THE

AMERICAN LAW REGISTER.

JANUARY, 1865.

RECENT DEVELOPMENTS IN ENGLISH JURISPRUDENCE.

(Concluded from November Number.)

3. The question of domicil discussed, and how far that of the wife is controlled by the husband.

4. Consideration of questions affecting the responsibility of the directors of joint stock companies in regard to purchase of shares made by parties not before shareholders; and how far directors are justified in compromising claims made upon their companies which might be successfully resisted.

5. Brief review of the case of Suffield *v.* Brown, affecting implied easements in different portions of an estate, conveyed to different parties at different times.

6. How far the father is entitled to the custody of his infant child.

7. General statutory exemptions from responsibility in common carriers.

8. At what time the title passes in contracts of sale.

9. How far knowledge of facts, acquired by the agent in other transactions, will affect his principal.

10. How far the master is responsible for accidental injuries resulting from the negligence of his servant.

11. The binding nature of parol contracts and understandings in regard to the title of land after being executed either in whole or in part.

12. How far the owner of domestic animals, straying upon the highway, is responsible for damage there done to persons rightfully there.

13. Upon what grounds compromises made in court and under its advice may be set aside.

3. The vexed question of domicil has recently attracted a good deal of interest before the House of Lords in England, in the

case of *Moorhouse* vs. *Lord*, 9 Jur. N. S. 677, and in *Pitt* vs. *Pitt*, 10 Jur. N. S. 735, which last case was determined so late as April of the present year. In the former case the court declare, that no change of residence will give a domicil in opposition to the domicil of origin, so long as there remains any purpose, however indefinite, of ever, in any contingency, returning to the former domicil. Lord KINGSDOWN'S illustration here was, that to an effectual change of domicil a man must intend to become a Frenchman instead of an Englishman.

In the case of *Pitt* vs. *Pitt*, there was involved in one event, the additional question, how far the domicil of the wife must continue to follow that of the husband, upon which the declarations of the Lord Chancellor were at least novel if not startling. "I should have had the greatest possible difficulty," said his lordship, "in holding that the domicil of the husband was, in a case of this kind, to be regarded in law as the domicil of the wife, by construction or attraction, so as to compel the wife to follow the husband and to become subject, for the purposes of divorce, to the jurisdiction of the tribunals of any country which the husband might choose, even for that purpose alone, to fix upon and declare, that he intended to acquire a domicil." This is probably in accordance with the American law upon the subject, where a separation, in fact, between husband and wife had already occurred; and especially where the husband, after such separation, proposed to select a forum for the mere purpose of acquiring a temporary domicil as the basis of the jurisdiction of a suit for divorce in the courts of that forum. Nothing could be more just and reasonable than such a doctrine within these limits. But such a declaration upon general grounds would deprive the husband of the acknowledged right to change the common domicil, without the concurrence of the wife. The same question has been very recently further discussed before the same court in the Yelverton case.

4. The subject of the responsibility of the directors of joint stock companies, for the effects of acts having their nominal sanction in regard to the apparent value of the shares of such companies, in inducing purchases of the same, is one of considerable difficulty always: and at the present time one of great magnitude and importance in the commercial world, these companies having engrossed so large a share of business capital within the last few years.

A very curious case, illustrating this point, was brought on for trial at the Guildford Assizes within the last few months: *Bale* vs. *Clelland*. The question arose in this way. The auditors of the company differed as to the true mode of drawing up the balance-sheet. In the opinion of one of them it ought to show a loss, while in that of the other it ought to show a profit. This difference of opinion becoming irreconcilable, it was referred to the decision of the shareholders at a general meeting, who naturally enough decided in favor of the scheme showing a profit, which resulted in declaring a dividend. The statute applicable to the subject (19 & 20 Vict. c. 47) contains the following direction as to dividends: "*The directors* may, with the sanction of the company in general meeting, declare a dividend to be paid to the shareholders in proportion to their shares." "No dividend shall be payable except out of the *profits* arising from the business of the company." The action was withdrawn from the jury upon a compromise between the parties, under the direction and advice of the court, but not until the evidence had been given, and some discussion of the questions of law before the court. Baron MARTIN, before whom the cause was tried, gave a very decided opinion against the directors. After repeating the general provisions of the law above quoted, the learned judge said:—"It is the bounden duty of the directors (indeed, I do not believe the shareholders could legally make a dividend, for it is the directors who are to make it), it is the bounden duty of the directors, when they declare a dividend, not to pay it except out of profits; and if a dividend is declared otherwise than out of profits, it is their duty to resist it and to refuse to pay it, and, if necessary, to appeal to the Court of Chancery to resist its payment." This is most manly and salutary counsel.

The question how far the prospectus and balance-sheet issued by directors, and especially the latter, which is addressed exclusively to the shareholders, for their information in regard to the true state of the company's funds, is to be considered open to the inspection and for the information of the general public; and how far the directors are liable for any injury suffered by any one in consequence of buying shares, relying upon facts stated in such prospectus and balance-sheet, was a good deal discussed in *Bale* vs. *Clelland*, *supra*, and in *Scott* vs. *Dixon*, 29 L. J. Ex. 62, note, which is a similar case. In the latter case, Lord CAMPBELL, C. J., said:—"Reports of joint stock companies, though

addressed to the shareholders, are meant for all who are likely to have dealings with the company." And his lordship adds, that the report in that case was open to the inspection and purchase of all, and that the directors knew, that immediately upon publication it would be in the hands of all the stockbrokers in Liverpool, and would be acted upon by all who wished to have dealings with the bank, the company in question.

This question is a good deal considered in *Cullen* vs. *Thomson*, 9 Jur. N. S. 85, where an action was brought in the Scottish courts by a shareholder against the directors and the manager and assistant manager of the Edinburgh and Glasgow Bank, on the ground that he had been induced by their fraudulent report to purchase shares in the bank, whereby he had suffered loss and damage. The manager and assistant manager furnished the detailed statement issued by the directors, and were cognisant of the fraudulent representations contained in the report. The Scottish courts thought that the managers, being the mere servants of the directors, were not liable to an action for their agency in the matter, which might be regarded as merely ministerial and subsidiary to that of the directors. But upon appeal the House of Lords held, that they were personally responsible for any participation in the perpetration of a distinct fraud, and accordingly reversed the judgment of the Scottish courts. The Lord Chancellor in giving judgment said, very justly, "No party can be permitted to excuse himself on the ground that he acted as the agent or the servant of another—the contract of agency or of service cannot impose any obligation on the agent or servant to commit or assist in the commission of a fraud."

A somewhat curious question has arisen in some late English cases, which, we doubt not, *might* be raised very frequently, in regard to the management of American companies.

In *Taunton* vs. *The Royal Insurance Company*, 10 Jur. N. S. 291, a bill was brought by a shareholder, on behalf of himself and all the other shareholders except the defendants, against the directors and the company, to obtain a declaration that funds applied by the directors in the adjustment of losses not strictly within the liabilities of the company, had been misapplied. It appeared that all losses from *explosion*, except of gas, were expressly excepted from the policies of the company. An explosion of gunpowder occurred, causing considerable damage to houses insured by the company, and the directors, as matter of

policy and to avoid clamor, but expressly protesting against all implication of obligation to do so, resolved to pay such losses, and did pay them. This course was approved by a majority of the shareholders, and had been followed by other insurance companies, and was the usual course pursued by such companies. The Vice-Chancellor, Sir W. P. WOOD, held that the plaintiff was not entitled to the relief sought. The risk was within the powers of the company to insure against, and was analogous to those actually insured against, and the course pursued was indispensable to the credit and good standing of the company, and clearly for their interest and necessarily for the benefit of the shareholder. The court held it to be within the reasonable discretion of the directors of the company, in the prudent and proper management of its concerns. A similar decision was made in the case of *Simpson* vs. *The Westminster Palace Hotel Company*, 6 Jur. N. S. 985, s. c., 6 Jur. N. S. 764; Id. 747. But the decision was dissented from by Lord Justice TURNER, in the Court of Chancery Appeal. It seems to have gone upon the ground that the acts complained of were for the furtherance of the general purposes of the association, and that courts of equity will not therefore restrain them, although not strictly within the terms of the charter of the company, or at all events not obligatory upon the directors.

We need scarcely add, that unless such cases are regarded as falling within the range of that somewhat numerous class of matters pertaining to the management of joint stock companies, which are submitted to the private and personal discretion of the directors, and which the courts will not condescend to interfere with, on account of the multiplicity and inferiority of such matters, according to the maxim *de minimis lex non curat;* unless, we say, these cases are to be referred to that category of cases, which are too minute and too insignificant to call for the supervision of the court, like the management of the minor offices and non-essential expenditures of the company, we should certainly hesitate to subscribe to the doctrines implied in their determination. We can comprehend why a court of equity might decline to assume the control of the general and minute detail of the business of a joint stock company; but upon any other ground, except of its minuteness and insignificance, it is difficult to see how the courts could feel justified in declaring that the directors of a corporation could be justified in paying out the funds of the company in the purchase of popularity, or by way of blackmail, or even in buy-

ing peace, except in cases confessedly doubtful. A natural person may do so, undoubtedly, and act wisely; but an agent or trustee certainly has not, ordinarily, any such discretion: and it would, as it seems to us, be a new and dangerous element to introduce into the discretion of persons standing in fiduciary relations. We cannot but feel that there is great wisdom and justice in the dissent expressed by Lord Justice TURNER.

5. The doctrine of implied easements and servitudes, growing out of erections upon adjoining lots, and the erection of blocks of buildings for a common purpose, has been considerably discussed in the English courts of late, but embraces too extensive a range of topics to be here discussed at length. But a very curious question of analogous character arose in *Suffield* vs. *Brown*, 9 Jur. N. S. 999, in regard to the implied right of use continuing the same as it had existed before, after the severance of ownership, without any express reservation. This was the case of a dock and wharf owned by the same party, where the bowsprits of vessels in the dock had to project over the corner of the wharf in order to enter the dock, if they were of any considerable size. The wharf was sold to one, without any reservation of the right claimed, and the dock to another. The bowsprits of vessels continued to be run over the edge of the wharf for a time, after the severance, when the owner of the wharf proposed to make such erections as would interrupt that use, and the question was brought before Sir J. ROMILLY, M. R., who decreed in favor of the right to continue such easement as being necessary to the full and reasonable enjoyment of the dock. The learned judge said, in giving judgment:—"If, therefore, it be true that the dock can still be used, it is equally true that it cannot be used exactly as it has been heretofore; and my opinion is, that this projection is necessary to the due enjoyment of the dock, in the ordinary sense of that term. What is meant by the use of that word in these and analogous cases is, in my opinion, the *full and complete use of the tenement, as it stands, when the joint owner of the two adjoining tenements grants one of them to one person, and the other to another;*" citing *Hinchcliffe* vs. *The Earl of Kinnoul*, 5 Bing. N. C. 1, 25; *Pryer* vs. *Carter*, 1 H. & N. 916.

But when the case came before the Lord Chancellor on appeal, 10 Jur. 111, the doctrine of the case of *Pryor* vs. *Carter* was dissented from and the decree of the Master of the Rolls reversed, upon the ground that mere knowledge of the manner in which pro-

perty conveyed was used by the vendor for the convenience of an adjoining tenement, will not affect the purchaser, if the property is conveyed without reservation, and the continuance of the former use is not indispensable. His lordship's opinion is somewhat diffuse, not to say rambling, and although doubtless sound in the main proposition already stated, contains much disquisition which is either irrelevant or unsound. The case of *Pryor* vs. *Carter* is a sound case, unquestionably, and has been always so regarded, but not decisive upon the question before the court. The true principle upon which all such cases should turn, no doubt, is, whether the continuance of the existing use is indispensable to the future enjoyment of that portion of the premises reserved, so that the purchaser of the portion first conveyed, as a reasonable man, must be presumed to have taken his conveyance with the expectation that such use would be thereafter continued the same as before; if so, the continuance of the use becomes by the assent of the purchaser an implied servitude upon the portion conveyed, which a court of equity will enforce by perpetual injunction; otherwise not.

The decision of the Lord Chancellor, in *Suffield* vs. *Brown*, and especially in disregarding, and, as far as lay in his power, overruling the case of *Pryor* vs. *Carter*, has been strenuously dissented from by the bar in England; and we anticipate that the *obiter dicta* of his lordship will not be generally regarded as law, either there or here, although his decision of the particular case, and the grounds upon which it is placed, may be considered sound. The truth is that his lordship is not so much of a lawyer as an advocate; and although he is sometimes right in his conclusions upon the particular case, he is generally more or less wrong in the speculations and reasons by which he attempts to fortify and defend his decisions.[1]

The rule of law upon the subject of implied easements is, no doubt, correctly laid down by WILDE, B., in *Dodd* vs. *Birchall*, 8 Jur. N. S. 1180, 1 H. & C. 113, in these words:—"Where a man has used his premises in a certain way for some time, and it can be brought home to the knowledge of the purchaser, the conveyance may be supposed to be made with an intention of reservation on the part of the grantor, and the land passes subject to such a use." The case of *Pryor* vs. *Carter* is quoted as correctly laying down

[1]London Jurist, Feb. 27, 1864, leading article. Communication in same, 19 March, 1864.

the law, by Lord CAMPBELL, Chancellor, in the House of Lords, in *Ewart* vs. *Cochrane*, 7 Jur. N. S. 925, so late as 1861, where the rule of law is thus stated in the opinion of the court. "Where two properties are possessed by the same owner, and there has been a severance made of part from the other, any thing which was used, and was necessary for the comfortable enjoyment of that part of the property which was granted, must be considered to follow from the grant." The only possible distinction between this proposition and the case of *Pryor* vs. *Carter*, consists in the fact that in one case the implied easement is attached to the portion first conveyed, and in the other it attaches to the portion reserved; in other words, the distinction consists in the difference between the construction of a grant and a reservation. This distinction has long since become practically obsolete in the law, except that in a case precisely equally balanced in point of construction, between the grantor and grantee (a contingency which seldom or never occurs), the equipoise is determined in favor of the grantee. It is idle, at the present day, to claim that any essential distinction between the construction of a grant and a reservation can be maintained. We conclude, therefore, that such a point, not even alluded to by the House of Lords in a case where it existed, and was decisive of the question in judgment, if adhered to, will not be held of serious weight: and that *Pryor* vs. *Carter*, and the doctrines built upon it, will still be held sound until overruled by the same court which declared them, that being the highest court in the land.

There are so many other points in the recent English decisions which we had marked for consideration, that we can only allude to them in the briefest manner.

6. We refer to a late decision in the court for divorce and matrimonial causes, in regard to the right of the father as against the mother to the custody of his infant child. The English courts seem disposed to adhere to this rule of the common law with great strictness, not to say pertinacity. In the case referred to, *Cartledge* vs. *Cartledge*, 31 L. J. P. M. & A. 84, the rule was carried to the extent of ordering an infant seven months old given to the father. By the English statute this court have a discretionary power, in regard to the custody of children pending a litigation between the parties for divorce in any form, or upon any kindred suit. But the judge here held, that in order to justify the mother in claiming the custody of her children as

against the father, she "*must establish something more than her maternal rights.*" It was admitted in this case, that although the mother was not absolutely nursing the child, she was in every sense the most suitable person to have the custody of it, but the case was decided upon the superior right of the father above that of the mother to the custody of his children. The question is considered by Vice-Chancellor KINDERSLEY, *In re Curtis*, 28 L. J. Ch. 459, where it was held that in order to take the custody of an infant child, incapable of exercising a discretion upon the subject, from the father, it was requisite to show that he was in such a perverted state of mind or morals, or entertained such religious opinions, that he would be likely to inculcate such views upon the minds of his children as to be seriously detrimental to them in after life as members of society; or that he treated them with such severity or cruelty as to be wholly unfit to have the custody of them.

This rule of the English courts does not, however, extend beyond the period of the child's discretion to choose between the parents; which period, to avoid contests, has been fixed by the English courts at the age of fourteen: *Alicia Race*, 26 L. J. Q. B. 169; *Hyde* vs. *Hyde*, 29 L. J. P. M. & A. 150.

We cannot forbear to say, that in our judgment, the rule which is now very generally established in the American States, of giving the custody of children, below the age of discretion, to the parent that upon the whole seems most suitable to exercise the custody, is the most just and reasonable rule upon the subject, always giving the father the preference, other things being equal. The rule of the common law which recognises the superior rights of the husband as to all matters pertaining to the control of the family, while the parents continue to live together, has not the same reasons of necessity or convenience in its favor after they become separated. The courts may then fix the custody of the children as they think will most conduce to their careful training, education, and comfort, without the violation of any rule affecting quiet and good order in families: a right which is now generally secured in the American States, either by custom or statute, but not in all, we are sorry to say.

7. In the case of *Hodgman* vs. *The West Midland Railway Company*, 10 Jur. N. S. 673, Jan. 1864, the extent of the responsibility of common carriers for the transportation of live animals as freight, and for accidents while upon their premises, and before they are regularly billed and the freight paid, and

how far general exemptions from responsibility will attach, is elaborately discussed and the rule declared that such exemptions attach from the first connection of the carrier with the property, the Lord Chief Justice dissenting.

8. The precise point of the finality and of the passing of the property in a contract of sale, was extensively discussed in *Turley* vs. *Bates*, 10 Jur. N. S. 368, April, 1864, and the doctrine declared that the rule that no property passes, where by one of the terms of the contract, anything remains to be done to the subject-matter of the contract, does not apply where it appears to have been the intention of the parties that the property should pass notwithstanding. And it is here suggested that this rule never applies, unless something remains to be done by the *seller*. How far these declarations of the Court of Exchequer will be adopted by the courts of last resort, it is impossible to say; but we cannot forbear to suggest the very obvious conclusion that the simplicity and perspicuity of the rule of law, upon this vexed question, is certainly very much increased by the doctrine and the intimations here put forward.

9. The Court of Exchequer Chamber, in the very late case of *Dresser* vs. *Norwood*, 10 Jur. N. S. 851, June, 1864, adopted a rule in regard to the effect of knowledge in the agent acquired in other transactions than those belonging to his agency, and how far such knowledge will affect the principal, which will be regarded as a very important qualification of the former rule upon that subject, viz.: That the knowledge of an agent is the knowledge of his principal, and the principal is affected by it, whether acquired by the agent in the course of his employment as such, or otherwise. This opinion of this high court of error, in which, by a unanimous judgment, the decision of the Court of Common Pleas, 10 Jur. N. S. 23, is reversed, cannot fail to impress the profession with the expectation that the new doctrine in the law of agency thus declared will be likely to be adhered to. We cannot but regard this as an important advance in the right direction. It is a view of the responsibility of the principal for the act and the good faith of his agent, which we cannot but rejoice to see adopted by so dignified and learned a tribunal; one which, in our humble way, and in a narrower sphere, we labored most earnestly to vindicate and to recommend in the case of *Fitzsimmons* vs. *Joslin*, 21 Vt. R. 129, and in *Hart* vs. *Farmers' & M. Bank*, 33 Vt. R. 252. In the latter of these cases the rule declared is almost precisely identical with that

declared by the English Court of Exchequer Chamber, viz.: That if an attorney receive notice that the person holding the record title of land is not the real owner, but merely a trustee, one who subsequently employs the same attorney to attach and levy upon the land as the property of the trustee, will be affected by the attorney's knowledge of the true state of the title, though not communicated to him before the attachment. This declaration of the Supreme Court of Vermont was, not without reason, regarded at the time as a very important departure from the former rule of law. We are not so simple as to suppose that our own views could, by possibility, have influenced the result to which the English courts have finally arrived; nor is the coincidence so novel as to impress us with any surprise, having experienced similar coincidences many times before; but we feel at liberty to express our gratification, because it is a great advance, in a very essential point, towards the recognition of the principle that good faith and fair dealing is the only ultimate basis of all the doctrines of the old common law of England and America. And we confess also to some willingness to afford the American bench, especially those of them who feel any painful sense of reluctance at the adoption of any principle, however strongly recommended by its sense of justice and right, provided it do not also come recommended by an express decision in its favor, or, what is more appalling to a mind perplexed with doubt and uncertainty, when it runs counter to a long course of judicial determinations; we feel desirous of affording such, if any such there be, a palpable illustration of the old maxim, that truth is mighty, and that we are always safe when we are clearly following in its train: *magna est veritas, et prævalebit.* But we should be sorry to be misunderstood, as in any sense urging a bold and defiant attitude in regard to the established course of judicial decisions. Nothing could be further from our wishes. It is only in extreme cases, and where there is no room for doubt, that the former course of judicial decision can be with safety disregarded, and in such a case there should never be any hesitation. We are glad also of this opportunity of stating a fact which is most undeniable, but not generally understood, perhaps, that the American bench are far more slavishly bound down to the authority of precedents, and feel far less liberty, so to speak, to walk upright and to regulate their course by an adherence to principle, than do the English judges. Inferior courts everywhere, as matter of taste as well as duty, must bow to the force of authority.

But the courts of ultimate authority labor under no such embarrassment; and it must result either from want of perception or want of courage, when a palpable disregard of the clearest principle, truth and justice, is maintained out of the most subservient and unquestioning deference to the authority of former precedents, however strictly in point.

10. There is a somewhat interesting question in regard to the responsibility of the master for the act of his servant, determined in the case of *Woodman* vs. *Joiner*, 10 Jur. N. S. 852, that where the plaintiff permitted the defendant to use his shed for doing a piece of carpentering, and the carpenter employed by the defendant, in lighting his pipe, set the shed on fire, that the defendant was not liable in any action for negligence. The court say:—"We have had much doubt upon this question, but have all arrived at the conclusion that there is no liability." "If the servant had been guilty of any negligence relating to his employment, it may be that the defendant would have been liable." It seems to us very obvious, that the master cannot be held liable in such a case unless guilty of some negligence himself in the employment of improper servants, or of improperly continuing them in service after becoming aware of their want of proper carefulness, or unless the servant does an injury, by negligence or wilfulness, in the course of his employment, whereby he becomes liable to his employer, in which case the defendant may be held directly responsible to the owner of the shed, because there is no privity between him and the defendant's servant.

11. In the case of *Thornton* vs. *Ramsden*, 10 Jur. N. S. 839, May, 1864, the question how far the owner of land is bound by parol contracts and understandings with lessees, who make erections of a permanent nature upon the faith of such understandings growing out of the customary management of the estate, and whether such contracts are enforceable in courts of equity, came before Vice-Chancellor STUART, and was extensively discussed, and the binding nature and force of such contracts and understandings fully maintained. The case is valuable, as well for the elaborate and learned review of the authorities, as for its full vindication of this important branch of equity jurisprudence.

12. The case of *Cox* vs. *Burbridge*, 9 Jur. N. S. 970, January, 1863, where it was held, that the owner of a horse, which strays upon the highway and there kicks a child, lawfully in the highway, is not responsible, unless it appear that the owner was

aware that the horse was likely to commit such an act, has created some discussion in England, and provoked some unfriendly criticisms, and as it seems to us, not altogether without reason. It seems almost incomprehensible that any one should require proof that the owner of a horse was made aware of its propensity to do damage when running at large in the highway. If the horse was wrongfully in the highway, and did damage in consequence to any person or thing rightfully there, the owner or keeper should be responsible, as it seems to us.

13. The case of *Stainton* vs. *The Carron Company*, 10 Jur. N. S. 783, in the House of Lords, July, 1864, before the Lords Justices, 7 Jur. N. S. 645, and before Sir JOHN ROMILLY, M. R., 6 Jur. N. S. 360, involves an important question, in all its bearings, especially in regard to the binding effect of a compromise between the parties made in court and under its advice. The House of Lords, by the mouth of the Lord Chancellor, declare, that the compromise was not binding when the cause of action grows out of the fraud of one party, which, although not known, was suspected by the other party before the compromise. Of the truth of this proposition we should not be disposed to raise any question. The only doubt which occurs to us in regard to the propositions maintained by the opinion in the House of Lords is, as to a point where the Lord Chancellor somewhat censoriously presents an extended criticism upon the form in which the Lords Justices required the decree before them to be drawn up, as being altogether uncalled for. The minute explanation of the point would carry us beyond our limits. It turned upon the effect of a decree of the Court of Chancery, upon a bill for an account between parties, from the year 1808 forward, where the decree was limited to the accounts subsequent to the year 1825, and the subsequent suit was for matters earlier than 1825. The Lords Justices regarded it important to take the admission of the parties that the last suit should be treated, as supplemental to the former, while the Lord Chancellor held that the latter suit was maintainable as a wholly independent suit. It seems very obvious to us, upon any recognised rule of decision, that the account was one entire thing; and if so, it is equally clear that successive suits for different portions of it cannot be maintained, and, by consequence, that the former adjudication would form a bar to any other suit except as supplemental to the former one.

There are one or two other matters to which we would gladly allude here, but our space will not allow. I. F. R.