It is to be hoped that the industry of his boyhood will characterize the discharge of the duties appertaining to the high office which he now fills. Noted as the Crown Lands Department was for numbers of undetermined cases, he will find still more in the Court of Chancery. The illness of the late Chancellor long before his resignation, and the vacancy in the office since his resignation, have added much to the work of the Court. The two Vice-Chancellors have been far from idle, but the work to be done was more than enough for any two men, however industrious or however able.

AUDITA QUERELA.

The indulgence shown by the Courts in modern times, by way of motion, has in a great measure superseded the remedy by Audita Querela. Still there are cases in which a resort to that proceeding is necessary. The proceeding is neither obsolete nor difficult. Owing to the fact that it is little used there is not much to be found in the books about it.

We therefore propose to devote some of our space to the consideration of the following:—The nature of the writ—Persons entitled to it—How obtained—From what Court issued—Form of writ—Process thereon and effect thereof—Subsequent proceedings—Damages and costs.

1. *Nature of the writ.* The proceedings of courts of justice are not to be perverted to purposes of injustice. Audita Querela is a proceeding invented to prevent the procedure of courts of justice working injustice. It is in general allowed where a party having a good defence at law has no opportunity of setting it up by the ordinary forms of proceeding in courts of law. Thus it lies for a person who is either in execution or in danger of being so upon a judgment or recognizance, when he has matter to show that the execution if issued ought not to have issued, or if not issued should not issue (2 Wms. Saund. 147, 1.) It is a mode of obtaining relief from a judgment at law just as scire facias is the mode of enforcing such a judgment. It is in the nature of a bill in equity, and yet defendant is not, either by the existence of the remedy or by having unsuccessfully resorted to it, precluded from bringing his original bill in equity for relief (*Williams* v. *Roberts*, 8 Hare, 315).

2. *Persons entitled to it.* The writ is only granted upon the application of a party to the judgment, or a person in privity with a party to the judgment. It will be refused when the applicant is a stranger to the judgment. Thus, where applicant had purchased lands from a judgment debtor after execution issued, under 5 Geo. II. cap. 7, contending that as plaintiff was an alien the execution was improperly issued, the court refused to interfere, leaving applicant to his action of ejectment against the purchaser at sheriff's sale (*Beard* v. *Ketchum*, 8 U. C. Q. B. 523. See also Bac. Abr. Audita Querela.) It is not a remedy to which a plaintiff can resort. It is peculiarly intended for relief of a defendant from the oppression or injustice of a plaintiff (*Aldridge* v. *Buller*, 2 M. & W. 418, per Parke, B.)

3. *How obtained.* The Rule of Court, Trinity Term, 9 Jac. I. is as follows:—"That no writ of audita querela for any cause whatever be allowed, nor bail thereupon taken, unless here in public and open court and by special motion here first made and a rule thereupon entered" This has been held to mean that the writ shall not issue without an order made *in open court* (*Beard* v. *Ketchum*, 8 U. C. Q. B. 533). In England it is now provided that "no writ of audita querela shall be allowed unless by Rule of Court *or order of a Judge*" (Eng. R. 79, H. T. 1853). This rule is not adopted in Upper Canada. The authority of a Judge in Chambers in Upper Canada is under the circumstances very doubtful. At one time it was thought that the writ being ex debito justitiæ might be issued without any application to court or judge. There was, however, no decision to that effect, and it has since been said that the Rule of 9 Jac. I. above mentioned is only declaratory of the common law (*Dearie* v. *Ker*, 7 D. & L. 231).

4. *From what Court issued.* An audita querela may be brought in the same court in which the record upon which it is founded remains, or be made returnable in the same court. Therefore in England it has been held that if a man recovers judgment in the Common Pleas or Queen's Bench, and afterwards by deed releases it and then sues out execution, the defendant may have an audita querela out of the Common Pleas or Queen's Bench where the record is; and yet he may have an audita querela out of Chancery returnable in the Common Pleas or Queen's Bench, "and so it is sometimes judicial and sometimes original" (2 Wms. Saund. 148 f.). But it cannot be issued out of any court returnable in the same court where the record upon which it is founded is not in such court (F. N. B. 105 b.).

5. *Form of writ.* The writ, after stating that the complaint of the defendant having been heard (*audita querela defendentis*), and after setting out the matter of the complaint, enjoins the Court to call the parties before them, and having heard the allegations and proofs to cause justice to be done between them (See forms in 2 Wms. Saund. 148 a. *Porchester* v. *Petrie*, 3 Doug. 261.)

6. *Process thereon and effect thereof.* An audita querela is not a supersedeas of execution (2 Wms. Saund. 148 f.). If the writ be founded on a record, or the party be in cus-