Estate of Beavan*, 7 V.L.R. (I. P. & M.,) 24; 2 A.L.T., 114.

Contest between Executor and Creditor seeking Administration c.t.a.—When Executor Preferred.]—*See In the Goods of Heffernan, ante column* 1522.

Administration de bonis non—Executor—Next-of-Kin.]—The executor of an administrator is not entitled to a grant of administration *de bonis non*; the next-of-kin of the intestate are the proper persons to apply. *In the Estate of Leahy*, 6 A.L.T., 16.

Administration de bonis non—Administratrix of Executor.]—A testator died leaving one F. sole executor and sole legatee. F. died intestate without having administered the whole property, and his widow took out administration to his estate. The Court granted administration *de bonis non* of the testator's estate to the administratrix. *In the Will of Naylor*, 6 A.L.T., 48.

Administration de bonis non—Executor of Administrator—Consent of Next-of-Kin.]—Administration *de bonis non* was granted to one of the executors of a husband, who had been administrator of his wife's estate, such executor being guardian of the children under the husband's will, and the wife's next-of-kin consenting to the application. *In the Estate of M'Ivor*, 6 A.L.T., 17.

Administration de bonis non—Son of Intestate—Consent of Widow.]—Where administration had been granted to the eldest son of an intestate with the consent of the widow, and the son died without having fully administered, and the only surviving son of the intestate then applied for administration *de bonis non*, the Court refused the application because no consent of the widow was filed. *In the Estate of Monichon*, 6 A.L.T., 28.

Administration de bonis non—When Granted.]—M. died in Victoria, and, as it was supposed, intestate. Administration was granted in Victoria to his widow, and she collected assets, and disposed of them as directed by a will, of which she was executrix, and which she and the executor named in the will proved in England. After her death intestate, the attorney under power of the executor of M. applied for administration *de bonis non* of M. in Victoria. *Held* that such grant could not be made till the administration wrongly granted, as upon intestacy, had been called in and revoked. *In re Minter*, 3 W.W. & A'B. (I. E. & M.,) 82.

(*b*) *Rule to Administer Realty and Administration of Real Estate under Act No.* 427.

To whom Granted.]—Where a brother of an intestate refused to apply for a rule, a rule was granted to the husband of intestate's sister. *In the Real Estate of Baldwin*, 6 W.W. & A'B. (I. E. & M.,) 40.

To whom Granted—Executor.]—An executor is not, from his obligation to pay debts, "a person interested in the estate" within the meaning of Sec. 4 of Act No. 230, so as to entitle him *virtute officii* to a rule to administer the realty of a testator as to which the will was silent. *In the Real Estate of Hood*, 4 W.W. & A'B. (I. E. & M.,) 20.

Rule to Administer Granted to Husband—Land Purchased by Wife with Husband's Money.]—Where land was purchased by a deceased wife with her husband's money and consent, and the Crown grant had been made out in the wife's name, the Court granted the husband a rule to administer subject to an affidavit that he consented to the property being treated as belonging to her. *In re Ellen Skinner*, 3 A.J.R., 7.

Husband's Preference to Children—Rule as to.]—*Quære*, whether the rule as to the husband's preference to children to administration of personalty applies to obtaining a rule to administer realty under Sec. 4 of Act No. 230. *In re Gallogly*, 5 A.J.R , 49.

Grant to Subsequent Applicant upon Neglect of First.]—C.M. obtained administration of the personal, and a rule to administer the real estate of an intestate, his uncle, but allowed the three months prescribed by the Rules of Court for filing an inventory of the personal estate to elapse without completing the bond as to the real estate. Under these circumstances he moved *ex parte* for a renewal of the order as to the real estate, and for leave to file an inventory *nunc pro tunc* upon an affidavit explaining his delay. In the meantime another next-of-kin, a brother of the intestate, arrived in the colony with a power of attorney from the children of three deceased brothers of the intestate, advertised his intention of applying for a rule to administer, and filed the usual affidavit. Upon motion by the brother, on notice to the nephew, a rule to administer was granted to the former. *In the Freehold Lands of Molloy*, 1 V.R. (I. E. & M.,) 15; 1 A.J.R., 8, *sub nom. In re Molloy.*

Death of Widow before Property Administered—To whom Rule Granted.]—A widow of an intestate, who left a son surviving him, obtained a rule to administer his freehold estate, but died before she had fully administered it, and while the son was under age. The Court expressed an opinion that a rule to administer the freehold so far as not already administered should be granted to a relative of the intestate rather than to the widow's executors. *In the Estate of Mather*, 8 V.L.R. (I. P. & M.,) 24; 3 A.L.T., 134.

When Rule Granted.]—Rule to administer real estate granted to widow, which real estate the intestate had agreed to purchase, and of which he had paid part of the purchase-money and the widow had paid the balance. *In the Real Estate of Welsh*, 4 W.W. & A'B. (I. E. & M.,) 17.

When Rule Granted—Delay in Proving Will.]—Where a will devising real estate was in existence, but had not been proved, and more than a year had elapsed since the testator's death, a rule under the Act No. 230, Sec. 4, was granted to a creditor to administer the real estate as upon an intestacy, although the land in question had been sold by a mortgagee after the death of the testator (mortgagor.) *In the Freehold Lands of King*, 5 W.W. & A'B. (I. E. & M.,) 37.

When Granted—Partial Intestacy—Act No. 230.]—The Act No. 230 authorising the grant of a rule to administer undevised real estate applies to a case of a partial intestacy; and in such a case a rule will be granted, with such variations from the form in the schedule as will meet the particular case. *In the Real Estate of Moore*, 3 W.W. & A'B. (I. E. & M.,) 77.

In such a case, although both personalty and undisposed of realty will be administered by the same person, separate accounts of the different kinds of property should be kept. *Ibid.*

When Rule Granted—Intestacy—"Transfer of Land Statute" (No. 301,) Secs. 67—74.]—Where a testator had an evident intention to dispose of all his property, and there was no direct devise of the lands passing the legal estate, but the executor had power to sell them, *Held* that the testator could not be treated as having died intestate as to them, and a rule to administer under the "*Transfer of Land Statute*" refused. *In the Real Estate of Gow*, 4 W.W. & A'B. (I. E. & M.,) 18.

NOTE.—Secs. 67—74 of the Act No. 301 are repealed by Act No. 427.

Intestate Dying before "Administration Act 1872"—Administration de bonis non—Administration of Real Estate.]—Administration had been taken out of the personal estate of an intestate, who died before the "*Administration Act* 1872" came into force, and whose administratrix had died. On an application by his daughter for administration of his estate and effects, or failing that for administration *de bonis non*, the Court granted administration *de bonis non*, and also under Sec. 6 administration of the real estate to the applicant, as if she had obtained a rule to administer under the Act No. 230. *In the Estate of Ewing*, 6 V.L.R. (I. P. & M.,) 93.

Person Dying after the Passing of the "Intestates Real Estate Act," and before the Passing of the "Administration Act 1872."]—The Court granted a rule to administer the real estate of a testator who died after the passing of the "*Intestates Real Estate Act*," but before the passing of the "*Administration Act* 1872," and who had left a will appointing an executor, who subsequently obtained probate, but not disposing of the real estate. *In the Estate of Moran*, 2 A.L.T., 76.

W., in 1864, obtained administration to the personal estate of her deceased husband; the Court, in 1879, granted her a rule to administer his real estate under Act No. 230. *In the Estate of Wilkinson*, 5 V.L.R. (I. P. & M.,) 64.

Intestate Dying before the "Administration Act 1872"—Administration of Real Estate.]—An intestate died before the "*Administration Act* 1872" came into force, administration of his personal estate was taken out, but the administrator died leaving the property unadministered. The Court granted an applicant administration *de bonis non* of the personalty and administration of the realty as if she had obtained a rule to administer under the Act No. 230. *In the Estate of Ewing*, 6 V.L.R. (I. P. & M.,) 93.

Intestate Dying before the Date of Act No. 230—Affidavits.]—An order for letters of administration to the estate of a person dying before the "*Intestates Real Estate Act*"(No.230)was passed, should state the date of the death before that Act. *In re Quinlan*, 2 V.L.R. (I. P. & M.,) 17.

"Administration Act 1872," Secs. 6, 7, 9—Real Estate — Heir-at-Law — Affidavits.]—Where an application is made, under the "*Administration Act* 1872," for the grant of letters of administration of the real estate of an intestate dying before the 1st July, 1864, to the heir-at-law in whom the real estate is already vested and who has been in possession of the real estate since the death of the intestate, the affidavits should show a motive for the application. *In the Estate of Norton*, 3 V.L.R. (I. P. & M.,) 58.

Administration—Intestate Dying before Act No. 230.]—The Court has no jurisdiction to grant administration of the real estate of an intestate, who died before the coming into operation of the Act No. 230. *In the Estate of O'Grady*, 6 V.L.R. (I. P. & M.,) 95; 2 A.L.T., 43.

Order to Administer Personalty Granted—No Rule to Administer Real Estate under Act No. 230—Long Delay.]—Where an order to administer the personalty of an intestate had been granted in 1869, and the person to whom the administration had been granted was ignorant that he should have taken out a rule under the "*Intestates Real Estate Act*," to administer the realty, the Court granted, in 1884, administration of the real estate to such person. *In the Estate of Hennessey*, 10 V.L.R. (I. P. & M.,) 40.

Death of Person obtaining Rule to Administer—Proper Course.]—The proper course, when a person obtaining a rule to administer freehold under the Act No. 230 dies, is to grant a rule to administer the freehold so far as unadministered by the person obtaining the rule. *In the Estate of Mather*, 8 V.L.R. (I. P. & M.,) 24; 3 A.L.T., 134.

When Granted or Refused—Land held under a Constructive Trust.]—The Act No. 223, sec. 16, which provides that certain real estates of an intestate shall be dealt with as if held for a term of years, applies only to property of which the intestate was the beneficial owner, with power to dispose of it really and beneficially, and is not applicable to property held by the intestate either as a direct or constructive trnstee. Therefore, a rule to administer was refused as to lands held by an intestate partner upon a constructive trust for the partnership. *In the Real Estate of Twomey*, 3 W.W. & A'B. (I. E. & M.,) 67.

When Rule Granted—Act No. 230, Sec. 3.]—"The power to dispose," in Sec. 3, means "power to dispose beneficially," and the Act does not apply to trust estates. Where real estate had been purchased by an intestate and his two partners for partnership purposes, and had been conveyed to them as tenants in common, a rule to administer the real estate was refused on the application of the intestate's widow. *In the Real Estate of M'Pherson*, 4 W.W. & A'B. (I. E. & M.,) 22.

Administration of Real and Personal Estate—Separate Rules—Realty Vested in Intsstate as Mortgagee.]—Although the Act No. 230 may make the administration of real estate the same as that of personal estate, they arise under separate jurisdictions, and Sec. 6 contemplates separate proceedings and separate rules. Where the realty is vested in an intestate only as mortgagee it does not come within the Act. Rule as to that part of realty refused. *In the Goods of Henderson, In the goods of Dickson*, 2 W.W. & A'B. (I. E. & M.,) 41.

Realty Held Partly under "Rsal Property Act" (No. 223) and Partly under Old Law—Separate Rules.]—Such realty should not be coupled under one rule. Two distinct rules made. *In the Real Estate of Sutherland*, 2 W.W. & A'B. (I. E. & M.,) 43.

Land nnder "Transfer of Land Statute"—Separate Rules.]—There is nothing in the "*Transfer of Land Statute*" forbidding a separate motion as to land under that Act, and such an application will be granted, although not necessary, at the risk of the administrator as to costs, for the costs of an unnecessary motion will not be allowed in passing an administrator's accounts. *In the Estate of Morrison*, 3 W.W. & A'B. (I. E. & M.,) 84.

Upon what Property Grant Operates.]—*Quære*, whether a rule under the Act No. 230 to administer undevised realty will operate upon property of which the intestate has a lease under Sec. 23 of the "*Land Act* 1862." *In the Real Estate of Wallis*, 3 W.W. A'B. (I. E. & M.,) 79.

(c) *Administration with exemplified copy of will or Grant of administration annexed.*

To Creditor.]—Where a testator died out of the jurisdiction and probate was granted out of the jurisdiction, the Court granted administration with an exemplified copy of the will annexed to a creditor. *In the Will of Farley*, 9 V.L.R. (I. P. & M.,) 42.

Executor Resident in England.]—*Semble* where executors are resident in England, the Court will grant administration with an exemplification of the will annexed to the attorney under power of the executors proving the will in England personally and not as the attorney of the executors. *In the Will of Slack, see ante column* 1526.

Administration c.t.a.—No Exemplification—Conditional Grant.]—A testator died in England, leaving a will relating exclusively to property in New South Wales, which he bequeathed equally to his two brothers. No executors were appointed. Administration was granted in England to one brother, and in New South Wales to the other, who applied in Victoria for a grant of administration to him in this colony, where the testator had real estate of the value of £900, as to which he had died intestate. The Court made an order for administration *c.t.a.* of the property in Victoria conditionally upon the exemplification of the grant in New South Wales being filed. *In the Estate of Severne*, 6 V.L.R. (I. P. & M.,) 1; 1 A.L.T. 123.

See S.P., *In the Goods of Whittaker*, 2 W. & W. (I. E. & M.,) 114.

Lost Will—English Grant—Evidence—Advertisement.]—Where the Probate Division of the High Court of Justice in England, in a contested suit granted administration with a draft of a lost will annexed, the Court here declined to grant probate upon an exemplification of the English grant, but required independent evidence of the facts in issue before the English Court. A verified copy of shorthand notes of the evidence in the suit and of the judgment having been produced, the Court, after requiring that the advertisement of the intention to apply for probate should indicate that the probate was based on an act of the English Court, granted probate upon the exemplification. *In the Will of Malcolm*, 6 V.L.R. (I. P. & M.) 102; 1 A.L.T., 201; 2 A.L.T., 3.

Will Proved in England—Evidence of Property.]—Upon an application, on an exemplification of the will, for administration *c.t.a.* of a will proved in England, there ought to be evidence that there was property to be acted upon in England. Where it appeared by the exemplification that the assets in England were sworn under £480, and duty paid accordingly, the Court held this sufficient evidence. *In the Goods of Webster*, 3 W. W. & A'B. (I. E. & M.,) 70.

Upon an application, on an exemplification of the will, for administration *c.t.a.* of a will proved in England, the Court will require evidence that the testator left personal property in England to found the jurisdiction of the English Courts before it will endorse what they have done. *In the Goods of Goodman*, 3 W. W. & A'B (I. E. & M.,)71.

Will Proved in Foreign Court—What Evidence Required.]—Motion for administration with an exemplified copy of the will annexed to an attorney under power of the executrix. The testator died in Ireland and the contents of the will and probate were authenticated by a certificate from the district registrar who granted it. *Held* that an exemplification of the will and probate under the seal of the Foreign Court and satisfactory evidence by an affidavit sworn before a Commissioner of this Court that testator had personal property in Ireland and was domiciled in the district of Belfast, and of the signature of the executrix to the power of attorney were necessary and indispensable. *In the Estate of Von Stieglitz*, 3 V.L.R. (I. P. & M.,) 35.

Grant of Administration by Foreign Court—Evidsnce Required.]—On a motion for a grant of administration of the estate of C. to the attorney under power of C.'s widow, it appeared that administration had been granted to the widow, who resided in New York, by the Surrogate's Court, at West Chester, in the State of New York. An exemplification of the grant was produced, and an affidavit of the marriage of C. and the administratrix, and of their residence together for some years, and of C.'s disappearance for seven years, during which he was totally unheard of, and was therefore presumed to have died in New York. Before granting administration to the attorney the Court required further affidavits as to the jurisdiction of the Surrogate's Court, and as to the marriage of the administratrix with the deceased, and upon obtaining them to its satisfaction granted the application. *In the Estate of Coady*, 6 V.L.R. (I. P. & M.,) 89; 1 A.L.T., 128.

Foreign Will—Necessary Materials in Affidavit.]—The general practice in granting administration with an exemplified copy of the will annexed is to require an exemplification from the Central Court in London, and an exemplification from a District Court is not sufficient. The affidavits should show jurisdiction in the Foreign Court, *i.e.*, they should allege that deceased had personal property in England or in the foreign country. *In the Will of Grove*, 5 V.L.R. (I. P. & M.,) 88; 1 A.L.T., 67.

Foreign Will—Administration to Attorney of Foreign Administrator—How far Court Recognises Acts of Foreign Court.]—The Court recognises the acts of authorities in another country only where it appears that the person in respect of whom they were done lived, and had property there. Where an application was made for administration by the attorney under power of a widow, a foreign administratrix, the Court required evidence as to identification that the administratrix was the widow, and was not satisfied with a certificate of the foreign authorities that she was the widow. *In the Estate of Dunoyer*, 5 V.L.R. (I. P. & M.,) 73.

Probate of Old Will Granted in England — Evidence of Property there.]—A testator died in 1858, and probate of his will was obtained in England in 1859. The testator's executrix managed the Victorian property, and received the rents without applying for probate in Victoria till 1882, when she applied for letters of administration *c.t.a.*, producing not the will but an exemplification of the English probate. The Court required an affidavit that the testator left property in England, and upon that not being forthcoming, refused the application. *In the Will of Cook*, 8 V.L.R. (I. P. & M.,) 20.

Will Proved in England—What Affidavits Necessary.]—On an application for administration with an exemplification of a will proved in England annexed, the Court will require affidavits that there was property in England to give jurisdiction to the English Court, and that the probate is unrevoked. *In the Estate of Piper*, 8 V.L.R. (I. P. & M.,) 45; 4 A.L.T., 111.

Foreign Consular Court—Evidence of Property—Verification of Signature of Power of Attorney.]—Application for administration with an exemplified copy of a will annexed. The testator died in China, and a person in China obtained administration *c.t.a.* from the Consular Court in China as attorney under power of the executors. This power was verified by statutory declaration instead of affidavit, and the only evidence of property in China was a letter from the consul stating that the testator left personal property there. *Held* that the verification and

evidence of property were insufficient, and the Court expressed its unwillingness to act upon the consular order of probate. *In the Estate of Friedlander*, 9 V.L.R. (I. P. & M.,) 49; 5 A.L.T., 144.

Copy of Will—Affidavit of Correctness not made before a Commissioner of the Court.]—The Court refused to grant letters of administration *c.t.a.*, the application for which was based upon an "extracted registered copy" of the will taken from the records of the Court of Buteshire, and sworn to be such by an affidavit made before the chief magistrate of Rothesay, on the ground that the affidavit was not made before a commissioner of the Court, there being such a commissioner at Glasgow, within a short distance of Bute. *In the Will of Thom*, 2 V.L.R. (I. P. & M.,) 19.

An affidavit sworn before the Lord Mayor of London is not sufficient. *In re Hopkins*, 4 A.J.R., 106.

Affirmation before Commissioner—Certified Copy.]—Where the execution of a power of attorney was verified by affirmation before a commissioner, the Court refused to accept such in the absence of evidence that the person verifying had conscientious scruples against taking an oath. Where the original probate was filed, but was taken off the file in order to be sent to England, the Court refused to grant administration with a certified copy of such probate, requiring the original probate to be annexed. *In the Estate of Talents*, 9 V.L.R. (I. P. & M.,) 27.

And *see* cases *ante columns* 1157, 1158, under POWER OF ATTORNEY for Requisites of Power and Verification of Signature.

Tasmanian Probate—Exemplification—Attestation of Will.]—It is not necessary, on an application for probate upon an exemplification of a Tasmanian probate, to prove that the will was duly attested. *In the Will of Degraves*, 6 V.L.R. (I. P. & M.,) 99; 2 A.L.T., 81.

Security Required.]—An applicant for administration, with an exemplified copy of the will annexed, who does not reside within the jurisdiction, and does not intend to do so, must give security. *In the Will of Hassell*, 6 A.L.T., 84.

Scotch Confirmation — Affidavit of Power of Sheriff to Grant it.]—Where letters of administration were applied for on behalf of the attorney under power of the person appointed in Scotland by the sheriff, the Court required an affidavit from a person conversant with Scotch law that the sheriff had power to grant it. *In the Estate of Sutherland*, 10 V.L.R. (I. P. & M.,) 23; 5 A.L.T., 156.

(*d*) *Administration durante minore ætate.*

See cases *ante columns* 1523, 1524.

(iii.) *Bonds and Sureties.*

Amount of Bonds.]—Where an estate was sworn under £33,000, including several doubtful debts, the Court allowed two sureties to give a bond and justify for £20,000 each. *In the Will of Bostock*, 1 A.J.R., 100.

Amount of Bond.]—Where no one but the administrator and his mother were entitled to the estate of an intestate, which was valued at £20,000, and the administrator was unable to get sureties (under the old rules) to justify for £80,000, an application for permission to enter into a bond for £40,000 was granted, the sureties to justify for £40,000. *In the Estate of Blannin*, 1 A.J.R., 4.

Amount—Possible Remittances from England.]—An intestate's estate was likely to be increased by possible remittances from England. *Held* that the bond should be for the full amount of the possible remittances. *In the Will of Hoskin*, 9 V.L.R. (I. P. & M.,) 38.

Administration Granted by Registrar—Rule Nisi for Revocation — Increase of Security.]—Where administration had been granted by the Registrar under Sec. 18 of the "*Administration Act* 1872," and a rule *nisi* in the alternative was obtained calling upon the administratrix to show cause why the grant should not be set aside, or why she should not find additional security, on the ground that the property was over £500, whereas she had sworn it to be £200, the Court, finding that the property was in fact under £500, but considerably over £200 in value, ordered the administratrix to give additional security, or in default that the grant should be revoked. *In re O'Brien*, 2 V.L.R. (I. P. & M.,) 76.

Administration Granted a long time after Death of Intestate—Amount of Bond How Calculated.]—Where a long time has elapsed since the death of the intestate before administration of his estate is granted, the usual sureties must be given, and the amount of the administration bond must be calculated on the value of the property at the time of the grant. *In the Estate of Hennessey*, 10 V.L.R. (I. P. & M.,) 40.

Estate Sworn below Proper Value—Fees—Amendment—Bond.]—Where the estate of an intestate has been sworn below the proper amount for which security was given by the administrator, the proper course is to allow the administrator to pay the additional fees, to amend the letters of administration by inserting the proper sum, and to require the administrator to enter into a fresh bond to the necessary amount. *In the Goods of Thornley*, 1 W. & W. (I. E. & M.,) 194.

Where the affidavit undervalued the total value of the real and personal estate, through a mistake in the addition, the value of each separately being correctly stated, the bond was fixed at the amount of the sums correctly added. *In the Estate of Dunbar*, 6 A.L.T., 28.

Dispensing with Sureties—Absent Next-of-Kin in Indigent Circumstances.]—The fact that the absent next-of-kin of an intestate is in indigent circumstances, is no ground for dispensing with one of the "two or more able sureties," required of the person to whom administration is granted under the Statute 22 and 23 Car. ii., Cap. x.,

sec. 1, should such next-of-kin apply for letters of administration. *In re Kinderlin*, 1 W. & W. (I. E. & M.,) 11.

Reducing Amount of Security.]—In applications for administration the Court cannot altogether dispense with sureties, but as the Statute 22 and 23 Car. ii., Cap. x., only requires some security, and does not specify the amount, the Courts will invariably reduce the amount where the debts are trifling or there are no debts at all. *In the Goods of Ellis*, 1 W. & W. (I. E. & M.,) 191.

See now "*Administration Act* 1872" (No. 427,) secs. 26-28.

Dispensing with Sureties.]—W.B. died leaving a will, and appointing J.B. his executor. J.B. died shortly afterwards, without proving the will. A. obtained administration to J.B.'s estate, and entered into a bond for an amount which included W.B.'s property. The Court refused to dispense with further sureties in granting A. administration *de bonis non* to W.B.'s estate. *In the Will of Bon*, 3 A.J.R., 62.

Administration c.t.a.—When Security Dispensed with.]—Where a will named certain persons as "trustees," but did not purport to dispose of the whole of the estate, the Court held that they were not executors according to the tenor, but allowed them a grant of administration *c.t.a.*; and, upon an affidavit being filed, that the will did in fact dispose of the whole estate, allowed the usual security to be dispensed with. *In the Will of Brown*, 4 V.L.R. (I. P. & M.,) 47.

Informal Appointment of Executors—Administration c.t.a.—Dispensing with Sureties.]—Where a testator had made an inoperative appointment of an executrix, the Court, in granting administration *c.t.a.* to the widow, refused to dispense with sureties where the widow took only a life estate. *In the Will of Boland*, 6 V.L.R. (I. P. & M.,) 92 ; 2 A.L.T., 42.

Administration c.t.a.—Dispensing with Sureties—Administrator to Enter into Bond.]—*In the Will of Keane, ante column* 1511.

Dispensing with Sureties—Administratrix cum Testamento Annexo Sole and Universal Legatee.]—*See In the Will of Dohrmann*, and *In the Will of Robertson, ante columns* 1511, 1513.

Dispensing with Sureties—Administration cum Testamento Annexo—Sole Devisee for Life.]—*See In re Cooper, ante columns* 1510, 1511.

Justifying Sureties — Dispensing with.]—An intestate died, leaving a widow, five adult children and one infant. The widow, administratrix, applied for dispensation with sureties, on the ground that there were no debts, and that all the children had signed a consent thereto, the widow being willing to give justifying security in respect of the share of the infant; but the Court refused to dispense altogether with sureties, but accepted two, justifying in a less amount than the value of the estate. *In the Estate of Wyld*, 6 V.L.R. (I. P. & M.,) 83 ; 1 A.L.T., 184.

For reasons why the Court differs from the English practice, and requires justifying sureties to administration bond. *See Ibid.*

The Court will not, in a case where a widow and children are the only beneficiaries, dispense with sureties. *In the Estate of Lewis*, 3 A.L.T., 79.

Four Sureties instead of Two.]—The Court consented to four sureties instead of two, each of the four justifying for half the amount, but each executing the usual administration bond for the full amount. *In the Estate of Barr*, 1 A.L.T., 76.

One Surety—Executor of Husband Surviving Wife—Wife's Estate Unadministered.]—*See In the Goods of Crawford*, 1 W. & W. (I. E. & M.,) 192; *ante column* 1519.

Dispensing with Sureties — Married Woman having Separate Property.]—A married woman died having separate property, and her husband was the only person entitled, but the Court in granting him administration refused to dispense with sureties. *In the Estate of Turnbull*, 7 V.L.R. (I. P. & M.,) 104.

Sureties — Leave to Justify in the Country when Granted.]—An application for leave for the sureties in an administration bond to justify in the country instead of before the Master in Melbourne, will not be granted unless there are special circumstances ; and that the estate is small is not such a special circumstance, unless it be sworn under £300. *In re Monks*, 1 W. & W. (I. E. & M.,) 14.

Sureties—Appointment of New.]—The Court refused an application after the estate had been realised, by sureties to an administration bond to be discharged, and to have new sureties appointed. *In the Estate of Wakefield*, 6 V.L.R. (I. P. & M.,) 96 ; 2 A.L.T., 42.

Surety in Bond—Who may be.]—A solicitor may become surety for his client in an administration bond. *In the Goods of Paynter*, 3 W.W. & A'B. (I. E. & M.,) 69.

The husband of an administratrix who is possessed of separate property may be accepted as one of the sureties to her administration bond. *In the Estate of Synnot*, 3 A.L.T., 39.

Attorney under Power of Executors in South Australia — Sureties in South Australia.] — A testator appointed executors resident in South Australia, and administration *c.t.a.* was granted to their attorney under power. The Court refused to accept as sureties for the bond persons resident in South Australia. *In the Estate of Hanson*, 5 V.L.R. (I. P. & M.,) 97.

Sureties out of the Jurisdiction.]—An application was made for an order to accept the bond of a surety out of the jurisdiction. The Court laid down no general rule, but thought that in each case the Master should consider the amount of the property, and the facilities for enforcing the bond out of the jurisdiction, the residence out of the jurisdiction being an ingre-

dient to be considered, but not a bar. *In the Estate of Stephens*, 9 V.L.R. (I. P. & M.,) 22; 4 A.L.T., 140.

Probate—Executors out of Jurisdiction—Bond and Sureties.]—Where executors out of the jurisdiction apply for probate, it will only be granted upon their entering into similar bonds and sureties to those required from administrators. *In the Goods of Ellis*, 1 W. & W. (I. E. & M.,) 191.

Executors out of Jurisdiction—Justifying.]—Where probate is granted to executors resident out of the jurisdiction, the Court will require them to enter into a bond, and to find sureties, but will permit the executors to justify before a commissioner in the country of their residence. *In the Will of Cullen*, 9 V.L.R. (I. P. & M.,) 30; 5 A.L.T., 33, 80.

S.P.—*See In the Will of Neville*, 8 V.L.R. (I. P. & M.,) 29; 4 A.L.T., 15.

Assurance Company—Guarantee.]—The Court refused to take the bond and guarantee of an assurance company, and expressed an opinion that if such companies wished to embark in that class of business the rules ought to be altered so as to enable the directors to become sureties, and providing that the funds of the company only would be answerable for any default. *Re Tucker*, 4 A.J.R., 172.

Security—Incorporated Company—"Administration Act 1872," Sec. 27.]—It is necessary to obtain an express order of the Court for the acceptance of the security of an incorporated company for an administrator under Sec. 27 of the "*Administration Act* 1872." The order should be drawn up as on reading the *Government Gazette* notice of the Governor-in-Council's approval of such company. *In the Estate of M'Donald*, 8 V.L.R. (I. P. & M.,) 28.

Guarantee Society—Affidavit as to Solvency.]—Where it is sought to substitute the bond of a guarantee society for that of private individuals there should be an affidavit to satisfy the Master that the society is solvent. *In the Estate of Bowman*, 7 V.L.R. (I. P. & M.,) 112; 3 A.L.T., 72.

Act No. 427, Sec. 28—Motion to Assign the Bond.]—The Court requires notice of a motion to assign an administration bond under Sec. 28 to be served upon the sureties. *In the Estate of M'Carthy*, 7 V.L.R. (I. P. & M.) 115; 3 A.L.T., 79.

Liability of Surety to Administration Bond—Act No. 427, Secs. 26, 28.]—*See M'Carthy v. Ryan* and *Regian v. Shovelbottom*, *ante columns* 1248, 1249, 1250.

(iv.) *Practice Relating to Grant of.*

(*a*) *Generally.*

Court not Guided by English Ecclesiastical Courts.]—There is nothing in the Supreme Court Act directing that the Supreme Court in its probate jurisdiction shall be guided by the practice of the Ecclesiastical Courts in England, and there is nothing in the Rules requiring that that practice shall form the basis of its administration in cases not specifically provided for, as there is with reference to the common law and equity jurisdiction of the Court. *In re Twist*, 1 W. & W. (I. E. & M.,) 17.

Presumption of Death.]—Where a testator had left England for Sydney in a ship which had not been heard of for two years, the Court granted administration with an exemplified copy of the will annexed, probate having been granted in England. *In the Will of Sohier*, 3 A.J.R., 97.

Evidence of Death—Affidavit by Fijian.]—Where, on a motion for probate, there was a difficulty in proving the death, an affidavit by a Fijian that the testator was murdered on board a vessel was received as evidence and probate granted. *In the Will of Warburton*, 4 A.J.R., 6.

Presumption of Death—Lapse of Time.]—Where a testator was the master of a ship which had in all probability foundered in a storm at sea, and on which the insurance company had paid as for a total loss, the Court, on an application made ten months after the date of the supposed foundering of the ship for probate of the will of the testator, who had not been heard of since the supposed loss, considered that the time which had elapsed was too short to justify it in granting probate. *In the Will of William Williams*, 8 V.L.R. (I. P. & M.,) 46; 4 A.L.T., 111.

Probate Granted in Ireland—Taking Original Probate off File.]—Where probate had been granted here to executors upon the original probate granted in Ireland, the Court refused an application to allow the original probate to be taken off the file to be returned to Ireland. *In the Will of M'Niece*, 6 V.L.R. (I. P. & M.,) 6; 1 A.L.T., 144.

Rule to Administer to Curator—Delivery Out of Will.]—Where a rule to administer the estate of a testator was granted to the Curator of Intestate Estates, no reference being made to the will, which was filed in the Master's office by the curator, the Court refused an application by one only of the beneficiaries for delivery out of the will to her, except upon the verified consent of all the beneficiaries. *In the Will of Farie*, 6 V.L.R. (I. P. & M.,) 98.

Order for Administration not Acted on—Grant to Another—Rescission not Necessary.]—Where administration had not been taken out within three months after an Order granting it, *Held* that Rule 13 of *Reg. Gen.* of 23rd June, 1873, did not require that that Order should be rescinded before granting administration to another applicant. *In the Estate of Kirley*, 10 V.L.R. (I. P. & M.,) 29; 5 A.L.T., 188, *sub. nom. In the Estate of Kerley.*

Administration—Title of Intestate to Property—Court will not make Inquiry.]—The Court, on an application for administration to the estate of an intestate accompanied by an affidavit that the deceased had real estate, and describing it, will not enter into the question as to deceased's

title to the real estate in question, or decide on the construction of a will under which it was claimed on behalf of the deceased. *In the Estate of Martin*, 10 V.L.R. (I. P. & M.,) 32.

Letters of Administration — Intestate Dying before the Passing of Act No. 230.]—Administration to the estate of an intestate who died before the passing of the Act No. 230 must, nevertheless, under the "*Administration Act* 1872," be taken out to the realty as well as to the personalty, Secs. 5, 6, 7, and 9 of the latter Act clearly showing a policy that the administrator must take both real and personal estate. *In re Quinlan*, 2 V.L.R. (I. P. & M.,) 17.

Grant of Administration—"Administration Act 1872."]—Since the "*Administration Act* 1872," the rule is that an order for administration should embrace the personal as well as the real estate. *In the Freehold Land of Jones*, 8 V.L.R. (I. P. & M.,) 48; 4 A.L.T., 93.

Where a rule to administer freehold lands had been obtained before the "*Administration Act* 1872" was passed, and also letters of administration to the deceased's goods, and the administrator died leaving part of the land unadministered, on an application for a rule to administer the unadministered freehold land, *Held* that the proper form of application was for an order to administer to the real and personal estate. *Ibid.*

And *see* cases *ante* columns 1534-1538.

Administration Granted durante minoritate—Application for Administration on Person Coming of Age—Notice.]—Where administration has been granted to a person during the minority of A. it is necessary for A. when seeking administration on attaining her majority to give express notice of such application to such person. *In the Estate of Austin*, 7 V.L.R. (I. P. & M.,) 111.

See S.P. on application for probate *In re Patten*, 2 V.L.R. (I. P. & M.,) 97.

Ecclesiastical Suit—Non-appearance of Plaintiff—Dismissal.]—In an ecclesiastical suit to try the right to administration of an intestate's estate, issue had been joined and notice of the cause having been set down for hearing given to the defendant. At the hearing the plaintiff did not appear, and the defendant applied for an order dismissing the bill. *Held* that no order was necessary, an entry by the judge of plaintiff's default in appearance being alone requisite to enable the defendant to proceed under the rule in the Master's office. *Carroll v. Carroll*, 1 W. W. & A'B. (I. E. & M.,) 69.

Decree in Ecclesiastical Suit—Moving upon.]—In an ecclesiastical suit a decision in favour of the plaintiff H. had been made but no decree had been drawn up. *Held* that the decree should be drawn up and H. should move upon that for letters of administration. *In the Goods of Hickson*, 2 W. W. & A'B. (I. E. & M.,) 53.

Where in a suit for letters of administration there has been a decree in favour of the plaintiff administration should not be granted immediately upon the making the decree; but a separate application should be made after the decree. *In the Goods and Real Estate of Graham*, 2 V.R. (I. E. & M.,) 57; 2 A.J.R., 46, *sub nom. Graham v. Edwards.*

Application to Revoke Probate—Insanity of Testator—Evidence.]—On an application to revoke a grant of probate to executors on the ground that the testator was insane, the Court, after the case had been opened on affidavits, allowed the affidavits to be used, and also directed *viva voce* evidence to be taken, and heard the case upon the affidavits and the *viva voce* evidence. *In the Will of Lecern*, 6 V.L.R. (I. P. & M.,) 9; 1 A.L.T., 142.

Proof of Will in Solemn Form—Revocation of Probate.]—Upon a rule *nisi* calling upon executors to show cause why probate granted to them should not be revoked, *Held* that the case having been launched on affidavits, the case must be tried on them; that the next-of-kin cannot claim as a matter of right an inquiry into circumstances attending the execution of the will or put the executors to prove the will in solemn form when probate has been granted to such executors by an *ex parte* application; that the revocation of probate is a matter of discretion depending on the circumstances in each case and that trial by jury or *viva voce* examinations may be had in applications for revoking probate. *In the Will of Lamont*, 7 V.L.R. (I. P. & M.,) 86, 88, 98, 99.

Issues—Who May Obtain.]—On the trial of the validity of a will it is not open to either party to call for trial by a jury. The judge only directs an issue when he himself feels a doubt on the matter. *In re Taylor*, 2 V.L.R. (I. P. & M.,) 68.

Probate Suit—Caveat—Withdrawal of Does Not Entitle Plaintiff to Probate.]—Upon a caveat being lodged an executor filed his bill to obtain probate. The defendant subsequently consented to withdraw his caveat, and to the bill being dismissed without costs. *Held* that the rules were so framed that the suit must be heard whether the caveat were withdrawn or not, and that the mere withdrawal of the caveat did not entitle plaintiff to probate. *M'Callum v. Swan*, 1 V.R. (I. E. & M.,) 17.

Supreme Court Rules, Cap. VIII., Sec. 8—Caveat.]—Where a caveat was lodged, but no undertaking to appear by the executrix herself or by the solicitors lodging the caveat was filed as required by the rules, the Court granted administration with an exemplified copy of the will annexed to the brother, as next-of-kin, notwithstanding the caveat. *In the Goods of O'Keefe*, 6 W.W. & A'B. (I. E. & M.,) 38.

Where Unauthorised Caveat Lodged.]—Where an unauthorised caveat has been lodged, probate of a will will not be granted as of course altogether disregarding the caveat, but notice of the motion must be served on the caveator. *In the Will of Hall*, 2 A.J.R., 129.

Administration Granted notwithstanding Caveat.]—Administration will be granted in spite of a caveat being lodged, if there has been

no authority given to the caveator to lodge it by the parties interested, on motion on notice to the caveator. *In the Goods and Real Estate of Graham*, 2 V.R. (I. E. & M.,) 57; 2 A.J.R., 46; *sub nom. Graham v. Edwards.*

Application for Administration—Caveat Lodged without Authority.]—Where the sister of an intestate applied for administration, and a proctor had lodged two caveats, one without authority, as for two next-of-kin, the Court ordered notice to be served on the proctor, and that the applicant should move that day week, either that the caveat lodged without authority be set aside as irregular, or that administration be granted, notwithstanding the caveat, and allowed it to be made part of the motion that the caveator might pay the costs. The notice to be addressed either to the proctor or his Melbourne agent, but service allowed on the agent. *In re Cameron*, 2 A.L.T., 16.

Act No. 427, Secs. 30, 32—Right to Begin—Attorneys under Power not Entitled to Administration when Next-of-Kin Present and Capable.]—Upon a rule *nisi* upon a caveat coming on for evidence and hearing, the right to begin belongs to those who are claiming administration. Upon the production of the power of attorney by next-of-kin, the next-of-kin who was present in Court admitted that he did not seek administration, that it was really his sons, the attorneys under power, who were moving, and the Court discharged the rule *nisi*. *In re Evans*, 5 A.J.R., 63.

Caveat Withdrawn — Personal Consent of Caveator.]—Where a caveat has been lodged, the personal consent of the caveator is necessary for its withdrawal. *In the Goods of Martley*, 5 A.J.R., 63.

Caveat Filed by Married Woman—Consent of Husband.]—It is not necessary to produce the consent of the husband of a married woman to her filing a caveat, until the hearing of the application for administration. *In the Estate of Hourigan*, 6 V.L.R. (I. P. & M.,) 2; 1 A.L.T., 122.

Time for Lodging Caveat.]—Although by the Rules of Court a caveat against an application for letters of administration should be filed within a certain time, yet, if at any time before the order is made a caveat is filed, it has operation. *In the Goods of Carroll*, 1 W. W. & A'B. (I. E. & M.,) 66.

Caveat not Lodged in Time—Right of Party to be Heard.]—Although a caveat against a grant of administration has not been lodged within the time fixed by the Rules, the Court has a discretion as to letting in a party to be heard. *In the Goods of Jones*, 1 W.W. & A'B. (I. E. & M.,) 67.

Suit for Letters of Administration—Caveat—No Appearance of Caveator.]—Where a caveat is filed within the fourteen days from the publication of the notice of intention to apply for administration within which caveats should be lodged by Supreme Court Rules, Cap. viii., r. 8, and a suit is commenced, and the defendant (caveator) does not appear, the plaintiff is entitled to a decree without going into evidence; but if the caveat have been lodged within the proper time, and the defendant do not appear, the plaintiff must produce affirmative evidence in support of the facts mentioned in the bill. *In the Goods and Real Estate of Graham*, 2 V.R. (I. E. & M.,) 57; 2 A.J.R., 46; *sub nom. Graham v. Edwards.*

No Appearance of Caveator—Costs.]—Where a caveator does not appear upon the hearing of an Order *nisi* for probate no costs will be given against him unless the order *nisi* asks for them. *In the Will of Mould*, 4 V.L.R. (I. P. & M.,) 32.

Withdrawal of Caveat before Service of Order Nisi—Costs.]—Where a caveat was lodged and withdrawn before service of order *nisi* without any offer to pay costs incurred, the order was made absolute with costs. *In the Estate of Downey*, 5 V.L.R. (I. P. & M.,) 72.

Rule Nisi for Administration not Seeking Costs—Withdrawal of Caveat.]—Where a rule *nisi* for administration did not ask for costs, and a caveat had been withdrawn with this fact in view, the Court upon making the rule absulute did not allow costs. *In re Cherry*, 2 A.L.T., 42.

Caveat Withdrawn—Costs.]—Where a rule *nisi* for administration was obtained and a caveat which had been lodged was withdrawn, the Court made the rule absolute without costs, as the rule *nisi* did not ask for them, and granted administration subject to an affidavit being filed stating that no other caveat had been entered up to time of grant. *In re Wolff*, 1 V.L.R. (I. P. & M.,) 31.

Caveat Withdrawn — Further Affidavit.] — A caveat to the grant of probate had been lodged and had been withdrawn. On moving absolute the order *nisi* the Court made the order absolute, but refused to grant probate until a further affidavit was made that no further caveat had been lodged. *In the Will of Lansell*, 7 V.L.R. (I. P. & M.,) 22; 2 A.L.T., 113.

Costs of Caveator.]—Where an order *nisi* was granted on 11th October, but served on 19th October, *Held* that the caveator was entitled to his costs (including those of the adjournment,) and that the caveator's solicitor was not bound to take any notice of the order, *i.e.*, as to getting his evidence ready until it was properly served. *In the Estate of Doull*, 7 V.L.R. (I. P. & M.,) 70, 85.

Caveat by Married Woman—Withdrawn—Evidence of Separate Estate.]—A married woman lodged a caveat, which was withdrawn after a rule *nisi* had been granted. *Held* that no costs would be granted against her in the absence of evidence that she had separate estate. *In the Estate of Hourigan*, 6 V.L.R. (I. P. & M.,) 2; 1 A.L.T., 122.

Caveat Lodged by Married Woman Withdrawn before Application for Administration—Costs out of Estate.]—Two sisters applied separately for

administration of an estate under £500, and each lodged a caveat against the grant of letters to the other. On the morning of the elder sister's application the younger sister withdrew her caveat. The Court, in granting administration to the elder, allowed her to deduct the costs occasioned by the caveat lodged by the younger, a married woman, out of the share of the estate to which she was entitled. *In the Estate of Brown*, 10 V.L.R. (I. P. & M.,) 41.

(*b*) *Advertisements.*

Probate—Advertisement Not Strictly Correct.]—Where it is intended to apply for probate to two of three executors named in a will, with leave reserved for the third to come in and prove, the advertisement of intention to apply must mention the third executor, and state the intention to apply for probate with leave reserved as to him. *In re Jones*, 1 W. & W. (I. E. & M.,) 14.

But where one of the executors appointed is a minor, the advertisement need not refer to the fact of his appointment, or specify that leave to him will be reserved. *In re Pyke, ibid*, 15.

Advertisement—Weekly Papsr.]—It is a sufficient compliance with Rule 3, Reg. Gen., 23rd June, 1873, if the advertisement is published in a weekly newspaper circulating in Melbourne. *In the Will of Collings*, 7 V.L.R. (I. P. & M.,) 38.

Advertisement—Lost Will—Notice to Next-of-Kin.]—Where probate is sought of a draft of a lost will, such a state of circumstances should be specifically stated in the advertisement, and express notice should be sent to those who would be entitled in the case of an intestacy. *In the Will of Smith*, 7 V.L.R. (I. P. & M.,) 40; 2 A.L.T., 143.

Administration Granted—Subsequent Will Found—What Advertisements Necessary on Application for Probate.]—*In the Will of Smyth*, 1 V.L.R. (I. P. & M.,) 17, and *In the Will of Braithwaite*, 4 V.L.R. (I. P. & M.,) 37; *post columns* 1558, 1559.

Advsrtisement of Intention to Apply for Probate "Regulæ Generales," 23rd June, 1873, Rule 3.]—The advertisement of intention to apply for probate must be inserted fourteen clear days before application. Where the advertisement was published on 11th May and the application was made on 25th May, *held* insufficient notice. *Re Richardson*, 4 A.L.T., 1.

Advertisement—Error in Number of Codicils.]—Where an advertisement stated an intention to apply in respect of a will and two codicils and there were three codicils, although one of the codicils was revoked, the Court directed a fresh advertisement specifying the three codicils. *In the Will of Kelly*, 9 V.L.R. (I. P & M.,) 48.

Advertisement—Affidavit of Search.]—Where an advertisement gave the name of deceased as "Mackintosh" instead of "M'Intosh," and the affidavit of search omitted to state that a "careful" search had been made the application was directed to be renewed. *In the Estate of M'Intosh*, 9 V.L.R. (I. P. & M.,) 48.

Probate—Long Delay in Applying after Advertisement.]—An advertisement of intention to apply for probate was published on 3rd November, 1882, and the application was not made until 15th May, 1884. *Held* that there should be a fresh advertisement of intention to apply, and that an affidavit explaining the delay was not sufficient, and application refused. *In the Will of Cox*, 10 V.L.R. (I. P. & M.,) 32; 5 A.L.T., 212.

Advertisement Nine Months Prior to Application.]—An advertisement of intention to apply for probate was inserted in a newspaper nine months before the application was made, and no affidavit was made explaining the delay. The Court refused the application, requiring a fresh advertisement to be inserted. *In the Will of Schneider*, 6 A.L.T., 85.

Will Not Signed in Full Name of Testator—Advertisement.]—Where a foreigner made his will in the German language, and signed it, but omitted one of his two Christian names, the Court required the advertisement of intention to apply for probate to notice this discrepancy. *In the Will of Schneider*, 6 V.L.R. (I. P. & M.,) 8; 1 A.L.T., 144.

Administration to Donee of Donatio Mortis Causa—Advertisement.]—*See In the Goods of Tully, ante column* 1529.

(*c*) *Affidavits.*

Executor's Affidavit—Must be Regular—Verification of Will.]—The first part of the executor's affidavit, which is in verification of the will, is part of the materials upon which probate should be granted, and probate will not be granted in its absence, although the will is verified by another affidavit. The other part of the executor's affidavit may be in another document, and may be filed at any time before issue of the probate from the office. Where the affidavit of an executor, which contained both facts, was defective in the jurat, the Court granted probate, subject to the production of a proper affidavit in the office before probate. *In the Goods of Grant*, 1 W.W & A'B. (I. E. & M.,) 64.

Affidavit Misstating Date of Execution.]—The affidavit of the executrix stated the date of the execution of a will to be 18th August, 1874, instead of 18th August, 1875. *Held* that a fresh affidavit was necessary. *In the Will of Anderson*, 6 A.L.T., 4.

Affidavit of Executor—Signature.]—The affidavit of an executor in support of an application for probate must be signed by him in full. *In the Will of Hayes*, 6 A.L.T., 64.

Name of Executor Misspelt—Affidavit.]—The testator appointed one Patrick Moylon as executor, who applied for probate under the name of Patrick Mylon. *Held* that an affidavit stating that the applicant and the executor were the same individual was necessary. *In the Will of Githens*, 6 A.L.T., 84,

Name of Attesting Witness Improperly Spelt.] —In an affidavit in support of an application for probate, the name of one of the attesting witnesses was stated to be "Rowlands." He signed his name to the will as "Rowlds," but no notice was taken of the discrepancy in the affidavit. *Held* that an affidavit stating why the witness had so signed was necessary. *In the Will of Vaughan*, 6 A.L.T., 17.

Affidavit as to Residence of Witnesses to Will —What Sufficient—Reg. Gen. June, 1873, Rule 4.]— An affidavit of executors as to the residence of the attesting witnesses to a will, stating that the will was executed in the presence of G.M. of C., solicitor, and S.M., "his clerk," is not sufficient as regards the residence of the second witness. *In the Will of Cook*, 10 V.L.R. (I. P. & M.,) 92 ; 6 A.L.T., 117.

Statement in Affidavit that Will is Unrevoked.] —It is desirable that the affidavit in support should always contain a statement that the will is unrevoked. *In the Will of Fagan*, 5 A.J.R., 48.

On an application for probate the Court requires an affidavit that the will is unrevoked, and such affidavit must be made by the executor or other applicant. *In the Wills of Bergin and Sides*, 10 V.L.R. (I. P. & M.,) 30.

Affidavit of Search.]—The affidavit of search should state that a "careful" search has been made. *In the Estate of M'Intosh*, 9 V.L.R. (I. P. & M.,) 48.

The affidavit as to property should negative distinctly the fact of there being personal property, mere silence as to the personal property is not sufficient. *In the Will of Tregurtha*, 10 V.L.R. (I. P. & M.,) 89.

Application for Grant of Probate to Married Woman—Affidavit that she has Separate Estate must specify Particulars of such Estate.]—*See In the Will and Codicils of Boundy* and other cases *ante columns* 1520, 1521.

Affidavits as to Alterations, &c., in Wills.]—*See In the Will of Thomson, ante column* 1506.

Affidavits as to Execution of Will].—*See ante columns* 1514-1517.

Administration—Affidavit that no Caveat is Lodged.]—On a motion for administration an affidavit was filed that no *caveat* was then entered, and the motion stood over for the filing of other affidavits. Upon the renewal of the motion on the other affidavits, *Held*, that no later affidavit that no *caveat* was lodged need be filed. *In re Kennedy*, 1 W. & W. (I. E. & M.,) 16.

And *see In re Woolf and In the Will of Lansell ante column* 1550.

Applications for Rules to Administer—Affidavits.] —*In re Quinlan* and *In the Estate of Norton, ante column* 1537.

Applications for Administration with Exemplified Copy of Will Annexed—Necessary Materials in Affidavits.]—*See* cases *ante columns* 1539-1541.

Administration — Affidavits Necessary.] — An order *nisi* for administration was obtained. Objections were taken that the affidavits on which the order was obtained were deficient in the following particulars: (1) There was no distinction between real and personal estate; (2) the next-of-kin were not specified and there was no allegation that the deceased left no widow. *Held* that these objections would be fatal to a grant of administration, and were equally fatal to the grant of the order *nisi*. Order discharged. *In the Estate of Austin*, 1 V.L.R. (I. P. & M.,) 38.

Intestate Leaving a Widow.]—Whenever an intestate dies leaving a widow in the colony, upon an application by any other person for letters of administration, there ought to be a special notice served on the widow, or an affidavit that she declines to take out administration, or of some special circumstances. *In the Goods of Kenworthy*, 2 W. & W. (I. E. & M.,) 118.

Letters of Administration—Defective Affidavits.] —On a motion for letters of administration to the estate of a person who died before 1864, the affidavits were defective for a motion for general administration under the "*Administration Act* 1872," as not stating the value of the real estate, but the Court dispensed with the statement, since the duties of the administrator, as far as the real estate was concerned, were very unimportant. *In re Quinlan*, 2 V.L.R. (I. P. & M.,) 17.

Reg. Gen. 23rd June, 1873, Rule 5—Necessary Affidavits—Next-of-Kin.]—In an Order *nisi* calling upon a caveator (creditor) to show why the administration should not be granted to an intestate's husband, the affidavit should state what next-of-kin there are, if any. *In the Estate of Smith, alias Peate*, 7 V.L.R. (I, P. & M.,) 27; 2 A.L.T., 114.

Application for Administration — Affidavit — Names of Next-of-Kin.]—In the affidavit in support of an application for letters of administration the names of the relatives or next-of-kin should be distinctly stated. *In re Crozier*, 5 A.L.T., 188.

Affidavit—Application by Widow.]—Where in an affidavit the applicant was described as "I, A.B., widow of the deceased, C.D.," *Held* that that was a sufficient statement that she was his widow. *In the Estate of Dogherty*, 3 A.L.T. 27.

Administration—Applicant Described as Brother-in-law of Intestate.]—An affidavit in support of an application for administration stated that the intestate had left a widow and several children; that the widow consented to administration being granted to the applicant, and that the applicant was the "brother-in-law" of the intestate. The relationship between the widow and the applicant was not shown. *Held* that an affidavit was required, stating the relationship between the widow and the applicant. *In the Estate of Crab*, 6 A.L.T., 16.

Administration—Application for after Lapse of Time—Affidavit of Value.]—Upon an application for administration of the real estate of an intestate after a long time had elapsed since the death, the Court required the affidavit of value to state the value of the estate at the time of the application, in order to determine the amount of the security. *In the Estate of Ewing*, 6 V.L.R. (I. P. & M.,) 93.

Affidavit—Clerical Error—Bond.]—Where an applicant for administration stated the value of the realty and personalty correctly, but, owing to a mistake in the addition, understated the value of the whole, the Court granted the appli-tion, the bond to be for the amount of the two sums properly added. *In the Estate of Dunbar*, 6 A.L.T., 28.

Jurat not showing Month in which it was Sworn.]—Where the jurat of an affidavit did not show the month in which it was sworn, *Held* that a fresh affidavit was necessary. *In the Will of Dodd*, 6 A.L.T., 4.

Affidavits before whom Sworn.]—Affidavits in the probate jurisdiction may, under Rule 5 of Reg. Gen. 13th May, 1868, be sworn before the proctor by whom they are prepared. *In the Will of Aitken*, 3 V.L.R. (I. P. & M.,) 56.

Endorsement of Proctor's Name on Affidavits and Documents.]—Except in cases where an applicant appears in person, the affidavits and documents should contain the name of some proctor endorsed upon them. *In re Johanson*, 5 V.L.R. (I. P. & M.,) 81.

Affidavits—Omission of Statement of Capacity of Commissioner.]—On a motion for a grant of administration, one of the necessary affidavits had been sworn before a Commissioner of the Supreme Court for taking affidavits, but he had merely signed his name, and there was nothing on the face of the affidavit to show that he was a commissioner. *Held* that since the forms of affidavit given by the rules contained the statement omitted, the affidavit could not be received. *In the Goods of Savage*, 1 V.R. (I. E. & M.,) 17; 1 A.J.R., 18.

Application for Administration by Attorney under Power—Upon what Materials Court will Act.]—Where an application was made for a grant of letters of administration to an attorney under power of the next-of-kin resident in England, the evidence of relationship consisted of statutory declarations made before some public functionary in England, accompanied by a notarial verification. *Held* that the Court could not act on these materials, but that affidavits before a commissioner of the Court in England must be obtained. *In the Goods of Hone*, 1 W.W. & A'B. (I. E. & M.,) 73.

Application for Administration — Affidavit in Support Sworn in Scotland—Notary Public—Evidence of Signature.]—An affidavit in support of an application for letters of administration was sworn before a notary public in Scotland and not before a commissioner of the Supreme Court for taking affidavits. *Held* that some further corroboration than the mere signature of the notary was required, and that an affidavit by a person who knew the signature of the notary would be sufficient. *In the Estate of Sutherland*, 10 V.L.R. (I. P. & M.,) 23; 5 A.L.T., 156.

(*d*) *Costs.*

Costs on Proceedings by Caveat.]—*See* cases *ante columns* 1550, 1551.

Costs—Contest between Next-of-Kin not Advertising and Creditor.]—*In re Twist*, *ante columns* 1521, 1522.

Costs—Contest between Executors and Creditor seeking Administration c.t.a.]—*In the Goods of Heffernan*, *ante column* 1522.

When Given out of the Estate—Of Person unsuccessfully Opposing Probate — Misconduct of Testator.]—Where a litigation as to a will is the result of the misconduct of the testator or the residuary legatee, the costs of the unsuccessful party may be thrown on the estate. Where, therefore, a husband and wife had made mutual wills, and the husband told his wife that he had made no subsequent will, and said if he had made any such will he must have been out of his seoses, and the claimant under the subsequent will was a party to the concealment, and there was strong reason on the wife's part to doubt the competency of her husband, two medical men having expressed their doubts as to his competency shortly before and after the execution of the subsequent will, the costs incurred by the wife in unsuccessfully opposing such subsequent will were thrown upon the estate. *In re Headen*, 2 V.L.R. (I. P. & M.,) 21.

When Given out of the Estate.]—Drunkenness is not such misconduct of the testator as to cause the costs of the parties opposing the will to be thrown on the estate. Where, therefore, on the trial of an issue as to the validity of a will, one of the attesting witnesses was called to prove incompetency of the testator owing to drunkenness, and his evidence was favourable to his competency, but there was a local impression that the testator was drunk at the time of execution, and there was evidence tending to show that he was in fact drunk during the day, and the jury found in favour of the will, the Court, in granting probate, not wishing to give costs against those opposing the grant, made the order without costs. *In re Taylor*, 2 V.L.R. (I. P. & M.,) 68.

Costs of Propounding Will.]—The Court cannot order the costs of a suit, in which a will is unsuccessfully propounded, to be paid out of the estate where the parties entitled to receive the assets are not before the Court; where all the persons interested in the litigation are not made parties; where the facts are not properly before the Court; and where the judgment does not finally dispose of the matter. In such a case the Court can only direct the ordinary result to follow where the plaintiff fails; *i.e.*, that the plaintiff pay the costs. *Macoboy v. Madden*, 5 W.W. & A'B. (I. E. & M.,) 38.

Costs Out of the Estate—Executor bona fide Propounding a Will which is Defeated by a Technical Error.]—Where an executor *bonâ fide* propounded a will which he had every reason to believe genuine, but which was defeated by a technical inaccuracy, resting on the evidence of a witness who had made an affidavit describing it as accurate, *Held* that the executor was entitled to have his costs out of the estate. *In the Will of Braithwaite*, 4 V.L.R. (I. P. & M.,) 37.

Of Executor Propounding Will.]—*Per Molesworth, J.*—Where an executor, if he had taken the trouble to investigate the case, would have reason to doubt the sanity of the testator, but nevertheless propounds the will for probate and fails, he should not get his costs out of the estate. *In the Will of Abel*, 8 V.L.R. (I. P. & M.,) 34, 42.

Per the Full Court—An executor appointed by a will, who propounds the will and fails to prove it, is not a trustee so as to entitle him to his costs out of the estate as a matter of right; and where the Primary Judge refuses costs to an executor so failing to prove the will, an appeal for costs will not lie from his discretion. *Ibid*, p. 43.

Per Holroyd, J.—Semble, that if a person named as executor in a will propounds the will, and the testamentary capacity of the testator comes in question, costs should be given out of the estate to the party propounding the will, although he does not succeed in establishing it, provided he had reasonable ground for believing the sanity of the testator. *Ibid*, p. 44.

Costs of Testing Validity of Will.]—To the general rule that the losing party should pay the costs, the case of an executor testing the validity of a will is an exception, but in a case where all the parties interested did not want the executor to litigate with an elder son who was opposing the grant of probate, on the ground of the testator's insanity, the Court refused probate, and directed the executor to pay the costs. *In the Will of Gordon*, 1 A.L.T., 110.

(v) *Revocation of Probate and Administration.*

When Granted.]—An application to revoke probate to one of several executors made with his consent will not be granted unless it can be shown that he has never acted. *In the Will of Parnell*, 2 V.R. (I. E. & M.,) 56.

Executrix Marrying—Executor Coming in Pursuant to Leave Reserved.]—Where probate had been granted to F. during widowhood, leave being reserved to M. to come in and prove upon her death or re-marriage, and F. remarried, probate was granted to M. without an order revoking probate to F. *In the Will of Fitzpatrick*, 4 V.L.R. (I. P. & M.,) 45.

Revoking Probate—Proving Per Testes.]—On a rule *nisi* obtained by one of the next-of-kin calling upon an executrix to show cause why a will should not be proved *per testes*, or why probate should not be revoked as unduly obtained, *Stawell*, C.J., feeling technical difficulties in the way of the former course, made an order for the revocation of probate. *Held per Barry and Williams, JJ.*, (*dissentiente Molesworth, J.*,) that having regard to the lapse of time since probate granted, the order, although obtained on insufficient materials as to execution, should not be revoked. *Per totam curiam* that the Court has jurisdiction to revoke an order for probate. *In re Pyke*, 1 W. & W. (I. E. & M.,) 20.

Evidence and Practice in Applications to Revoke Probate.]—*See In the Will of Lecerf, and In the Will of Lamont, ante column* 1548.

Of Probate of Previous Will.]—After probate had been obtained to one will, a second and later one was discovered, appointing the same executors as the former. On motion by the executors, probate of the earlier will was revoked, and probate granted of the latter. *In the Will of Dyer*, 1 V.R (I. E. & M.,) 14; 1 A.J.R., 4.

Two Wills—One Disposing of Realty Only, the Other of Personalty Only—Revoking Probate.]—A testator left two wills, the earlier one disposing of realty only, the latter executed after Act No. 427 of personalty only. Probate of the latter had been granted. On motion for probate of earlier will, *Held* that under the second will the executors took all the property of whatever kind, but that if probate were sought of the first will, the existing probate must be revoked. *In the Will of Cameron*, 7 V.L.R. (I. P. & M.,) 33; 2 A.L.T., 136.

Later Will Discovered—Proper Method of Obtaining Probate Thereto.]—Where probate has been granted of a will, and a later will has been discovered, the proper course for the person seeking probate of the later will to pursue is to proceed by advertisement for probate of the later will and for revocation of the earlier one, serving notice thereof upon the executors; and not to apply in the first instance for an order *nisi* for revocation of the grant to the first, and for probate to the later will. The advertisement should be the usual fourteen days' advertisement, but stating fully the facts of the first and second wills and of the intention to move for revocation and probate. *In the Will of Braithwaite*, 4 V.L.R. (I. P. & M.,) 37.

Mutual Wills—Revocation of Probate.]—E.R. made a will 10th August, 1872, giving all her property to her husband A.R. On 1st November, 1876, she made a second will revoking the first and making a fresh disposition of her property which was burnt in April, 1878, under her directions and she expressed her intention of making another. The first will was made in accordance with an agreement made between the husband and wife that they would make mutual wills in each other's favour, and the husband obtained probate of it. The Court made absolute a rule to revoke the probate of the first will notwithstanding such agreement. *In the Will of Reynolds*, 7 V.L.R. (I. P. & M.,) 57; 3 A.L.T., 39.

Revocation of Administration—Rule nisi for—Who May Obtain.]—An application for a rule *nisi* to revoke administration, which was made

by a solicitor on behalf of persons interested, but who were out of the jurisdiction and had given no express instructions for such an application, was refused; but *semble* that if the application had been made by the solicitor on his own behalf it would have been granted, since there would, in that case, have been some one responsible for the costs if the rule were discharged. *In the Goods and Real Estate of Graham*, 2 V.R. (I. E. & M.,) 57.

Administration Granted to Widow, an Infant—Administration Revoked.]—*In the Real Estate of M'Millan, ante column* 1519.

Administration Granted—Revocation—Advertisement.]—Where administration has been granted and subsequently a will is found probate of which is applied for, it is necessary that notice should be given to the administrator and that the advertisement for probate should state that application will be made for revocation of the grant of administration. *In the Will of Smyth*, 1 V.L.R. (I. P. & M.,) 17.

Revocation—Notice to Former Grantee.]—Where an application to revoke the grant of administration *c.t.a.*, which has not been taken out, is made, notice thereof should be served upon the former grantee. *In the Estate of Ebsworth*, 4 V.L.R. (I. P. & M.,) 48.

Revocation of Administration to Attorney under Power.]—Where administration had been granted to an attorney under power of the widow of the intestate resident out of the colony, the Court revoked the grant to the attorney upon the motion of the widow, its attention being called to the words in the power and advertisement reserving leave to the widow to supersede the attorney, although such reservation was not contained in the order granting administration, but the Court confirmed the attorney's previous acts as administrator. *In the Estate of Bowman*, 7 V.L.R. (I. P. & M.,) 112; 3 A.L.T., 72.

Administration Improperly Issued—Revocation—Notice.]—An administration improperly issued from the Master's office cannot be treated as a nullity, but an application should be made to revoke such administration, and grant fresh administration to the applicant, and notice of such application should be served upon the person to whom the administration was improperly issued. *In the Estate of Schroeder*, 8 V.L.R. (I. P & M.,) 29.

(vi). *Jurisdiction.*

(*a*) *Of Court in the Probate Jurisdiction.*

Issue—New Trial.]—Where the Primary Judge sitting in the probate jurisdiction had directed that an issue should be tried by a jury before himself, and an application was made to the Full Court for a new trial of the issue, on the ground of misdirection, *Held*, by the Full Court, that it had jurisdiction, but that such an application should be made in the first instance to the Primary Judge himself, and that the Full Court will not entertain such an application unless by way of appeal. *Morley v. Nesbitt*, 2 V.L.R. (L.,) 97; *See* also *In the Will of Nesbit*, 2 V.L.R. (I. P. M.,) 61.

The Court has jurisdiction to revoke an order for probate. *In re Pyke*, 1 W. & W. (I. E. & M.,) 20. *See* S.C., *ante column* 1558.

How Exercised.]—The Court will not favour applications made merely for title, and not for the purposes of administration, for which latter purposes alone the probate jurisdiction of the Court is conferred and exercisable. *In the Real Estate of Cropley*, 4 V.L.R. (I. P. & M.,) 61.

See further S.C., *ante column* 1530.

Allowance of Commission to Executors—Testator Dying before "Administration Act 1872."]—The Court has no jurisdiction in a summary proceeding to allow any commission to executors out of the real estate of a testator who died before the coming into operation of the "*Administration Act* 1872." *In the Will of Egan*, 6 V.L.R. (I. P. & M.,) 97; 2 A.L.T., 76.

Passing Accounts.]—There is no jurisdiction to direct the passing of accounts before the Master-in-Equity of real estate devised to trustees before the passing of the "*Administration Act* 1872." S.C., 2 A.L.T., 76.

(*b*) *Of Registrar.*

Real Estate subject to a Mortgage.]—Where a testator died possessed of real estate worth over £500, subject to a mortgage which would reduce its value to less than £500, *Held* that under Sec. 18 of Act No. 427 the property must be considered to be of its full value, and that the Registrar had no jurisdiction. *In the Will of Coppin*, 7 V.L.R. (I. P. & M.,) 41.

VII. Construction and Interpretation.

(*a*) *General Principles.*

When a Will needs Interpretation.]—Where the language of a will admits of a plain and grammatical construction which is consistent with the apparent intention of the testator and does not deprive the devisee of all estate conferred upon him by the will, the Court will not have resort to the canons of construction framed for the interpretation of wills in cases of difficulty. *Lynch v. Johnson*, 4 V.L.R. (L.,) 263.

Construction to Avoid Intestacy.]—Where the construction of a will is doubtful the Court will endeavour to construe it in such a way as to avoid an intestacy. *Holley v. Holley*, 6 A.L.T., 63.

Intention of Testator.]—In interpreting a will the Court considers the intention of the testator and not what may be best for those interested under it. Where, therefore, the testator requested that his children should be sent to their relatives in Ireland, the Court refused to dispense with this direction, though evidence was adduced tending to show that it might be prejudicial to the health of some of the children. *Kearney v. Lowry*, 5 W.W. & A'B. (E.,) 202.

Inconsistent Clauses—Revocation—Ambiguity.]—Where there are two clauses in a will inconsistent one with the other, the later, as best describing the last intention of the testator, is to be deemed a revocation of the prior; but the terms of both clauses must, to justify such an interpetation, be equally distinct respecting the particular devise or bequest, for a clause absolute and express in its terms is not to be impliedly revoked by one of doubtful meaning. *Briant v. Edrick*, 1 V.R. (L.,) 35; 1 A.J.R., 49.

Succession.]—A will should be construed according to the law of succession in force at its date. *In re Goodman's Estate*, 6 V.L.R. (E.,) 181.

Annuity for Maintenance of Children during Infancy held to be an Annuity for the Life of the Annuitant—On what Property Chargeable.]—*Westwood v. Kidney*, 5 A.J.R., 25, 95; *post* under sub-heading—Annuity.

When Will Speaks from Death—Property described as "Now in my Possession.]—The words "now in my possession" are only words of description, and do not express a contrary intention within the meaning of 1 Vict., Cap. 26, Sec. 24 (*"Wills Act"*), so as to prevent the will from speaking from the time of death. *Noone v. Lyons*, 1 W. & W. (E.,) 235.

Date from which Will Operates—Words of Futurity.]—H. devised land in trust for E.B. for life, and after her decease for her children then born or thereafter to be born as tenants in common in tail male, and his will contained a proviso that if any of the persons so made tenants in common in tail male "shall be born in my lifetime" then the devise as to such person was revoked and another devise substituted. *Held* that a son of E.B. born before the date of the will did not fall within the provision, and was consequently entitled in tail male. *Lynch v. Johnson*, 4 V.L.R. (L.,) 263.

Instructions for Will—How Construed.]—Imperfect instructions for a will executed as a will should not be more liberally construed than a document purporting to be a complete will. *Read v. Read*, 5 V.L.R. (E.,) 212; 1 A.L.T., 30.

(*b*) *Particular Words and Cases.*

"Debts Due at Decease."]—A direction to pay "debts due at decease" in a will includes debts the time for payment of which had not arrived at the time of the testator's death; *i.e.*, *debts debita in præsenti solvenda in futuro*. *Press v. Hardy*, 1 W.W. & A'B. (E.,) 97, 102.

"Now in his Possession"—"All the Property Belonging to Me"—"After Paying my Just Debts."]—The testator, G.H., made his will, dated 31st July, 1860, as follows:—"I desire that my agent, D.L., shall, immediately on my decease, turn *all the property belonging to me now in his possession* into cash, and shall, *after paying my just debts*, hand over the same to my two executors—namely, the said D.L. being one and W.N. the other." The will then gave specific legacies and a residuary disposition. After the date of the will D.L. accounted with the testator as his agent, and ceased to act as such; and the testator purchased the equity of redemption of land of which he was seized as mortgagee, and sold a portion of such land. *Held* that the words, "now in his possession," were only words of description, and, not coming within the exception in Sec. 24 of 1 Vict., Cap. 26 "unless a contrary intention shall appear," &c., did not prevent the will from speaking from the death of the testator; that the words, "all the property belonging to me," passed the real estate; that the words, "after paying my just debts," charged the debts on the real estate, so as to enable the executors to sell it; and that the legatees ranked co-equally, and must abate in proportion. *Noone v. Lyons*, 1 W. & W. (E.,) 235.

"Right Heirs."]—A testator devised his dwelling-house in trust for his wife and nephew during their joint lives; upon the death of his wife, in the lifetime of the nephew, to him absolutely; upon the death of the nephew, in the lifetime of the wife, to her for life, with remainder to the testator's "right heirs." Testator left a brother and sister, his next-of-kin; and after testator's death his brother, as heir-at-law, conveyed his interest in the dwelling-house to the wife and nephew. *Held* that the property should go beneficially as real estate undisposed of—*i.e.*, to the next-of-kin—and that the wife and nephew were not entitled to an absolute conveyance of it from the trustees. *In re Goodman's Estate*, 6 V.L.R. (E.), 181.

"Issue" when it means "Hsirs of Body."]—*M'Gregor v. M'Coy*, 1 V.L.R. (E.,) 162; *see post column* 1568.

"Children" includes "Grandchildren."]—*See Knight v. Knight*, 10 V.L.R. (E.,) 195; 6 A.L.T., 62; *post column* 1566.

"Death without Heirs" when it means "Death without Heirs of Body."]—*See M'Gregor v. M'Coy*, 1 V.L.R. (E.,) 162; *post columns* 1567, 1568.

"From the Time of my Death"—Inserting Words.]—A testator left his residuary real and personal estate to his wife for life, and after her death upon trust to be divided equally between certain of his children (naming them) if living at his decease, and their issue if dead; and for the purposes of such division he directed that such residuary estate should, as soon as convenient after his wife's death, be appraised or valued by two indifferent persons to be appointed by such children or the majority of them, and one umpire to be appointed by such two persons, and the value put upon such estate should be allotted and divided amongst his said children in such manner as they should amongst themselves agree; and in case his said children should not agree amongst themselves within twelve months "from the time of my death" in such allotment and division, then he directed his trustees, as soon as convenient, to sell the residue of his real estate and divide the proceeds equally amongst his said children. Two of the children named died shortly after the testator, and before the widow's death. No appraisement or apportionment was made; and,

after the widow's death, the trustees sold a part of the residuary real estate. *Held* that the Court could not interpret the will by inserting the word "wife's" after "my" in the clause providing for the sale of the property. *M'Millan v. Ross*, 8 V.L.R. (E.,) 243; 4 A.L.T., 23.

"Die before Receiving Payment of such Share"—"Share."]—Where a will directed, if any person entitled to a share under it should die before receiving payment, how such share should be disposed of, the Court held that the words "die before receiving payment of such share" must be construed to mean before being entitled to receive; also that the word "share" in that part of the will regarded the distribution at the end of, not during the period after which the trustees were to sell, collect and call in all the property, and pay it in equal shares to the objects of the trust. *Broomfield v. Summerfield*, 2 V.L.R. (E.,) 174.

Affirmed in *Hayes v. Wilson*, 10 V.L.R. (E.,) 226.

"I Direct that the Share of my Business in the Firm of" &c., "shall be carried on."]—A testator carried on business in partnership with another and his will contained a provision "as to the share of the business to which I am entitled in the firm of Howie and Swan, I direct that the same shall be carried on by my said wife for the benefit of herself and my children, in conformity with the trusts of this my will." The executors renounced probate, and administration *c.t.a.* was granted to the wife. *Held* that the will did not authorise the wife as administratrix to carry on the business after a dissolution of the partnership. *Swan v. Seal*, 10 V.L.R. (E.,) 57, 64; 5 A.L.T., 196.

Direction to Trustees to Erect a Tombstone.]—Trustees were by will directed to purchase land in the M. cemetery for a family grave, and to erect a tombstone or tombstones for three or four persons at a cost of £200 if required, or such sum beyond that as they might think fit. Testator by his wish was buried in the B. cemetery. The trustees asked the advice of the Court whether they could expend the money on a tombstone in the B. cemetery. *Held* that they could under the circumstances; that the wish as to the erection of the monument was as peremptory as that as to the place of interment. *In re Campbell*, 9 V.L.R. (E.,) 138.

Trust for Sale not followed by Disposition of Proceeds—Intestacy as to Corpus.]—Imperfect instructions for a will executed as a will should not be construed more liberally than a document purporting to be a complete will. Where A. left instructions for a will which were executed as a will by which the income of property was disposed of, and directions were given as to the sale and conversion of all the property but no directions as to the distribution of the proceeds; and at the end there was a clause directing the shares of daughters in the principal and interest to be to their separate use, *Held* that there was no disposition of the *corpus*, and that the trust for sale did not operate as a conversion, and that A., having died in 1854, his heir-at-law was entitled to the *corpus* of real estate, and the personal estate was to be divided amongst his next-of-kin. *Read v. Read*, 5 V.L.R. (E.,) 212; 1 A.L.T., 30.

Widow Entitled in Event of Children Dying without Issue.]—A testator died in 1866, devising and bequeathing his estate to executors and trustees on trust to pay certain legacies, and thereafter (subject to an annuity in favour of his wife) to be divided among his children when they attained the age of twenty-one. The only child of the testator died when aged nine years. *Held* that the will making no provision for the disposal of the property in the event of the children dying without issue the widow was entitled to the whole. *Shevill v. Affleck*, 6 A.L.T., 131.

(c) *Precatory and Executory Words and Trusts.*

Absolute Interest or Trust.]—A testator gave all his estate and effects unto his wife if she should survive him, her heirs, executors, administrators and assigns, but in case she should not, unto J.M. and J.R., their heirs, executors, administrators, and assigns, and directed that the said trustee or trustees should stand possessed of the said estate and effects in trust for the equal benefit of all children living at his decease and their respective issue and appointed his wife, J.M., and J.R. executors. *Held*, the wife took no beneficial interest under the will, but was a trustee for the children. *M'Crae v. Rutherford*, 2 W.W. & A'B. (E.,) 25.

Direction to Erect a Tombstone.]—*In re Campbell, ante column* 1563.

(d) *Conditional Devises.*

Effect of Conditional Devise—Gift of Income and Division of Corpus among such as should be Alive.]—Where a testator disposed of income among certain persons during a certain period, and directed a division of the *corpus* at the end of the period among so many of them as should be then alive, *Held* that the interest in the income of any such person dying before or after the testator and within such period passed to the personal representatives of such person. *Broomfield v. Summerfield*, 2 V.L.R. (E.,) 174.

Condition in Restraint of Marriage—Failure of Persons to take the Gift over.]—A testator devised real estate to his children, with a proviso that, if any one should marry a person not professing the Hebrew faith, his or her share should go to an infant grandson, and the will contained no residuary devise or bequest. The infant grandson predeceased the testator. Some of the children having married Christians, upon petition for advice, *Held* that the infant grandson having died before the testator, leaving no representative, there was thus no one to take the devise over, and the intention of the testator not being distinct to punish his children, apart from an interest to benefit his grandson, no forfeiture was incurred. *In re Ellis' Trusts*, 6 V.L.R. (E.,) 35; 1 A.L.T., 140.

Condition against Marrying any other than a Jew—Death of Person who would Take on Breach of Condition.]—A testator left certain of his real estate in trust for a daughter, her heirs and assigns, and directed that if she should marry a person not being a Jew and professing the Hebrew faith, her interest in the property should be held in trust for a grandson, his heirs and assigns. The grandson in question died during the lifetime of the testator, and the daughter married a Christian. On a summons to the Registrar of Titles to uphold his grounds for refusing to grant her an unconditional certificate of title, *Held* that the will created a conditional limitation, and that the death of the grandson in the testator's lifetime did not enlarge the estate of the daughter, and that she was not entitled to an unconditional certificate under the "*Transfer of Land Statute.*" *In re* "*Transfer of Land Statute*," *ex parte Folk*, 6 V.L.R. (L.,) 405; 2 A.L.T., 77.

Gift to Wife—Condition in Restraint of Remarriage.]—F. made his will, by which after directing payment of debts, &c., and giving certain legacies, he bequeathed all the rest and residue of his estate, to his wife, on trust for his wife and son, share and share alike; provided that if after his decease his wife should marry, the bequest to her should be revoked, and the whole residue of the estate should go to the son. *Held, per Molesworth, J.*, that the provision for the cesser of the wife's interest upon her marriage was effectual, although in restraint of marriage, and that she was entitled to the income of a moiety of the estate during widowhood. *Trustees Executors and Agency Coy. v. Foy*, 10 V.L.R. (E.,) 267; 6 A.L.T., 111.

(*e*) *Validity of Devises.*

Effect given to Devises under "Wills Statute 1864," Sec. 31.]—The doctrine laid down in *Winter* v. *Winter* (5 Hare 306) can hardly be regarded as settled, viz.:—That the "*Wills Statute* 1864," Sec. 31, gives effect to devises, which would have been void altogether for want of objects, as well as to those frustrated by the removal of the object. *Broomfield* v. *Summerfield*, 2 V.L.R. (E.,) 174; affirmed in *Hayes v. Wilson*, 10 V.L.R. (E.,) 226.

Gift of £500 "Towards Erecting a Monument to J.P.F., and for Keeping his Grave in Repair."]—A testatrix bequeathed £500 "towards erecting a monument to J.P.F., and towards keeping his grave in repair." *Held*, that the gift was not void, and that so much as related to the keeping the grave in repair did not offend against the rule against perpetuities, the *corpus* and not the income being given. *Wiseman* v. *Kildahl*, 6 V.L.R. (E.,) 78; 1 A.L.T., 140.

Void for Remoteness of Limitations.]—Where a testator directed trustees to convert his estate, and, after payment of annuities, to hold upon trust for all the children of his son, who, being sons, should attain twenty-five years, or, being daughters, should attain twenty-one years or marry under that age, with trusts for maintenance and advancement, at the discretion of the trustees, out of presumptive shares, and for accumulation of the surplus, *Held* that the gifts to sons and daughters could not be separated, that the Court could not substitute the age of twenty-one for twenty-five so as to escape the illegality, and could not separate the provisions for maintenance from the direct gifts, and that the whole gift was void for remoteness. *Ker v. Hamilton*, 6 V.L.R. (E.,) 172, 176.

Charitable Gifts.]—*See* CHARITY.

(*f*) *Substitutional Devises.*

Who Entitled—Period of Distribution—Maintenance Clause.]—A testator empowered his executors, upon his youngest child attaining twenty-one to convert his estate into money, and directed that it should be divided among his wife and children then living, and in case of any child of his dying before becoming entitled, leaving lawful issue, such issue should take the parent's share. There was then a provision that the trustees should apply the whole, or such part as they thought fit, of the annual income to which "any child" should for the time being be entitled in expectancy, for or towards the maintenance of such child. One of the testator's sons survived him, attained the age of twenty-one, but died before the period of distribution leaving a child, A. *Held* that A. was presumptively entitled to his father's share under the will, *sed quære* whether he would be absolutely entitled if he should die under age before the period of distribution. *Knight v. Knight*, 10 V.L.R. (E.,) 195; 6 A.L.T., 62.

Held also that the maintenance clause applied to A., since the word "child" includes grandchild. *Ibid.*

Death of Devisee before Will Executed to Testator's Knowledge.]—A testator left the residue of his estate to trustees to convert and invest, and directed them at the expiration of ten years from his death to divide it equally among his children and grandchildren, named in the will, of whom there were thirty-two in all; provided that their respective shares were not to be paid until those named reached the age of twenty-one, or being females married; provided also that if any person died before being entitled to receive payment of his or her share, leaving issue of his or her body, the share of such person should go to such issue in equal shares; if there should be no such issue the share of such person should go to the survivors of the thirty-two in equal shares. One of the thirty-two was dead to the testator's knowledge when the will was executed. *Held* that there was an intestacy as to her share at the end of the ten years. *Hayes v. Wilson*, 10 V.L.R. (E.,) 226.

Death of Devisee, before Period of Distribution, of Age and Leaving a Will.]—Another of the thirty-two, of age when the testator made his will, died unmarried within the ten years, leaving a will. *Held* that his share went to the survivors of the thirty-two. *Ibid.*

Death of Devisee Leaving Issue.]—Another of the thirty-two died within the ten years leaving

issue. *Held* that her share went to her issue. *Ibid.*

Another of the thirty-two died within the ten years under age and unmarried. *Held* that his share went to the survivors of the thirty-two. *Ibid.*

"Executors, Administrators, and Assigns, to and for His and Their Own Use and Benefit"—Words of Limitation.]—A testator devised and bequeathed his estate to a person "his executors, administrators, and assigns, to and for his and their own use and benefit." The devisee predeceased the testator. *Held* that the words "executors, administrators, and assigns," were words of limitation, and not of substitution, and that the gift lapsed. *Plummer v. Hood*, 6 V.L.R. (E.,) 159; 2 A.L.T., 40.

VIII. What Interest Passes.

(*a*) *Generally.*

A testator directed that after the death of his wife (tenant-for-life) his property should be divided in equal shares between his children (naming them), and in the event of either or any of their deaths, then that the share of any or either of them so dying should be equally divided between his or their children, and in the event of any or either dying without leaving issue that his or her share should be divided between the survivors and their heirs. *Held* that the testator's children surviving the tenant-for-life took absolute interests. *Beith v. Beith*, 1 V.R. (E.,) 164; 1 A.J.R., 147.

Cross-remainders — Estates-in-tail — Lapse—Wills Act, No. 222, Sec. 30.]—A testator died in November, 1864, having by his will, dated 16th October, 1859, devised three estates (X. Y. and Z.) upon trust for his three sons, A., B. and C. respectively, and declared that each portion should be vested at twenty-one, and that in the meantime, and until such vesting, the trustees might apply the annual produce of the respective portions to which each child should be entitled in expectancy for his maintenance and education; and, "moreover, in the event of the death of either of the three sons, A., B., and C., previous to obtaining possession of the portion referred to, or, if without heirs, the said portion or portions should be equally divided among the survivor or survivors of my sons aforesaid." A. and B. both died in the testator's lifetime; A. unmarried and intestate; B. intestate and leaving an only child, a daughter, D. *Held* that the three sons took respectively estates-in-tail, with cross-remainders to survivors; that the words that each portion should be vested at twenty-one meant that they should get into possession prefatory to the provision for maintenance; that death without heirs meant as between the brothers without heirs of the body; that D. took an estate-in-tail in the land devised to her father, the lapse of the devise being prevented by Sec. 30 of "*The Wills Act*" (No. 222); that C. took as survivor the estates devised to A.; that the charges on Y. and Z. in favour of A. lapsed in favour of the persons to whom the lands were devised. *M'Gregor v. M'Coy*, 1 V.L.R. (E.,) 162.

Estate in Special Tail after Possibility of Issue Extinct—Remainder.]—Devise of an estate in trust for testator's widow "to be held by her and her heirs, if any, or failing issue by me," then, after her decease, over to daughters. The widow had no issue by the testator except a posthumous son, T., who died shortly after birth. *Held* that the words "issue" and "heirs" meant heirs of the body, and that the widow took as tenant in special tail, after possibility of issue extinct, with remainder to the daughters. *Ibid.*

Tail Male—When Devisee Entitled in.]—*See Lynch v. Johnson ante column* 1561.

A bequest was given to testator's wife of all his property "in trust for his children, and at her death to revert to the sole use of my children in equal proportions." There being no question raised as to whether the real estate passed, that being assumed, *Held* that the wife and children were entitled in equal shares to the income during the wife's life. After her death the *corpus* went to the children in equal shares. *Stevenson* v. *M'Intyre*, 5 V.L.R. (E.,) 142; 1 A.L.T., 14.

Durante Viduitate.]—Where a testator directed that the residue of his property should be equally divided between his wife and son, but that if the widow married again her share should be paid to the son, *Held* that the wife was entitled to the income of a moiety during widowhood. *Trustees Executors and Agency Company v. Foy*, 6 A.L.T., 111.

Devise Durante Viduitate—Fee-Simple Determinable on Re-Marriage.]—A testator devised all his estate to his wife "absolutely, and for her sole and absolute use and benefit, as long as she shall continue my widow, provided nevertheless that if my said wife shall marry at any time after my decease, then I give, devise, and bequeath my said estate . . . unto the right heirs of me, the said" testator, and to their heirs, &c. The widow died without re-marrying. *Held* that she was seised in fee-simple. *Barclay v. Evans*, 8 V.L.R. (L.) 330; 4 A.L.T. 88.

Express Estate for Life followed by Words giving Power of Disposition at Death.]—Where an express estate for life only is given by will, followed by words showing that the devisee can dispose by means taking place at death, the latter give a power only, especially in the case of female devisees who may have the incapacities of coverture. Therefore where a testator devised his estate to trustees in trust to permit such of his daughters as should come of age or be married "to receive and take the rents and profits of their respective shares," as therein set forth, during their respective lives; "the *shares*" of such daughters to be "for their own separate use, and to be as follows" (specifying certain portions of the real estate for each daughter), and subsequently *reserved* to each of them a power to dispose by will of her share without the concurrence of her husband, *Held* that each daughter took a life estate in her share, with a power of disposal of the fee by will, the words "reserve" and "shares" not indicating that the

testator had given by implication a greater estate than for life. *Johnston v. Brophy*, 4 V.L.R. (E.,) 77.

Gift of Bank Deposit Receipts Bearing Interest.]—A gift of bank deposit receipts bearing interest passes the interest accrued up to the time of death as *corpus*, and the tenant for life is only entitled to the income arising from such when invested. *In re Thomas's Will*, 10 V.L.R. (E.,) 25.

Legacies to Executors—Tenants in Common—Intestacy.]—G. by his will bequeathed legacies to the two executors for their trouble. The will afterwards provided that, if there should be a residue it should be divided equally amongst the executors, to wit (naming them), and two other persons, share and share alike. One of the executors died during the testator's lifetime. *Held* that the objects of the residuary clause were tenants in common; that the two executors did not take as a class, and there was no survivorship between them; and that the share of the executor who predeceased the testator lapsed, and there was an intestacy with respect to it. *Griffith v. Cholmley*, 5 W.W. & A'B. (E.,) 186.

Shares of Income.]—A testator left property to trustees upon trust to convert and invest, and directed them to apply the net income "in and towards the support of my present wife so long as she shall remain my widow, and in and towards the education and maintenance of my children by my first wife during their respective minorities, in the equal, several, and respective shares following, *i.e.*, one equal share in and towards the support of my present wife during widowhood and any children I may have by her, and one equal share in and towards the maintenance and education of each of my children by my first wife equally among such of them as shall then be living." At the date of the will the testator had seven children by his first wife. At his death there were six living by his first wife, and three by his second including a posthumous child. *Held* that the will directed a division of income between the widow and the children of the first marriage and the survivors of the latter if any died unmarried under age, the widow having an obligation to maintain her own children; and that upon the widow's death or marriage the share of income she might then have would go to her own children living in equal shares. *Brock v. Kelson*, 3 V.R. (E.,) 16; 3 A.J.R. 8.

(*b*) *Vested or Contingent Interests.*

Vesting.]—A testator directed his trustees to continue a partnership business, and after certain payments out of the profits to accumulate the balance and invest, and from and after the dissolution of the partnership, he bequeathed a certain sum to be set apart for each of the daughters, and invested separately as soon as convenient after the dissolution, directing income to be paid to the daughter for life, remainder to her children on the youngest attaining twenty-one, but if any daughter should die without leaving a child who should live to attain twenty-one, then for the sisters equally. The testator also made provision for the education of the daughters out of the profits of the business. *Held*, that the provision for maintenance being unconnected with the legacies, afforded no argument in favour of vesting, and one of the daughters having died under twenty-one and unmarried, before the dissolution of partnership her legacy was not vested, but was distributable among the other daughters. *Osborne v. Osborne*, 9 V.L.R. (E.,) 1; 4 A.L.T., 113.

Meaning of Word "Vest."]—"Vest" may, if the context of the will is in favour of that construction, be read as importing only that the interest previously vested is at a specified time to become absolute and indefeasible. A testator directed his trustee to hold certain property in trust "for my child (if only one), or for all my children (if more than one), in equal shares, and so that the interest of a son or sons shall be absolutely vested at the age of twenty-one, and of a daughter or daughters at that age or on marriage, with a provision for issue of sons dying under twenty-one leaving issue, and a gift over in the event of no object of the trust acquiring an absolutely vested interest." *Held per* Privy Council, that the shares of the children were vested at the death of the testator subject to be divested. *Armytage v. Wilkinson*, L.R., 3 App. Cas. 355.

A gift upon trust for such of a testator's children as should attain the age of twenty-one does not confer a vested interest. *In re Stillman's Will*, 1 V.L.R. (E.,) 158.

Under a Deed—Vested Interests upon Marriage or Majority—Beneficiary attaining Majority and Dying Unmarried.]—*See Re "Transfer of Land Statute," ex parte Leach*, 5 A.J.R., 72; *ante column* 353.

Where a will gave estates in realty to three sons respectively, and declared that each portion should be vested at twenty-one, and that in the meantime, and until such vesting, the trustees might apply the annual income of the respective portions to which each child should be entitled in expectancy for his maintenance, &c., and "moreover in the event of the death of either previous to obtaining possession of the portion referred to or without heirs, the said portion or portions should be divided equally between the survivor or survivors," *Held* that the words that each portion should vest at twenty-one meant that they (the sons) should get into possession prefatory to the provision for maintenance. *M'Gregor v. M'Coy*, 1 V.L.R. (E.,) 162; *see* S.C., *ante column* 1567.

IX. Devise to a Class.

(*a*) *Who Entitled.*

Where a testator directed trustees to convert his estate, and, after payment of annuities, to hold upon trust for all the children of his son, who, being sons, should attain twenty-five years, or, being daughters, should attain twenty-one years or marry under that age, with trusts for maintenance and advancement during the "suspense of absolute vesting," at the discretion of

the trustees, and for accumulation of the surplus, *Held* (apart from the question of remoteness) that all sons and daughters born at any time would take, and not only those living at the date of the will or decease. *Ker v. Hamilton*, 6 V.L.R. (E.,) 172.

Residue Given to Executors—Not a Devise to a Class, and no Survivorship.]—Where a testator left residuary estate to two executors' *nominatim* and two other named persons, and one of the executors predeceased the testator, *Held* it was not a devise to a class, and that therefore there was an intestacy as to such share, which lapsed. *Griffith v. Chomley*, 5 W.W. & A'B. (E.,) 186.

Death before Testator—Presumption of Death—Lapse.]—A testator died October, 1866, having, by will, April, 1852, devised certain real estate to trustees upon trust, to pay one-half of net rents to wife for life, and to pay the other half to three sisters in equal shares, and after death of any of them, leaving children her surviving, to pay her share in the rents to such children who should attain the age of twenty-one, or, being daughters, attain that age, or marry under that age, in equal shares and upon trust after the widow's death, to sell and distribute the proceeds in like manner. The widow died in 1871, and A, one of the sisters, died in 1871, having left three children by a former marriage, B., C., and D., of whom D. had not been heard of since 1855, and a son, E., by a second marriage. *Held*, that this being a gift to a class, D. would be entitled to his share, even though he did not survive A., but that since D. had not been heard of since 1855, that is more than seven years before the testator's death in 1866, he must be taken to have predeceased the testator, and that on that ground his share had lapsed. *Low v. Moule*, 5 V.L.R. (E.,) 10.

(*b*) *Per Stirpes or Per Capita.*

Devise to Trustees upon Trust for A. and B. during their Lives and after the Death of Either, upon Trust to their Children.]—A testator devised and bequeathed his real and personal estate to trustees upon trust for A. and B. during the term of their natural life, and after the death of either of them, for their children. *Held* that the will was to be read "during the terms of their natural lives, and after the decease of either of them, as to her share upon trust for her children." That the testator could not be taken to have intended to have made the death of either terminate the interest of both, and to have excluded after-born children of the survivor, and that consequently the children took *per stirpes*. *Young v. Hall*, 3 A.J.R., 98.

X. Description of Bequest or Devise.

Gift of Houses—Vacant Land.]—A gift of certain houses, in a will, will include a vacant piece of land which had been used with one of the houses. *Richardson v. Shirra*, 6 A.L.T., 48.

Residuary—Including Realty and Personalty.]—A testator after directing payment of his debts by his wife, disposed of his property in the following words:—"The rest, residue, and remainder of my worldly goods, such as carts, horses, moneys or property, of what nature or kind soever, which God in His goodness hath bestowed upon me shall be for the sole use and benefit exclusively of my aforesaid wife;" and he afterwards appointed her executrix. *Held* that the testator's real estate was thereby effectually devised, the word "property" being sufficient to pass realty. *Bamblet v. Bamblet*, 1 W. W. & A'B. (E.,) 80.

"All my Property."]—The words "all my property" are sufficient to pass real estate. *Noone v. Lyons*, 1 W. & W. (E.,) 235.

What Included in General Residnary Bequest—Surplus Income.]—A testator left all his real and personal property to trustees to sell and convert, pay debts, and invest in certain securities, and then directed payment out of income of certain annuities to relatives named, and directed, after the death of the last survivor of the relatives to whom annuities had been given, that the trustees should pay over the whole residue of his property, estate and effects, and the securities on which they should have been invested as by the will directed. After providing for debts, legacies and annuities there was a large surplus income. *Held*, by *Molesworth*, J., and the *Full Court*, that the residuary gift included the surplus income as well as the principal, and that the Court will not decide questions about accumulations of income for more than twenty-one years until the time has expired. *Hastie v. Curdie*, 6 W.W. & A'B. (E.,) 91.

"Residuary Legatee" — After-Acquired Real Estate.]—A testator by will bequeathed all real and personal estate to S., as to specified parts upon trusts contained in a letter in favour of children, and then appointed S. executor and "residuary legatee." There was certain real estate acquired after execution of the will. *Held* that this after-acquired property passed under a general devise, and that the testator did not die intestate with respect to it; that "legatee" must be read as "devisee," and that S. was beneficially entitled to the after-acquired property. *Stephen v. Stephen*, 3 V.L.R. (E.,) 94.

XI. Annuity.

Annuity for Maintenance of Children during Infancy held to be an Annuity for the Life of the Annuitant—On What Property Chargeable.]—A testator directed his trustees to receive rents of certain property (A) during the minority of his eldest son, devising the property to the son on attaining age; other property (B) was left in a similar way to a younger son; other property was left to trustees with a direction to sell it on the eldest daughter of the first marriage coming of age, and to divide the proceeds amongst the daughters of that marriage; other property was left with similar provisions as to daughters by the second marriage. The testator then directed the trustees to pay out of rents of his said real estate a yearly sum of £500 to his widow, to be applied by her towards the maintenance, &c., of all his children during their respective minorities; and left his residuary estate to trustees

upon trust to convert, to invest, and to divide among his children when the eldest son came of age. The bill did not seek any specific interpretation of the will nor did the answers, the bill merely setting out the will and praying for execution of the trusts. It was referred to the Master to report as to the rights of all parties. Upon exceptions to the report, *Held* that although the widow was provided for in other parts of the will yet she was entitled to the £500 as an annuity for life and not during the minorities of the children, and that this annuity was chargeable on the *corpus* of all the residuary estate including the rents and profits of the specifically devised properties during infancy and suspense, such charge not clogging the trustees' power of sale, but affecting the proceeds only. *Westwood v. Kidney*, 5 A.J.R., 25, 95.

XII. Incidents of Bequests and Devises.

(*a*) *Advancement and Maintenance.*

"Statute of Trusts" (No. 234,) Sec. 61—Payment of Rents for Maintenance.]—Petition for advice and direction under Sec. 61 by the trustees of the will of S. deceased. On 30th July, 1870, testatrix, by virtue of the power given by an indenture, devised certain land to the petitioner upon trust for such of her children as should attain the age of twenty-one in equal shares as tenants in common if more than one, and directed that the trustees might at any time in their discretion sell or mortgage the land or any part, and out of the proceeds pay the debts, funeral and testamentary expenses of the testatrix, and any sums they thought fit for maintenance or advantage of the children, and invest the residue in Government or real securities in Victoria, and stand possessed of the securities and income upon the same trusts declared as to the land. The trustees were empowered to demise the land during minority of the children for a term not exceeding twenty-one years. The testatrix left a husband and four children, who lived on a part of the land devised, and applied the rent fixed by the trustees in education and maintenance of the children, who were all infants. Other portions of the real estate were let at low rents, no part having been sold or mortgaged. The husband's business was limited and he was unable to maintain the children. The petition sought advice as to whether the trustees were justified in paying rents to the husband as for maintenance. *Held* that as the property was small and the children took parallel interests on attaining twenty-one, there being no conflicting interests, the Court would answer the question although it involved the construction of the will; that the trustees were justified in paying to the husband the rents for maintenance of the children before sale or mortgage of the land; that the land was held partly on trust for maintenance; that the children's interests were not vested, but as the chances were equal, the Court would direct equal maintenances. *In re Stillman's Will*, 1 V.L.R. (E.,) 158.

Maintenance.] — A testator bequeathed his personal property to his wife and daughters; his real estate to his wife during life or widowhood, and, upon her re-marriage, as to income for his daughters so long as his son was under age, and, when he came of age, for him; if he should die under age for his daughters. The widow married, and there was no present provision for the son. On application by the trustees to employ part of the income in maintaining the son, and to raise an apprentice fee, *Held* that there was no authority for so construing the will as to imply a provision for the son's maintenance; and application refused. *In re M'Kay*, 2 V.L.R. (E.,) 105.

Maintenance — Resort to Accumulations.]—A testator devised land for the maintenance of his son and grandchildren, and directed the income of other property to be accumulated during the infancy of the grandchildren, and then left the *corpus* to such of them as should attain twenty-one. The testator during his lifetime sold part of the former property, and the son having died shortly after the testator, the Court directed that the trustees, instead of accumulating the rents and profits of the second property, should from time to time apply a portion of the income to the maintenance of the infants. *In re Higginbotham*, 4 V.L.R. (E.,) 57.

Maintenance—Substitutional and not Cumulative Provisions.]—Where a testator provided a certain sum per annum for each child's maintenance until the age of ten years, and after then and until the age of fourteen years "the increased sum of £100 annually," and after then and until the age of twenty-one years or marriage "the further increased annual sum of £150;" and on attaining majority or marriage "the yearly sum of £150," *Held* that these respective sums were substitutional as each child attained the specified ages, and not cumulative. *Osborne v. Osborne*, 6 V.L.R. (E.,) 132.

Maintenance—When Insufficient, Court will not Generally Increase.]—Where a testator has by will made a provision for the maintenance of his children during minority of £80 a year for each child until a certain age and then of £100 and £150 at other ages, which though sufficient to maintain and educate them, was very narrow in regard to the amount of property coming to them ultimately, the Court will not in the absence of any evidence of mistake on the part of the testator, increase the amount allowed for maintenance. *Osborne v. Osborne*, 6 V.L.R. (E.,) 3; 1 A.L.T., 121.

Application of Capital to Maintenance Refused.]—A testator directed a fund, £125 in the whole, to be invested till his youngest child attained twenty-one, the interest to be paid to the widow, and the capital then divided between her and the children. The children were both under the age of two years, and the widow being in distressed circumstances applied to have the fund paid to her for the maintenance of herself and the children. *Held* that the Court was bound to apply the property of deceased persons according to their wills, not to substitute its discretion for them, and application refused. *In re Giles*, 4 V.L.R. (E.,) 37.

And *see* cases *ante columns* 554-556 under Infant; and *ante columns* 1439, 1440 under Trusts and Trustee.

Cestuis que Trustent Entitled to Unapplied Income when Coming of Age.]—A testator bequeathed certain shares to trustees on trust to apply income thereof towards the maintenance and education of his grandchildren. Part of the income only was so expended. *Held* on a petition under sec. 61 of "*Statute of Trusts* 1864," that the grandchildren having attained their majority were entitled to the unapplied residue of this income. *In re the Will of Downing*, 7 V.L.R. (E.,) 22 ; 2 A.L.T., 133.

(*b*) *Election.*

In what Cases.]—*Per Molesworth*, J. The principle of election applies to the joint effect of will and codicil, as if devises under each of them were contained in the one instrument, the will and codicil being taken as the disposition of the testator, speaking as at the date of the codicil. *Whitehead v. Whitehead*, 4 A.J.R. 165.

A testatrix by will devised certain properties to the defendant. By codicil she devised to the plaintiff land, which after her death, and after the respective devisees had entered into possession of theproperties devised to them, was discovered to have devolved upon defendant as heir-at-law in priority to the testatrix. Defendant took steps to bring the land under the "*Transfer of Land Statute*" in his own name and plaintiff entered a caveat. Defendant also proceeded against plaintiff in ejectment and to recover six years' mesne rents and profits. On suit by plaintiff to compel defendant to elect whether he would take under the will and codicil or against them, *Held* that defendant must be put to his election. *Ibid*, 165.

Voluntary Settlement—Collusive Sale and Repurchase by Settlor—Inconsistent Subsequent Will.]—R. settled property by voluntary settlement upon A. in trust for himself and family. This settlement was not parted with or disclosed to the other beneficiaries, and R. by a fictitious sale and repurchase got the settled property back and disposed of it by will in a different manner to the trusts contained in the will. Two beneficiaries under the settlement were dispossessed by beneficiaries who took interests under both will and deed. *Held* that the deed being bad as against the will, the beneficiaries dispossessed were entitled to be recouped out of the interests given by the will to those taking under the deed as against it, and it was referred to the Master to inquire as to whether it was for the interest of the beneficiaries under both will and settlement to elect under which to take. *Moorhouse v. Rolfe*, 4 A.J.R., 159.

Settlement Followed by Will.]—B. by voluntary settlement settled certain real estate upon his children. Having married again, he, by will, left all his property upon trust as to certain lands for his five daughters by the first marriage, and as to certain real estate, and one-sixth of the settled property, which he erroneously believed to be his own, upon certain trusts for his widow and any children of the second marriage. There was one child of the second marriage. *Held*, that such child and the widow were entitled to call upon the five daughters to elect whether they would take under the will or the settlement. *Johnston v. Brophy*, 4 V.L.R. (E.,) 77.

(*c*) *Accumulations.*

Of Income.]—Courts of equity will not by anticipation deal with questions as to the disposition of surplus income upon the contingency of the period fixed by law for accumulations being exceeded. In a case where there was a residuary gift which was held to include income, as well as *corpus*, the Court refused to entertain the question of the rights of parties to accumulations of income after twenty-one years, and decree was made subject to the rights which any of the parties might have in the income so accumulating after twenty-one years. *Hastie v. Curdie*, 6 W.W. & A'B. (E.,) 91, 98.

Direction for Accumulation—Circumstances in which Court directed Trustees, instead of Accumulating, to Apply Income to Maintenance.]—*In re Higginbotham*, *ante column* 1574.

(*d*) *Conversion.*

See cases *ante column* 206.

Trust for Sale not Followed by a Disposition of the Proceeds.]—Where a testator left instructions for a will, which were executed as a will, by which the income was disposed of, and in which directions were given for sale and conversion, but the proceeds of the sale were not disposed of, *Held* that the trust for sale did not work a conversion so as to alter the rights of the heir-at-law and next-of-kin to the property as to which the Court held there was an intestacy. *Read v. Read*, 5 V.L.R. (E.,) 212; 1 A.L.T., 30.

Real Estate Ordered to be Sold in Default of Allotment.]—A testator left real estate subject to an estate for life to trustees upon trust for certain of his children if living at his decease, and the issue of such as were dead; and for the purposes of division among them, directed that the said estate should be appraised or valued as soon as convenient after the death of the tenant for life, by two persons appointed by the children, or a majority of them, and an umpire appointed by such two persons, and the value put upon such estate should be divided among the children in such manner as they should among themselves agree; and failing agreement within twelve months of his death, he directed his trustees to sell the estate and divide it equally between the children. One of the testator's sons died shortly after him and before the tenant for life, and a son shortly before the tenant for life, and no appraisement or apportionment was ever made, and after the death of the tenant for life the trustees sold part of the real estate. *Held* that the share of the deceased daughter in the real estate was converted into personalty and passed to her administrators ; that the provision for appraisement and division was rather a recommendation than a direction, and did not affect the conversion created by the power of sale in the trustees. *M'Millan v. Ross*, 8 V.L.R. (E.,) 243; 4 A.L.T., 23.

(e) *Mortgages.*

Charges upon Land—"Locke King's Act" (Incorporated in the "Real Property Statute 1864.")]—Where deeds are deposited as a security for an advance of money, the land comprised in them is "charged by way of mortgage" within the meaning of Part XI. of the "*Real Property Statute* 1864" (re-enacting 22 Vict., No. 61,) and the heir or devisee of such land is not entitled to have the mortgage debt paid out of the personalty or other real estate of the testator or intestate. *Brent v. Jones*, 1 V.R. (E.,) 76, 80; 1 A.J.R., 2, 51.

Exoneration of Land—Charge of Debts.]—A testator, after appointing executors, devised to his wife a portion of his real estate for her life and then over. He also devised land, subject to an equitable mortgage, to P.; bequeathed to his wife all the ready money of which he might be possessed at the time of his decease, and directed her to pay his funeral and testamentary expenses, and also "all debts due at decease." On a suit instituted for execution of the trusts, and to obtain the opinion of the Court as to which of the several properties devised under the will should bear the burden of the debt charged by the equitable mortgage, *Held* that the widow's life estate and the ready money were liable to pay the mortgage debt, the words directing payment of debts being, according to Act No. 61 (repealed and re-enacted by the "*Real Property Statute* 1864," part XI.,) sufficient to show an intention to exonerate the devised land, but that the charge upon the widow should not extend further; should not subject even undisposed of personalty to exonerate the devised estate; and that the estate in remainder after the wife's death was not chargeable with such debts. *Press v. Hardy*, 1 W.W. & A'B. (E.,) 97, 102.

Exoneration of Land—Personalty—Residuary Realty.]—A testator devised his personal estate upon trust to pay thereout a mortgage on his dwelling-house and his debts, and to pay the surplus to his wife; and if the personalty were insufficient to pay the mortgage and debts, he directed the balance to be raised by a sale of the whole or part of his residuary realty. He devised his dwelling-house in trust for his wife and nephew during their joint lives; upon the death of the wife, in the life of the nephew, to him absolutely; upon the death of the nephew, in the life of the wife, to her for life, with remainder to the testator's "right heirs;" and devised his residuary real estate to his wife in fee. The personal estate was insufficient to pay the mortgage and debts. *Held* that the residuary real estate should pay the debts left unpaid in exoneration of the dwelling-house. *In re Goodman's Estate*, 6 V.L.R. (E.,) 181.

Exoneration of Land—General Personalty—Rents of Realty.]—A testator, by will, directed trustees to convert his personal estate into money, and therewith pay all his just debts, if sufficient; if not sufficient, the deficiency to be supplied out of other moneys coming to their hands. By codicil, he directed all mortgages to be paid out of rents of the real estate before the rents should be received by the children. *Held* that the mortgages were payable primarily out of the general personal estate, and that any deficiency should be made up out of the rents of real estate. *Macartney v. Kesterson*, 6 V.L.R. (E.,) 56; 1 A.L.T., 177.

"Real Property Statute 1864" (No. 213,) Sec. 150—Exoneration — Contrary Intention.]—The Court may look for evidence of a "contrary intention" *dehors* the will into other "deeds or documents," executed even after the will. Such intention must be signified, if not by express words, by something amounting almost to necessary inference or necessary implication. A devise of property in strict settlement is not sufficient to signify such "contrary intention." *Brown v. Abbott*, 7 V.L.R. (E.,) 121; 3 A.L.T., 47.

(f) *Payment of Debts and Legacies—Out of what Funds or Estates.*

Proportion of Debts and Legacies Payable out of Reversions.]—A testator, by his will, bequeathed and devised specific personalty and realty to his wife for life, and the residue of his estate to trustees upon trust for sale and conversion (but postponed the sale of the property given to his wife for life till after her death), and out of the proceeds to pay his debts and legacies. *Held*, affirming *Molesworth, J.*, that the widow was entitled to call for an immediate sale of the reversions of both realty and personalty devised and bequeathed to her, or a competent part thereof, for the purpose of paying their proportions of the debts and legacies, and distributing the balance. *Attorney-General v. M'Pherson*, 4 V.L.R. (E.,) 51.

Bequest of Residue "Upon Trust to Sell the Same, and I Bequeath" Several Pecuniary Legacies.]—A testatrix, by will, gave the residue of her estate to executors "upon trust to sell the same, and I bequeath" several pecuniary legacies, and then disposed of the residue. *Held*, that the residue was applicable for payment of the legacies. *Wiseman v. Kildahl*, 6 V.L.R. (E.,) 78; 1 A.L.T. 140.

When Debts Chargeable on Real Estate].—Where a testator devised "all his property" to be converted, and "after payment of all just debts" to be divided, *Held* that the words "all his property" passed real estate, and that, therefore, the debts were chargeable on the real estate so as to entitle the executors to sell it. *Noone v. Lyons*, 1 W. & W. (E.,) 235.

WORDS.

Acceptance.]—The expression "acceptance" includes a promissory note. *Synnot v. Parkinson*, 4 V.L.R. (L.,) 521.

The expression "the whole of my property" used by an equitable mortgagor must be taken to mean all the property which he then believed himself to be, or was in fact, in a condition to convey to a purchaser. *Gladstone v. Ball*, 1 W. & W. (E.,) 277, 286.

Act No. 324, Sec. 9—Meaning of "Action."—*See Allardyce v. Cunningham, ante column* 1130.

Meaning of Word "Stock" in Sec. 25 of Act No. 234—Shares in a Joint-Stock Mining Company.]—*See Bryant and Saunders, In re Saunders, ante column* 1451.

Vendor and Purchaser—Meaning of "All Legal Agreements"—Mining Agreements.]—Where a purchaser of all the right, title, and interest of a vendor, who had an option of purchase under a lease for five years, as a condition precedent agreed in writing to confirm and recognise "all legal agreements made by the vendor relating to the letting of his land for mining purposes, and where the vendor had by writing, not under seal, agreed to give to A. a license to mine for a certain time on the said land, *Held* that the words "all legal agreements" meant not only those enforceable in a court of law, but those of which courts of equity would decree specific execution by compelling a grant under seal to the same effect, and that those words must not be read with reference to the rights of the Crown or of the landlord. *Ah Wye v. Locke*, 3 A.J.R., 84, 85, 86.

Timber.]—The expression "timber" in agreements as to land must be construed according to its strict meaning, and be held to include all trees used for building purposes in the place where they are growing, but not to include trees used for fencing purposes only; and the parties must show by evidence what sort of trees are used for fencing purposes only; and what sort of trees are used for building purposes only in each particular locality. *Bruce v. Atkins*, 1 W. & W. (E.,) 141, 144, 145.

Incapable.]—The term "incapable" in the English language does not mean a voluntary inability to act, but an involuntary one. *Iffla v. Beaney*, 1 W. & W. (E.,) 110, 116.

In Testamentary Instruments.]—*See* WILL.

Defamatory.]—*See* DEFAMATION.

Meaning of the Word "Stevedoring."]—*See Collins v. Robbins, ante column* 1124.

Meaning of Word "Land" in Sec. 64 of Act No. 301—Easements.]—*See In re Transfer of Land Statute, ex parte Cunningham, In re M'Carthy, ante columns* 1411, 1412.

WORK AND LABOUR.

(1) *General Principles.*

Construction of Contract—Two Documents of Different Date Read Together.]—*See Appleton v. Williams, ante column* 188.

Construction of Contract — Satisfaction of Employer—Question for Jury.]—*Smith v. Sadler, ante column* 10.

Construction of Contract—Meaning of Quality.] —*See M'Gregor v. Melbourne Omnibus Coy., ante column* 189.

Count for Work and Labour Done—Contract for Making a Chattel which when Completed would Result in a Sale.]—*See Lyons v. Hughes, ante column* 193.

Jurisdiction of Justices of Peace as to Work and Labour.]—*Reg. v. Lloyd; Reg. v. Call, ex parte Thomas, ante column* 749.

Construction of Contract—Time for Possession.] —Contract provided that the contractor, if not put into possession at any time within two weeks and thirty days after execution of the contract, was entitled to a commensurate extension of time for completing the works, but he was in any case entitled to possession after thirty days. *Held* that the Board of Land and Works was bound to give possession after thirty days from the execution of the contract. *Young v. Board of Land and Works*, 3 V.R. (L.,) 110; 3 A.J.R., 77.

Penalty for Overtime—Delay Caused by Employer.]—A building contract fixed a time for completion and provided for a penalty in case of non-completion within the time fixed. The employer prevented the contractor from entering upon the work at the time agreed upon. *Held* that the employer could not insist upon the completion of the work within a similar time from the date it was actually commenced, but that the condition as to time was gone altogether. *Findlay v. Cameron*, 4 V.L.R. (L.,) 191.

Contract to Build a House—Alterations or Additions to be Valued by Architect.]—A contract to erect a house after providing that the works were to be executed to the satisfaction and under the direction and subject to the final approval of the architect, contained a clause that in the event of any alteration or addition being deemed necessary during the progress of the works such alteration or addition should be done by the plaintiff, and the cost of the same valued by the architect and added to or deducted from (as the case might be) the original amount of the contract. *Held* that this did not amount to an undertaking by the defendant that the architect should value such alterations and additions when executed, and that no action would lie for the omission by the architect so to do. *Duncan v. Shrigley*, 1 V.R. (L.,) 139; 1 A.J.R., 124.

Contract for Bulk Sum—Additions—What are Extras.]—A contract for the formation and drainage of a street contained the following proviso:—"Should any alterations be deemed advisable the city surveyor hereby reserves to himself the power to make such, which altered works shall be measured and paid for as if the same had originally been included within the

scope of the specification, and the contractor is distinctly to understand that no claim will be allowed for extras unless ordered in writing." The plaintiff alleged that he was duly required by the city surveyor to make, and did make, certain additions to and alterations upon the specified works, and also executed certain extra works which were duly ordered in writing, and claimed payment for the balance of the contract, for the additions and for the extra works. Plea that the additions, alterations, and extra works were not ordered in writing. Demurrer that the additions and alterations did not require to be ordered in writing. *Held* that in a contract of this kind, framed in the terms and containing the provisoes that this one did, and where obviously the additions were of the same kind of work, although they might cause the whole sum to be exceeded, yet they were not extras outside the contract, but that in the case of extras both parties know that the work is outside the contract, and the contractor is aware that he ought not to execute it unless ordered in writing; but that the additional work in this case being contemplated by the parties, could not be regarded as an extra, and judgment for plaintiff. *Barter v. Mayor, &c., of Melbourne*, 1 A.J.R., 160.

Works to be executed according to Directions of Engineer—Position of Engineer.]—A contract provided that certain works were to be done to the satisfaction and under the directions of O'C., an engineer appointed for that purpose. O'C. directed certain dams to be erected to prevent the water from filling the lagoon to be excavated, and the contract required the lagoon to be "unwatered." *Held* that the defendants were not liable for anything done by O'C. outside the *quasi* judicial functions given him by the contract unless the relation of principal and agent were created, which it was not by the contract. *Packham v. Board of Land and Works*, 5 A.J.R. 142.

Contract for Executing Works Suitable for a Bathing Establishment—To What Warranty Refers.]—R. contracted to execute certain work and provide certain materials and fittings for a bathing establishment, and the contract concluded "we guarantee the same to be in every way suitable for the requirements and efficiency of your establishment." Among the fittings was a large copper boiler which proved insufficient in capacity, although of the specified dimensions. At the trial the judge directed the jury that the warranty was limited by the size, &c., previously set out, and that R. was not bound to supply a larger boiler than that specified. On Rule *nisi* for a new trial, *Held, dissentiente Fellows*, J., that the direction was correct, R. being under the warranty only liable to provide labour and materials which should be good and suitable, and under no liability as to the capacity of the boiler except that it should be of the specified size. *Hosie v. Robison*, 5 A.J.R., 176.

Provision Making One Party Judge in His Own Cause.]—A contract for the performance of certain works contained a clause which provided that no remissions of any deductions made from the contract price by way of liquidated damages for delay, should be made by the Board of Land and Works until the engineer-in-chief made and presented a recommendation to that effect to the board, and until they had signified their approval of such recommendation. *Held* that, the engineer being an arbitrator between the parties, the clause would render the board judge in their own cause, and was, therefore, inoperative. *O'Keefe v. Board of Land and Works*, 1 A.J.R., 145.

Power of Architect to Determine Contract.]—A building contract provided that if the architect discovered that the contractor was using bad materials, and not progressing in a satisfactory manner, the architect might, after certain notice, determine the contract. The contract time was exceeded and no extension of time was given. *Held* that after the expiration of the contract time the architect had no such power. *Bailey v. Hart*, 9 V.L.R. (L.,) 66; 4 A.L.T., 161.

Means of Payment—Deductions by Employers.]—Contract between petitioners and the Board of Land and Works, on behalf of the Queen, that petitioners should make a railway for a gross sum of £1,271,841, according to specification and schedules of works and prices; but in the event of any discrepancy between the amount in schedules and the gross sum, the petitioners should be bound by the gross sum if the amount in the schedules was in excess, and all prices in the schedules should be proportionately reduced; that all *extras* ordered should be paid for, and all deductions for omission should be made in accordance with schedule of prices; that contractors should furnish fortnightly accounts, and on these being certified the Government should pay to contractors the amounts, deducting 10 per cent. until the amount of deductions should amount to £10,000, when that sum might be invested at contractors' option in Government debentures, and income paid to the contractors; the schedules of quantities attached to specifications represented the work to be performed under the several contracts, and the Engineer-in-Chief reserved power to make any alterations, deductions, or additions, such alterations, &c., to be allowed for at the ratio set against the several items of the schedules of quantities. At the end of the contract there was a recapitulation setting forth the several sums for each of the seven sections of the line, the total amount of which was £1,374,963; and underneath "less 7½ per cent. for entire work, £103,122," which reduced the total to the gross sum of £1,271,841. *Held* that the Crown was entitled to deduct £10 from every £100 of the amount mentioned in the certificates, notwithstanding that £10,000 might have accumulated and been invested; that the words, "7½ per cent. for the entire work," were not to be limited to mean that no deduction was to be made unless the entire work was completed, but that 7½ per cent. was to be deducted from each payment; and that deductions for *extras* were to be made at the same rate. *Evans v. The Queen*, 2 W. & W. (L.,) 46.

Building Contract—Action on when Maintainable — Satisfaction of Employer — Question for Jury.]—*Smith v. Sadler, ante column* 10.

(2) *Conditions Precedent to Right to Sue and Recover Payment—Certificates.*

Condition Precedent.]—R. contracted with the Government to build a two-cell log lock-up, and the contract contained *inter alia* the following stipulations:—(1) All materials used were to be of the best description and all works were to be executed conformably to the specifications, &c., and to the satisfaction of the superintending officer and the Inspector-General. (2) Any discrepancy between the drawings and specification should be rectified by the Inspector-General. (4) All prepared work or material should be the property of the board. (5) The contractor, if directed, should suspend work and have no claim for damages until after thirty days from such suspension and the board should not be bound to give possession of the ground or work till thirty days after signature of the contract. (6) If any dispute arose between the superintending officer and the contractor as to the quality or as to quantities or prices or any matter not thereby left to the sole determination of the board or Inspector-General, such dispute should be referred to the Inspector-General whose decision should be final; and the contractor should not be entitled to sue in respect of any claim or right under the contract until the matter in dispute should have been determined by the board or Inspector-General, and the obtaining such determination was declared a condition precedent to the maintenance of any action on the contract. R. sued the board, alleging in his declaration that the board did not give him possession at the expiration of thirty days after signature of the contract. As a fourth plea the board pleaded that the subject matter was a claim or right under the contract and was a matter in difference not determined by the board or Inspector-General. Demurrer to plea alleging that the subject matter was not such a claim or right. *Held* that the cause of action was not one of those claims or rights which on being referred could be determined by the board or Inspector-General, it was not one of those matters which had been left or referred by the specification itself, nor, being a matter which might have been, had it been referred under the powers given by the contract. *Semble*, the words "claim or right" refer to claims and rights for allowances and other matters arising after contract has begun and do not refer to a breach in delaying to give possession. *Roy v. Board of Land and Works*, 2 W.W. & A'B. (L.,) 188.

Construction of Contract—Works to be Executed to Satisfaction of Engineer—Condition Precedent—Covenant to Perform, &c.—Accuracy of Drawings.]—In a contract for the excavation of a lagoon each party covenanted to "perform, &c., the conditions contained in or reasonably to be inferred from the specifications and general conditions thereby annexed," and there was a statement in the contract that the specifications and conditions with the plaintiff's tender were the documents forming the schedule to the deed; there was also a clause that the plaintiff was to execute the works to the satisfaction of the engineer, and a statement that the "contractor (the plaintiff) was to satisfy himself" as to the correctness of levels and dimensions. The declaration averred a tender to execute the works according to the "general conditions." *Held* that the covenant did not embrace the tender (which was to execute under the "general conditions,") and that the tender was not a covenant in itself, and, though part of the schedule, it was not a part of the contract, and that, therefore, the satisfaction of the engineer was not a condition precedent to the right to sue; that the covenant only referred to future acts, and that there was no "covenant that the drawings were accurately made," and the statement that the plaintiff was to satisfy himself as to the correctness of levels relieved defendants from responsibility as to their accuracy. *Packham v. Board of Land and Works*, 5 A.J.R., 37.

Certificate of Engineer—Condition Precedent.]—A contract for excavations contained certain conditions as to progress payments being made after measurements, by and with the certificate in writing of the superintending officer, and for final payment after the chief engineer had given his certificate, with a proviso apparently referring to both progress and final payments, making the right thereto dependent on obtaining the certificate of the chief engineer as a condition precedent; then followed conditions referring matters of difference to the decision of the chief engineer, and providing for the mode of reference, but containing no negative words, or expressly making the decision of the chief engineer a condition precedent to either party bringing an action on the contract. *Held* that it was a mere collateral agreement, of which the parties might or might not avail themselves; and that the jurisdiction of the Court was not ousted, there being no words providing that no action should be brought until a third party had given his decision, and such words were more necessary seeing that the arbitrator was the chief engineer; that these conditions did not amount to a condition precedent, so as to give force to a plea, that no such decision had been given. *Young v. Board of Land and Works*, 3 V.R. (L.,) 110; 3 A.J.R., 77.

Condition Precedent—Reference to Engineer.]—A clause (No. 27) in a contract provided for the reference to the chief engineer of any disputes, &c., touching works, quantities, materials, &c., or "touching or concerning the meaning or intention of the contract or conditions" or "concerning any other matter or thing not hereinbefore left to his determination, or to be governed by his certificate." *Held* that the words "touching or concerning the meaning or intention of the contract or conditions" referred to other conditions of the contract, and not to the condition giving the power to refer; that a plea having been put in of a reference of the matters in dispute, and of determination thereon, the words "concerning any other matter or thing, &c.," referred to the *genus* work, quantities, &c., and related only to progress and final payments as to which the certificate was necessary. *Ibid.*

Reference to Arbitration—Effect of Determination of Contract—Neglect to Maintain a Chief Engineer.]—In a contract there was a clause similar to the above-mentioned (No. 27) as to reference, and a clause providing for de-

termination of the contract after certain notice. Three breaches were assigned, viz., (1) Wrongfully suspending the carrying on of the works;" (2) Wrongfully preventing execution of extras; and (3) Refusal to maintain a chief engineer." The defendants pleaded a reference and determination thereon. Replication that before the matters of dispute arose, the contract was determined. *Held* that breaches (1) and (2) fell within the condition giving the chief engineer power to decide; and that the word "contract" in the clause giving power to determine meant "further execution of the works," and not the articles of agreement under seal, and for the purposes of reference, the articles of agreement still continued in force, and that the replication was bad; that the "chief engineer" being defined as the chief engineer of water supply for the time being, the appointment was not one which the board could make, and the contractor being aware of this definition the third breach gave no right of action. *Gowan v. Board of Land and Works*, 3 V.R. (L.,) 123; 3 A.J.R., 91.

Final Certificate of Engineer—Award.]—In the last-mentioned case a clause (No. 17) provided that when a final certificate was given by the engineer as to the total amount of work done payment might be made. Such a certificate was given. *Held* that such a certificate was only a certificate under clause 17 and not an award under clause 27 (providing for references of matters in dispute to the engineer), and did not and could not refer to damages plaintiff claimed for being stopped in the execution of his work. *Gowan v. Board of Land and Works*, 3 V.R. (L.,) 241; 3 A.J.R., 120.

Condition Precedent—Reference to Arbitration.]—A building contract contained a condition that in case of any dispute between the employer and the contractor they should enter into a written agreement to submit the dispute to an arbitrator to be appointed jointly, or if they should not agree then to two arbitrators to be named in the agreement, to be appointed one by each, and a third to be appointed by the two other arbitrators, and that if either party on being called upon to execute the agreement should refuse he should pay to the other £50 by way of liquidated damages. *Held* that the person refusing to execute the agreement was not liable to pay the £50 unless the other party after his refusal to appoint an arbitrator, appointed one for him, and then tendered a submission containing the appointment. *Thackwray v. Winter*, 6 V.L.R. (L.,) 128.

Right to Payment—Engineer's Certificate.]—Where W. entered into a contract with J. to erect a framework for mining machinery, the work to be executed to the engineer's satisfaction, and W. sued for balance of an account for work done, it being proved that the engineer was not satisfied, *Held* that W. was bound to do the work to the satisfaction of the engineer, and not having done so was not entitled to a verdict. *Walsh v. Johnston*, 6 W.W. & A'B. (L.,) 77.

Progress and Final Payments—Engineer's Certificate.]—A contract provided for progress payments "after measurement by, and with the certificate in writing of, the superintendent officer," and for final payments "after certificate by the chief engineer" and making the right to both progress and final payments dependent on the certificate of the chief engineer as a condition precedent. *Held* that no progress or final payments whether for specified work, extras, or maintenance, were to be made except upon the certificate of the chief engineer—the words "after measurement by, and with the certificate in writing, &c.," not excluding another certificate, *i.e.*, one by the chief engineer. *Young v. Board of Land and Works*, 3 V.R. (L.,) 110; 3 A.J.R., 77.

Final Payment—Engineer's Certificate.]—A contract contained a condition that certain works were to be executed under the control and to the satisfaction of an engineer, and a subsequent condition that final payment should be made upon a certificate of the engineer that the works had been satisfactorily completed. *Held* that the former condition was a condition precedent to the right to payment, and not a collateral covenant. *Young v. Ballarat Water Commissioners*, 4 V.L.R. (L.,) 306, 316.

Final Certificate.]—A final certificate overrides even all *interim* orders, is a condition precedent to the contractor's right to recover and equally binds both parties, and it then is immaterial whether the contractor has complied with the conditions of the contract in other respects, they being merely ancillary to the grant of the certificate. Where, therefore, the jury find that the final certificate has been improperly withheld, the result is the same as if the certificate had been given, *Young v. Ballarat Water Commissioners*, 5 V.L.R. (L.,) 503, 565; 1 A.L.T., 105.

Contractor acting on a Document as a Final Certificate—Board of Land and Works Estopped from Denying that it was Such.]—*O'Keefe v. Board of Land and Works, ante column* 413.

Right to Recover Payment—Several Certificates.]—In a building contract provision was made for progress payments upon production of an architect's certificate, and when the whole of the works were completed the contractor was entitled to receive upon production of a certificate to that effect an amount, which with the sums previously received, should amount to 97½ per cent. of the whole amount, and the balance was to be paid by the proprietor within twelve months after production of a certificate stating the amount of such balance and that the contractor had executed and completed the works to his entire satisfaction. The architect gave a certificate for progress payments and another certificate certifying that the contractors were entitled to receive a sum of £3000, less £300, being balance in full on contract as security for satisfactory reparation of any defects found in the works. *Held* that the second and third certificates mentioned in the contract might be combined, but that the certificate given did not amount to the last certificate mentioned in the contract, and that the plaintiffs were not entitled to recover the whole balance due. *Walker v. Black*, 5 V.L.R. (L.,) 77.

Right to Payment—Additions, &c.—Surveyor's Certificate.]—M. entered into a building contract with a road board. The contract contained provisions to the effect that the board's surveyor should have power to make "such additions, deductions, and alterations" in the work as should be necessary, and that such additions, &c., "were to be valued at the rates named in the schedule;" that no such alterations "would be paid for unless previously authorised by the surveyor in writing;" and "that no money should be payable until a written certificate to that effect be obtained from the surveyor." It appeared that as to a certain embankment there were errors in the quantities, so that £180 more work was done than was specified. Action by M. for the price of this additional work. *Held*, reversing the judge of the County Court, that the surveyor's certificate was necessary for this extra work. A nonsuit to be entered, or verdict for defendant. *Broadmeadows Road Board v. Mitchell*, 4 W.W. & A'B. (L.,) 101.

Right to Recover for Extras—Certificate—Building Contract.]—Where items sued on are extras, an architect's certificate in writing is necessary. *Roberts v. Lambert*, N.C., 22.

Recovery of Payment for Extras.]—Payment for extras ordered by the engineer inside the contract must be recovered in the mode prescribed in the contract, and not under the common count, and payment for extras outside the contract cannot be recovered unless ordered by the engineer, as prescribed by the contract. *Young v. Ballarat Water Commissioners*, 5 V.L.R. (L.,) 503, 563; 1 A.L.T., 105.

Right to Payment for Extras—Engineer's Certificate.]—A contract contained a condition that the contractor should execute any extras which an engineer might, by an order in writing, require; but no extras were to be paid for which should be done without such order in writing, "nor unless the total quantities and rates of payment for such extras shall have been previously ascertained and certified by the engineer." *Held* that the contractor could not claim payment for the extras unless the total quantities and rates of payment for them had been ascertained and certified previously to the execution of such extras. *Young v. Ballarat Water Commissioners*, 4 V.L.R. (L.,) 306, 315.

Waiver of Condition.]—It is no answer to a plea that a certificate has not been given to allege that the absence of the certificate was due solely to the improper refusal of the engineer to give it, and that the defendants were aware of the refusal, and so had waived the condition. *Ibid*, p. 316.

Liability of Employer for Extras.]—An employer may make himself liable for extras not ordered by the architect under a building contract under seal, which provides that no extras shall be allowed or paid for without an order in writing from the architect, if such employer himself verbally order the contractor to execute the extras; there being nothing to prevent the employer making additional contracts. *Thackwray v. Winter*, 6 V.L.R. (L.,) 128.

Engineer's Certificate—Withholding—Damages.]—C. and B. contracted with the Government to build a railway. The contract *inter alia* provided that the Crown should from time to time pay C. and B. the amount certified by the Engineer-in-Chief to be due, who, by clause 29 was to be furnished every fortnight with a detailed account of work done, and was to certify the same; that 10 per cent. was to be retained by the Crown of the amounts so certified until the sums retained amounted to £10,000 which was to be invested at the option of the contractors; and that the balance should be paid after completion of the works; and that it should be obligatory upon the Engineer-in-Chief to give his certificate under clause 29 or state his reasons in writing for not doing so. The representatives of C. and B. presented a petition alleging as a breach that the engineer had not complied with clause 29 or stated his reasons in writing, and the petition contained a count for work done, money lent, paid, had and received, for interest and money due on account stated. It appeared that in reply to a letter from contractors the engineer wrote—"I decline to give you a certificate, and one reason is that there is nothing due to you." *Held*, (page 198)—(1) That the engineer had merely stated a "conclusion" and not a "reason." (2) (pp. 205, 206, 219)—That the petitioners were entitled to substantial and not merely nominal damages for the breach, the damages being the loss of the certificate and flowing directly from the breach. (3) (p. 213)—That the reasons to be stated by the engineer must be sufficient reasons in law, supported by facts that were true. (4) (p. 218)—That the furnishing of accounts by the contractors in clause 29 within fourteen days or any other limited time was not a condition precedent to obtaining the certificate. *Bruce v. The Queen*, 2 W.W. & A'B. (L.,) 193.

Improper Refusal of Certificate—Damages.]—The proper measure of damages in the case of an improper refusal of a certificate is the value of the certificate which the engineer ought to have given; progress payments do not conclude the plaintiffs, and the interest which the parties have agreed that the certificate shall carry if not paid forms as much a part of its value until paid as the capital sum on which it rests—Interest allowed at 10 per cent. *Young v. Ballarat Water Commissioners*, 5 V.L.R. (L.,) 503, 546, 557; 1 A.L.T., 105.

Engineer's Certificate—Withholding—Liability of Employer.]—A contract for the execution of works provided that the contractor should not be entitled to payment until he had obtained the certificate of the employers' engineer. *Held* that the employers were not liable for the withholding of such certificate by the engineer unless the withholding were fraudulent and the engineer were acting in collusion with the employers. *Semble*, that if the engineer refuse to certify in pursuance of the contract, and the employers remain inactive, and so retain a large sum from the contractors, it would be evidence of collusion. *Young v. Ballarat Water Commissioners*, 4 V.L.R. (L.,) 502, 508.

Semble, that if an engineer wilfully and improperly refuse to grant a certificate, and

application is made to the employer to compel him either to give one or assign valid reasons for the refusal, or if he fails to do so to dismiss him and appoint another, and the employer declines to comply with that request, he will be liable to an action for a wrong inflicted on the contractor, such wrong consisting in the employer's tortiously refusing to perform the duty he owes to the contractor, and thereby preventing him (the contractor) from obtaining the payment to which he is entitled. *Ibid*, p. 317.

Contract for Public Works—Position of Engineer—Improper Refusal of Certificate.]—An engineer appointed by a company for whom works are being executed, and who, by the contract, is empowered to give certificates, is not an arbitrator, but a skilled agent of the employer, whose certificate is, by mutual agreement, essential as a condition precedent to the contractors obtaining final payment for the work done by them. He is appointed to form a professional opinion, owes a duty to the contractor as well as his employer, and is bound to act fairly towards both parties. Where then a final certificate has been refused, a jury may, upon evidence, find that although the certificate has been withheld the works have substantially been completed to the engineer's satisfaction; but there must be some evidence that the certificate has been withheld by the engineer in collusion with his employers, and by their procurement; and if the explanations given be not satisfactory, the jury should decide what inferences should be deduced as to the motives, intents, and understandings that existed between the engineer and his employers. *Young v. Ballarat Water Commissioners*, 5 V.L.R. (L.,) 503, 560, 543, *et seq.*; 1 A.L.T., 105.

Engineer Fraudulently Withholding his Certificate—Action against Engineer.]—If a contract make the certificate of the employers' engineer a condition precedent to the contractor's right to payment, and the engineer fraudulently withhold his certificate, an action will lie, at the suit of the contractor, against the engineer for such withholding, and the plaintiff need not aver in his declaration that the certificate was withheld by the engineer acting in collusion with the employers. *Young v. Ohlfsen Bagge*, 4 V.L.R. (L.,) 516.

(3) *Forfeiture of Materials and Deposit.*

Condition for Forfeiture of Materials—Extension of Time.]—A contract provided for the determination of the contract, and the forfeiture by the defendants of all materials found upon the ground in case of certain specified breaches of contract by the contractor (plaintiff), and also that the engineer might extend the time in which the works were to be completed. An extension of time had been granted, and after this a dispute arose between the engineer and contractor as to the execution of certain work, and after the extended time had expired, the engineer called upon the contractor to perform it in a particular way, and then notice was served upon the contractor that the defendants would determine the contract, and forfeit the materials. *Held* that the proviso as to forfeiture only applied during the original term of the contract, and could not be enforced after the expiration of that period, and during or after the extended time. *Mayor of Essendon v. Ninnis*, 5 V.L.R. (L.,) 236; 1 A.L.T., 23.

Contract for Construction of Railway—Deposit—Forfeiture.]—A projected railway, for the purposes of construction, was divided into four divisions, and P. put in tenders for all the divisions separately, which were accepted by the defendants, and P. paid a deposit of £500. One of the conditions of tendering provided that the person whose tender was accepted for each division should deposit a sum of £200, and the person whose tender was accepted for the whole work should deposit £500; that if the same person's tender should be accepted for two divisions, he should deposit £300, if for three divisions, £400, and if for the whole contract, £500. Another condition required the person whose tender was so accepted to deposit £5 per cent. on the whole amount of his tender within ten days after being called upon to do so, and within three days after that to execute a contract deed. In the event of his not making this further deposit, the monies first deposited to be forfeited. P., not being in a position to tender the deposit of £5 per cent. on the whole, tendered this percentage on only two of the divisions, which the defendants refused to accept, and forfeited the deposit of £500. *Held* that the deposit was rightly forfeited. *Porter v. Board of Land and Works*, 1 V.R. (L.,) 207; 1 A.J.R., 161.

(4) *Damages and Compensation.*

Depreciation of Plant—Interest on Penalties and Deposits.]—On an action for breach of a contract for the construction of certain works, the plaintiff recovered a verdict and wished to add to his verdict two sums for depreciation of plant, and for interest on the penalties and deposit retained by the Government (defendant). *Held* that the item for depreciation of plant should be allowed; but as to the other item for interest the damages were too remote. *Young v. Board of Land and Works*, 4 A.J.R., 36.

Construction of Contract—Compensation for Suspension.]—A contract for the execution of works provided that the contractor should, on receiving written notice from the engineer of the employer, suspend the whole or any part of the works, and should have no claim for loss or damage owing to such suspension until thirty days from the date of the suspension. *Held* that if the works were suspended for more than thirty days the employers were liable to compensate the contractor for such suspension. *Young v. Ballarat Water Commissioners*, 4 V.L.R. (L.,) 502, 507.

Suspension of Works.]—Where a condition provides for payment of damages in case of suspension of works, the contractor may recover for what is really a suspension of works, though directions for such suspension are given as under an "order for works." *Young v. Ballarat Water Commissioners*, 5 V.L.R. (L.,) 503, 558; 1 A.L.T., 105.

Measure of Damages for Fraudulent Withholding of Certificate.]—*See Bruce v. The Queen*; *and Young v. Ballarat Water Commissioners, ante column* 1588.

Damages—Measurement in Prescribed Way not Carried out.—If a contract for the performance of certain works provide that they are to be measured in a certain way, and the work be not measured in the prescribed way, the employer is liable in damages to the contractor. *Young v. Ballarat Water Commissioners*, 4 V.L.R. (L.,) 502.

Where a condition provided that all measurements were to be made according to the most accurate methods, the contractors must show what those methods are and the correct quantities according to those methods, and may recover damages for incorrect measurements. *Young v. Ballarat Water Commissioners*, 5 V.L.R. (L.,) 503, 557.

WRITS.

When Executed.] — *Semble* — A writ issued within the statutable period of six years may remain in force any length of time. *Platts v. Wright*, 1 A.L.T., 131.

And *see ante columns* 434, 435, 1073, 1074, 1206.

Arrest on Ca. Re.—Act 274, Sec. 332—Materials in Affidavit.]—*Barry, J.*, (*In Chambers*,) set aside a writ of *ca. re.* on the ground that the affidavit on which it had been granted did not contain the facts from which it might be inferred that the action would be defeated unless the defendant were forthwith apprehended. *Lordan v. Hufton*, 1 A.L.T., 54.

And for other cases of writs of *ca. re.* and for writs of *ca. sa. see ante columns* 122, 123.

ADDENDA.

ACCOUNT.

Column 6. After *Cronan v. Edwards* add :—

Four-day Order for Filing Accounts—Form of.]—For a form of a four-day order for filing accounts made, without costs, upon application by the plaintiff where the defendants made default in filing accounts directed by the decree at the time appointed by the answer—*See Graham v. Gibson*, 6 V.L.R. (E.,) 75 ; 1 A.L.T., 183.

ACQUIESCENCE—*See* WAIVER.

ADMINISTRATION OF ESTATES OF DECEASED PERSONS.

Column 16. After *Orton v. Prentice* add :—

Creditors' Administration Suit—Presentation of Master's Report for Confirmation—Right of Creditor to Notice—Rules of Court, cap. vi., Rule 29.]—*See Clough v. Gray, post column* 1185.

Reference to Master for Account of Receipts and Disbursements—No Reference as to Share or as to Marriage Settlement of Administratrix—Statement in Report of Administratrix of her Share.]—*See Ware v. Ware, post column* 1185.

Liberty to Revive Suit—When Given to Creditor.]—*See Lonsdale v. Batman, post column* 1196.

Revivor—Order for in Administration Suit when Made.]—*See Grant v. Grant, post column* 1196.

Stop Order—When Refused to a Creditor in an Administration Suit.]—*See Ware v. Ware ; Ware v. Aitken ; post columns* 1199, 1200.

ATTACHMENT.

Column 60. After *Harkness v. Mayor, &c., of Maryborough* add :—

Property of Married Woman Settled by Antenuptial Deed Restraining Anticipation—Woman Married before Act No. 384—Property not Liable to be Attached under Sec. 208 of Act No. 274.]—*See Hutchings v. Cunningham, post column* 547.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Column 97. After *Rowan v. Mitchell* add :—

Agreement between Drawer and Acceptor to Renew for Remainder upon Payment of Part of the Sum Secured by the Bill—Full Payment of Part Agreed upon is a Condition Precedent to Right to Claim the Renewal.]—*See Pachten v. Politz, post column* 200.

CHAMPERTY.

Column 130. After *Mitten v. Spargo* add :—

Plaint for Trespass—Assignment of Claim Pending Appeal—Not Objectionable on Ground of Champerty or Maintenance.]—*See Herbert v. Millan, post column* 995.

CONTEMPT OF COURT.

Column 180. After *In re Ballarat Patent Fuel Coy.* add :—

Marrying Ward of Court—Attachment for.]—*See Ware v. Ware, post columns* 551, 552.

ESTOPPEL.

Column 409. *After Aspinall v. Marks ; Marks v. Aspinall* add :—

Defendant not Raising Ground of Defence is Concluded by Judgment.]—A defendant not raising a substantial ground of defence in an action is concluded by the judgment, and cannot make the omitted ground of defence the subject of an independent action ; and this principle is not affected by the fact that the two actions were brought in separate courts, and that the plaintiff in the second action seeks to recover unliquidated damages. *See Hurst v. Bank of Australasia, ante column* 9.

Appeal against Rates—Objections—Respondent Estopped from Taking.]—*See Corio Road Board v. Galletly, post column* 1271.

Column 412. After *Beckx v. Jones* add :—

Admission by Proprietor of Bonded Store by Marking Certificates that Goods Stored were Plaintiff's—Proprietor Estopped from Denying Plaintiff's Right to Possession.]—*See Isaacs v. Skellorn, post column* 1296.

Column 414. After *Ettershank v. Zeal* add :—

One Partner Treating Other as Sane for Purposes of Agreement for Dissolution Estopped from Treating him as Insane, for Purposes of Agreement for Reviving Partnership.]—*See Creswick v. Creswick, post column* 1130.

EVIDENCE.

Column 416. After *M'Vea v. Pasquan* add :—

Silence of Defendants in Police Court—Not Evidence of Admission of Facts Stated by Witnesses.]—*See Fisher v. Wheatland, post column* 1424.

GUARANTEE OR INDEMNITY.

Column 489. After *M'Ewan v. Newman* add :—

Guarantee given by Directors of a Mining Company in Consideration of Liquidator's having Transferred Money from his Name to theirs—Past Consideration.]—*See White v. Bank of Victoria, post columns* 1013, 1014.

INSOLVENCY.

Column 638. After *Halfey v. M'Ewan* add :—

Bill of Sale over Goods—Bill Unregistered—Grantee Seizing Goods—Title of Official Assignee—Act No. 204, Sec. 56—Act No. 557, Sec. 1.]—*See In re Shaw, ante column* 104.

INSURANCE.

Column 724. After *Johnson v. Union Fire Insurance Coy. of New Zealand* add :—

Insurance by Purchaser and Destruction by Fire of Buildings on Land before Title Given—Rescission of Contract—Right of Purchaser to Insurance Moneys.]—*See Bartlett v. Looney, post column* 1480.

JURISDICTION.

Column 741. After *Wilson v. Shepherd, In the Will of Wilsmore* add:—

Of Supreme Court where Decree has been Pronounced by Court of another Colony in a Suit between the same Parties in Respect of the same Subject Matter.]—*See Larnach v. Alleyne, post columns* 1437, 1438.

JUSTICES OF THE PEACE.

Column 778. After *Regina v. Miller, ex parte Hassall* add :—

Clerk of Petty Sessions taking Higher Fees than by Law Allowed—Taking not Wilful—Prohibition to Justices who had Convicted.]—*See Regina v. Lloyd, Ex parte Munce, ante column* 456.

MONEY CLAIMS.

Column 1046. After *United Hand-and-Hand Coy v. M'Iver* add :—

Sale of Goods—Vendor Remaining in Possession—Insolvency—Seizure by Assignee—Vendee unable to Recover Price as Money Had and Received.]—*See Warnock v. Blyth, post column* 1291.

Several Writs of Fi. Fa.—Goods Sold under one Writ, but Proceeds Applied in Satisfaction of Prior Writ—Person taking out Writ under which Goods were Sold unable to Sue Sheriff for Money Had and Received.]—*See Barnard v. Wright, post column* 1313.

Column 1047. After *Perkins v. Cherry* add :—

Liability of Attorney to Client in Action for Money Paid for Costs Recovered against Client after Settlement with Attorney.]—*See Wisewould v. Lee, post column* 1337.

PARLIAMENT.

Column 1119. After *Harbison v. Dobson* add :—

Articled Clerk a Member of—Not Necessarily Barred from Admission as a Solicitor.]—*See Ex parte Duffy, post column* 1331.

POLICE.

Column 1148. After *Power v. The Queen* add :—

Duty of Constable under Sec. 56 of Act No. 265 when Assault has been Committed—Assaulting Peace Officer in Execution of his Duty—Act No. 233, Sec. 34.]—*See Regina v. Huxley and Walsh, ante column* 1113.

POWER OF ATTORNEY.

Column 1158. After *Brown v. Hardy* (*ibid*) add :—

Power Given by One Partner to Another—Partner making Arrangement in Excess of Terms of Power.]—*See Oppenheimer v. Oppenheimer, ante column* 1130.

PRACTICE AND PLEADING.

Column 1190. After *Macoboy v. Phelan* add :—

In Suit by Principal to Compel Agent to Transfer Shares—Third Parties.]—*See Hardy v. Cotter, post column* 1243.

Column 1195. After *Bank of Australasia v. Balbirnie Vans* add :—

Infant Entitled to Share in Fund partly in Hands of Trustees under Direction of the Court in a Suit —Direction to Pay Past Maintenance out of Fund can only be Obtained by Summary Order in Suit or by Supplemental Suit.]—*See Mitchell v. Tuckett, post column* 1440.

Column 1222. After *Tobin v. Mayor, &c., of Melbourne* add :—

Action for Breach of Contract to Give Possession of Land on a Certain Day—Plea that before Breach Defendant Obtained a Transfer and Certificate of Title in his own Name not a Good Plea.]—*See Phœnix Foundry Coy. v. Hunt, post column* 1483.

PROHIBITION.

Column 1253. After *Regina v. Cope, In re Moore* (*ibid*) add :—

Where Refused—Costs Taxed after Trial and Judgment Entered.]—*See Anderson v. Ziegler, ante column* 260.

STATUTES.

Column 1371. After *Allardyce v. Cunningham* add :—

"Statute of Trusts 1864," Sec. 25—"Stock."]—*See Bryant v. Saunders, In re Saunders, post column* 1451.

WAIVER AND ACQUIESCENCE.

Column 1486. After *Carson v. Wood* add :—

Waiver of Condition in Contract for Work and Labour that Engineer should give Certificate.]—*See Young v. Ballarat Water Commissioners, post column* 1587.

Column 1487. After *Brown v. Abbott* add :—

Acquiescence of Husband in Settlement made in Wife's Favour with Husband's Money.]—*See Mason v. Sawyers, ante column* 1430.

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