DIGEST

OF

SUPREME COURT CASES,

FROM 1825 TO 1862.

ABANDONMENT.

See POSSESSION.

ABATEMENT.

See NUISANCE.

ABDUCTION.

See CRIMINAL LAW.

ABORIGINAL.

Aboriginals within the boundaries of the Colony are subject to the laws of the Colony, and there is no difference between an offence committed by them upon a white man and an offence upon another aboriginal. *R. v. Murrell*, 72.

ABSENT DEFENDANTS.

Foreign attachment.—*Fisher v. Wilson*, 155; *Kenny v. Teas*, 820; *Ex parte Smith*, 945.

ACCEPTANCE.

See CONTRACT.

ACCORD AND SATISFACTION.

Accord and satisfaction is not pleadable to an action on a judgment. *Polack v. Tooth*, 381.

The payment of a smaller sum, although by *cheque*, is not a satisfaction of a debt. *Ibid.*

ACCOUNT.

Account decreed to be kept by church trustees of pew-rents and other income, pending a decision on the legality of the deposition of officiating minister. *Purves v. Lang*, 955.

ACCOUNT STATED.

Foreign attachment.—A letter from defendant, in Canton, to plaintiff, in this colony, acknowledging that the former is indebted to the latter in a certain amount, and authorising him to retain certain goods in the colony, is sufficient as an "account stated" to entitle plaintiff to proceed by Foreign Attachment against the goods, in the possession of a third person, although the transaction, out of which the cause of action has arisen, occurred beyond the colony. *Ex parte Smith*, 945.

ACQUIESCENCE.

Trespass.—Continuing trespass to cattle-station acquiesced in. *Nowland v. Humphrey*, 1167.

ACT OF PARLIAMENT.

See STATUTES.

ACT.

Contra bonos mores. *Reg. v. Russell*, 110.

ADMIRALTY.

See SHIPPING.

ADMISSION.

See EVIDENCE.

ADVERSE POSSESSION.

Against the Crown.—If the statute 21 Jac. I, c. 14, is in force in the Colony, its effect is not, where the lands of the Crown are the subject of an intrusion, to put the Crown out of possession, but, having more than a bare right of entry, notwithstanding the intrusion be of 20 years' duration, the Crown can convey those lands effectually by grant, without having recourse to an Information of Intrusion (but, *semble*, the statute is not in force).

The Crown is not included in the meaning of the word "person" in 3 & 4 Will. IV, c. 27. The right of the Crown can only be barred by sixty years' adverse possession. *Doe d. Wilson v. Terry*, 505; and see *The King v. Steel*, 65.

AFFIDAVIT.

The word "settler" is not a sufficient legal definition of the degree of a deponent, and his affidavit will therefore be excluded. *R. v. Cummings*, 289.

Examination by Full Court of affidavit on which the order of a single Judge was made. *Nathan v. Legg*, 161.

It is the practice of the Court to receive an affidavit, made even during an argument, as to the mere service of an order. *Reynolds v. Tree*, 400.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

AIDER BY VERDICT.

See PRACTICE AND PLEADING—VERDICT.

ALIEN.

Local allegiance.—Every person who sues in the Queen's Courts, in the absence of evidence to the contrary, is reasonably presumed to be her subject; if born an alien, and neither naturalized nor become a denizen, yet if he owe local allegiance, he is a subject. *Holt v. Abbott*, 695.

AMENDMENT.

See PRACTICE AND PLEADING, JUSTICES, PROHIBITION.

APPRENTICE.

Parent's consent—Indenture.—The commitment of an apprentice, for absence from his apprenticeship, is bad if it does not follow the terms of the Apprentices Act, 8 Vic., No. 2, s. 4, and, on an application by *habeas corpus*, the conviction may therefore be examined as on a motion for a *prohibition*. The Masters' and Servants' Act, 9 Vic., No. 27, is not applicable to apprentices.

A conviction is not good in substance, when the commitment is general, instead of to solitary confinement, and also when the indenture of apprenticeship was never properly executed.

An indenture of apprenticeship, by which a son purports to bind himself with his parent's consent, the latter being made a party therein but not having executed the same, cannot take effect. *Ex parte Erwin*, 816, and see *ex parte Byrne*, reported at page 817.

ARREST.

Mesne process—Power of Court to discharge.—Defendant having been held to bail under 3 Vic., No. 15, on suspicion that he was about to remove from the Colony, and discharged on giving the Sheriff a bail-bond, afterwards, on the ground of insufficiency of the affidavit, obtained an order from the Judge, that the bail-bond should be delivered up to be cancelled on the first day of term, unless the Court should otherwise order. On application by the plaintiff to discharge this order, *held*, that though the Court *might* have no express power to grant the discharge under the Statute in question, yet it still retained its power under the former law.

The Court *will* examine the affidavits to see that the cause of action is certainly stated. *Nathan v. Legg*, 161.

Ca. Re.—Discretion to discharge bail.—*Roberts v. Morton*, 916.

A *Ca. Re.* cannot be issued before the writ of summons in an action. *Kenny v. Teas*, 820.

Ca. Sa.—Judgment Creditor.—Defendant having entered into a consent rule for payment of costs to the plaintiff, a writ of *ca. sa.* was afterwards obtained thereon by the plaintiff, and the defendant imprisoned.

Held (*per* the *Chief Justice* and *Manning J.*), the plaintiff was a judgment creditor within the meaning of sec. 3, 10 Vic., No. 7, on the consent rule (*Dickinson, J. dissentiente*). *Doe d. Long v. Delaney*, 502.

Criminal—without warrant.—The Sydney Police Act, 17 Vic., No. 31, sec. 18, does not empower an officer to arrest a person for an assault, however aggravated, which was not committed within his view, unless when he receives the information, he reasonably believes that there has not been a sufficient time to get a magistrate's warrant. *Freeman v. M'Gee*, 1009.

Arrest without imposition of hands.—*Greenwood v. Ryan*, 275.

Order of Court.—Commitments of a Court of Record need not be in writing. *Ex parte Hallett*, 163.

Contempt.—Instead of attachment an order of the Court to one of its officers can be enforced by a *fi. fa.* *Ex parte Hunter*, 165.

ASSAULT.

See CRIMINAL LAW.

ASSIGNMENT.

See INSOLVENCY.

ATTACHMENT.

See ABSENT DEFENDANTS—ARREST.

ATTORNEY.

12 Geo. I, cap. 29.—An attorney, having entered into an agreement with a person, who had been transported to this colony for the crime of forgery, in order to obtain the "good will" and services of the latter in the practice of his profession, is liable to be struck off the rolls, and the clerk to transportation for seven years by 12 Geo. I, cap 29. In this case, the facts having been admitted by the person concerned, the Court only ordered the agreement to be cancelled. *In re Roberts*, 89.

ATTORNEY-GENERAL.

Notice to—Prohibition—In cases of conviction before Justices where the Crown is interested in the penalty, it is a condition precedent to the hearing of a motion for a prohibition under the Justices' Acts, that notice should have been given to the Attorney-General. For a common law prohibition such notice is not necessary. *Ex parte Gaynor*, 1299.

See also CRIMINAL INFORMATION.

AUCTIONEER.

Undisclosed principal—liability.—*Mortimer v. Mort*, 938.

BAIL.

See ARREST, ABSENT DEFENDANT.

BAILIFF.

See SHERIFF.

BANKRUPTCY.

See INSOLVENCY.

BAR.

Trial at bar—Right of Crown to.—*Windeyer v. Riddell*, 295.

BETTING.

See GAMING, AND CRIMINAL LAW.

BIGAMY.

See CRIMINAL LAW.

BILLS OF EXCHANGE.

Foreign bill—stamp.—The question was whether a promissory note, made in England, and insufficiently stamped, as appeared by 55 Geo. III, c. 184, and therefore avoided by 31 Geo. III, c. 25, was admissible in evidence in this colony.

Held, on the authority of *Alves v. Hodgson*, that the Colonial Court should give effect to the revenue laws of Great Britain;

also, (*per* the *Chief Justice* and *Manning J.*) the instrument could not be dealt with as valid here, on the broader ground that in the country, where it was made, it was inoperative and invalid. *Gilchrist v. Davidson*, 539.

Death of drawer.—The drawer of a bill undertakes that a drawee shall honor it, and if he die before presentment, the liability is transferred to his representatives, and here, by 54 Geo. III, c. 15, the holder may sue either the executor or the heir. *Holt v. Abbott*, 695.

BILLS OF LADING.

See SHIPPING.

BILLS OF SALE.

Conveyance of present and future property — acquiescence in seizure—seizure of money.—*Held*, on motion for a new trial, that the goods of G. and R. acquired *after* the execution of the bill of sale did not pass thereby, but inasmuch as they were clearly *intended* so to be, the defendant might have succeeded on the evidence adduced if he had pleaded the seizure and that G. and R. acquiesced.

The defendant not being entitled to seize money under the bill of sale, was liable to the extent thereof to the insolvents, and not having made an allowance to them on that account, and with their acquiescence until after the sequestration, was liable to pay the same sum over again to the creditors of the insolvents under sec. 12 of the Insolvent Act, but not as money received "to the use of the assignee." *Morris v. Taylor*, 978.

Registration—declaration of trust.—In consideration of money lent to G. by A. and B., G. gave a bill of sale over certain goods to A. to secure payment to A. and B., and also to secure to B. payment of a debt previously incurred. A. executed a declaration of trust on the same date, but on a separate paper, acknowledging himself a trustee for B. The former deed only was registered.

Held (by a majority of the Court), that the declaration of trust was within section 2 of the Bill of Sale Act. *Wilson v. Cabcroft*, 1267.

BODY.

See CORONER.

BOND.

4 Anne, cap. 16, sec. 13—equitable principles—payment into Court.—The statute, 4 Anne, c. 16, s. 13, gives to the Court an equitable jurisdiction, to be summarily exercised, to allow the defendant, in an action on a bond, to pay the amount due into Court, and in case the amount is in dispute, to refer the matter to the Prothonotary for a report thereon. The Prothonotary may also be ordered to report upon *facts* necessarily involved in the question of the amount due.

Notwithstanding the condition of a bond be the payment of money by some person other than the obligor, and by instalments, the statute still applies. *Eales v. Dangar*, 490.

—— **Several persons entitled.**—When the bond discloses the fact that other persons, besides the sole obligee, are interested, the condition being, to pay him or one of two other persons, according as they should severally be entitled, payment to the obligee may be in fact no payment for the purposes of the action, and beyond the question what payments have been made, a further enquiry is necessary, to whom they were made, having regard to equitable principles. *Ibid.*

BOUNDARY.

—— **Bearings without allowance for magnetic variation.**—The boundaries of the land in an information of intrusion were fixed by the actual bearings without allowance for the magnetic variation, *held*, although the grant must be taken to have referred to the *true* bearings, there was no variance. *Attorney-General v. Brown*, 312.

—— **Admissions.**—Admissions by grantee, prior to issue of Crown grant, as to boundaries. *Doe d. Evans v. Lang*, 827.

And see TRESPASS.

BREACH.

See CONTRACT, MARRIAGE, AND TRUST.

BREAD.

Fancy bread.—"Turnovers" are not fancy bread within the meaning of 6 Will. IV, No. 1. *Ex parte Godfrey*, 1017.

General warrant.—An inspector of weights and measures, under 6 Will. IV, No. 1, may seize bread under a general warrant. *Ibid.*

BUILDING ACTS.

5 Will. IV, No. 20, sec. 4—encroachment.—A conviction under sec. 4 of 5 Will. IV, No. 20, for encroaching on the footpath, cannot include the two penalties, for the commission of the offence, and continuance of the same.

Such proceedings must be brought within six months. *Ex parte Younger*, 1403.

An encroachment upon the streets of Sydney caused by rebuilding over the alignment cannot be removed without an adjudication in accordance with sec. 4 of 5 Will. IV, No. 20. *Quære*, whether 14 Vic. No. 41, sec. 100, could apply.

Section 55, of 20 Vic., No. 36, does not extend to a statutory nuisance. *Alexander v. Mayor of Sydney*, 1451.

8 Will. IV, No. 6.—The Sydney Building Act, 8 Will. IV, No. 6, is apparently copied from 14 Geo. III, c. 78, which provides for the inspection of certain buildings by the District Surveyor, "and such surveyor for his trouble thereon, shall be paid by such master-workman, or person causing such building or wall to be built, such sum of money for his trouble therein *as two justices shall, by any writing under their hands, order*, not exceeding, &c.," "and in default of payment of such sums, *or such other sums as such justices shall appoint*," the same shall be levied by distress and sale under the warrant of one justice. The local Act omits the words in italics. Although the Court did not decide that the magistrates had no jurisdiction to issue a warrant to recover fees under the Act, but merely that it was a doubtful case, *held* that the Court ought not to interefere by *mandamus*, to compel the magistrates to act, when by so doing, the latter might be subjected to an action. *Ex parte Buchanan*, 102.

—— **City Surveyor—Penalties.**—The City Surveyor, under the Act, 20 Vic., No. 36, re-establishing the Corporation of Sydney, has the powers of the surveyors under the Building Act, 8 Will. IV, c. 6, ss. 55, 56, and 57, which powers were not repealed by 6 Vic., No. 3, 14 Vic., No. 41, and 17 Vic. No. 33.

The forfeiture and penalty to which persons are liable under section 57 of 8 Will. IV, c. 6, can be recovered by action only, and not summarily. *Ex parte Watt*, 1461.

BY-LAW.

See RAILWAY—MUNICIPALITY.

CARTERS' ACT.

Section 1 of 18 Vic., No. 28, notwithstanding the grammatical ambiguity, repeals everything in section 40 of the Police Act, 4 Will. IV No. 7, which relates to the riding upon drays or carts without some person on foot to guide them.

Only vehicles *plying for hire* are within the enactment of 18 Vic. No. 28, sec. 36. *Ex parte Boyne*, 894.

CERTIORARI.

—— **Motion for—Notice of Grounds.**—Notice of one of the grounds for the motion to quash a conviction not having been given in the affidavit in support of the *certiorari*, *held* that this was not necessary, as there was no provision to that effect in the Colonial Statutes, and 7 Geo. IV, c. 48, sec. 17, was not in force here. *Reg. v. Mann*, 182.

—— **From Quarter Sessions.**—The Supreme Court has authority, after conviction and judgment for felony at the Court of Quarter Sessions, to remove the record of conviction by *certiorari* for the purpose of quashing it, not for error on the record, but for facts extrinsic of the record.

Evidence of such facts must be brought before the Court by affidavits.

After conviction a prisoner cannot raise as an objection on the return to a *certiorari* anything which he could have advanced in the court below.

A defect in the record cannot be advanced as a matter of error, if notice has been specifically given of it in the Court below, but reference to it may be properly allowed, as a circumstance to be taken in connection with other evidence *dehors* the record. *Reg. v. Hodges*, 201.

—— **From Circuit Court—Motion for New Trial.**—The Court has no power to remove by *certiorari* the proceedings in a criminal case, tried before a Circuit Court, after sentence, whether the case be felony or misdemeanour, for the purpose of entertaining a motion for a new trial. *Reg. v. Evans*, 1005.

CHARTER OF JUSTICE.

Sec. XI.—*Ex parte Chung*, 1458.

Sec. XIII.—*Gosling v. Grosvenor*, 443.

CHILD.

Deserted Wives and Children's Act, 4 Vic., No. 5.—*Ex parte Armstrong*, 1122; *ex parte Rose*, 1163.

Child Desertion by Mother, 22 Vic., No. 6, sec. 9.—*Reg. v. Smith*, 1382.

CHURCH.

Presbyterian Church—Receiver of Pew Rents—Synod—Trustees of Church Land.—Certain land in Sydney was granted in the year 1826 to trustees for religious purposes, and the Scots Church was erected thereon.

Held that these retained the legal estate in the land, notwithstanding the subsequent Acts, 7 Will. IV, No. 3; 8 Will. IV, No. 7; and 4 Vic., No. 18; and although new trustees had been elected under the provisions of section 3 of 4 Vic., No. 18.

Also, that a receiver would not be appointed of the pew rents and other receipts of a church, the minister of which had been deposed by the Presbyterian Synod of Australia, and that the trustees would not be enjoined from allowing him to preach therein, the legality of the depositions being still in dispute, but an order would be made that the trustees should keep an account of all receipts of pew rents and assessed rates and of expenditure (the Act giving no power to the Court to interfere with voluntary contributions), and take security from the said minister for the repayment by him of any moneys paid by them to him.

The Court will not grant a receiver of the rents of portion of a building to the extent to which it encroaches upon other premises, in respect of which a receiver may be appointed.

Query, as to the power of the Presbyterian Synod of Australia to depose a minister of the Church of Scotland holding a charge in the Colony. *Purves v. Lang*, 955.

Presbyterian Church—Power of Synod to depose—Laches.—In the year 1826 certain land in Sydney was granted by the Crown to the defendants, the Rev. Dr. *Lang* and *David Ramsay*, and others (since deceased), as "trustees for the congregation of Scots Presbyterians in Sydney," for the purpose of "erecting a Scots church, in which the ordinances of religion should be dispensed by a regularly ordained minister of the Church of Scotland. The only congregation to which the above description could apply was one of certain Scots Presbyterians, in which Dr. *Lang*, an ordained minister of the Church of Scotland, officiated. In 1832 this church with others united to form a presbytery, and in 1833 a synod was established. The latter body, acting under the statutes, 8 Will. IV, No. 7, and 4 Vic., No. 18, in the year 1842 deposed Dr. *Lang*, and declared the church in question to be vacant. Dr. *Lang*, however, was suffered by the trustees to continue his ministration there.

A suit was instituted by plaintiffs, members of the Synod, as representing that synod, and for the congregation of the church, in 1855, praying that the defendants (the trustees) might be ordered to convey to new trustees, that possession of the church might be given up, and that the defendant, Dr. *Lang*, might be restrained from performing the duties of minister.

Held, the statutes, 7 Will. IV, No. 3; 8 Will. IV, No. 7; and 4 Vic., No. 18, were not private Acts, since they related to the general community of Presbyterians.

Also, that the Synod had no power to depose the rev. defendant from his status under the said statutes, but had full power to exclude him from the church in question, which was within its jurisdiction.

Also (the *Chief Justice dissentiente*) that the prayer of the Bill could be granted, although in the pleading it was founded upon the "deposition," since it appeared therein that the church was also declared "vacant" by the Synod, and the suit was on behalf of a charity.

In a case such as the above, where the judgment of the Court is appealed from, on grounds which are not frivolous, the execution of the decree should be suspended upon the defendants giving security. (*Attorney-General v. Monroe*, 12 Jurist 210, followed.)

Held, by the *Privy Council*, that the decree below must be reversed on the ground that it did not appear that the plaintiffs were members of the congregation in question, or that as a public body they were entitled to institute the suit.

Also, that it was very doubtful whether, if they had any right, the plaintiffs could call upon the Court to enforce it after thirteen years delay. *Purves v. Attorney-General*, 1189.

Ecclesiastical law of England—8 Will. IV, No. 5—Prerogative of Crown in Ecclesiastical matters.—A clergyman of the Church of England in Sydney having excluded the Bishop of Sydney from his church was cited, in accordance with the powers contained in the royal letters patent appointing the Bishop, by the Chancellor of the diocese to appear before him and undergo the visitation of the Bishop. *Held*, that a prohibition must be granted against the said Bishop of Sydney and Chancellor, inasmuch as the King's Ecclesiastical Law of England, under which and the above letters patent the said proceedings would have been valid, was displaced, even if originally in force in the Colony, by 8 Will. IV, No. 5. *Held*, also, under 9 Geo. IV, c. 83, s. 24, the King's Ecclesiastical Law of England is not applicable to this Colony, nor can it be introduced by the Sovereign by virtue of letters patent appointing a Bishop, or by long recognition on the part of the members of the English Church in the diocese of the said Bishop.

(Per *Wise* J., Ecclesiastical Law is no part of the Common Law of any Colony.)

The Crown can, by virtue of its prerogative, create a bishopric, and nominate a Bishop in the Colonies.

A prohibition lies, not only against a Court having *some* jurisdiction, and exercising the same wrongly, but also against individuals, assuming to act as, but not constituting a Court. *Ex parte the Rev. G. King*, 1307.

CLAIMS AGAINST GOVERNMENT.

See CROWN, ACTIONS BY AND AGAINST.

CLAIMS, COURT OF.

See CROWN GRANTS.

CODICIL.

See WILL.

COLLISION.

See SHIPPING.

COMMON LAW.

Application of English Common Law to this Colony, see STATUTES, 9 Geo. IV, cap. 83, sec. 24.

English Ecclesiastical law is no part of the Common Law of any Colony. *Ex parte the Rev. G. King*, 1307.

CONDITION.

See CONTRACT.

CONFESSION.

See EVIDENCE.

CONFLICT OF LAWS.

Foreign revenue law—Promissory note.—The question was whether a promissory note, made in England, and insufficiently stamped, as appeared by 55 Geo. III, c. 184, and therefore avoided by 31 Geo. III, c. 25, was admissible in evidence in this Colony.

Held, on the authority of *Alves v. Hodgson*, that the Colonial Court should give effect to the revenue laws of Great Britain;

also (*per* the *Chief Justice* and *Manning* J.) the instrument could not be dealt with as valid here, on the broader ground that in the country, where it was made, it was inoperative and invalid. *Gilchrist v. Davidson*, 539.

Imperial and Colonial Land and Assessment Acts.—*Rusden v. Weekes*, 1406.

CONSIDERATION.

See CONTRACT.

CONSPIRACY.

See CRIMINAL LAW.

CONSTABLE.

—— Action against—Obedience to warrant—Statutory defence—Notice.—Arrest of plaintiff by defendant under a warrant "to arrest a man who calls himself Clark." The plaintiff was never identified as such, and after several remands was discharged.

Held, that the warrant was good.

There may be an arrest without imposition of hands, provided there be a constraint on a person's will. Under the above warrant the defendant could only arrest a person who could be identified as having "called himself Clark."

By sec. 6 of 24 George II, c. 44, when the officer has obeyed a warrant, for issuing which the justice is or may be liable, a copy of the warrant must be demanded by the plaintiff, and the justice joined in the action; but, by sec. 8, when the officer, with intent to obey a warrant properly issued, acts in a manner not authorised thereby, he must be sued within six calendar months.

The defendant, by noting the statute 21 Jac. I, c. 12, at the foot of his plea, was probably entitled to give in evidence any matter of defence, which he had either by common law, or by that enactment, or by any subsequent statute.

Although the offence with which the plaintiff was charged amounted to larceny within the statute, 7 and 8 Geo. IV, c. 29, yet the defendant, by acting in supposed obedience to the warrant, is not entitled to the benefit of *notice* under that statute. *Greenwood v. Ryan*, 275.

CONSTITUTION.

See ELECTIONS—GOVERNOR.

CONTEMPT.

See ARREST.

CONTRACT.

Consideration, failure of.—*Fitzgerald v. Luck*, 118.

Consideration, valuable—under Registration Acts.—*Doe d. Irving v. Gannon, No. 1*, 385; *Doe d. Peacock v. King*, 829; *Gannon v. Spinks*, 947.

Unilateral Agreement—Condition precedent.—L. contracted with A. to sell a certain station to him at a certain price if the offer were accepted within 2 months, this time being allowed for A. to visit the property, B. reserving the right to sell to any other in the meantime, and promising in that event that if A. should offer to purchase within the time allotted, he would pay to A. a forfeit of £100. A., after starting to inspect, received a letter announcing the sale of the station by B.

Held, A. was entitled to payment of the £100, although he neither completed the journey of inspection nor made an offer to purchase. *Abbott v. Lance*, 1283.

—— Promise of Crown grant—measure of damages.—In a proceeding by way of petition of right against the Government, for not granting an allotment of land pursuant to contract, it was proved that the Governor, in order to induce D. to settle in N.S.W., promised him a grant of land at W.; that D. gave up his claim to an allotment at W. in consideration of a promise to grant an allotment at H., which latter was not carried out.

Held, not to be necessary to prove as a condition precedent that D. had settled in the colony, the agreement implying only that he should settle when the grant was made.

Held, further, that the measure of damages for the breach of such a contract is the highest value which such land as had not been allotted had acquired. *Dumaresq v. Robertson, No. 4*, 1387.

Form—Statute of Frauds—Delivery.—It is no objection to a verdict for the plaintiff for

goods sold and delivered (above £10), that there was no proof of actual delivery as required by the Statute of Frauds, if this defence was not pleaded, and proof of a constructive delivery according to the custom of timber dealers is therefore sufficient. *Caffrey v. Taylor*, 842.

—— **Statute of Frauds, ss. 4 and 17—Names of parties—Guarantee.**—The declaration stated that one H. was desirous of obtaining certain machinery, but was unable to pay for the same, and that a writing was given to H. by J., signed by himself, and in the following words:—"I will furnish Mr. Hardy with funds for the purchase of a steam-engine and machinery for a flour mill, on his suiting himself with the same, and notifying the purchase to me. Yass, 29 January, 1854. John Jobbins"; and the plaintiffs averred that H. delivered to them the said writing, on the faith of which they supplied him with the said machinery. An action having been brought against the executors of J. for the price of the goods.

Held, that the instrument must be taken to mean an undertaking to the vendors, whoever they might be, to pay the price of the required machinery to *them*, and not merely a collateral undertaking within section 4 of the Statute of Frauds. (*Dickinson, J. dissentiente.*)

Held, also, the writing was a sufficient memorandum of the contract to satisfy the requirements of the 4th and 17th sections, although the plaintiffs were not named therein. (*Dickinson, J. dissentiente.*)

Notwithstanding the rule of Court, excluding all defences under the Statute of Frauds, unless pleaded, where a declaration is demurred to and discloses the fact upon its face that there is no sufficient writing, the Court will give effect to the defence, although not pleaded. *Byrnes v. Williams, No.* 1, 1086.

The purchaser of a chattel, of a greater value than £10, delivered to the seller, by way of guarantee for the payment, a memorandum in writing in these words:—"I will furnish H. with funds for the purchase of a steam engine and machinery for a flour mill, on his suiting himself with the same, and notifying the purchase to me." This memo. was signed by J., but was not addressed to anyone.

In an action against J. to recover the price of the machinery,

Held (by the *Chief Justice*), the contract was not rendered void by the Statute of Frauds, as the plaintiffs' names could not have been inserted in the memo. when it was written; the Statute does not invalidate a contract, otherwise good, for want of evidence, of which the contract is not susceptible. *Williams v. Lake* distinguished. The above memo. was an agreement to pay the price of the machinery to the plaintiffs.

Held (by *Milford*, J.), the contract, if any, could only be taken as a promise to H. to pay for the machinery when procured.

On appeal, before the *Privy Council*,

Held, both the parties to a contract are required by the 17th sec. of the Statute of Frauds to be specified in writing, either nominally or by description or reference, and therefore the above memo. is not sufficient. A promise in writing, signed, to pay to a person unnamed, who shall furnish goods to the writer, or to a third person making default, will become a binding contract with anyone, whosoever he may be, who shall accept the promise in writing and furnish the goods.

The contract was in fact a promise to furnish H. with money to pay for the machinery, and although plaintiffs had not been paid by H., it would have been a good defence to an action properly framed if it could be shown that J. had furnished H. with the necessary funds. *Byrnes v. Williams, No.* 2, 1479.

—— **Statute of Frauds, ss. 1 and 4—Action of trespass brought to enforce agreement invalid by the statute.**—An unwritten agreement having been entered into by plaintiff and defendant, that plaintiff should have defendant's land for five years and keep thereon defendant's sheep, plaintiff in accordance therewith entered and received the said sheep. Subsequently defendant demanded the sheep, and, on plaintiff's refusal to restore them, entered the land and took them. To an action on the trespass defendant pleaded, 1st, the Statute of Frauds, and, 2nd, cross action for damages arising out of plaintiff's breaches of the agreement.

Held, on demurrer, the agreement, *per se*, by the first section of the Statute of Frauds, could only have the force of a lease at will.

The agreement that plaintiff should keep defendant's sheep on the land was an inseparable part of the contract, and should also have been in writing.

Where an action of trespass is brought, really to enforce an agreement rendered invalid by the Statute of Frauds, a plea of the statute is a good answer to the cause of action. *Sutton v. Lintot*, 1229.

Illegal contract—Gaming.—*Chambers v. Perry*, 430; *Armstrong v. O'Brien*, 1235.

Contract by Correspondence.—Delivery of subsequent letter before one of earlier date. *Tooth v. Fleming*, 1152.

Contract under Seal — Improvident agreement - Implied duty.—*Tulip v. King*, 282.

Sale of goods "ex Dankberheid"—Delivery in reasonable time.—A contract for sale of goods "*ex Dankberheid*," made at a time when the said ship was bound to Sydney on a voyage from England, is not distinguishable from a contract for the sale of goods *to arrive*, and does not imply that, irrespective of the actual event of the ship's arrival, the goods are to be delivered in a reasonable time. *Hughes v. Greer*, 846.

Uncertainty in terms.—Sale of station. *Tooth v. Fleming*, 1152.

CONTRIBUTION.

—— between purchasers of land subject to a prior mortgage. *Terry v. Osborne*, 806.

—— between co-trustees who have committed breaches of trust in different degrees. *Wentworth v. Tompson*, 1238.

CONTRIBUTORY NEGLIGENCE.

Spicer v. Hunter River S. N. Co., 1351.

CONVERSION.

Arrest of ship by Marshal of Vice-Admiralty Court. *Lyons v. Elyard*, 328.

Insolvent's goods. *Wilson v. Cobcroft*, 1267.

CONVEYANCE.

See VENDOR AND PURCHASER.

CONVICTION.

See CRIMINAL LAW—JUSTICES.

CORONER.

See STATUTES, 4 *Ed. I, stat.* 2.

Mutilation of dead body.—The defendant, not being a duly qualified medical practitioner, dissected and removed parts of the body of a deceased person, with the intent, according to the information, of preventing due inquiry into the cause of death. This act is a criminal misdemeanour, as tending to defeat the object of the Coroner's inquest, and being *contra bonos mores*. The defendant having demurred to the whole of the information, was held to have admitted all the facts stated therein, and to be estopped by the record from affirming that there was no legally appointed Coroner for Sydney. *Reg. v. Russell*, 110.

Exhumation of dead body.—The Supreme Court has jurisdiction to order the exhumation of a body, for the purpose of a *post mortem* examination, although an inquest has already been held. *Reg. v. Clarkson*, 593.

COSTS.

I. COMMON LAW.
II. CRIMINAL LAW.
III. DISTRICT COURT.
IV. EQUITY.

I. COMMON LAW.

—— **Certificate to deprive of.**—The plaintiff in an action for libel having recovered one farthing damages, the defendant applied to the presiding Judge to certify to deprive the plaintiff of costs under 43 Eliz., cap. 6.

Held, the Court had no power to grant such certificate. *Brady v. Cavanagh*, 107.

Where a plaintiff recovered 40s. damages, for false imprisonment, in the Supreme Court, the Judge refused to certify to deprive him of costs, since it was not clear beforehand that he would not recover £30 and upwards. *Freeman v. M'Gee*, 1009.

—— **Certificate for costs.**—In order that a Judge may grant a certificate to a plaintiff for his costs, there is no necessity for either party to be present.

A Judge may also on reconsideration, and on fresh evidence, alter his decision already given. *Coberoft v. Clark*, 1383.

—— **Circuit Court—Certificate to deprive of costs.**—The Judge presiding over a *Circuit* Court has no power to grant a certificate to deprive plaintiff of costs, as at *Nisi Prius* in Sydney, the Circuit Courts being distinct tribunals.

The statute 43 Eliz., c. 6, even if in force, has been virtually repealed by the practice established under the present rules of Court.

(*Per the Chief Justice*) The 43 Eliz., c. 6, never was in force in the Colony. *M'Donald v. Elliott*, 751.

—— **New trial—party successful twice on one issue—detention of witnesses.**—The plaintiff, who succeeded on one issue at the trial, and obtained a new trial, is entitled on succeeding on the same issue at the second trial, to have his costs of that issue at the first trial, and in connection therewith to a portion of the brief fees, but not to costs for searches which were equally necessary on the other issues.

The defendants in their costs on the other issues are entitled to expenses of detaining witnesses, if it appear reasonable to the Prothonotary, that they should have been so detained, rather than examined *de bene esse*; but if not, then the defendants are only entitled to the costs of *one* examination order in respective of all such. In deciding this point the Prothonotary is right in using the affidavit of increase, and in referring to the Judge's notes of the evidence, on the question of fact which is to guide his decision. *Towns v. Underwriters, &c.*, 646.

—— **Nonsuit set aside.**—When a plaintiff succeeds in setting aside a nonsuit, he is entitled to his costs of the motion, but each party must pay his costs of the first trial. *Emery v. Armstrong*, 887.

—— **Discontinuance—Special Jury.**—A plaintiff, who has discontinued, is liable for the costs of a Special Jury, paid by the defendant, and also for the defendant's costs of obtaining the order for the same. *Bank of Australasia v. Walker*, 504.

—— **Technical objection.**—Leave to appeal to the Privy Council having been refused on a technical objection, costs were not granted, as it was believed that leave would be given by the Privy Council. *Terry v. Hosking*, 819.

—— **Expenses of survey and map.**—Expenses incurred in the *survey* of land, from which a map was prepared for use at the trial of an action of trespass, cannot be allowed on taxation, even though the map was absolutely necessary to understand the evidence; the cost of making the *map* may be allowed. (The Chief Justice *diss.*) *Cameron v. Hay*, 1358.

—— **43 Geo. III, cap. 46, sec. 3.**—This statute is not in force in New South Wales. *Simmons v. Taylor*, 1050.

Consent rule for payment of costs.—A consent rule for the payment of costs may be enforced by writ of *Ca. Sa* under 10 Vic., No. 7, sec. 3. *Doe d. Long v. Delaney*, 502.

II. CRIMINAL LAW.

Costs of Criminal Information.—The Court can discharge a rule for a criminal information with costs (*per* the *Chief Justice* and *Therry, J.*, *Dickinson, J.*, *dubitante*). [*per* the *Chief Justice*,—In certain cases of misdemeanour, the Queen's Bench in England has the same power by statute, of directing the filing of a criminal information, that this Court possesses in cases both of misdemeanour and felony. But that Court without any enactment in that respect, has the power of discharging a rule *nisi* for any such information, with costs. I conceive that this Court, therefore, the circumstances being the same, and its jurisdiction being, by statute, as ample in all cases as that of the Queen's Bench, also possesses that power.] *Reg. v. M'Innis*, 356, 359, 365.

Criminal Information—Public Officer.—On an unsuccessful application for a criminal information against a public officer for an official act, the defendant is entitled to costs, although defended by the Crown law officers. *Blackett v. Newman*, 1117.

Private prosecutor, liability of.—*Reg. v. Lang*, 1133.

III. District Court.

—— **Acts done out of Court.**—On the taxation of costs of a suit in the District Court, whether as against a client, or between party and party, in respect of what is done *in* Court, only such charges can be allowed as are fixed by the Act, but this rule does not apply to what is done *out of* Court. *Moffat v. O'Toole*, 1364.

—— **Interpleader issue over £10—original verdict under £10.**—*Ex parte Sandon*, 1381.

IV. Equity.

Rule discharged, but respondent succeeded only in form.—Costs (following *Walker v. Webb*) allowed to neither side, on the discharge of a rule *nisi*, the respondents having succeeded in form, but substantially failed. *Clarke v. Terry*, 753.

One of successful parties guilty of fraud.—Decree below (in favour of plaintiff) reversed without costs to one defendant (guilty of fraud), no costs of appeal. *Cockcroft v. Hancy*, 1051.

Interim injunction—imperfect grounds.—Interim injunction obtained *ex parte* on imperfect materials—costs of motion to dissolve the injunction, which was granted, made defendant's costs in the suit. *Morewood v. Flower*, 1109.

Appeal by infant.—A decree against an infant defendant having been made *without* costs, his appeal therefrom must be dismissed *with* costs. *Byers v. Brown*, 1136.

Difficult construction of agreement—Appeal by both parties.—Although the defendant has been on the whole unsuccessful in the suit, the plaintiff is not entitled to obtain our construction of a very difficult agreement, entirely at his adversary's expense. The costs of the Appeal must be borne by each party, because each has alike appealed, and neither has entirely succeeded, for the decree has varied, as to a portion in favour of the plaintiff, but as to other portions in favour of the defendant. *Tooth v. Fleming*, 1162.

COVENANT.

Agreement to work only for plaintiff.—Action on the case in which plaintiff declared on an agreement under seal, whereby he agreed to proceed to Australia, and work for the defendant as a collier, and to work for no other unless by permission of the defendant, payment to be made according to the amount of work done. The plaintiff averred that the defendant was thereby under a duty to provide the plaintiff with a reasonable quantity of work for his maintenance and support, but had failed to do so.

Held, on demurrer, that there was no express or implied contract to find full employment, and consequently no *duty*, and that if there were a duty, not *Case* but *Covenant* was the appropriate remedy. *Tulip v. King*, 282.

CRIMINAL LAW.

I. Offences.

II. Practice.

1. *Appeal.*
2. *Commitment.*
3. *Evidence.*
4. *Information by Attorney-General.*
5. *Information under 9 Geo. IV, cap. 83, sec. 6.*
6. *Pleading.*
7. *Recognizances.*
8. *Trial.*
9. *Sentence and Punishment.*
10. *Prisoner's property.*
11. *Drunkenness.*

I. Offences.

Abduction.—Inducing or persuading a girl to leave her parents, or remain absent from them, without any actual taking by the accused, personally or by an agent, constitutes the offence of abduction, within sec. 20, of 9 Geo. IV, c. 31.

Regina v. Meadows not followed. *Reg. v. Abbott*, 467.

Bigamy—English Marriage Acts—declaration.—The prisoner was married to C. by a clergyman of the Church of England, and afterwards, in the lifetime of C. went through the ceremony of marriage with G. the officiating

minister being a Presbyterian. A written declaration to the effect that one of the parties was a member of the Presbyterian Church, was not taken by the minister, as required by 5 Will. IV, No. 2, but it was proved that a verbal statement, that G. was a member of that Church was made by the prisoner. The latter was tried, and found guilty of bigamy.

Held, the prisoner's declaration to the minister, that G. was a Presbyterian, was, as against himself, sufficient evidence of her being a member of the Church, called in the Act 5 Will. IV, No. 2, the Presbyterian Church of Scotland.

The second ceremony acquired no validity by the Act, 5 Will. IV, No. 2, because it was not accompanied by the written declaration, as thereby required (*Catterall v. Sweetman followed*).

If the ancient English marriage law be in force in the Colony (on which point the *Chief Justice* and *Therry*, J., refused to give an opinion) the ceremony was invalid by that law. (*Reg. v. Millis and Catherwood v. Caslon followed.*)

The conviction, however, must be affirmed. (The Court assigned different grounds for the latter decision.)

(*Per* the *Chief Justice* and *Therry*, J.) Even though a valid marriage would not, in any event, have been effected, the prisoner's entering into that ceremony amounted to that crime. (*Reg. v. Bawm*, and *Rex. v. Penson.*)

(*Per Dickinson*, J.) The second ceremony was a valid marriage *per verba de praesenti*. This marriage acquired no validity from the ceremony performed by the minister, but as the Act, 5 Will. IV, No. 2, contained no clause of nullity, it was not made void thereby. Nor was it avoided by the English Marriage Acts, 26 Geo. II, c. 33, s. 18, and 4 Geo. IV, c. 76, s. 33, these not being in force in the Colony. (*Rex v. Maloney*, 1836, *ante*, p. 74.)

The decision in *Regina v. Millis* was based on the law anterior to the Marriage Acts; which law, being founded on positive institutions (the Institutes of Edmund and of Lanfranc), is a portion merely of the *lex scripta*, or at any rate of the customary law, and is no part of the pure common law of England. This also is not applicable to the colony.

Marriages *per verba de praesenti* were not invalidated by the 7 Will. IV, No. 6. *Reg. v. Roberts*, 544.

—— **English Marriage Law.**—*Reg. v. Maloney*, 74.

—— **Proof of marriage—Identity of parties.**—On the trial of a prisoner for bigamy there was no direct evidence of the first marriage, but the fact of a marriage between certain parties was proved by the registry book, and evidence was given of the acts of the prisoner and his alleged first wife to identify them as the parties so married. *Held*, the evidence was sufficient to sustain the conviction.

By sec. 4, 3 Vic., No. 7, a copy of a duplicate certificate to be filed in the Supreme Court was made the only evidence of a marriage under the Act. *Held*, although the marriage was proved by the original register, and it was no part of a minister's *duty* to keep the same, the prisoner was estopped from relying on the objection, the exclusion of the evidence not having been claimed at the trial. *Reg. v. Taafe*, 713.

—— **Marriage per verba de praesenti—declaration.**—The prisoner was proved to have been twice married, the first ceremony having been performed by a Roman Catholic minister, but in the absence of the latter there was no evidence whether the declaration, provided by 5 Will. IV, No. 2, was taken or not.

Held, the prisoner's conviction of bigamy was good, and that the ceremony in question was either a marriage according to the common law of England *per verba de praesenti*, or a marriage according to that law, as altered by the Saxon Constitution, which required the intervention of a "mass priest." *Reg. v. Boudsworth*, 870.

Breach of the peace—duel.—Inciting to fight a duel. *Reg. v. Bland*, 534; *Thorn v. Faithfull*, 966; *Reg. v. Ford*, 777.

Burglary—place under separate roof.—The prisoners were found guilty of burglary in the *dwelling house* of *B.*, and of stealing therein property of *B.* and his partners. Two questions were reserved for consideration, viz.:—whether the place broken into (an office, part of a mill and flour warehouse, in which none slept, and under a separate roof from that of the dwelling

house of *B.*, but communicating by a door) was part of the dwelling house; and whether the place must not be described as the dwelling house of *B.* and partners, being used solely for partnership purposes.

Held, that as there was a *direct internal communication*, the cases before 7 and 8 Geo. IV, c. 29, still governed the matter, and the place was part of the dwelling house; also that the occupation by *B.* was rightly described. *Reg. v. Nicholl*, 233.

Carnally knowing—assault.—The prisoner was indicted for carnally knowing a child under ten years of age, under the provisions of 9 Geo. IV, cap. 31, sec. 17, and being acquitted by the Jury on this charge, was found guilty of a common assault, without the child's consent, in accordance with 1 Vic., c. 85, sec. 11, which provides "that upon the trial of any person, for any *felony whatever*, when the crime charged shall include an assault against the person, it shall be lawful for the Jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding.

Held, that the conviction was wrong, since an assault on the person is no legal ingredient in the offence charged.

The fact that the child *resisted*, would not the less have made the prisoner guilty of carnal knowledge, if the offence had been completed, although he might have been equally amenable to trial for rape (*per* the *Chief Justice* and *a'Beckett*, J., *Dickinson*, J., *dissentiente*). (*per Dickinson*, J.),—If the offence had been completed the proof of an assault would have made the prisoner guilty of rape, and entitled to an acquittal on this charge. *Reg. v. Weldon*, 250.

Conspiracy—averment of overt acts.—The defendants were charged, in substance, that being gold brokers, they had conspired to defraud all who brought gold to them, and one P. in particular, by the use of false weights. *Held*, the averment of overt acts, and of the ownership of the gold, was unnecessary. (*Reg. v. Parker* distinguished). *Reg. v. Nash and Forbes*, 905.

Disorderly house—boxing match.—An entertainment, in the nature of a boxing match, in a private house, to which admission is charged, is within the Act, 9 Geo. IV, No. 14, s. 1. *Reg. v. Egan*, 588.

—— **brothel.**—The Statute, 25 Geo. II, cap. 36, sec. 8, is in force in N. S. Wales. *Reg. v. Erwin*, 1349.

Embezzlement.—Property of an unincorporated Company embezzled—Allegation of ownership. *Reg. v. Townend*, 436.

Escape, permitting.—A constable is liable for negligently permitting a prisoner to escape, notwithstanding that the prisoner was not delivered to him by name, but the warrant addressed to all constables generally. *Reg. v. Tudor*, 1023.

False pretences—falsity known to prosecutor.—A finding of the jury that prisoner is guilty of obtaining a cheque by false pretences, but that the person from whom it was obtained knew that the representation was false, amounts to a verdict of not guilty. *Reg. v. Korff*, 716.

—— **joint representation.**—One prisoner, in the presence of the other, said to the prosecutor, "We" (or "I") "have a bit of gold for sale," and afterwards produced some metal, which was cleaned by the other, and then purchased by the prosecutor. One-third of the metal was brass. *Held* a representation by both prisoners, that *all* the metal produced was gold.

It was found that part of the metal was not gold, that the pretence was fraudulently made, and that the prosecutor was thereby induced to part with his money. *Held* the false representation was a pretence within the statute. *Reg. v. Ebsworth*, 866.

Fraudulent concealment of insolvent's property.—It is not necessary to a charge of receiving the assets of an insolvent, that the prisoner should have so received them for his own benefit, if he knew that the owner was insolvent, and intended to assist in defrauding his creditors. To render the offence complete the owner must be *actually* in insolvent circumstances, but sequestration is not necessary. *Reg. v. Snelgrove*, 904.

Gaming.—The Act, 18 Geo. II, cap. 34, sec. 8, is not applicable to this Colony from want of machinery to carry the same into effect. *Reg. v. Schofield*, 97.

— **common gaming house—nearest gaol.**—A "common gaming house" is one, in which games are commonly played with cards, dice, balls, or other implements ordinarily used in gaming, whether such games be in themselves unlawful or not; such games being played, not for the recreation merely of the keeper and his family, and being played habitually or very frequently. It is immaterial whether they be for any stake or wager, or not. Although it did not appear by the warrant or the conviction that the prisoner, convicted of keeping a common gaming house, was a person "found" in a gaming house, or "brought before" the justices, under a search warrant, these facts were shown by the depositions and other proceedings, and it was not necessary therefore to proceed by information, under the Gaming Act, 14 Vic., No. 9, sec. 1, but the conviction could be amended, by virtue of 14 Vic., No. 43, s. 9. The committal of the prisoner at Windsor to the Parramatta Gaol was illegal, the Gaming Act requiring such committal to be to the nearest gaol, and the Gaol Act, 4 Vic., No. 29, having constituted a gaol establishment at Windsor, although this prison was at the time of the committal without officers. *Reg. v. Butterworth*, 671.

— **14 Vic., No. 9, section 1.**—The provisions of the Gaming Act, 14 Vic., No. 9, are limited to "such" a house as is described in section 1, that is, a house entered by warrant issued by a Justice on complaint, &c., being made to him on oath. The marginal note is no part of the statute. *Ex parte Gaynor*, 1299.

Indecent exposure.—In any street or in the view thereof. *Ex parte Landregan*, 871.

Larceny.—It is not necessary to describe pieces of paper which a prisoner is charged with stealing. *R. v. Farrell*, 5.

— **Receiving.**—A prisoner, indicted for receiving together with others charged with burglary, is no less guilty, although he may not have known by whom the property was stolen.—*R. v. Farrell*, 5.

— **bailee—drover.**—One who hires a drover to take cattle from one place to another is not answerable for any misfeasance by that drover, inasmuch as the latter has an independent calling, and is not in law the servant of his casual employer. A conviction, therefore, of such a drover of *larceny* in stealing two bullocks which he had sold on the road, is bad, for he had *possession*, not *charge* merely. *Reg. v. Liffidge*, 793.

— **recent possession—Inconsistent statements.**—The law, that recent possession is *prima facie* evidence of larceny, is in force in this Colony, but what shall be deemed recent possession must be determined by reference to the nature of the goods, and the particular circumstances of the country.

A prisoner who has made several inconsistent statements with regard to the goods, and was in the neighbourhood at the time of the larceny, may be rightly convicted, although his possession should not be deemed recent. *Reg. v. Medcalf*, 1119.

— **cattle stealing—17 Vic., No. 3, sec. 6.**—Where a statute prohibited the "taking, using, *or* working" of cattle without the owner's consent making the same a misdemeanour, and punishable with a fine of £20, or imprisonment, &c., for every head of cattle *so used*, a conviction for "taking" was held to be amendable by substituting the word "using," the evidence sustaining the latter charge. The commitment, although purporting to be for "taking, using, *and* working" was held good also.

R. v. Druitt followed. Imprisonment can be awarded without the alternative of a fine. *Reg. v. Jones*, 1385.

Malicious injury—destruction of fence.—D. and others had for some years used a road through the prosecutor's land with the latter's consent, but in consequence of a quarrel the prosecutor erected a fence obstructing the same and told D. the road was stopped. This fence D. cut down, and was afterwards convicted and fined by the Justices for having committed a "malicious" injury. *Held*, the conviction was right (the *Chief Justice diss.*) *Ex parte Dutton*, 910.

Mutilation of dead body.—A misdemeanor. *Reg. v. Russell*, 110.

Offences against the person—Murder.—The information in this case having charged the prisoner with causing the death of another person by blows and by throwing the deceased

to the ground, the Judge told the jury that it was not necessary for them to be satisfied that the deceased died from the conjoint operation of the two causes of death assigned, but that, if they found that the deceased died from either of the two, both acts being clearly proved to have been done by the prisoner, that was sufficient. *Held*, that, in deference to the *opinions* of English Judges, the jury should have been directed to acquit, unless they thought the death was the result of the *combined causes* alleged. *Reg. v. Morley*, 389.

The prisoner was rightly convicted of murder, as he and the others were engaged in the commission of a felony, and evidently determined to effect their object at all hazards, and although the prisoner personally might not have inflicted the fatal wound. *Reg. v. Mogar*, 655.

—— Alien murdered on high seas.—Murder of an alien by a captain of a British ship on a foreign coast. *Reg. v. Ross*, 857.

—— defence, killing to save ship's crew.—The hanging of a man, even for the purpose of saving the lives of the crew of a ship, is nevertheless murder. *Reg. v. Ross*, 857.

Perjury—production of record.—On the trial of a prisoner for perjury, committed at a Court of Petty Sessions, the record, or a certificate, must be produced, to show that the Justices had jurisdiction. *Reg. v. Smith*, 1130.

Rape — drunkenness — intention.—The prisoner was found guilty of an assault with intent to commit a rape. At the time of committing the offence he was intoxicated. *Held* (*per* the *Chief Justice* and *Therry*, J.) in cases, such as this, where the crime is statutory, and intention is essential to the charge, the jury should be instructed that they must find the specific intent charged, and that, in considering the evidence as to that intent, they should find only (if the prisoner was intoxicated) whether he was so much intoxicated as not to have been able to form any specific intent.

Dickinson, J., dissented from this restriction as to the finding. *Reg. v. Ryan*, 797.

Unlawful receiving.—A prisoner may be guilty of receiving stolen property without knowing by whom it was stolen. *R. v. Farrell*, 5.

II. PRACTICE.

1. *Appeal.*

Arrest of judgment—good and bad counts—several offences.—On a motion in arrest of judgment the record alone can be looked to. The descriptive allegation in an indictment for embezzlement, that the money taken was the property of "The Commercial Banking Company of Sydney, his masters, &c." (an unincorporated Bank), is not sufficient, and at the proper stage may be demurred to, but, after verdict, is cured by 7 Geo. IV, c. 64.

An allegation that the money was the property of "*L. Duguid* and others his partners, the masters, &c.," renders the count bad; and (*per* the *Chief Justice* and *Therry*, J.) is not cured by verdict; (*per Dickinson*, J.) the defect is cured by the statute.

Where there are several counts, some of which have been held to be good, and some bad, the Court can pass sentence upon the good counts.

An objection that an indictment is bad, because of six distinct offences being charged therein, is of no avail in arrest of judgment, though at the trial the Crown may be called upon to elect.

It is a good objection (on a point reserved) to two counts that they allege the money, embezzled on different occasions, to be the property of the Bank in the same terms, the proprietors of the Bank being constantly changed, but sentence may be passed on the prisoner on a good count. *Reg. v. Townend*, 436.

—— record alone before Court.—On a motion in arrest of judgment the Court will not refer to the evidence, but to the record alone. *Reg. v. Korff*, 716.

—— objections and answers not adduced by Counsel.—It is the right and duty of the Court, in criminal as in civil cases, to take into consideration objections to the record not put forward by counsel, as also answers (not adduced by the Crown) to points, which *have* been taken for the defence. *Reg. v. Nash and Forbes*, 905.

Certiorari.—*See* CERTIORARI.

New trial—Circuit Court.—The Court has no power to remove by certiorari the proceedings in a criminal case, tried before a Circuit Court,

after sentence, whether the case be felony or misdemeanor, for the purpose of entertaining a motion for a new trial. *Reg. v. Evans*, 1005.

Privy Council.—There is no provision in the New South Wales Act, 9 Geo. IV, cap. 83, for an appeal to the King in Council in criminal cases. *R. v. Farrell*, 5.

Special case—grounds to support conviction.—A Crown Prosecutor may support a conviction by any law that can be found to sustain it, without making election as to any particular statute or section. *Reg. v. Erwin*, 1349.

Special demurrer.—An objection that an information charges several assaults as one should be by special demurrer, and not in arrest of judgment. *Reg. v. Ellis*, 749.

2.—*Commitment.*

Servant — amendment.—A commitment under this Act which omits to allege that the defendant had entered on his service, or that the contract was in writing is defective; but this may be amended by sec. 9, of the Prohibition Act of 1850. *Ex parte Evennett*, 813.

Terms of statute not followed.—*Ex parte Erwin*, 816.

3.—*Evidence.*

Accomplice — convict.—An accomplice, though a convict attaint, is a competent witness for the prosecution within the Colony. *R. v. Farrell*, 5.

Affidavit—admission by prisoner.—An affidavit made by a prisoner on a former occasion may at his trial be used against him. *Reg. v. Freeman*, 845.

—— libel—affidavits in reply.—Where an applicant for a criminal information had filed affidavits denying the imputations in the alleged libel, and the respondents afterwards filed others in contradiction, naming specific instances, leave to file further affidavits was refused the applicant, as being contrary to the practice of the Court. *Ex parte Deniehy*, 881.

Confession—Depositions at another inquiry.—The prisoner was tried and convicted of aiding and abetting in the manslaughter of her husband, and at the trial a deposition, made by her before any person was charged with the crime, was admitted in evidence against her.

Held, the admission of the deposition as a confession was good; also that it was no objection that the deposition had been proved at the trial by the magistrate, who signed the jurat, and that person who had witnessed the prisoner's "mark" was not called.

The deposition, although not expressed in the first person, or in prisoner's exact words, was held admissible, as it was taken before the new Act in that behalf. *Reg. v. Muldoon*, 657.

Conviction, copy of record.—A certificate by the Clerk of the Peace of a prisoner's conviction, accompanied by a copy of the information and of the *minutes* of conviction, is sufficient proof of such conviction under the Evidence Act of 1852 (the *Chief Justice dissentiente*). *Reg. v. Tudor*, 1023.

Contradiction—hostile witness.—Where evidence has been given as to previous statements of a witness, who proves adverse to the side on which he is called, the jury should be directed, that if they think there is an inconsistency in the statements of the witness, his evidence should be simply thrown out of consideration. (*Therry, J., dissentiente*). *Reg. v. Lynch*, 1120.

Res gestæ—dying declaration.—The words "I have a wound in my throat, Mogo has settled me," uttered by a deceased person during an attack on him by the prisoner and others, are admissible in evidence against the prisoner, on a charge of murdering the deceased, as part of the *res gestæ*; they are also evidence in conjunction with subsequent statements to the same effect, made under the fear of an immediate dissolution. *Reg. v. Mogar*, 655.

Waiver of right to object.—Waiver of right to take exception to evidence caused by prisoner failing to take objection at the time. *Ex parte Ward*, 872.

9 Geo. IV, cap. 83.—Under 9 Geo. IV, cap. 83, the Court has power to prescribe rules of Practice and Evidence. *R. v. Farrell*, 5.

4. *Information by Attorney-General.*

Information in place of indictment—Crown Prosecutor.—Courts of Quarter Sessions in New South Wales are not instituted after the course of the Common Law, for here the Courts proceed by information of a Crown Prosecutor instead of the indictment of a Grand Jury, and

this involves a most vital departure from the Common Law, so that if a Crown Prosecutor be not appointed in the manner laid down by the Legislature, the objection is as serious as to a Grand Jury improperly empanelled.

Under 4 Vict. No. 22, sec. 10, the Governor has power to appoint a Crown Prosecutor, but an appointment thereunder, held to be void by a Court of Record, does not vacate a previous commission; nor is the issue of a commission invalidated by the attachment of an irregular condition thereto, that the appointment shall be subject to the approval of the Queen. *Reg. v. Hodges*, 201.

—— prosecution not conducted by Crown Prosecutor.—There is no distinction between the power of the Crown Prosecutor and that of the Attorney-General in regard to filing informations. The filing of an information is equivalent to the finding of a bill by a Grand Jury, and a conviction, under an information filed by the Crown Prosecutor, is not invalidated by the prosecution being conducted by some other person. *Reg. v. Walton*, 706.

—— prosecution by Attorney-General —information filed by Crown Prosecutor.—It is no objection to a conviction, that the information was filed by a barrister, under a commission to act as the deputy of the Attorney-General, and the prosecution conducted at the subsequent session by the Attorney-General. *Reg. v. Ellis*, 749.

—— allegation that prisoner is a British subject.—An allegation that the prisoner is a British subject is mere surplusage. *Reg. v Ross*, 857.

Fraudulent insolvency—defects in information cured by verdict.—The indictment of an insolvent, under section 73 of the Insolvent Act, for fraudulent concealment and removal of part of his estate, is not substantially defective for want of an allegation that he was in fact insolvent at the time of such concealment and removal. The word "Insolvent," used as a substantive, is throughout the Act, invariably used as indicating simply the person of the debtor, whose estate has been, or is sought to be sequestrated, without regard to the fact of insolvency at any time.

An omission to state the value of the goods in the information is cured by verdict.

It is no objection that the creditors defrauded were not named therein. *Reg. v. Knight*, 582.

Right of Attorney-General to prosecute — Exclusion of private prosecutor.—Where a private person obtains the committal of a person charged with libel before the Justices, and an information is filed by the Attorney-General, the Court has no power to allow the private prosecutor to conduct the proceedings to the exclusion of the Attorney-General.

But where the Attorney-General thus assumes the conduct of the case, the private prosecutor is relieved from any liability to pay costs under sec. 12 of 11 Vic., No. 13. *Reg. v. Lang*, 1133.

9 Geo. IV, cap. 83, section 5.—*Held* that by sec. 5 of 9 Geo. IV, c. 83, the Attorney-General was merely in lieu of a grand jury, until its establishment, and none of the powers and liabilities of the latter had been conferred or imposed upon him. Informations were therefore to be filed by him as in cases of misdemeanor. *Reg. v. Cummings*, 289.

Leave to file a criminal information in the name of the Attorney-General not having been taken advantage of by the person to whom it was granted, the Attorney-General *ex officio* filed an information against the same defendant, although he had before refused to do so, calling on him to answer a charge of forgery, and although on a prosecution before the Magistrates defendant was not committed for trial or held to bail, but had been twice discharged by the Bench. The information was not filed in term or during criminal sittings. *Ibid.*

5. *Information under 9 Geo. IV, cap. 83, sec. 6.*

Prima facie case.—Criminal prosecutions for libel under 9 Geo. IV, cap. 83, proceed on the same principle as in England. Whenever a *primâ facie* case is shown the Court must send it to a jury. *Allan v. Bull*, 70.

In an application for a criminal information the Court will be guided by the principles laid down in the statute 7 Geo. IV, c. 64, sec. 1, viz., that if there be a strong presumption of guilt the person charged shall be committed to prison, and if notwithstanding evidence given in behalf of the

said person, there shall appear sufficient grounds for a judicial inquiry, he shall be admitted to bail by the justices.

A rule *nisi* for a criminal information in the form given by *Chitty* is good, although the applicant's name is not therein stated. *Reg. v. Cummings*, 289.

To induce the Court to grant a criminal information a *strong presumption of the party's guilt* is not necessary, but merely such a state of facts as shows that there is *sufficient ground for further judicial inquiry*.

In granting such the Court does not act *in all respects* as a Grand Jury, and the defendant may show cause by way of traverse of the matter in the applicant's affidavits.

The grant is not a matter of course, but in the discretion of the Court, and although a *primâ facie* case may have been made, on showing cause both sides must be heard, and if satisfied of the innocence of the accused, the Court is bound to discharge the rule *nisi*.

Also (*per* the *Chief Justice*, and *Therry*, J., *Dickinson*, J., *dubitante*), the Court has the power to discharge the rule with costs. *Reg. v. McInnis*, 351.

Applicant must be blameless.—The Court will not grant the extraordinary remedy of criminal information for libel unless the person seeking to make use of it can show that he is *wholly* guiltless of the imputations cast upon him. *Ex parte Denieky*, 881.

Prosecutor, an attorney, in consequence of the receipt of an insulting letter from another attorney, the defendant, in the matter of an action, in which they represented the respective parties, communicated directly with the latter's client. The defendant then wrote and sent to the former a letter containing libellous matter.

Held, that the former must have known that his action would produce angry feelings, although not wrong in itself, and he was therefore not entitled to an exercise of the extraordinary power of the Court by way of criminal information. *Ex parte McCulloch*, 788.

The Court will not grant the extraordinary remedy of a criminal information for a breach of the peace, unless the applicant be himself wholly blameless. *Thorn v. Faithfull*, 966.

Where an application for a criminal information is made against a person for a libel containing two imputations, one of which is wholly unsustained by the defendant, the rule cannot be granted unless the plaintiff exculpate himself from both charges.

A criminal information will not be allowed where the plaintiff has committed a technical and merely inadvertent breach of the Licensing Act, 13 Vic. No. 29, s. 3, although he has been subjected to a malicious attack by the defendant in reference thereto. *Bloxsome v. Dunbar*, 1087.

Motive of applicant immaterial.—A case being such as, under the circumstances, to call for the issue of a criminal information, the particular object or motive of the prosecutor is immaterial. *Reg. v. Abbott*, 467.

—— Applicable to felony also—terms may be imposed.—On an application to the Supreme Court for a criminal information under 9 Geo. IV, c. 83, sec. 6, notwithstanding the proviso, that exculpatory affidavits need not be required by the Court, unless the justice of the case demands it, the Court has power to impose terms, as the condition of its interference, and looks not merely at the transaction itself, which is in question, but at all the attendant circumstances.

The Statute extends the power of the Court to cases involving felony as well as misdemeanor, the latter alone being within the jurisdiction of the Queen's Bench. *Reg. v. Macdermott*, 236.

—— Circumstances of the act may be examined.—In applications for a criminal information, the Court has a more extensive jurisdiction than a Grand Jury, inasmuch as it can take into account the conduct and character of the prosecutor, and the circumstances of the act complained of.

—— Form—Postponement—Absent witness.—It is no objection to an information that it is not on parchment, such not being in use in the Colony for this purpose. The Court will grant a postponement of the trial where a material witness for the defence cannot be obtained from a distance in time, although the principal witness for the prosecution is detained at great inconvenience, and the grant of a postponement cannot

be limited by the condition that the defendant shall consent to the evidence of the latter witness being taken *de bene esse*. *Reg. v. Cummings*, 289.

—— Against public officer.—*Blackett v. Newman*, 1117.

6. *Pleading.*

Demurrer.—The defendant, not being a duly qualified medical practitioner, dissected and removed parts of the body of a deceased person, with the intent, according to the information, of preventing due inquiry into the cause of death. This act is a criminal misdemeanour, as tending to defeat the object of the Coroner's inquest, and being *contra bonos mores*. The defendant having demurred to the whole of the information, was held to have admitted all the facts stated therein, and to be estopped by the record from affirming that there was no legally appointed Coroner for Sydney. *Reg. v. Russell*, 110.

7. *Recognizances.*

Clause authorising variation in place and time—Fictitious address of surety.—Recognizances, entered into before a Judge of the Supreme Court, exercising a discretion, are valid, notwithstanding they contain a clause, authorising the Attorney-General to appoint another time and place than those actually specified in them.

On its appearing that the address given by a surety was fictitious, the Court ordered an *alias* summons to issue. *In re Hibberd and Whittaker*, 587.

8. *Trial.*

Rules.—Under 9 Geo. IV, cap. 83, the Court has power to prescribe rules of Practice and Evidence. *R. v. Farrell*, 5.

Information not on parchment—Postponement.—It is no objection to a criminal information that it is not on parchment, such not being in use in the Colony for this purpose. The Court will grant a postponement of the trial where a material witness for the defence cannot be obtained from a distance in time, although the principal witness for the prosecution is detained at great inconvenience, and the grant of a postponement cannot be limited by the condition that the defendant shall consent to the evidence of the latter witness being taken *de bene esse*. *Reg. v. Cummings*, 289.

Information charging several offences—Challenge.—The descriptive allegation in an indictment for embezzlement, that the money taken was the property of "The Commercial Banking Company of Sydney, his masters, &c." (an unincorporated Bank), is not sufficient, and at the proper stage may be demurred to, but, after verdict, is cured by 7 Geo. IV, c. 64.

An allegation that the money was the property of "*L. Duguid* and others his partners, the masters, &c.," renders the count bad; and (*per* the *Chief Justice* and *Therry*, J.) is not cured by verdict; (*per Dickinson*, J.), the defect is cured by the statute.

Where there are several counts, some of which have been held to be good, and some bad, the Court can pass sentence upon the good counts.

An objection that an indictment is bad, because of six distinct offences being charged therein, is of no avail in arrest of judgment, though at the trial the Crown may be called upon to elect.

The Crown having challenged a juryman on the ground that he is one of the prisoner's bail, and the objection being overruled, is entitled to take another objection, that the juryman is not an "indifferent party."

It is a good objection (on a point reserved) to two counts that they allege the money, embezzled on different occasions, to be the property of the Bank in the same terms, the proprietors of the Bank being constantly changed, but sentence may be passed on the prisoner on a good count. *Reg. v. Townend*, 436.

Prisoner's affidavit on former occasion.—An affidavit made by a prisoner on a former occasion may, at his trial, be used against him. *Reg. v. Freeman*, 845.

Private prosecutor.—*Reg. v. Walton*, 706.

Exclusion of private prosecutor by Attorney-General.—Where a private person obtains the committal of a person charged with libel before the Justices, and an information is filed by the Attorney-General, the Court has no power to allow the private prosecutor to conduct the proceedings to the exclusion of the Attorney-General.

But where the Attorney-General thus assumes the conduct of the case, the private prosecutor is relieved from any liability to pay costs under sec. 12 of 11 Vic., No. 13. *Reg. v. Lang*, 1133.

Right of reply by the Crown.—The Crown has the right of reply, although no witnesses have been called, and the jury has not been addressed, by the prisoner's counsel. (*Per* the *Chief Justice* and *Therry*, J., *Dickinson*, J., *dissentiente.*) *Reg. v. Bruce*, 591.

The Attorney-General, or other representative of the Crown, has a right of reply in prosecutions in the name of the Crown, although no evidence has been called in defence.

But where the prosecution is conducted by counsel for a private prosecutor this right does not exist. *Reg. v. Shanahan*, 1454.

Reply by private prosecutor.—A private prosecutor, conducting the prosecution of an information filed by the Crown Prosecutor, has no right of reply, when no witnesses have been called for the defence. *Reg. v. Milford*, 1463.

Verdict of assault in charge of carnally knowing.—The prisoner was indicted for carnally knowing a child under ten years of age, under the provisions of 9 Geo. IV, cap. 31, sec. 17, and being acquitted by the Jury on this charge, was found guilty of a common assault, without the child's consent, in accordance with 1 Vic., c. 85, sec. 11, which provides "that upon the trial of any person, for any *felony whatever*, when the crime charged shall include an assault against the person, it shall be lawful for the Jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding.

Held, that the conviction was wrong, since an assault on the person is no legal ingredient in the offence charged.

The fact that the child *resisted*, would not the less have made the prisoner guilty of carnal knowledge, if the offence had been completed, although he might have been equally amenable to trial for rape (*per* the *Chief Justice* and *a'Beckett*, J., *Dickinson*, J., *dissentiente*). (*per Dickinson*, J.),—If the offence had been completed the proof of an assault would have made the prisoner guilty of rape, and entitled to an acquittal on this charge. *Reg. v. Weldon*, 250.

Doubtful verdict.—It is the duty of a Judge to endeavour, by questioning the Jury, to arrive at their *real* meaning in cases where that meaning seems doubtful. *Reg. v. Ellis*, 749.

Special case.—A special case can only be submitted by the Judge, who tried the prisoner, and reserved the point in question. *Reg. v. Furne'l*, 1467.

Point reserved—Special case.—A point cannot be reserved on the application of Counsel, except before verdict, under 13 Vic., No. 8. The submission of a Special Case by the Chairman of Quarter Sessions *prima facie* imports that the trial was not, when the application was made, wholly terminated. *Reg. v. Marrington*, 643.

9. *Sentence.*

Dissection.—A sentence of death pronounced in this Colony upon a prisoner found guilty of murder, without any order for the dissection of the prisoner's body, or that it should be buried within the precincts of the prison, was right. *Reg. v. Knatchbull*, 176.

10. *Prisoner's property.*

Statute, De Catallis Felonum of Ed. II.—The statute, 1 Ric. III, c. 3, enacting that no person shall seize the goods of anyone arrested or imprisoned for suspicion of felony, before he be convicted, is not inconsistent with the Statute of Ed. II, *De Catallis Felonum*, which provides that no man arrested for felony shall be disseised of his goods until conviction, but that, as soon as he is taken, they shall be inspected and inventoried, to be kept by *sureties*, responsible for the same, &c.

Where a person was apprehended on a criminal charge, and money in his possession taken from him by the arresting constable, and handed over to the Inspector-General of Police, who paid it into the Treasury, *held*, he could not, after making his escape from custody, although not since retaken or indicted, maintain an action against the Inspector-General for the recovery of the said money. *Ramsay v. Mayne*, 853.

11. *Drunkenness.*

Intention—Attempted Rape.—The prisoner was found guilty of assault with intent to commit a rape. At the time of committing the offence he was intoxicated.

Held (*per* the *Chief Justice* and *Therry*, J.) in cases, such as this, where the crime is statutory, and intention is essential to the charge, the jury should be instructed that they must find the

specific intent charged, and that, in considering the evidence as to that intent, they should find only (if the prisoner was intoxicated) whether he was so much intoxicated as not to have been able to form any specific intent.

Dickinson, J., dissented from this restriction as to the finding. *Reg. v. Ryan*, 797.

CROSS ACTIONS.

—— Before Justices and in Supreme Court. *Hargraves v. Harrison*, 1049.

CROWN.

—— **Action by—Recovery of quit-rents.**—An action against the Colonial Treasurer and a collector of quit-rents for trespass, by breaking into the plaintiff's house, and for the seizure and sale of plaintiff's goods for arrears of quit-rents, is one in which the Crown is interested, and an application for its removal into the Exchequer Jurisdiction of the Court must be granted.

The Court has no means of accomplishing this, but by directing that the action henceforth shall be, and be deemed and taken to be, specifically in that jurisdiction.

The right of the Crown to have the *venue* laid wherever it pleases does not extend to all actions which are not *real*, but only to such as are *transitory*, and therefore not to the present case which, although a *personal* action, is in its nature local.

The prerogative right of the Crown to a trial at Bar is in force here, notwithstanding the absence of the writ of *nisi prius*. *Windeyer v. Riddell*, 295.

—— **Action against—inadmissible averments.**—The Court has power, independently of the Common Law Procedure Act, to expunge inadmissible averments from a declaration, in an action under the 20 Vic., No. 15. The declaration should not set out the proceedings before the Government in a claim for compensation, but only such facts as are legally necessary for consideration in regard to the amount of damages. *Dumaresq v. Robertson* (No. 1), 1090.

—— **Crown cannot plead double.**—Even assuming that the Crown had the power to plead double without the leave of a Judge, and that it had not been taken away by 20 Vic., No. 15, the rules of Court of 14 June, 1858, made under this Act, took away that right.

An action against a representative of the Crown under the above statute is to be regarded as an action against the Crown. *Dumaresq v. Robertson* (No. 2), 1124.

—— **Crown cannot plead Statute of Limitations under 20 Vic., No. 15.**—The Crown cannot plead the Statute of Limitations in an action under 20 Vic., No. 15. *Dumaresq v. Robertson* (No. 3), 1291.

—— **Security for costs.**—On appeal to the Privy Council the Crown is not compelled to give security for costs. *Dumaresq v. Robertson* (No. 4), 1387.

CROWN GRANT.

Apparent interest of promisee fed by Crown grant.—The defendant claimed the land in dispute under a lease and release in 1832, purporting to be a conveyance of the fee simple, and reciting a seizin in fee, from one K., the *promisee* of a Crown grant, to W.; the grant to K. afterwards issued in 1839. In 1843 K. conveyed the same land to M., one of the lessors of the plaintiff. *Held*, on motion to enter a verdict for the defendant (1) that the lease and release of 1832, though contained in the same deed, operated as a good conveyance; (2) that the plaintiff was estopped by the lease and release, either by the *release* simply, or by the *recital* of the seizin in fee; (3) that such an interest did not pass under the conveyance as to defeat the estoppel, the most that K. had being an equitable interest, and that of a character not defined and very unintelligible; (4) that the estoppel would have been equally binding, by way of *conclusive admission* without being pleaded, as the defendant had had no opportunity of so pleading it; and (5) that on the acquisition by K., afterwards, of the legal fee, by the grant, the plaintiff's apparent interest was converted into an actual interest. *Doe d. Aspinwall v. Osborne*, 422.

Promisee's interest sold by Sheriff.—The defendant, a judgment debtor, being in occupation of a certain farm, which was sold by the Sheriff under 54 Geo. III, c. 15, after an (alleged) seizure obtained a grant from the Crown.

Held, the Sheriff cannot sell more than he has taken in execution, and that the subsequent issue of a grant to the judgment debtor does not give the purchaser a legal estate. The Sheriff cannot convey more than he has sold (*semble*). The Court, on the proof of the fact of such sale, will not presume that the Sheriff did his duty, by duly levying before the expiration of the writ, in favour of a plaintiff in ejectment who is bound to establish his title. *Doe d. Walker v. O'Brien*, 246.

Boundaries disputed—Statute of Limitations.—Plaintiff and defendant occupied adjoining land as promisees from the Crown in 1822, in which year plaintiff obtained his grant. The piece of land in dispute was occupied by the plaintiff since 1829, and fenced in by him in 1835, but was included in the grant issued to the defendant in 1842. The latter did not attempt to eject the plaintiff till 1852. *Held*, the defendant could not have sued till 1842, and that his claim would not be defeated even if he knew in 1835 of the erection of the fence, unless silent from a fraudulent motive. *Query*, can a mere "location order," such as was usually given in the early days of the Colony, even if for valuable consideration, be regarded as constituting a declaration of trust in the Crown, valid and enforceable by law? *Lang v. Evans*, 889.

Admission of grantee.—The defendant occupied for many years certain Crown land as promisee, with the cognizance of the plaintiff, who afterwards obtained a Crown grant including the land in question. *Held*, the plaintiff was entitled to *all* the land included in his grant, but that evidence was rightly received of his admission, tending to show possession by the defendant since 1825 with his cognizance, not as facts to vary his title, but to show what was his view as to his boundaries prior to the issue of the grant. *Doe d. Evans v. Lang*, 827.

Court of Claims - Grantee held trustee.—In 1803 S. obtained a lease of Crown land for twenty-one years, reserving rent, with a provision for the purchase of the fee simple, by the lessee, in which case the Crown undertook, in effect, to give a grant of the land to the lessee, or other legal proprietor. Plaintiff's claim was traced by various conveyances to S. In 1842 defendants, W., claiming as representatives of a devisee of S., after a reference to the Commissioners for Claims, under 5 Will. IV, No. 21, and recommendation by them, received a grant of the property in question. The evidence was held to show that plaintiffs were unaware of defendant's application, and that W. was guilty of fraud and concealment before the Commissioners. The grant contained the proviso "that the lawful rights of all parties, other than the grantee, therein named, in the land thereby granted, should enure and be held harmless, anything in the said grant to the contrary notwithstanding." *Held* W. had no *equity* as against the pliantiffs, and the grant having been made, not in pursuance of a mere promise, but a stipulation in a lease, W. must be declared a trustee for them. The decision of the Commissioners ought to be conclusive unless it be unconscientious for a person to retain the benefit thereof. *Walker v. Webb*, 253.

Grant to husband and wife—Sale by husband.—In the year 1820 J., being in possession of certain land in Sydney, made his will devising the said property to S., an infant, the defendant, appointing trustees therein for S., and shortly after died. The surviving trustee in 1823 obtained a lease of the land from the Crown, in trust for S., for twenty-one years; in 1829 a proclamation was issued by *Governor Darling*, promising a grant in fee simple to all occupiers or lessees of Crown lands under certain conditions. S., being still an infant, married W. in 1834, and the same year W. and his wife applied for a grant to the Commissioners under the Act, 4 Will. IV, No. 9, but before the issue thereof W. sold the land, T. being the purchaser; the grant was issued in 1835 to W. and his wife, their heirs and assigns. W. died in 1839 and his wife came of age about the same time.

In a suit by the representatives of T. to prevent S., the defendant, from enforcing a judgment obtained against them in ejectment.

Held, the defendant was at the time of her marriage possessed of an equitable claim to the fee simple in the land, and the lease, if not void (as it was held to be for uncertainty), being in derogation of that claim, could not bind her, and the husband had nothing to dispose of.

The Court is not a Court of Appeal from the decisions of the Commissioners under the Claims to Land Act, 4 Will. IV, No. 9, and the grantee

can only be constituted a trustee for another person where there is fraud or unconscientiousness. The usual clause, in grants under the Act, that "the lawful rights of all persons, other than the grantees, shall enure and be held harmless," could not avail the plaintiffs, without subverting the rules for the protection of the property of married women and infants.

The interest of the promisee under the proclamation was nearly equivalent to an estate in fee; *(semble)* an indefeasible interest, except as against the Crown. *Terry v. Wilson*, 522.

Court of Claims—Rules for guidance—Resulting trust to the Crown.—The Commissioners for investigating claims to land, under 5 Will. IV, No. 21, cannot decide or report on the same, on any other than the same principles, which govern Courts of Law, when a question of *construction* arises.

Where a grant was made in accordance with the report of the Commissioners to trustees to the *several trusts and uses* declared in a certain will, the terms of which cannot be held to apply to the land granted, the land must be taken to have reverted to the Crown, as on a resulting trust. *Clarke v. Terry*, 753.

Finality of decision—Interest of promisee.—Certain Crown land was, in 1796, in the possession of P., from whom by successive transfers it came in 1825 to T., who died in 1827 leaving a widow and two children. The widow, claiming as administratrix, sold to H., one of the defendants, and there was evidence to show that he knew the deceased had children.

Subsequently, a proclamation having been issued by the Governor, promising grants to persons who had been in occupation of lands in Sydney in the year 1823, or to their representatives, H. applied to the Court of Claims for a grant of the said land, and a grant was made to him in 1836. The other defendant was a mortgagee of H., and the plaintiffs the daughter of T., claiming that H. was a trustee for them, and should be decreed to execute a conveyance.

Held (by the Primary Judge, *Milford*, J.), the issue of the grant was not conclusive of the rights of the parties, and the defendants being affected with notice were trustees. The plaintiffs *had* an interest giving them a *locus standi*, The Court being bound by *Spenser v. Gray*.

Where one attorney acts for both mortgagor and mortgagee, the latter is affected with notice of any facts known to the attorney.

Held (on appeal, by the Full Court, reversing the decree below), the plaintiffs, as representatives of a promisee of Crown land, and also as representatives of a mere occupant, had no title or interest, known to and cognizable by Courts either of law or of Equity. (*Spenser v. Gray* distinguished.) The *plaintiffs*, therefore, had no *locus standi*, notwithstanding H.'s fraud in obtaining the grant.

The Statute, 4 Will. IV, No. 9, clearly intended that the Commissioners' decision should be authoritative, and, if adopted by the Crown, final; 4 Will. IV, No. 9, and 5 Will. IV, No. 21, distinguished.

The legal rights and interests of the plaintiffs were not altered by Governor *Darling's* proclamation.

The proviso in the grant in these words, "Provided also, that the lawful right of all parties, other than the grantee hereof, in the land hereby granted, shall enure and be held harmless—anything herein to the contrary notwithstanding," following a similar proviso in the proclamation, would probably not be sustained, but at any rate could only apply to parties having a *lawful right* to the land.

Decree below reversed, without costs to H., with costs to other defendant, who was held not affected with notice; no costs of appeal. *Cockcroft v. Haney*, 1051.

Fraud in obtaining grant—void or voidable—Scire Facias to repeal.—The Supreme Court has a Common Law jurisdiction to entertain a *Scire Facias* for the repeal of a Crown Grant, and the 9 Geo. IV, c. 83, s. 11, confers the same power.

A *Sci. Fa.* is not maintainable to repeal a Crown Grant to a person deceased before the issue thereof, the instrument being a *nullity*. *Reg. v. M'Intosh* (No. 1), 680.

The Crown, intending to grant certain land to one M., was induced by another person of the same name, after M.'s death, to deliver the grant to him by representing himself to be the promisee.

Held, the grant was not void, but voidable. *Reg. v. M'Intosh* (No. 2), 698.

Information of Intrusion.—If the Statute 21 Jac. I, c. 14, is in force in the Colony, its effect is not, where the lands of the Crown are the subject of an intrusion, to put the Crown out of possession, but, having more than a bare right of entry, notwithstanding the intrusion be of twenty years' duration, the Crown can convey those lands effectually by grant, without having recourse to an Information of Intrusion (but, *semble*, the statute is not in force). *Doe d. Wilson v. Terry*, 505.

Mortgage of land promised—Effect of subsequent grant.—H., being the owner of certain land in the county of Northumberland, for which a Grant had not yet issued, mortgaged the same, with other property, to the plaintiff in 1838, by a deposit of the deeds with a memo. of the loan, and a promise to execute a mortgage. This was not registered. In 1843, H. conveyed this land among a large number of properties (by a registered transfer) to the Bank of A., from which the defendant O. purchased, and a Grant was issued to O. in 1851 in accordance with the recommendation of the Commissioners. *Held*, the plaintiff was a mortgagee within the meaning of the Act, 5 Will. IV, No. 21, s. 8, and the equitable mortgage had the same effect as if the Grant had issued before the date thereof. Under the terms of the conveyance to the Bank the latter took no more interest in the land than H. then had. The plaintiff, however, could not make the defendants liable for the whole of her claim as mortgagee, inasmuch as the proprietors of the other lands included in the mortgage were liable to contribute. These should be made parties, in order to be present at the account. *Terry v. Osborne*, 806.

Presumption—in favor of Crown—Limitations.—The defendant, having been in possession of certain land since 1821, in January, 1844, leased it to the plaintiff; a grant from the Crown of the same land had, however, issued to one S. L. in 1831. The plaintiff being threatened with eviction by J. L., heir of S. L., the grantee, accepted a lease of the premises from J. L. in October, 1844, and, on the defendant distraining for rent, replevied his goods, on which the defendant avowed and the plaintiff pleaded *non-tenuit*. On a motion for a new trial, the verdict having been for the plaintiff, *held*, *inter alia*,—

Bare possession in a subject cannot, as against the Crown, with respect to lands in this Colony, be taken to afford any presumption of title. The ten years possession of the defendant would not have been sufficient to exempt him from *pleading his title specially* on intrusion brought, even under 21 Jac. I, c. 14 (but, *semble*, this statute is not in force here).

The defendant could derive no benefit from his twenty-three years possession under 3 and 4 Will. IV, c. 27, since the Crown was not bound by the statute, and the first ten years' possession was therefore inoperative.

The making of a grant raises a presumption in favour of the Crown. *Hatfield v. Alford*, 330.

Promise of grant—binding on Crown.—A promise by the Governor of the Colony of a grant on condition that the promisee stay in the country is binding on the fulfilment of the condition. The Governor having the right of granting land, had also the right to make binding promises, and a promise made by him was obligatory on his successors in office. *Dumaresq v. Robertson* (No. 3), 1291.

Purchaser for valuable consideration.—Crown grant to purchaser for valuable consideration without notice as against volunteer under prior conveyance of interest. *Spenser v. Gray*, 477.

Purchase in another's name—27 Eliz., cap. 4—void grant.—Land was purchased at a Government land sale by C., but in the name of B., the defendant, who was an infant and son of a friend of C. C. completed the purchase and took a grant in the same name, but subsequently sold the property to the plaintiff, and signed the document of transfer in the defendant's name, alleging to the purchaser that it was his true name. This document was as follows:—"This is to certify, that I have this day sold and disposed of to Robert Byers, all my right, title, and interest in that piece or parcel of land"—describing the land in question—"for the sum of seventy pounds; with the cottage, and everything on the said ground." On a bill being brought by plaintiff against the defendant, claiming that he should be declared a trustee for the plaintiff, &c. *Held*, that the document and signature by C. were a sufficient memorandum of the contract within

the Statute of Frauds, and binding on C. Also, that the obtaining of the grant to the defendant by means of money supplied by C. was a fraudulent conveyance within the meaning of the 27 Eliz., c. 4, and void against the plaintiff.

Also, that the grant was not void absolutely, but only as against the plaintiff.

By sec 5 of the Land Sales Act, 5 and 6 Vict., c. 36, the purchase vested in C. an interest, which might be the subject of transfer. *Ryers v. Brown*, 1136.

Reservation in grant—Mines of coal—Tenures.—Sixty acres of land at Newcastle were granted by the Crown in 1840 to D., under whom defendant claimed as lessee, the grant, after the usual words of limitation, and reservation of a quit-rent, containing the following clauses, "provided nevertheless, and we do hereby *reserve* to ourselves all such parts and so much of the said land as may hereafter be required for a public way or ways, . . and also all stone and gravel, . . and all land within one hundred feet of high-water mark, . . and also all *mines* of gold and silver, and of *coals*, with full and free liberty and power to search for, dig, and take away the same." In a subsequent part of the instrument there were provisos for making the grant void, "if the conditions, reservations, and provisos therein contained" should not be duly observed. Upon this land defendant mined for coal.

Held, the word *reserve* created an *exception* in the grant, and therefore that the *veins* of coal, being severable from the land, remained as a *corporeal* hereditament in the Crown, and were properly the subject of an information of intrusion. No "office found" was necessary, the right not being founded upon the breach of a condition, but upon an intrusion into soil, always the property of the Crown.

The waste lands of this colony are, and ever have been, from the time of its first settlement in 1788, in the Crown; and they are, and ever have been, from that date, (in point of legal intendment,) without office found, in the Sovereign's possession; and, as his or her property, they have been and may now be effectually granted to subjects of the Crown.

At the time of making a grant of land to a subject the Crown must be presumed to have had a title to that land, and this *original* title, as the foundation and source of all other titles, is matter of judicial cognizance. The feudal principles, that all lands are holden mediately or immediately of the Crown, is equally in force in New South Wales as in England.

Estates in land here are not *allodial*, but tenures in free and common socage, and there is nothing in a quit-rent inconsistent with this tenure. *Attorney-General v. Brown*, 312.

Reservation of water—Riparian rights—Construction of Crown grants.—Certain lands, near Botany Bay, were granted by the Crown to S.L., for valuable consideration, in 1823, described as bounded on the west and south-west sides by Botany Bay, *a creek, and Redmond's Farm*, and reserving to His Majesty, *inter alia*, any quantity of water and any quantity of land, not exceeding ten acres, in any part of the said grant as might be required for public purposes, and providing that the working of any water-mill's there erected, or to be erected, should not be interfered with by such reservation. The plaintiffs, E.L. and D., subsequently became owners of parts of this land.

Shortly after the grant above mentioned S.L. obtained a conveyance of the adjoining farm, which had been granted to one *Redmond* by the Crown without any such reservation as above, and which S.L. had occupied for some time before his own grant under a contract of sale; part of this was devised by S.L. to M.L., one of the plaintiffs. The boundary of R.'s grant on the south was in part described as *the creek* (referred to in the other grant).

Under the provisions of the *Water Act*, 17 Vic., No. 35, the Commissioners for the City of Sydney, obtained the resumption by the Crown of portions of the said properties of the plaintiffs, including the whole of the creek and land on either bank.

The plaintiffs recovered from the defendants the value of the land resumed, and damages for the loss of motive power for certain *water-mills* upon the said creek, but the question was whether they were entitled to compensation for the loss of water for other purposes.

Held, the reservation clause was good (and, *semble*, even if bad as not strictly either a reservation or an exception, it would be valid as a re-grant). There was no uncertainty as to quantity

therein, as the number of mills to be protected clearly was that existing at the time of appropriation, and the amount of water *required* was a mere matter of calculation.

(*Per Milford*, J. The right of user in S.L. of any water *plus* that required for his mills was similar to an estate at will.)

If the reservation in question would have been void under other circumstances, by reason of its derogation from the rights of ownership in the grantee or repugnancy to the title conveyed by the grant, yet it was good in the case of the Crown, by reason of the prerogative vested in the Sovereign for the protection of his subjects.

The grant to *Redmond* having stated his land to be bounded by the creek, M.L. had no right to the land over which the creek flowed *ad medium filum aquæ*, or any riparian right to use the water. Nor was M.L. entitled to compensation for the defendants' disturbance of the water flowing over her land, for though there was no reservation of water in *Redmond's* grant, yet, claiming from S.L., who accepted the grant of the land above with the reservation, which could not be exercised without disturbance of the water below, she was bound thereby. The maxim *volenti non fit injuria* would have applied to S.L. if the Commissioners had exercised their powers while he possessed the properties.

The plaintiffs therefore were only entitled to compensation for loss of motive power to such *mills* as were erected upon the land granted to S.L.

Held (on appeal to the *Privy Council*, in the case of *Mary Lord*), upon a question of the meaning of words, the same rules apply whether the subject-matter be a grant from the Crown or a subject, and the plaintiff was therefore entitled to the land *ad medium filum*. S.L. would have been entitled to compensation in respect of *Redmond's* grant; for the Crown could not grant any property in the water to S.L., nor he to the Crown, and the effect of the reservation in his grant was only that he waived his own rights as riparian owner in respect of the land conveyed by the said grant. (Judgment below reversed, with costs.) *Lord v. City Commissioners*, 912.

Trustees, grant to.—A person who has had twenty years' possession of land, if he lose his possession, may be effectually defeated, on his bringing an ejectment, by showing actual title in another. The promisee of a Crown grant, having by his will disposed of his lands to the plaintiff and another, died before issue of the grant. Subsequently a grant was made to the trustees of the will (who by the terms thereof had no estate in the said lands), in trust for the persons entitled under the will.

Held, that the grant conveyed the legal estate, as the testator, under the will, would have devised it, had he, at the date of the will, the legal estate in himself. *Doe d. Swan v. M'Dougall*, 411.

Trust, grant in—Resulting trust to the Crown.—A grant having issued for certain land in Sydney to R. and C., and their heirs and assigns, in trust for E., with the usual declaration that the land was given for building purposes, and reservation of a quit-rent; R. on the decease of E., C. being also dead, claimed to be entitled to the fee-simple.

Held, the building clause was not part of the *trust*, but the consideration or condition on which the grant was made, and therefore on the death of the *cestui que trust*, the Statute of Uses vested the remainder in the Crown. And no "office found" was necessary to entitle the Crown to possession. *Attorney-General v. Ryan*, 719.

In a Crown grant to certain persons, "*devisees in trust for W., their heirs and assigns*" to hold to them "*as such devisees as aforesaid, their heirs and assigns for ever*," the words "*devisees in trust for W., &c.*," are not words of description only, and W. is named as a person taking a beneficial interest. In the absence of words of inheritance, W. only takes a life interest thereby.

The case is substantially the same as if the grant had been to the said persons and their heirs, *in trust for* W., in which event the Statute of Uses renders them mere conduit pipes for the vesting of the legal estate, for life, in W.

On the death of W., the inheritance is in the Crown, as on a resulting use by implication. (*Attorney-General v. Ryan* followed.) *Smith v. Dawes*, 812.

Uncertainty, proof of matters in pais to avoid—Presumption of confirmation.—The plaintiff claimed the land in dispute as heir at law of N.D., who died in 1830, about eighteen years before the commencement of this action. N.D.

was in possession for many years before and up to the time of his death, and two Crown grants had issued to him in respect of the said land, the first, dated January, 1794, of land described as 120 acres, "lying in the district of Bulanaming, and separated on the north by a road of 200 feet wide from the land allotted for the maintenance of a schoolmaster; to be known as Burran Farm, without the town of Sydney"; the second, dated October, 1799, describing the land granted as 90 acres, lying in the district of Bullanaming, bounded on the south-west by Page, Candells, Jenkins, and Field Farms, from which it is separated by a road 200 feet in width; and on the south by an allotment belonging to Samuel Burt—to be known as Burran Farm." The defendants relied on a conveyance, in October, 1827, of the said lands by N.D. to B.R., under whom they claimed, but this the plaintiff declared to be a forgery.

Held, on motion for a new trial, that the first grant was void for uncertainty of description, and probably the second also, unless it could be shown that the description in the latter could refer only to one piece of land.

The said grants, although executed by the Governor in his individual name, were not private conveyances, but Crown grants, and as such recognised by 6 Will. IV, No. 16, as being as effective as if issued in the name of the Sovereign. But the statute did not avoid the effect of the uncertainty in the description, and could not be extended thus by equitable construction.

A grant might be made certain by extrinsic facts, referred to in such grant, but those in question contained no such reference, beyond an intended future name.

The defendants were not estopped from denying the validity of the grants to the person under whom they claimed, inasmuch as the invalidity was apparent on the plaintiff's case.

On appeal to the *Privy Council*, *held*, if there be such a description in a Crown grant, whether by descriptive words, or by reference to matters *in pais*, or otherwise, as that by evidence connected with such description, the identity of the lands granted is capable of being established, the grant may be good. The facts that both grants mentioned *some* boundaries, the receipt of quit-rent by the Crown, the survey by N.D. and a Government surveyor in 1822, were some evidence to go to a jury as to the identity of the lands, and as to the probability that possession was given by Government officers, at or soon after the time of the grants, by which they might be made good.

The jury would have been justified in presuming from the long possession of N.D., not a substitutional, but a supplementary and confirmatory grant by the Crown. *Doe d. Devine v. Wilson*, 722.

Grant to wife of transported convict—Feme sole.—Satisfactory evidence having been given that a person was a prisoner at the time of a Crown grant to his wife, and of her conveyance in her own name to another, she must be considered a *feme sole*, and her conveyance is good. *Doe d. Tugwell v. Farrell*, 399.

Crown Grant—Proof—Enrolment.—*Doe d. Bowman v. M'Keon*, 475.

CROWN LANDS.

See also CROWN GRANTS.

Waste lands—Alienation.—The King is possessor of all the unappropriated lands of the Colony. Possession of land claimed by the Crown may be recovered by it, by information on the record, although the possession of the defendant be adverse.

Crown lands can only be alienated by means of a record—that is, by a grant, by letters patent, duly passed under the Great Seal of the Colony, according to law, and in conformity with His Majesty's instructions to the Governor. *The King v. Steel*, 65.

License to occupy—Suit between trespassers.—The plaintiff and defendant, owning certain adjoining lands bounded by Darling Harbour, encroached upon the said harbour by filling in the shallow water before their properties, a small part between, however, being left as a waterway. The plaintiff justified her encroachment by a license from the Crown. The waterway having been obstructed by the defendant,—

Held, the plaintiff, if proved to be a licensed occupant, had an interest, beyond mere possession, which would entitle her to an injunction against the defendant to prevent injury to her use of the waterway. But the defendant's intrusion being only on the Crown, the plaintiff, if an intruder

also, could claim no relief against the damage resulting from the defendant's trespass.—*Wilshire v. Deurin*, 1000.

License—Station.—In an action for trespass on certain Crown lands in the possession of the plaintiff, it was held, on demurrer to the defendant's plea, alleging that he held a depasturing license from the Crown, that the defendant must succeed, and that the license, though it gave no actual property in the land against the Crown, would convey to the holder a defeasible right to go upon the land, for the purpose of depasturing, notwithstanding its possession by any person not holding such a licence. *Borthwick v. Bingle*, 384.

Issue of occupation licenses by the Governor, *Hall v. Gibson* (No. 1), 1026.

The Crown can legally, by the exercise of the royal prerogative, delegate to the Governor the power to confer rights of commonage over the waste lands of the Colony, until they are sold or leased, notwithstanding the Land Acts.

An instrument under seal is unnecessary, either to delegate this power to the Governor, or to grant the right, which is not strictly an interest in land.

The term "purchased," in the regulations issued by the Governor in regard to the awarding of such permission, means purchased for money value at auction, according to the terms of the Land Sales Act, 9 & 10 Vict., c. 104. *Hall v. Gibson* (No. 2), 1125.

License—Transfer of Station.—A vendee of Crown land, held under a license, is not bound to obtain the sanction of the Crown to the transfer, but must do all reasonably in his power to perfect it.

Nor is such sanction necessary to a legal transfer of stations. *Tooth v. Fleming*, 1152.

Trespassers on Crown Lands.—An unlicensed occupier of Crown lands cannot maintain an action of trespass against an intruder, his own occupation being rendered wholly illegal by the imposition of penalties for such an act under section 4 of 9 & 10 Vict., c. 104. *Hardy v. Wise*, 897.

CROWN PROSECUTOR.

See CRIMINAL LAW INFORMATION.

CUSTOM.

—— **Sale of distress without appraisement—Long usage.**—The Court has no judicial knowledge of a long usage to sell goods distrained for rent without appraisement, and the usage, even if proved to exist, would not be enforced. *Slapp v. Welb*, 649.

—— **Timber merchants—Constructive delivery.**—Custom of timber merchants to consider measurement a constructive delivery. *Caffrey v. Taylor*, 812.

—— **District Court—Evidence of usage.** Under sec. 94 of the District Court Act the Court can only entertain appeals from the decision of a District Court Judge on points of law. But when the question raised in a case stated is the admissibility of evidence of a usage the Court may remit the case to the Judge below for a further statement of facts proved by the evidence, in order that the relation of the evidence objected to to the issue may be understood, and also for a further statement of the evidence of the usage, to ascertain whether such evidence is sufficient to justify a finding in favour of the usage, and whether the usage is good in law. *Ex parte Church*, 1303.

—— **Architect's charges—Reasonable custom.**—Whether an architect's charge is reasonable, a question of fact for the jury, is sufficiently proved by showing the customary charges in the profession.

Quære, whether such a charge could be enforced if the custom were unreasonable. *Brees v. Church*, 1356.

DAMAGES.

Measure of damages.—Non-fulfilment of promise by Governor to make a grant of Crown Land. *Dumaresq v. Robertson* (No. 4), 1387.

Discussion of principles to guide a jury in assessing damages for trespass to a cattle station. *Nowland v. Humphrey*, 1167.

—— **Misdirection.**—Misdirection, in regard to estimation of damages, in favour of losing party. *Wilson v. Coberoft*, 1267.

—— **Value of race-horse—Railway by-laws.**—The Railway Commissioner, under 22nd

Vic., No. 19, has no power to make a by-law relieving himself from all responsibility for care of horses carried by rail.

In assessing damages for the loss of a race-horse a jury is entitled to take into account its pedigree and engagements. *Bell v. The Railway Commissioner*, 1398.

DECISIONS.

—— by English Courts.—*Ex parte Nicholls*, 123; *Reg. v. Morley*, 389.

—— Motion to reopen case—Conflicting decision in English Court.—After the decision of a case by the Court, a motion to reopen the same, based on a conflicting judgment of the Court of Queen's Bench and the House of Lords, will not be entertained, but *secus*, if the judgment be that of the Privy Council. *Williamson v. N.S.W. Mar. Ass. Co.*, 975.

Overruling previous decisions.—*Doe d. Peacock v. King*, at page 839.

DECLARATION.

See CRIMINAL LAW, EVIDENCE.
EVIDENCE, ADMISSION.
PRACTICE AND PLEADING.

DEDICATION.

See HIGHWAY.

DEFAMATION.

Libel—Pleading—Public benefit.—The plaintiffs declared on a libel published by the defendant in his newspaper, and which charged the plaintiffs with having published false news in their newspaper from corrupt motives, to which the defendant pleaded—1st, a plea alleging that the plaintiffs published in their journal an article, &c., which was false, and that the plaintiffs so published it for corrupt, sordid, &c., purposes, and that the matter complained of was for the public benefit,—2nd, that the alleged libel was published by the defendant without actual malice, and without gross negligence, and that a full apology was published in the defendant's newspaper (written and signed by the author of the alleged libel), and that a certain sum had been paid into Court in full satisfaction. The plaintiffs' demurred generally to the first plea; and specially to the second plea, upon the ground, among others, that the apology was made, not by the defendant, but by some other person.

Held, the first plea was good, inasmuch as, if the article, published by the plaintiffs, was false, and so published from corrupt motives, it must have been *false to their knowledge*, and if false, considering the subject-matter of the article, the defendant's publication must have been beneficial to the public.

The second plea was held bad on the ground stated above.

A person who knowingly publishes fa'se news is not entitled to an action for damages, because the libel complained of visits him, individually, more severely than is necessary for the public advantage. *Pickering v. Mason*, 601.

A justification to a declaration on a libel must allege not only that the publication thereof is for the public benefit, but also *how* the public are to benefit thereby.

An assertion, therefore, in a plea, which justifies the libel as necessary to maintain the truth of statements of Members of Council, in regard to public questions, cannot be rejected.

A justification by averments of particular facts will not cover a general charge of habitual untruthfulness.

The defendant having impugned the veracity of the plaintiff in regard to an article in a newspaper written by the latter, *held*, a plea in justification was bad for not averring that the said newspaper article was the plaintiff's. *Rusden v. Cohen*, 885.

An advertisement of an absconding debtor is for the public benefit. *Floyd v. Taylor*, 1402.

A plea of justification to a declaration on a libel is bad, if it cannot be collected therefrom, that the facts set out as amounting to a justification occurred before the publication of the libel. Such a plea is also bad, where it does not set forth the reasons why the publications of the facts thus averred were for the public benefit, but merely that defendant thought they were for the public benefit.

Semble, a positive averment that the publication was for the public benefit is sufficient alone. *Armstrong v. Parkinson*, 1021.

—— **Justification of part—Garbled extracts.**—A plea in an action for libel is bad, if it justifies part only of the imputations declared, without mention of the remainder, but defendant may be allowed to amend by excepting the omitted passages from his plea and so leaving them unjustified, or by specifically meeting the same.

It is no objection to a plea on demurrer, that the extracts, which it contains, of the alleged libellous publication are garbled, the charge conveyed by the publication being a question for the jury.

Where the facts alleged would, if true, make their publication for the public benefit, the plea of justification sufficiently complied with sec. 4, of 11 Vic., No. 13. *Maister v. Hipgrave*, 1254.

Libel—Pleading—Duplicity—27 Eliz., cap. 5.—A plea to a declaration in libel averred the truth of the facts, the correctness of the report of the police court proceedings, on which the action was founded, and a justification, as being published for the public benefit.

On objections by way of demurrer that no facts were alleged showing that the publication was for the public benefit, that the particular facts alleged did not support that averment, and that certain alleged mistaken views to be corrected by the said report were absurd, *held* notwithstanding 27 Eliz., c. 5, that these were objections in substance and excluded from consideration by 12 Vic., No. 1, s. 6.

A plea is not bad for duplicity because it contains other matters, which, by sec. 4 of 11 Vic., No. 13, are required to be joined to the averment of the truth of the libel.

An averment in a plea that certain money had been stolen is not bad for uncertainty if set out with as much certainty as in an indictment for larceny. *Hughes v. Kemp*, 516.

—— **Justification — Amendment.** — The justification of a libel, on the ground that the publication thereof was for the public benefit, should state the reasons *why* it was beneficial.

(*Per* the *Chief Justice* and *Therry*, J.; *Dickinson*, J., *dissentiente*.) Where the Court on the argument of a demurrer is in a position to see what a proposed amendment would amount to, it is incumbent on them, for the saving of expense and delay, to say whether, when the amendment is made, the open statement of these facts might be alleged to be a statement for the public benefit. A plea of "truth" and "for the public benefit," without any reason assigned, is made good by inserting averments that plaintiff was still a practising attorney at the time of publishing the alleged libel, and that there was a likelihood of his being employed by Her Majesty's subjects in matters of trust, if they remained ignorant of this delinquency, &c. *Cory v. Moffit*, 763.

Libel—32 Geo. III, cap. 60—Province of Judge and jury.—In a libel action the jury should be directed that if they think the words complained of are calculated to bring the plaintiff into public scandal, infamy, disgrace, or ridicule, and if they are in any portion referable only to his private character, or, in case they relate wholly to public conduct, if the jury think that they exceed the limits of fair comment on the actions of a public man, then the plaintiff is entitled to a verdict, but otherwise, the defendant. Whether a writing amounts to a libel is a question of law, but being unavoidably mixed up with the facts which a jury have to determine, the jurors have a right to decide it contrary to the Judge's direction.

Even in criminal cases, by 32 Geo. III, c. 60 (*Fox's Act*), the question of libel or not is a matter on which the Judge may, at any rate in his discretion, deliver his opinion to the jury, and *a fortiori* in civil action. *Holroyd v. Parkes*, 968.

The Court has the power to determine as to the sufficiency of facts, stated in a plea to a declaration in libel as showing how the publication was for the public benefit. *Morgan v. Irby*, 1149.

Libel—Costs—Certificate.—The plaintiff in an action for libel having recovered one farthing damages, the defendant applied to the presiding Judge to certify to deprive the plaintiff of costs under 43 Eliz., cap. 6.

Held, the Court had no power to grant such certificate. *Brady v. Cavanagh*, 107.

Privilege of witness.—A malicious defamation is not absolutely privileged by being published in a Court of Justice. *Smith v. Nash*, 594.

Slander—Inferential charges—Jury.—A declaration in slander for words causing injury to plaintiff in his business, which is apparently

insufficient as to its statement of the cause of action, may be upheld on the ground that the alleged slander *inferentially* makes charges which would cause such injury.

A plea that, by the use of the words complained of, the plaintiff had not been injured in his business, is bad.

It is for the jury alone to decide whether the words were spoken on an occasion when the plaintiff could sustain no damage, and the question cannot be raised directly or indirectly on demurrer. *Maxwell v. Daley*, 843.

Slander—demurrer—surplusage.—A declaration on a verbal slander was resolvable into the following three averments:—1st. That the defendant maliciously said of the plaintiff, that he would not take the plaintiff's word on oath. 2nd. That the defendant said so during a trial, in which the plaintiff was a witness. 3rd. That the defendant said those words in certain evidence upon that trial, which he spontaneously, officiously, and maliciously gave. The defendant demurred on the ground, that an action would not lie for defamation under the circumstances alleged; that it ought to have been alleged that the words were used without reasonable and probable cause; and that it ought to have been alleged that the defendant was actuated by express malice.

Held, the declaration would have been good, by the Act, 11 Vic., No. 13, had it merely set forth the words complained of, and was not vitiated by the statement of the manner and occasion of the defamation, which were merely surplusage, and no ground for a demurrer. [*Note to Hodgson v Scarlett dissented from.*] *Smith v. Nash*, 594.

Slander—evidence—defendant's intention.—When the jury has found in an action for slander that the words complained of were not calculated to do an injury, the Court is not prevented by sec. 2 of 11 Vic., No. 13, from exercising control over the verdict, and directing a new trial on the ground that the verdict was against evidence.

Evidence of defendant's statements are admissible to show with what intention the slander was uttered. (*Pearson v. Lemaitré* followed.) *Darby v. Reid*, 704.

DELIVERY.

Actual and constructive.—*Caffrey v. Taylor*, 842.

Reasonable time.—*Hughes v. Greer*, 846.

DEMAND.

Before right of action.—*Ryan v. Howell*, 470.

DEMURRER.

See PRACTICE AND PLEADING.

DEPOSITIONS.

See CRIMINAL LAW, EVIDENCE.

DESCENT.

See INHERITANCE.

DESERTED WIVES AND CHILDREN'S ACT.

Signature of order—second order—refusal to give evidence.—The signature of an order by the justices under the Deserted Wives and Children's Act, 4 Vic., No. 5, s. 11, within twenty days is merely directory.

Where a second order was made by justices under this Act, assuming that a prior order was invalid, and obedience to the second was resisted on the ground that the first was valid, the justices had jurisdiction to compel the defendant to give evidence for the purpose of deciding the question.

A committal for a refusal to give such evidence is also justified by sec. 8 of the Deserted Wives Act, 22 Vic., No. 6. *Ex parte Armstrong*, 1122.

Dismissal of complaint—Justices' Act—Certificate.—Notwithstanding sec. 35 of Sir *John Jervis'* Act, 11 and 12 Vict., c. 43, adopted by 14 Vic., No. 43, the provisions of the former Act apply to proceedings under the Deserted Wives and Children's Act, 4 Vic., No. 5.

The dismissal of a complaint or information, therefore (sec. 14, 11 and 12 Vict., c. 43,), is a bar to a second application, only, when followed by a certificate, which certificate is in the discretion of the magistrates. *Ex parte Rose*, 1163.

Desertion, evidence of.—*Ex parte Hogan*, 880.

Child desertion by mother.—The general intention of the 22 Vic., No. 6, is to punish parents of either sex for child desertion, and therefore, although male parents only are mentioned therein, mothers are rendered equally liable by the Acts Shortening Act, 16 Vic., No. 1, sec. 6. *Reg. v. Smith*, 1382.

DISORDERLY HOUSES.

See CRIMINAL LAW.

DISTANCE.

Computation under rules of Court. *Fraser v. Nott*, 1019.

DISTRESS.

See LANDLORD AND TENANT.

Distress for quit rents due to the Crown. *Windeyer v. Riddell*, 295.

DISTRICT COURT.

Attendance of plaintiff—Amount of claim.—The personal attendance of a plaintiff is not made necessary by the District Court Act, 22 Vic., No. 18 (*Milford, J., dissentiente*).

No plea of extreme inconvenience in particular cases will warrant a violation of the rule, that claims under a certain amount must be sued in the District Court. *Johnston v. Rooke*, 1227.

Appeal.—Under sec. 94 of the District Court Act the Court can only entertain appeals from the decision of a District Court Judge on points of law. But when the question raised in a case stated is the admissibility of evidence of a usage the Court may remit the case to the Judge below for a further statement of facts proved by the evidence, in order that the relation of the evidence objected to to the issue may be understood, and also for a further statement of the evidence of the usage, to ascertain whether such evidence is sufficient to justify a finding in favour of the usage, and whether the usage is good in law. *Ex parte Church*, 1303.

Appeal—Special case amended.—Where a special case from the District Court has been amended by the order of the District Court Judge by the omission of certain matter, the Supreme Court will not look outside the case as amended. *Brees v. Church*, 1356.

Interpleader—Costs.—In an interpleader case in the District Court claimant established his right to certain goods, over £10 in value, which had been seized in execution of a verdict for less than that amount.

Held, the interpleader suit was a new issue, and claimant was therefore entitled to advocate's costs. *Ex parte Sandon*, 1381.

Jurisdiction—Corporation.—The District Courts have jurisdiction, under 22 Vic., No. 18, to hear cases in which a corporation is made defendant.

Taylor v. The Crowland Gas, &c., Co. followed. *Ex parte Harwood*, 1224.

Supreme Court issues—Appeal.—A case sent down from the Supreme Court to the District Court for the trial of an issue under sec. 98 of 22 Vic., No. 18, is not subject to appeal in the same manner as causes commenced in the District Court under sec. 94.

Semble, sec. 99 does not apply to such cases. *O'Neil v. Browne*, 1278.

DOCUMENTS.

See EVIDENCE.

DRUNKENNESS.

See CRIMINAL LAW.

DUEL.

See CRIMINAL LAW.

EASEMENT.

See HIGHWAY—WATER.

ECCLESIASTICAL LAW.

See CHURCH.

EJECTMENT.

Land in possession of Crown.—The Court will grant an injunction to restrain an action of ejectment in respect of land in possession of the Crown. *Reg. v. O'Connell*, 117.

Presumption—Sheriff's sale.—The Court, on proof of a Sheriff's sale, will not presume that he did his duty, by duly levying before the expiration of the writ, in favour of a plaintiff in ejectment. *Doe d. Walker v. O'Brien*, 243.

Possessory title.—A person who has had twenty years' possession of land may, if he lose possession, be effectually defeated in ejectment by actual title being shown in a third person. *Doe d. Swan v. M'Dougall*, 411.

Disclosure of defects in title—Estoppel—Onus of proof.—*Doe d. Devine v. Wilson*, 722.

ELECTION.

Uncertainty in deed.—Uncertainty made good by election. *Dick v. Ebsworth*, 865.

Undisclosed principal.—Election to charge principal or agent. *Mortimer v. Mort*, 938.

ELECTIONS.

Revision Court—Appeal.—An application having been made to the Court of Revision under the Electoral Districts Act, 6 Vic., No. 16, to place a certain person's name on the voters' list, the Magistrate sitting therein refused the claim, on the ground that the written notice required by the Act was not produced, or a written copy thereof. A *mandamus* to the Magistrate to reconsider the matter, or to the Clerk of the Revision Court to enter the name of the applicant on the Electoral Lists was refused by the Supreme Court, on the ground that the Act of Council had made the Revision Court the sole court of appeal. *Ex parte Ashton*, 174.

Legislative Council—evidence of membership—disputed right.—In an action for trespass, against the Speaker and Sergeant-at-Arms of the Legislative Council, for ejectment of the plaintiff from the Council Chamber, *held*, that although the question of membership was unavoidably in issue, if the law had specifically provided a tribunal for the determination of that fact, the decision by that tribunal was the only admissible evidence of it; but that, if the Governor and Council, by whom the question of the vacancy had been actually decided, had not power to do so, no evidence was admissible to impeach the plaintiff's right, for in any case the Court had not the power to entertain the question.

A jurisdiction given to one tribunal is ordinarily to be taken as excluding that of any other.

Where the Electoral Court, established under the authority of 5 & 6 Vic., c. 76, s. 2, has jurisdiction, as it has in respect of disputed returns, the vacancy of a seat is to be determined by that tribunal, and not by the Governor under s. 11.—*Martin v. Nicholson*, 618.

EMBEZZLEMENT.

See CRIMINAL LAW.

ENTRY.

See LANDLORD AND TENANT—TRESPASS.

ESCAPE.

See CRIMINAL LAW.

ESTOPPEL.

—— to deny Landlord's title—Title paramount.—The defendant, having been in possession of certain land since 1821, in January, 1844, leased it to the plaintiff; a grant from the Crown of the same land had, however, issued to one S. L. in 1831. The plaintiff being threatened with eviction by J. L., heir of S. L., the grantee, accepted a lease of the premises from J. L. in October, 1844, and, on the defendant distraining for rent, replevied his goods, on which the defendant avowed and the plaintiff pleaded *non-tenuit*. On a motion for a new trial, the verdict having been for the plaintiff, *held*,—

The plaintiff was not estopped from denying his tenancy under the defendant.

A tenant cannot deny that the person by whom he was let into possession had title at that time, unless by a plea averring an eviction by title paramount. A tenant may not show that his lessor's title is determined, unless the plea discloses a similar eviction in consequence of that determination.

The tenant need not prove an actual eviction by legal process or otherwise, provided his new holding be *bonâ fide*, and there be no collusion.—*Hatfield v. Alford*, 330.

Variation of written contract—evidence.—The parties to a contract are estopped from saying that the written varies from the actual contract. But the jury are not estopped, where evidence to that effect has been admitted without objection.—*Hughes v. Greer*, 849.

—— **denial of landlord's title by tenant.**—Defendant in ejectment is estopped from relying on defects in title, shown by plaintiff in stating his case, where he has been proved to have paid rent to the person through whom plaintiff claims, the defects being antecedent to this payment. *M'Intosh v. Pollard*, 1035.

—— **interest to defeat estoppel—recitals—conclusive admission.**—The defendant claimed the land in dispute under a lease and release in 1832, purporting to be a conveyance of the fee simple, and reciting a seizin in fee, from one K., the *promisee* of a Crown grant, to W.; the grant to K. afterwards issued in 1839. In 1843 K. conveyed the same land to M., one of the lessors of the plaintiff. *Held*, on motion to enter a verdict for the defendant (1) that the lease and release of 1832, though contained in the same deed, operated as a good conveyance; (2) that the plaintiff was estopped by the lease and release, either by the *release* simply, or by the *recital* of the seizin in fee; (3) that such an interest did not pass under the conveyance as to defeat the estoppel, the most that K. had being an equitable interest, and that of a character not defined and very unintelligible; (4) that the estoppel would have been equally binding, by way of *conclusive admission*, without being pleaded, as the defendant had had no opportunity of so pleading it; and (5) that on the acquisition by K., afterwards, of the legal fee, by the grant, the plaintiff's apparent interest was converted into an actual interest.—*Doe d. Aspinwall v. Osborne*, 422.

—— **released by disclosure of defect on other side.**—A defect in title shown by plaintiff in ejectment releases the defendant from an estoppel, otherwise arising, from relying upon the said defect. *Doe d. Devine v. Wilson*, 722.

EVIDENCE.

Admission as to boundaries.—Admissions as to boundaries by grantee previous to issue of Crown grant. *Doe d. Evans v. Lang*, 827.

In an action for trespass to a station, *held*, that U., through whom defendant claimed, could be cross-examined as to admissions made by him, that others were in possession of the locus, before or when he entered thereon, and U.'s evidence in respect thereto could be contradicted, inasmuch as he was identified in interest with the defendant. *Nowland v. Humphrey*, 1167.

In an action for trespass to a station evidence was given of an admission by the plaintiff that certain lands, between the plaintiff's and defendant's stations, were not part of his station, although his stock had been allowed to graze thereon. Evidence was also given that at the time of the admission, defendant's station had not been occupied by him. There was no evidence of any occupation license by the Crown.

Held, if both parties had been *in possession* of their stations, and mutually asserting exclusive possession of the lands in dispute, such an admission by one would naturally mean that the other was the *earlier occupant*, but such could not be the inference where it was clearly proved that the disputed tracts were exclusively fed over by the cattle of the plaintiff and long before any other person claimed them.

The plaintiff therefore as having been in exclusive possession, was entitled to succeed against any intruder, without authority from the Crown. *Spring v. Tate*, 1360.

Admission by executor.—Admission by executor does not bind the heir. *Bank of Australasia v. Murray*, 612.

Recitals.—Conclusive admission by recitals in a deed as against person executing the same. *Doe d. Aspinwall v. Osborne*, 422.

Affidavits.—In support of a motion to make a rule absolute, for the issue of an information in the nature of *quo warranto*, new affidavits may be read, provided they are merely confirmatory of the facts already alleged. *Ex parte Gaunson*, 318.

Affidavits made on previous occasion.—W. having sold his interest in a public-house to M., and, pending a transfer of the license, ostensibly employed him as barman, was convicted under sec. 49 of 13 Vic., No. 29, for having permitted M. to conduct the business, on the hearing before the Justices copies of the affidavits of M. and W., made and used on a previous occasion, were admitted in evidence, but no objection taken by W. at the time.

Held, the defendant could not, on a motion for a Prohibition, object to the reception of the copy of his own affidavit, but that that of M. was clearly inadmissible, unless it had been proved that W. had used it previously. *Ex parte Ward*, 872.

Commission—objections to questions.—On an examination before a Commissioner, when a question is objected to, it is the duty of the Commissioner to note such an objection for the subsequent decision of the Court, but to allow the questions to be put and record the answers. *Stewart v. Byrnes*, 1091.

Admissions—to show intention.—Evidence of defendant's statements are admissible to show with what intention the slander was uttered. (*Pearson v. Lemaitré* followed.) *Darby v. Reid*, 704.

Documents—plan.—A map indicating what the vendor of a station alleges to be his boundaries, is no evidence in favour of the vendee against the occupier of a neighbouring station of the vendee's possession of a disputed tract, lying between the stations, and is inadmissible. *Cameron v. Hay* (No. 2), 1370.

Proof of right-of-way by plan. *Haunan v. Cooper*, 631.

Documents, public—transportation.—An indent is sufficient to prove that a person is a transported convict, though not stating the offence for which he was transported. *Doe d. Tugwell v. Farrell*, 399. But reversed, *sub nom. Doe d. Cotton v. Farrell*, 408.

—— **order in Chambers.**—The order of a Judge in Chambers may be proved by the production in Court of the original order. *Reynolds v. Tree*, 402.

—— **recitals in warrant.**—Action against Justice—Recitals in warrant *some* evidence of jurisdiction. *Smith v. Barton*, 445.

—— **Enrolment of grants.**—Proof by certified copy. *Doe d. Bowman v. McKeon*, 475.

—— **marriage register.**—By sec. 4, 3 Vic., No. 7, a copy of a duplicate certificate to be filed in the Supreme Court, was made the only evidence of a marriage under the Act. *Held*, although the marriage was proved by the original register, and it was no part of a minister's *duty* to keep the same, the prisoner was estopped from relying on the objection, the exclusion of the evidence not having been claimed at the trial. *Reg. v. Taafe*, 713.

—— **record—perjury.**—On the trial of a prisoner for perjury, committed at a Court of Petty Sessions, the record, or a certificate, must be produced, to show that the Justices had jurisdiction. *Reg. v. Smith*, 1130.

Witnesses—indirect denial—anticipation of proof.—A plaintiff may give evidence in *indirect* denial of facts stated by defendant's witnesses only in cases where the Judge shall be satisfied, under all the circumstances, that the fact adduced by the defendant, and sought to be denied, was one which the plaintiff could not reasonably have anticipated would have been adduced.

In such cases the defendant ought to be permitted to give evidence in rejoinder.

A plaintiff, anticipating a defendant's proofs, and meeting the same by evidence, must do so fully and without reserving portion of his defence. *Doe d. Lumsdaine v. Bollard*, 404.

Witness—question to discredit—refusal to admit evidence—admission ex gratia.—A witness may be asked the question, whether he was not discharged from the police for making a false charge, but is not bound to answer it.

Where counsel was not allowed to ask a certain question, but afterwards was given an opportunity *ex gratia* to do so, and refused to avail himself of it, *held*, no objection could be based on the prior refusal to admit the evidence. *Reg. v. Hornary*, 1465.

Parol evidence—marriage—identity.—On the trial of a prisoner for bigamy there was no direct evidence of the first marriage, but the fact of a marriage between certain parties was proved by the registry book, and evidence was given of the acts of the prisoner and his alleged first wife to identify them as the parties so married. *Held*, the evidence was sufficient to sustain the conviction. *Reg. v. Taafe*, 713.

——**handwriting.**—Proof of the handwriting of deceased witnesses to a deed having been given at a trial, *held*—the admission in evidence of the handwriting of a deceased witness to the conveyance was wrong, but was right in the case of

another witness, also deceased, who, on examination upon interrogatories, had denied his signature to the conveyance (the handwriting in the latter case, however, being the witness' signature taken during his examination). *Doe d. Devine v. Wilson*, 722.

Parol evidence—descriptions in grant.—Uncertainty in descriptions of Crown grant made good by admission of proof of matters *in pais*. *Doe d. Devine v. Wilson*, 722.

Presumption.—Presumption in favor of possession by the Crown raised by the issue of a grant of land. *Hatfield v. Alford*, 330.

Presumption of continuance of estate of original grantee. *Att.-Gen. v. M'Intosh* (No. 1), 700.

Privilege of party to the case.—A witness in his own case is entitled to no peculiar privilege, or claim to be regarded in any other light than an ordinary witness in the cause. *Fisher v. Kemp*, 779.

A party to a cause who contemplates giving evidence for himself has a right to remain in Court for the conduct of his case, and is not liable to exclusion as other witnesses. *The London C. B. v. Lavers*, 884.

Possession of prior occupier.—In an action of trespass to a sheep station, in which the defendant has pleaded "not possessed," the plaintiff is entitled to prove possession of the part of the station trespassed on, by showing that the former occupier, from whom he purchased, occupied the ground in question. *Lesler v. Girard*, 463.

Membership of Legislative Council.—In an action for trespass, against the Speaker and Sergeant-at-Arms of the Legislative Council, for ejectment of the plaintiff from the Council Chamber, *held*, that although the question of membership was unavoidably in issue, if the law had specifically provided a tribunal for the determination of that fact, the decision by that tribunal was the only admissible evidence of it; but that, if the Governor and Council, by whom the question of the vacancy had been actually decided, had not power to do so, no evidence was admissible to impeach the plaintiff's right, for in any case the Court had not the power to entertain the question. *Martin v. Nicholoson*, 618.

No objection taken.—Consideration of evidence, which could have been successfully objected to, but admitted without objection. *Hughes v. Greer*, 846.

Governor's power.—The Court cannot take judicial notice of the powers of the Governor derived from an Order in Council. *Hall v. Gibson* (No. 1), 1026.

Usage.—Usage, to explain terms of wagering contract. *Armstrong v. O'Brien*, 1235.

Habeas corpus.—*Habeas corpus ad. test.* to bring prisoner as witness before a Committee of the Legislative Assembly. *In re Kelly*, 1275.

EXECUTION.

Fi. Fa.—Order of the Court to one of its officers enforced by *fi. fa.* *Ex parte Hunter*, 165.

Sale of "right, title, and interest."—Certain land having been conveyed by D. to the defendant, part of the consideration being an annuity secured on the property, but the transfer not being registered, the Sheriff afterwards sold to the plaintiff all the estate, title, and interest of D. in and to the land, and all his right, title, and interest, in and to the annuity (the "alleged" conveyance to the defendant being recited in the deed), and the plaintiff's transfer was thereupon registered. Verdict in ejectment having been given, by direction, for the plaintiff, and the jury having found, specially, that the sale to the defendant was *bonâ fide* and for value, the Court was moved, on leave reserved, to enter a nonsuit. *Held*, that the sale by the Sheriff could only operate to convey the land, if there had been some secret or fraudulent arrangement, showing the sale to the defendant to be fictitious, but, as the jury had found the latter to be a genuine and real transaction, for value, the former conveyance merely operated as a transfer to the plaintiff of the annuity. *Doe d. Cooper v. Hughes*, 419.

Ca. Sa.—Sheriff's deputy.—A writ of *ca. sa.* was issued, directed to the Sheriff *or* his deputy, and delivered to the Sheriff who gave a warrant thereon to his bailiff. *Held*, the bailiff's authority was under the *warrant* alone, and the arrest by him, for the Sheriff, was an arrest by the Sheriff himself, under the writ, by his Deputy. But no

variance was held to be caused by an allegation that defendant was taken in execution under the *writ* by M., the lawful deputy of the Sheriff, for the Sheriff's warrant *in effect* authorised the bailiff to act under the *writ*, and therefore the arrest by him was equally under the writ (*per* the *Chief Justice*, and *Manning*, J., *Dickinson*, J., *dissentiente*). *Gosling v. Grosvenor*, 443.

Sheriff's sale—Irregularity.—A sale by the Sheriff cannot be impeached on the ground of irregularity on the part of the Sheriff in the conduct of the sale, and a delivery under such a sale, in other respects valid and lawful, cannot lawfully be opposed; the party injured must seek redress from the person committing the irregularity.

(*Semble*), a temporary abandonment by the Sheriff of goods he is entitled to deliver, does not necessarily, until the return of the writ, defeat his right to deliver to the purchaser. *In re Hughes*, 689.

Ca. Re.—A *ca. re.* cannot be issued and served before the writ of summons in the action. *Kenny v. Teas*, 820.

Sheriff's sale—bargain and sale. *Winchester v. Hutchinson*, 1353.

Landlord's rights.—Execution levied against goods upon premises, the rent of which is in arrear. *Hoskisson v. Uhr*, 1468.

EXECUTOR AND ADMINISTRATOR.

Vice-Admiralty Court.—An executor is necessarily authorised to adopt the same remedies in the Court of Vice-Admiralty which the testator would have been at liberty to resort to, if alive, notwithstanding the statute 13 Ric. II, st. 1, c. 5 (*per Stephen*, C. J., and *a'Beckett*, J., *Dickinson*, J., *dissentiente*). *Ex parte Gibb*, 274.

54 Geo. III, cap. 15—Liability of heir.—The existence of a debt, due by a deceased person, is not proved, as against his heir, by the admission of his executor, nor can the case be taken out of the Statute of Limitations thereby.

The statute, 54 Geo. III, c. 15, does not render land in this Colony disposable, for the liquidation of debts, by an executor.

A creditor is not enabled, by 54 Geo. III, c. 15, to take lands, which descend on the heir, under a judgment and execution against the executor. *Bank of Australasia v. Murray*, 612.

In every case where a person's executor or administrator might be sued, in respect of the personal estate, then his heir-at-law may be sued, under 54 Geo. III, c. 15, s. 4, and in the same form of action, in respect of the real estate.

The drawer of a bill undertakes that a drawee shall honor it, and if he die before presentment, the liability is transferred to his representatives, and here, by 54 Geo. III, c. 15, the holder may sue either the executor or the heir. *Holt v. Abbott*, 695.

FALSE IMPRISONMENT.

See MALICIOUS PROSECUTION.

FALSE PRETENCES.

See CRIMINAL LAW.

FIERI FACIAS.

See EXECUTION.

FOREIGN DEFENDANT.

Scire facias against foreign members of a Company against which judgment has been obtained. *Bank of Australasia v. Frazer*, 675.

FRAUD.

—— In obtaining Crown grant.—*Walker v. Webb*, 253; *Reg. v. M'Intosh*, 698.

FRAUDS, STATUTE OF.

See CONTRACT—VENDOR AND PURCHASER.

FRAUDULENT CONVEYANCES.

See REGISTRATION—VENDOR AND PURCHASER.

FRAUDULENT PREFERENCE.

See INSOLVENCY.

GAMING.

See also CRIMINAL LAW.

Indirect action on a wager.—Action for damages on a wagering contract for not *running a horse* according to agreement. *Held*, that a party cannot indirectly recover by action the amount of a bet, which the statute, 16 Car. II, c. 7, s. 3, says he shall not obtain directly by suit in any Court.

On a motion in arrest of judgment the Court is not to look out of the record, and if the pleadings state only so much of a transaction as is illegal, the Court will not adjudge it valid by combining with it other facts, which, though not stated on the record, they may conceive to have had a possible existence. *Chambers v. Perry*, 430.

Lawful game—Usage to explain wager.—By the proviso to sec. 8 of 14 Vic., No. 9, the winner of a lawful game may recover the stakes deposited with a stakeholder, although he is also one of the parties contributing to the same.

In order that a plea of the above statute should be good, it is necessary to allege not only that the plaintiff betted the money, but that the bet was on an unlawful game, or, if lawful, that the money was not a contribution to the winner of the game.

In the absence of notice to a stakeholder of the terms of a subsequent verbal agreement, providing for an event not included in the original written contract, matters left doubtful by the latter must be determined upon the general usages of the matches in question. *Armstrong v. O'Brien*, 1235.

GOODS.

See SALE OF GOODS.

GOVERNMENT.

See CROWN.

GOVERNOR.

Powers—Judicial notice—Delegation.—The Court cannot take judicial notice of the powers of the Governor derived from an Order in Council, but only those given by statute.

The Crown is not empowered by statute to delegate to the Governor the granting of occupation licenses. *Hall v. Gibson* (*No.* 1), 1026.

— Delegation—Prerogative of Crown.—The Crown can legally, by the exercise of the royal prerogative, delegate to the Governor the power to confer rights of commonage over the waste lands of the Colony, until they are sold or leased, notwithstanding the Land Acts.

An instrument under seal is unnecessary, either to delegate this power to the Governor, or to grant the right, which is not strictly an interest in land. *Hall v. Gibson* (No. 2), 1125.

Conditional promise of grant.—A promise by the Governor of the Colony of a grant on condition that the promisee stay in the country is binding on the fulfilment of the condition. The Governor having the right of granting land, had also the right to make binding promises, and a promise made by him was obligatory on his successors in office. *Dumaresq v. Robertson* (No. 3), 1291.

Appointment of Sheriff.—Section 11 of the Charter of Justice, empowering the Governor to appoint a Sheriff under such instructions as he might receive from the Secretary of State, is merely directory.

This, however, is repealed by the Sheriff's Act 7 Vic., No. 13, which leaves the appointment wholly in the hands of the Governor.

An appointment by the Governor, as representing the Crown, by law and usage would carry the power of removal.

The commission of a Sheriff, recorded in the Supreme Court, is a sufficient supercession of a former Sheriff. *Ex parte Chung*, 1458.

GRANT.

See CROWN GRANT.

GUARANTEE.

Warranty of title, not of quality, by vendor.—*Fitzgerald v. Luck*, 118.

Statute of Frauds, section 4.—The declaration stated that one H. was desirous of obtaining certain machinery but was unable to pay for the same, and that a writing was given to H. by J.,

signed by himself, and in the following words:—"I will furnish Mr. Hardy with funds for the purchase of a steam engine and machinery for a flour mill, on his suiting himself with the same, and notifying the purchase to me. Yass, 29 January, 1854. John Jobbins"; and the plaintiffs averred that H. delivered to them the said writing, on the faith of which they supplied him with the said machinery. An action having been brought against the executors of J. for the price of the goods,

Held, that the instrument must be taken to mean an undertaking to the vendors, whoever they might be, to pay the price of the required machinery to *them*, and not merely a collateral undertaking within section 4 of the Statute of Frauds (*Dickinson*, J., *dissentiente*). *Byrnes v. Williams* (No. 1), 1086.

The purchaser of a chattel, of a greater value than £10, delivered to the seller, by way of guarantee for the payment, a memorandum in writing in these words:—"I will furnish H. with funds for the purchase of a steam engine and machinery for a flour mill, on his suiting himself with the same, and notifying the purchase to me." This memo. was signed by J., but was not addressed to any one.

In an action against J. to recover the price of the machinery,

held (by the *Chief Justice*), the contract was not rendered void by the Statute of Frauds, as the plaintiffs' names could not have been inserted in the memo. when it was written; the Statute does not invalidate a contract, otherwise good, for want of evidence, of which the contract is not susceptible. *Williams v. Lake* distinguished. The above memo. was an agreement to pay the price of the machinery to the plaintiffs.

Held (by *Milford*, J.), the contract, if any, could only be taken as a promise to H. to pay for the machinery when procured.

On appeal, before the *Privy Council*,

held, both the parties to a contract are required by the 17th sec. of the Statute of Frauds to be specified in writing, either nominally or by description or reference, and therefore the above memo. is not sufficient. A promise in writing, signed, to pay to a person unnamed, who shall furnish goods to the writer, or to a third person making default, will become a binding contract with anyone, whosoever he may be, who shall accept the promise in writing and furnish the goods.

The contract was in fact a promise to furnish H. with money to pay for the machinery, and although plaintiffs had not been paid by H., it would have been a good defence to an action properly framed if it could be shown that J. had furnished H. with the necessary funds. *Byrnes v. Williams* (No. 2), 1479.

HABEAS CORPUS.

Return—Order of Supreme Court.—On a return to a writ of *habeas corpus*, that prisoner was detained by an order of the Supreme Court, *held*, that the Court was bound to consider that he was duly imprisoned, and that the fact of that order having been set out irregularly in the return, was no ground for directing the prisoner's discharge. To entitle a person under such circumstances to be discharged from custody, the order must be first set aside by proceedings in the nature of a writ of error. Commitments of a Court of Record need not be in writing. *Ex parte Hallett*, 163.

Sentence of Foreign Court.—The Supreme Court has jurisdiction to order the release of a prisoner confined in this country under an illegal sentence of a Foreign Court. *Reg. v. Murray*, 287.

Conviction before Magistrates.—The defendant's remedy, on conviction and imprisonment for absence from service, is rather by *prohibition* than by *habeas corpus*. *Ex parte Evennett*, 813.

The commitment of an apprentice, for absence from his apprenticeship, is bad if it does not follow the terms of the Apprentices Act, 8 Vic., No. 2, s. 4, and, on an application by *habeas corpus*, the conviction may therefore be examined as on a motion for a *prohibition*. The Masters' and Servants' Act, 9 Vic., No. 27, is not applicable to apprentices. *Ex parte Erwin*, 816.

—— ad testificandum.—The Court can grant a writ of *habeas corpus*, to bring a prisoner before a committee of the Legislative Assembly,

for the purpose of giving evidence, but, *semble*, the Colonial Legislature cannot compel such attendance. *In re Kelly*, 1275.

Release by prohibition.—*Semble*, a person can be delivered out of prison by means of prohibition, where the Court in which the conviction took place acted without jurisdiction.—*Ex parte Davis*, 1305.

False return—Attachment.—The truth of the return to a writ of *habeas corpus* may be impeached and inquired into under the 56 Geo. III, c. 100 (s. 3), which is in force in New South Wales.

It is the right and duty of the Court to issue a rule *ex mero motu*, calling upon a respondent to show cause why an attachment should not issue against him, if it has reason to believe that his return to a writ of *habeas corpus* is untrue. *Ex parte West*, 1475.

HIGHWAY.

Presumption of dedication—Interruption of user—Right of divergence.—To constitute the dedication of a roadway to the public, there must have existed, in the mind of the owner of the soil, an intention to dedicate it.

Long user of a roadway by the public is evidence ordinarily of a dedication.

An act done by an owner to notify his dissent must be decided and unequivocal in its character to rebut the presumption raised by continual user.

The public may diverge from a road, if it be rendered impassable, whether by accident or the intentional obstruction of the same. *Lawson v. Weston*, 666.

Plea of right of way in trespass.—*Hannan v. Cooper*, 634.

Thoroughfare—Wharf.—The defendants were owners of a certain wharf separated from the northern end of the Circular Quay, Sydney. Subsequently the said Quay was extended to defendants' boundary, and plaintiffs became the lessees thereof from the Crown, under the provisions of the statute, 10 Vic., No. 11, sec. 11 of which enacted that "nothing in the Act contained" should be deemed or construed to "prevent the use of any public wharf as a public thoroughfare," &c. The sale to the plaintiffs of the dues also contained a reservation of the wharf as a public thoroughfare.

Held, the Quay was either a thoroughfare, or a highway, and the defendants were entitled to so use it, notwithstanding their use might injure the business of the Quay, and although they entered, not from the same way as other members of the public, but through an opening made in their boundary wall at the northern end of the Quay.

The right, however, could not be exercised so as to defeat the object of the maintenance of the wharf. *Willis v. Campbell*, 932.

HUSBAND AND WIFE.

Breach of promise to marry—Damages. In an action for breach of promise of marriage the amount of damages is not to depend merely on the *pecuniary* loss to the plaintiff. Where there has been a positive refusal to marry, no formal request is necessary to give a right of action. *Stewart v. Byrnes*, 1091.

Marriage—Contract per verba de praesenti.—The prisoner was married to C. by a clergyman of the Church of England, and afterwards, in the lifetime of C., went through the ceremony of marriage with G., the officiating minister being a Presbyterian. A written declaration to the effect that one of the parties was a member of the Presbyterian Church, was not taken by the minister, as required by 5 Will. IV, No. 2, but it was proved that a verbal statement, that G. was a member of that church, was made by the prisoner. The latter was tried, and found guilty of bigamy.

Held, the prisoner's declaration to the minister, that G. was a Presbyterian, was, as against himself, sufficient evidence of her being a member of the Church, called in the Act 5 Will. IV, No. 2, the Presbyterian Church of Scotland.

The second ceremony acquired no validity by the Act, 5 Will. IV, No. 2, because it was not accompanied by the written declaration, as thereby required. (*Catterall v. Sweetman followed.*)

If the ancient English marriage law be in force in the Colony (on which point the *Chief Justice*

and *Therry*, J., refused to give an opinion), the ceremony was invalid by that law. (*Reg. v. Millis and Catherwood v. Caslon followed.*)

The conviction, however, must be affirmed. (The Court assigned different grounds for the latter decision.)

(*Per* the *Chief Justice* and *Therry*, J.) Even though a valid marriage would not, in any event, have been effected, the prisoner's entering into that ceremony amounted to that crime.

(*Per Dickinson*, J.) The second ceremony was a valid marriage *per verba de praesenti*. This marriage acquired no validity from the ceremony performed by the minister, but as the Act, 5 Will. IV, No. 2, contained no clause of nullity, it was not made void thereby. Nor was it avoided by the English Marriage Acts, 26 Geo. II, c. 33, s. 18, and 4 Geo. IV, c. 76, s. 33, these not being in force in the Colony. (*Rex v. Maloney.*)

The decision in *Regina v. Millis* was based on the law anterior to the Marriage Acts; which law, being founded on positive institutions (the Institutes of Edmund and of Lanfranc), is a portion merely of the *lex scripta*, or at any rate of the customary law, and is no part of the pure common law of England. This also is not applicable to the Colony.

Marriages *per verba de praesenti* were not invalidated by the 7 Will. IV, No. 6. *Reg. v. Roberts*, 544.

The prisoner was proved to have been twice married, the first ceremony having been performed by a Roman Catholic minister, but in the absence of the latter there was no evidence whether the declaration, provided by 5 Will. IV, No. 2, was taken or not.

Held, the prisoner's conviction of bigamy was good, and that the ceremony in question was either a marriage according to the common law of England *per verba de praesenti*, or a marriage according to that law, as altered by the Saxon Constitution, which required the intervention of a "mass priest." *Reg. v. Bondsworth*, 870.

Plaintiff a married woman.—A nonsuit was properly entered, on the ground that the plaintiff was a married woman, though not pleaded by the defendant. *Cannon v. Keighran*, 170.

Conveyance by feme sole—Wife of convict.—Satisfactory evidence having been given that a person was a prisoner at the time of a Crown grant to his wife, and of her conveyance in her own name to another, she must be considered a *feme sole*, and her conveyance is good. *Doe d. Tugwell v. Farrell*, 399.

Where a woman married a person transported for life, and during the continuation of his sentence received a grant of land from the Crown, *held*, she could not convey her estate in the land without her husband's concurrence, except pursuant to 7 Vic., No. 16.

The result is not affected by 2 and 3 Will. IV, c. 62, and 6 Vic., c. 7. *Brown v. Tindall*, 1286.

Married woman's property—Payment of debts.—The question was whether the separate landed estate of a married woman was liable in the hands of her heir to the payment of simple contract debts, incurred by her during coverture, the deceased not having executed her power of appointment.

Held, the property *belonged* to the deceased within the meaning of the Act 54 Geo. III, c. 15, s. 4, and was, by the statute, in a case and for a purpose like the present, on the same footing, in the hands of a trustee or heir, exactly as personal estate in the hands of an executor (*per* the *Chief Justice* and *Dickinson*, J., *Therry*, J., *dubitante*). *Phillips v. Holden*, 606.

Grant to husband and wife—Interest under promise.—In the year 1820 J., being in possession of certain land in Sydney, made his will devising the said property to S., an infant, the defendant, appointing trustees therein for S., and shortly after died. The surviving trustee in in 1823 obtained a lease of the land from the Crown, in trust for S., for twenty-one years; in 1829 a proclamation was issued by *Governor Darling*, promising a grant in fee simple to all occupiers or lessees of Crown lands under certain conditions. S., being still an infant, married W. in 1834, and in the same year W. and his wife applied for a grant to the Commissioners under the Act, 4 Will. IV, No. 9, but before the issue thereof W. sold the land, T. being the purchaser; the grant was issued in 1835 to W. and his wife, their heirs and assigns. W. died in 1839, and his wife came of age about the same time.

In a suit by the representatives of T. to prevent S., the defendant, from enforcing a judgment obtained against them in ejectment.

Held, the defendant was at the time of her marriage possessed of an equitable claim to the fee simple in the land, and the lease, if not void (as it was held to be for uncertainty), being in derogation of that claim, could not bind her, and the husband had nothing to dispose of.

The interest of the promise under the proclamation was nearly equivalent to an estate in fee; (*semble*) an indefensible interest, except as against the Crown. *Terry v. Wilson*, 522.

Grant to wife — Husband conveys alone — Curtesy — Discontinuance.—Certain land was in 1834 granted to M.H., the wife of J.H., who alone conveyed it to the defendant the same year, and the latter's occupation continued until this action. In 1835 J.H. and M.H. together conveyed the property to the persons under whom the plaintiff claimed. Ejectment was not brought by the plaintiff until 1855, but within twenty years of the latter conveyance.

Held, the title of the plaintiff was not barred by the Statute of Limitations. The conveyance of J.H. was no forfeiture, nor inoperative, but passed all his estate and interest, including his prospective right, as tenant by the curtesy. Consequently the interest of the wife was a *future* one within the meaning of sec. 3 of the statute, and could not arise till the death of J.H.

Jumpsen v. Pitchers (13 Simons 327) followed.

No "discontinuance" could have affected the title of the plaintiffs, although the deed of 1834 had been by fine or feoffment. *Nicholson v. Healey*, 1081.

Restraint on anticipation — Sheriff's Sale.—A clause, restraining anticipation, in the settlement of the separate property of a married woman, is good against the Sheriff's execution. The husband of the married woman in such a case is justified in forcibly preventing the Sheriff's officer from delivering possession of the property in question to the purchaser at the Sheriff's sale. *In re J. T. Hughes*, 659.

IMPOUNDING.

Impounding — Undertaking to pay damages.—Respondent having impounded complainant's sheep, an undertaking to pay damages was given, under 4 Will. IV, No. 3, to release them. A summons for illegal impounding was afterwards dismissed by justices, on the ground that the case was one of disputed boundaries.

The respondent was ordered by the Full Court to take no proceedings on the undertaking, pending the prosecution of an action of trespass by the complainant within a certain time, and in the event of his failure in the action, the order to be discharged. *Eales v. Nordland*, 702.

Impounding — Sale.—The sale of an impounded animal by a poundkeeper without a Justice's order, as required by s. 20 of 4 Will. IV, No. 3, is absolutely void.

Quære, whether the sale is bad if the provision in s. 14 of the Act, as to the advertisement in the *Gazette*, is not strictly complied with.—*Oliver v. Elliott*, 901.

Impounding — Driving charges.—A poundkeeper is not entitled, under 19 Vic., No. 36, to detain cattle for non-payment of driving charges, where no such scale of charges has been fixed by the magistrates. *Graham v. Fennell*, 1357.

INDECENT ASSAULT.

See CRIMINAL LAW.

INFORMATION.

See CRIMINAL LAW.

INFORMER.

Right to sue for penalty. *Ex parte Pearce*, 189.

INHERITANCE.

B., the owner of certain land, died and his daughter C. inherited the same and died in possession, leaving a grandson, the defendant. C. had entered into a covenant, on which plaintiff brought his action, and defendant pleaded that he had no lands by descent from C.

Held (by majority, *Wise*, J., *diss.*), that the defendant was heir of C. and not of B., the Act 3 & 4 Will. IV., c. 106, only altering the *method* by which the heirship was traced, and therefore the defendant was liable on the bond. *Badham v. Shiel*, 1428.

INJUNCTION.

Common Law.—An injunction cannot be granted, *ex parte*, in an action, if there is no indorsement on the summons of the intention to apply, sec. 47 of 20 Vic., No. 31, being controlled by ss. 44 and 45. *Jeffreys v. Leonard*, 1132.

Equity.—Respondent having impounded complainant's sheep, an undertaking to pay damages was given, under 4 Will. IV, No. 3, to release them. A summons for illegal impounding was afterwards dismissed by justices, on the ground that the case was one of disputed boundaries.

The respondent was ordered by the Full Court to take no proceedings on the undertaking, pending the prosecution of an action of trespass by the complainant within a certain time, and in the event of his failure in the action, the order to be discharged. *Eales v. Nowland*, 702.

INNKEEPER.

Employment of unlicensed person to sell.—W. having sold his interest in a public house to M., and, pending a transfer of the license, ostensibly employed him as barman, was convicted under sec. 55 of 13 Vic., No. 29, for employing an unlicensed person, not a servant, to sell liquor, &c.

Held, the conviction was bad, as the actual owner could not have been said to have been "employed" to sell. *Ex parte Ward*, 872.

INSOLVENCY.

Assignment — Mortgage — Contingent liability.—An assignment by a debtor of all his property to trustees for the benefit of his creditors according to the forms laid down by ss. 33 and 34, 5 Vic., No. 9, is exempted from the operation of 5 Vic., No. 17, sec. 5, rendering it an act of insolvency, by 7 Vic., No. 19, sec. 8.

Held, that it was not necessary that the majority in number and value of the creditors should sign the deed before notification in the *Government Gazette*, &c., that the deed became operative as soon as it was so executed, and that this execution must take place before the debtor's estate is placed under sequestration.

A mortgagee, in the absence of any provisions in the Act to the contrary, may be included in the number of such creditors entitled to sign, if his debt be due.

Holders of contingent liabilities of the debtor (here, holders of bills endorsed by the debtor) cannot be included in the number of such creditors. *In re Coxen*, 223.

Bill of sale.—Seizure of goods by holder of bill of sale held not to operate as a conveyance under section 8. *Morris v. Taylor*, 978.

Bill of sale—Declaration of trust.—In consideration of money lent to G. by A. and B., G. gave a bill of sale over certain goods to A. to secure payment to A. and B., and also to secure to B. payment of a debt previously incurred. A. executed a declaration of trust on the same date, but on a separate paper, acknowledging himself a trustee for B. The former deed only was registered.

Held (by a majority of the Court), that the declaration of trust was within section 2 of the Bill of Sale Act, and (by the full Court) the *whole* transaction was worthless, and as to *both* the debts so secured, the case being also governed by sec. 8 of the Insolvent Act, since G.'s estate had been sequestrated within 60 days of the execution of the bill.

There is no necessity for a demand by the assignee, in order to maintain an action of trover against persons who have removed insolvent's goods after his insolvency. *Wilson v. Cobcroft*, 1267.

Certificate.—The Chief Commissioner having allowed twelve months for the English creditors of the insolvent to come in, under sec. 43, of the Insolvent Act, and three-fourths in number and value of the Colonial creditors having given their consent to the issue of a certificate under section 94, the insolvent applied before the expiration of the twelve months for his certificate, after giving all necessary notices, &c.

Held, that sec. 94 is *mandatory* on the Court to issue the certificate. *In re Peek*, 171.

Conveyance to trustees for creditors.—The plaintiffs claimed in ejectment under a conveyance from J. to P. in 1839, and from P. to themselves in 1841. J., however, in 1843, conveyed all his property to K. and others, in trust for his

creditors, the land in question being named in the instrument; this deed was immediately registered, while that of J. to P. was not registered till 1845. The conveyance to K. was not executed by the due proportion of creditors as required by 5 Victoria, No. 9, s. 33. J.'s estate was sequestrated in 1844, and K. appointed assignee. Defendant's title was based upon a conveyance by K., alone, in 1847, to one B. The jury found that the conveyances, J. to P., J. to the trustees, and P. to the plaintiffs, were *bona fide*, and also that the land in dispute was included in the trust deed in error. *Held*, there was a "valuable consideration" within the meaning of the 6 Geo. IV, No. 22, to support the deed of 1843, namely, the promise to pay all J.'s creditors equally, and allow him to leave the Colony.

The registration of the deed of 1843 did not render void the conveyance to P., but merely gave the former a "priority." As, therefore, the land did not belong to J., his conveyance to trustees could not have the effect of a "fraudulent alienation within the meaning of the Insolvency Act's, 5 Vic., No. 9, ss. 5, 6, and 33, and 7 Vic., No. 19, s. 8. The fact that the same instrument conveyed other properties also would not affect the question, the 6th section not making the instrument void, but merely the alienation. *Gannon v. Spinks*, 947.

Fraudulent concealment.—Justices have jurisdiction to proceed in the matter of a complaint against a person for having fraudulently concealed his property with intent to defraud his creditors. *Reg. v. Windeyer*, 368.

The indictment of an insolvent, under section 73 of the Insolvent Act, for fraudulent concealment and removal of part of his estate, is not substantially defective for want of an allegation that he was in fact insolvent at the time of such concealment and removal. The word "Insolvent," used as a substantive, is throughout the Act, invariably used as indicating simply the person of the debtor, whose estate has been, or is sought to be sequestrated, without regard to the fact of insolvency at any time.

An omission to state the value of the goods in the information is cured by verdict.

It is no objection that the creditors defrauded were not named therein. *Reg. v. Knight*, 582.

Fraudulent insolvency—Interest to prosecute. *Ibid.*

Partnership — joint and separate estate.—An offer of composition to the separate creditors on the sequestration of the joint estate of a partnership is not binding on such separate creditors as do not elect to come in and prove.

The sequestration of the "estate" of a partnership passes the separate estates of the partners to the assignees, and the release of the former causes the release of the latter. *Haslingden v. Bate*, 994.

A debtor, whose private property and share of partnership assets are insufficient to pay his partnership debts, is "actually insolvent" within the meaning of the Insolvent Act, 5 Vic., No. 17, although his private property may be sufficient to pay his private debts.

The word "insolvent," in sec. 8 of the Act, refers to a "general inability to pay debts," and is not to be contrasted with the words "actually insolvent."

The wording of sec. 8 is not similar to that of the corresponding section of the English Act, and contemplates, not the *animus* of the transferror, but the effect of the transfer. *Perry v. Simpson*, 997.

Preferential claims.—A landlord can only establish a preferential claim under sec. 41 of the Insolvent Act, 5 Vic., No. 17, for such rent as he could have distrained for.

Having determined the lease, in pursuance of a clause authorising him to do so, and entered on the demised premises, he was not in a position to distrain at the time of the sequestration order, unless by 8 Anne, c. 14, sec. 6, the terms of which, *Semble*, only apply to the determination of a tenancy by lapse of time, or perhaps by notice to quit. The Statute of Anne, however, by sec. 7, only applies during the continuing possession of the insolvent.

Miners working by the job or piece can only rank with the general body of creditors, and not preferentially as for wages. *In re Whittell*, 441.

Preference.—The plaintiff claimed certain land in ejectment as official assignee of G. The property in question was mortgaged by the grantee P. to G., and subsequently, the mortgage being unregistered, G. procured from P. a conveyance

to the defendants upon trust for the wife of G., &c., to which conveyance G. was an assenting party, the consideration for the deed being recited therein to be a general release by the wife of G. of her dower, which release was executed at the same time. The trust deed was registered and G. shortly after became insolvent.

On a motion for a new trial, the verdict having been for the plaintiff, *held*, that the jury should have been directed that the trust would prevail over the mortgage deed only if made *bona fide and for valuable consideration.*

The *onus probandi* lay upon the defendants. The recital of the consideration in the trust deed was not binding on the official assignee of G., for he represented, not G., but G.'s creditors. A valuable consideration moving from the party to whom the deed is made, or *the party beneficially taking*, is a sufficient consideration to support the deed under the Registration Act. *Doe d. Irving v. Gannon*, 385.

The words "absolutely void" in sec. 8 of the Insolvent Act, 5 Vic., No. 17, must, in accordance with the intention of the Legislature, be held to mean "void as against *all* the creditors," and a transaction cannot be avoided by a single creditor for his private advantage under the provisions of this section, but only by all the creditors acting by their assignee for their common benefit.

A bill of exchange was drawn by L. on the defendants and transmitted to them for acceptance by the plaintiffs, who had advanced money to L. on the faith of a promise to indorse the bill to them on acceptance.

After such acceptance, the bill was formally discounted by the plaintiffs and indorsed to them by L., who subsequently voluntarily sequestrated. The defendants were in fact creditors of L. *Held* (by the Privy Council), that section 8 of 5 Vic., No. 17, must be construed with sections 5, 6, 7, 9, and 12, and the words "having the effect of preferring any then existing creditor" should be taken as referring only to fraudulent preferences. But, in any case, they could not be construed to extend to a case in which not only was there no intention to prefer, but in which the preference (if any) arose from defendants having accepted the bill and so represented themselves to third parties as debtors to L. In the absence of proof that the delivery or indorsement of the bill was unfair or improper, the insolvency of L. at those times did not affect the defendants' liability. *Bank of Australasia v. Harris*, 1337.

Reputed ownership.—An insolvent, H., having been indebted to T., had deposited with her certificates of shares in a certain company. T. afterwards assessed the value of the shares and proved for the balance of the debt against H.'s estate.

H. had, however, after the deposit, continued to receive the dividends of the said shares, and to vote at meetings of the shareholders. On application by T. that the trustees of the estate of H. should transfer the shares to her, *Held*, that the term "true owner" in sec. 55 of the Insolvent Act indicates the person *beneficially* interested, and that T. had forfeited her right to succeed by allowing the order and disposition of the shares to remain in the Insolvent, as reputed owner. Reputed ownership is a matter of fact, to be collected from all the circumstances, and not to be inferred from want of notice alone. *In re Hughes*, 265.

INTEREST.

Rate of Interest.—There is no legal limit (*semble*) to rate of interest in this Colony. *See* 13 Anne, cap. 15, sec. 12.

Usage of allowing 8 per cent. (in an action on a promissory note) followed. *Macdonald v. Levy*, 39.

INTRUSION.

Possessory title.—In an information of intrusion, where the defendant pleads the general issue by Statute, he must, to obtain the benefit of the Statute, prove that the King has been out of possession for twenty years.

The King is the possessor of all the unappropriated lands of the Colony. Possession of land claimed by the Crown may be recovered by it, by information on the record, although the possession of the defendant be adverse.

Crown lands can only be alienated by means of a record—that is, by a grant, by letters patent, duly passed under the Great Seal of the Colony, according to law, and in conformity with His Majesty's instructions to the Governor. *The King v. Steel*, 65.

Damages.—An information of intrusion resembles an action of trespass, and damages therefore are recoverable, where things valuable are taken away, whether in form demanded or not. *Attorney-General v. Brown*, 312.

Right of entry.—Notwithstanding twenty years' adverse possession, even if 21 Jac. I, cap. 14, be in force, the Crown has more than a bare right of entry, and can convey the land by grant without recourse to an information of intrusion. *Doe d. Wilson v. Terry*, 505.

Continuance of effect of prior grant.—In an information of intrusion the land was described as having been "granted in accordance with the Reports, &c.," in addition to the ordinary description of the abuttals. A demurrer to this was held good on the ground that there was a presumption that the title in the grantee still existed, the Crown not having shown that the estate had determined. *Attorney-General v. Ryan* (No. 1), 700.

Crown entitled in remainder.—Grant to trustees.—When by the Statute of Uses the remainder has become vested in the Crown, no "office found" is necessary to entitle the Crown to possession. *Attorney-General v. Ryan* (No. 2), 719.

JUDGE.

Resignation and new appointment.—When the Judge who tried a case resigned, was then appointed Acting *Chief Justice*, and subsequently made an order for execution to issue notwithstanding a notice of motion for a new trial. *Held*, he had no jurisdiction, for, although the same individual, he was not the same *Judge* who had tried the case. *Solomon v. Dangar*, 1289.

JUDGMENT.

See PRACTICE AND PLEADING.

JURISDICTION.

See SUPREME COURT—DISTRICT COURT—PROHIBITION, &c.

Exclusion.—A jurisdiction given to one tribunal is ordinarily to be taken as excluding that of any other. *Martin v. Nicholson*, 618.

Consent.—Consent by a defendant cannot confer jurisdiction on a tribunal, unless given by law. *Ex parte Tighe*, 1100.

JURY.

Grand Jury.—*See* CRIMINAL LAW, PRACTICE, 4 & 5.

Grand Jury—Crown Prosecutor.—There is no distinction between the power of the Crown Prosecutor and that of the Attorney-General in regard to filing informations. The filing of an information is equivalent to the finding of a bill by a Grand Jury, and a conviction, under an information filed by the Crown Prosecutor, is not invalidated by the prosecution being conducted by some other person. *Reg. v. Walton*, 706; and see *Reg. v. Hodges*, 201.

Challenge to array.—A prisoner is not entitled to have the names of all the jurors on the panel read before exercising his right of challenge.

A challenge to the array should be made when the full jury appear in the box. *Reg. v. Wright*, 654.

A challenge to the array is bad, which traverses the return filed by the Sheriff to the precept, ordering him to summon a jury.

The Deputy Sheriff may sign a Jury Summons in his own name. *Reg. v. Lang*, 687.

Challenge by Crown.—The Crown having challenged a juryman on the ground that he is one of the prisoner's bail, and the objection being overruled, is entitled to take another objection, that the juryman is not an "indifferent party." *Reg v. Townend*, 436.

Discontinuance—Costs of Special Jury.—A plaintiff, who has discontinued, is liable for the costs of a Special Jury, paid by the defendant, and also for the defendant's costs of obtaining the order for the same. *Bank of Australasia v. Walker*, 504.

Tales de circumstantibus.—Under the Jury Act, 4 Vic., No. 28, sec. 4, a *tales* is not limited to trials at *nisi prius* at the Assizes. *Hall v. Pawley*, 109.

JUSTICES.

Quarter Sessions—Constitution.—Courts of Quarter Sessions in New South Wales are not

instituted after the course of the Common Law, for here the Courts proceed by information of a Crown Prosecutor instead of the indictment of a Grand Jury, and this involves a most vital departure from the Common Law, so that if a Crown Prosecutor be not appointed in the manner laid down by the Legislature, the objection is as serious as to a Grand Jury improperly empanelled.

The Supreme Court has authority, after conviction and judgment for felony at the Court of Quarter Sessions, to remove the record of conviction by *certiorari* for the purpose of quashing it, not for error on the record, but for facts extrinsic of the record.

Evidence of such facts must be brought before the Court by affidavits.

After conviction a prisoner cannot raise as an objection on the return to a *certiorari* anything which he could have advanced in the Court below.

A defect in the record cannot be advanced as a matter of error, if notice has been specifically given of it in the Court below, but reference to it may be properly allowed, as a circumstance to be taken in connection with other evidence *dehors* the record.

The sittings of the Supreme Court do not, as those of Queen's Bench, supersede the power of Courts of Quarter Sessions.

Under 4 Vic., No. 22, sec. 10, the Governor has power to appoint a Crown Prosecutor, but an appointment thereunder, held to be void by a Court of Record, does not vacate a previous commission; nor is the issue of a commission invalidated by the attachment of an irregular condition thereto, that the appointment shall be subject to the approval of the Queen. *Reg. v. Hodges*, 201.

—— **Absence of Chairman.**—When the Chairman of Quarter Sessions is unavoidably absent on the day appointed, the assembled magistrates may legally elect a chairman, and proceed to the trial of prisoners. *Reg. v. Furnell*, 1467.

—— **Two Justices—Special case.**—A sentence pronounced under a statute giving jurisdiction to *two* magistrates is not good in a case, where, although two were present at the verdict, they were not the same two who were present at any former portion of the case; nor where the two present on the second day of a trial were not present on the first day. A point cannot be reserved on the application of Counsel, except before verdict, under 13 Vic., No. 8.

The submission of a Special Case by the Chairman of Quarter Sessions, *primâ facie* imports that the trial was not, when the application was made, wholly terminated. *Reg. v. Marrington*, 643.

—— **Defence by Counsel.**—*Ex parte Nicholls*, 123.

Small Debts Act—Splitting.—Whenever a man has claims against another at any one time, each separately less than £10, but of which the aggregate is above that amount, the latter is to be deemed his "cause of action," and the bringing of separate actions in the Small Debts Court is a violation of the statute, s. 9. *Ex parte Anderson*, 746.

—— **Abandonment of Excess.**—Where a plaintiff at a Petty Sessions abandons the excess, in order to bring his claim within £10, this should be shown on the record. *Reg. v. Smith*, 1130.

Actions against Justices—Variance.—In an action against a magistrate for assault and false imprisonment, under 24 Geo. II, c. 44, from the general tenor of a notice given by the plaintiff to the defendant, in which the word "maliciously" was used in describing the nature of the injury, it could only be inferred that an action upon the case was contemplated. Instead of this, the proceeding ultimately adopted was an action for trespass. *Held*, that the variance was fatal. *Arnold v. Johnston*, 198.

—— **Warrant—Seizure of waif.**—A cask of tallow, being a waif, was taken from the possession of the plaintiff, by a constable, one of the defendants, who entered the plaintiff's house and seized the said cask under a warrant from the other defendant, a Justice of the Peace. *Held*, that although the house was a public-house, and the cask taken without resistance, on the production of the warrant, yet the subsequent act committed furnished a test of the animus with which the first entry was made, and rendered it a trespass.

The magistrate could not allege as a defence that the warrant did not contemplate the breaking and entry.

In this case the magistrate was not justified in issuing the warrant, since the requisite circum-

stances, under secs. 19 and 63 of the Larceny Act, 7 and 8 Geo. IV, c. 29, in the case of a waif, did not exist. *Moore v. Furlong*, 397.

—— **Presumption in favor.**—In an action against a magistrate for trespass for false imprisonment the plaintiff proved a warrant, issued by the defendant, to search the plaintiff's house for stolen goods, and if found therein, to arrest the plaintiff (under which warrant the plaintiff was arrested), and reciting an information on oath before the defendant, and that there was good reason to suspect, &c. The Judge granted a nonsuit, which was refused by the plaintiff, and a verdict was given by the jury, on the direction of His Honor, for the defendant, who had tendered no evidence.

The questions were afterwards raised on motion for a new trial, whether the plaintiff, by putting in the warrant, established also a justification of the defendant by the recitals therein, and whether the Judge's *direction* to the jury to find a verdict for the defendant was right. A new trial was refused by majority (the *Chief Justice* dissenting.) *Held* (*per Dickinson* and *Manning*, JJ.), that the recitals were *some* evidence of the facts on which the magistrate's jurisdiction was based, and could not be discredited gratuitously, without grounds for suspicion; and that the non-production of the information by the defendant was no reason for such suspicion. The Judge's opinion having been rightly given that the plaintiff ought to be nonsuited, his direction to the jury was also right; (*per Dickinson*, J.) that unless it was clearly shown that His Honor's direction was wrong, the verdict should not be disturbed; (*per Manning*, J.) if it could be clearly seen that the proper conclusion of fact had been arrived at, an error in the charge, if any, should not upset the verdict; (*per* the *Chief Justice*) no presumption arose in the defendant's favour, from his having acted as a magistrate, to *confer jurisdiction* on him, and the *existence* of jurisdiction must be proved; the recital that there *was* an information must be taken as true, and was *some* evidence that the information established a case of larceny against the plaintiff; but the jury was not bound to believe the defendant's own assertion, and the question was for them, not the Judge. *Smith v. Barton*, 445.

Conviction.—The Court can intend nothing in favour of a conviction, and the record of conviction must distinctly show that the justices not only had jurisdiction in the matter, but that they proceeded on competent evidence. *Reg. v. Mann*, 182.

Conviction—Amendment.—Although it did not appear by the warrant or the conviction that the prisoner, convicted of keeping a common gaming-house, was a person "found" in a gaming-house, or "brought before" the justices, under a search warrant, these facts were shown by the depositions and other proceedings, and it was not necessary therefore to proceed by information, under the Gaming Act, 14 Vic., No. 9, sec. 1, but the conviction could be amended, by virtue of 14 Vic., No. 43, s. 9. *Reg. v. Butterworth*, 671.

The Rent and Replevin Act, 13 Vic., No. 11, s. 22, does not empower the justices to order a fine to be paid, and in default of immediate payment a term of imprisonment in lieu thereof. *Semble*, no other statute would justify the direction of imprisonment by the conviction, and before the issue of a distress warrant. But under sec. 10 of the Justices Act, 17 Vic., No. 39, the conviction may be amended by striking out the award of imprisonment and of a distress warrant. *Ex parte Cockburn*, 1012.

Where a statute prohibited the "taking, using, *or* working" of cattle without the owner's consent making the same a misdemeanour, and punishable with a fine of £20, or imprisonment, &c., for every head of cattle *so used*, a conviction for "taking" was held to be amendable by substituting the word "using," the evidence sustaining the latter charge. The commitment, although purporting to be for "taking, using, *and* working" was held good also.

R. v. Druitt followed. Imprisonment can be awarded without the alternative of a fine. *Reg. v. Jones*, 1385.

Conviction—Good in substance.—It is the duty of the Court, before holding any conviction by a Magistrate to be erroneous, to consider the *whole* of the evidence, and if enough unobjectionable evidence remains, after giving effect to all legal objections, to sustain the conviction. *Ex parte Ward*, 872.

A conviction of an apprentice is not good in substance, when the commitment is general, instead of to solitary confinement, and also when the indenture of apprenticeship was never properly executed. *Ex parte Erwin*, 816.

Conviction—Multifarious.—A conviction under sec. 4 of 5 Will. IV, No. 20, for encroaching on the footpath, cannot include the two penalties, for the commission of the offence, and continuance of the same. *Ex parte Younger*, 1403.

Jurisdiction—Mandamus.—No mandamus will be issued against Justices where their jurisdiction is doubtful. *Ex parte Buchanan*, 102.

Jurisdiction under 3 Vic., No. 9—Territorial commission.—The Statute 3 Vic., No. 9, sec. 44, does not give the Justices power to convict summarily.

The Court can intend nothing in favour of a conviction, and the record of conviction must distinctly show that the Justices not only had jurisdiction in the matter, but that they proceeded on competent evidence.

The Justices, having been appointed by a general commission of the Peace, to act as Justices of the *territory*, and a subsequent general commission having issued, whereby certain gentlemen were assigned to be Justices for *the City of Sydney and the adjacent County of Cumberland*, under the provisions of the Sydney Corporation Act (1842), *held*, that it was thereby intended to supersede so much of the territorial commission, as previously included Cumberland as a portion of the territory, and that the before-mentioned territorial Justices had no jurisdiction in the county of Cumberland. This principle is recognised by the stat. 2 and 3 Phillip and Mary, cap. 18. *Rex. v. Mann*, 182.

Jurisdiction—Trespass—Mandamus.—The question in this case was whether a *mandamus* could issue to compel a Justice to proceed in the matter of a complaint against a person for having fraudulently concealed and removed his property with intent to defraud his creditors, the grounds of the Justice's refusal being his want of jurisdiction.

Held, that a Justice has jurisdiction.

An application for a *mandamus* need not be made against the Magistrates generally.

The commission of the Justices is not invalidated by reason of its variation in *form* from the ancient forms used in England.

The jurisdiction of the Justices is extended to all trespasses whatever by 34 Ed. III, c. 1, and is not limited to trespasses against the peace, as in 18 Ed. III, c. 2.

Even if such jurisdiction did not extend to the *trial* of cases of fraudulent insolvency in Quarter Sessions, yet a Justice can out of sessions inquire, and commit, or hold to bail. *Reg. v. Windeyer*, 366.

—— Cross action in Supreme Court.—The Justices have jurisdiction in a suit, notwithstanding the commencement of a cross action by the defendant in the Supreme Court, in regard to the same subject-matter. *Hargraves v. Harrison*, 1019.

——Consent.—Where Justices in an application under the Act 20 Vic., No. 23, ruled the question of period of hiring immaterial, *held*, the ruling was wrong; but if it could be seen that the Justices actually *had* jurisdiction, their order could be sustained.

Consent by a defendant cannot confer jurisdiction on a tribunal, unless given by law. *Ex parte Tighe*, 1100.

Adjudication—Dismissal.—The dismissal of a case by a magistrate, upon a declared opinion that he has no power to adjudicate, cannot be looked upon as an adjudication. *Ex parte Deedo*, 193.

Information.—An information may be laid by a Police Officer, or any other person, in matters where the public is concerned. *Reg. v. Egan*, 588.

Tenements Act—Notice.—An appearance and adjudication under the Tenements Act, 11 Vic., No. 2, must be on the *notice* only, and the time and place are to be mentioned in it. The 11 & 12 Vic., c. 43, does not make good an adjudication by the Justices on complaint and *summons*, in a proceeding under the former Act, which does not relate to offences against the public. *Ex parte M'Cullum*, 684.

Adjudication on facts.—The conclusions of Justices on questions of fact must be looked at as if the findings of a jury, and not disturbed unless clearly wrong. *Ex parte Godfrey*, 1017.

Summary recovery of goods.—Before the issue of a summons to compel restitution by summary process of property under the value of £20, as provided by sec. 10, of 19 Vic., No. 24, there must be a notice of the claim. *In re Healy*, 1129.

Second application—Certificate.—Notwithstanding sec. 35 of Sir *John Jervis'* Act, 11 & 12 Vic., c. 43, adopted by 14 Vic., No. 43, the provisions of the former Act apply to proceedings under the Deserted Wives and Children's Act, 4 Vic., No. 5.

The dismissal of a complaint or information, therefore (sec. 14, 11 & 12 Vic., c. 43), is a bar to a second application, only, when followed by a certificate, which certificate is in the discretion of the Magistrates. *Ex parte Rose*, 1163.

LACHES.

Suit to oust a deposed minister.—*Held*, that it was very doubtful whether, if they had any right, the plaintiffs could call upon the Court to enforce it after thirteen years' delay. *Purves v. Attorney-General*, 1189.

LAND.

See CROWN LAND—REGISTRATION—VENDOR AND PURCHASER, &c.

LANDLORD AND TENANT.

Distress for quit rent.—An officer of the Crown having distrained, is bound to remove the goods at once, and failing to do so becomes a trespasser *ab initio*, for he entered under the general authority of the law.

The goods taken should not have been sold till after the expiration of fifteen days from their seizure, as laid down by 51 Hen. III, c. 4. *Windeyer v. Riddell*, 295.

Sale of goods distrained.—Section 2, 2 Will. and Mary, sess. I, c. 5, is not in force in the Colony, not because its provisions are in their nature inapplicable, but because machinery for its application is wanting.

But the statute may be applicable to the Colony so far as to legalise the *sale* of goods distrained for rent, in the absence of a valuation by an appraiser sworn by one of the officers named in the statute, notwithstanding that it is inoperative as regards the disposal of the surplus, which by section 2 is to be handed to "the Sheriff or Under-Sheriff of the county, or constable of the hundred, parish, or place, where such distress shall be taken."

The Sheriff and Under-Sheriff of the Colony do not, within the meaning or for the purposes of this Act, occupy the place of such officers.

The distrainor is not bound to hand the surplus immediately to the owner of the goods. An actual *demand* is a necessary preliminary to a right of action in the owner, and the distrainor is entitled to a *reasonable time* after demand for investigating the claim of ownership. *Ryan v. Howell*, 470.

The law of distress and replevin, so far as it respects the powers of seizing, detaining, and replevying of goods, is in force in this Colony.

(*Semble*), long usage alone, apart from 7 Vic., No. 13, s. 4, which treats the English law of distress as in force, could amount to an adoption. The power of selling a tenant's goods, when distrained, depends on 2 Will. & Mary, c. 5, s. 2, and is not in force here, unless it be preceded by *appraisement*, as required by the Statute. The Court has no judicial knowledge of a long usage to sell the goods *without appraisement*, and the usage, even if proved to exist, would not be enforced.

Quære whether a sufficient appraisement can be here, and the Sheriff of the Colony be considered to have the same powers as the Sheriff of "the county" in England.

The defendant is not a trespasser *ab initio*, by reason of the illegal sale, the several acts of trespass being divisible by 11 George II, c. 19, s. 19. *Slupp v. Webb*, 649.

Determination of lease—insolvency.—A landlord can only establish a preferential claim under sec. 41 of the Insolvent Act, 5 Vic., No. 17, for such rent as he could have distrained for.

Having determined the lease, in pursuance of a clause authorising him to do so, and entered on the demised premises, he was not in a position to distrain at the time of the sequestration order, unless by 8 Anne, c. 14, sec. 6, the terms of which, *Semble*, only apply to the determination of a tenancy by lapse of time, or perhaps by notice to

quit. The Statute of Anne, however, by sec. 7, only applies during the continuing possession of the insolvent. *In re Whittell*, 441.

Estoppel.—*See* ESTOPPEL.

Lease.—The grant of a lease of land gives to the lessee a right to determine the tenancy of any tenants at will occupying the same, and to enter thereon. *Hogan v. Hand*, 1244.

Rent.—Quit rents reserved in Crown grant. *Windeyer v. Riddell*, 295.

Rent in arrear—goods removed by Sheriff.—It is enacted by the 8 Anne, c. 18, that no goods shall be taken by the Sheriff, by virtue of any writ of execution, on land leased . . . . . , unless the party issuing such writ shall pay the landlord the rent then due—not exceeding a year's arrear.

Held, an action is maintainable against a sheriff by a landlord for removing from the demised premises goods taken in execution thereon, after notice of a claim for rent unpaid, although the person against whom the execution is levied is not a tenant of the landlord, and the goods were not the tenant's property. *Hoskisson v. Uhr*, 1468.

Tenements Recovery.—An appearance and adjudication under the Tenements Act, 11 Vic., No. 2, must be on the *notice* only, and the time and place are to be mentioned in it. The 11 & 12 Vic., c. 43, does not make good an adjudication by the Justices on complaint and *summons*, in a proceeding under the former Act, which does not relate to offences against the public. *Ex parte M'Callum*, 684.

A statutory prohibition may not be granted in respect of proceedings under the Tenements Recovery Act, 11 Vic., No. 2.

The jurisdiction of the Court at common law to grant a Prohibition against magistrates is limited to cases where their decision is demonstrably wrong. *Ex parte Roberts*, 775.

Weekly tenancy.—In the absence of any official contract, or of any proof of a specific custom as to the giving of a week's notice, notice need not be given to a weekly tenant, to determine the tenancy. *Ibid.*

Yearly tenancy.—An agreement for the letting of a dwelling, signed by the landlord, "at the rate of twenty shillings per week, for so long a term as I hold the same, or until I shall determine to keep my property," is void for uncertainty, but by implication of law a tenancy arises, by payment of rent, from year to year, unless the presumption be negatived.

Semble, there is no such thing as a weekly tenancy by implication. *Ex parte Murphy*, 976.

LARCENY.

See CRIMINAL LAW.

LIBEL.

See DEFAMATION.

LICENSE.

See INNKEEPER.

LIMITATONS, STATUTES OF.

Action against Crown.—The Crown cannot plead the Statute of Limitations in an action under 20 Vic., No. 15. *Dumaresq v. Robertson* (No. 3), 1291.

54 Geo. III, cap. 15—admission by executor.—The existence of a debt, due by a deceased person, is not proved, as against his heir, by the admission of his executor, nor can the case be taken out of the Statute of Limitations thereby. *Bank of Australasia v. Murray*, 612.

Unoccupied Crown grant—accrual.—The Crown granted in 1823 certain land to W., which he subsequently mortgaged by deposit of the grant to T., and in 1835 discharged the mortgage by payment. The Crown grant, however, was not returned, T. alleging that it could not be found. Possession of the land had been held by T. or his representatives from 1827 to the commencement of this action.

Held, in an action by the representatives of W., to recover possession, that W. had no right of action, within 3 and 4 Will. IV, c. 27, until 1835, and that the case did not come within sec. 3 of the statute, although there was no proof that W. had ever occupied the land, inasmuch as the Crown never was in the "possession, or receipt of the profits, of the land" as therein mentioned. *Wilshire v. Ford*, 851.

Disputed tract between Crown grants.—Plaintiff and defendant occupied adjoining land as promisees from the Crown in 1822, in which year plaintiff obtained his grant. The piece of land in dispute was occupied by the plaintiff since 1829, and fenced in by him in 1835, but was included in the grant issued to the defendant in 1842. The latter did not attempt to eject the plaintiff till 1852.

Held, the defendant could not have sued till 1842, and that his claim would not be defeated even if he knew in 1835 of the erection of the fence, unless silent from a fraudulent motive. *Lang v. Evans*, 889.

Future interest.—Certain land was in 1834 granted to M.H., the wife of J.H., who alone conveyed it to the defendant the same year, and the latter's occupation continued until this action. In 1835 J.H. and M.H. together conveyed the property to the persons, under whom the plaintiff claimed. Ejectment was not brought by the plaintiff until 1855, but within twenty years of the latter conveyance.

Held, the title of the plaintiff was not barred by the Statute of Limitations. The conveyance of J.H. was no forfeiture, nor inoperative, but passed all his estate and interest, including his prospective right, as tenant by the curtesy. Consequently the interest of the wife was a *future* one within the meaning of sec. 3 of the statute, and could not arise till the death of J.H.

Jumpsen v. Pitchers (13 Simons 327) followed.

No "discontinuance" could have affected the title of the plaintiffs, although the deed of 1834 had been by fine or feoffment. *Nicholson v. Healey*, 1081.

Reversioner—absence beyond seas.—M.H., being owner of certain lands, allowed T. and R. to occupy 40 acres thereof, as tenants at will, and left the Colony in 1796. In June, 1832, M.H. leased, by an agent, the whole estate to C. for seven years, to commence from January 1, 1833, and died in 1833. The plaintiff was the heir-at-law of M.H., and the defendants claimants under T. and R., by continuous possession. The title of M.H. had been acknowledged by T. and R. in 1832.

Held, that the case was governed by sec 5 of 3 and 4 Will. IV, c. 27, and that the right to bring an action for the recovery of the 40 acres first accrued on the termination of the tenancy of T. and R., by the operation of the lease to C.

Also, that the action could in fact have been brought on January 1, 1833.

Held (by the Privy Council, on appeal, reversing the above decision), that, apart from the effect of the lease to C., the plaintiff, being beyond the seas at the time of the accrual of his right on his father's death, and ever since that time, was entitled to the benefit of the 16th section of the Statute, 3 and 4 Will. IV, c. 27, and, his action being brought within 30 years, he was not barred.

The grant of a lease of land gives to the lessee a right to determine the tenancy of any tenants at will occupying the same, and to enter thereon, but the statute will not run against the lessor, whose title is that of a reversioner expectant on a term of years, until the expiration of the term. *Hogan v. Hand*, 1241.

Accrual of right—absence beyond seas.—In the year 1830 one N. died intestate in New South Wales, seized of certain land, the subject of this action. His heir-at-law was E., a brother who resided then, and afterwards until his death in 1835, in Ireland. The plaintiff, grand-son and heir of E., was never in the Colony until after the commencement of the action in 1856.

Held, that the plaintiff was rightly non-suited, inasmuch as his action should have been brought within twenty years after E.'s right accrued by the death of N., under sec 2 of 3 and 4 Will. IV, c. 27, or within ten years after E.'s death, by section 16.

No privilege of disability was conferred on the plaintiff by sec. 16 of the Statute, although he was absent when his right accrued.

Notwithstanding the adoption, by 8 Will. IV, No. 3, of the 3 and 4 Will. IV, c. 27, including sec. 19 of the latter Act, Ireland must be deemed as regards New South Wales to be "beyond seas," within the meaning thereof (*per Dickinson, J.*)

Held (on appeal by the Privy Council, affirming the judgment below), that the Colonial Legislature had the power, under 9 Geo. IV, c. 83, to adopt the 3 and 4 Will. IV, c. 27.

Also, that plaintiff's right of action was barred by ss. 2 and 16 of 3 and 4 Will. IV, c. 27, by which the 21 Jac. I, c. 16, was displaced, without reference to existing rights.

Quære, whether Ireland is, by the 19th section of the statute, "beyond seas." *Devine v. Holloway*, 1102.

MAGISTRATE.

See JUSTICES.

MAINTENANCE.

See DESERTED WIVES AND CHILDREN.

MALICIOUS PROSECUTION.

Malice—Defendant's belief.—The defendant, in an action for malicious prosecution, cannot be asked directly whether he acted maliciously, but he may be asked whether, at the time of the prosecution, he believed in the truth of the charge.

Where there *was* before the Jury, however, an affidavit by the defendant, wherein he had actually sworn to the plaintiff's guilt, but the defendant's *direct* evidence as to his *belief* had been excluded, *held* (*Therry*, J., *dissentiente*), the defendant was entitled to a new trial. *Walsh v. M'Donough*, 800.

Reasonable cause—evidence.—In an action for malicious prosecution (on a charge of perjury) the Judge is entitled to direct the jury to say, first, whether the defendant when he preferred the charge, honestly believed he could substantiate it, and, secondly, whether he had reasonable grounds for such belief. Whether there was a reasonable cause for the charge, is a question of law for the decision of the Judge. *Machattie v. Lee*, 1366.

Action against constable—*Greenwood v. Ryan*, 275.

MANDAMUS.

Doubtful Jurisdiction.—Where the jurisdiction of magistrates is doubtful, they will not be compelled to act, by the issue of a *mandamus*. *Ex parte Buchanan*, 102.

Electoral Revision Court.—An application having been made to the Court of Revision under the Electoral Districts Act, 6 Vic., No. 16, to place a certain person's name on the voters' list, the Magistrate sitting therein refused the claim, on the ground that the written notice required by the Act was not produced, or a written copy thereof. A *mandamus* to the Magistrate to reconsider the matter, or to the Clerk of the Revision Court to enter the name of the applicant on the Electoral Lists was refused by the Supreme Court, on the ground that the Act of Council had made the Revision Court the sole court of appeal. *Ex parte Ashton*, 174.

—— against individual Magistrate.—An application for a mandamus to compel a magistrate to proceed in a matter need not be made against the magistrates generally. *Reg. v. Windeyer*, 366.

—— rule nisi.—Rule under 11 and 12 Vict., cap. 44, sec. 5, to be granted rather than mandamus in certain cases. *Ex parte Hogan*, 880.

—— public duty—water supply.—The Corporation of Sydney is not justified in refusing to supply water, on the ground that there are arrears of rates unpaid by a former tenant, and may be compelled by mandamus to authorise the construction of the necessary works, where there is a water-main already laid near the premises in question. *Ex parte Hamilton*, 1233.

MARKET OVERT.

A sale by public auction at a place not authoritatively appointed by law for publicly buying and selling is not a *Market overt*. The doctrine of *Market overt* may be applicable to this Colony when public markets are established, but a sale even in *market overt* of this particular species of property will not change the property unless the directions of the Statutes 2 *Phillip and Mary*, cap. 7, and 31 *Eliz.*, c. 12, be observed. *Fitzgerald v. Luck*, 118.

MARRIAGE.

See HUSBAND AND WIFE—BIGAMY.

MARRIED WOMEN'S PROPERTY.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

Apprentice.—The Act, 9 Vic., No. 27, is not applicable to apprentices. *Ex parte Erwin*, 816.

Piece work.—An agreement under seal to work for defendant, and for no other except by his permission, payment by the piece, does not imply a contract to find full employment for the plaintiff. *Tulip v. King*, 232.

Drover.—A drover is not a servant within the Act. *Reg. v. Liffidge*, 793.

Vet. surgeon and farrier.—A person engaged by a Veterinary Surgeon and Working Farrier, by a contract in writing, as "an Assistant in the Veterinary Department, also to the working of the Farriery Department," for which he was to receive weekly wages, and, for working over hours, half the profits of that work, is not a *servant*, within the meaning of the Masters and Servants Act, 9 Vic., No. 27. *Ex parte Evennett*, 813.

Church holiday—Master's deputy.—The statute, 5 and 6 Ed. VI, cap. 3, prescribing certain holidays on which there should be an abstinence from work, prescribes only spiritual censures as penalties, and there being no dominant Church in the Colony, is not in force here.

A workman cannot claim exemption from work because the day has been proclaimed a holiday by his Church. Disobedience of the orders of the master's deputy is a breach within the Masters and Servants Act. *Ex parte Ryan*, 876.

Contract from fortnight to fortnight.—Section 5 of the Masters and Servants Act, 20 Vic., No. 28, is not subject to the same restriction as ss. 2 and 3, but embraces all contracts, where wages have been *earned*, and are payable. A hiring as a daily labourer, at 8s. a day, to be paid every fortnight, is within ss. 2 and 3, being an engagement from fortnight to fortnight.

Where Justices in an application under this Act ruled the question of period of hiring immaterial, *held*, the ruling was wrong; but if it could be seen that the Justices actually *had* jurisdiction, their order could be sustained. *Ex parte Tighe*, 1100.

Master's liability for servant's acts.—For a conviction, under the Scab Act, 10 Vic., No. 8, s. 2, of the owner of a flock, for having "permitted or suffered" a trespass on another person's station of diseased sheep, in charge of a shepherd, clear proof must be given of the owner's participation in the offence. The acts of the shepherd, although civilly binding the master, cannot render him liable in a proceeding of this nature, unless by express terms in the Act. *Ex parte M'Kinnon*, 792.

Piece work — Claim in Insolvency.—Miners working by the job or piece can only rank with the general body of creditors, and not preferentially as for wages, in Insolvency. *In re Whittell*, 441.

MAXIMS.

CAVEAT EMPTOR. *Fitzgerald v. Luck*, 118.

VOLENTI NON FIT INJURIA. *Lord v. City Commissioners*, 912.

NON JUS SED SEISINA FACIT STIPITEM.—*Badham v. Shiel*, 1436.

MERCHANT SHIPPING.

See SHIPPING.

MISTAKE.

Payment by mistake. *Baldwin v. Elliott*, 868.

MONOPOLY.

There is nothing in the operation of a grant of land, with a reservation of all the mines of coal, tending to a monopoly in the sale of coals. *Attorney-General v. Brown*, 312.

MORTGAGE.

Equitable mortgage of land promised by Governor, unregistered, as against subsequent registered conveyance. *Terry v. Osborne*, 806.

Mortgagor *held* owner within the meaning of the Fences Act, 9 Geo. IV, No. 12. *Rodd v. Campbell*, 326.

MUNICIPALITIES.

"Then current year."—A Municipal Council cannot under the Act, 22 Vic., No. 13, fix arbitrarily dates at which a "financial year" shall commence and terminate. *Nicholls v. Peisley*, 1380.

The current year in section 79, of 22 Vic., No. 13, must be taken to mean the "municipal" or artificial, not the calendar, year. *Berry v. Graham*, 1493.

Constitution—proclamation ultra vires.—A petition for the constitution of a municipality, setting out the boundaries, was received and granted by the Executive Council, under the Municipalities Act of 1858. The proclamation defining the municipality omitted some land within the boundaries set out in the petition, and included some land not so described, and which formed no part of the places therein mentioned.

Held, the proclamation was *ultra vires*, and bad by reason of the *addition* of lands in the proclamation, and also as having united in the same municipality a town and rural districts; the omission in the proclamation did not invalidate it.

But a trivial addition would not have this effect.

Section 6 of the Act did not cure the objections, the act of the Executive Council having been an assumption of power which never existed, and not merely irregular.

Held (by the *Privy Council*), the addition to the municipality of areas not set forth in the petition rendered the proclamation invalid, as *ultra vires* of the Government and Executive Council.

But the inclusion of a town and rural district in one municipality is not bad. *Berry v. Graham*, 1493.

—— public duty—water supply—mandamus. *Ex parte Hamilton*, 1233.

MURDER.

See CRIMINAL LAW.

NAVIGATION.

See SHIPPING.

NEGLIGENCE.

Prothonotary's duty — contributory negligence.—It is the duty of the Prothonotary to deliver the pleadings in all causes for trial before a Circuit Court to the Clerk of Assize, and if on his failure to do so the Judge refuses to hear a cause, the plaintiff therein is immediately entitled to recover from him damages for the injury; it is no excuse that the papers in question were delivered out of the Prothonotary's possession for use in a chamber application and not returned to him.

But a plaintiff cannot recover for such a breach if he had no right of action against the original defendants, or if by the exercise of ordinary skill on the part of his legal representatives the pleadings could have been made sufficiently complete for trial. *Hardy v. Raymond*, 1028.

Contributory negligence — collision.—Where a vessel is at anchor without showing the lights required by 16 Vic., No. 46, sec. 35, and is run down by another vessel, notwithstanding the fact that a light was exhibited from the former, clearly visible to the latter, the owners of the latter are liable, in spite of the contributory negligence of the other, if the injury could have been avoided by the exercise of ordinary diligence, and the statute is not to be interpreted so as to allow the running down of vessels insufficiently lighted. *Spier v. Hunter River S. N. Co.*, 1351.

NEW TRIAL.

See PRACTICE AND PLEADING.

NONSUIT.

See PRACTICE AND PLEADING.

NOTICE

—— to terminate weekly tenancy. *Ex parte Roberts*, 775.

—— of default in Bill of Sale, need not be in writing. *Morris v. Taylor*, 978.

NUISANCE.

Abatement.—There can be no prescription in this Colony, as there can be no immemorial possession. When a lower riparian owner has erected a dam, causing the waters of a stream to overflow the close of an owner higher up, the latter is entitled, if he suffer an injury thereby, to abate the nuisance. *Stevens v. M'Clung*, 1226.

In a plea of justification in trespass it is not sufficient to allege a duty on the defendant to abate an alleged nuisance, unless the facts also stated show that such duty arises. *Alexander v. the Mayor, &c., of Sydney*, 1451.

OFFICIAL ASSIGNEE.

See INSOLVENCY.

OFFICE FOUND.

See INTRUSION.

ORDERS IN COUNCIL.

Construction of Orders in Council not affected by the Acts Shortening Act, 16 Vic., No. 1. *Terry v. Hosking*, 819.

PARLIAMENT.

Attendance of witness.—The COURT can grant a writ of *habeas corpus*, to bring a prisoner before a Committee of the Legislative Assembly, for the purpose of giving evidence, but, *semble*, the Colonial Legislature cannot compel such attendance. *In re Kelly*, 1275.

Elections. *See* ELECTIONS.

PARTNERSHIP.

Liabilities.—Declaration in *sci. fa.* against defendants as joint contractors with S. & S. against whom a judgment had been obtained, which was still unsatisfied, to recover execution, under 4 Vic., No. 6, sec. 17. *Held*, on demurrer, that a plea denying that the damages are still unsatisfied is bad, for traversing the non-payment which was prematurely alleged in the declaration.

A plea denying that S. & S. were authorised to do the act for which damages had been given, and that defendants had any opportunity to defend the said action, no fraud being suggested, is bad.

A plea that the plaintiff had been paid and satisfied and was collusively, and at the instance of S. & S., bringing this action to recover a contribution from the defendants for the benefit of S. & S. is bad, the facts averred showing nothing deceitful or fraudulent. *Polack v. Milne*, 376.

And see INSOLVENCY.

PATENT.

Injunction—Manufacture.—For the purpose of deciding the question, in a patent case, whether an interim injunction against the defendants should be continued, or dissolved on terms, until the result of a trial at law respecting the validity of the patent be known, the Court must balance the degree of inconvenience caused to the litigant parties.

Where a plaintiff obtained an injunction *ex parte* against the infringement of a patent by the defendant, but on imperfect materials, and filed irregularly supplemental affidavits instead of affidavits in reply, the costs of a motion to dissolve the injunction, which was granted, were made defendant's costs in the cause.

16 Vic., No. 24, distinguished from the English statute of Monopolies.

In granting injunctions of this nature, the Court, here, does not require a strict statement in the affidavits, as in England, that the patentee is the original inventor, and that the invention was not practised at the time when the patent was granted, nor is it necessary to produce the patent, or set out the whole of it, if its existence be proved, and the requisite parts thereof set out in the application. "Manufacture," in its generic sense, embraces the manufactured article as well as the machine by which it is manufactured. *Moorewood v. Flower*, 1109.

PAYMENT.

—— of part of judgment debt. *Polack v. Tooth*, 381.

—— by mistake "in his own wrong." *Baldwin v Elliott*, 868.

PENALTY.

Right to sue.—Where a statute gives a penalty to a particular party, it must be construed to give him a right to sue for it, although no such right is given in *express terms*.

Fleming q. t. v. Bailey is not an authority against this proposition; the observations there made to the contrary effect are but *obiter dicta*. *Ex parte Pearce*, 189.

PERJURY.

See CRIMINAL LAW.

PETTY SESSIONS.

See JUSTICES.

PILOT.

See SHIPPING.

PLAN.

See EVIDENCE.

PLEADING.

See PRACTICE AND PLEADING.

POOR.

There are no legally recognised poor in this Colony. *Reg. v. Schofield*, 97.

POSSESSION.

See ADVERSE POSSESSION—CRIMINAL LAW—CROWN LANDS—INTRUSION—TRESPASS.

Abandonment.—Where a run is left, without servants in occupation, for any considerable time, and without some indication, patent to the world, of an intention to resume occupation, it must be taken to have been abandoned. *Hall v. Gibson* (No. 2), 1125.

Presumption of actual title.—The presumption of actual title, and in fee, which arises from the possession of land is as efficacious in this Colony as in England, but possession is not *necessarily* proof of a fee simple in the possessor, inasmuch as the circumstances of the Colony or district may render it reasonable to infer the existence of a less interest. *Balham v. Shiel*, 1428.

PRACTICE AND PLEADING.

I. IN THE SUPREME COURT AT COMMON LAW.

Practice.

1. *Appeal.*
2. *Arrest.* *See* ARREST.
3. *Bail.*
4. *Chambers.*
5. *Costs.* *See* COSTS.
6. *Error.*
7. *Evidence.* *See* EVIDENCE.
8. *Execution.* *See* EXECUTION.
9. *Judgment.*
10. *New trial.*
11. *Non suit.*
12. *Order of Judge.*
13. *Payment into Court.*
14. *Scire Facias.*
15. *Service.*
16. *Stay of proceedings.*
17. *Trial.*
18. *Verdict.*
19. *Writ.*
20. *Generally.*

Pleading.

21. *Amendment.*
22. *Declaration.*
23. *Demurrer.*
24. *New assignment.*
25. *Plea.*
26. *Replication.*

II. IN THE SUPREME COURT IN EQUITY.

Practice.

27. *Costs.* *See* COSTS.
28. *Injunction.*
29. *Receiver.*

III. IN CRIMINAL CASES. *See* CRIMINAL LAW.

IV. IN DISTRICT COURT. *See* DISTRICT COURT.

V. IN VICE-ADMIRALTY.

I. IN THE SUPREME COURT AT COMMON LAW.

Practice.

1. *Appeal.*

Discretion of Judge.—Where the Court and a Judge have a coextensive and alternative jurisdiction, there can be no appeal to the Court from the Judge, if the matter is one purely in the discretion of the latter. *Outtrim v. Bowden*, 417.

In reviewing the decision of a Judge in a matter upon which he has a discretion, the Court will act on the same principle as that on which the verdict of a jury is dealt with, and will not disturb it unless manifestly wrong. *Fitch v. The Liverpool, &c., Co.*, 1450.

Issues sent to District Court.—A case sent down from the Supreme Court to the District Court for the trial of an issue under sec. 98

of 22 Vic., No. 18, is not subject to appeal in the same manner as causes commenced in the District Court under sec. 94.

Semble, sec. 99 does not apply to such cases. *O'Neill v. Browne*, 1278.

2. *Arrest.* *See* ARREST.

3. *Bail.*

Discharge of bail.—Defendant having been held to bail under 3 Vic., No. 15, on suspicion that he was about to remove from the Colony, and discharged on giving the Sheriff a bail-bond, afterwards, on the ground of insufficiency of the affidavit, obtained an order from the Judge, that the bail-bond should be delivered up to be cancelled on the first day of term, unless the Court should otherwise order. On application by the plaintiff to discharge this order, *held*, that though the Court *might* have no express power to grant the discharge under the Statute in question, yet it still retained its power under the former law.

The Court *will* examine the affidavits to see that the cause of action is certainly stated. *Nathan v. Legg*, 161.

4. *Chambers.*

Proof of Order—Emergency.—The order of a Judge in Chambers, exercising the powers of the Full Court in vacation, may be proved by the production of the original order in Court.

A foundation for the interference of a Judge, under sec. 27, 4 Vic., No. 22, must be shown by clearly setting out in the summons that it is a case of emergency, and the order of the Judge ought to bear on its face sufficient to show that he had jurisdiction. *Reynolds v. Tree*, 402.

Application de novo.—Where a Judge in Chambers has refused to make any order in an application to set aside a judgment, but has dismissed the application with costs, the Court is not debarred from hearing the same motion, although not by way of appeal. *Cooper v. Dumaresq*, 1025.

5. *Costs.* *See* COSTS.

6. *Error.*

Jurisdiction.—The Court has authority, in the exercise of the same powers as are vested in the Lord Chancellor, to issue a writ of error, ordering its members, sitting in exercise of the common law jurisdiction, to hear a case.

It is sufficient if a writ of error be authenticated in the ordinary mode by the seal of the Court. *Australian Trust Co. v. Berry*, 992.

7. *Evidence.* *See* EVIDENCE.

8. *Execution.* *See* EXECUTION.

9. *Judgment.*

Arrest of judgment.—On a motion in arrest of judgment the Court is not to look out of the record, and if the pleadings state only so much of a transaction as is illegal, the Court will not adjudge it valid by combining with it other facts, which, though not stated on the record, they may conceive to have had a possible existence. *Chambers v. Perry*, 430.

Consent rule for costs.—Defendant having entered into a consent rule for payment of costs to the plaintiff, a writ of *ca. sa.* was afterwards obtained thereon by the plaintiff, and the defendant imprisoned.

Held (*per* the *Chief Justice* and *Manning*, J.), the plaintiff was a judgment creditor within the meaning of sec. 3, 10 Vic., No. 7, on the consent rule; (*per Dickinson*, J., *dissentientem*) the word "judgment" was not applicable to the consent rule, since the Act should be construed strictly. *Doe d. Long v. Delaney*, 502.

10. *New Trial.*

Agreement by Counsel.—Where counsel agreed that the facts should be found by the jury, and the verdict thereon be determined by the Full Court, *held*, defendant could not move for a new trial (*per* the *Chief Justice* and *Dickinson*, J., *Therry*, J., *dissentiente*). *Doe d. M'Cabe v. Stubbs*, 589.

Damages small—Trespass—Right of way.—"But as we clearly see that the damages were given for the prostration of the fences, and that the real struggle at the trial was, as to the existence of a way where those fences were broken, we order (the plaintiff consenting) that a verdict should now be entered as we think the Jury should at the trial have been instructed. Considering the smallness of the damages and the circumstances of the whole case, we think there ought not to be a new trial." *Hannan v. Cooper*, 642.

Slander—Words not likely to do injury.—When the jury has found in an action for

slander that the words complained of were not calculated to do an injury, the Court is not prevented by sec. 2 of 11 Vic., No. 13, from exercising control over the verdict, and directing a new trial on the ground that the verdict was against evidence. *Darby v. Reid*, 704.

Evidence—General rules.—There are three classes of cases in which a new trial will or may be granted.

I. Where the verdict is *demonstrably* wrong, in which case the new trial is a matter of right, and to be granted without payment of costs.

II. Where, though not demonstrably wrong, the verdict appears to the Court, upon the whole, to be against the *weight* of evidence. New trials in such cases will be granted or refused according to their circumstances, and either with or without costs.

III. Cases not within the previous classes, but in which, from other circumstances, the ends of Justice require a further investigation.

In this class of cases the Court will not grant a new trial, even upon payment of costs, unless it appear *probable* that it will be productive of a different result. *Fisher v. Kemp*, 779.

Verdict—Average struck—Prejudice.—Where a juryman was heard to say before the trial, in reference to a particular defendant, that if he were on the jury he "would whip it into the defendant," or words to that effect, but subsequently swore that he only used the words in joke, and that in reality he assessed the damages lower than the other jurymen, it is no ground for a new trial (*Dickinson, J., dissentiente*).

The Court will not grant a new trial on the ground that the jury have arrived at the amount of their verdict by striking an average of the amounts proposed by the several jurymen. *Stewart v. Byrnes*, 1091.

Misdirection—In favour of party applying.—Although a Judge may have misdirected the jury as to their estimation of the damages, the Court will not grant the defendant a new trial, if the error has operated in his favour. *Wilson v. Colcroft*, 1267.

Evidence—Opinion of presiding Judge.—In an action for trespass to land, lying both east and west of a certain stream, and being the property of the Crown, which had been used for many years for depasturing purposes, both plaintiff and defendant claimed possession, each through a distinct succession of persons, alleged by them to have been in exclusive occupation. There was conflicting evidence as to the fact of such occupation, and the extent thereof. A verdict having been found for plaintiff,

Held, that assuming there was clear evidence on both sides of a continuous possession, a new trial could not be granted on the ground that the verdict was against the weight of evidence, notwithstanding the opinion of the presiding judge that the verdict was a mistaken one; nor on the ground that plaintiff had, on becoming insolvent sometime before the action, omitted any mention of such possession in his schedule, the property being then of little value.

Held (by the Privy Council, on Appeal), a new trial must be granted, the evidence not warranting the verdict. But where the opinion of the presiding judge is against a verdict, the Privy Council is not bound thereby if otherwise satisfied with the result.

The plaintiff's omission in his schedule was some evidence that his claim was unfounded, and his long continued acquiescence in defendants' trespasses gave weight to the defendants' claim. *Nowland v. Humphrey*, 1167.

Issue of execution—new trial motion.—The judge who tries a case has exclusive jurisdiction to make an order, that execution shall issue notwithstanding a notice of motion for a new trial. *Solomon v. Dangar*, 1289.

Sufficient evidence to support verdict.—Where evidence, wrongly received at a trial, is material, and may have influenced the verdict more or less, a new trial is a matter of right, although there is ample evidence, open to no legal objection, to support the finding of the jury. *Cameron v. Hay*, 1370.

11. *Nonsuit.*

Admission of evidence without objection.—Where evidence, showing the circumstances out of which a contract arose, could be

successfully objected to, but is admitted without objection, the Jury, and the Judge (on an application for a nonsuit), are entitled to consider it in connection with the contract.

Whenever leave is reserved to a defendant at the trial, to move to enter a nonsuit, the Court will not direct a nonsuit, unless the plaintiff's case appears to be defective, on a review of the *whole* of the evidence, including what may have been given for the defendant. *Hughes v. Greer*, 846.

12. *Order of Judge in Chambers.*

—— **Emergency — proof of order.**—The order of a Judge in Chambers, exercising the powers of the Full Court in vacation, may be proved by the production of the original order in Court.

A foundation for the interference of a Judge, under sec. 27, 4 Vic., No. 22, must be shown by clearly setting out in the summons that it is a case of emergency, and the order of the Judge ought to bear on its face sufficient to show that he had jurisdiction. *Reynolds v. Tree*, 402.

13. *Payment into Court.*

Equitable principles — Prothonotary's report.—The statute, 4 Anne, c. 16, s. 13, gives to the Court an equitable jurisdiction, to be summarily exercised, to allow the defendant, in an action on a bond, to pay the amount due into Court, and in case the amount is in dispute, to refer the matter to the Prothonotary for a report thereon. The Prothonotary may also be ordered to report upon *facts* necessarily involved in the question of the amount due.

Notwithstanding the condition of a bond be the payment of money by some person other than the obligor, and by instalments, the statute still applies.

When the bond discloses the fact that other persons, besides the sole obligee, are interested, the condition being to pay him or one of two other persons according as they should severally be entitled, payment to the obligee may be in fact no payment for the purposes of the action, and beyond the question what payments have been made, a further inquiry is necessary, to whom they were made, having regard to equitable principles. *Eales v. Dangar*, 490.

14. *Scire Facias.*

Judgment cannot be questioned.—Declaration in *scire facias* on a judgment.—The Court will not on objections entered by the defendant in the demurrer book allow him to question the propriety of the judgment, before obtained. *Polack v. Milne*, 376.

Plea—accord and satisfaction.—A plea to a declaration, in *Sci. Fa.* on a judgment, that after the recovery of the judgment the defendant delivered to the plaintiff a cheque to the full satisfaction thereof is bad.

Accord and satisfaction is not pleadable to an action on a judgment.

The statute 4 and 5 Anne, c. 16, sec. 12, has only made payment of the *whole* of the debt a defence. *Polack v. Tooth*, 381.

Absent defendant—service.—Persons not resident in the Colony are not liable to a judgment upon the matters here made equivalent to the return of two *nihils* to a *Sci. Fa.*, requiring them, as shareholders in a certain Company, to show cause why they should not satisfy a judgment obtained against the said Company. The English practice, dispensing with actual service, never could have been applicable to cases, in which the defendant was at no time within the jurisdiction of the English Courts. *Bank of Australasia v. Frazer*, 675.

Sci. Fa. to repeal Crown grant of land.—The Supreme Court has a Common Law jurisdiction to entertain a *Scire Facias* for the repeal of a Crown Grant, and the 9 Geo. IV, c. 83, s. 11, confers the same power.

A *Sci. Fa.* is not maintainable to repeal a Crown Grant to a person deceased before the issue thereof, the instrument being a *nullity*. *Reg. v. M'Intosh*, 680.

15. *Service.*

—— **proof of.**—Service of an order may be proved by an affidavit, made and filed during an argument. *Reynolds v. Tree*, 402.

16. *Stay of Proceedings.*

Under sec. 27, 4 Vic., No. 22. *Reynolds v. Tree*, 402.

Section 93 of the *C.L.P. Act* does not apply to cases where there is a notice of motion for a new trial. The rule of court, which gives such a

notice the effect of a stay of execution, was made under a jurisdiction possessed by the Court before the passing of the *C.L.P. Act*, and not affected by it. *Morris v. Taylor*, 978.

17. *Trial.*

Tales.—A *tales de circumstantibus* is not limited to trials at *nisi prius* at the assizes. *Hall v. Pawley*, 169.

Counsel's assertions—duty of Judge.—A Judge presiding at *Nisi Prius* is not bound to negative assertions of fact made by Counsel. *Doe d. Irving v. Gunnon* (No. 1), 385.

Nonsuit refused—Verdict for defendant directed. *Smith v. Barton*, 445.

Facts found by jury—agreement of counsel. *Doe d. M'Cabe v. Stubbs*, 589.

Exclusion of party from Court.—A party to a cause who contemplates giving evidence for himself has a right to remain in Court for the conduct of his case, and is not liable to exclusion as other witnesses. *The L. C. Bank v. Lavers*, 884.

Prejudice of juryman.—Where a juryman was heard to say before the trial, in reference to a particular defendant, that if he were on the jury he "would whip it into the defendant," or words to that effect, but subsequently swore that he only used the words in joke, and that in reality he assessed the damages lower than the other jurymen, it is no ground for a new trial (*Dickinson*, J., *dissentiente*). *Stewart v. Byrnes*, 1091.

18. *Verdict.*

Aider.—A verdict cannot import into a declaration a new fact, though it may show that an *essential* fact, defectively stated in the declaration, was properly proved at the trial. *Chambers v. Perry*, 430.

Average struck by jury.—The Court will not grant a new trial on the ground that the jury have arrived at the amount of their verdict by striking an average of the amounts proposed by the several jurymen. *Stewart v. Byrnes*, 1091.

19. *Writ.*

Foreign attachment—goods in possession of Company.—A writ under the Foreign Attachment Act, 2 Will. IV, No. 7, was rightly served on the persons in whose power the goods of an absent defendant were, without joining the other members of the partnership Company to which they belonged. *Fisher v. Wilson*, 155.

20. *Generally.*

Venue—prerogative of Crown.—The right of the Crown to have the *venue* laid wherever it pleases does not extend to all actions which are not *real*, but only to such as are *transitory*, and therefore not to the present case which, although a *personal* action, is in its nature local. *Windeyer v. Riddell*, 295.

Motion to reopen case.—Motion to reopen a case, in which judgment had been given, on the ground of a conflicting decision in the English courts. *Williamson v. N.S.W. Mar. Ass. Co.*, 975.

Distance.—Computation of distances under rules of Court. *Fraser v. Nolf*, 1019.

Execution to issue—new trial motion.—The judge who tries a case has exclusive jurisdiction to make an order, that execution shall issue notwithstanding a notice of motion for a new trial. *Solomon v. Dangar*, 1289.

Pleading.

21. *Amendment.*

Proposed amendment, opinion may be expressed on.—Defamation.—(*Per* the *Chief Justice* and *Therry*, J.; *Dickinson*, J., *dissentiente.*) Where the Court on the argument of a demurrer is in a position to see what a proposed amendment would amount to, it is incumbent on them, for the saving of expense and delay, to say whether, when the amendment is made, the open statement of these facts might be alleged to be a statement for the public benefit. *Cory v. Moffit*, 763.

By sec. 174 of the C.L.P. Act, 17 Vic., No. 21, the Court ought to amend the record on terms, if it can see that, had the pleadings been otherwise drawn, the evidence adduced by either party might have procured him a verdict. *Morris v. Taylor*, 978.

Misconception of right of action.—Leave to amend declaration, the action having been based on a misconceived construction of a promise. *Byrnes v. Williams* (No. 2), 1479.

22. *Declaration.*

Trespass—allegation of "malice"—In an action against a magistrate for assault and false imprisonment, under 24 Geo. II, c. 44, from the general tenor of the notice given by the plaintiff to the defendant, in which the word "maliciously" was used in describing the nature of the injury, it could only be inferred that an action upon the case was contemplated. Instead of this, the proceeding ultimately adopted was an action for trespass. *Held*, that the variance was fatal. *Arnold v. Johnston*, 193.

Action on Case or Covenant—implied duty.—Action on the case in which the plaintiff declared on an agreement under seal, whereby he agreed to proceed to Australia, and work for the defendant as a collier, and to work for no other unless by permission of the defendant, payment to be made according to the amount of work done. The plaintiff averred that the defendant was thereby under a duty to provide the plaintiff with a reasonable quantity of work for his maintenance and support, but had failed to do so.

Held, on demurrer, that there was no express or implied contract to find full employment, and consequently no *duty*, and that if there were a duty, not *Case* but *Covenant* was the appropriate remedy. *Tulip v. King*, 282.

Trespass to land and goods—matters of aggravation. *Walsh v. Harris*, 309; *Hannan v. Cooper*, 634; *Hay v. Bergin*, 1258.

Expunction of inadmissible averments—The Court has power, independently of the Common Law Procedure Act, to expunge inadmissible averments from a declaration, in an action under the 20 Vic., No. 15. The declaration should not set out the proceedings before the Government in a claim for compensation, but only such facts as are legally necessary for consideration in regard to the amount of damages. *Dumaresq v. Robertson*, 1000.

23 *Demurrer.*

Objections in substance—12 Vic., No. 1, sec. 6. *Hughes v. Kemp*, 516.

Surplusage. *Smith v. Nash*, 594.

Expression of opinion of Court on proposed amendments. *Cory v. Moffit*, 763.

Statute of Frauds.—Notwithstanding the rule of Court, excluding all defences under the Statute of Frauds, unless pleaded, where a declaration is demurred to and discloses the fact upon its face that there is no sufficient writing, the Court will give effect to the defence, although not pleaded. *Byrnes v. Williams*, 1086.

24. *New Assignment.*

See Hannan v. Cooper, 634.

25. *Plea.*

Right to plead double—Crown.—Even assuming that the Crown had the power to plead double without the leave of a Judge, and that it had not been taken away by 20 Vic., No. 15, the rules of Court of 14 June, 1858, made under this Act, took away that right. *Dumaresq v. Robertson*, 1124.

Plaintiff a married woman.—A nonsuit was properly entered on the ground that the plaintiff was a married woman, though not pleaded by the defendant. *Cannon v. Keighran*, 170.

Trespass—aggravation.—The declaration stated a trespass upon the plaintiff's close by the defendant, and a seizure and conversion of his chattels also on the said close. Plea, that the close was the defendant's. The question was whether the trespass to the goods was a substantive grievance, or merely an aggravation of the trespass to the close.

Held, that the plaintiff's demurrer to the plea was good, that the taking of goods cannot be supposed any part of the manner in which the close was trespassed on, and that the language of the declaration did not warrant the defendant in supposing that it was alleged as a mere aggravation of the trespass to the close. *Walsh v. Harris*, 309.

Plea "not possessed"—justification.—The arrest of a vessel by an officer of the Vice-Admiralty Court, where there is a concurrent possession by the owner, is not a conversion.

In an action of trover against the Marshal for the above arrest, *held*, that notwithstanding there was no conversion, the plaintiff was entitled to a verdict, with nominal damages, on the issues arising from the special plea of justification and

the plea of "not possessed," no evidence having been given by the defendant on the point. *Lyons v. Elyard*, 328.

Sci. fa.—payment—fraud—collusion.—Declaration in *sci. fa.* against defendants as joint contractors with S. & S. against whom a judgment had been obtained, which was still unsatisfied, to recover execution, under 4 Vic., No. 6, sec. 17. *Held*, on demurrer, that a plea denying that the damages are still unsatisfied is bad, for traversing the non-payment which was prematurely alleged in the declaration.

A plea denying that S. & S. were authorised to do the act for which damages had been given, and that defendants had any opportunity to defend the said action, no fraud being suggested, is bad.

A plea that the plaintiff had been paid and satisfied and was collusively, and at the instance of S. & S., bringing this action to recover a contribution from the defendants for the benefit of S. & S. is bad, the facts averred showing nothing deceitful or fraudulent. *Polack v. Milne*, 376.

Plea "not possessed."—The Court *had* power to make the rule, of August 12, 1856, that the plea of not possessed, or that the close was not the plaintiff's close, should put in issue only the fact that the plaintiff had exclusive possession when the defendant entered, but not any circumstances which made the entry lawful, *e.g.*, a Crown Grant to the defendant. *Nowland v. Humphrey*, 1167.

Sci. fa. on judgment—accord and satisfaction.—A plea to a declaration, in *sci. fa.* on a judgment, that after the recovery of the judgment the defendant delivered to the plaintiff a cheque to the full satisfaction thereof, is bad.

Accord and satisfaction is not pleadable to an action on a judgment.

The statute 4 and 5 Anne, c. 16, sec. 12, has only made payment of the *whole* of the debt a defence. *Polack v. Tooth*, 381.

Duplicity—uncertainty. *Hughes v. Kemp*, 516.

Trespass—highway pleaded—reply de injuria—aggravation. *Hannan v. Cooper*, 634.

Statute of Frauds not pleaded. *Caffrey v. Taylor*, 842.

Set off by cross action. *Sutton v. Lintot*, 1229.

26. *Replication.*

Replication de injuria. *Hannan v. Cooper*, 634.

II.—In the Supreme Court in Equity.

Practice.

27. *Costs.* *See* Costs.

28. *Injunction.*

Church trustees.—Application for injunction to prevent Church trustees from allowing a certain Presbyterian minister to preach in the church of which they were trustees. *Purves v. Lang*, 955.

Patent—interim injunction—evidence required. *Morewood v. Flower*, 1109.

29. *Receiver.*

Pew rents.—Application for receiver of pew rents and other church receipts. *Purves v. Lang*, 955.

Rents of part of a building.—The Court will not grant a receiver of the rents of portion of a building, which encroaches upon other premises, in respect of the rents of which a receiver may be appointed. *Purves v. Lang*, 955.

III.—In Criminal Cases.

See Criminal Law.

IV.—In District Court.

See District Court.

V. In Vice-Admiralty.

Executor.—An executor is necessarily authorised to adopt the same remedies in the Court of Vice-Admiralty which the testator would have been at liberty to resort to, if alive, notwithstanding the Statute 13 Ric. II, st. 1, c. 5 (*per Stephen*, C. J., and *a'Beckett*, J.; *Dickinson*, J., *dissentiente*). *Ex parte Gibb*, 274.

PREFERENCE.

See Insolvency.

PREROGATIVE.

See CROWN ACTIONS—CROWN GRANT, &c.

Ejectment—Crown Land.—Ejectment in regard to land in possession of the Crown will be restrained. *Reg. v. O'Connell*, 117.

Presumption of possession.—The making of a grant of land raises a presumption in favour of possession by the Crown. *Hatfie'd v. Alford*, 330.

Delegation—occupation licenses.—The Crown can delegate to the Governor power to issue occupation licenses, without an instrument under seal. *Hall v. Gibson* (No. 2), 1125.

Bishopric—Ecclesiastical law.—The English Ecclesiastical Law cannot be introduced by the Sovereign by virtue of letters patent appointing a Bishop.

The Crown can, by virtue of its prerogative, create a bishopric, and nominate a Bishop in the Colonies. *Ex parte Rev. G. King*, 1307.

PRESCRIPTION.

—— Twenty years enjoyment of flowing stream, *quære* whether there is a presumption of a grant, *Cooper v. Corporation of Sydney*, 765.

—— There can be no prescription in this Colony, as there can be no immemorial possession. *Stevens v. M'Clung*, 1226.

PRESUMPTION.

See EVIDENCE.

Possession—Presumption of title.—The presumption of actual title, and in fee, which arises from the possession of land is as efficacious in this Colony as in England, but possession is not *necessarily* proof of a fee simple in the possessor, inasmuch as the circumstances of the Colony or district may render it reasonable to infer the existence of a less interest. *Badham v. Shiel*, 1428.

PRETENCE TITLES.

See Cannon v. Keighran, 170; *Doe d. Peacock v. King*, 829.

PRINCIPAL AND AGENT.

Auctioneer—Undisclosed principal—Election—Intention to charge. *Mortimer v. Mort*, 938.

PRIORITY.

See REGISTRATION.

PRIVY COUNCIL APPEALS.

Interest on verdict—Costs.—Plaintiff recovered a verdict on a note, with interest to that date, but on appeal to the Full Court, a verdict was entered for the defendant, and a certain sum recovered from the plaintiff by *fi. fa.* thereon. This was again reversed by the Privy Council, and the amount of subsequent interest at the same rate as previously allowed was ordered to be paid to the plaintiff, and costs, &c.

Held, the Privy Council had jurisdiction to order the payment of interest, subsequent to the verdict. But if not, this Court would not hear argument on the matter.

The interest was to be calculated, not on the verdict, but upon the amount of the note, and from the day after the verdict to the day on which judgment must be signed—both days inclusive.

Costs of the application (to enter the judgment of the Privy Council on the roll), over and above those mentioned by the Appellate Court, also allowed. *Bank of Australasia v. Breillat*, 487.

Right to appeal—Waiver.—*Held*, by the Full Court, where a plaintiff, who had obtained a verdict for damages, of which part were assessed absolutely, and part conditionally on the opinion of the Full Court, afterwards entered up judgment and issued execution as to the former amount, *held*, this was not such a waiver as to deprive him of the right to appeal to the Privy Council against the Court's disallowance of the latter amount. *Lord v. City Commissioners*, 912.

Opinion of presiding Judge.—The Privy Council is not bound by the opinion of the presiding Judge in the Court below in respect of a verdict being warranted by the evidence. *Nowland v. Humphrey*, 1167.

Stay of proceedings.—In a case where the judgment of the Court is appealed from, on grounds which are not frivolous, the execution of the decree should be suspended upon the defendants giving security. *Purves v. Attorney-General*, 1189.

A single Judge has power in vacation to grant leave to appeal to the Privy Council, subject to the confirmation of the order by the Full Court, but not to grant a stay of proceedings in the case of an interlocutory judgment. *Wallack v. Lloyd*, 1464.

Costs.—The Crown need not give security. *Dumaresq v. Robertson*, 1387.

Three months.—The period of three months allowed by the Orders in Council, within which to obtain leave to appeal to the Privy Council, is three *lunar* months.

The Acts' Shortening Acts do not affect the construction of Orders in Council. *Terry v. Hosking*, 819.

Costs of entering judgment.—The costs of an application, to enter a judgment of the Privy Council on the roll, over and above those mentioned by the Appellate Court, allowed by the Supreme Court. *Bank of Australasia v. Breillat*, 487.

Costs—Leave to appeal refused—Technical objection.—Leave to appeal having been refused on the ground of the application being too late, the Court refused costs because the objection was highly technical, believing that the Privy Council would grant leave on appeal. *Terry v. Hosking*, 819.

Necessary costs after appeal.—The Court has no authority to supplement the amount of costs allowed by the taxing officer of the Privy Council, by other necessary costs preceding and following the appeal. *Lord v. City Commissioners*, 912.

PROHIBITION.

Jurisdiction of Supreme Court.—The Court has no jurisdiction to grant a prohibition in the matter of a seaman's claim for wages under the Merchant Seamen's Act, 13 Vic., No. 28. A writ of prohibition, by the Common Law, lies only where the inferior Tribunal has exceeded its jurisdiction, and the Prohibition Act, 14 Vic., No. 43, only extends to Orders and Convictions in criminal cases, or concerning matters in their nature criminal. *Ex parte Towns*, 708.

A statutory prohibition may not be granted in respect of proceedings under the Tenements Recovery Act, 11 Vic., No. 2.

The jurisdiction of the Court at Common Law to grant a prohibition against magistrates is limited to cases where their decision is demonstrably wrong. *Ex parte Roberts*, 775.

A prohibition lies, not only against a Court having *some* jurisdiction, and exercising the same wrongly, but also against individuals, assuming to act as, but not constituting a Court. *Ex parte Rev. G. King*, 1307.

A superior Court will grant a prohibition at any stage of a case where the inferior Court has no jurisdiction over the subject matter of the suit; but not if an objection to the jurisdiction has been taken below, and disallowed on the evidence there submitted; the Court of Appeal, however, has power to *review* the decision, but will not go outside that evidence. *Ex parte Nicholson*, 1400.

"We are of opinion that the Common Law right of prohibition is not taken away by the statute which gives a cumulative remedy partly in the nature of an appeal, and partly in the nature of a prohibition. It appears from the affidavits that the proceedings complained of are not yet concluded, no formal conviction having been drawn up or fine enforced, and without giving any opinion whether this writ would lie where the party convicted was under sentence, we are of opinion that the prohibition is in time in the present instance." *Ex parte Gaynor*, 1299.

Conviction—Notice to Attorney-General.—In cases of conviction before Justices where the Crown is interested in the penalty, it is a condition precedent to the hearing of a motion for a prohibition under the Justices' Acts, that notice should have been given to the Attorney-General. For a common law prohibition such notice is not necessary. *Ex parte Gaynor*, 1299.

Notice to Prosecutor—Release by prohibition.—Where a rule *nisi* is obtained for a

prohibition in regard to a summary conviction, the party prosecuting as well as the Justices must be called on to show cause.

Semble, a person can be delivered out of prison by means of prohibition, where the Court in which the conviction took place acted without jurisdiction. *Ex parte Davis*, 1305.

Release from imprisonment—Habeas corpus.—The defendant's remedy, on conviction and imprisonment for absence from service, is rather by *prohibition* than by *habeas corpus*. *Ex parte Evennett*, 813; *ex parte Erwin*, 816.

Conviction—Evidence.—It is the duty of the Court, before holding any conviction by a Magistrate to be erroneous, to consider the *whole* of the evidence, and if enough unobjectionable evidence remains, after giving effect to all legal objections, to sustain the conviction. *Ex parte Ward*, 872.

PROMISSORY NOTE.

See BILL OF EXCHANGE.

PROTHONOTARY.

Duty to deliver pleadings.—It is the duty of the Prothonotary to deliver the pleadings in all causes for trial before a Circuit Court to the Clerk of Assize, and if on his failure to do so the Judge refuses to hear a cause, the plaintiff therein is immediately entitled to recover from him damages for the injury; it is no excuse that the papers in question were delivered out of the Prothonotary's possession for use in a Chamber application and not returned to him.

But a plaintiff cannot recover for such a breach if he had no right of action against the original defendants, or if by the exercise of ordinary skill on the part of his legal representatives the pleadings could have been made sufficiently complete for trial. *Hardy v. Raymond*, 1028.

PUBLICAN.

See INNKEEPER.

PUBLIC DUTY.

Water supply—Rates.—The Corporation of Sydney is not justified in refusing to supply water, on the ground that there are arrears of rates unpaid by a former tenant, and may be compelled by mandamus to authorise the construction of the necessary works, where there is a water-main already laid near the premises in question. *Ex parte Hamilton*, 1233.

PUBLIC WORKS.

Compensation.—"The compensation clauses in statutes authorising public works apply only where the act complained of is such, that it would have afforded a cause of action before the Act; and, further, that such act is authorised by the statute." *Hood v. the Corporation of Sydney*, 1294.

PURCHASER.

See VENDOR AND PURCHASER—CROWN GRANT. &c.

QUARTER SESSIONS.

See JUSTICES—CRIMINAL LAW.

QUO WARRANTO.

An application for an information in the nature of *quo warranto* must be granted if the relator show sufficient grounds to require a further investigation.

In support of a motion to make the rule absolute new affidavits may be read provided they are merely confirmatory of the facts already alleged. *Ex parte Gaunson*, 348.

RACE.

See GAMING.

RAILWAY.

By-law—Loss of race-horse—Damages.—The Railway Commissioner, under 22nd Vic., No. 19, has no power to make a by-law relieving himself from all responsibility for care of horses carried by rail.

In assessing damages for the loss of a race-horse a jury is entitled to take into account its pedigree and engagements. *Bell v. the Rail. Com.*, 1398.

RAPE.

See CRIMINAL LAW.

RECEIVER.

See PRACTICE AND PLEADING, EQUITY.

RECITAL.

See ESTOPPEL.

REGISTRATION.

Birth—Particulars.—A registrar is not bound to receive the registration of a birth, unless the particulars required by the form are given.

Power to exact such information is within the Act, 19 Vic., No. 34. *Blackett v. Newman*, 1117.

Bona fide—Valuable consideration—Recitals.—The plaintiff claimed certain land in ejectment as official assignee of G. The property in question was mortgaged by the grantee P., to G., and subsequently, the mortgage being unregistered, G. procured from P. a conveyance to the defendants upon trust for the wife of G., &c., to which conveyance G. was an assenting party, the consideration for the deed being recited therein to be a general release by the wife of G. of her dower, which release was executed at the same time. The trust deed was registered and G. shortly after became insolvent.

On motion for a new trial, the verdict having been for the plaintiff, *held*, that the jury should have been directed that the trust would prevail over the mortgage deed only if made *bona fide and for valuable consideration*.

The *onus probandi* lay upon the defendants. The recital of the consideration in the trust deed was not binding on the official assignee of G., for he represented, not G., but G.'s creditors. A valuable consideration moving from the party to whom the deed is made, or *the party beneficially taking*, is a sufficient consideration to support the deed under the Registration Act. *Doe d. Irving v. Gannon* (*No.* 1), 385.

The *bona fide* execution mentioned in sec. 11 should be a *bona fide* execution by those by whom the deed is made. *Doe d. Irving v. Gannon* (*No.* 2), 400.

Certain land having been conveyed by D. to the defendant, part of the consideration being an annuity secured on the property, but the transfer not being registered, the Sheriff afterwards sold to the plaintiff all the estate, title, and interest of D. in and to the land, and all his right, title, and interest, in and to the annuity (the "alleged" conveyance to the defendant being recited in the deed), and the plaintiff's transfer was thereupon registered. Verdict in ejectment having been given, by direction, for the plaintiff, and the jury having found, specially, that the sale to the defendant was *bona fide* and for value, the Court was moved, on leave reserved, to enter a nonsuit. *Held*, that the sale by the Sheriff could only operate to convey the land, if there had been some secret or fraudulent arrangement, showing the sale to the defendant to be fictitious, but, as the jury had found the latter to be a genuine and real transaction, for value, the former conveyance merely operated as a transfer to the plaintiff of the annuity. *Doe d. Cooper v. Hughes*, 419.

Unregistered equitable mortgage—subsequent registered transfer without reference, followed by Crown grant. *Terry v. Osborne*, 806.

The land in question was conveyed by J., in 1839, to P., under whom the plaintiffs claimed, but the transfer was not registered until 1845. The same land was conveyed by J., in 1843, to trustees, for J.'s creditors, from whom the defendant purchased, and registered the same year.

Held, the omission to register a deed is not necessarily, or by itself, indicative of fraud, but, with other matters, it *may* be a badge of fraud.

The conveyance to the trustees, in pursuance of an arrangement by J. with his creditors, was a conveyance for valuable consideration, within the meaning of the Registration Act.

(*Per* the *Chief Justice* and *Therry*, J.; *Dickinson*, J., *dissentiente*.) According to the earlier decision of the Court, in *Doe v. Gannon*, the Registration Act, 6 Geo. IV, No. 22, provides that a registered conveyance, to have priority over other conveyances, must have been "made and executed *bona fide*, and for valuable consideration," and this *bona fides* has reference to the *conveying party*.

(*Per Dickinson*, J.) *Doe v. Gannon* was incorrectly decided. The jury should be instructed that the vendee under the prior conveyance should prevail, unless the purchasers under the second transfer shall prove that their conveyance was registered before the former, and that they gave

valuable consideration for their title, *without knowledge of the former conveyance*. The Act renders the earlier deed *utterly void* against the subsequent (but prior registered) deed.

(*Per* the *Chief Justice*.) The first deed is not *void*, but the respective *priorities* of the conflicting instruments are merely reversed. *Doe d. Peacock v. King*, 829.

The plaintiffs claimed in ejectment under a conveyance from J. to P. in 1839, and from P. to themselves in 1844. J., however, in 1843, conveyed all his property to K. and others, in trust for his creditors, the land in question being named in the instrument; this deed was immediately registered, while that of J. to P. was not registered till 1845. The conveyance to K. was not executed by the due proportion of creditors as required by 5 Victoria, No. 9, s. 33. J.'s estate was sequestrated in 1844, and K. appointed assignee. Defendant's title was based upon a conveyance by K., alone, in 1847, to one B. The jury found that the conveyances, J. to P., J. to the trustees, and P. to the plaintiffs, were *bona fide*, and also that the land in dispute was included in the trust deed in error. *Held*, there was a "valuable consideration" within the meaning of the 6 Geo. IV, No. 22, to support the deed of 1843, namely, the promise to pay all J.'s creditors equally, and to allow him to leave the Colony.

The registration of the deed of 1843 did not render void the conveyance to P., but merely gave the former a "priority." As, therefore, the land did not belong to J., his conveyance to trustees could not have the effect of a "fraudulent alienation" within the meaning of the Insolvency Acts, 5 Vic., No. 9, ss. 5, 6, and 33, and 7 Vic., No. 19, s. 8. The fact that the same instrument conveyed other properties also would not affect the question, the 6th section not making the instrument void, but merely the alienation. *Gannon v. Spinks*, 947.

Enrolment of grant.—The Statute 11 Vic., No. 38, makes a certified copy of the enrolment of a grant primary evidence of the grant, without proof that the original grant cannot be produced. The enrolment of grants in the Registrar's book must be presumed to be correct (*per* the *Chief Justice*, and *Manning*, J.; *Dickinson*, J., *dissentiente*.) *Doe d. Bowman v. M'Keon*, 475.

RELEASE.

Lease and release in one deed.—Effect of such deed by the promisee of a Crown grant. *Doe d. Aspinwall v. Osborne*, 422.

RENT.

See LANDLORD AND TENANT.

REVENUE.

Quit rents—distress.—The property in the quit rents, being part of the ordinary internal revenue of the Colony, was rightly laid in the Queen, even assuming that the surplus revenues of the Colony had been surrendered to Parliament by the Crown by the Statute 1 & 2 Vic., c. 2, sec. 2.

The Collector of Internal Revenue, although not specifically authorised to distrain for the recovery of such rents, is recognised as a legal officer by several Colonial statutes, and by 3 Will. IV, No. 8, sec. 8, is required to perform a specific duty, and a distress being one means for the recovery of the rents, he is therefore entitled to distrain. *Windeyer v. Riddell*, 295.

Foreign Revenue law—stamp. *Gilchrist v. Davidson*, 539.

RIGHT OF WAY.

—— obstruction. *Ex parte Dutton*, 910.

—— necessity.—Where the law implies a grant of a right of way of necessity, the right of selecting the same rests with the grantee, but it must be a reasonably direct course. *Sharpe v. Emery*, 1281.

ROAD.

See HIGHWAY.

SALE OF GOODS.

Sale of stock with station. *Tooth v. Fleming*, 1152.

Stolen Goods—warranty of title—market overt.—The plaintiff purchased a horse from the defendant, which was afterwards claimed by a person from whom it had been stolen, and to whom possession was awarded by a Magistrate's

order. The plaintiff recovered damages from the defendant, and on a motion to enter a verdict for the defendant, *held*,

A sale by public auction at a place not authoritatively appointed by law for publicly buying and selling is not a *Market overt*. The doctrine of *Market overt* may be applicable to this Colony when public markets are established, but a sale even in *Market overt* of this particular species of property will not change the property unless the directions of the Statutes 1 *Phillip and Mary*, cap. 7, and 31 *Eliz.*, c. 12, be observed.

The owner was entitled to recover possession of the horse without prosecuting the thief to conviction.

The vendor guarantees that the vendee shall have undisturbed possession of the thing bought. This is a warranty of *title*, not of *quality*, and the maxim *caveat emptor* does not apply. Apart from authority, the verdict should be upheld on the ground of public policy. *Early v. Garrett* and *Springwell v. Allen* distinguished. *M'Lucas v. Hunt* followed. *Fitzgerald v. Luck*, 118.

SCIRE FACIAS.

See PRACTICE AND PLEADING.

SEAL.

The great seal of the Colony is not required in writs of error. *Australian Trust Co. v. Berry*, 992.

SEAMAN.

See SHIPPING.

SEPARATE ESTATE.

See HUSBAND AND WIFE.

SERVANT.

See MASTER AND SERVANT.

SHERIFF.

Appointment and removal.—Section 11 of the Charter of Justice, empowering the Governor to appoint a sheriff under such instructions as he might receive from the Secretary of State, is merely directory.

This, however, is repealed by the Sheriff's Act, 7 Vic., No. 13, which leaves the appointment wholly in the hands of the Governor.

An appointment by the Governor, as representing the Crown, by law and usage would carry the power of removal.

The Commission of a Sheriff, recorded in the Supreme Court, is a sufficient supersession of a former sheriff. *Ex parte Chung*, 1458.

The Sheriff and Under-Sheriff of the Colony do not, within the meaning of the Act, 2 Will. and Mary, sess. 1, cap. 5, occupy the place of the "Sheriff or Under-Sheriff of the county, or constable of the hundred, parish, or place, where, &c." *Ryan v. Howell*, 470. (*See also Slapp v. Webb*, 649.)

By the 7 Vic., No. 13, the tenure of office of the Sheriff was made "during pleasure" instead of "from year to year," and he can now only appoint a Deputy during continuance of his office, or at will.

The Statutes 42 Ed. III, c. 9, and 23 Hen. VI, c. 7, are not in force in the Colony.

The Deputy-Sheriff may sign a Jury Summons in his own name. *Reg. v. Lang*, 687.

Bailiff—warrant.—A writ of *ca. sa.* was issued, directed to the Sheriff *or* his deputy, and delivered to the Sheriff, who gave a warrant thereon to his bailiff.

Held, the bailiff's authority was under the *warrant* alone, and the arrest by him, for the Sheriff, was an arrest by the Sheriff himself, under the writ, by his Deputy. But no variance was held to be caused by an allegation that defendant was taken in execution under the *writ* by M., the lawful deputy of the Sheriff, for the Sheriff's warrant in *effect*, authorised the bailiff to act under the *writ*, and therefore the arrest by him was equally under the writ, (*per* the *Chief Justice*, and *Manning*, J., *Dickinson*, J., *dissentiente*). *Gosling v. Grosvenor*, 443.

Regularity of sale—presumption.—The Court will not presume that the Sheriff duly levied on the proof only of a sale by him. *Doe d. Walker v. O'Brien*, 246.

Irregularity at sale—abandonment.—A clause, restraining anticipation, in the settlement of the separate property of a married woman, is good against the Sheriff's execution. The husband

of the married woman in such a case is justified in forcibly preventing the Sheriff's officer from delivering possession of the property in question to the purchaser at the Sheriff's sale. A sale by the Sheriff cannot be impeached on the ground of irregularity on the part of the Sheriff in the conduct of the sale, and a delivery under such a sale, in other respects valid and lawful, cannot lawfully be opposed; the party injured must seek redress from the person committing the irregularity.

(*Semble*), a temporary abandonment by the Sheriff of goods he is entitled to deliver, does not necessarily, until the return of the writ, defeat his right to deliver to the purchaser. *In re Hughes*, 659.

Payment to Sheriff by mistake.—The plaintiff contracted to purchase cattle, alleged to be the property of M., and on the seizure of them by the Sheriff, before delivery, under a levy by the execution creditor of M., paid the price to the Sheriff's officer. The cattle afterwards proved to belong to A., who recovered from the plaintiff their value.

Held, the plaintiff was not entitled to recover from the Sheriff, his payment being made "in his own wrong," and the money not having been paid compulsorily to relieve his own goods. *Therry J., dissentiente. Baldwin v. Elliott*, 868.

Goods removed from demised premises—arrears of rent.—It is enacted by the 8 Anne, c. 18, that no goods shall be taken by the Sheriff, by virtue of any writ of execution, on land leased . . . . , unless the party issuing such writ shall pay the landlord the rent then due—not exceeding a year's arrear.

Held, an action is maintainable against a sheriff by a landlord for removing from the demised premises goods taken in execution thereon, after notice of a claim for rent unpaid, although the person against whom the execution is levied is not a tenant of the landlord, and the goods were not the tenant's property.—*Hoskisson v. Uhr*, 1468.

Chattels real—bargain and sale.—A conveyance by bargain and sale, by the Sheriff, of chattels real taken in execution and sold under sec. 4 of 54 Geo. III, cap. 15, will pass the legal as well as the equitable estate in the lands to the purchaser, the conveyance taking effect by operation of law. *Winchester v. Hutchinson*, 1353.

Port Phillip Judge.—Writ issued by Resident Judge of Port Phillip to Sheriff of N.S.W. *Macdermott v. Develin*, 243.

SHIPPING.

Harbour Master.—The captain of a ship, not registered in Sydney, is not liable for damage done to another vessel by an anchor placed in the fairway, to which the ship has been moored by the direction of the Harbour Master, in the execution of his duty, under the Port Act. *Paterson v. Knight*, 497.

59 Geo. III, cap. 58.—Absence—jurisdiction of Justices.—*Quære*, whether under the *New South Wales Act* Justices of this Colony have jurisdiction to entertain complaints of seamen, upon contracts entered into outside the Colony as they undoubtedly have upon contracts made within it.

Absence of a seaman from his ship for three hours without leave does not necessarily work a forfeiture of wages, although so provided by the agreement of service. *Geary v. Vivian*, 1.

5 & 6 Will. IV, cap. 19.—Desertion.—The magistrates have no jurisdiction under sec. 6 of Sir James Graham's Act, 5 and 6 Will. IV, cap. 19, to entertain a complaint against a seaman for desertion. Sec. 6 only applies to the port of clearance. *Ex parte Roxburgh*, 86.

13 Vic., No. 28.—Prohibition—absence—wages.—The Court has no jurisdiction to grant a prohibition in the matter of a seaman's claim for wages under the Merchant Seamen's Act, 13 Vic., No. 28. A writ of Prohibition, by the Common Law, lies only where the inferior Tribunal has exceeded its jurisdiction, and the Prohibition Act, 14 Vic., No. 43, only extends to Orders and Convictions in criminal cases, or concerning matters in their nature criminal.

(*Semble*), the forfeiture of wages, created by sec. 7 of the Seamen's Act, and the punishment of imprisonment provided by sec. 6 are cumulative.

A seaman, guilty of an act of insubordination and ordered off duty by the Captain, does not thereby become liable to forfeiture as "absent from duty."

There is nothing in sec. 7 of the Act to limit its application to offences committed in port only. *Ex parte Towns*, 708.

Seamen's discharge—foreign vessels.—Foreign as well as Colonial vessels are subject to the 9th and 11th sections of the Water Police Act, 17 Vic., No. 36, relative to discharges of seamen. *Ex parte Douglas*, 1456.

Navigation—acts of Harbour Master.—*Paterson v. Knight*, 497.

Collision—lights—contributory negligence.—Where a vessel is at anchor without showing the lights required by 16 Vic., No. 46, sec. 35, and is run down by another vessel, notwithstanding the fact that a light was exhibited from the former, clearly visible to the latter, the owners of the latter are liable, in spite of the contributory negligence of the other, if the injury could have been avoided by the exercise of ordinary diligence, and the statute is not to be interpreted so as to allow the running down of vessels insufficiently lighted. *Spier v. Hunter, R.S.N. Co.*, 1351.

Nationality of Ship.—Evidence that a ship had for a considerable period been sailed under British colours, unrebutted and unexplained, is sufficient proof that the vessel is British. *Reg. v. Ross*, 857.

Vice-Admiralty—arrest—conversion.—The arrest of a vessel by an officer of the Vice-Admiralty Court, where there is a concurrent possession by the owner, is not a conversion.

In an action of trover against the Marshall for the above arrest, *held*, that notwithstanding there was no conversion, the plaintiff was entitled to a verdict, with nominal damages, on the issues arising from the special plea of justification and the plea of "not possessed," no evidence having been given by the defendant on the point. *Lyons v. Elyard*, 328.

SLANDER.

See DEFAMATION.

SMALL DEBTS RECOVERY.

See JUSTICES.

SOLICITOR.

See ATTORNEY.

SPECIAL CASE.

The submission of a Special Case by the Chairman of Quarter Sessions, *primâ facie* imports that the trial was not, when the application was made, wholly terminated. *Reg. v. Murrington*, 643.

And see CRIMINAL LAW.

SPECIFIC PERFORMANCE.

Station.—A Court of Equity has jurisdiction to grant Specific Performance of a contract to sell a station, or tract of Crown land held under license. *Tooth v. Fleming*, 1152.

STATUTES, CONSTRUCTION.

Penal statutes—strict construction.—"In construing penal statutes, we must not, by refining, defeat the obvious intent of the legislature. All that appears to be meant by the rule that penal statutes receive a strict construction is this, that they shall in no case be extended beyond the words by what in civil cases would be called an equitable construction. And yet, in respect of penal as well as other statutes, the word 'master' has been holden equally to mean a 'mistress,' although this went to create a treason." *Reg. v. Knight*, 585.

Equitable construction.—"All that the local Act accomplished is this, that it rendered grants of land, erroneously issued by the Governors of this Colony in their own names, as valid as if they had been issued in the name of the reigning Sovereign. But, if these grants had been originally made in the Sovereign's name, they would have been invalid for uncertainty. The Act of Council, therefore, did not render them less invalid." *Doe d. Devine v. Wilson*, 722.

Repeal.—Inclusion in a repealing statute of an exemption already standing in the repealed statute. *Ex parte Boyne*, 894.

Private Act.—Church Acts.—*Held*, the statutes, 7 Will. IV, No. 3; 8 Will. IV, No. 7; and 4 Vic., No. 18, were not private Acts, since they related to the general community of Presbyterians. *Purves v. Attorney-General*, 1189.

Public Works. — Compensation. — "The compensation clauses in statutes authorising public works apply only where the act complained of is such, that it would have afforded a cause of action before the Act; and, further, that such act is authorised by the statute."—*Hood v. the Corporation of Sydney*, 1294.

Marginal note.—A marginal note is no part of a statute.—*Ex parte Gaynor*, 1299.

Uncontemplated result. — Interpretation of Navigation Act—when effect of statute would lead to absurd results. *Spier v. Hunter River S. N. Co.*, 1351.

STATUTES, ENGLISH.

Adoption by usage.—The law of distress and replevin, so far as it respects the powers of seizing, detaining, and replevying of goods, is in force in this colony.

(*Semble*), long usage alone, apart from 7 Vic., No. 13, s. 4, which treats the English law of distress as in force, could amount to an adoption. *Slapp v. Webb*, 649.

5 & 6 Will. IV, cap. 19, 5 & 6 Will. IV, cap. 76, and 7 Vic., No. 21, sec. 17.—Sir James Graham's Act, 5 and 6 Will. IV, c. 19, by sec. 54, "shall not intend or apply to any ship registered in or belonging to any *British* colony having a *Legislative Assembly*, or to the crew of such ship, while such ship shall be within the precincts of such colony, &c."

This statute was undoubtedly in force in New South Wales until 5 and 6 Will. IV, c. 76, which established a Legislative Council.

Held, that this Legislative Council was a *Legislative Assembly* within the meaning of Sir James Graham's Act.

By the local Act, 7 Vic. No. 21, after reciting (sec. 17) that "it is expedient to remove doubts as to whether the statute 5 and 6 Will. IV, c. 19, be now in force in the colony of *New South Wales*"; it is in the gross "*Declared and enacted that that Act is and shall be in force and operation in this Colony.*"

Held, that Sir James Graham's Act did not become inoperative, *ipso facto*, because of the change in the Colonial Legislature.

Held, also, that the 17th sec. of the local Act was simply inoperative, but that the adoption of parts of the English Act, which were clearly inapplicable here, was not to be regarded as *suicidal*, and that an intention may be inferred that that statute should be recognized, so far as it *could be applied* to the law of the Colony. *Ex parte Dredo*, 193.

Conflict between English and Colonial Statutes.—*Rusden v. Weekes*, 1406, *and see* 9 GEO. IV, CAP. 83, SEC. 24.

Institutes of Edmund and of Lanfranc (Marriage law) are not in force here as part of the common law of England. *Reg. v. Roberts*, 544.

51 Hen. III, cap. 4.—(Sale of distress.) *Windeyer v. Riddell*, 295.

4 Ed. I, st. 2, *de coronatoris*, mentioned. *Reg. v. Russell*, 114.

Ed. II,—(de Catallis Felonum). *Ramsay v. Mayne*, 853.

18 Ed. III, cap. 2, treated as in force. *Reg. v. Windeyer*, 366.

34 Ed. III, cap. 1, is in force in N.S.W. *Reg. v. Windeyer*, 366.

42 Ed. III, cap. 9, is not in force. *Reg. v. Lang*, 687.

13 Ric. II, st. 1, cap. 5, Vice-Admiralty. *Ex parte Gibb*, 274.

11 Hen. IV, cap. 2. *Reg. v. Hodges*, 208.

23 Hen. VI, cap. 7, is not in force. *Reg. v. Lang*, 687.

1 Ric. III, cap. 3. *Ramsay v. Mayne*, 853.

3 Hen. VIII, cap. 12. *Reg. v. Hodges*, 208, 209.

27 Hen. VIII, cap. 10,—Operations of Statutes of Uses in a Crown grant. *Att.-Gen. v. Ryan* (No. 2), 719; *Smith v. Dawes*, 802; *Reg. v. Roberts*, 569.

27 Hen. VIII, cap. 16, mentioned. *Reg. v. Roberts*, 569.

27 Hen. VIII, cap. 28. *Att.-Gen. v. Brown*, 323.

32 Hen. VIII, cap. 2, referred to as if in force. *Nicholson v. Healey*, 1085.

32 Hen. VIII, cap. 9, sec. 2, (pretence titles) is in force in N. S. Wales. *Cannon v. Keighran*, 170.

—— mentioned in *Doe d. Peacock v. King*, at page 833.

33 Hen. VIII, cap. 23. *Reg. v. Ross*, 861.

35 Hen. VIII, cap. 14. *Att.-Gen. v. Brown*, 323.

37 Hen. VIII, cap. 20. *Att.-Gen. v. Brown*, 323.

5 & 6 Ed. VI, cap. 3.—The statute 5 and 6 Ed. VI, cap. 3, prescribing certain holidays on which there should be an abstinence from work, prescribes only spiritual censures as penalties, and there being no dominant Church in the Colony, is not in force here. *Ex parte Ryan*, 876.

2 Phillip & Mary, cap. 7. *Fitzgerald v. Luck*, 118.

2 & 3 Phillip & Mary, cap. 18. *Reg. v. Mann*, 182.

13 Eliz., cap. 5, mentioned. *Doe d. Irving v. Gannon* (No. 2), 400.

27 Eliz., cap. 4, mentioned. *Doe d. Irving v. Gannon* (No. 2), 400; *Spenser v. Gray*, 477; *Byers v. Brown*, 1136.

27 Eliz., cap. 5, treated as in force. *Hughes v. Kemp*, 516.

31 Eliz., cap. 12. *Fitzgerald v. Luck*, 118.

35 Eliz., cap. 3. *Att.-Gen. v. Brown*, 323.

43 Eliz., cap. 6, does not extend to costs in an action for libel. *Brady v. Cavanagh*, 107.

43 Eliz., cap. 6—virtually repealed by practice of the Supreme Court. *M'Donald v. Elliott*, 751.

21 Jac. I, cap. 3. (Monopoly) *Attorney-General v. Brown*, 320; *Morewood v. Flower*, 1109.

21 Jac. I, cap. 12, treated as in force. *Smith v. Barton*, 445; and *Greenwood v. Ryan*, 275.

21 Jac. I, cap. 14, mentioned. *The King v. Steel*, 65.

21 Jac. I, cap. 14. *Quære*, whether in force here? *Att.-Gen. v. Brown*, 312.

21 Jac., cap. 14. *Semble*, not in force here. *Hatfield v. Alford*, 330; *Doe d. Wilson v. Terry*, 505.

21 Jac. I, cap. 16, mentioned as if in force in N.S.W. *Hatfield v. Alford*, 346.

21 Jac. I, cap. 16, (displaced by 2 and 3 Will. IV, cap. 27). *Devine v. Holloway*, 1102.

12 Car. II, cap. 24. (Tenures.) *Att.-Gen. v. Brown*, 323.

16 Car. II, cap. 7, sec. 3 (Wagers), treated as in force. *Chambers v. Perry*, 430.

29 Car. II, cap. 3, ss. 1 and 4. *Sutton v. Lintot*, 1229.

29 Car. II, cap. 3, sec. 4. *Byers v. Brown*, 1136.

29 Car. II, cap. 3, ss. 4 and 17. *Byrnes v. Williams*, 1086 *and* 1479.

29 Car. II, cap. 3.—Sale of goods above £10. *Caffrey v. Taylor*, 842.

2 Will. and Mary, sess. 1, cap. 5, sec. 2, is not in force in the Colony, because machinery for its application is wanting.

But the statute may be applicable to the Colony so far as to legalise the *sale* of goods distrained for rent, in the absence of a valuation by an appraiser sworn by one of the officers named in the statute, notwithstanding that it is inoperative as regards the disposal of the surplus, which by section 2 is to be handed to "the Sheriff or Under-Sheriff of the county, or constable of the hundred, parish, or place, when such distress shall be taken."

The Sheriff and Under-Sheriff of the Colony do not, within the meaning or for the purposes of this Act, occupy the place of such officers.

The distrainor is not bound to hand the surplus immediately to the owner of the goods. An actual *demand* is a necessary preliminary to a right of action in the owner, and the distrainor is entitled to a *reasonable time* after demand for investigating the claim of ownership. *Ryan v. Howell*, 470.

2 Will. and Mary, sess. 1, cap. 5, mentioned. *Windeyer v. Riddell*, 307.

2 Will. and Mary, sess. 1, cap 5, sec. 2, is not in force. *Slapp v. Webb*, 649.

8 and 9 Will. III, cap. 11, sec. 8, treated as in force. *Eales v. Dangar*, 490.

4 and 5 Anne, cap. 16, sec. 12, makes only payment of the whole of a debt a defence to an action. *Polack v. Tooth*, 381.

4 Anne, cap. 16, sec. 13 (see Bond), acted on. *Eales v. Dangar*, 490.

8 Anne, cap. 14, ss. 6 and 7, acted on. *In re Whittell*, 441.

8 Anne, cap. 18 (Ruff. cap. 14)—removal of goods subject to distress for rent. *Hoskisson v. Uhr*, 1468.

13 Anne, cap. 15, sec. 12, 12 Anne, st. 2, cap. 16, Ruff., is not in force in N.S.W. *Macdonald v. Levy*, 39.

12 Geo. I, cap. 29.—An attorney, having entered into an agreement with a person, who had been transported to this Colony for the crime of forgery, in order to obtain the "good will" and services of the latter in the practice of his profession, is liable to be struck off the rolls, and the clerk to transportation for seven years by 12 Geo. I, cap. 29. In this case, the facts having been admitted by the persons concerned, the Court only ordered the agreement to be cancelled. *In re Roberts*, 89.

4 Geo. II, cap. 28, sec. 5, mentioned. *Windeyer v. Riddell*, 308.

11 Geo. II, cap. 19, sec. 19. *Slapp v. Webb*, 649.

18 Geo. II, cap. 34, sec. 8, is not in force in this Colony. *Reg. v. Schofield*, 97.

24 Geo. II, cap. 44 (action against a magistrate). *Arnold v. Johnston*, 198; *Greenwood v. Ryan*, 275; *Moore v. Furlong*, 397.

25 Geo. II, cap. 33, sec. 8, is in force in N.S. Wales. *Reg. v. Erwin*, 1349.

26 Geo. II, cap. 33, sec. 18, is not in force in N.S.W. *Reg. v. Roberts*, 544.

22 Geo. III, cap. 58. *Smith v. Barton*, 448.

31 Geo. III, cap. 25. *Gilchrist v. Davidson*, 539.

32 Geo. III, cap. 60, treated as in force. *Holroyd v. Parkes*, 968.

39 Geo. III, cap. 37. *Reg. v. Ross*, 862.

43 Geo. III, cap. 46, sec. 3, is not in force. *Simmons v. Taylor*, 1050.

47 Geo. III, cap. 74. *Bank of Australasia v. Murray*, 614.

53 Geo. III, cap. 155, ss. 49 and 51. *Ex parte Rev. G. King*, 1325.

54 Geo. III, cap. 15, sec. 4.—The question was whether the separate landed estate of a married woman was liable in the hands of her heir to the payment of simple contract debts, incurred by her during coverture, the deceased not having executed her power of appointment.

Held, the property *belonged* to the deceased within the meaning of the Act 54 Geo. III, c. 15, s. 4, and was, by the statute, in a case and for a purpose like the present, on the same footing, in the hands of a trustee or heir, exactly as personal estate in the hands of an executor (*per* the *Chief Justice* and *Dickinson*, J., *Therry*, J., *dubitante*). *Phillips v. Holden*, 606.

In every case where a person's executor or administrator might be sued, in respect of the personal estate, there his heir-at-law may be sued, under 54 Geo. III, c. 15, s. 4, and in the same form of action, in respect of the real estate. *Holt v. Abbott*, 695.

The statute, 54 Geo. III, c. 15, does not render land in this Colony disposable, for the liquidation of debts, by an executor.

A creditor is not enabled, by 54 Geo. III, c. 15, to take lands, which descend on the heir, under a judgment and execution against the executor. *Bank of Australasia v. Murray*, 612. *And see Doe d. Walker v. O'Brien*, 246; *Winchester v. Hutchinson*, 1353.

55 Geo. III, cap. 184. *Gilchrist v. Davidson*, 539.

56 Geo. III, cap. 100, sec. 3, is in force in N.S. Wales. *Ex parte West*, 1475.

57 Geo. III, cap. 53. *Reg. v. Ross*, 863.

59 Geo. III, cap. 53. *Geary v. Vivian*, 1.

59 Geo. III, cap. 122. (Australia was within the limits of the East India Company's Charter.) *Ex parte Rev. G. King*, 1325.

4 Geo. IV, cap. 76, is not in force in the Colony. *R. v. Maloney*, 74; *Reg. v. Roberts*, 544.

6 Geo. IV, cap. 16, is not in force in N.S. Wales. *Ex parte Lyons*, 140.

7 Geo. IV, cap. 48, sec. 17, is not in force here. *Reg. v. Mann*, 182.

7 Geo. IV, cap. 64, treated as in force. *Reg. v. Townend*, 436.

7 Geo. IV, cap. 64, sec. 1.—In an application for a criminal information the Court will be guided by the principles laid down in the statute 7 Geo. IV, c. 64, sec. 1, viz., that if there be a strong presumption of guilt the person charged shall be committed to prison, and if, notwithstanding evidence given in behalf of the said person, there still appear sufficient grounds for judicial inquiry, he shall be admitted to bail by the justices. *Reg. v. Cummings*, 289.

7 & 8 Geo. IV, cap. 27. *Smith v. Barton*, 448.

7 & 8 Geo. IV, cap. 29. *Smith v. Barton*, 448.

7 & 8 Geo. IV, cap. 29 (Action against constable). *Greenwood v. Ryan*, 275.

7 & 8 Geo. IV, cap. 29 (Burglary). *Reg. v. Nichol*, 233.

7 & 8 Geo. IV, cap. 29, ss. 19 and 63, acted on in *Moore v. Furlong*, 397.

7 & 8 Geo. IV, cap. 29, sec. 53. *Reg. v. Ebsworth*, 866.

9 Geo. IV, cap. 14, sec. 7. *Byrnes v. Williams* (No. 2), 1479.

9 Geo. IV, cap. 31, is in force in N. S. Wales. *Reg. v. Knatchbull*, 176; *Reg. v. Ross*, 862.

9 Geo. IV, cap. 31, sec. 17 (Carnal knowledge). *Reg. v. Weldon*, 250.

9 Geo. IV, cap. 31, sec. 20 (Abduction). *Reg. v. Abbott*, 467.

9 Geo. IV, cap. 33. *Bank of Australasia v. Murray*, 615.

9 Geo. IV, cap. 83, sec. 4. The Supreme Court has jurisdiction, under 9 Geo. IV, c. 83, s. 4, in the case of the murder of a native of New Caledonia, by the captain of a British vessel, on board the said vessel, while lying in a bay of the island, although the bay is within the jurisdiction of the French Government.

It is immaterial, under the above circumstances, whether the murder was done by or upon a British subject or an alien.

An allegation in this indictment that the prisoner is a British subject is mere surplusage.

Evidence that the prisoner had for a considerable period commanded the vessel, and that during that time she sailed under British colours, unrebutted and unexplained, is sufficient proof that the vessel is British. *Reg. v. Ross*, 857.

9 Geo. IV, cap. 83, sec. 5. *Reg. v. Cummings*, 289; and see CRIMINAL LAW, INFORMATION.

9 Geo. IV, cap. 83, sec. 6. On an application to the Supreme Court for a criminal information under 9 Geo. IV, c. 83, sec. 6, notwithstanding the proviso, that exculpatory affidavits need not be required by the Court, unless the justice of the case demands it, the Court has power to impose terms, as the condition of its interference, and looks not merely at the transaction itself, which is in question, but at all the attendant circumstances.

The statute extends the power of the Court to cases involving felony as well as misdemeanor, the latter alone being within the jurisdiction of the Queen's Bench. *Reg. v. Macdermott*, 236.

Leave to file a criminal information in the name of the Attorney-General not having been taken advantage of by the person to whom it was granted, the Attorney-General *ex officio* filed an information against the same defendant, although he had before refused to do so, calling on him to answer a charge of forgery, and although on a prosecution before the Magistrates defendant was not committed for trial or held to bail, but had been twice discharged by the Bench. The information was not filed in Term or during criminal sittings. *Reg. v. Cummings*, 289.

To induce the Court to grant a criminal information a *strong presumption of the party's guilt* is not necessary, but merely such a state of facts as shows that there is *sufficient ground for further judicial inquiry*.

In granting such the Court does not act *in all respects* as a Grand Jury, and the defendant may show cause by way of traverse of the matter in the applicant's affidavits.

The grant is not a matter of course, but in the discretion of the Court, and although a *primâ facie* case may have been made, on showing cause both sides must be heard, and if satisfied of the innocence of the accused, the Court is bound to discharge the rule *nisi*.

Also (*per* the *Chief Justice* and *Therry*, J., *Dickinson*, J., *dubitante*), the Court has the power to discharge the rule with costs. *Reg. v. M'Innis*, 351; and see CRIMINAL LAW, INFORMATION.

9 Geo. IV, cap. 83, sec. 11. *Reg. v. M'Intosh*, 680.

9 Geo. IV, cap. 83, sec. 19. *Ex parte Nicholls*, 123.

9 Geo. IV, cap. 83, sec. 24. "This clause means that all the Acts of Parliament, and the Act *59th Geo. III, cap.* 58, *inter alia*, shall be considered as part of the municipal laws of the Colony—*the lex loci*—under which Justices of the Peace may entertain complaints made by seamen, *upon contracts entered within the Colony*, and determine them in the summary manner pointed out by the Act—not that it shall be lawful for any Justices of the Peace in New South Wales to have the same jurisdiction in cases of contracts between masters and mariners, entered into in England, as Justices residing in England." *Geary v. Vivian*, 1.

Held, that sec. 24 of the New South Wales Act, 9 Geo. IV, c. 83, has in view the *common* as well as the *Statute* law of England, and that the Court under this statute has power to prescribe rules of Practice and Evidence, *per* STEPHEN and DOWLING, JJ., the CHIEF JUSTICE, *dissentiente*.

Held, per the CHIEF JUSTICE, that the New South Wales Act did not introduce the laws of England into this Colony, but was merely declaratory, and that whenever the law of England *could* be applied, the Court must apply it. *Reg. v. Farrell*, 5.

On consideration of the statute 9 Geo. IV, c. 83, 24, I think this Court can only declare such portions of English law applicable to this Colony as the Colonial Legislature would declare to be applicable by ordinances to be by them for that purpose made." *Reg. v. Lang*, 693.

And see further, *Macdonald v. Levy*, 39; *Reg. v. Schofield*, 97; *Reg. v. Maloney*, 74; *Ex parte Nicholls*, 123; *Ex parte Lyons*, 140; *Reg. v. Knatchbull*, 176; *Ryan v. Howell*, 470; *Reg. v. Roberts*, 544; and *Ex parte the Rev. G. King*, 1307.

10 Geo. IV, cap. 7. *Ex parte Nicholls*, 134.

1 Will. IV, cap. 47. *Bank of Australasia v. Murray*, 614, 617.

2 & 3 Will. IV, cap. 62 (adopted 4 Will. IV, No. 4.) *Brown v. Tindall*, 1286.

2 & 3 Will. IV, cap. 71, mentioned. *Cooper v. Corporation of Sydney*, 771.

3 & 4 Will. IV, cap. 27, ss. 2 and 3. *Wilshire v. Ford*, 851.

3 & 4 Will. IV, cap. 27, ss. 2, 16, and 19. *Devine v. Holloway*, 1102.

3 & 4 Will. IV, cap. 27, ss. 2, 5, and 16. *Hogan v. Hand*, 1244.

3 & 4 Will. IV, cap. 27 (adopted 8 Will. IV, No. 3), does not bind the Crown. *Hatfield v. Alford*, 330; *Doe. d. Wilson v. Terry*, 505.

3 & 4 Will. IV, cap. 104. *Badham v. Shiel*, 1438.

3 and 4 Will. IV, cap. 106, ss. 2 and 5. (adopted 7 Will. IV, No. 8). *Badham. v Shiel*, 1428.

5 & 6 Will. IV, cap. 19, sec. 6, only applies to port of clearance, and cannot give jurisdiction to Justices of this Colony in cases of desertion here of seamen, who signed articles elsewhere. *Ex parte Roxburgh*, 86.

5 & 6 Will. IV, cap. 19, sec. 54, effect of adoption by 7 Vic., No. 21. *Ex parte Deedo*, 193.

6 & 7 Will. IV, cap. 114.—The right to make rules of practice for Courts of Quarter Sessions is vested in the Governor, by sec. 19 of 9 Geo. IV, c. 83.

The case of *Collier v. Hicks*, which decided that "no person has by law any right to act as an advocate on the trial of any information before

Justices of the Peace, without their permission," although since the statute of 9 Geo. IV, c. 83, *was* binding on the Court.

That decision has been virtually overruled by the English Parliament by 6 & 7 Will. IV, cap. 114, which has declared and enacted a different exposition of the law of England, upon a fundamental principle in the mode of administering justice, and is longer binding on the Court.

There is nothing in sec. 24 of the *New South Wales* Act to restrain the Courts of the Colony from applying here any English statute, affecting the fundamental personal rights of British subjects, whether in force in England subsequently or prior to July 28, 1828.

The Prisoners' Counsel Act is in Force in this Colony so far as its provisions can be applied. (*Per the Chief Justice* and *Willis*, J., *Stephen*, J., *dissentiente.*)

(*Per Stephen*, J.) Statutes passed in England since the settlement of a Colony do not extend there, unless by express terms or unavoidable construction.

The Prisoners' Counsel Act, sec. 2, is, however, *declaratory* of the law, and a legislative recognition of the principle, erroneously overruled by *Collier v. Hicks*. *Ex parte Nicholls*, 123.

1 Vic., cap. 85, sec. 11 (adopted 2 Vic., No. 10). Offences against the person. *Reg. v. Weldon*, 250.

1 & 2 Vic., cap. 2, sec. 2.—The property in Quit rents should be laid in the Queen. *Windeyer v. Riddell*, 295.

5 & 6 Vic., cap. 36 (waste lands of Crown). *Att.-Gen. v. Brown*, 318.

5 & 6 Vic., cap. 36, sec. 5.—*Byers v. Brown*, 1136.

5 & 6 Vic., cap. 76, ss. 2, 8, 9, and 11. *Martin v. Nicholson*, 618.

6 & 7 Vic., cap. 7.—Conveyance by wife of convict. *Brown v. Tindall*, 1286.

9 & 10 Vic., cap. 104. *Rusden v. Weeks*, 1406.

9 & 10 Vic., cap. 104 (Grant of Commonage). *Hall v. Gibson* (No. 2), 1125.

9 & 10 Vic., cap. 104, sec. 4. *Hardy v. Wise*, 897.

11 & 12 Vic., cap. 43.—Justices—amendment. *Ex parte M'Cullum*, 684.

11 & 12 Vic., cap. 43, ss. 14 and 35. *Ex parte Rose*, 1163.

11 & 12 Vic., cap. 44, sec. 5. *Ex parte Hogan*, 880.

18 & 19 Vic., cap. 54, sec. 2. *Rusden v. Weekes*, 1403.

18 & 19 Vic., cap. 56, sec. 4. *Rusden v. Weekes*, 1406.

22 & 23 Vic., cap. 35, sec. 19. *Badham v. Shiel*, 1440.

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6 Geo. IV, No. 22.—Valuable consideration—*bona fides*—Priority. *Doe d. Peacock v. King*, 829; *Gannon v. Spinks*, 947.

9 Geo. IV, No. 12 (Dividing fences). *Rodd v. Campbell*, 326.

9 Geo. IV, No. 14, sec. 1.—Public Entertainments. *Reg. v. Egan*, 588.

10 Geo. IV, No. 9. *Ex parte Nicholls*, 134.

2 Will. IV, No. 7, sec. 5.—Goods were attached in the hands of a small number of the members in a certain partnership Company, by a writ issued against them individually, to satisfy the defendant's debt to the plaintiffs.

Held, that under sec. 5 of 2 Will. IV, No. 7, the writ was rightly served on the persons in whose power the goods were, without joining the other members of the Company (*per the Chief Justice* and *Stephen*, J., *Willis*, J., *dissentiente*), *Fisher v. Wilson*, 155.

3 Will. IV, No. 3, sec. 35. *Doe d. Colton v. Farrall*, 403.

3 Will. IV, No. 6, sec. 18 (see Shipping—Navigation). *Paterson v. Knight*, 497.

4 Will. IV, No. 1.—Water Supply of Sydney. *Cooper v. Corporation of Sydney*, 765.

4 Will. IV, No. 3, ss. 14 and 20. *Oliver v. Elliott*, 901.

4 Will. IV, No. 3—Impounding—Disputed Station Boundaries. *Eales v. Nowland*, 702.

4 Will. IV, No. 7, sec. 40. *Ex parte Boyne*, 894.

4 Will. IV, No. 9.—Court of Claims. *Terry v. Wilson*, 522; *Clarke v. Terry*, 753; *Cockroft v. Hancy*, 1051.

5 Will. IV, No. 2.—A marriage without the written declaration required by the Act acquires no validity, but (*per Dickinson*, J.) is not void thereby. *Reg. v. Roberts*, 544.

5 Will. IV, No. 2, is inconsistent with the application to the Colony of the English Marriage Act, 4 Geo. IV, cap. 76. *R. v. Malony*, 74; and see *Reg. v. Bondsworth*, 870.

5 Will. IV, No. 20. *Willis v. Campbell*, 934, 937; *ex parte Younger*, 1403; *Alexander v. Mayor of Sydney*, 1451.

5 Will. IV, No. 21. (Court of Claims). *Walker v. Webb*, 253; *Spencer v. Gray*, 477; *Clarke v. Terry*, 753; *Terry v. Osborne*, 806; *Cockroft v. Hancy*, 1051.

6 Will. IV, No. 1. *Ex parte Godfrey*, 1017.

6 Will. IV, No. 16.—Crown grant by Governor in individual name—uncertainty in description. *Doe d. Devine v. Wilson*, 722.

7 Will. IV, No. 3. *Purves v. Lang*, 955; *Purves v. A. G. and Lang*, 1189.

7 Will. IV, No. 6, does not invalidate marriages *per verba de praesenti*. (*Dickinson*, J.) *Reg. v. Roberts*, 544.

8 Will. IV, No. 3, sec. 2. *Hatfield v. Alford*, 346.

8 Will. IV, No. 5. *Ex parte Rev. G. King*, 1307.

8 Will. IV, No. 6, ss. 55, 56, and 57. *Ex parte Watt*, 1461.

8 Will. IV, No. 7. *Purves v. Lang*, 955; *Purves v. A. G. and Lang*, 1189.

2 Vic., No. 18, sec. 80. *Ex parte Pearce*, 189.

3 Vic., No. 7, sec. 4.—Proof of marriage by original register. *Reg. v. Taafe*, 713.

3 Vic., No. 9, sec. 44, does not give Justices power to convict summarily. *Reg. v. Mann*, 182.

3 Vic., No. 15 (Arrest). *Nathan v. Legg*, 161.

4 Vic., No. 5. *Ex parte Rose*, 1163.

4 Vic., No. 5, sec. 4.—"Direct" evidence of marriage. *Ex parte Hogan*, 880.

4 Vic., No. 5, sec. 11. *Ex parte Armstrong*, 1122.

4 Vic., No. 6 (Writ of Foreign attachment). *Kenny v. Teas*, 820; *ex parte Smith*, 945.

4 Vic., No. 6, ss. 6 and 23. *Polack v. Milne*, 376.

4 Vic., No. 18, sec. 3. *Purves v. Lang*, 955; *Purves v. A. G. and Lang*, 1189.

4 Vic., No. 22, sec. 10.—(Crown Prosecutor). *Reg. v. Hodges*, 201; *Reg. v. Walton*, 706.

4 Vic., No. 22, sec. 13. *Macdermott v. Devlin*, 243.

4 Vic., No. 22, sec. 27. *Reynolds v. Tree*, 402.

4 Vic., No. 23, sec. 4.—A *tales* is not limited to trials at *nisi prius* at the assizes. *Hall v. Pawley*, 169.

5 Vic., No. 9, sec. 9. *Macdermott v. Devlin*, 243.

5 Vic., No. 9, sec. 18.—(*Semble*) The 20th section of the Jury Act. 11 Vic., No. 20, has not put it out of the power of the Court, or a Judge, to compel a person to submit his cause of action to arbitration, under 5 Vic., No. 9, s. 18. *Outtrim v. Bowden*, 417.

5 Vic., No. 9, sec. 31. *Winchester v. Hutchinson*, 1355.

5 Vic., No. 9, sec. 43.—The Judges, suspecting a breach of duty in an officer of the Court, who had charge of certain sums of money, ordered him to pay over the same to another officer, and in default of such payment authorised the issue of writs of *fi. fa.* against him under sec. 43 of 5 Vic., No. 9. On application to set the writ aside,

Held, that the case fell within the mischief contemplated by the statute, and within the words of the section, but, *semble*, a case *primæ impressionis*. *Ex parte Hunter*, 165.

5 Vic., No. 17, sec. 5.—(Insolvency.) *In re Coxen*, 223.

5 Vic., No. 17, ss. 5, 6, and 33. *Gannon v. Spinks*, 947.

5 Vic., No. 17, ss. 5, 6, 7, and 8. *Perry v. Simpson*, 937.

5 Vic., No. 17, sec. 8. *Bank of Australasia v. Harris*, 1337; *Wilson v. Coheroft*, 1267.

5 Vic., No. 17, ss. 8 and 12. *Morris v. Taylor*, 978.

5 Vic., No. 9, ss. 33, 34, and 37.—(Insolvency). *In re Coxen*, 223.

5 Vic., No. 17, sec. 41.—Preferential claims. *In re Whittell*, 441.

5 Vic., No. 17, ss. 43 and 94.—(Insolvency.) *In re Peck*, 171.

5 Vic., No. 17, sec. 55.—(Insolvency.) *In re Hughes*, 265.

5 Vic., No. 17, sec. 73. *Reg. v. Knight*, 582.

5 Vic., No. 17, sec. 74. *Reg. v. Snelgrove*, 904.

5 Vic., No. 17, ss. 86 and 99. *Haslingden v. Bate*, 994.

6 Vic., No. 3. *Ex parte Watt*, 1461.

6 Vic., No. 16.—(Electoral Act) Courts of Revision. *Ex parte Ashton*, 174.

6 Vic., No. 16, ss. 36, 46, 47, and 48. *Martin v. Nicholson*, 618.

7 Vic., No. 12, sec., 12.—(See Shipping—Navigation.) *Paterson v. Knight*, 497.

7 Vic., No. 13. *Reg. v. Lang*, 687; *Ex parte Chung*, 1458.

7 Vic., No. 13., sec. 4. *Slapp v. Webb*, 649.

7 Vic., No. 16. (Conveyance by married woman.) *Brown v. Tindall*, 1286.

7 Vic., No. 16, sec. 11.—(Registration.) *Doe d. Irving v. Gannon* (No. 1), 385; *Doe d. Irving v. Gannon* (No. 2), 400; *Doe d. Cooper v. Hughes*, 419.

7 Vic., No. 16, sec., 21. *Winchester v. Hutchinson*, 1355.

7 Vic., No. 19, sec. 8.—(Insolvency.) *In re Coxen*, 223; *Cannon v. Spinks*, 947.

7 Vic., No. 21, sec. 17. *Ex parte Deedo*, 193.

8 Vic., No. 2, ss. 4 and 5. *Ex parte Erwin*, 816.

9 Vic., No. 27.—Disobedience of orders of Master's Deputy. *Ex parte Ryan*, 876.

9 Vic., No. 27, sec. 2. *Ex parte Evennett*, 813.

10 Vic., No. 7, sec. 3. *Doe d. Long v. Delaney*, 502.

10 Vic., No. 8, sec. 2. *Ex parte M'Kinnon*, 792.

10 Vic., No. 10.—Where a plaintiff at a Petty Sessions abandons the excess, in order to bring his claim within £10, this should be shown on the record. *Reg. v. Smith*, 1130.

10 Vic., No. 10, sec. 9.—Small debts—splitting demands. *Ex parte Anderson*, 746.

10 Vic., No. 11, sec. 11. *Willis v. Campbell*, 932.

11 Vic., No. 2.—Tenements recovery. *Ex parte Roberts*, 775; *Ex parte M'Cullum*, 684.

11 Vic., No. 13, sec. 1.—Defamation. *Smith v. Nash*, 594.

11 Vic., No. 13, sec. 2.—New trial in action for slander. *Darby v. Reid*, 704.

11 Vic., No. 13, sec. 4. *Hughes v. Kemp*, 516; *Armstrong v. Parkinson*, 1021; *Morgan v. Irby*, 1149; *Maister v. Hipgrave*, 1254.

11 Vic., No. 13, sec. 12. *Reg. v. Lang*, 1133.

11 Vic., No. 20, sec. 15. *Reg. v. Lang*, 687.

11 Vic., No. 20, sec. 20.—(*Semble*) The 20th section of the Jury Act, 11 Vic., No. 20, has not put it out of the power of the Court, or a Judge, to compel a person to submit his cause of action to arbitration, under 5 Vic., No. 9, s. 18. *Outtrim v. Bowden*, 417.

11 Vic., No. 20, ss. 23 and 24. *Reg. v. Wright*, 654.

11 Vic., No. 20, sec. 33.—Does not apply where there is no trial. *Bank of Australasia v. Walker*, 504.

11 Vic., No. 38.—The Statute 11 Vic., No. 38, makes a certified copy of the enrolment of a grant primary evidence of the grant, without proof that the original grant cannot be produced. The enrolment of grants in the Registrar's book must be

presumed to be correct (*per* the *Chief Justice* and *Manning*, J., *Dickinson*, J., *dissentiente*). *Doe d. Bowman v. M'Keon*, 475.

12 Vic., No. 1, sec. 6. *Hughes v. Kemp*, 516.

13 Vic., No. 8.—Application for reservation of a point must be before verdict. *Reg. v. Marrington*, 643.

13 Vic., No. 28, ss. 6 and 7.—Seamen—(*Semble.*) The forfeiture of wages, created by sec. 7 of the Seamen's Act, and the punishment of imprisonment provided by sec. 6 are cumulative.

A seaman, guilty of an act of insubordination and ordered off duty by the Captain, does not thereby become liable to forfeiture as "absent from duty."

There is nothing in sec. 7 of the Act to limit its application to offences committed in port only. *Ex parte Towns*, 703.

13 Vic., No. 29, ss. 49 and 55. *Ex parte Ward*, 872.

14 Vic., No. 9. *Ex parte Gaynor*, 1299.

14 Vic., No. 9, sec. 1.—*Reg. v. Butterworth*, 671.

14 Vic., No. 9, sec. 3. *Armstrong v. O'Brien*, 1235.

14 Vic., No. 41. *Ex parte Watt*, 1461.

14 Vic., No. 41 (public duty of Corporation to supply water). *Ex parte Hamilton*, 1233.

14 Vic., No. 41, ss. 71 and 72 (Sydney Water Supply). *Cooper v. Corporation of Sydney*, 765.

14 Vic., No. 41, sec. 100. *Alexander v. Mayor of Sydney*, 1451.

14 Vic., No. 43, sec. 9.—A commitment under the Masters and Servants Act which omits to allege that the defendant had entered on his service or that the contract was in writing is defective; but this may be amended by sec. 9 of the Prohibition Act of 1850. *Ex parte Evennett*, 813;

—— and in the case of the conviction of an apprentice. *Ex parte Erwin*, 816; also, *Reg. v. Butterworth*, 671.

15 Vic., No. 4, sec. 3. *Ex parte Landregan*, 871.

15 Vic., No. 11, sec. 22. *Ex parte Cockburn*, 1012.

16 Vic., No. 1 (Acts Shortening). *Terry v. Hosking*, 819; *Reg. v. Smith*, 1382.

16 Vic., No. 14, sec. 8. *Reg. v. Tudor*, 1023.

16 Vic., No. 24 (distinguished from the statute of monopolies). *Morewood v. Flower*, 1109.

16 Vic., No. 46, sec. 35. *Spier v. Hunter River S. N. Co.*, 1351.

17 Vic., No. 3, sec. 6. *Reg. v. Jones*, 1385.

17 Vic., No. 21 (expunction of inadmissible averments). *Dumaresq v. Robertson* (No. 1), 1090.

17 Vic., No. 21, ss. 15 and 16. *Kenny v. Teas*, 820.

17 Vic., No. 21, ss. 95 and 174. *Morris v. Taylor*, 978.

17 Vic., No. 31, sec. 18. *Freeman v. M'Gee*, 1009.

17 Vic., No. 33. *Hood v. the Corporation of Sydney*, 1294; *ex parte Watt*, 1461.

17 Vic., No. 34. *Hood v. the Corporation of Sydney*, 1294.

17 Vic., No. 35. *Lord v. City Commissioners*, 912.

17 Vic., No. 36, ss. 9 and 11. *Ex parte Douglas*, 1456.

17 Vic., No. 38, sec. 9. *Ex parte Hamilton*, 1233.

17 Vic., No. 39, sec. 10. *Ex parte Cockburn*, 1012.

18 Vic., No. 23, ss. 1 and 36. *Ex parte Boyne*, 894.

19 Vic., No. 2, sec. 2. *Wilson v. Coberoft*, 1267.

19 Vic., No. 24, sec. 10. *In re Healy*, 1129.

19 Vic., No. 34 (refusal of Registrar to receive irregular registration). *Blackett v. Newman*, 1117.

19 Vic., No. 36. *Hay v. Bergin*, 1258; *Graham v. Fennell*, 1357.

20 Vic., No. 15 (facts necessary in declaration). *Dumaresq v. Robertson* (No. 1), 1090.

20 Vic., No. 15 (right of Crown to plead double). *Dumaresq v. Robertson* (No. 2), 1124.

20 Vic., No. 15. *Dumaresq v. Robertson* (No. 3), 1291.

20 Vic., No. 28, ss. 2, 3, and 5. *Ex parte Tighe*, 1100.

20 Vic., No. 31, ss. 44, 45, and 47. *Jeffreys v. Leonard*, 1133.

20 Vic., No. 31, sec. 17. *Sutton v. Lintot*, 1229.

20 Vic., No. 36. *Ex parte Watt*, 1461; *Hood v. the Corporation of Sydney*, 1294.

20 Vic., No. 36, sec. 55. *Alexander v. Mayor of Sydney*, 1451.

22 Vic., No. 6, sec. 8. *Ex parte Armstrong*, 1122.

22 Vic., No. 6, sec. 9. *Reg. v. Smith*, 1382.

22 Vic., No. 7, sec. 1 (hostile witness). *Reg. v. Lynch*, 1120.

22 Vic., No. 13. *Nicholls v. Peisley*, 1380.

22 Vic., No. 13, ss. 1-7 and 79. *Berry v. Graham*, 1493.

22 Vic., No. 17. *Rusden v. Weekes*, 1406.

22 Vic., No. 18 (jurisdiction of District Court when a corporation is defendant). *Ex parte Harwood*, 1224.

22 Vic., No. 18, ss. 62 and 63. *Johnston v. Rooke*, 1227.

22 Vic., No. 18, sec. 94. *Ex parte Church*, 1303.

22 Vic., No. 18, ss. 94, 98, and 99. *O'Neill v. Browne*, 1278.

22 Vic., No. 19, sec. 116. *Bell v. the Railway Commissioner*, 1398.

STATUTE OF FRAUDS.

See CONTRACT—VENDOR AND PURCHASER.

STATUTE OF LIMITATIONS.

See LIMITATIONS.

STOLEN PROPERTY.

Recovery of stolen property. *Fitzgerald v. Luck*, 118.

SUPREME COURT.

Port Phillip Judge.—The Resident Judge of Port Phillip is a Judge of the Court of New South Wales, and in that capacity has an exclusive original jurisdiction in his district, but he has also an auxiliary jurisdiction in New South Wales, and has power to issue writs of execution to the Sheriff, in Sydney, to enforce his judgments, under 4 Vic., No. 22, s. 13, and 5 Vic., No. 9, s. 9. *Macdermott v. Develin*, 243.

Illegal Foreign sentence—Release.—The Supreme Court has jurisdiction to order the release of a prisoner confined in this country under an illegal sentence of a Foreign Court. *Reg. v. Murray*, 287.

Exhumation of dead body.—The Supreme Court has jurisdiction to order the exhumation of a body, for the purpose of a *post mortem* examination, though an inquest has already been held. *Reg. v. Clarkson*, 598.

Exchequer Jurisdiction.—An action against the Colonial Treasurer and a collector of quit-rents for trespass, by breaking into the plaintiff's house, and for the seizure and sale of plaintiff's goods for arrears of quit-rents, is one in which the Crown is interested, and an application for its removal into the Exchequer Jurisdiction of the Court must be granted.

The Court has no means of accomplishing this but by directing that the action henceforth shall be, and be deemed and taken to be, specifically in that jurisdiction. *Windeyer v. Riddell*, 295; *and see Reg. v. O'Connell*, 117.

Elections.—The Supreme Court has no jurisdiction to decide a question of disputed election to the Legislative Council. *Martin v. Nicholson*, 618.

Jurisdiction to issue Sci. Fa.—The Supreme Court has a Common Law jurisdiction to entertain a *Scire Facias* for the repeal of a Crown grant, and the 9 Geo. IV, cap. 83, sec. 11, confers the same power. *Reg. v. M'Intosh* (No. 1), 630.

Circuit Court—costs.—The Judge presiding over a *Circuit* Court has no power to grant a certificate to deprive plaintiff of costs, as at *Nisi Prius* in Sydney, the Circuit Courts being distinct tribunals.

The statute 43 Eliz., c. 6, even if in force, has been virtually repealed by the practice established under the present rules of Court.

(*Per the Chief Justice*) The 43 Eliz., c. 6, never was in force in the Colony. *M'Donald v. Elliott*, 751.

Offences on high seas—British ship.—The Supreme Court has jurisdiction, under 9 Geo. IV, c. 83, s. 4, in the case of the murder of a native of New Caledonia, by the captain of a British vessel, on board the said vessel, while lying in a bay of the island, although the bay is within the jurisdiction of the French Government.

It is immaterial, under the above circumstances, whether the murder was done by or upon a British subject or an alien.

An allegation in the indictment that the prisoner is a British subject is mere surplusage.

Evidence that the prisoner had for a considerable period commanded the vessel, and that during that time she sailed under British colours, unrebutted and unexplained, is sufficient proof that the vessel is British.

The Statutes 39 Geo. III, c. 37, and 9 Geo. IV, c. 31, mentioned. *Reg. v. Ross*, 857.

Discharge of bail.—The Court has the power to discharge bail given by a person arrested under a *ca. re.*, but the exercise of it is discretionary. *Roberts v. Morton*, 946.

Exercise of power of Lord Chancellor.—The Court has authority, in the exercise of the same powers as are vested in the Lord Chancellor, to issue a writ of error, ordering its members, sitting in exercise of the common law jurisdiction, to hear a case.

It is sufficient if a writ of error be authenticated in the ordinary mode by the seal of the Court. *Australian Trust Co. v. Berry*, 992.

Resignation and reappointment of Judge.—When the Judge who tried a case resigned, was then appointed Acting *Chief Justice*, and subsequently made an order, that execution should issue notwithstanding a notice of motion for a new trial,

Held, he had no jurisdiction, for, although the same individual, he was not the same *Judge* who had tried the case. *Solomon v. Dangar*, 1289.

Legality of Colonial Statutes.—*Held*, the Courts of a Colony have the power, and are under the obligation to decide, whether an Act of the Colonial Legislature is in contravention to an Act of the Imperial Parliament, and consequently not binding on the inhabitants of the Colony. *Ruslen v. Weekes*, 1406.

Officers of the Court.—Order to officer of the Court enforced by issue of a *fi. fa.* *Ex parte Hunter*, 165.

TENANT.

See LANDLORD AND TENANT.

TENURE.

Tenure of land in New South Wales. *Attorney-General v. Brown*, 312.

TITLE.

See REGISTRATION—VENDOR AND PURCHASER &c.

Pretence titles.—*Cannon v. Keighran*, 170; *Doe d. Peacock v. King*, 829.

TRESPASS.

Trespass ab initio—distress.—The officer of the Crown having distrained, is bound to remove the goods at once, and failing to do so becomes a trespasser *ab initio*, for he entered under the general authority of the law.

The goods taken should not have been sold till after the expiration of fifteen days from their seizure, as laid down by 51 Hen. III, c. 4. *Windeyer v. Riddell*, 295.

Trespass to close—aggravation.—The declaration stated that a trespass upon the plaintiff's close by the defendant, and a seizure and conversion of his chattels also on the said close. Plea, that the close was the defendant's. The question was whether the trespass to the goods was a substantive grievance, or merely an aggravation of the trespass to the close.

Held, that the plaintiff's demurrer to the plea was good, that the taking of goods cannot be supposed any part of the manner in which the close was trespassed on, and that the language of the declaration did not warrant the defendant in

supposing that it was alleged as a mere aggravation of the trespass to the close. *Walsh v. Harris*, 309.

Plaintiff trespasser on Crown land.—In an action for trespass on certain Crown lands in the possession of the plaintiff, it was held, on demurrer to the defendant's plea, alleging that he held a depasturing license from the Crown, that the defendant must succeed, and that the license, though it gave no actual property in the land against the Crown, would convey to the holder a defeasible right to go upon the land, for the purpose of depasturing, notwithstanding its possession by any person not holding such a license, *Borthwick v. Bingle*, 384.

Trespass ab initio.—*Moore v. Furlong*, 397.

Station—disputed tract.—In an action for trespass to a sheep station, in which the defendant has pleaded "not possessed," the plaintiff is entitled to prove possession of the part of the station trespassed on, by showing that the former occupier, from whom he purchased, occupied the ground in question. *Lester v. Girard*, 463.

Trespass—right of way—plan.—*Hannan v. Cooper*, 634.

Trespass ab initio—distress.—A defendant, who had distrained legally, but sold the distress without appraisement as required by Statute, was held not to be a trespasser *ab initio*, the several acts of trespass being divisible by 11 Geo. II, cap. 19, sec. 19. *Slapp v. Webb*, 649.

Conveyance of land with reservation—Trespass thereon.—The plaintiff having brought an action for trespass in respect of certain land, conveyed to him with a certain reservation, was nonsuited. *Held*, that the question, whether the acts of trespass were upon the reserved portion or not, was for the jury. *Emery v. Armstrong*, 887.

Illegal occupation of Crown land.—An unlicensed occupier of Crown lands cannot maintain an action of trespass against an intruder, his own occupation being rendered wholly illegal by the imposition of penalties for such an act under section 4 of 9 and 10 Vict., c. 104. *Hardy v. Wise*, 897.

Waterway—Suit between trespassers on Crown land.—The plaintiff and defendant, owning certain adjoining lands bounded by Darling Harbour, encroached upon the said harbour by filling in the shallow water before their properties, a small part between, however, being left as a waterway. The plaintiff justified her encroachment by a license from the Crown. The waterway having been obstructed by the defendant,

Held, that plaintiff, if proved to be a licensed occupant, had an interest, beyond mere possession, which would entitle her to an injunction against the defendant to prevent injury to her use of the waterway. But the defendant's intrusion being only on the Crown, the plaintiff, if an intruder also, could claim no relief against the damage resulting from the defendant's trespass. *Wiltshire v. Dearin*, 1009.

Trespass to enforce invalid agreement.—Where an action of trespass is brought, really to enforce an agreement rendered invalid by the statute of frauds, a plea of the statute is a good answer to the cause of action. *Sutton v. Lintot*, 1229.

Plea "not possessed"—Continuing trespass—Damages.—The Court *had* power to make the rule, of August 12, 1856, that the plea of not possessed, or that the close was not the plaintiff's close, should put in issue only the fact that the plaintiff had exclusive possession when the defendant entered, but not any circumstances which made the entry lawful, *e.g.*, a Crown Grant to the defendant.

A person in exclusive possession of any land in the Colony can maintain trespass against a person without better title trespassing on him, and the latter cannot by the very act of trespass, immediately and without acquiescence, give himself what the law understands by "possession." If, therefore, the first person in the plaintiff's line was in exclusive possession of the locus, before the first in the defendants' came on it, and thence the possession passed through other persons to the plaintiff, and if neither the plaintiff nor any in his line acquiesced in the trespasses of any in the defendants', the plaintiff could maintain an action against the defendants, not for trespassing before the plaintiff came into possession, but for *continuing* to trespass after the plaintiff entered.

Discussion of the principles to guide a jury in assessing damages in such an action. *Nowland v. Humphrey*, 1167.

Trespass to land and goods—Aggravation—Crown license.—In an action for trespass to land, and taking, driving about, and impounding sheep, defendants pleaded, plaintiff's possession being admitted, that the land was the property of the Crown, and that G. was a tenant of the Crown, for depasturing purposes, and therefore entitled to possession, by whose authority the trespasses were committed.

Held, that the plea was good, although it did not show that the trespasses were necessary to the exercise of G.'s rights, that G. had previously entered, or that plaintiff's occupation was not legal.

Also, that no allegation was needed of the unlawfulness of plaintiff's possession, since, if lawful, it was matter for reply.

The charge as to the scattering and driving about of plaintiff's cattle being a substantive one, a plea, assuming to justify all the trespasses to the cattle on the ground that they were taken damage feasant and impounded, is bad. Acts of trespass, stated in a declaration, which are, or may be, distinct from, and unconnected with others in the same count, are not to be deemed aggravations of the latter, but as substantive trespasses. *Hay v. Bergin*, 1258.

Station—Exclusive possession.—In an action for trespass to a station evidence was given of an admission by the plaintiff that certain lands, between the plaintiff's and defendant's stations, were not part of his station, although his stock had been allowed to graze thereon. Evidence was also given that at the time of the admission defendant's station had not been occupied by him. There was no evidence of any occupation license by the Crown.

Held, if both parties had been *in possession* of their stations, and mutually asserting exclusive possession of the lands in dispute, such an admission by one would naturally mean that the other was the *earlier occupant*, but such could not be the inference where it was clearly proved that the disputed tracts were exclusively fed over by the cattle of the plaintiff and long before any other person claimed them.

The plaintiff therefore, as having been in exclusive possession, was entitled to succeed against any intruder, without authority from the Crown. *Spring v. Tate*, 1360.

Nuisance—Abatement—Duty.—In a plea of justification in trespass it is not sufficient to allege a duty on the defendant to abate an alleged nuisance, unless the facts also stated show that such duty arises. An encroachment upon the streets of Sydney caused by rebuilding over the alignment cannot be removed without an adjudication in accordance with sec. 4 of 5 Will. IV, No. 20. *Alexander v. Mayor of Sydney*, 1451.

TROVER.

Plea "not possessed."—*Lyons v. Elyard*, 328.

Demand—Insolvent's goods.—There is no necessity for a demand by the assignee, in order to maintain an action of trover against persons who have removed insolvent's goods after his insolvency. *Wilson v. Coberoft*, 1267.

TRUST AND TRUSTEE.

Grantee of Crown land—Trustee for person entitled.—In 1803 S. obtained a lease of Crown land for twenty-one years, reserving rent, with a provision for the purchase of the fee-simple, by the lessee, in which case the Crown undertook, in effect, to give a grant of the land to the lessee, or other legal proprietor. Plaintiff's claim was traced by various conveyances to S. In 1842 defendants, W., claiming as representatives of a devisee of S., after a reference to the Commissioners for Claims, under 5 Will. IV, No. 21, and recommendation by them, received a grant of the property in question. The evidence was held to show that plaintiffs were unaware of defendant's application, and that W. was guilty of fraud and concealment before the Commissioners. The grant contained the proviso "that the lawful rights of all parties, other than the grantee, therein named, in the land thereby granted, should enure and be held harmless, anything in the said grant to the contrary notwithstanding."

Held, W. had no *equity* as against the plaintiffs, and the grant having been made, not in pursuance of a mere promise, but a stipulation in a lease, W. must be declared a trustee for them. The decision of the Commissioners ought to be conclusive unless it be unconscientious for a person to retain the benefit thereof. *Walker v. Webb*, 253.

Purchaser for value—volunteer.—Land in Sydney, occupied by M., under the promise of a grant from the Governor, was sold by him in 1819 to C., who in 1822 conveyed the same for valuable consideration to S., reciting his seizin or possession of the said land, *in trust* for the son of S., and in case of his death during his minority, remainder to S., and in the same instrument covenanted with S. for good title, &c. In 1824 S. sold to the defendant, who had ever since been in possession. The plaintiff, the *cestui que trust* under the conveyance to S., having brought a bill for a conveyance of the property, for which a grant had issued to the defendant, it was proved that the price paid by the defendant to S. was the full value of the land at the time, and that the defendant was satisfied with a transfer of possession of the property, and a mere receipt for the money, on being assured that there were no title deeds.

Held, there was no constructive notice to the defendant of the trust, but even if there had been notice, the plaintiff was a volunteer within the statute of 27 Eliz., and the trust in his favour was avoided by the subsequent sale for value.

The principle to be applied by the Court in a case of this character was the same as that laid down for the guidance of the Court of Claims, viz., that the right to obtain the grant and to retain it must depend upon "*the real justice and good conscience of the case.*" *Spenser v. Gray*, 477.

Crown grant in trust.—A person who has had twenty years possession of land, if he lose his possession, may be effectually defeated, on his bringing an ejectment, by showing actual title in another. The promisee of a Crown grant, having by his will disposed of his lands to the plaintiff and another, died before issue of the grant. Subsequently a grant was made to the trustees of the will (who by the terms thereof had no estate in the said lands), in trust for the persons entitled under the will.

Held, that the grant conveyed the legal estate, as the testator, under the will, would have devised it, had he, at the date of the will, the legal estate in himself. *Doe d. Swan v. M'Dougall*, 411.

A grant having issued for certain land in Sydney to R. and C., and their heirs and assigns, in trust for E., with the usual declaration that the land was given for building purposes, and reservation of a quit rent; R. on the decease of E., C. being also dead, claimed to be entitled to the fee-simple.

Held, the building clause was not part of the *trust*, but the consideration or condition on which the grant was made, and therefore, on the death of the *cestui que trust*, the Statute of Uses vested the remainder in the Crown. And no "office found" was necessary to entitle the Crown to possession. *Attorney-General v. Ryan*, 719.

Where a grant was made in accordance with the report of the Commissioners to trustees "to the *several trusts and uses* declared in a certain will, the terms of which cannot be held to apply to the land granted, the land must be taken to have reverted to the Crown, as on a resulting trust." *Clarke v. Terry*, 753.

In a Crown grant to certain persons, "*devisees in trust for W., their heirs and assigns*" to hold to them "*as such devisees as aforesaid, their heirs and assigns for ever*," the words "*devisees in trust for W., &c.*," are not words of description only, and W. is named as a person taking a beneficial interest. In the absence of words of inheritance, W. only takes a life interest thereby.

The case is substantially the same as if the grant had been to the said persons and their heirs, *in trust for* W., in which event the Statute of Uses renders them mere conduit pipes for the vesting of the legal estate, for life, in W.

On the death of W., the inheritance is in the Crown, as on a resulting use by implication. (*Attorney-General v. Ryan* followed). *Smith v. Dawes*, 802.

Breach of trust—Account against co-trustees.—W., M., and T. were trustees under a will, with power to retire and appoint new trustees. M. retired and E. was appointed in his stead.

Subsequently W. left the Colony, having appointed E. and T. his attorneys in regard to the trust. T. having received and misapplied certain of the trust funds,

Held, that E. and T. had been rightly decreed to account in respect of the moneys received and misapplied, from the date of W.'s departure until that at which it was admitted that the irregularities ceased.

Also, that W. could maintain the suit without joining the *cestuis que trustent* as parties. Not only was there a breach of trust by all three trustees, but also a breach by E. and T., who held under the power of attorney a fiduciary character with respect to W.

Accounting parties, in such cases, are in this Colony chargeable with interest at 8 per cent., unless a greater rate is shown to have been obtained; and although the will may direct a deposit, until investment, in banks, which actually only allowed a lower rate. *Wentworth v. Tompson*, 1238.

Church property.—*See* CHURCH.

USAGE.

See CUSTOM—EVIDENCE.

USURY.

The Usury Laws of England do not apply to this Colony. *See* Stat. 13 Anne, cap. 15, sec. 12. *Macdonald v. Levy*, 39.

VENDOR AND PURCHASER.

Station—limitations of vendor's liability.—The defendant, an auctioneer, sold to the plaintiffs, or one of them, a certain sheep-station and sheep, upon this condition, among others, that the purchaser should be on the station to take delivery within thirty days of sale, allowing, if required, another thirty days for delivery of stock, after which all responsibility on the part of the vendor should cease, and no objection to either stock or station should be allowed. The purchase money was paid and possession taken, but it was discovered after the time limited in the above condition, however, that the vendor had no license from the Crown, and plaintiffs were therefore ejected as trespassers.

Held, when a station or right of run is sold, the vendor engages to make some sort of a title to it, and at all events to give something to which he has a right.

Conditions of sale which restrain the vendor's liability, and which derogate from the rights of the purchaser according to the general rules of law, are to be construed strictly, and, therefore, in the above contract, the word "station," taken in conjunction with the word "sheep," must mean that the objections to be taken to each were to be of the same kind, *viz.*, as to quality, quantity, and situation of run. *Mortimer v. Mort*, 938.

Station—Contract by correspondence—Uncertainty in terms.—Defendant offered in writing, on Aug. 5, to sell to plaintiff certain stations, with all the cattle and horses thereon or belonging thereto, or that had lately left the said stations, and all the stores, &c., for "£15,000, equal to cash"; the offer to remain open till Oct. 10; or if a muster were required, to deliver the same at the rate of 50s. each for the cattle, and £5 for each of the horses, stores and effects given in; and to pay all claims thereon for rent, &c. This was accepted by the plaintiff by letter dated Sep. 29, in which he stated that he required a muster, and confirmatory letters were sent by him on the 8th and 10th October, the latter reaching defendant before the former.

The parties having disagreed as to various terms, a suit was brought for specific performance.

Held, a Court of Equity had jurisdiction to grant specific performance of a contract to sell a station, or tract of Crown land held under license.

Difficulty and uncertainty in the language of the contract was no bar to a decree, if the Court could possibly construe and define the terms.

The date of the contract was that of the earliest of the plaintiff's letters, viz., the 29th of September, without regard to the time when such acceptance reached the defendant's hands.

The plaintiff, having required a muster, was bound to pay the stipulated price for all the then existing head of stock, including all calves and foals born on or before the 29th of September.

The defendant was not bound to muster and deliver *all* the stock, although the price must depend upon the number delivered.

The defendant was not bound to obtain the sanction of the Crown to the transfer, but must do all reasonably in his power to perfect it.

Nor is such sanction necessary to a legal transfer of stations. *Tooth v. Fleming*, 1152.

Conveyance—omission to register.—The omission to register a deed is not necessarily, or by itself, indicative of fraud, but, with other matters, it *may* be a badge of fraud. *Doe d. Peacock v. King*, 829.

Conveyance—uncertainty—election.—A conveyance, bad for uncertainty, may be made good by the election of the vendee, and possession under it with the assent of the vendor, notwithstanding the land so occupied is in excess of the area included in the conveyance. *Dick v. Ebsworth*, 865.

Statute of frauds—false name—voluntary conveyance.—Land was purchased at a Government land sale by C., but in the name of B., the defendant, who was an infant and son of a friend of C. C. completed the purchase and took a grant in the same name, but subsequently sold the property to the plaintiff, and signed the document of transfer in the defendant's name, alleging to the purchaser that it was his true name. This document was as follows:—"This is to certify, that I have this day sold and disposed of to Robert Byers, all my right, title, and interest in that piece or parcel of land"—describing the land in question—"for the sum of seventy pounds; with the cottage, and everything on the said ground." On a bill being brought by plaintiff against the defendant, claiming that he should be declared a trustee for the plaintiff, &c.

Held, that the document and signature by C., were a sufficient memorandum of the contract within the Statute of Frauds, and binding on C. Also, that the obtaining of the grant to the defendant by means of money supplied by C. was a fraudulent conveyance within the meaning of the 27 Eliz., c. 4, and void against the plaintiff.

Also, that the grant was not void absolutely, but only as against the plaintiff. *Byers v. Brown*, 1136.

Conveyance by Sheriff—bargain and sale—chattels real.—A conveyance, by bargain and sale, by the Sheriff, of chattels real taken in execution and sold under sec. 4 of 54 Geo. III, cap. 15, will pass the legal as well as the equitable estate in the lands to the purchaser, the conveyance taking effect by operation of law. *Winchester v. Hutchinson*, 1353.

Inquiry for title deeds. *Spenser v. Gray*, 477.

Grant by implication—right of way of necessity. *Sharpe v. Emery*, 1281.

VICE-ADMIRALTY.

See PRACTICE AND PLEADING—SHIPPING.

VOID AND VOIDABLE.

Crown grant. *Reg. v. M'Intosh (No. 2)*, 698; *Doe d. Divine v. Wilson*, 722.

Unregistered conveyance. *Doe d. Peacock v. King*, 829.

Under Insolvent Acts. *Gannon v. Spinks*, 947.

Purchaser for value. *Byers v. Brown*, 1136.

"Absolutely void." *Wilson v. Coberoft*, 1267; *Bank of Australasia v. Harris*, 1337.

VOLUNTARY CONVEYANCE.

Infant volunteer. *Byers v. Brown*, 1136.

WAGER.

See GAMING.

WAGES.

See MASTER AND SERVANT—SHIPPING.

WAIF.

A cask of tallow, being a waif, was taken from the possession of the plaintiff, by a constable, one of the defendants, who entered the plaintiff's house and seized the said cask under a warrant from the other defendant, a Justice of the Peace. *Held*, that although the house was a public-house, and the cask taken without resistance, on the production of the warrant, yet the subsequent

act committed furnished a test of the animus with which the first entry was made, and rendered it a trespass.

The magistrate could not allege as a defence that the warrant did not contemplate the breaking and entry.

In this case the Magistrate was not justified in issuing the warrant, since the requisite circumstances, under secs. 19 and 63 of the Larceny Act, 7 and 8 Geo. IV, c. 29, in the case of a waif, did not exist. *Moore v. Furlong*, 397.

WARRANT.

Arrest.—Arrest of plaintiff by defendant under a warrant "to arrest a man who calls himself Clark." The plaintiff was never identified as such, and after several remands was discharged.

Held, that the warrant was good.

There may be an arrest without imposition of hands provided there be a constraint on a person's will. Under the above warrant the defendant could only arrest a person, who could be identified as having called "himself Clark." *Greenwood v. Ryan*, 275.

Search warrant.—Search warrant in cases of larceny. Authority to issue this depends either on the Common Law, or the 7 & 8 Geo. IV, cap. 29, sec. 63. *Smith v. Barton*, 418.

General warrant.—An inspector of weights and measures under 6 Will. IV, No. 1, may seize bread under a general warrant. *Ex parte Godfrey*, 1017.

And see CRIMINAL LAW—JUSTICES—PROHIBITION—SHERIFF.

WARRANTY.

See GUARANTEE.

WATER.

Flowing water—occasional or surface water.—The plaintiff sought to restrain the defendants from making a trench upon the Water Reserve, for the purpose of obtaining water from a swamp therein, on the ground that the trench would intercept water naturally flowing on to the plaintiff's land.

Held, that if the stream were temporary, and casual only, and overflow at times of the surplus water of the swamp, no right was vested thereby in the plaintiff, but if the stream were in a channel, between banks, continually or habitually so flowing, the water which would naturally reach the stream could not legally be abstracted, whether such water were underground or not.

The evidence on this point being contradictory, an issue was directed.

Quære, will twenty years enjoyment of the flow, if *not* habitual, but casual and accidental only, give the plaintiff a right thereto, or will not the presumption of a Crown grant thereof be too violent to be adopted?

The Corporation, having the control of the water supply of Sydney, by 14 Vic., No. 41, s. 72, previously exercised by the Crown, under the provisions of the Water Tunnel Act, 4 Will. IV, No. 1, can have no right, which an individual in such a case would not have. The powers also expressly given by the Act, ss. 71 and 72 of 14 Vic. No. 41, must be taken to have *some* limit.

Every proprietor, and in general, every occupier, by reason of his occupation, is entitled, as an incident to the property in the land, to the reasonable use of the water of any perennial stream, or, at least, of any such stream running in a defined course and channel, flowing through that land. And he is similarly entitled to have the stream continue so to flow, without any unreasonable use of its water, or of the water properly belonging to it, by any other proprietor or occupier. *Couper v. Corporation of Sydney*, 765.

Crown grant—reservation of water—compensation.—Certain lands near Botany Bay, were granted by the Crown to S.L., for valuable consideration, in 1823, described as bounded on the west and south-west sides by Botany Bay, *a creek, and Redmond's farm*, and reserving to His Majesty, *inter alia*, any quantity of water and any quantity of land, not exceeding ten acres, in any part of the said grant as might be required for public purposes, and providing that the working of any water-mills there erected, or to be erected, should not be interfered with by such reservation. The plaintiffs, E.L. and D., subsequently became owners of parts of this land.

Shortly after the grant above mentioned S.L. obtained a conveyance of the adjoining farm, which had been granted to one *Redmond* by the Crown without any such reservation as above, and which S.L. had occupied for some time before his own grant under a contract of sale; part of this was devised by S.L. to M.L., one of the plaintiffs. The boundary of R.'s grant on the south was in part described as the *creek* (referred to in the other grant).

Under the provisions of the *Water Act*, 17 Vic. No. 35, the Commissioners for the City of Sydney, obtained the resumption by the Crown of portions of the said properties of the plaintiffs, including the whole of the creek and land on either bank.

The plaintiffs recovered from the defendants the value of the land resumed, and damages for the loss of motive power for certain *water mills* upon the said creek, but the question was whether they were entitled to compensation for the loss of water for other purposes.

Held, the reservation clause was good (and, *semble*, even if bad as not strictly either a reservation or an exception, it would be valid as a re-grant). There was no uncertainty as to quantity therein, as the number of mills to be protected clearly was that existing at the time of appropriation, and the amount of water *required* was a mere matter of calculation.

(*Per Milford*, J. The right of user in S.L. of any water *plus* that required for his mills was similar to an estate at will.)

If the reservation in question would have been void under other circumstances, by reason of its derogation from the rights of ownership in the grantee or repugnancy to the title conveyed by the grant, yet it was good in the case of the Crown, by reason of the prerogative vested in the Sovereign for the protection of his subjects.

The grant to *Redmond* having stated his land to be bounded by the creek, M.L. had no right to the land over which the creek flowed *ad medium filum aquæ*, or any riparian right to use the water. Nor was M.L. entitled to compensation for the defendant's disturbance of the water flowing over her land, for though there was no reservation of water in *Redmond's* grant, yet, claiming from S.L., who accepted the grant of the land above with the reservation, which could not be exercised without disturbance of the water below, she was bound thereby. The maxim *volenti non fit injuria* would have applied to S.L. if the Commissioners had exercised their powers while he possessed the properties.

The plaintiffs therefore were only entitled to compensation for loss of motive power to such *mills* as were erected upon the land granted to S.L.

Held (on appeal to the *Privy Council*, in the case of *Mary Lord*), upon a question of the meaning of words, the same rules apply whether the subject-matter be a grant from the Crown or a subject, and the plaintiff was therefore entitled to the land *ad medium filum*. S.L. would have been entitled to compensation in respect of *Redmond's* grant; for the Crown could not grant any property in the water to S.L., nor he to the Crown, and the effect of the reservation in his grant was only that he waived his own rights as riparian owner in respect of the land conveyed by the said grant. (Judgment below reversed, with costs.) *Lord v. City Commissioners, Darvall v. Same, Mary Lord v. Same*, 912.

Prescription—abatement of nuisance—dam.—There can be no prescription in this Colony, as there can be no immemorial possession. When a lower riparian owner has erected a dam, causing the waters of a stream to overflow the close of an owner higher up, the latter is entitled, if he suffer an injury thereby, to abate the nuisance. *Stevens v. M'Clung*, 1226.

Riparian rights—woolwashing.—In the absence of prescription, grant, or other legal right, a riparian proprietor cannot interfere with the rights of other proprietors, by using the water passing by his land for woolwashing, so as to pass on the water in a foul state. *Hood v. Corporation of Sydney*, 1234.

WATER WAY.

Injunction to prevent obstruction.—*Wilshire v. Dearin*, 1000.

WAY.

See HIGHWAY—RIGHT OF WAY.

WEIGHTS AND MEASURES.

Inspector—warrant to search.—*Ex parte Godfrey*, 1017.

WHARF.

Thoroughfare.—The defendants were owners of a certain wharf separated from the northern end of the Circular Quay, Sydney. Subsequently the said Quay was extended to defendant's boundary, and plaintiffs became the lessees thereof from the Crown, under the provisions of the statute, 10 Vic., No. 11, sec. 11 of which enacted that "nothing in the Act contained" should be deemed or construed to "prevent the use of any public wharf as a public thoroughfare," &c. The sale to the plaintiffs of the dues also contained a reservation of the wharf as a public thoroughfare.

Held, the Quay was either a thoroughfare, or a highway, and the defendants were entitled to so use it, notwithstanding their use might injure the business of the Quay, and although they entered, not from the same way as other members of the public, but through an opening made in their boundary wall at the northern end of the Quay.

The right, however, could not be exercised so as to defeat the object of the maintenance of the wharf. *Willis v. Campbell*, 932.

WIFE.

See HUSBAND AND WIFE.

WILL.

Codicil—republication.—A codicil, referring to, and confirming the will, or a previous codicil, is equivalent in general to a republication of such will or previous codicil. Where a codicil recites that the testator had, in his will, devised *all his real estate not specifically otherwise disposed of*, and then gives the *same* real estate, in a certain event, to new parties, the words used do not indicate an intention of republication, but the reverse. (*Strathmore v. Bowes* followed.) *Clarke v. Terry*, 753.

WITNESS.

See EVIDENCE—CRIMINAL LAW.

WORDS, DEFINITIONS OF.

"Absent from duty," 13 Vic., No. 28. *Ex parte Towns*, 708.

"Absolutely void." *Wilson v. Coberoft*, 1267. *Bank of Australasia v. Harris*, 1337.

"Belonging to," 54 Geo. III, cap. 15, sec. 4. *Phillips v. Holden*, 606.

"Bona fide or for valuable consideration," 7 Vic., No. 16, sec. 11. *Doe d. Irving v. Gannon* (No. 1), 385. *Doe d. Irving v. Gannon* (No. 2), 400. *Doe d. Cooper v. Hughes*, 419.

"Common gaming house," 14 Vic., No. 9, sec. 1. *Reg. v. Butterworth*, 671.

"Current year," sec. 79, 22 Vic., No. 13. *Berry v. Graham*, 1493.

"Devisees in trust for," &c.—Crown grant to. *Smith v. Dawes*, 802.

"Direct" evidence of marriage—4 Vic., No. 5, sec. 4. *Ex parte Hogan*, 880.

"Ex Dankberheid"—Sale of goods to arrive. *Hughes v. Greer*, 846.

"First accrual of right of action." *Devine v. Holloway*, 1102.

"Highway" and "Thoroughfare," distinction. *Willis v. Campbell*, 935.

"Insolvent," sec. 8, 5 Vic., No. 17. *Perry v. Simpson*, 997.

"Insolvent," 5 Vic., No. 17, sec. 73. *Reg. v. Knight*, 582.

"Inventor." *Morewood v. Flower*, 1109.

"Judgment," 10 Vic., No. 7, sec. 3. *Doe d. Long v. Delaney*, 502.

"Laws" and statutes, 9 Geo. IV, cap. 83. *Reg. v. Roberts*, 544.

"Legislative Assembly," sec. 54, 5 & 6, Will. IV, cap. 19. *Ex parte Deedo*, 193.

"Manufacture." *Morewood v. Flower*, 1109.

"Months." *Terry v. Hosking*, 819.

"Nearest gaol, committal to," 14 Vic., No. 9. *Reg. v. Butterworth*, 671.

"Or" in the sense of "and." *Morris v. Taylor*, 978.

"Possession or power," sec. 5, 2 Will. IV, No. 7. *Fisher v. Wilson*, 155.

"Possession, order, or disposition," 5 Vic., No. 17, sec. 55. *In re Hughes*, 265.

"Purchased." *Hall v. Gibson* (No. 2), 1125.

"Real justice and good conscience of the case." *Spenser v. Gray*, 477.

"Realm of England," 9 Geo. IV, cap. 83. *Reg. v. Roberts*, 544.

"Reputed owner," 5 Vic., No. 17, sec. 55. *In re Hughes*, 265.

"Right, title, and interest," Sheriff's sale. *Doe d. Walker v. O'Brien*, 246.

"Right, title, and interest." *Doe d. Cooper v Hughes*, 419.

"Taking" or "decoying" (abduction). *Reg. v. Abbott*, 467.

WRIT.

See ATTACHMENT—EXECUTION—HABEAS CORPUS—QUO WARRANTO, &c.

YEARLY TENANT.

See LANDLORD AND TENANT.

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