DIARY FOR OCTOBER.

1. Wed... Clerk and Deputy Clerks of Crown and Master and Registrar in Chancery to make quarterly returns.
6. SUN.. *19th Sunday after Trinity.*
7. Mon... County Court Term begins.
12. Sat.... County Court Term ends.
13. SUN.. *20th Sunday after Trinity.*
15. Tues.. Law of England introduced into Upper Canada 1792.
18. Fri.... *St. Luke the Evangelist.*
20. SUN.. *21st Sunday after Trinity.*
25. Fri.... *Crispin.*
27. SUN.. *22nd Sunday after Trinity.*
28. Mon... *St. Simon and St. Jude.*
31. Thurs. *All Hallow Eve.*

CONTENTS.

THE

Canada Law Journal.

OCTOBER, 1872.

Our advertising columns announce the publication of a new work by Mr. S. R. Clarke, of Toronto, Barrister-at-Law, on the Criminal Law of Canada, which we have reason to think will be not only a success in itself, but also of immense service to the Profession and Magistracy in the Dominion at large. We have not yet had an opportunity of examining it, but a cursory glance would seem to show that it will prove a most valuable treatise on the criminal law as it applies to this country.

A pretty fair test of the confidence of the public and profession in their Judges is the number of appeals from their decisions. A return to an address of the House of Commons of Canada gives a statement of the number of cases taken before the Privy Council in 1869, 1870 and 1871, from Ontario, Quebec, New Brunswick and Nova Scotia, and the information given is highly suggestive. There have been only two cases actually appealed from Ontario; and though appeal bonds were filed in two other cases, no further action will probably be taken in them. Quebec has sent no less than twenty-one cases to the Privy Council, six in 1869, five in 1870, and ten in 1871. This points to a pleasant state of uncertainty in the minds of the profession in the Province of Quebec, as to what the law is in a variety of cases, and shews a laudable desire on the part of the litigants "to get to the bottom of it." The Supreme Court of New Brunswick has, during the same period, granted leave to appeal in six cases; but the courage of those concerned has partly failed them, for only three have been transmitted to England, and no action appears to have been taken in these. Only one case has been appealed during the same three years from Nova Scotia; and the further information is given in the return, that only three cases in all have been taken to England from that Province since 1860, when Sir Wm. Young was appointed Chief Justice of the Supreme Court. It will thus be seen that,

taking into consideration the business done in Ontario, the number of appeals is almost nominal as compared with Quebec, and much less than those in the other Provinces. The encouragement given to those who desire to have a *final* decision is not very great; for, out of all the cases referred to England, judgments have been given in only three of the Quebec appeals and in none of the others; two of the Quebec judgments having been reversed, and one confirmed.

The Lord Justice James has a way of interjecting very quotable and pungent sentences in his judgments. For instance, the other day he gave the pith of a much-used line of argument both for and against the Court of Chancery in a few words. A question arose upon the right of the Westminster District Board of Works to interfere with some buildings being erected by Lord Auckland, which they threatened to pull down by virtue of certain statutory powers. Upon demurrer to the jurisdiction the Lord Justice observed, "I have no doubt that this is a case within the jurisdiction of this court, so that the matter may be determined once for all, instead of leaving Lord Auckland to go before a magistrate and to discuss with him the question of jurisdiction and the construction of the Act of Parliament, which it is said on the part of the defendants involves some difficulty, and then, perhaps, to go to the Court of Queen's Bench to have the thing tried by *certiorari*. Of course, some persons may object to this court, but it is not the habit of this court to say that it is so bad a tribunal that people should go to all these different places, rather than come here to have their grievances decided."

We lately culled out a few judicial strictures upon the way in which some of the Canadian County Court judges do their work. We observe from a late judgment of Sir Robt. Phillimore, in an admiralty appeal, that his spirit has been vexed from a like cause. He mildly called attention to the fact that there were two things which concurred to render it impossible for the court to come to any satisfactory conclusion on the materials before it. First, it appeared that the notes of the evidence were merely rough notes taken by the learned judge of the County Court of Northumberland for his own guidance, and though no doubt (as he charitably puts it) sufficient for his purpose, yet they could not be regarded as satisfactory for the purpose of an appeal. Second, that he (Sir Robert) was without the assistance which, in many cases of the kind, he had derived from a statement of the reasons which influenced the court below in arriving at the decision appealed against. *The Busy Bee*, 20 W. R. 813. From all which it would appear that there are County Court judges who are alike all the world over.

LAWYERS IN PARLIAMENT.

The elections for the Dominion House of Parliament being now over, it may not be out of place to see how the legal profession in Ontario is there represented. We find on looking at the list, that out of the eighty-eight members for Ontario, some twenty are barristers, and of these seven are Queen's counsel. It would be highly uninteresting to discuss the question as to the propriety of having a large number of lawyers in Parliament, and we presume the usual number of "clap-trap" speeches have been made on that subject whenever a suitable occasion was presented by a member of the legal fraternity being a candidate, without in the slightest degree affecting the result of his election. But it is interesting to note the classification of those who have been elected.

Of course the first on the list is the statesman and great constitutional lawyer, who has for so many years ruled the destinies of this Dominion, but who has during that time been separated from the practice of his profession. The most prominent figures next to the Minister of Justice are, on one side of the House, the veteran and eloquent leader of the Bar in Ontario, the Treasurer of the Law Society, and on the other, one who, though his junior by many years, has in a short period of time by his high talent and great learning obtained a reputation at the Equity Bar of this Province which has never been equalled, and who is as well known to the country at large as he is in the profession. Of the rest, however, there are not very many whose names are familiar either on circuit or at Osgoode Hall. This may be to some a matter of surprise, but a little consideration will easily explain the reason. In fact, we need not recapitulate in

our own language what has already been stated publicly by lawyers in Parliament on this subject. Mr. Blake, in one of his speeches, said, when replying to some attack made upon him:

"When I went into public life, I was an active member of a large firm, and had a large and increasing share of the profits, producing to me at that time over £3,100 a year. Now my position is very different, for I have a fixed income from the firm of £1,200 a year only, while I should be receiving over £3,000 if I had remained in private life. I can gain nothing from the increased profits of the firm," &c.

Small encouragement this to ruin one's health in the public service. Even if in receipt of an official income in addition, Mr. Blake's salary would be considerably less than what he would receive from his profession. Of course, professional men who enter public life do not do so (at least we do not care to discuss the standing of those who do, if such there be) for the purpose of increasing their incomes, but those who thus devote themselves to their country, have other ills to bear than the mere loss of incomes. This part of the subject has been amplified by Mr. Harrison, when replying to an address of his constituents asking him again to become a candidate for West Toronto. His observations contain so much sound common sense, and so fully cover the ground, that we reproduce them. He says:

"I cannot longer owe a divided allegiance, part to professional and part to parliamentary duties, * * * and I cannot, after mature deliberation, hesitate as to the choice.

"What is it to be a member of the Parliament of Canada? It is yearly, at a most inconvenient time, to leave one's home, to neglect one's business, to work hard for the public, with the prospect of little or no thanks; to be abused when honestly doing what one's conscience conceives to be for the public interest; to have the worst possible motives imputed; to work day by day in committees of the House, considering all manner of details; to pass sleepless nights in an unhealthy atmosphere; and so to continue from year to year, and in the end, to be cast aside or elevated to office—and, if so elevated, to live a life of great drudgery and respectable poverty.

"What is it to be a member of the Canadian bar? It is to attend to one's business, to be well paid for what one does, to be praised for the honest discharge of duty, to be free from the imputation of unworthy motives, to work when and so often as one pleases, to have one's rest when rest is needed, to obtain a position worthy of honourable ambition, to retain it so long as one's health and energies will permit, and so to work from year to year in the almost certain hope of independence.

"It may be said that these views are selfish. No doubt they are so. But the law of self is a fundamental law of nature. The man who affects to disregard this natural law is as surely punished as the man who violates human law. An empty pocket and broken health are too often the penalties of faithfully serving the public, to the neglect of one's immediate interests.

"There are, in almost every constituency, some men who can serve the public with less inconvenience to themselves than others. Men who, by reason of large fortune, are independent of the sheriff, may safely do so. Men who have nothing to lose, and so nothing for the sheriff, may also do so. But the middle man, who has something to lose, and is desirous of increasing that something for the sake of his family, has everything to lose and little to gain. What is the gain? Perhaps after years of toil a position in the Government, a position which enables the malignant to attack with greater malignity, a position which demands of the sufferer unwearied exertions for less pay than the salary of a bank manager or the income of a second-class lawyer. And yet men are found, election after election, to summon caucuses, to attend conventions, to accept nominations, to address public meetings, to be slandered by one political party for enlisting under the banner of the other political party, to banish themselves from house and home, and yearly to imprison themselves for two or three months at hard labour within the walls of a House of Parliament. It is well that there should be such men. Selfishness is, I admit, a low spring of action, ambition is a more popular one. Some men are vain of distinctions. The ability to write M.P. after one's name, or to have the prefix of "Honourable" is, by some, deemed worthy of all the sacrifices which I have detailed. I have counted the cost, and am no longer prepared to continue the sacrifice. If ambition alone were the object of my life I would, perhaps, continue in public life. But one, in flights of ambition, is frequently reminded that humanity needs sustenance, and that other calls, if not so lofty, are not, on that account, to be despised."

We may here *en passant* quote an observation on the above remarks of Mr. Harrison by Mr. Goldwin Smith, in the *Canadian Monthly*, when speaking of the demoralizing tendency of political struggles:—

"The parting address of Mr. Harrison, of course, afforded a butt for the arrows of small wit. Yet, amidst the torrent of electioneering trash, it was, perhaps, the one thing worthy of a moment's remembrance. We shall find that it is necessary to make public life tolerable to sense and self-respect, or to pay for their exclusion."

Of course, there are prominent men, leaders of political parties, who will be found ready, though not willing, to sacrifice their own ease and comfort on the call of patriotism or ambition, but these are so few as to form the exception; and whilst we honour these for their patriotism, or pity those for their ambition, we can scarcely wonder that so few of those who have taken a first place at the Bar, think it worth their while to venture on the stormy sea of politics.

DUTIES OF JUDGE AT NISI PRIUS.

It will be well for our readers to note that some of the views expressed by Mr. Justice Gwynne in *Walsh* v. *Nattrass*, 9 C.P.453 have been contravened by the effect of a late decision in England. We refer to his remarks as to the duty of the judge at Nisi Prius to stop the case when it appears in the evidence, that a felony was being made the foundation of an action for damages, before the criminal act had been adjudicated upon by the proper criminal tribunal. His views proceeded upon the authority of various English and Canadian cases cited in the judgment, all of which must be now held to be overruled by *Wells* v. *Abrahams*, 20 W. R. 659, Q. B., a report of which, taken from the *Law Times*, will be found in another place. Mr. Justice Lush was pressed by the defendant to non-suit, or to direct a verdict for him, but he declined to stop the case or to withdraw the issues from the jury. That ruling was upheld by the court, Cockburn, C. J., observing, "The only question which we have to consider is whether my brother Lush was called upon to interfere. Now I am totally at a loss to see from what source that power could be derived. The judge is frequently not even a member of the court in which the proceedings are being tried; he is merely an instrument for the purpose of trying the issues. On a proper application he might, perhaps, let it go to the court to determine what should be done, but at the trial he can only deal with the issues on the record." With this view all the judges express their concurrence. The effect of the decision is to over-rule *Wallock* v. *Constantine*, 2 H. & C. 146, upon which Mr. Justice Gwynne's opinion mainly proceeded. These views, though at first not agreed to, appear to be adopted by Hagarty, C. J., in *Williams* v. *Robinson*, 20 C. P. 255, but they must now be taken not to be law.

SURROGATE COURT ADVERTISEMENTS.

In the palmy days of Chancery practice, administration suits were considered fair game for the profession. One of the English Vice-Chancellors, who loved his joke, was wont to say when pronouncing judgment on applications of this kind, "Let the usual order go for the destruction of the estate according to due course." But now-a-days, "*Nous avons changé tout cela.*" Yet still a strict eye has to be kept upon all matters pertaining to the estates of deceased persons. Very often there is no one who has a personal interest in keeping down the expenditure connected with the adjustment of such estates.

Our attention has been lately called to a quite unnecessary outlay for disbursements in publishing advertisements of the Surrogate Courts for next-of-kin and the like, prior to grant of administration. Take, for instance, cases arising under the 35th section of the Act, C. S. U. C. cap. 16, where a citation or summons is published pursuant to the 20th Rule of Court. It is true that this rule requires the judge to direct by special order in what papers the citation or summons is to appear by way of advertisement, but neither statute nor rule of court requires that both the order and the citation should be published as is almost invariably done. There is no propriety in publishing—no necessity to publish the order: all that is accomplished by so doing is to double the length and the expense of the advertisement. The order is intended, not for the information of the persons cited, but for the guidance of the officers of the court and the solicitors in charge of the business.

COMMERCE IN LAND.

In former years, Mr Cobden was one of the most conspicuous movers in England in agitating for the adoption of a scheme tending to reform the law relating to land, in its posses-

sion, enjoyment and disposition, and in matters referring to its title by inheritance or purchase. His views were, that the law should be so changed as to give greater freedom to the alienation of land, so that owners willing to sell, and persons of means willing to buy, should be able to deal together with safety and expedition, and also without undue expenditure in searching and clearing up the title. To this end, he favoured the adoption of the law of primogeniture, and was prepared to advocate the incorporation into English law of certain portions of the French legal code. Since his time, there has been a movement in the same direction going on in England to a greater or less extent. The last manifestation of its progress is to be seen in the proceedings at the Social Science Congress for this year.

Mr. Jacob Waley, one of the conveyancing counsel of the Court of Chancery, read a very comprehensive and able paper concerning the best means for facilitating the transfer and disposition of land,—having special reference, of course, to property in England. He does not deal with the subject of registration of title, which gives Canada an immense advantage in the ease and simplicity, to say nothing of the smallness of expense, with which land can be transferred from owner to owner. But he suggests certain changes in the mechanism of the English system, which are of value here in so far as we have adopted the English law of real property. These details he has grouped under six divisions, as follow:

"I. It will hardly be questioned that the length of time allowed by law for the assertion of dormant claims largely contributes to the expense and difficulty of the preliminary investigation to which the title to land is subjected upon transfer. Now, the length of time which ought to operate as a bar to an unasserted title must, of course, differ according to circumstances. When the law is not easily accessible or put in motion, when communications are imperfect and intelligence travels slowly, so that opportunities are given to the powerful and the crafty to wrest the devolution and ownership of land out of its lawful course, a longer time must obviously be allowed for the assertion and restoration of displaced titles. No one, probably, has ever perused our older law books, from Littleton downwards, without noticing the great space and importance given to the subject of disseisin or forcible dispossession of the rightful owner of land, and inferring the comparative lawlessness of the times when disseisin was regarded as among the ordinary contingencies of landed property. At present a possession, adverse to the true legal title, has very rarely any other foundation than accident; and when a misconception of this kind has once occurred, it is rarely brought to light otherwise than by accident. Such windfalls of fortune it seems consistent with a sound jurisprudence rather to discourage than to promote. Even under the old law, a fine followed by non-claim for five years operated in most cases as a conclusive bar; and it appears to me that in the circumstances of modern society, a period of five years, instead of the twenty now given by the Statute of Limitations of the 3 & 4 Will. IV., would be quite sufficient to allow for the assertion of dormant or displaced rights, with the addition, say, of ten years more in cases of infancy and absence.

II. Under the present Statute of Limitations of 3 & 4 Will. IV., an adverse possession gained by time against a tenant for life is inoperative against his successors in interest, each of whom gets a new period of twenty years from the time at which his own interest would commence. It has been suggested, and in that suggestion I concur, that adverse possession should operate against the estate—that is to say, not merely against the limited owner, during the currency of whose interest the adverse possession takes place, but against the whole series of owners having successive interests, who for this purpose should be considered as represented by the owner entitled to the possession and barred by the non-assertion of his rights.

A proposal to the above effect was, I believe, contained in a bill unsuccessfully promoted some years since by Lord St. Leonards. It may appear unjust that the *laches* of the tenant for life should bar the remainderman, but I think that the injustice is apparent only, the impression being due to our technical conceptions as to the ownership of land. If the limited owner, instead of being called tenant for life, were regarded as owner of the estate, but with a limited power of alienation, there would be nothing repugnant in the estate being bound by his *laches*. Besides, the case of land being recovered by the remainderman after the tenant for life has been barred by adverse possession, is so rare as to render it inexpedient that it should be the subject of special legislative provision. *In ea quæ frequentius accidunt subveniunt jura.* It must be admitted that both the changes here contended for, namely, a shortening of the period of limitation and the operation upon the estate of adverse possession as against a limited owner, would require the broad and free exercise of the jurisdiction to deal with cases

of fraud so as to prevent unjust acquisition by trustees and others having peculiar means of knowledge or influence, or owing to collusion between the limited owner and the wrongful possessor.

III. As under the course of dealing by which a purchaser is protected—roughly indeed, but on the whole pretty effectually—against concealed incumbrances, the possession of the title deeds is that on which he has mainly to rely as evidence of the safety of the title, it is most desirable to eliminate those risks which arise when the ownership of the title deeds is not accompanied by the full and unencumbered ownership of the estates. The predicament of an owner in fee, who by settlement has reduced his estate to a tenancy for life, and who, retaining the title deeds, would, by mere suppression of the last settlement, be able to present all the outward signs of absolute ownership, is constantly present to the apprehensions of the conveyancer. The danger occasioned by this facility for fraud might be obviated, if the law required, as a condition of the validity of settlements of land against a subsequent purchaser, that the settlement should be enrolled, say, at the Common Pleas, at which searches have in ordinary course to be made before the completion of the purchase. For the purpose of such an enactment, a settlement might be defined as an instrument (not testamentary) by which successive interests are created in land or the proceeds of land, or by which the land is subjected to any charge otherwise than for the payment of money lent.

IV. Though I think that the system of settlement by which persons in being are restricted to the enjoyment of land or of the income of the proceeds during their lives, and the corpus is retained for the next generation, is one which has unanswerable claims to be preserved, I do not hold the same opinion with regard to the ingenious and elaborate system of protection to estates tail, which prevents alienation by expectant heirs, and which is supposed to be one of the most powerful means of keeping estates in the same family from one generation to another. To what extent the transmission of family estates is really perpetuated by this system is a matter on which opinions would probably differ. My own opinion is that the perpetuation of estates in the same family would not be materially affected by the abolition of the system of protection.

But regarding, as I should, with regret, any large inroads on the permanence of landed property as a family possession, I nevertheless consider that this permanence, so far as not secured by the sentiments and principles of the proprietary class, has no claim to be specially protected by law. I think, therefore, that it would be a beneficial change, calculated to promote the free circulation of land both by removing restrictions to which it is needlessly subjected, and by dispensing with a mass of technical difficulties, if estates tail existed only for the purpose of defining and limiting the devolution of the land, so long as not disposed of by the act of the tenant in tail, and if the tenant in tail, whether in possession or reversion, had in all cases the full power of disposing (subject, of course, to prior interests) of the fee simple of the land.

V. The want of a real representative or person who, upon death, can exercise the same powers over the real estate as the executor has over the personal estate, has been long acknowledged, and should be supplied. I think that the personal representative might, without inconvenience, have in all cases the power to sell or mortgage the real estate of the deceased, and to receive the money. The practical conveyancer, who probably finds in informal wills the most frequently recurring obstacle to alienation will best appreciate the importance of an improvement by which this source of difficulty will be got rid of.

VI. The last alteration which I am about to propose, is a great extension of the existing facilities for the letting on lease and for the sale of settled estates. The Settled Estates Act was itself an important measure of relief, of which advantage has been extensively taken. But the power of letting property for any purpose for which it may be adapted, and of selling it into the hands best able to develop its capabilities, is one which ought in the public interest to exist universally, and to be easily exercisable. The machinery of notices and consents required by the Settled Estates Act ought, as it appears to me, to be dispensed with. A power of leasing, at least as extensive as the Court of Chancery can exercise under the Settled Estates Act might, I think, be exercisable as a matter of course, and without the intervention of the court, by a limited owner in possession, the obligation to take the best rent, without any fine or premium, being in general a sufficient guarantee that the interest of the lessor will be in accordance with that of his successors in estate. As regards a sale, it may be reasonable that the limited owner in possession should be required to make an *ex parte* application to the Court of Chancery for leave to sell; and as he could not be allowed to receive the purchase money, he might, on the same application, obtain the appointment of trustee to receive the money, and hold it upon trusts corresponding to the interests in the land."

PROFESSIONAL ETIQUETTE.

A legal firm not two hundred miles from Toronto, has propounded and distributed a printed circular which is more in the green grocery line of advertising than anything we have seen for some time, and which is about the best of the kind that has been published. The circular commences by stating that "The undersigned have any amount of money on hand to loan, &c., on more favorable terms and at a less rate of interest *and expense* than any other office in the county." Very accommodating, certainly, not to say modest; and very useful in the present tightness of the money market, but we are quite prepared to hear ill-natured people suggest that the *expense* may possibly be *greater* "than any other office in the county," if the highly-favored borrower falls behind in his payments. The public are then informed that "a large amount of the above consists of trust funds, which will be loaned at 7 per cent., provided the security be first-class real estate." This is well; but for fear the inducement set out above should prove insufficient to tempt customers to give the advertisers a trial before going elsewhere, the circular concludes thus: "We would ask those wishing to borrow, *or otherwise requiring our services* to give us a call, and we are confident of being able to deal satisfactorily with them." Were it not that the business card of this firm appears at the head of the circular it would be difficult to say in what line these enterprising, not to say funny, advertisers do business. We should be glad to encourage them by giving their names, and thereby a gratuitous advertisement; but we fear that the medium of this journal is not one that they would select as likely to benefit them in their peculiar line.

This, however, though highly unprofessional, and therefore objectionable, is not perhaps quite so bad as another breach of propriety that we have lately heard of. We are informed that a client of a Toronto solicitor keeps on hand a stock of half sheets of note paper, with the card of the solicitors printed at the top, then a request to pay "the following claim, otherwise proceedings will be taken to enforce it," (or words to that effect), and concluding with the name of the solicitor, also printed. When the enterprising client desires to frighten a delinquent debtor he sends him one of these "lawyer's letters," and this without further trouble or expense. We presume this is done with the general assent of the solicitor, and we should suppose there must be some *quid pro quo*.

These practices may be more general than we suppose, but we do not like them any the better for that. The status of the profession is low enough already in many ways. If some in it are so ignorant of its niceties, or care so little about them, or are so needy, let them give up the law, and try to make a living in another and more congenial sphere.

ONTARIO CONTROVERTED ELECTIONS.

Since the meeting of the local House in December last, two petitions have been presented under "The Controverted Elections Act of 1871."

The first of these was complaining of the election of Mr. James S. McCuaig, who had been returned for the County of Prince Edward, upon the vacancy caused by a former election for the county being declared void upon a petition. The election was held on the 22nd and 29th of last December, and the petition was filed on the 22nd of January following. The complainants were four voters at the election, and the seat was claimed for his opponent, Mr. Gideon Striker. The case came on for hearing before Mr. Justice Morrison, at Picton, on the 23rd of August last, and resulted in the respondent being unseated, and Mr. Striker declared duly elected. The trial occupied little more than an hour, and no point of special importance was determined.

The other petition was against the return of Mr. Christopher Finlay Fraser, who had been elected to fill the vacancy caused by the death of the late Mr. McNeil Clarke, for the South Riding of the County of Grenville. The election was held on the 19th and 20th of March last, and the petition, claiming the seat, was filed on the 25th of April by Mr. William Ellis, the opposing candidate at the election. The respondent was charged, both personally and by his agents, with the commission of corrupt practices. Recriminatory charges of a similar nature were made by the respondent against the petitioner. The trial began at Prescott, before Vice-Chancellor Mowat, on the 3rd of September last, and continued until the 14th of the same month, when judgment was given declaring the elec-

tion of Mr. Fraser void, and that no person was duly elected. The case was determined, by consent of parties, upon the scrutiny, the petitioner having abandoned his charges of corrupt practices. No decision was given upon the recriminatory charges. The present case was another illustration of the practical impossibility of carrying a lengthened scrutiny to its conclusion under the system now in force, owing to the immense expense which such a process involves. Here the scrutiny occupied the greater part of a week, at the end of which time comparatively small progress had been made, and a final decision was arrived at by the respondent admitting to be bad a number of votes sufficient to deprive him of his majority.

Some idea may be formed of the expense entailed upon the parties, when it is stated, that besides the respondent, who is himself a member of the legal profession, and took an active part in the management of the case, four counsel, together with the attorneys for each party, attended daily in court during the fortnight which the trial occupied, and that the number of witnesses subpœnaed was several hundred.

Mr. Brough, the very efficient Registrar of the Court on this petition, is preparing a report of the case for this journal, which, from his thorough knowledge of the subject, cannot fail to be a valuable addition to the series of election cases which we have published from time to time, and which cannot be elsewhere obtained.

A friend lately sent us a West Indian newspaper, which contains the charge of Chief Justice Peel to the Grand Jury at Antigua. It appears that one result of the confederation of the Leeward Islands, proclaimed on 30th March last, was the extinction of grand juries in that colony. The learned Judge "regrets the cessation of an institution which history tells us has often done good service in the cause of liberty and justice;" and he thus continues: "Its value has been most apparent in troublous times. Often and again, in England's stormy story, in her many fits of political and religious phrensy, have Grand Juries—those of London and Middlesex especially—thwarted the vengeance of an angry monarch, an unscrupulous government, or of a victorious faction, and interposed between them and their intended victim."

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

(*Reported by* Henry O'Brien, *Esq., Barrister-at-Law.*)

Bigelow v. Cleverdon.

C. L. P. Act, sec. 158—Compulsory reference.

Under the above section a country cause may be referred to the arbitration of an officer of the proper Court at Toronto, as well as to the County Judge.

[Chambers, January 13, 1872.—*Mr. Dalton.*]

Tilt having obtained a summons under Con. Stat. U. C. cap. 12, sec. 158, to show cause why the matters in dispute should not be referred to the arbitration of the Judge of the County Court of the County of Wentworth, or such other person as might be appointed, now asked that the reference might be made to Mr. Jackson, the Clerk of the Common Pleas, in which Court the action was brought. The writ had been issued in the county of Wentworth. The plaintiff had not declared.

Mr. Clute (Harrison, Osler & Moss) —It would be more convenient to try the case at Hamilton, in the county of Wentworth, and by the statute the reference must be to the Judge of that County, the writ having issued there; and the case cannot be referred to the Clerk of the Court in Toronto: *Cotton* v. *McKenzie*, 2 U. C. L. J. 344; *McEdward* v. *McEdward*, 3 U. C. L. J. 75.

Mr. Dalton —Under the circumstances of this case, it must be referred to the Judge of the County of Wentworth, though I am reluctant to burden him with it, as he is not, as Judge, entitled to any fees *. I do not think, however, that in country causes the reference *must* be made to the proper County Judge. The words of the statute do not limit the reference to him, but merely state that a reference may be made to him in country causes as well as to the officer whose appointment is authorized by the preceding words of the section. I am quite clear that a case like this might properly be referred to an officer of the Court at Toronto.

Jameson and Carroll v. Kerr, Galley v. Kerr.

Replevin—Assignee in insolvency—Con. Stat. U. C. cap. 29, sec. 2—Insolvent Act, 1869, sec. 50.

Goods are repleviable out of the hands of a guardian in insolvency, notwithstanding Con. Stat. U. C. cap. 29, sec. 2.

[Chambers, Feb. 8, 1872.—*Mr. Dalton* and *Gwynne, J.*]

J. H. Macdonald for Jameson and Carroll, and *Clarke* for Galley, moved before Mr. Dalton for orders to replevy certain bricks which had been seized by the Sheriff of the County of York, under an attachment in insolvency against one Moran, and handed over by the sheriff to Mr. Kerr, an official assignee, as guardian. The applicants claimed these bricks

* It is usual now for references such as those alluded to above to be made to a County Judge, mentioning him by name merely, without reference to his public capacity, so as to get over the difficulty as to fees. This can only be done, of course, by consent of the parties.—Eds. C. L. J.

as their property, having purchased them from Moran.

Mr. Dalton refused to grant orders for writs of replevin on the ground that section 2 of the Replevin Act precluded replevin under such circumstances. From this decision the applicants appealed to a judge. The matter was then argued before Mr. Justice Gwynne, who, reversing the decision of Mr. Dalton, ordered writs of replevin to issue. The further facts of the case appear in following judgment of

GWYNNE, J.—These were two summonses by way of appeal from two orders made by Mr. Dalton in these cases, whereby he discharged two several summonses asking for writs of replevin to issue in these suits, and refused to grant the writs of replevin upon the ground that the goods sought to be replevied were in the custody of Mr. Kerr, an official assignee, as guardian, under a delivery to him, by the sheriff, of the goods in question, seized under a writ of attachment issued from the County Court in compulsory liquidation against one Moran, an insolvent.

The evidence offered upon affidavits by the applicants is strong to show, and conclusive, if not contradicted, that the goods in question, namely divers kilns of bricks, were the property respectively of the applicants. No affidavits are offered in opposition to the title set up by them; it may be that Mr. Kerr, being official assignee, can admit nothing. The case, therefore, stands thus: that the evidence of title offered by the applicants, although not admitted, is not denied; the property seized is shown to be of that nature that, having regard to the business of the respective applicants, namely that of builders, they may be exposed to very serious injury if the property should not be restored to them, which any damages which they might recover in actions of trespass would not reimburse them for, and Mr. Dalton, I am informed by himself, felt this so strongly that he would have granted the writs without hesitation, if he had not considered himself fettered by the language of the second section of the Replevin Act, Consolidated Statute U. C. ch. 29.

By that section it is provided that "the provisions herein contained shall not authorize the replevying of or taking out of the custody of any sheriff or other officer any personal property seized by him, under any process, issued out of any court of record for Upper Canada." The section is consolidated from 18 Vict ch. 118. In order to put a correct construction upon this section, it will be necessary to consider what was the law before the passing of the Act from which this section is taken, for the purpose of consolidation, and what was the object of the Act.

Although it was held in England in the cases collected and cited in *Hurling* v. *Mayville*, 21 C. P. 499, that replevin lay for *any wrongful taking* of property from the possession of the true owner, still it never lay where the taking was in execution under a judgment of a superior court, and the reason is given by Parke, B., in *George* v. *Chambers*, 11 M. & W. 160, citing Chief Baron Gilbert's treatise on Replevin, p. 188, as his authority, where it is said, "If a superior court award an execution, it seems that no replevin lies for goods taken by the sheriff by virtue of the execution; and if any person shall pretend to take out a replevin and execute it, the court of justice would commit him for contempt of their jurisdiction, because by every execution the goods are in the custody of the law, and the law ought to guard them, *and it would be troubling the execution awarded, if the party upon whom the money was to be levied, should fetch back the goods by replevin*, and therefore they construe such endeavour, to be a contempt of their jurisdiction, and upon that account commit the offender; that is, if a person attempt to defeat the execution of the court, they will treat it as a contempt, and punish it by attachment of the sheriff." In *Rex* v. *Monkhouse*, 2 Str. 1184, the court granted an attachment against a sheriff for granting a replevin of goods distrained on a conviction for deer stealing, for the reason that the conviction was conclusive and its legality could not be questioned in replevin; and in *Earl Ridnor* v. *Reeve*, 2 Bos. & Pul. 391, the court said that it had been determined that when a statute provides that the *judgment* of commissioners appointed thereby shall be final, their decision is conclusive, and cannot be questioned in any collateral way; and so not in replevin.

In *Pritchard* v. *Stephens*, 6 T. R. 522, where goods taken under a warrant of distress granted by commissioners of sewers were replevied, and the proceedings in replevin moved into the King's Bench, the court refused to quash the proceedings, leaving it to the defendant in replevin to put his objection in a formal manner on the record. In that case Callis is cited, p. 200, where he says, "If upon a judgment given in the King's Court, or upon a decree made in the court of sewers, a writ or warrant of *distringas ad reparationem* or of that nature be awarded, and the party's goods be thereby taken, these goods ought not to be delivered to be taken either out of this court or out of any other court of the King, *because it is an execution out of a judgment*," and it is said there, citing another passage of Callis, p. 197, that there is a distinction between those goods that remain in the custody of the officer under the seizure and those that afterwards come into the hands of a purchaser, saying that the former are not repleviable; however, the court refused to quash the proceedings, leaving the defendant to raise his defence upon the record, although the goods were replevied out of the hands of the officer acting under the decree and warrant of the court of sewers.

Thus, then, the law stood in England, that for any wrongful taking a replevin lay except where the taking was in execution under a judgment of a superior court, or of an inferior tribunal whose judgment was by statute made final and conclusive, to which may be added the further exception where the taking was in order to a condemnation under the revenue laws: *Cawthorne* v. *Camp*, 1 Anst. 212, or for a duty due to the crown: *Rex* v. *Oliver*, Bun. 14, and the reason of the law that goods taken in execution could not be replevied was that it could not be endured that the cause of justice should be frustrated by permitting the party, *upon whom the money was to be levied*, in satisfaction of a judgment of a superior court, or of a judgment

or conviction made final by a statute, *to fetch back* the goods by replevin, and so delay the plaintiff in his recovery of the fruits of his judgment. The reason then given for the courts in England, holding it to be a contempt of court for a party to proceed, and consequently for their not permitting him to proceed by replevin, in respect of a seizure under an execution issued out of a superior court, applies only to the case of a replevin brought or attempted to be brought by him against whom the execution issued. While adopting the same principle, there have been, in the supreme court of the State of New York, several cases of replevin being maintained even against a sheriff in respect of goods taken in execution.

In *Clark* v. *Skinner*, 20 Johnson, 465, it was held that replevin lies at the suit of the owner of a chattel against a sheriff, constable or other officer who has taken it from the owner's servant or agent while employed in the owner's business, by virtue of an execution against such servant or agent, the actual possession of the property in such case being considered as remaining in the owner, and not in the defendant in the execution. Platt, J., giving judgment says, "Suppose John Clark (against whom the execution was and from whom the goods were taken) had taken the horse and sleigh as a trespasser himself, would they be *in the custody of the law* as to the true owner, *because the constable happened to find them in the hands of a person against whom he had an execution?* If I leave my watch to be repaired, or my horse to be shod, and it be taken on a *fi. fa.* against the watchmaker or blacksmith, shall I not have replevin? If the owner put his goods on board a vessel to be transported, shall he not have this remedy, if they are taken on execution, against the master of the vessel? It seems to me indispensable for the due protection of personal property. In many cases it would be mockery to say to the owner—Bring an action of trespass or trover against the man who has despoiled you. Insolvency would be both a sword and a shield for trespassers. Besides there are many cases where the possession of chattels is of more value to the owner than the estimated value in money, and the action of detinue is so slow and uncertain, as a specific remedy, that it has become nearly obsolete." "The rule," he proceeds, "I believe is without exception, that wherever trespass will lie the injured party may maintain replevin. Baron Comyns says, 'Replevin lies of all goods and chattels unlawfully taken.' (6 Com. Dig. Replevin A.) 'Though,' he says, (Replevin D) 'replevin does not lie for goods taken in execution. This last proposition,' he adds, 'is certainly not true without important qualifications. *It is untrue as to goods taken in execution where the fi. fa. is against A. and the goods are taken from the possession of B.*, (being the property of the latter, is plainly intended) "By goods," he proceeds, "*taken in execution*, I understand goods *rightfully taken in obedience to the writ*, but if, through design or mistake, the officer takes goods which are not the property of the defendant in the execution, he is a trespasser, and such goods never were *taken in execution*, in the true sense of the rule laid down by Baron Comyns."

In *Thompson* v. *Button*, 14 Johnson, 84, it is laid down that goods taken in execution by a sheriff out of the possession of the defendant in the execution, being in the custody of the law, cannot be replevied, *but if the officer having an execution against A. undertakes to execute it on goods in the possession of B., the latter may bring replevin for them.* The chief justice in giving judgment says, "As a general principle, it is undoubtedly true that goods taken in execution are in the custody of the law, and it would be repugnant to sound principles to permit them to be taken out of such custody, *when the officer has found them in and taken them out of the possession of the defendant in the execution.*" This judgment is in precise accord with the law of England, as I understand it.

In *Hall* v. *Tuttle*, 2 Wend. 476, the law is laid down in precisely the same language. The court, in giving judgment, adds, "The sheriff levies at his peril, if the property does not belong to the defendant in the execution."

In *Dunham* v. *Wyckoff*, 3 Wend. 279, the case came up on demurrer, which admitted that the property in the goods seized under execution was in the plaintiff in replevin, although when seized they were in the possession of the person against whom the judgment and execution was had. Judgment was given for the plaintiff on the demurrer, as the pleadings admitted the property to be his. A similar point was decided on error in *Acker* v. *Campbell*, 33 Wend. 372.

The principle upon which these cases proceed seems to be in accord with that stated by Chief Baron Gilbert as the principle upon which the courts in England refused to permit replevin to be brought in respect of goods seized under an execution issued upon a judgment recovered in the superior courts.

Our law of replevin in this country would seem to have its foundation in 4 Wm. IV. cap. 7; for the sheriff in this country, having no county court, it is difficult to see how the action could have been brought before that statute. (See *Hutt* v. *Keith*, 1 U. C. Q. B. 478.) By that Act, the remedy seems to have been limited to the case of a wrongful distress, probably because of there having been an opinion prevalent that it was only in such case that replevin lay in England. The Act provides that any person complaining of a wrongful distress in a case in which by the law of England replevin might be made, may, on filing a procipe, obtain from the crown office a writ of replevin in a form given by the statute.

This law was amended by 14 & 15 Vic. cap. 64, A.D. 1851, whereby it was enacted "that whenever any goods, chattels, deeds, &c., valuable securities or other personal property or effects has been or shall be wrongfully distrained or otherwise wrongfully taken, or has been or shall be wrongfully detained, the owner, or person or corporation who by law can now maintain an action of trespass or trover for personal property, shall have and may bring an action of replevin for the recovery of such goods, chattels or other personal property aforesaid, and for the recovery of damages sustained by reason of such unlawful caption and detention, or of such unlawful detention, in like manner as actions are now by law brought and maintained by any person complaining of an unlawful distress." The writ was to be

obtained only upon an affidavit of the claimant, his servant or agent, that the person claiming is the owner of the property claimed, describing it.

The effect of this Act was to introduce the law as existing in England, namely, to authorize replevin to be brought for any wrongful taking, with this further addition, that it should also lie wherever trover lay.

It happily seldom occurs that a sheriff or his officer, under a writ of execution against B., wantonly and vexatiously, and without any reasonable excuse, takes from A. his goods, of which he is in actual visible possession as undisputed owner. Consequently, we do not find that to redress such a wrong, any person required to avail themselves of the privileges of the Act by bringing replevin.

But cases of persons not being in actual possession, but claiming to be the owners, by virtue of some contract with an execution debtor, of goods taken under an execution from the actual visible possession of an execution debtor as apparent owner, are cases which do frequently occur in practice. *In such cases as last mentioned the action of replevin did not lie according to the law of England.* That remedy was only available when goods were taken from and out of the possession of the plaintiff in replevin, who also claimed to be the true owner, and therefore entitled to *retain* the possession and enjoyment of the goods taken. Replevin being the *re* delivery of the goods taken *to the person from whose actual possession they were taken*, upon pledges given by him to prosecute his claim of right to *retain* such possession. Although, according to the law of England, the real owner of goods taken under execution from the actual possession of an execution debtor as apparent owner, could not maintain replevin, nevertheless, upon the construction put upon 14 & 15 Vic. cap. 61, such persons were permitted in this Province to bring *replevin* against the sheriff, and to have his right tried in that form of action. Of such class of actions, *Short* v. *Ruttan* (Sheriff), 12 U. C. Q. B. 79, is an example.

The words of the Act authorizing the owner to bring replevin in all cases wherein he could maintain trespass or trover, seemed to authorize him to bring an action of *replevin*, although the goods were never taken out of his actual possession, and although according to the law of England replevin in such a case could not be maintained. Doubts, however, were entertained whether it could have been the intention of the Legislature to place the remedy by replevin upon a footing so different from that upon which *ex vi termini*, and according to the law of England, it stood in England. Accordingly, to remove these doubts, the Act 18 Vic. cap. 118, appears to have been passed. The preamble of that Act recited that, "Whereas doubts have arisen whether by the provisions of a certain Act of the Parliament of this Province, passed in the fourteenth and fifteenth years of Her Majesty's reign, entitled, 'An Act to amend and extend the law relative to the remedy by replevin in Upper Canada,' when any goods and chattels or other personal property and effects in the said Act mentioned have been seized and taken in execution, or by attachment or otherwise, under process from any Court of Record in Upper Canada, *the same can be replevied* and *taken out of the hands and custody of the sheriff or other officer to whom the execution of such process of right belongs;* and whereas it is expedient to remove such doubts,"—and the Act declared that the said Act did not authorize, and shall not be construed to have authorized and permitted, or to authorize and permit, the replevying and taking out of the hands and custody of any sheriff or other officer, as aforesaid, any such goods and chattels which such sheriff or other officer shall have seized and taken, *and shall have in his lawful keeping under and by virtue* of any process whatsoever issued out of Her Majesty's Courts of Record in Upper Canada. Upon the passing of this Act it was held, in accordance with the law as it was always understood in England, that a person out of possession could not maintain replevin in respect of goods seized and taken in execution from and out of the possession of the execution debtor: *Calcutt* v *Ruttan*, 13 U. C. 146. That decision is what would have been decided if the remedy by replevin had existed in this Province precisely as it existed in England, and the 14 & 15 Vict. cap. 61, had never been passed.

In so far as goods taken in execution were concerned, the object and effect of the Act 18 Vic. seems to have been to place the law in this Province upon the same footing as in like cases it was in England; but the Act went further, and extended to goods seized under an attachment against absconding debtors *the like* protection from the remedy by replevin, and, as it seems to me *only the like* protection as by the law of England surrounded goods taken in execution. And there appears to be some reason for this, although the writ of attachment is not preceded by a judgment, as an execution is; because by the Act respecting absconding debtors in force at the time of the passing of 18 Vict. ch. 118, namely, 2 Wm. 4, ch. 5, sec. 4, provision was made, *more effectual than replevin*, and the like provision now exists under Consolidated Statute 22 Vict. c. 25 for superseding the attachment and obtaining restoration of his goods *upon the application of the defendant* in the suit on his giving bail in respect of the action in which the attachment issued. The language of the Act 18 Vict. ch. 118, namely, "any such goods and chattels which such sheriff or other officer shall have seized and taken, *and shall have in his lawful keeping under and by virtue* of any process, &c., seems to me to accord precisely with the judgment of Platt, J., in *Clark* v *Skinner*, 20 Johnsons' Report, *supra*, wherein he says: "By goods taken in execution I understand goods *rightfully taken in obedience to the writ*," but if through *design* or mistake the officer "takes from A. goods which are not the property of, nor, I add, in the possession of the defendant in the execution when taken, he is a trespasser, and such goods never were taken in execution in the true sense of the rule laid down by Baron Comyns"—goods of which the defendant is in possession when seized under and by virtue of any process against him authorizing the seizure of his goods and chattels are in the lawful keeping of the officer, *under and by virtue* of the process because the possession of goods *prima facie* implies property—but if a sheriff or his bailiff, or the bailiff of a division court, (for 23 Vic. ch.

45, sec. 8, places goods seized by him under any process issued out of a division court in precisely the same position, as to the action of replevin, as 18 Vict. ch. 118 did goods seized by a sheriff under process from any court of record,) wantonly and causelessly, and, it may be, maliciously, takes from the actual and undisputed possession of the real owner *his* goods under colour and pretence of an execution or other process which he has for execution upon the goods of another, shall the person upon whom such wanton wrong may be committed, be held to be deprived of a right, recognized by the law of England, of availing himself of the only remedy which in the given case may be competent to secure him any adequate redress?

The second section of Con. Stat. U. C. c. 29, is expressed in briefer language than 18 Vict c. 118, but the substance and effect of both is the same, and both must receive the same construction. Now, certain of the goods of a judgment debtor are by law specially exempted from all liability under any execution issued upon the judgment: as, for example, the bed, bedding and bedsteads in ordinary use by the debtor; the necessary and ordinary wearing apparel of himself and his family; the tools of his trade, to a certain amount. If, then, a sheriff's bailiff, or the bailiff of a division court, although the right of exemption should be claimed, should vexatiously and wantonly seize these exempted articles; or if a sheriff's bailiff, or the bailiff of a division court, without any pretence of right, should vexatiously and wantonly enter the house of A., and strip it of all his household furniture in his actual use, merely because the bailiff has in his hands an execution or other process against the goods of B.; or if a sheriff's bailiff, under like circumstances, should seize a raft of timber belonging to A. and in his possession, on its way for delivery to C., under a contract which A. is bound under heavy penalties to fulfil, and should so cause a breach of the contract; or if, under like circumstances, and it may be by fraudulent collusion with B, the execution debtor, or with his creditor, the sheriff should seize a steamship belonging to A and in his possession, freighted with goods and passengers, at the moment of its departure from port on its voyage, and so prevent the voyage altogether—can any of these goods so wrongfully seized be, with any propriety of language, said to be *in the lawful keeping of the sheriff or bailiff, under and by virtue of a process which neither directs nor warrants any such service.* Or shall it be said that a judge, when invoked to permit the party so wronged to seek redress in the only form of action which can give him any relief, shall have no jurisdiction to do so? Similar instances without number, of wanton injury, might be enumerated, where the goods of an utter stranger to the process in the bailiff's hands, and to the person against whom it has issued, may be wrongfully and vexatiously seized by the officer; wherein, if a judge, upon hearing the parties, and being satisfied that the seizure is utterly inexcusable, cannot sanction the issuing of the writ of replevin, the hands of justice must be admitted to be most cruelly tied. I am not aware of any case which has held that justice is so crippled. In this case I am not called upon, however, to rest my decision upon the ground that in answer to the application for the writs there is no denial of what is plainly asserted on oath, namely, that the goods seized were the property of and in the possession of the claimants when seized, and that they were wrongfully seized without any process authorising such seizure; for I am of opinion that the goods now being in the possession of the official assignee are not in the custody of the sheriff or other officer under the process, within the meaning of section 2 of 22 Vic. c 29, even though that section could protect the goods in the hands of the sheriff from being reached by a writ of replevin.

The execution of all process coming out of courts of record to be executed, belongs to the sheriff of the county to whom it is addressed; except when the sheriff is himself a party, when it belongs to the coroner to execute it.

The term, then, "sheriff or other officer," in 18 Vict cap. 118, and in 22 Vict cap 29, sec. 2, as indeed is plainly expressed in 18 Vict., means a sheriff or other like officer, as his deputy, bailiff, or a coroner, "*to whom the execution of such process of right belongs;*" and what is declared not to have been authorised is the replevying the goods which *such* sheriff or other officer shall have seized under or by virtue of the process *out of his hands* Now, when the sheriff has transferred the goods seized under an attachment in insolvency, in discharge of his duty under the process placed in his hands, to the official assignee in insolvency, they came into his hands and could only be detained therein *as and if they are the property of the insolvent.* In no other event can the official assignee retain the goods. He becomes liable to the true owner, from whom they were wrongfully taken, not by reason of the original wrongful taking, but by reason of his own wrongful detention of goods not belonging to the insolvent after a demand made for them upon him by the true owner, from whom they had been taken Such wrongful detention cannot be justified by the assertion that the sheriff, who had wrongfully seized the goods, had given them to the assignee If the goods were now in the hands of the sheriff he, to set himself right with the true owner, and to protect himself from an action, might unhesitatingly restore the goods to the owner When the official assignee, to whom he has delivered them (upon demand being made upon him by the true owner), refuses to restore them, *he* becomes a wrong-doer himself, wholly independently of the sheriff and of the wrong committed by him, and must be responsible for his own acts.

The affidavits and argument upon the appeals leave no doubt on my mind that these are cases in which I have a discretion enabling me to grant writs of replevin, and that I properly exercise that discretion by granting them, which I therefore do without further delay, to enable the official assignee, if so advised, to have my judgment reviewed by the court during the present Term; and as the Act of 1860 enables me to direct that a bond may be taken in less than treble the amount of the property I think it proper to limit the amount to a sum not exceeding four thousand dollars in each case. The orders of Mr. Dalton will therefore be set aside, and the orders will go for the writs of replevin.

Warren v. Cotterell.

Married Women's Act. 1872—*Ejectment*—"*Separate tort.*"

Under the Married Women's Property Act, 1872, a wife may be the sole defendant in an ejectment brought to recover possession of land owned by her husband, who is permanently resident out of the Province.

[Chambers, April 20, 1872.—*Mr. Dalton.*]

This was an action of ejectment to recover possession of the east half of lot 36, in the first concession of the township of West Zorra.

On the 18th April, and before any appearance was entered,

T. Ferguson obtained a summons calling upon the plaintiff to show cause why the writ of summons herein, and the copy and service thereof, should not be set aside with costs on the ground that the sole defendant named in the said writ is a married woman, and that the land in question does not belong to her, but to her husband. He referred to Cole on Ejectment, page 84.

No cause was shown; but as it appeared that the action had been commenced after the passing of the Married Women's Property Act, 1872 (35 Vict. cap. 16, Ont.), judgment was reserved, for the purpose of considering the effect of that statute. On the 20th April, judgment was delivered by

Mr. Dalton.—The facts of this case seem to be, that the sole defendant is a married woman, whose husband has gone to reside permanently in the State of Michigan. The motion is to set aside the writ of ejectment, copy and service, because the husband is not joined as a defendant. The wife is, in fact, "the person in possession," and the motion is not grounded on a denial of this, but on the alleged necessity that the husband should be joined in an action against the wife. As to the necessity of this, in ordinary cases there can be no question; but whether it applies to ejectment may perhaps be doubtful, from the peculiar nature and object of the action. In ordinary actions it has hitherto been applicable, even to this extent, that where she is sued for her own separate debt, and does not defend, a judgment signed against her alone will be set aside. No cause having been shown to this summons, it does not appear how or when the present defendant acquired possession; and I am not aware of any case under our Ejectment Act in which this question has arisen, except one in Chambers some months ago, where I set aside the process on account of the non joinder of the husband. Under the old Ejectment Act, the point could never have arisen, and in practice the difficulty is lessened by the fact that where the husband is permanently resident abroad, service may be made upon the wife for him (Tidd's Prac. 9th Ed. 1210-1). Here the wife, and not the husband, is the person in possession, and the plea of non joinder would be a plea in abatement.

In the action of ejectment, which is unlike any other, the defendant is in possession of the specific land sought to be recovered, and the plaintiff, by his writ, alleges that possession to be unlawful. Can the defendant in such a case merely set up matter in abatement, and offer no defence on the merits? Can he say, as this defendant practically does, "This may indeed be your land, but you cannot sue me for its recovery"? It seems an extraordinary thing that a person can retain possession in person of the land of another, and yet, even while standing upon it, deny the right of the owner to pursue his legal remedy without joining some one else who is not in possession, and is, in fact, out of the country.

In *Bissill* v. *Williamson*, 7 H & N. 395, Baron Bramwell says, "In ejectment there never can be any proceeding analogous to a plea in abatement: for the plaintiff in his writ says, 'I am entitled to possession,' and therefore matter in abatement can be no reason for defendant holding the land." The form of action which bears the strongest analogy to ejectment is replevin, in which one man claims and another defends possession of a specific chattel. In this action no plea in abatement is allowed, unless it alleges matter which gives the defendant a title to the return of the chattel (Gilbert on Distress, 146). In ejectment the possession is not, indeed, given to the plaintiff, as is the case in replevin, where "the deliverance of the goods is immediate, so that the plaintiff hath possession before the defendant can plead thereto" (Gilbert, *loc cit*); but both forms of action, being for the recovery of a specific thing, are in this respect identical. The Married Women's Property Act, 1872, meets the case exactly, section 9 providing that "any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or *torts*, as if she were unmarried." Now the tort here complained of is the unlawful possession of this land, which possession is held by the wife alone. This is therefore her "separate tort;" and the action having been commenced since the passing of the statute, I think the application must fail.

Summons discharged without costs.

CHANCERY CHAMBERS.

(*Reported by* Thomas Langton M.A., *Student-at-Law.*)

Re S. & M., Solicitors.

Next friend. Statutes—35 *Vict., c. 16 (Ont.)*—*Solicitor*—*Taxation*—*Delivery of bills of costs.*

The Act of 35 Vict., c. 16 (Ont.), which gives power to a married woman in certain cases to sue and be sued alone, does not prevent her husband being considered as *dominus litis*, and the suit his suit, if she joins him as a party plaintiff; nor does it obviate the necessity for a next friend in order to bind her.

It is the policy of the Court that a solicitor is bound by his original delivery of bills of costs to his client, and it is not competent for him to make a qualified or conditional delivery of a bill, which would, even by a reservation in express terms, enable him to deliver subsequent and more complete bills in the event of recourse being had to taxation.

[Chambers, August 20, 1872.—*The Chancellor.*]

This was an appeal by *Spencer* from an order of the Referee made upon the petition of clients for the taxation of solicitors' bills. He took the preliminary objection to the petition that it was made by two married women and their husbands, without the intervention of next friend for the married women, and contended that an order made upon such a petition would not bind the married women who might by next friends subsequently take proceedings for a second tax-

ation, citing *Dan. Prac.* (4th ed.) p. 109-11, *Re Waugh*, 15 Beav. 508, *Pearse* v. *Cole*, 16 Jur., 214. He also read affidavits to shew that the bills of costs had been hurriedly prepared for the convenience of the clients in forming an estimate of their amount with a view to a settlement; and had not been delivered in a formal way for taxation, but an express reservation had been made of a right to deliver other and more complete bills in the event of a taxation. He therefore contended that this was a qualified delivery which did not bind a solicitor, and which it was competent for him to make.

Hamilton for the petitioners. As to the objection with regard to the want of next friend, it is only necessary to have one to secure costs, and this necessity could not arise when there are moneys of the clients in the solicitor's hands: *Re Curran* 2 Ch. Cham. 305. Furthermore, since 35 Vict., c 16 (Ont.), no next friend is required (secs. 1 & 9), and so the Referee had held in *McAllister* v. *Timlin*. (A report of this case is to be found in the *Daily Mail* of 29th May and 15th June, 1872.) It was not competent for solicitors to deliver bills not intended for taxation. On this point he cited *Re Pender*, 8 Beav. 299; *Re Chambers*, 34 Beav., 177; *Re Carven*, 8 Beav. 436; *Re Andrews*, 17 Beav. 510; *Re Whalley*, 20 Beav 576; and *Re Crawford and Crombie*, 2 Ch. Cham 13.

Spencer in reply. No objection had at the time been made by the clients to receive the bills conditionally. No solicitor could venture to let his client have an approximate bill if he was to be bound by any delivery.

The Chancellor. — I said at the close of the argument that I thought the first objection must prevail. The rule is that when husband and wife join in any pleading or proceeding the husband is considered to be *dominus litis*, and the wife is not bound: so if in this case there were a taxation upon this petition it would be nominally at the instance of two married women, together with their husbands and others; but it would not prevent the married women having another taxation. The Act of last session does not appear to me to touch that question. It enables a married woman in certain cases to sue alone. In this case the petitioner joins husbands and wives as having a joint interest. As a fact the married women are not suing alone. I cannot assume that this a case in which they can do so. I am asked by petitioner to strike out the name of the husband. The interests of the parties are not so before me that I can say that the husbands are not properly and necessarily joined, and I certainly ought not to do what is asked upon this appeal.

Upon the second point, I said that it is a matter of policy to bind solicitors by bills that they deliver. The bill delivered is subject to taxation, and the solicitor is not at liberty to withdraw it, or to substitute another bill for it, at any rate after an order for taxation, without leave of the Court, which is only granted upon special grounds. It is contended that here there was no absolute delivery of a bill, but that a bill of items was sent to the clients with an express reservation that if not accepted, and if a taxation were desired by the clients, the solicitors reserved to themselves the right to make out and deliver their bill (a reason for this is given in the affidavit of Mr. McDonald). The question is, whether it is competent to a solicitor to reserve such a right upon the delivery of a bill. There are some reasons against it. If he can do so in one case he can do so in all; and of course if one solicitor can do this all may do it, and thus the rule that a solicitor is bound by his bill delivered might be virtually abrogated. On the other hand, it is convenient sometimes that a solicitor should be at liberty to deliver what may be called an approximate bill. His client may desire to be informed approximately of how he and his solicitor stand, and the solicitor might deliver it with an intimation that if paid without taxation he is content to receive the amount, but if taxation were desired he would deliver another and a fuller bill. I think this is open to some serious objections. It operates to discourage taxation—the solicitor offers a premium to his client to abstain from the exercise of that right. It is asking the client to decide blindfold, for in ninety-nine cases out of a hundred the client cannot know whether the bill is correct or not. It places his client in a certainly difficult position. He is asked to pay a demand, of the justice of which he can know little or nothing, upon pain of having the demand increased if it is not paid; and the client, rather than run such a risk, may be induced to pay a bill which is really more than he ought to pay. As a matter of policy ought not a solicitor to be prevented from placing his client in such a position? It may be considered that the client should refuse to receive a bill thus conditionally delivered; but a client is seldom aware of his rights; and the rules in relation to the delivery and taxation of bills between solicitor and client are framed mainly for the protection of the latter. The observations of Lord Langdale, in *Re Pender*, 8 Beav. 304-5, are not inapposite in the case before me. A solicitor had delivered bills not signed by the solicitor, so that he was not in a position to sue for their recovery; and the client having obtained an order for their taxation, the solicitor moved to set it aside, on the ground that it was not within the Solicitor's Act, 6 & 7 Vic. The Master of the Rolls held the bills within the Act, and added these observations (p 304): "But if a bill delivered without being signed is not taxable, the solicitor may charge what he pleases with impunity: he may in the first instance deliver a bill not signed to an amount far beyond what he is entitled to, and take his chance of obtaining payment without taxation, in which case he will in most cases succeed; but if he should fail, which may possibly happen, and his bill, according to the hypothesis, is not to be taxed, he will say, as has been said, 'It was not delivered with a view either to an action or to taxation, but for the purpose of amicable discussion and arrangement.' He will then deliver a signed bill for what is justly due to him, excluding the gross overcharges in the bill delivered but not signed, and so escape paying the cost of taxation. In this supposed case his attempt has failed, but it has cost him little or nothing, and, by obtaining payment of other bills not signed or taxed, he may console himself for the disappointment in

the particular instance." Certainly much of the evil pointed out by Lord Langdale might result from the delivery of bills by solicitors which they were at liberty to withhold upon any ground from taxation His Lordship proceeded upon the construction of the Act, and [illegible], "It ought to be observed that any other [illegible]uction of the Act would facilitate the practice of great fraud and oppression," and he then proceeded to point out how this would be in the language that I have quoted. It is not contended on behalf of the solicitor in this case that the bills delivered were not taxable under our statute unless saved from taxation by the reservation made by the solicitor who delivered them. There is language of the same learned judge in another case, *In re Carven*, *supra*, which applies with more or less force to this case, according to the sense in which certain words are used. He says: "I must take leave to say that if a solicitor has delivered his bill he is bound by it, and the taxation must be on that bill; he is not entitled as of course to reduce his demand, or to reserve the power of delivering a bill containing other charges. I conceive that a most improper object." If by reason of the words, "reserve the power," is meant that he cannot expressly reserve the power, that is this case; if by the words is meant "he cannot have the power in reserve," it is not a direct authority against an express reservation of the power, but it is an authority against the policy of allowing such a power to be reserved.

What was done by the solicitor in this case was to append to the foot of each bill this memorandum: "In the event of a taxation being applied for in this case we reserve to ourselves the right of delivering another and more complete bill," and underneath is written the partnership name of the solicitor, and the solicitor's agent at Woodstock says that before delivering the bills to the two clients to whom or to one of whom he delivered them, he said that the solicitors reserved to themselves the right of making up and delivering more full and complete bills of costs. The solicitors now put it that there was no absolute delivery to the clients of the bills of costs; but only a qualified or conditional delivery, and that the clients should have objected to receive them if they were not content so to receive them. I inclined at first to agree with the solicitors, but upon examining the exact terms of the memorandum, and of what was said by the agent to the clients, the delivery of the bills does not appear to me to have been a conditional one. The memorandum treats the delivery as an actual delivery of a bill of costs, and speaks of another delivery of another bill, and the message of the agents to the clients was to the same effect The question now is, whether the solicitors can in this way take themselves out of the general rule. They have delivered bills asserting a right which they said they reserved to deliver other bills. They had, in fact, no such right as they so claimed to have. How is such a delivery of bills of costs to be regarded? It was not a delivery for the purpose of taxation. Can the clients use it for the purposes of taxation, because it is a bill delivered, and the statute enacts that bills delivered shall be taxable? Apart from the policy of the law, and if this was a transaction not connected with bills of costs, I should hold the parties to whom these papers were delivered not entitled to use them for any purpose from which they were in terms restricted from using them. But the subject matter being bills of costs, and the policy of the law being in my judgment against the delivery of them with the restriction which the solicitors have attempted to put upon their delivery, the question presents other considerations. Is there any way of carrying out the policy of the law, and preventing the miscniefs pointed out by Lord Langdale and others to which I have referred, except by holding the solicitor's attempted restriction upon the ordinary right of the client upon the delivery of a bill of costs to be inoperative? I confess I think it necessary to go to that length I found myself entirely upon the policy of the law which could in any case be defeated if solicitors were to be at liberty to annex to the delivery of their bills of costs such a restriction as has been attempted in this case. There is no hardship upon the solicitor in this. If there is any good reason why they should not be bound by their bills delivered by them the Court will, in a proper case, relieve them and allow them to deliver other bills, or to amend those already delivered. That would be a matter in the discretion of the Court. What has been attempted here has been to substitute for the discretion of the Court, under the name of reserving a right, the act of the solicitor himself. I think it right to meet this attempted innovation at the threshold, and to say at once that it cannot be

Since writing the foregoing, I have referred to the case of *In re Chambers*, 34 Beav. 177. A bill of costs had been delivered, and after some objections and some discussion the solicitors delivered a new bill of costs, giving notice that he abandoned the first bill and substituted the second. The client then took out an order to tax the first bill. The solicitor moved against it, and the question was, whether the solicitors could substitute the second bill and have that bill taxed, and the Master of the Rolls held that he might. That case differed from the one before me in this, that here there have been no bills but the one set delivered, and that there has been an order for taxation; while in that case there was no order to tax until after the delivery of the second bill. The language of the Master of the Rolls in giving judgment is against the solicitor. In this case "I am of opinion that a solicitor cannot deliver his bill with items of overcharge, and say, 'I do not intend this to be my bill, but if objected to I intend to deliver another.' This is precisely what the solicitors in this case have done." He goes on to say, "Nor after a bill has been once referred for taxation, when he finds that items in it will be struck off, can he deliver another bill of costs. But the circumstances of this case are different, for the substituted bill was delivered before the service of or notice of the order to tax. Lord Langdale held, and I have also held, that a solicitor cannot substitute as a matter of course a second bill for the first; but I have not held that you never can do it." Looking at the previous part of the judgment, that "a solicitor cannot deliver a bill and say, 'I do not intend this to be my bill, but if objected

to I intend to substitute another,'" I should say that his lordship has not held that an attempted reservation of right to substitute another bill for the one delivered would not be a ground for creating an exception. I cannot help thinking that *In re Chambers* in itself created a dangerous precedent It is, however, distinguishable from the case before me in the particulars that I have pointed out It is no matter of doubtful policy that a solicitor should be held to the bill that he has once delivered, unless he gets the leave of the Court to alter it. There can be no better authority than Lord Langdale upon questions of this nature; and in *Re Pender* he has explained the policy of the law, and the reason for it, very clearly I think that solicitors should not be allowed by any device or in any shape or way, to contravene the policy of the law. I shall of course be understood as not imputing any intentional impropriety to the solicitors in this case. I have reason to believe that they meant no wrong.

The order made by the learned Referee Chambers does not conclude the solicitors. It is made without prejudice to any application they may make for leave to deliver substituted bills of costs; the learned Referee only held that they could not as a matter of right, of their own notice without leave, substitute other bills for those delivered, and in that I think, for the reasons I have given, that he is right. As to the costs of this application, each party succeeds as to one point, I think there should be no costs.

DIVISION COURTS.

In the Third Division Court in the County of Elgin.

Oakes v. Morgan.

Nonsuit after payment of money into Court—Div. Ct. Rule 130—Impounding money for defendant's costs.

[St. Thomas, Aug. 19, 1873.—*Hughes, Co. J.*]

This was an action to recover an account claimed for work and labour. At the trial the plaintiff proved a special executory contract to serve defendant for a fixed period not performed on his part, but sought to recover as upon a *quantum valebat* for the time he had worked as plaintiff's hired servant. The defendant paid a specific sum into Court, less than plaintiff's claim. The plaintiff was, on his own evidence, nonsuited at the trial because he proved he had failed to perform his contract.

After the sitting, *E. Horton* (who acted as counsel at the trial) applied for an order to set aside the nonsuit, and for a new trial on the following grounds:—

1st That the payment by the defendant into Court was an admission that defendant was indebted to the plaintiff in at least that sum.

2nd. That the ordering a nonsuit when money had been paid into Court was unjust and unprecedented.

3rd. That the plaintiff was and is entitled under the circumstances to the amount paid into Court, and acknowledged to be due from defendant to him.

W. J. White, attorney for defendant, shewed cause, and cited the several authorities hereinafter referred to, contending that the nonsuit was right, and that the money paid into Court could not be taken out by the plaintiff, as the practice of a court of record permits, because the 130th General Rule of 1869 provides against that practice; that it is in fact to be retained by the clerk until the final result of the cause; that it may be impounded to abide the order of the judge who may order it to be applied in discharge of defendant's costs.

No one appeared to support the application.

Hughes, Co. J., delivered the following judgment:

The payment into Court was an admission that the defendant owed the plaintiff $8 and no more. The plaintiff proceeded with his claim for, and undertook to prove his right to recover more, in fact the whole of his demand, and would not accept the $8 in full; he, however, proved at the trial, he was not entitled to any sum whatever.

After payment of money into Court there may be a nonsuit in a court of record, and that this is sustained by precedent, there is abundance of authorities, if authorities are required. *Gutteridge* v *Smith* was the leading case on the subject, 2 H Bl 374; 2 Esp. 482. n. It was formerly held that after tender, plaintiff could not be nonsuited, but it is now settled that plaintiff may be nonsuited after a plea of tender: *Anderson* v. *Shaw*, 3 Bing 290 The 69th section of the Division Courts Act applies the principles of practice of the Superior Courts to the Division Courts in cases not otherwise provided for. The 130th Division Court Rule of 1869, makes the practice different with regard to plaintiff's right to take the money out of a Division Court, from that which is the practice in the Courts of Record. The rule provides that it is *not* to be paid out to the plaintiff until the final determination of the suit unless the judge shall otherwise order; the object of that rule is quite obvious; so that the grounds stated for setting aside the nonsuit herein are untenable. Besides this, I do not see how I could be expected to grant a new trial, when upon the plaintiff's own shewing the merits of the case are entirely against his right to recover any sum whatever, the application ought rather to have been for me to grant an order for the clerk to pay over (after deducting defendant's costs) the balance of the amount paid into Court, to the plaintiff.

The authority shewn by Mr. White, 2 Chit. Arch. Pr. (9 ed.) 1283, lays it down that the Court or a Judge, may, if the plaintiff fails in his action, and the money has not been taken out of Court by him, impound it to answer the defendant's costs.

I shall, therefore, order the application for a new trial to be discharged and the money paid into Court to be impounded to pay the defendant's costs; and after those costs are satisfied the balance to be paid to the plaintiff.

ENGLISH REPORTS.

EXCHEQUER CHAMBER.

HOLLAND AND ANOTHER v. HODGSON AND ANOTHER.

Trade fixtures—Mortgagee and assignee of bankrupt—Looms attached to the freehold.

Where an article is affixed to the soil by the owner of the fee, though only by means of bolts and screws, it is to be considered as part of the land; at all events, where the object of setting up the article is to enhance the value of the premises to which it is annexed for the purposes to which those premises are applied.

Trover for looms by mortgagees against the assignees of M., a bankrupt, the mortgagor M had carried on the business of a worsted spinner. By a mortgage, dated 1869, he conveyed to the plaintiffs in fee the said mill, in which he carried on his business, "and also all the steam-engine, shafting, going-gear, machinery, and all other fixtures whatever, which now or at any time hereafter during the continuance of this security shall be set up and affixed to" the premises The defendants subsequently, on M. becoming bankrupt, were chosen as his assignees, and as such took possession of and sold the looms on the premises; and it was in respect of this conversion that this action was brought The looms were placed in various rooms in the mill. They were driven by steam power, which gave motion to the shafting and going-gear, from drums on which the required communication was given to the looms by means of leather bands, which could be applied to or disconnected from the looms at pleasure. It being necessary for the working of the looms that they should be kept steady and perpendicular to the line of shafting, they were annexed to the floor by means of two nails driven through their feet. After the nails had been driven in, the looms could not be moved without drawing the nails, but this could easily be done without any serious injury to the floors. It was not necessary that the nails should have heads, although, as a fact, they had either flat or square bolted heads; but spikes without heads would have equally answered the purpose; and if such spikes had been used, the looms could have been lifted up and removed, and put back again, without disturbing the spikes. The mortgage deed was not registered under the Bills of Sale Act

Held, (affirming the decision of the court below), that the looms were fixtures, which passed with the freehold under the mortgage.

Longbottom v. *Berry* (22 L. T. Rep. N. S. 385; L Rep. 5 Q. B. 123), affirmed.

[22 L. T. N. S., 709.—May 23, 1872.]

Error from the Court of Common Pleas.

The declaration was in trover for looms and other fixtures. Pleas, not guilty, and payment into court of a sum that did not cover the value of the looms. Replication, damages *ultra*.

The court below having decided, on the authority of *Longbottom* v *Berry* (22 L P. Rep. N S. 385; L Rep. 5 Q B. 123), in favour of the plaintiffs' right to recover the value of the looms, the defendants brought error, and the following case was stated accordingly for the opinion of the court:

1. George Mason, of Horton, near Bradford, in Yorkshire, in the year 1869, carried on the business of a worsted spinner and stuff manufacturer at Bank Top Mill, at Horton aforesaid, of which he was the owner.

2 By a mortgage, dated the 7th April, 1869, the said George Mason conveyed to the plaintiffs in fee the said mill, with several closes of land, cottages, and other hereditaments and premises therein described, the parcels thereof so far as they relate to the said mill, being as follows:—"All that worsted mill lately occupied by the firm of Messrs. Thomas Ackroyd and Sons, situate at Horton Bank Top, in the parish of Bradford, in the county of York, with the warehouse, counting house, engine house, boiler house, weaving shed, warehouse, gas works and reservoirs belonging, adjoining or near thereto; and also the steam engine, shafting, going gear, machinery and all the fixtures whatever, which now or at any time hereafter during the continuance of this security, shall be set up and affixed to the said hereditaments and premises hereby granted and assured, or intended so to be, or any part thereof." The said deed, which may be referred to by either party, was not registered under the Bills of Sale Act.

3. The said George Mason, by a deed, dated 3rd July, 1869, assigned to the defendants all his estate and effects to be administered as if under a bankruptcy The said deed was duly registered, and everything happened to make it a valid deed under section 192 of the Bankruptcy Act 1861, and the clauses of the Bankruptcy Amendment Act 1868, relating to such deeds.

4. Under the last mentioned deed, the defendants took possession of, and sold, amongst other things in the said mill, the property mentioned in next paragraph as claimed by the plaintiffs. Other articles, both in the Bank Top Mill and in another mill which had also been mortgaged by the said George Mason to the plaintiffs, have been in dispute between the plaintiffs and the defendants, but by abandonment of some claims, and payment into court as to others, the matters in dispute are now reduced to the articles mentioned in the next paragraph.

A copy of the pleadings accompanies and forms part of this case.

5. The plaintiffs claim the following articles as passing by the words of the deed of 7th April, 1869, set out in the second paragraph:

A. 436 looms, sold at	£1,038	4	0
B 14 Jacquard engines, sold at	9	2	0
C. 660 shuttles, sold at.....	19	3	4
D. A drill, sold at	32	0	0

6 The looms, which are machines for weaving worsted stuffs and other fabrics, were placed in various rooms in Bank Top Mill, some on the ground floor and some on the first floor. In all cases they were driven by steam power, which was applied to them in the following manner: The steam engine worked or gave motion to the shafting and going-gear, which consisted of long shafts passing from one end to the other of each room, and having fixed upon them at proper intervals large concentric wheels called drums, from which the required motion was communicated to the looms by means of leather bands, which could be applied to or disconnected from the looms at pleasure The steam engine and the shafting and going-gear were unquestionably fixtures, and passed as such to the plaintiffs under their said mortgage.

The looms slightly varied in size, but each was about 7ft. long by 3ft wide, and from 3ft. to 4ft. high, and weighed about 7 cwt. or 8 cwt. Each loom stood upon four feet, one at each corner, each foot being a flat piece of iron about 3in. long by 1½in broad, with a hole drilled through it about ⅝in in diameter. It is essential to the proper working of a loom that it should stand

on a level and be steady, and keep its true direction perpendicular to the line of the shafting. If it merely rested by its own weight upon the floor, it would be liable in working to be shaken and drawn sideways from the true line. In order to keep the looms in question steady and in their proper position for working, the following methods were adopted:

In the case of the looms which were in rooms on the ground floor (the floors of which rooms were formed throughout of stone flags), the method adopted was as follows: holes about half an inch or three-quarters in diameter were drilled or cut in the stone floor, in the places where two of the four feet of each loom, at opposite corners, would stand. Into each of the holes was driven a plug of wood, so as to fill it up completely, and make it a tight fit. Then the loom was placed in position and brought to a proper level by thin pieces of wood, packed where necessary under the loom feet, and then a nail about four inches long, in some cases with a flat head, and in others with a square bolted head, was driven through the hole in the loom foot into the wooden plug. The other two feet of each loom were left free.

In the case of the looms which were in rooms on the upper floors, the method adopted for keeping the looms steady and in their proper position for working, was somewhat different. The floors of these rooms, like the others, were principally formed of stone flags, but beams of wood about four inches wide and three inches thick were built into the floor along the lines upon which the loom feet stand, and the nails used for keeping the looms in these rooms steady and in their proper position for working, were driven at once into these beams instead of into wooden plugs, as in case of the looms in the ground-floor rooms. The rooms in the upper floors were built and arranged specially to receive the looms, and the purpose for which the beams were introduced was to supersede the necessity of drilling or cutting holes for the wooden plugs. After the nails had been driven into the wooden plugs or beams, as above described, the looms could not be moved without drawing the nails from the wooden plugs and beams; but this could easily be done without any serious injury to the floors. It was not necessary for the purpose of keeping the looms in their proper position for working, that the nails so driven into the wooden plugs or beams as above described should have heads. Spikes without heads would equally have answered the purpose, and if such spikes had been used the looms could have been lifted up and removed, and again placed in their proper position for working, without disturbing or removing the spikes. Patterns of a loom foot, and of two or three of the nails or bolts used to keep the looms in question steady and in their proper position for working, will be in court on the hearing of this case, and may be referred to by either party. A photograph of a loom marked A accompanies and forms part of this case.

7. The Jacquard engines were machines used in conjunction with the looms as above described, when it was required to use the looms for weaving worsted stuffs or other fabrics with patterns. When so used, they were simply screwed on the top part of the looms, and were not otherwise attached to the mill than were the looms themselves.

8. The shuttles are wooden instruments about eight inches long, so shaped as to carry the bobbins or reels on which the yarn or thread to be used for weaving worsted stuffs or other fabrics in the loom is wound. They are used in the process of weaving, and when used are shot backwards and forwards horizontally by the action of the loom, carrying the yarn or thread at each throw between the warp.

The shuttles are of no use without the loom, and the loom cannot be used for weaving without the shuttles; but the shuttles have an entirely distinct and separate existence from the looms, and form no part of the looms, and by breaking the yarn or thread can be removed from them at any time. Patterns of a shuttle and of a bobbin or reel will be in court on the hearing of this case, and may be referred to by either party.

Some of the shuttles in question were actually in the looms now in question at the time of their being taken possession of. The remainder were spare shuttles provided for use when wanted. Those which were so actually in the looms were sold by the defendants for 10*l.*, and the remainder for 9*l.* 3*s.* 4*d.*

9. The drill was a large machine for drilling holes in iron and other metals. It was about eight feet high, and stood on a three-cornered base or foot about five feet long on two sides, and three feet long on the third. It was worked, like the looms, by means of a leather belt, which ran upon the permanent shafting, and was capable of being applied to and disconnected from the drill at pleasure. It was so heavy that it was capable of being worked without being fixed or attached to any part of the mill; but when it was removed by the defendants it was bolted to the floor at one corner by an iron bolt about five inches long, passing through a hole in its base or foot. This bolt was secured by a flat head at the top, and at the bottom was screwed into a nut, which was let into the under side of one of the flagstones of the room in which it was placed. By unscrewing the bolt the drill could be removed. Its weight was about two tons.

The value of the different articles in question are to be taken to be the amounts for which the same were sold as above stated.

10. Amongst the articles in the Bank Top Mill which were sold by the defendants, and which were claimed by the plaintiffs under this said mortgage (but as to which there is now no dispute between the parties, the defendants having paid the money into court in respect of the same), there were several articles of machinery besides the steam engine and the shafting and going-gear, which were unquestionably fixtures, and passed as such to the plaintiffs under the said mortgage.

11. The question for the opinion of the court is, whether any and which of the articles now in dispute passed to the plaintiffs as against the defendants, and according to such opinion judgment is to be entered up on the issue joined on the replication for the plaintiffs for such sum as

the court may direct, or for the defendant; in either case with costs.

Afterwards, on the 5th June, 1871, come here the parties aforesaid, and the court is of opinion that the judgment should be for plaintiffs, except as to shuttles and Jacquard looms mentioned in the said special case. Therefore it is considered that the plaintiffs do recover against the defendants the sum of 1,070*l.* 4*s.* and their costs of suit.

The 7th June, 1871.—The defendants say that there is error in law in the record and proceedings in this action, and the plaintiffs say there is no error therein.

The grounds of error intended to be argued herein are, that the looms and drill did not pass to the plaintiffs by the deed of the 7th April, 1869: that the said looms and drill were not fixtures, and were not machinery within the meaning of that deed: that if the said looms and drills passed by the said deed, such deed was, as regards the said looms and drill, void as against the defendants, by reason of the same not having been registered under the Bills of Sale Act.

The following are the points for argument on behalf of the plaintiffs (defendants in error): First, the deed of the 7th April, 1869, passed the looms and drill, and also Jacquard engine and shuttles; secondly, the said articles were fixtures and machinery within the meaning of that deed; thirdly, the said articles passed as part of the freehold, and consequently the deed of the 7th April, 1869, did not require registration under the Bills of Sale Act.

Field, Q. C. (*Kemplay* with him), for the appellants (the defendants).—The question raised in this case is, whether these looms, being used by a manufacturer (the mortgagor) in his mill, and attached to the floor in the way stated in the case, passed to the mortgagee as part of the freehold. If the looms remained mere personal chattels, then, though they might pass under the mortgage as fixtures, yet, as the mortgage deed was not registered under the Bills of Sale Act, it does not hold good as against the defendants. In the court below the rule to enter the verdict for the defendants was, without argument, at once disposed on the authority of *Longbottom* v. *Berry* (22 L. T. Rep. N. S. 385; L. Rep. 5 Q. B. 123), from which it could not be distinguished. This appeal, then, though in form an appeal from the Court of Common Pleas, is in reality an appeal from the Court of Queen's Bench. The real question is, whether these looms ever became part of the freehold. The only difference between this case and *Longbottom* v. *Berry* is that here spikes could be used to keep the looms in their places; in other respects the two cases are undistinguishable. The decision in *Longbottom* v. *Berry* is a departure from the true rule of law. The true rule is laid down by Parke, B., in delivering the judgment of the court in *Hellawell* v. *Eastwood*, 6 Ex. 295. That was a case where some "mules" for spinning cotton had been taken as a distress, and the question arose whether these "mules," when fixed, became part of the freehold. "This," said Parke, B., "was a question of fact, depending upon the circumstances of each case, and principally on two considerations: first, the mode of annexation to the soil or fabric of the frame, and the extent to which it is united to them, whether it can be easily removed, *integre, salve et commode*, or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law, *perpetui usus causa*, or in that of the Year Book, *pour un profit del inheritance*, or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel." That doctrine was cited and approved of as good law by the Court of Queen's Bench in *Parsons* v. *Hinde* (14 W. R. 860); it was also cited with approval by the same court in *Turner* v. *Cameron*, 22 L. T. Rep. N. S. 625; L. Rep. 5 Q. B. 306 [Blackburn, J., cited *Mather* v. *Fraser*, 2 Kay & J. 536.] In *Walmsley* v. *Milne*, 7 C. B. N. S. 115, the court did not impugn the authority of *Hellawell* v. *Eastwood*; the judgment there proceeded on the conclusion in point of fact that the mortgagor had annexed the articles in question to the freehold for the purpose of improving the inheritance. In *Waterfall* v. *Penistone*, 6 E. & B. 876, *Hellawell* v. *Eastwood* was again cited, and approved as laying down the true rule. He cited also *Trappes* v. *Harter*, 2 C. & M. 153; *Climie* v. *Wood*, L. Rep. 3 Ex. 257; Ex. Ch. L. Rep. 4 Ex. 328; *Lancaster* v. *Eve*, 5 C. B. N. S. 717. It appears from a consideration of these authorities, that the true rule of law is that laid down by Parke, B., in *Hellawell* v. *Eastwood*, and, judged by that rule, the looms in this case were chattels, and did not pass by a conveyance of the freehold. As regards the mode of annexation, they were only so annexed that they might have been easily removed, *salve, integre et commode*, without injury to them or to the building; next, as regards the object and purpose of the annexation, that was simply and solely to keep the looms steady and perpendicular to the line of shafting. It was for the more convenient use of the looms, and not for the improvement of the mill as a mill. The steam engine, boiler, shafting and so forth, were, no doubt, as regards the object and purpose of their annexation, attached to the freehold, for they were put up for the more convenient use of the mill as a mill. The mill could not be used as such without the machinery and shafting gear; but the looms were not equally indispensable. To test the question in another way, these looms would not be ratable: *Reg* v. *Lee*, L. Rep. 1 Q. B. 241. He cited also *Wood* v. *Hewitt*, 8 Q. B. 913; *Fisher* v. *Dixon*, 12 C. & F. 312; *Gibson* v. *The Hammersmith Railway Co.*, 32 L. J. 337, Ch.; 8 L. T. Rep. N. S. 48; *Cullwick* v. *Swindell*, L. Rep. 8 Eq. Cas. 249.

Cave for the plaintiffs (respondents)—The looms were intended to pass; secondly, they did pass, and as part of the freehold and not as chattels. What was mortgaged was a "worsted mill," and the mill can hardly be called a "worsted mill" without these looms: (*Haley* v. *Hammersley*, 30 L. J. 271, Ch.; see also Amos and Ferrard on Fixtures, p. 226, *et seq.*) Where the owner sets up looms like these, the presumption is that he does it for the improvement of the inheritance. In *Hellawell* v. *Eastwood* the question was between landlord and tenant. With regard to fixtures to which the tenant is entitled, as against the landlord, to take away at the end

of the term, they form part of the freehold nevertheless. "When chattels," says Parke, B., in *Hallen* v *Runder* (3 Tyrr. 959), "are thus fixed to the freehold by a tenant, they become part of it subject to the tenant's right to separate them during the term and thus to convert them into goods and chattels as stated by Gibbs, C.J., in *Lee* v. *Risdon* (7 Taunt. 191; 2 Mar. 495), and the very able work of Messrs. Amos and Ferrard on Fixtures; but whilst annexed they may be treated for some purposes as chattels, for instance, in the execution of a *fi. fa.* they may be seized and sold as falling under the description of goods and chattels" He cited, besides the cases cited for the defendants, *Ex parte Barclay*, 5 De G. M. & G. 403; *Boyd* v. *Shorrock*, 17 L. T. Rep. N. S. 197; 37 L. J. 144 Ch.. L. Rep 5 Ch. 72; *Re Dawson*, 16 W. R. 424.

Field, Q.C., in reply.

Cur. adv. vult.

May 23.—Blackburn, J. delivered the judgment of the Court (Kelly, C.B., Blackburn, Mellor, and Hannen, JJ., Channell and Cleasby, BB.)—In this case George Mason, who was owner in fee of a mill, occupied by him as a worsted mill, mortgaged the mill and all fixtures, which then were or at any time thereafter should be set up and affixed to the premises, in fee to the plaintiffs. The mortgage deed was not registered as a bill of sale, and Mason, who continued in possession, assigned all his estate and effects to the defendants, as trustees, for the benefit of his creditors. The defendants, under this last deed, took possession of everything. The plaintiffs brought trover. The defendants paid money into court, and there was a replication of damages *ultra*. A case was stated showing the nature of the articles, and how and in what manner they were affixed to the mill. As the deed was not registered under the Bills of Sale Act, 17 & 18 Vict. c. 36, it was, by sec. 1 of that Act, void as against the defendants, as assignees for the benefit of creditors, so far as it was a transfer of "personal chattels" within the meaning of that Act. And as by sec. 7 the phrase "personal chattels" is declared in that Act to mean, *inter alia*, "fixtures," it was void (as against these defendants), so far as it was a transfer of fixtures as such. Since the decision of this court in *Climie* v. *Wood* (*sup*), it must be considered as settled law (except perhaps in the House of Lords) that what are commonly known as trade or tenant fixtures form part of the land, and pass by a conveyance of it, and that though, if the person who erected those fixtures was a tenant, with a limited interest in the land, he has a right as against the freehold to sever the fixtures from the land, yet, if he be a mortgagor in fee, he has no such right as against his mortgagee. Trade and tenant fixtures are, in the judgment in that case, accurately defined as "things which are annexed to the land for the purpose of trade or of domestic convenience or ornament in so permanent a manner as to become part of the land, and yet the tenant who has erected them is entitled to remove them during his term, or it may be within a reasonable time after its expiration." It was not disputed at the bar that such was the law, and it was admitted, and we think properly admitted, that where there is a conveyance of the land, the fixtures are transferred, not as fixtures, but as part of the land, and the deed of transfer does not require registration as a bill of sale. But we wish to guard ourselves by stating that our decision, so far as regards the registration, is confined to the case before us, where the mortgagor was owner to the same extent of the fixtures and of the land. If a tenant, having only a limited interest in the land and an absolute interest in the fixtures, were to convey not only his limited interest in the land and his right to enjoy the fixtures during the term so long as they continued a part of the land, but also his power to sever those fixtures and dispose of them absolutely, a very different question would have to be considered. As it does not arise, we decide nothing as to this. We are not to be understood as expressing dissent from what appears to have been the opinion of Wood, V.C., in *Boyd* v *Shorrock* (*sup*), but merely as guarding against being supposed to confirm it. In *Climie* v. *Wood* (*sup*) the jury had found as a fact that the articles there in question were tenant's fixtures, and that finding was not questioned. Neither the Court of Exchequer nor the Court of Exchequer Chamber had occasion there to consider what would constitute a fixture. In the present case there is no such finding. The controversy was confined to the looms, the nature of which, and the mode of their annexation, are described in the case. In the court below it was properly admitted that there was no real distinction between those looms and the articles which the Court of Queen's Bench in *Longbottom* v. *Berry* (*sup*) decided to be so annexed as to form part of the land. Judgment was accordingly given for the plaintiffs without argument, leaving the defendants to question *Longbottom* v. *Berry* in a court of error. The present is therefore really, though not in form, an appeal against the decision of the Court of Queen's Bench in *Longbottom* v. *Berry*, and was so argued. There is no doubt that the general maxim of law is that what is annexed to the land becomes part of the land, but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation and the object of annexation. Where the article in question is no further attached to the land than by its own weight, it is generally to be considered a mere chattel: (see *Wiltshear* v. *Cottrell*, 1 E. & B. 689, and the cases there cited.) But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land: (see *Deyncourt* v. *Gregory*, L. Rep. 3 Eq. 382.) Thus blocks of stone, placed one on the top of another, without any mortar or cement, for the purpose of forming a dry stone wall, would become part of the land; though the same stones, if deposited in a builder's yard, and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels. On the other hand, an article may be very firmly affixed to the land, and yet the circumstances may be such as to show that it never was

intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that the shipowner was also the owner of the fee of the spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land. Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they are so intended lying on those who assert that they have ceased to be chattels; and that on the contrary an article which is affixed to the land, even slightly, is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel. This last proposition seems to be in effect the basis of the judgment of the Court of Common Pleas delivered by Maule, J., in *Wilde* v. *Waters* (16 Com. B. 637.) This, however, only removes the difficulty one step, for it still remains a question in each case whether the circumstances are sufficient to satisfy this onus. In some cases, such as the anchor of the ship, or the ordinary instance given of a carpet nailed to the floor of a room, the nature of the thing sufficiently shows it is only fastened as a chattel temporarily, and not affixed permanently as part of the land. But ordinary trade or tenant fixtures which are put up with the intention that they should be removed by the tenant (and so are put up for a purpose in one sense only temporary, and certainly not for the purpose of improving the reversionary interest of the landlord), have always been considered as part of the land, though severable by the tenant. In most, if not all of such cases, the reason why the articles are considered fixtures is probably that indicated by Wood, V.C., in *Boyd* v. *Shorrock* (*sup.*), that the tenant indicates by the mode he puts them up that he regards them as attached to the property during his interest in the property. What we have now to decide is as to the application of these rules to looms put up by the owner of the fee in the manner described in the case. In *Hellawell* v. *Eastwood* (6 Ex. 312) decided in 1851, the facts as stated in the report, are that the plaintiff held the premises in question as tenant of the defendants, and that a distress for rent had been put in by the defendants, under which a seizure was made of cotton spinning machinery, called "mules," some of which were fixed by screws to the wooden floor, and some by screws which had been sunk in the stone floor and secured by molten lead poured into them. It may be inferred that the plaintiff, being the tenant only, had put up those mules, and from the large sum for which the distress appears to have been levied (2000*l.*) it seems probable that he was the tenant of the whole mill. It does not appear what admissions, if any, were made at the trial, nor whether the court had or had not by the reservation power to draw inferences of fact; though it seems assumed in the judgment that they had such a power. Parke, B. in delivering the judgment of the court says: "This is a question of fact depending on the circumstances of each case, and principally on two considerations; first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed *integre, salve, et commode*, or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law *perpetui usus causa*, or in that of the Year Book, *pour un profit del inheritance*, or merely for a temporary purpose of the more complete enjoyment and use of it as a chattel." It was contended by Mr. Field that the decision in *Hellawell* v. *Eastwood* had been approved in Queen's Bench in the case of *Turner* v *Cameron* (*sup.*) It is quite true that the court in that case said that it afforded a true exposition of the law as applicable to the particular facts upon which that judgment proceeded; but the court expressly guarded their approval by citing from the judgment delivered by Parke, B. the facts upon which they considered it to have proceeded: "They were attached slightly, so as to be capable of removal without the least injury to the fabric of the building or themselves, and the object of the annexation was not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels." As we have already observed, trade or tenant fixtures might, in one sense, be said to be fixed merely for a temporary purpose; but we cannot suppose that the Court of Exchequer meant to decide that they were not part of the land, though liable to be severed by the tenant. The words "merely for a temporary purpose" must be understood as applying to such a case as we have supposed—of the anchor dropped for the temporary purpose of mooring the ship, or the instance immediately afterwards given by Parke, B., of a carpet tacked to the floor for the purpose of keeping it stretched whilst it was there used, and not to a case such as that of a tenant who, for example, affixes a shop counter for the purpose (in one sense temporary) of more effectually enjoying the shop while he continued to sell his wares there. Subject to this observation, we think that the passage in the judgment in *Hellawell* v. *Eastwood* (6 Ex. 312) does state the true principles, though it may be questioned if they were in that case correctly applied to the facts. The court, in their judgment, determine what they have just declared to be a question of fact, thus: "The object and purpose of the annexation was not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels." Mr. Field was justified in saying, as he did in his argument, that, as far as the facts are stated in the report, they are very like those in the present case, except that the tenant who put up the mules cannot have been supposed to have intended to improve the inheritance, if by that is meant his landlord's reversion, but only at most to improve the property whilst he continued tenant thereof;

and he urged with great force that we ought not to act on a surmise that there were any special facts or findings not stated in the report, but to meet the case as showing that the judges who decided *Hellawell* v. *Eastwood* thought that articles fixed in a manner very like those in the case before us remained chattels; and this is felt, by some of us at least, to be a very weighty argument. But that case was decided in 1851. In 1858 the Court of Queen's Bench had, in *Willshear* v. *Cottrell* (1 E. & B. 689), to consider what articles passed by the conveyance in fee of a farm. Amongst the articles in dispute was a thrashing machine, which is described in the report thus: "The thrashing machine was placed inside one of the barns (the machinery for the horse being on the outside,) and there fixed by screws and bolts to four posts which were let into the earth." *Hellawell* v *Eastwood* was cited in the argument. The court (without, however, noticing that case) decided that the thrashing machine, being so annexed to the land, passed by the conveyance. It seems difficult to point out how the thrashing machine was more for the improvement of the inheritance of the farm than the present looms were for the improvement of the manufactory. And in *Mather* v. *Fraser* (2 K. & J. 286) Wood, V.C., who was there judge both of the fact and the law, came to the conclusion that machinery affixed not more firmly than the articles in question by the owner of the fee to land for the purpose of carrying on a trade there became part of the land. This was decided in 1856. And in *Walmsley* v. *Milne* (7 C.B., N.S., 115), the Court of Common Pleas, after having their attention called to a slight misapprehension by Wood, V.C., of the effect of *Hellawell* v. *Eastwood*, came to the conclusion, as is stated by them at p. 131, "That we are of opinion, as a matter of fact, that they were all firmly annexed to the freehold for the purpose of improving the inheritance, and not for any temporary purpose." The bankrupt was the real owner of the premises, subject only to a mortgage which vested the legal title in the mortgagee until the repayment of the money borrowed. The mortgagee first erected baths, stables, and a coachhouse and other buildings, and then supplied them with the fixtures in question for their permanent improvement. As to the steam engine and boiler, they were necessary for the use of the baths. The hay-cutter was fixed into a building adjoining the stable as an important adjunct to it, and to improve its usefulness as a stable. The malt mill and grinding stone were also permanent erections, intended by the owner to add to the value of the premises. They therefore resemble in no particular (except being fixed to the building by screws) the mules put up by the tenant in *Hellawell* v. *Eastwood*. It is stated in a note to the report of the case that on a subsequent day it was intimated by the court that Willes, J., entertained serious doubts as to whether the articles in question were not chattels. The reason of his doubts is not stated, but probably it was from a doubt whether the Exchequer had not, in *Hellawell* v. *Eastwood*, shown that they would have thought that the articles were not put up for the purpose of improving the inheritance, and from deference to that authority. The doubt of this learned judge in one view weakens the authority of *Walmsley* v. *Milne*, but in another view it strengthens it, as it shows that the opinion of the majority, that as a matter of fact the hay-cutter, which was not more firmly fixed than the mules in *Hellawell* v *Eastwood*, must be taken to form part of the land, because it was "put up as an adjunct to the stable, and to improve its usefulness as a stable," was deliberately adopted as the basis of the judgment; and it is observed that Willes, J. though doubting, did not dissent. *Walmsley* v. *Milne* (7 C.B., N.S., 115) was decided in 1859. This case and that of *Willshear* v *Cottrell* seem authorities for this principle, that where an article is affixed by the owner of the fee, though only affixed by bolts and screws, it is to be considered as part of the land—at all events, where the object of setting up the article is to enhance the value of the premises to which it is annexed for the purposes to which those premises are applied. The threshing machine in *Willshear* v. *Cottrell* was affixed by the owner of the fee to the barn as an adjunct to the barn, and to improve its usefulness as a barn, in much the same sense as the hay-cutter in *Walmsley* v *Milne* was affixed to the stable as an adjunct to it, and to improve its usefulness as a stable. And it seems difficult to say that the machinery in *Mather* v *Fraser* was not as much affixed to the mill as an adjunct to it, and to improve the usefulness of the mill as such, as either the threshing machine or the hay cutter. If, therefore, the matter were now to be decided on principle, without reference to what has been done on the faith of the decisions, we should be much inclined, notwithstanding the profound respect we feel for everything that was decided by Parke, B., to hold that the looms now in question were, as a matter of fact, part of the land. But there is another view of the matter, which weighs strongly with us. *Hellawell* v. *Eastwood* was a decision between landlord and tenant, not so likely to influence those who advance money on mortgage as *Mather* v *Fraser*, which was a decision directly between mortgagor and mortgagee. We find that *Mather* v *Fraser*, which was decided in 1856, has been acted upon in *Boyd* v. *Shorrock*, by the Court of Queen's Bench, in *Longbottom* v. *Berry*, and in Ireland in *Re Dawson*, Ir. L. Rep. 2 Eq. These cases are too recent to have been themselves much acted upon, but they show that *Mather* v. *Fraser* has been generally adopted as the ruling case. We cannot, therefore, doubt that much money has, during the last sixteen years, been advanced on the faith of the decision in *Mather* v *Fraser*. It is of great importance that the law as to what is the security of a mortgagee should be settled; and without going so far as to say that the decision, only eleven years old, should be upheld, right or wrong, on the principle that "*communis error facit jus*," we feel that it should not be reversed unless we clearly see that it is wrong. As already said, we are rather inclined to think that if it were *res integra* we should find the same way. We think, therefore, that the judgment below should be affirmed.

Judgment affirmed.

EXCHEQUER.

Taubman v. The Pacific Steam Navigation Co.

Carriage by sea—Wilful act and default—Exemption of carrier from liability, under special contract.

A special contract, entered into between a shipowner and a passenger by sea, contained a provision that the shipowner would not be answerable for loss of baggage, "under any circumstances whatsoever."

Held, that such a stipulation covers the case of wilful default and misfeasance by the shipowner's servants.

Martin v. *Great Indian Peninsular Railway Company* (17 L. T. Rep. N. S. 349; 37 L. J. 27, Ex.; L. Rep. 3 Ex. 9) explained.

[26 L. T. N. S. 704, April 22. 1872]

The plaintiff became a passenger on one of the defendants' vessels from Rio Janeiro to England. On taking his passage he signed a contract by which the company engaged to carry him and his luggage upon condition, among other things, that the company would not be answerable for loss of or damage to the luggage "under any circumstances whatsoever." On the voyage the plaintiff's portmanteau was lost through the negligence of the defendant company's servants. The plaintiff brought an action for the loss of the portmanteau, averring in the declaration that the loss was occasioned by the wilful act and default of the defendants.

To this the defendants pleaded, setting out the terms of the contract.

Replication, that the defendants did not use proper skill and care, but were guilty of gross negligence and wilful default, and that, by reason of the said gross negligence and wilful default, the loss was occasioned, and demurrer to the plea.

Demurrer to the replication.

Garth, Q. C., with him, *Morgan Howard*, for the plaintiffs.—The act complained of is a wrongful act of the defendants' own doing, against the consequences of which no form of contract can protect them. The contract would protect the defendants in a case of ordinary negligence, but not in a case of wilful misfeasance or default. The courts have never held that a company could screen itself from liability in such cases, and it was to prevent such attempts that the Railway and Canal Traffic Act, 17 & 18 Vict. cap. 31, was passed. He cited *Peek* v. *The North Staffordshire Railway Company*, in the House of Lords, 8 L. T. Rep. N. S. 768; 32 L. J. 241, Q. B.; 10 H. L. Cas. 743; Story on Bailments, s. 549; *Martin* v. *The Great Indian Peninsular Railway Company*, 17 L. T. Rep. N. S. 349; 37 L. J. 27, Ex.; L. Rep. 3 Ex. 9.

Cohen, for the defendants, was not called upon.

Kelly, C. B.—The defendants in this case are entitled to our judgment. It is only necessary to read the contract in order to decide this case. The defendants are not to be liable for the loss of luggage "under any circumstances." This "gross negligence" of the defendants' servants is a "circumstance;" so is "wilful default." If the act had been actually done by the shipowners, the act would have been a trespass, whatever the contract might be. But this is the act of the servants, and the action is really one for breach of contract. *Martin* v. *The Great Indian Peninsular Railway Company* is distinguishable, for there the freedom from liability only extended to the time during which the baggage was to be in the charge of the troops.

Martin, B.—I am of the same opinion, as far as I can see from the imperfect statement of facts we have before us. The defendants are not under the liabilities of common carriers, and they are free to make any terms they choose. Probably the words in the special contract were inserted for the very purpose of exempting the company from liability for the acts of their servants.

Bramwell, B.—I am of the same opinion. *Primâ facie*, the defendants are not liable, for the contract says they are not to be liable for the loss of baggage under "any circumstances." A loss has occurred under certain circumstances, and the plaintiff is seeking to recover. Next we must consider, is there any implied exception? I am of opinion that there cannot be, for the parties could easily have expressed it: see the judgment of Maule, J., in *Borradaile* v. *Hunter*, 5 M. & G. 639; 12 L. J. N. S. 225, C. P. Then it is urged that in certain cases the Legislature have interfered. That, as far as it goes, is against the plaintiff's case. And the court will not extend the Railway and Canal Traffic Act further than they can help, for it has been already the cause of more dishonest transactions than any Act of Parliament.

Cleasby, B.—What is the meaning of the word "circumstances?" I find in Johnson's Dictionary that the word "circumstance," in a legal sense, means "one of the adjuncts of a fact, which makes it more or less criminal." Arguing from this definition of "circumstance" by analogy, I should think the words in the contract will cover the present case.

QUEEN'S BENCH.

Wells v. Abrahams.

Trover—Felony by defendant—Defendant's application to set aside verdict.

In an action of trover for a brooch; pleas not guilty, and not possessed; the jury found a verdict for the plaintiff. Upon a rule for a new trial, on the ground that the facts alleged had established a felony by the defendant, and on the ground that subsequently to the verdict criminal proceedings had been instituted against the defendant:

Held, that those were not grounds for setting aside the verdict upon application of the defendant.

Wellock v. *Constantine*, 2 H. & C. 146, discussed and questioned.

[26 L. T. N. S.—May 2, 1871.]

This was an action for the conversion of a diamond brooch, tried before Lush, J., at the last Liverpool assizes. The defendant pleaded only not guilty. The jury found a verdict for the plaintiff; damages £150, the value of the brooch.

According to the evidence of the plaintiff's wife, she left a parcel of jewellery, containing amongst other things this brooch, with the defendant, who was a jeweller and pawnbroker, for the purpose of security for a sum of money she wanted to borrow. The defendant refused to advance the sum she required, and returned the parcel, but, as the plaintiff's wife alleged, the defendant abstracted and kept this brooch. Defendant and his son both asserted that the parcel did not contain such a brooch, but the jury found a verdict for the plaintiff. Criminal proceedings were afterwards commenced against

the defendant for stealing this brooch. Defendant had paid the amount of plaintiff's judgment and costs.

Torr, Q C., for the defendant, had obtained a rule nisi for a new trial on the ground that the evidence tended to prove a felony; and on affidavits of the facts subsequent to the trial, that is, a criminal prosecution for the felonious stealing of the brooch alleged to have been converted in the action

Aspinall, Q C., for the plaintiff, shewed cause.
Torr, Q C., supported the rule.

The arguments upon the rule came on by way of motion, when the following were cited and discussed: *Crosby* v. *Leng*, 12 East. 409; *Stone* v. *Marsh*, 6 B & C. 551; *Gibson* v. *Minet*, 1 H. Bl. 569; *White* v. *Spettigue*, 13 M & W. 603; 1 Hale, Pleas of the Crown 546; Com. Dig. "Action on case," B. 51; *Dawkes* v. *Covenaigh*, Styles 346; 1 Sm. L. C. 6th edit, 267; 9 & 10 Vict. c. 93, s. 1; *Harris* v. *Shaw*, Cas temp Ld. Hard. 349; *Wellock* v. *Constantine*, 2 H. & C 146; *Markham* v. *Cobb*, Wm Jones, 147; *Gimson* v. *Woodfull*, 2 C. & P. 41; *Huggins* v *Butcher*, Yelv 89 [See also Bishop's Criminal Law, vol. 1, sects. 553 to 603; and *Prosser* v. *Rowe*, 2 C & P. 421.]

COCKBURN, C J.—This rule must be discharged. There is a rule long established, in fact coeval with the law of England, that where a certain statement of facts discloses at the same time a civil injury to an individual and a public injury, the civil injury is suspended until there has been a prosecution by the party injured That is the law; the question is, how is it to be enforced? It may be that the person against whom a prosecution is impending may plead that he is in the position of a felon, and may thus stop the civil action. I do not say so; it certainly would be to allow a person to allege his own criminality. To bring a civil action while the prosecution was going on may be oppressive. Under such circumstances, the court, as it is always willing to do, might, by the exercise of its summary jurisdiction, stay proceedings. Or suppose a person neglects to prosecute, preferring from selfish interest to bring a civil action, a public prosecutor might apply to the court to interfere and prevent his deriving the benefit of the fruits of his action. The only question in this case is whether my brother Lush ought to have interfered either by nonsuiting the plaintiff, or, if he refused to be nonsuited, by entering a verdict for the defendant. I cannot see whence he derives the power to do either. A judge at Nisi Prius has not the power of the court, nor is he always even a member of the court in which the action is brought. He is merely the instrument of the court to try the issue upon the record. Possibly he might refuse to try the cause. But when the cause has begun, the judge can only deal with the issues before him. In this case they were upon the pleas of not guilty and not possessed. The property was the plaintiff's, and the defendant had converted it. If he converted it *animo furandi*, the conversion would amount to a felony, and he would be liable to be prosecuted. Whether the conversion was felonious or not was a question of fact. How was the judge to direct a nonsuit, or how could he leave such a question to the jury? There was no such issue, and the judge had no power to do so. This is an application for a new trial on the ground that upon the facts the judge should have nonsuited, or entered a verdict for the defendant, He should have done this, it is alleged, on the ground that the facts showed that the defendant had committed a felony. At the trial Mr Torr, properly, would not have admitted that the defendant had committed a felony. He comes here applying on facts which, he says, shew a felony, and denies that a felony was committed. He applies on facts of which he denies the truth. He has, therefore, no *locus standi*. The only ground on which he could apply would be that he had committed a felony.

BLACKBURN, J.—I am of the same opinion. There are, no doubt, many dicta of high authority that where there is a civil injury which is also the subject of a criminal prosecution for felony, it is the duty of the person injured first to prosecute, and that he cannot go on with his civil remedy until he has prosecuted. There is no case, however, before those of *Gimson* v. *Woodfull* (2 C. & P. 41), and *White* v. *Spettigue* (13 M. & W. 603), in which that rule has been acted upon. It is quite possible that such a duty may lie upon the party injured Upon a proper case made on behalf of the Attorney-General, acting in the capacity of public prosecutor, shewing that such an action was brought by a person desiring to avoid prosecuting, or in any way to compromise a felony, the court might stay proceedings in the action. I doubt whether, upon the application of a defendant who was being criminally proceeded against, such an action might not be stayed until the criminal proceedings were disposed of, on the ground of his being harassed with the two proceedings at the same time. Now, it is said that it was the judge's duty to nonsuit the plaintiff, or to direct a verdict for the defendant At the trial the question to be decided was: Did the defendant convert the goods mentioned in the declaration to his own use? If the jury had found that the facts had amounted to a felony, were the jury to say that the defendant was not guilty of the conversion? I do not think that the defendant could have pleaded a good plea that the conversion charged against him in the declaration was a felony. The authority for the series of dicta which have been quoted is to be traced back to the case of *Markham* v *Cobb* (Wm. Jones 147), decided in the time of Charles I. This was an action of trespass for entering the plaintiff's house and taking £3000 of his money. The plea was, that the plaintiff procured the defendant to be indicted and convicted before the justices of gaol delivery of the county of Nottingham for burglariously entering the said house and taking therefrom £3000, which was the trespass alleged. To this plea the plaintiff demurred The plea in effect was, that the plaintiff had elected to take criminal proceedings against the defendant, and therefore could not go on with this civil action. The decision in that case as to the election was that a party had an election between bringing trespass or an appeal; that bringing an appeal would be a bar to bringing an action for the

trespass: but that a conviction upon an indictment, which was the suit of the king, was no bar to an action. Then there is the case of *Higgins* v. *Butcher* (Yelv. 89). This was an action brought by the plaintiff for assaulting his wife, whereby she died. It was objected that this was a personal action, which died with the wife. Tanfield, J. says: "If a man beats the servant of J. S. so that he dies of that battery, the master shall not have an action against the other for the battery and loss of the service, because the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into felony, and that drowns the particular offence and private wrong offered to the master before, and his action is thereby lost." After that comes the case of *Dawkes* v. *Coveneigh* (Styles, 346). This was an action of trespass and carrying away £250. The plea was not guilty. A special verdict was found to the effect that the defendant did feloniously break the house and carry away the £250 and was indicted for it, and was found guilty and burnt in the hand for it. The question was whether, under these circumstances, an action for trespass was maintainable by the party injured. There was at first a difference of opinion amongst the judges, but upon re-argument the whole court agreed with Roll, C.J., who said: "This is after a conviction, and so there is no fear that the felon shall not be tried; but if it were before conviction, the action would not lie, for the danger the felon might not be tried. And there is no inconvenience if the action do lie, and since he could not have had his remedy before, he shall not now lose it; and now there is no danger of compounding for the wrong." Judgment was accordingly given for the plaintiff. It may be added that the decision in the case of *Higgins* v. *Butcher* was on the ground that *actio personalis moritur cum persona*. From the time of the case of *Dawkes* v. *Coveneigh* there was no attempt made to interfere with actions on this ground until the case of *Gimson* v. *Woodfull*. The dicta had been repeated in the books, and the law had been so laid down In that case Best, C.J., acted upon it, and made it a ground for nonsuiting the plaintiff. That case, however, was overruled by *White* v. *Spettigue* (13 M & W. 603.) Then we come to the case of *Wellock* v. *Constantine* (2 H. & C. 146) In that case there was no issue of felony to be tried by the jury. The plaintiff, on the face of the declaration, alleged that a felony had been committed. That, probably, would have been a case for the summary jurisdiction of the court in staying the action. No such course, however, was taken. The case went down to trial, and my brother Willes nonsuited the plaintiff. The court did not set aside that nonsuit. Throughout the argument, the dicta of the judges seemed to be that the judge was wrong in nonsuiting, and that what he should have done was to stay the proceedings. The court then suggested a *stet processus*; but the parties not being able to agree, the court thought it right to discharge the rule. They might have set aside the nonsuit, on the terms that all proceedings in the action should be stayed until the question of felony had been settled. I do not understand the decision. I think that it would be a mistake in applying the rule to call upon the jury to try a question of felony which was not before them.

Lush, J.—I am of the same opinion The party injured should, in the first instance, prosecute, and until he does so, cannot obtain redress. That is the rule; but how it is to be enforced we are nowhere informed. No instance has been mentioned to us in which the civil proceeding has been stayed. The defendant cannot set up his own criminality. The judge at Nisi Prius cannot interfere in the middle of the trial of the cause. He cannot refuse to try the cause. He cannot stay it. He cannot nonsuit the plaintiff, if there be evidence to go to the jury in support of his case upon the issues joined. He cannot direct a verdict contrary to the evidence. If the declaration on the face disclose a felony, that would be a ground for demurrer, or for a motion in arrest of judgment.

Quain, J.—I am of the same opinion. This is an application for a new trial on the ground of misdirection; that the judge should have directed a nonsuit or a verdict for the defendant on the ground that he had been guilty of a felony. The defendant did not say a word at the trial about a felony. He took his chance of a verdict. Now he says that a felony was committed. This is a position inconsistent with that which he took at the trial. He has no right to come here under these circumstance. Is there any case where such a course has been adopted, or where such a plea has been pleaded? There is none where such an application has been made by the felon himself. We cannot make such a precedent. If it appeared upon the face of the declaration, then it might be a case for demurrer, or for a motion in arrest of judgment

Rule discharged with costs.

REVIEWS.

A Treatise on the Law of Damages: Comprising the measure, the mode in which they are assessed and reviewed, the practice of granting New Trials, and the Law of Set-off. By John D. Mayne, of the Inner Temple, Esquire, Barrister-at-Law. The Second Edition, by Lumley Smith, of the Inner Temple, Esquire, Barrister-at-Law, Fellow of Trinity Hall, Cambridge. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar. 1872.

When the first edition of this work appeared in 1856, it was welcomed as an able and a much needed exposition of the Law of Damages. The only preceding work of the kind in England was the old and forgotten treatise of Sergeant Sayer. In the United States, Professor Sedgwicke had written a work on the Law of Damages that, so far as his coun-

try was concerned, supplied a want. Mr. Mayne undertook to do for England that which Professor Sedgwicke had done for the United States. And it is no disparagement of Professor Sedgwicke's labours to say that Mr. Mayne proved himself no mean rival. From the moment that Mayne's treatise appeared, it secured for itself a place in every good law library, and a companionship with Roscoe's Nisi Prius on almost every circuit. This was because the arrangement of the work was good, and the views of the author in general reliable. His selection and examination of English and American cases was all that could be desired in a work of the kind. Had he explored the Canadian field of forensic jurisprudence as well as the American, he would have enhanced the value of his work. But as it was, from incongruous and widely scattered materials he succeeded in elaborating a concise and readable treatise on a very interesting branch of law.

One of his great difficulties was to distinguish between the right to recover and the amount to be recovered. People of little reflection may be inclined to smile at the mention of such a difficulty; but, as pointed out by the author in his preface to the first edition, the right to sue often depends upon the existence of the very circumstances which determine the right to damages. For instance, where the wrong complained of affects the public generally, the particular loss sustained by the plaintiff is the fact which at once gives him a right of action, and guages the compensation he is to obtain. So in actions against executors, the possibility of obtaining any real satisfaction may depend entirely upon the form in which they are sued, whether in their representative or personal capacity. In many cases of torts, no measure of damages can be stated at all, and the only way of approximating to such a measure is by ascertaining what evidence could be adduced in support of the particular issues.

The author did much to overcome the difficulty we have mentioned. His inability to do so altogether, made some portions of his work resemble a treatise on the Law of Nisi Prius, rather than one exclusively appropriated to Damages. For this he apologizes in his preface to the first edition. But no apology was necessary. The fact that his work in some parts resembles a treatise on Nisi Prius Law is no objection to it. On the contrary, the whole subject of Damages is one so essential for consideration at Nisi Prius, that a work on the subject is a necessary *vade mecum* to a Nisi Prius counsel.

There was a portion of the work more open to objection, and of little use to a Nisi Prius practitioner, viz., that which collected compensation cases. This class of cases is *sui generis*. Of late it has grown to such dimensions as to demand treatises relating almost exclusively to railway and other companies having compensation clauses in their acts of incorporation. In this connection we more immediately refer to the law of railway companies by Messrs. Godefroi and Short. The editor of the edition of the work now before us has, we think prudently, omitted this class of cases. He has, however, in all other respects, retained the original work in its original form. His additions, which are bulky, are placed within brackets, so as to distinguish his work from that of Mr. Mayne. Notwithstanding his efforts to compress, the second edition of the work contains one hundred pages more than the first edition.

A new edition of Mayne on Damages has been long needed. Often have we wondered that a second edition was not sooner issued. Of late years the decisions on the question of damages have been numerous and interesting. The accumulation of decisions during the sixteen years that have elapsed between the first and second editions have been so great as to increase the size of the work one-fifth beyond its original dimensions.

Mr. Lumley Smith, the editor of the second edition, has been very modest in attempting to proclaim what he has done. He does not even give us the number of additional cases included in the work, but these cannot fall short of a thousand. The original work contained references to about two thousand cases. This edition has no less than three thousand cases. The reading of these cases so as to understand them, and the placing of them when understood in the appropriate parts of the work, was a task of great labour and heavy responsibility. The editor has also, we should mention, made a selection of American cases since 1856. In a future edition we hope there will be some references to the decisions in this part of the British Empire. Of late we have had occasion to point out the omis-

sions in this respect of more than one English author. We shall continue to do so as long as necessary, but hope that before the lapse of much time English authors who extend their explorations to the legal fields of our American cousins will be induced to "cross the line," and make use of some of the fruit which we have in such abundance for their use, and which we can assure them is worthy of their acceptance.

We do not intend here to give a summary of the contents of the book. The original work is so well known as to render this unnecessary. But we may say that the second is printed in larger type and on better paper than the first edition. This perhaps may be explained by reason of the change of law publishers. The present publishers (Messrs. Stevens & Haynes) are taking the lead of older houses in London in the law-publishing business. They deserve to do so. Their enterprise and business ability merit great praise, and, better still, substantial patronage.

The Law Magazine and Review. April, July and August, 1872. No. III., New Series. London: Butterworths.

This is now a "monthly journal of jurisprudence for both branches of the legal profession at home and abroad." From the three numbers of the new series which have reached us, we should say that this valuable review will not lose caste by the change from a quarterly to a monthly; it will be even more acceptable in that it will be more frequent. The August number concludes "Notes on the Temple Church." We make room for that part of it which speaks of the Master of the Temple:—

"The master of the Temple has always held a position of honour. The greatest name in the list is undoubtedly that of the "judicious Hooker." In the Life of Richard Hooker, prefixed to the edition of his works, in 1666, it is mentioned that, in 1585, a Mr. Aloy, master of the Temple, died—a man so well loved, says the biographer, that he went by the name of Father Aloy. His predecessor, and the only one since the Reform, had been Mr. Ermstead. Hooker succeeded him, being selected thereto on account of his saint like life. He was then thirty-four years old.* He at once entered into controversy with the lecturer, a Mr. Walter Travers. The latter was a friend of Cartwright, and one of the great leaders of the Presbyterian school, which had given forth Martin Mar-prelate, and other books and pamphlets, which were disturbing the peace of Elizabeth and the Anglican party. It is said that Travers had hoped to be appointed master of the Temple, and to put his Presbyterian views of church government into practice. He was a man of blameless life, and, even according to his enemies, of great learning. His great offence was that he had taken orders at Antwerp. He kept up a correspondence with Beza at Geneva, and with others of his way of thinking in Scotland. Hooker and Travers seem to have preached in opposition to each other. They followed, says the biographers of Hooker, the apostolic example; for as Paul withstood Peter to the face, so did Hooker withstand Travers. 'The forenoon sermon spake Canterbury; and the afternoons, Geneva.' This was clearly dangerous, and the Archbishop of Canterbury prohibited Travers from preaching. Travers petitioned the Queen in Council. The latter refused to interfere. Whereupon the petition was published, and Hooker had to reply to it. The two great points in dispute show how entirely the 'great vital truths' of one generation are apt to be looked on as mere curiosities by succeeding ones. We dig them from the great sepulchre of dead and buried controversies merely to suggest a moral. They were, first, that Hooker had declared 'That the assurance of what we believe by the Word of God is not to us so certain as that which we perceive by sense;' and secondly, that he had ventured on the monstrous assertion, 'That he doubted not but that God was merciful to save many of our forefathers living heretofore in Popish superstitions, forasmuch as they sinned ignorantly'—a horrible piece of latitudinarianism which in these days would pass unchallenged. Hooker was gentle enough as well as 'judicious,' but he could hit out very neatly. Take this, for example, 'Your next argument consists of railing and of reasons; to your railing I say nothing; to your reasons, I say what follows.' The controversy divided the lawyers into two parties: the younger going mostly with Travers. The life in the Temple was too busy for the gentle Hooker and, in 1591, he petitioned to be removed, and had another living presented to him. His 'Ecclesiastical Polity' was written whilst living in the Temple, and was the result of the controversy just mentioned. Hooker's marriage hardly seems to justify the adjective 'judicious,' which usually accompanies his name. Recovering from an illness, he came to the conclusion that it was well he should marry. Instead, however, of looking out for a wife, he commissioned his landlady

* Life of Hooker: Hooker's Works, p. 9, edition, folio, 1666.

to do this duty for him. She made a selection, and her own daughter became the wife of Hooker. The marriage was about as unsatisfactory as might have been expected. Hooker's peculiarly gentle character, his simplicity, disinterestedness and utter unworldliness, combined with his attainments and ability, his sweetness and light, made him a favourite; and within a few years of his death caused his name to be held in a veneration more resembling that of a saint than that of any other modern English divine. Hooker was succeeded by a Dr. Balgey.

Sherlock's name ranks next in the list of those who have held the mastership of the Temple. He was in many respects a model and a typical Anglican clergyman. Living in violent times, he refused on the one hand to become a violent man, and on the other to abstain from taking part in the great controversies which were occupying men's minds. His first noteworthy appearance was when, towards the end of the reign of Charles II., an order-in-council was issued forbidding the clergy to touch on controverted points of theology. What this meant was, of course, that though they might preach the doctrines of the Church of Rome to their hearts' content, they must not venture to attack these doctrines. Sherlock refused compliance, and became unpopular at court in consequence. In 1688, when James II. issued his Declaration of Indulgence, and ordered it to be read in all churches, the leading clergy of London met together to consider whether or not they should comply with the royal command. Sherlock was among them, and was one of those who determined not to comply. A little later he was present at a still more important meeting, convened at the Palace of Lambeth. The famous seven Bishops were there, together with Sherlock and others of the leading city clergy. The petition, as our readers know, was signed only by the bishops, but doubtless they represented the views of Sherlock and his companions. It is sufficient to mention that Stillingfleet, Tillotson, Tenison and Patrick were there as well as Sherlock, to show that the non-episcopal part of the meeting had an amount of capacity among them fully equal to that found in the bishops. When the Prince of Orange and Mary accepted the sovereignty, Sherlock's old instincts as a clergyman, who had doubtless preached in favour of divine right of kings, was too strong for him. When we remember the wonderful declarations to which the clergy of that day had subscribed—as, for example, that they believed that it was unlawful in any case to take up arms against the king—the wonder is, not that a man here and there should be found like Sherlock, with a conscience unable to transfer his allegiance from a king who had in fact been deposed by arms, to one who, in accordance with the views all but universally taught by the clergy, was a usurper who had laid his hands on the Lord's anointed, but that so few among the clergy should have been found to be constant to their old professions. Sherlock refused to acknowledge William III., and became one of the non-jurors. Thenceforward, for a time at least, he was the great favourite of the Jacobite party. Subsequently he saw his way to taking the oaths."

Canadian Monthly and National Review. Toronto: Adam Stevenson and Co., Publishers. August and September, 1872.

The editors, we notice, are departing from the plan of giving the names of contributors to the articles in every case. We think it was a mistake so doing, and are glad to see the change. We commend to all lovers of the early history of England an inimitable sketch of King Alfred and his Times—especially in connection with University College, Oxford—under the title of *Alfredus Rex Fundator* written by Mr. Goldwin Smith. The sketch of Lord Elgin will be read with much interest by the admirers of that most estimable and useful man.

A Chinaman was sworn in New York recently according to his native custom. An interpreter and a queen's ware plate were procured; the interpreter repeated the oath and the "Heathen Chinee" waved the plate twice in the air and brought it down with a tremendous crash upon the table, after which he proceeded to give his testimony. Our courts are exceedingly compliant to the religious eccentricities of witnesses, and all that is essential to the validity of an oath is the belief in a Supreme Being, who will punish perjury; the form is left to the religious notions and court customs of the witness. Now we suppose if a Mahommedan should be sworn in New York, he would be furnished with the koran; and if a Hindoo should be called upon to testify, his demand for the vedas would be gratified; or if, like the Quaker, he should object to swearing by his bible, he would be allowed to swear according to his native custom.—*Albany Law Journal.*

The Paris *Figaro* says that the argument for the defence in the late Irish murder trial was borrowed from a French lawyer, M. Chaix d'Est Ange, who, in behalf an assassin, urged the following plea: "Suppose that the unfortunate victim had been struck with apoplexy between the moment when his assailant lifted his axe and that at which the axe fell upon him, in such case you will have condemned an innocent man."