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DIARY FOR DECEMBER.

1. Monday .... Last day for notice of trial County Court.
7. SUNDAY. .... *2nd Sunday in Advent*
9. Tuesday. .... Quarter Sessions and County Court Sittings in each County.
11. Thursday ..... Sittings of Court of Error and Appeal commences.
13. Saturday..... Last day for coll. of money for School Teach. Last day for serv.
14 SUNDAY .. *3rd Sunday in Advent.* [of writ for York & Peel Assizes.
21. SUNDAY ..... *4th Sunday in Advent.*
22. Monday..... Nomination of Mayors
23. Tuesday ..... Declare for York and Peel Assizes.
25. Thursday..... CHRISTMAS DAY.
28. SUNDAY..... *1st Sunday after Christmas.*
30. Tuesday..... End of Municipal year. Last day on which 1 on half of Gram [School Fund payable. Last d. for not. of trial Y. & P. Assizes

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

DECEMBER, 1862.

THE LAW OF SEDUCTION.

The action for seduction is in form a fiction,—in substance a snare. It is pregnant with inconsistencies; it cannot be defended on principle; it is most unsatisfactory in practice.

The aim of the law is to furnish a remedy for every wrong. Some wrongs are of such enormity as to be deemed public wrongs, and as such treated as crimes, and so punished. Others, of apparently minor import, are left to be redressed at the instance of the sufferer in action for compensation.

It is not right for a man to have connection with a woman against her will—this is a public wrong, and punishable as a crime. It is not right for a man to have connection with a woman by artifice—this is a private wrong, and punishable by action.

To defraud another of his property is a crime, but to defraud a woman of her virtue, as the law stands, is something less than a crime.

Marriage is the state in society to which all women look forward. To attain this state, character is necessary: the loss of character is the loss of earthly prospects. No compensation can be awarded adequate to the loss of virtue under such circumstances.

The injury is at least twofold—pain which the woman suffers from shame—and loss of reputation. The sense of shame must be strong indeed when we know it frequently causes the woman to destroy her offspring—to murder her own flesh and blood. The loss which she sustains by the ruin of her reputation defies computation. The consequence at times is a life of prostitution, loathsome disease—in a word, a living death.

Besides, there is an injury to her family. Nothing is so destructive of domestic comfort and earthly happiness as the ruin of a fond daughter or a loved sister. The contemplation of it is awful. The realization of it is maddening. The complication of miseries which arise from this cause cannot be computed.

We do not assert that in all cases the man only is to blame; but we do assert that in the majority of cases he is the sole delinquent.

In what manner therefore does the law afford redress for this wrong? It neither punishes the wrong doer as a criminal, nor gives an action to the woman, who is the real sufferer.

It is true that an action lies against the wrong doer, but not at the instance of the woman seduced, nor for her seduction, but at the instance of her parents, for the loss of service arising from the fact of seduction followed by pregnancy.

The foundation of the action at common law is loss of service. The mere relationship of parent and child is not sufficient to support the action. There must be the real or presumed relationship of master and servant: the action at common law is not maintainable without some proof of loss of service. (*Thompson* v. *Ross*, 5 H. & N. 16.)

Slight evidence of service is sufficient, such as milking of cows, pouring out tea, or the performance of similar domestic duties. (*Bennett* v. *Allcott*, 2 T. R. 168; *Carr* v. *Clark*, 2 Chit. R. 261; *Mann* v. *Barrett*, 6 Esp. 32.)

If the daughter live with her parents, the relationship of master and servant is presumed (*Maunder* v. *Venn.*, M. & M. 323); but if living in the service of another at the time of the seduction her parent cannot at common law maintain the action. (*Dean* v. *Peel*, 5 East. 45.)

The consequence is that a great hardship arises. The law based on fiction works real injustice. For the seduction of the daughter of the rich man, who resides with her father, and whom the law presumes to be the servant of her father, though she perform no service whatever beyond that of living in luxury at his expense, the law provides a remedy. But for the seduction of the daughter of the poor man, whom necessity compels to be the servant of others, at common law there is no remedy whatever. (*Carr* v. *Clark*, 2 Chit. R. 260.)

The master himself with whom she is hired may be her seducer, and as no loss of service arises therefrom to her father or mother, the action at common law cannot

be sustained. (*Harris* v. *Butler*, 2 M. & W. 539; *Davis* v. *Williams*, 10 Q. B. 725.)

The daughter may be the chief source of the support of a widowed mother or aged father; her ruin while in service may be starvation to her parents; and yet the law of England is powerless to afford redress.

In a recent case the daughter of a widow was seduced. The daughter had gone into service in the family of one Ross, where she received wages as a domestic servant. While in the service of Ross, his son seduced her. The mother brought her action, but the action was held not to be maintainable, though it was shown that in the evenings, the daughter, with the consent of her mistress, made shirts for her mother, who was a shirt maker, and so assisted her mother to get an honest livelihood. Pollock, C. B., said, "We are all agreed that there was no service in this case. The service must be a real genuine service, such as a parent, master or mistress, may command. Here the girl did work for her mother by the consent of the lady who was her true mistress. It was argued that if a daughter making tea in the house of her parent is a sufficient service to entitle the parent to sue for the loss of such service, a parent might sue in the case of a domestic servant going home on Sunday evenings and making tea there. But here there was merely a permission, which might at any moment have been withdrawn. The entire services of the girl belonged to her master. However painful it may be that there should be a wrong without a remedy, we must leave the law as we find it. We cannot make that a service which was no service. The rule therefore will be absolute to enter a nonsuit." (*Thompson* v. *Ross*, 5 H. & N. 16.)

So in a still more recent case. The daughter had, till 1854, resided with her father and mother. In that year the father, owing to pecuniary difficulties, left them and went to lodge elsewhere. Then the daughter took a house in her own name, in which she carried on the business of a milliner, and thereby helped to maintain her mother and the younger members of the family. During 1856, when on a temporary visit to the house of a sister, she met the defendant and was seduced by him. The furniture in the house belonged to the father. He occasionally visited his family there, and contributed something towards their support. Still the action was held not to be maintainable. Williams, J., said, "However painful it is to make the maintenance of an action of this sort depend upon services rendered by the daughter, still as the law is so we are bound by it." (*Manly* v. *Field*, 7 C.B. N.S. 96.)

The rule in the United States is somewhat different. There, it is held that a father may maintain an action for the seduction of his daughter, though at the time of the seduction in the service of a third person, provided the service be under such circumstances that he is in a position to reclaim her services at his pleasure. The reason is that the consent of the father to his daughter's absence, and to her appropriating her wages to her own use, is treated as a mere license revokable at any time. (*Martin* v. *Payne*, 9 Johns. 387; *Hornketh* v. *Barry*, 8 Serg. & R. 36; *Bolton* v. *Miller*, 6 Indiana, 262.) It is not so clear that a widowed mother has under similar circumstances the same right—the authorities are conflicting on the point. (*South* v. *Dennison*, 2 Watts, 474; *Roberts* v. *Connelly*, 14 Alabama, 241; *Sargent* v. *Anon*, 5 Cow. 106; *Parker* v. *Meek*, 3 Sneed. 34.)

In Upper Canada, however, the legislature has made an attempt to place the law on a more satisfactory footing than it is either in England or in the United States. On 4th March, 1837, our legislature passed the 7th Wm. IV. cap. 8, entitled "An Act to make the remedy in cases of seduction more effectual," &c. It recited that in some cases the law failed in affording redress to parents whose daughters were seduced, and enacted that the father, or in case of his death the mother, of any unmarried female who might be seduced after the passing of the Act, and for whose seduction such father or mother could sustain an action in case such unmarried female were at the time dwelling under his or her protection, shall be entitled to maintain an action for seduction, notwithstanding such unmarried female was at the time of her seduction serving or residing with any other person upon hire or otherwise. In furtherance of the spirit of the Act, it was also enacted that upon the trial of any action for seduction brought by the father or mother, it shall not be necessary to give proof of any act or acts of service performed by the person seduced, but the same shall be in all cases presumed, and no proof shall be received to the contrary. (Con. Stat. U. C., cap. 77, sec. 1, 2.)

The effect of our act is apparently to rest the action rather on the relationship of parent and child than of master and servant. There is no doubt that it is more consonant with reason than the common law rule which still prevails in England, and to some extent still prevails in the United States. It is strange that the English legislature have not either abolished the action or made it more effective than it is there at present. One would expect, as the action there is rested solely on loss of service, that no damages could in the action be recovered beyond compensation for loss of service. Such however is not the case. The judges, who cling with such tenacity to the common law foundation of the action, have with strange inconsistency permitted the claim to damages to go much beyond mere loss of service. In England, as well as in

the United States and in Upper Canada, damages may be given for loss sustained by the parent in being deprived of the society and comfort of a virtuous child, and for the distress and anxiety of mind caused by her seduction. (*Irwin* v. *Dearman*, 11 East. 24; *Andrews* v. *Askey*, 8 C. & P. 7.)

One effect of our statute has been to make the action of very frequent occurrence. In many instances the action, though brought in the name of the parent, is brought without the knowledge of the parent. It is in such cases the action of the daughter; and though substantially the plaintiff, she is allowed to enter the witness box and swear the case through, while under our law, which prevents parties to the record being witnesses on their own behalf, the defendant is not able to say a word on oath in contradiction of her story. The defence of such an action under such circumstances is peculiarly difficult.

The action is easily brought, easily proved, and most difficult to be met. If the defendant were allowed to give his story in the box, the jury could judge between the alleged seducer and the person seduced. Without his oath in all probability there is no evidence to offer, and, in the absence of evidence for the defence, a verdict for the plaintiff is almost a matter of certainty. Should the seduced be a person of doubtful character, the defendant, with a view to impeach her credibility or lessen damages, may be tempted to put witnesses in the box. This, however, as the law stands, is an experiment fraught with danger. The jury perhaps, more influenced by the tears of the young woman or the eloquence of her counsel than by the evidence of her accusers, may disbelieve the testimony of the latter, and, because of the supposd attempt "to blacken her character," swell the damages.

In conclusion, we hesitate not to say that the action in its present form is a delusion. It is supposed to be the action of the parent, but in nine cases out of ten is the action of the daughter. It is supposed to be for loss of service to the parent, but is either for loss of virtue by the daughter, or, worse still, for the wages of prostitution. The daughter is in such cases the actual plaintiff. On her part the action is a claim for damages. When a woman is deprived of her virtue her moral character is generally shaken. Perhaps, she has nothing left but to make as good a speculation as her altered circumstances will admit. Her real seducer it may be is a young man of buoyant expectations but no substance. Her speculation is much more likely to pay if she can only get a jury to believe that a man of property, who perhaps innocently was once or twice in her company about the time of her seduction, is her seducer. If a married man so much the better — he is the more likely to pay handsomely in order to prevent the exposure of a trial, however innocent he may be of the charge We do not say that this *is* always the case. But we do say that, as the law stands, it *may* be the case in numberless instances. The temptation is great, and we fear that some women are bad enough to give way to that temptation. When chastity goes truth frequently follows. When marriage is out of the question, a good round sum of money is not to be despised. We are satisfied that in this way injustice is often done. Some remedy is needed. We think the action ought either to be abolished, and the offence, like rape, made criminal, or the law be so amended as to allow the defendant to give his testimony in answer to the oath of the seduced.

SELECTIONS.

ACCIDENTS TO SERVANTS.

In the United Kingdom, where manufactures have become the main business of life, and have reached an extent and importance unknown and undreamed of in former ages, the various questions between master and servant have acquired a legal prominence which in less busy communities they will probably never be able to attain. Among these the liability of the master or employer in cases of corporeal injury to the employed must always stand pre-eminent, since on its proper solution may depend the health and even the lives of thousands of human beings. The vast development of machinery has given birth, within the last few years, to a hundred new and unexpected dangers, and the workman walks unarmed in the midst of perils like a man with naked feet dancing in a labyrinth of sword blades. Although the masters are the class who profit most by the progress of manufactures, it must be remembered that the employed and the whole nation benefit by it also. Thus we should not be dealing practically with the question if we were to throw upon the employers the whole burden of the dilemma. Let us try to examine very briefly the present law on the subject, and consider whether there is anything wanting, and what measures have been or may be suggested by way of amendment.

It is natural and proper that if a workman is injured by pure accident, the master should incur no liability. Accordingly, in such cases, the law has never interfered, and the workman's only protection is to demand higher wages in proportion to the risk. But it frequently happens that injuries do not arise from pure accident, but from negligence of the master, negligence of the fellow servant, or negligence of the employed himself. In the first of these cases the law supplies a remedy, but in the other two it refuses to interfere. Moreover, the remedy in case of negligence of the master is fettered by two very unfortunate conditions; for first, the negligence must be personal on the part of the master, and secondly, the injured person must have shown no negligence himself. It results from the former rule that the injured man has only a very limited protection against defective machinery and dangerous modes of working, and from the latter that if he acquiesce too readily in any irregularity, his own laches will deprive him of his remedy against those of his master.

Thus, in considering the law as it now stands, we have three complaints to make; the first, that if a workman is injured by the negligence of a fellow-servant he has no remedy against the master; and further that he is to a great extent deprived, under certain circumstances, of his remedy in case of negligence on the part of his employer. The first point was established, not without some contest, by the cases

of *Hutchinson* v. *The York, Newcastle and Berwick Railway Company*, 5 Exch. 343; and *Barton Hill Coal Company* v. *Reid*, 6 W. R. 664—decided apparently upon the general principle that a workman enters into the contract with his eyes open and is aware of the risk he will have to run. It may be urged in opposition to this view, that he is aware of the necessary and ordinary risk, but that the risk arising from a fellow-servant's negligence is unnecessary and special. A master is responsible to any chance passer-by for injuries caused by his servant's carelessness, and there is nothing, we submit, in an ordinary contract for service, which should deprive an injured workman of the protection which that responsibility affords to other people.

The hardship as regards the second point consists in this, that in case of injury from defective machinery, the workman, for the technical reason of want of privity, cannot get damages as against the maker, (*Winterbottom* v. *Wright*), 10 M. & W 108); and as the master has not usually caused the defect by personal negligence, there is, as a general rule, no possibility of obtaining damages at all. It may be doubted whether this conclusion of law is based on sound principles. In reason and justice the responsibility must be *somewhere*, and there seems to be no valid argument why it should not reside in the man who ordered the machinery, and who ought to have selected a competent person to make it.

We must briefly allude to the third point. We shall say nothing of the simplest instances of *mixed* negligence, where the master and the injured servant are equally guilty, although even in these cases something might perhaps be done to apportion the blame; but the mere absence of protest on the part of the servant certainly ought not to shield the master who provides imperfect machinery, or otherwise places the workman in unnecessary danger. Since the decision in *Holmes* v. *Clark*, 10 W. R. 405, it appears to be a question for a jury, whether absence of protest amounts to negligence; and this arrangement, although likely to be satisfactory in most instances, may be a source of cruel hardship if there should be tyranny on one side or timidity on the other.

Considering the immense importance of sound animal power in a country which lives entirely by labour, it is evident, apart from any consideration of morality, that public policy demands every care for the preservation of the lives and health of working men. If our lust for wealth or our love of industry compels us to invite comparatively ignorant men to employments of a necessarily perilous nature, we should be prepared to give them all the benefit of our knowledge, and we should shrink from no responsibility which the nature of our position imposes upon us. It can scarcely be said that we act this honest and manly part so long as we refuse to recognise constructive negligence and permit the servant to suffer for the master's having defective machinery. It is evident that the workmen can have no control over the machinery or the mode of working; they must obey their hierarchy of rulers, which rises rank above rank till it culminates in the master himself; and as they have no voice in importing new engines or new methods, it is not fair that they should bear all the risk that such importation involves. With regard to injuries by a fellow servant, the law is again somewhat harsh, for it deprives the employed of a right to which any stranger would be generally entitled. We may add that acquiescence ought to be very clearly proved if it is to be accounted equivalent to negligence, for it is certain that it may well be the result of improper influence, and that most workmen would sooner put up with much danger and inconvenience rather than risk their places by making any objection or remonstrance.

If the bill introduced by Mr. Ayrton on this subject has passed, the various hardships to which we have alluded would, as far as we can see, have been provided against. We do not indeed assert that no further legislation would have been required, for there never was an Act of Parliament so perfect as entirely to defy evasion; but the several cases which we have noticed would have been dealt with, and to the best of our judgment we think they would have been dealt with effectually. It is highly desirable at any rate that Parliament should lay down some rules on the subject, and as the Bill of Mr. Ayrton seems calculated to meet the principal difficulties of the case, we shall have great satisfaction in seeing it re-introduced at the earliest possible opportunity.—*Solicitor's Journal.*

SELECTIONS FROM THE OLD REPORTERS AND TEXT WRITERS.

It is actionable to call a counsellor "a daffy-down-dilly," (Rol. Ab. 55.) if there be an averment that the words signify an ambidexter; or to say of an attorney, that "he hath no more law *than Master Cheney's bull*," (Sid. 327; S. C. 2 Keb. 202.) even although Mr. C. actually have no bull; for if that be the case, as Keeling, C. J., observed, "the scandal is the greater." And it is quite clear that to say that a lawyer has "no more law than a goose," is actionable; (Sid. 127.) and the reporter adds a quære, Whether it be not actionable to say a lawyer "hath no more law than the man in the moon!"

So also to say to a man, "You enchanted my bull;" (Sid. 424.) or "Thou art a witch," or that a person "bewitched my husband to death," (Cro. Eliz. 312.) is clearly actionable. Quære, Whether it be not also actionable to say to or of a young lady, "you enchanted me," or "She enchanted me," or, as the case may be, "She enchanted my brother, my dog," &c., or "She's a bewitching creature," or to put the exact point, "She's quite bewitched poor Tom."

On the other hand, you may say if you please of another. "That he is a great rogue, and deserves to be hanged as well as G. who was hanged at Newgate;" because this is a mere expression of opinion; and perhaps you might think that G. did not deserve hanging (T. Jones, 157). So also you may say of any Mr. Smith that you know, "Mr. Smith struck his cook on the head with a cleaver, and cleaved his head; the one lay on the one side, and the other on the other;" because it is only to be *inferred* that thereby the cook of Mr. Smith died, and this in the reported case was not averred (Cro. Jac. 181). *A fortiori*, you may say, "Mr. Smith threw his wife into the Thames, and she never came up again;" or "Mr. Smith cut off Tom's head and walked with it to Worcester;" because this is all inference; and his cook, wife, or Tom, as the case may be, for all that the court knows, may be still alive.

Swinburne, part 4, sect. 6. art. 2, mentions a bequest of a legacy to a person, on condition of his drinking up all the water in the sea; and it was held, that, as this condition *could not be performed*, it was void. The condition *to go to Rome in a day*, which Blackstone mentions in his Commentaries as void, as impossible to be performed, may soon perhaps cease to be so, and consequently become good, since railroads are introduced upon the Continent.

In 1 Rol. Ab. 45, it appears that in the country, when men passed cattle, it is usual to say "God bless them!" *otherwise they are taken for witches.*

By the old law of England, if a man married a woman that was a Jew, or a Christian woman married with a Jew, it was felony, and the party so offending was to be burnt alive (3 Inst. 89; and see Fleta, lib. 1, c. 35). It has been doubted whether an idiot can contract matrimony. In *Styles* v. *West*, 3 Jac. K. B., it was adjudged that an idiot might consent to marriage and have legitimate issue (Shep. Gr. Abr. tit. Ideot. 1 Sid. 112). And Lord Coke has said that an idiot shall be endowed (Co. Litt. 187). "But particularly," says Shepherd, "if he have so much knowledge that he can read or learn to read by instruction and information of others, or can measure an ell of cloth, or name the days of the week, or beget a child son or daughter, or such like, whereby it may appear that he

has some light of reason, then he is no idiot naturally." (See Termes de la Ley.)

A writ was *ad respondendum J. S. et fidei Uxori ejus.* The defendant pleaded in abatement of the writ, because the name of the wife was Faith in English, and pretended it should be *Fidi.* Rhodes said he knew a wife who was called Troth, and named Trothia in Latin, and well; and the writ was adjudged good in the former case (Goldsb. fol. 86).

A. gives *B.* such a stroke as befells him to the ground, *B.* draws his knife and holds it up for his own defence. *A.* in haste to fall upon *B.* to kill him falls upon *B.*'s knife, whereby he is wounded to death; he is *felo de se*, for *B.* did nothing but what was lawful in his own defence (3 Inst. 54). So if a gun be discharged with a murderous intent at *J. S.*, and the piece break and strike into the eye of him that dischargeth it, and killeth him, he is *felo de se;* and yet his intention was not to hurt himself. If one persuade another to kill himself, and is present when he doth so, he is a murderer: but *quære*, if *A.* lay impoisoned fruit for a stranger, and his father or mother come and eat it, whether this is not petty treason, because it is not *crimen paris gradus* (See Bac. Elem. 59, 60).

If *I. S.* counsel or command one to kill a man, and he kill another, or to burn one man's house, and he burn another's, or to steal a horse, and he steal a cow, or to steal a black horse, and he steal a white one, or to steal a goldsmith's plate from him going to such a fair, and he go to his shop in Cheapside, and rob him there, and break open his house to do it,—in these cases the counsellor shall not be accessory, because this is another felony (Plowd. 475). But if one command a felony, and it be done in another fashion, time, or place only, than it was commanded, he may be accessory to it. As if one bid another to rob *J. D.* on Shooter's-hill, and he does it on Gad's-hill, or to rob him one day, and he does it another day, or to do it himself, and he does it by another, or to kill him by one poison, and he does it by a sword,—in all these cases he shall be accessary (Plowd. 475; and see Stamf. 1. 45). If one counsel a woman to murder the child in her body, and after the child is born alive, and then murders it in the absence of him that gave her the counsel, in this case he is an accessory (Dy. 185; Plowd. 475).

If *B.* have a right of entry into his house, he ought to have a common entrance at the usual door, and shall not be put to enter at a hole, a back-door, or a chimney; and if they leave the common door open and make a ditch, so that *B.* cannot enter *without skipping*, the condition is broken. So if I am obliged to suffer *J. S.* to have a way over my land, and when I see him coming I take him by the sleeve and say to him, "*Come not there; for if you do, I will pull you by the ears,*" the condition is broken (Latch, 47).

If a legacy be given to a child unborn in the womb, and the birth prove monstrous, *i. e.* very contrary to the common form and shape of mankind, as with a crow's-beak instead of a nose, or with the face of an ass instead of a better, in such an ill-favored case, the legacy is void. Otherwise, if it is born only with some of the less principal members imperfect or supernumerary, as with half a thumb, or two thumbs, or six fingers on a hand, or the like: but if the birth (not accidentally) be imperfect as to its integrals, or defective as to its more noble and principal parts and members, as but with one eye, or one hand, although the creature hath life, the legacy hath none; for albeit an amplification of the natural form shall not prejudice, yet a mutilation thereof will.—*Note*, this extends not to hermaphrodites, who are not excluded a single capacity; for that sex which most prevails with them in nature shall likewise prevail in law, as to the legacy bequeathed (Orphan's Legacy, 475).

One Becher, a gentleman of the Middle Temple, was returned in an attaint; and before the return of the pannel he became a minister of the church; and at the day of the return he appeared and prayed to be discharged, according to the privilege of those of the ministry. But the court allowed not of his prayer, because he was a layman at the time of his pannel made; and so he was sworn (Becher's case, 4 Leon. 90).

One Howel Gwin was convicted of forging a deed by putting a dead man's hand to it, and condemned to 100*l.* fine, and to stand in the pillory two hours before the hall door.—Memorandum, he cut off a dead man's hand, and put a paper and a seal into it, and so signed, sealed, and delivered the deed with the dead hand, and swore that he saw the deed sealed and delivered (Styles, 362).

A man and his wife had lived a long time together; and the man having at length spent his substance, and living in great necessity, said to his wife that he was now weary of his life, and that he would kill himself, the wife said that she would die with him; whereupon he prayed her that she would go and buy some ratsbane, and they would drink it together; which she accordingly did, and she put it into drink, and they both drank of it. The husband died; but the woman took salad oil, which made her vomit, and recovered. *Quære, if murder* in the wife (Moor. 754).

A horse whereon a man is riding, cannot be distrained for rent. But C. J. Keeling was of opinion that such a horse may be distrained damage feasant, and that he shall be led to the pound with his rider upon him (1 Sid. 440).

Clobor's wife complained against him in the Spiritual Court, *causa sævitiæ*, for that he gave her a box on the ear, and spate in her face, and whirled her about, and called her a *damn'd whore*. This was not by libel, but verbal accusation, reduced after to writing. The husband denied it; but the court ordered him to give her four pounds every week, *pro expensis litis*, and alimony; whereupon he moved for a prohibition, suggesting that he chastised his wife for a reasonable cause, as by the law of the land he well might; after which she went from him; and that they were reconciled again, which took away the former *sævitiæ* as reconcilation after elopement. Richardson, C. J., said, that they could not examine what was cruelty and what not. But without doubt the matter alleged is cruelty, for spitting in the face was punishable by the Star Chamber: but if Clobor had justified, and set forth a provocation by the wife to give her reasonable castigation, that would be some color for a prohibition (*Hetley*, 149, 150). And see *Agar's* case, (2 Brownl. 36.) where it seems to have been held, that a husband has a right to beat his wife, and call her any name he pleases.

A man may justify the battery of another in defence of his wife, *for she is his chattel* (2 Roll. 546).

If a man assault me, I am not bound to attend until he strikes, but I may lay on before in my own defence; for it may be I shall come too late afterwards (2 H. 4, 8, per Cur).

In one case a man may choose his father; it is this: if a man has a wife, and dies, and within a very short time after the wife marries again, and within nine months hath a child, so as it may be the child of the one or the other; some have said that in this case a child may choose his father. *Quia in hoc casu filiatio non potest probari;* for avoiding of which question and other inconveniences, the law before the conquest was, *sit omnis vidua sine marito duodecim mensibus et si maritaverit, perdat dotem* (Co. Litt. 8, a).

A man may plead *not guilty*, yet tell no lye; for by the law no man is bound to accuse himself; so that when I say *not guilty*, the meaning is as if I should say, by way of paraphrase, I am not so guilty as to tell you: if you will bring me to a tryal and have me punished for what you lay to my charge, prove it against me (Selden).

A. says to *B.*, "One of us is perjured." *B.* says to *A.*, "It is not I." And *A.* says, "I am sure it is not I." *B.* shall have an action for these words, for the subsequent words show apparently that he intends him (*Cox* v. *Chambers*, 1 Roll. 75).

Justice Twisden said, he remembered a shoemaker brought an action against one, for saying he was a cobbler: and though a cobbler be a trade of itself, yet it was held the action lay in Chief Justice Glyn's time (1 Mod. fol. 19).

When an execution is lawfully begun, or hath a legal commencement, this diversity was taken and agreed for law in *Sir William Fish's case.* Sir William was looking out of his window, and the sheriff *per fenestram*, delivered to him a *capias ad satisfac.* to take the said Fish and apprehend him, and Fish escaped from him, and the sheriff broke the door of his house, *maintenant*, and re-took him; and adjudged lawful, because there was a lawful beginning of the execution before, which was presently pursued (Palmer, 53).

A sheriff cannot, upon private process, rush into a house, which by craft, as knocking at the door, &c., he procured to be opened unto him, and then the first entry was held unlawful; for the opening of the door was occasioned by craft, and then used to the violence intended (Hob. fol. 62).

If one shall the second time, use any conjuration or witchcraft to provoke love in a maid, this will be felony (1 Jac. cap. 12).

A man entered into a condition not to sell his wife's apparel; and held a good bond, though it was moved to be against law, and contrary to the liberty of a husband, so to oblige himself; but Coke held it clearly good; as if one should oblige himself to a stranger, to pay to his wife yearly 20*l.*; this without question is good (*Smart* v. *Watson*, 1 Roll. Rep. 334).

An adulterer takes away another man's wife, and puts her in new clothes: the husband may take the wife with her clothes; for it is as it were a gift of the said appparel unto her. Besides, the more worthy thing draws to it things of less worthiness; as a base mine where there is ore, shall be the King's, for the worthiness of the ore (Finch's Law, 22, 23. And see Cro. Car. 344).

A wife cannot feloniously take her husband's goods; and though she so take 'em, and deliver 'em to a stranger, yet no felony in the stranger. And if a feme covert say of J. S., he stole my plate out of my chamber, although she may not have plate of her own, yet because in common speech 'tis well known that the wife accounts her husband's goods her goods, yet the words are actionable (Cro. Car. 52). Yet for all this she cannot dispose of her husband's goods; and therefore 'twas adjudged, in *Stephen's case*, that where a wife played at cards, and lost 40*l.* of her husband's money, that the husband should recover it again in trover against the gamester (1 Sid. 122; 1 Keb. 340). *Quære*, what remedy has the gamester if he loses to the wife? Or will the law construe it a gift of the money to her, &c.?

'Twas moved to quash an indictment of forcible entry, because the addition of the parties was in English sail-weaver, confectioner, &c.: but the court overruled it; for many persons *have been hanged that have had no other addition* in their indictment. *Note*, it is the constant practice to put them in English in indictments (*Rex.* v. *March*, 1 Sid. 101).

If I make J. S. my attorney, and he (the warrant of attorney still continuing) is made a knight, yet the warrant of attorney is not determined, though the word knight, which is now part of his name, be not in it (Owen, 31).

Libel for calling a man a knave, prohibition lies, *because* in the time of Henry VI. knave was a good addition (Week's case, Latch, 156; 1 Sid. 149).

It was resolved by the court, that negroes are by usage *tanquam bona, and shall go to the administrator until they become* Christians, and thereby they are infranchised. This was upon a special verdict in an action of trover; the jury finding that negroes are usually bought and sold in India (*Butts* v. *Penny*, 3 Keb. 785).

So trover lies for monkeys, because they are merchandize, and valuable, without showing they are tame or reclaimed (2 Cro. Car. 262).

In the time of popery if a stranger had taken my goods and offered them to an image in a consecrated ground, this had made as good exchange of the property of my goods as if I had sold them in market overt; but if I found the goods after in the wrong doers possession, I might take them again (34 H. 6; 10 Co. 91).

If the wife of an attorney of the King's Bench be arrested, she ought not to claim the privilege of that court, not to put in bail to the action, as her husband may; but he must put in bail for her, and for want thereof she shall go to prison. (Stiles, Prac. Reg. 446).

A writ of conspiracy for indicting one for felony, does not lie but against two persons at the least; therefore you shall not have such a writ against husband and wife, because they are but one person, and one cannot be said to conspire with himself (F. N. B. 116 K).

One said of a justice of the peace, "he is a logger-headed, a slouch-headed, and a bursen-bellied hound." This is no cause of indictment before justices of the peace in their sessions, partly for want of jurisdiction, and partly because the words are not actionable. This was assigned for error after judgment (1 Keb. 629).

Justice Dodridge says, it has been wittily observed, that all words which end in "ment" shall be taken and expounded according to the intent; as parliament, testament, arbitrament, &c. (Latch. 41, 42).

It has been held that Sain John and Saint John are several names: so are Elizabeth and Isabel; so Margaret, Marget, and Margerie; so Gillian and Julian; so Agnes and Anne; so *cousin* and *cozen*; so Edmund and Edward; so Randulphus and Randal; so Randulphus and Randolphus; and so Randolph and Ranulph (See Anderson, 211, 212. 2 Cro. 425, 558. 2 Roll. 135). So also Miles and Mils are not one name. (Stiles, 389). But Piers and Peter are one name (2 Cro. 425). So Saunder and Alexander; so Garret, Gerrard and Gerald. (2 Roll. 135). So Joan and Jean (2 Cro. 425). So Jacob and Jaacob (1 Mod. 107. 3 Keb. 284). And James and Jacob are several names; yet Jacobus is Latin for both, and will serve for either of them (2 Roll. 136).

Cooper brought an action upon the case against Witham and his wife, for that the wife maliciously intending to marry him, did often affirm that she was sole and unmarried, and importuned *et strenue requisivit* the plaintiff to marry her; to which affirmation he gave credit, and married her, when *in facto* she was wife to the defendant; so that the plaintiff was much troubled in mind, and put to great charges, and much damnified in his reputation. He had a verdict, but no judgment; for by Twisden J. the action lies not, because the thing here done is felony: no more than if a servant be killed, the master cannot have an action *per quod servitium amisit*, *quod curia concessit* (1 Sid. 375).

One Carey brought an action of trespass *vi et armis* against Stephens, for casting wine upon his velvet doublet; and well brought, though he might have had an action on the case. (Noy, 48.)

In Fox's Book of Martyrs, there is a story of one Greenwood, who lived in Suffolk, that he had perjured himself before the Bishop of Norwich, in testifying against a martyr who was burned in Queen Mary's time: and had therefore afterwards by the judgment of God, his bowels rotted in him, and so died. But it seems this story was utterly false of Greenwood, who after the printing of the Book of Martyrs was living in the *same parish. It happened after, that one Booth*, a parson, was presented to the living of that parish where this Greenwood dwelt: and some time after in one of his sermons, happenned to inveigh severely against the sin of perjury, and cited the passage out of Fox, that Greenwood was a perjured person, and was killed by the hand of God: whereas in truth he was present at the sermon; and therefore brought an action on the case for calling him a perjured person: and the

defendant pleaded *not guilty;* and Wray, C. J., laid it down, that being delivered but as a story, and not with any malice or intention to slander any, he was not guilty of the words maliciously. (2 Cro. 91; 1 Roll. 87.)

John Walter, Knight, Lord Chief Baron, a profound learned man, and of great integrity and courage, being Lord Chief Baron by patent Primo Caroli *quamdiu se bene gesserit*, fell into the king's displeasure, and being commanded to forbear the exercising of his judicial place in court, never did exercise from the beginning of Michaelmas Term quinti Caroli, until he died, viz., the 18th of November, 1630. But because he had that office *quamdiu se bene gesserit*, he would not leave his place, nor surrender his patent without a *scire facias* to show what cause there was to determine or forfeit it, so that he continued Chief Baron until the day of his death. (Cro. Car. 203.)

Jacob Hale, the famous rope-dancer, had erected a stage in Lincoln's Inn Fields: but upon petition from the inhabitants, there was an inhibition from Whitehall. And upon complaint to the judges that he had erected one at Charing Cross, he was sent for into Court, and the Chief Justice told him he understood it was a nuisance to the parish; and some of the inhabitants being in court, said it occasioned broils and fightings, and drew so many rogues to that place that they lost things out of their shops every afternoon. Hales said, that in 8 Car. 1, Noy prayed a writ to prohibit a bowling-alley erected near St. Dunstan's Church, and had it. (1 Mod. 76; and see 2 Keb. 846.)

One Cox was confined *ad curiam visus, Franc. plegii et baronis*, because he put on his hat in the presence and in contempt of the Court of the Lord, and said, "he cared not what he could do," and hindered the business of the Court *incivilitèr se gerens*. (1 Keb. 451 and 465.)—*Monthly Law Reporter.*

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office"

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DIVISION COURTS.

We regret that, owing to the indisposition of the gentleman engaged in the compilation of the "Division Court Manual," we are without copy for publication in this number. We hope in our next issue to make up for lost time.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

Reported by C. Robinson, Esq., *Barrister-at-Law, Reporter to the Court.*

Holcomb et el. v. Shaw.

Taxes—Collection of after return of collector's roll—Pleading—Consol. Stats. U. C., ch 55, secs. 24, 96, 103, 104, 110, 111, 112.

After the collector's roll for the year has been formally returned the municipality cannot appoint any one to collect the unpaid taxes by distress; their collection belongs to the treasurer.

In an action of replevin the defendant avowed, setting out the assessment of certain taxes in the city of Kingston for the year 1855 and 1859, the delivery of the collector's rolls to the collector for those years, and their return by him, with the taxes hereinafter mentioned appearing unpaid, that he, the defendant, was duly appointed by resolution of the council, instead of the collector for those years, to collect certain taxes remaining unpaid after the return of said rolls: that certain persons named were set down and assessed on said rolls as owner and occupant of certain real property for a sum mentioned, payment of which was duly demanded by the collector of those years: and that at the said time when, &c., (being in 1861,) the defendant took the goods in question as a distress for such taxes, the same being in the plaintiff's possession on the premises so assessed. *Held*, on demurrer, that the avowry showed no defence, the council having under the circumstances no authority to make such appointment.

The plaintiffs in answer to the avowry pleaded several pleas denying the assessment of the several parties as alleged, to which the defendant replied, so far as it might be intended to rely on any error in said assessments, that the collector's rolls for said years were made out by the clerk from the assessment rolls as finally passed, and the assessments in question correctly transcribed. *Held*, on demurrer, replication bad.

Replevin, for an iron safe, office chairs and tables, &c., alleged to have been taken by the defendant on certain premises known as the Marine Railway Wharf and Stores, situated at the foot of Gore and Earl streets, in the City of Kingston. Writ issued on the 4th December, 1861.

Avowry, that in the year 1855 the assessed yearly value of the whole ratable real and personal property, in the municipality of the city of Kingston, after the final revision of the assessments for the said year, 1855, was £77,000, and in the same year 1855, the mayor, aldermen, and commonalty (now the council of the corporation) of the city of Kingston, in council assembled, passed a by-law, sealed with the seal of the said municipal corporation, and signed by O. S. Gildersleeve, mayor, and head of the said corporation, who presided at the meeting of the said council at which the said by-law was passed, and by M. Flanagan, clerk of the said municipal corporation, authorising the raising of certain sums of money for the lawful purposes of the said municipality by the levying and collection in the said year, 1855, of certain rates therefor, as follows, namely, &c., (specifying the sums required for different purposes and respective rates therefor,) and also in the said year, 1855, the mayor, aldermen and commonalty (now the council of the corporation) of the said city Kingston in council assembled, passed another by-law, sealed, &c., as before, and authorising the levying and collection in the said year, 1855, of a certain other rate of seven pence in the pound upon the said assessed yearly value to raise the sum estimated and required by the board of common school trustees of the said city of Kingston, in the said year, 1855, to be provided by the said mayor, aldermen, and commonalty of the city of Kingston, for the said year, 1855, the said several rates so authorised to be levied and collected in and for the said year, 1855, being together equal to 3s. 2d. in the pound, on the said assessed yearly value of £77,000.

And the defendant avers that in the year 1859 the assessed yearly value of the whole ratable real and personal property in the said municipality of the city of Kingston, after the final revision of the assessments for the said year, 1859, was $315,135, and in the said year, 1859, the mayor, aldermen, and commonalty (now the council of the corporation) of the said city of Kingston in council assembled passed a by-law, sealed, &c., and authorising the raising of certain sums of money for the lawful purposes of the said municipality by the levying and collection in the said year, 1859, of certain rates therefor, as follows, namely, &c., (specifying as before,) being together equal to nineteen and three quarter cents in the dollar upon the said yearly assessed value of $315,130.

And the defendant further avers that the clerk of the said municipality of the said city of Kingston for the said years 1855 and 1859, made out collector's rolls, as required by the assessment laws in force in the said years in Upper Canada, for each ward in the said city in each of the said years for the collection of the said rates, in accordance with and founded upon the said several by-laws in that behalf, which rolls were duly delivered to the collector for the said respective years, and returned by said collector as required by law, the taxes hereinafter mentioned appearing in the said rolls for the said years for Sydenham ward, in the said city of Kingston, on the return thereof as remaining unpaid: and the defendant further avers that at the said time when, &c., he was a collector duly and by a resolution in that behalf of the said council of the said municipality appointed by said council instead of the collector for the said respective years, to collect certain taxes remaining after the said return of said rolls unpaid, and amongst others the collector's rolls for Sydenham ward, for the said years 1855 and 1859, were delivered to the defendant, that he, the defendant, might collect the taxes remaining unpaid therein from the person or persons who ought to pay the same, which unpaid taxes in said rolls for said Sydenham ward for the said years 1855 and 1859, included and contained the taxes hereinafter

mentioned; and the defendant avers that it became and was his duty, in virtue of his said appointment and office, to collect the taxes hereinafter mentioned of and from the person or persons who ought to pay the same. And the defendant avers that on the collector's rolls for Sydenham ward aforesaid, in the said city of Kingston, for the said year 1855, Donald McIntosh and John Counter are set down and assessed as occupant and owner respectively, as, for, and in respect of certain real property situated in the said ward, being a part of the real property in the said ward known as the Marine Railway property, which was occupied by the said Donald McIntosh in the said year 1855, and therein assessed at the yearly value of £100; and the said several rates hereinbefore particularly mentioned as authorised to be levied and collected in the said year 1855, under the said by-law passed by the said council in that year, and contained and set down in the said rolls, amounting in all, as is hereinbefore stated and shewn, to three shillings and two-pence in the pound, did on the said assessment of £100 yearly value come to and make the sum of £15 16s. 8d., which was the tax for the said year 1855, rated, assessed, and set down on the said roll for the said ward to and against the said Donald McIntosh as occupant, and the said John Counter as owner, of the said part of the aforesaid real property, known as the Marine Railway property, so occupied in the said year 1855, by the said Donald McIntosh as aforesaid.

And the defendant further avers that tho said Donald McIntosh and John Counter, in the said year 1855, were both residents of and within the said municipality, and that they did not nor did either of them send children to, or support by subscribing thereto, any separate school for protestants or coloured persons, within the said municipality in the said year 1855, and that they did not, nor did either of them, on or before the first day of February, in the said year 1855, give to the clerk of the said municipality notice that they or he were or was Roman Catholics or a Roman Catholic, and supporters or a supporter of a Roman Catholic Separate School, within the said municipality.

And the defendant further avers that payment of the sum of £15 16s. 8d. taxes, as aforesaid, so payable by the said assessed persons, or either of them, was duly demanded in the manner required and prescribed by law, by the collector of the said municipality for the said year 1855; and the defendant further avers, that at the said time when, &c., the said real property, in respect of which the said assessment was made to and against the said Donald McIntosh and John Counter, was occupied by the said plaintiffs, who were occupants thereof within the meaning of the assessment laws in force in Upper Canada, and who then had thereon and in their possession the said goods in the declaration mentioned; and the defendant says that the said sum of £15 16s. 8d. taxes, as aforesaid, then still being unpaid, and fourteen days having elapsed from the time payment of the same had been duly demanded as aforesaid, without the same having been paid, he, the defendant, at the said time when, &c., and in the performance of his duty in that behalf, and justly, &c.. took the said goods in the declaration mentioned, the same being then on the said premises in respect of which the said assessment was made and in the said plaintiffs' possession thereon, as he lawfully might, as and for and in the name of a distress for the said sum of £15 16s. 8d. taxes aforesaid, so rated, assessed, and imposed as aforesaid, and remaining due and unpaid at the said time when as aforesaid, and so assessed and set down in the said roll, to and against the said Donald McIntosh and John Counter, as, for, and in respect of the said real property, as the occupant and owner of the same as aforesaid, in and for the said year 1855, as appears by the said roll. Wherefore the said defendant prays judgment, and a return of the said goods, with his damages, &c., according to the form of the statute in such case made and provided, to be adjudged to him.

The avowry contained a statement in the same terms as to the assessment for the year 1859, for part of said Marine Railway, against Hooker & Pridham as occupants, and Alexander Campbell as owner, and that the amount being unpaid, being $138 25c., the defendant seized the said property as a distress for the same. There was also set out in the avowry a distress made by the defendant for an amount of rates assessed in 1859, against R. M. Rose and Alexander Campbell, as occupant and owner of another part of the said Marine Railway property; and the return of the collector's roll by the collector of rates for 1859, the amount appearing unpaid thereon after demand made according to law by the collector for that year, were stated in the same manner in all respects as with respect to the assessment of 1855.

The plaintiffs pleaded eight pleas to the avowry, as follows:

1. That the said clerk of the said municipality of the said city of Kingston for the said years 1855 and 1859, did not make out the collector's rolls, as required by the assessment laws in force in the said years in Upper Canada, for each ward in the said city in each of the said years, as in the said avowry of the defendant is alleged.

2. That the collectors for Sydenham ward for each of the said years 1855 and 1859 did not duly return the said collector's rolls for the said respective years, as required by law, as in said avowry is alleged.

3. That Donald McIntosh and John Counter were not set down and assessed on said collector's roll for Sydenham ward, in said city of Kinston, for said year 1855, as occupant and owner respectively, for and in respect of certain real property described in said avowry, as is therein alleged.

4. That the sum of £15 16s. 8d., mentioned in said avowry of the defendant as the tax for the said year 1855, for the said premises, was not rated, assessed, and set down to and against the said Donald McIntosh as occupant, and the said John Counter as owner of the same, as in the said avowry is alleged.

5. That in the collector's roll for Sydenham ward for the said year 1859, Hooker & Pridham and Alexander Campbell are not set down and assessed as occupants and owners respectivety for and in respect of certain real property in said avowry described, as is therein alleged.

6. That the sum of $138 25c. mentioned in the said avowry as the tax for the said year 1859 for the said premises, was not rated, set down and assessed in said last mentioned collector's roll, to and against the said Hooker & Pridham as occupants, and the said Alexander Campbell as owner of the said land, as in the said avowry is alleged.

7. That on the collector's roll for Sydenham ward for the said year 1859, R. M. Rose and Alexander Campbell are not set down and assessed as occupant and owner respectively as and for certain real property in the third part or count of the said avowry mentioned, as is therein alleged.

8. That the sum of $59 25c., mentioned in the said part or count of the said avowry as the tax for the said year 1859 for the said premises, was not rated, assessed and set down in said last mentioned collector's roll, to and against the said R. M. Rose as occupant, and the said Alexander Campbell as owner, of the said land, as in the said avowry is alleged.

They then demurred to the three parts or counts of the avowry as bad in substance, on the ground that the circumstances mentioned do not afford a justification in law for taking the plaintiffs' goods in the year 1861, by way of distress for taxes assessed in 1855 against Donald McIntosh and John Counter (or in 1859 against Hooker & Pridham, and Alexander Campbell, or against R. M. Rose and Alexander Campbell) inasmuch as the remedy for the recovery of taxes by distress of goods is only given by law against the persons who have been assessed for such taxes, and from whom the same have been demanded, and not against future owners or occupants, and it appears from the avowry that Donald McIntosh and John Counter, and not the plaintiffs, were the parties assessed for 1855 for said taxes, (and Hooker & Pridham, and Alexander Campbell, and R. M. Rose and Alexander Campbell, for 1859,) and from whom the payment thereof was demanded.

That the remedy by distress for taxes did not at the time when, &c., exist against any person whatever, because it does not appear that the collector for the years 1855 or 1859 did, on or before the 14th of December, in either of these years, return his roll to the city chamberlain, nor that any resolution was passed by the council of the city of Kingston appointing any other latter day for the return of such roll to the city chamberlain, and because pending such return the city council had no power to appoint a person instead of the collector to collect the unpaid taxes by distress; and because, if any such person could ever have been appointed by resolution, it should have been immediately after the day fixed

for the return of collector's roll for each of the said years, and not after the lapse of several years.

A further objection was urged to that part of the avowry relating to the rates for 1855, assessed against McIntosh as occupant, and John Counter as owner, that it does not appear by the avowry that the word "owner" was added to the name of John Counter or Donald McIntosh on the assessment roll, or the word "occupant" to either name, and that therefore the taxes for 1855 cannot by law be recovered in any way from those who have since that year owned or occupied such property; and a similar objection was taken to the other parts of the avowry.

The defendant replied to the first, third, fourth, fifth, sixth, seventh, and eighth pleas to the avowry, so far as it may be intended to rely under the same, or one, or either of them, upon any supposed defect or error committed in or with regard to the said assessments in the rolls, or so far as any such defect or error may be objected against the validity of any said assessments, that the collector's rolls for Sydenham ward, for the said years 1855 and 1859, in the introductory part to and in the avowries mentioned, were made out by the said clerk from the assessment rolls for said ward for the years 1855 and 1859, as finally passed by the respective courts of revision for the said city of Kingston, for the said years respectively, and amended by the judge of the county court of the united counties aforesaid on appeal, and certified by the said clerk, and the said assessments mentioned in said avowries are correctly transcribed from the said assessment rolls, as contained therein, into the collector's rolls as aforesaid.

The plaintiffs demurred to this replication, on the grounds.

1st. That the said replication seeks to raise an immaterial issue.

2nd. That it is a departure from the defendant's avowry in this, that it admits the truth of the pleas, which are direct traverses of allegations contained in the defendant's avowry.

3rd. That the mere fact that the collector's roll is correctly transcribed from the assessment roll is of no avail where both rolls are equally defective.

Albert Prince and *Kirkpatrick* for the plaintiffs.

Read, Q.C., and *Agnew*, contra, cited *Jarvis* v. *Brooke*, 11 U. C. Q. B. 290; *Newberry* v. *Stephens et al.*, 16 U. C. Q. B. 65; *McBride* v. *Gardham*, 8 U. C. C. P. 296; *Spry* v. *McKenzie*, 18 U.C.Q.B. 161; *Fraser* v. *Page*, Ib. 327; *McLean* v. *Farrell*, 21 U. C. Q. B. 441.

[Hagarty, J., referred to *Sargant* v. *The City of Toronto*, 12 C. P. 185, not then reported.]

Consol. Stats. U. C., ch. 55, secs. 9, 19, 21, 22, 23, 24, 26, 61, 93, 96, 97, 99, 102, 104, 110, 111, 112, were referred to in the argument.

McLean, C. J.—The defendant shews by his avowry that certain rates were assessed in 1855 against Donald McIntosh and John Counter, and in 1859 against Hooker and Pridham, as occupants, and Alexander Campbell as owner of part of the Marine Railway premises, and R. M. Rose as occupant and Alexander Campbell as owner of another part of the same premises, and he alleges that the collector's rolls containing the assessment against these several parties for the years mentioned were duly returned, and that on such rolls the amount assessed against the parties respectively appeared to be due and unpaid:—that being so due and unpaid he was appointed collector, and the rolls shewing the same to be due were placed in his hands to enable him to collect such arrears from the *person or persons who ought to pay the same*:—that the same having been demanded from the parties whose names appeared on the collector's roll, and the same remaining *fourteen days unpaid* after such demand *by the collectors* for 1855 *and* 1859, and the plaintiffs *being in possession* of the premises for which the rates were due, and the goods being on the premises, the defendant seized them by way of distress for such rates.

The 94th section of the act for the assessment of property Consol. Stats. U. C., ch. 55, requires that a collector shall call at least once on the person taxed, or at his place of residence or place of business, if within the municipality, and shall demand payment of the taxes payable by such person. Then the 96th section provides that if payment be not made the collector may, after the lapse of fourteen days after such demand, levy the same, with costs, by distress of the goods of the person who *ought to pay the same*, or of any goods and chattels in *his possession* wherever the same may be found within the county.

The defendant states his own appointment as collector, instead of the collectors for 1855 and 1859, but he does not allege that he ever made any demand of the rates in arrear from the person who *ought to pay the same*, though he had no authority to collect from any one but the person *who ought to pay* the amount assessed. He contents himself with alleging that the collectors for 1855 and 1859 demanded the rates from the parties whose names were on the roll, and because fourteen days expired after their several demands, and the taxes were not then paid, he seized the goods of the plaintiffs on the premises. The defendant does not allege that the plaintiffs were the persons who *ought to pay* the rates in arrear, but assumes that because they were occupying the premises in the latter part of 1861, and had goods in their storehouse, *they were the persons* who ought to pay taxes assessed and demanded in 1855 by some former collector as taxes due by McIntosh and Counter, and in 1859 as taxes due by the occupants and owner in that year. Surely it did not require any great extent of judgment to point out that the rates ought to be paid by the persons who occupied or owned the premiees during these years, and that they were the persons legally liable for them.

Against them the collector of 1855, after demanding payment, might at any time after fourteen days have proceeded by distress, and he might have seized any goods which he could have found within the united counties of Frontenac, Lennox, and Addington, belonging either to the occupants or the owner. But instead of the remedy against these parties being pursued within a reasonable period, the collection in one instance is deferred for a period of six years, and in another nearly two years, until the premises are owned and occupied by other parties, and they are attempted to be held liable, *because they hold the premises*, for the taxes of previous occupants and owners. They are not only regarded as the persons who ought to pay the taxes due by others six years ago, which might have been otherwise collected long since, but it is not even thought necessary by the defendant that he should make a demand of them from the plaintiffs before proceeding to distrain. Now it is, I think, quite plain that the defendant in the first place had no right to distrain without a demand by himself personally as collector, and that, if he had any right to distrain against any one under his appointment, the plaintiffs were not the persons *who ought to pay* the rates in arrear.

The defendant alleges that he was appointed to collect the rates in arrear, instead of the collectors for 1855 and 1859, and he professes to be *continuing* the levy and collection of the taxes unpaid to these collectors; but in my opinion section 104 of the Assessment Act gives no power (after the rolls have been returned to the collectors) to the city council, after a lapse of *several years*, to appoint a person instead of the former collectors to *continue* their proceedings.

That section was intended to give to the council power, by resolution, to authorise the same collector, or any other person in his stead, to continue collections which were being made, but which had not been completed at the time apppointed for the return of the collector's roll. But to suppose that it confers upon a council the same power, after the lapse of any number of years, seems to me to be most absurd. If that were so, then the 102nd section, authorising taxes which cannot otherwise be recovered to be *recovered with interest and* costs as a debt due to the local municipality, and the 107th section, which makes taxes which have accrued on land a lien on such land, having preference over *any* claim, lien, privilege, or incumbrance of any party, except the Crown, and not requiring registration to preserve it, would be superfluous. If so summary a mode of proceeding could be adopted, and the party in possession at the expiration of any number of years could be held responsible. the longer, and more expensive, and more dilatory mode would seldom be adopted for the recovery of taxes in arrear.

Having failed to collect the taxes of 1855 and 1859, the only mode of proceeding, as it appears to me, was by action against the persons who ought to pay them, and if the taxes are shewn to be unpaid after every legal exertion to recover them before the return of the collector's roll, the lands remain liable, and may be sold on execution as in any other suit, no matter who may have become the owner in the meantime.

I think it is quite clear that the plaintiffs are entitled to judgment on the demurrer to the avowries.

As to the demurrer to the replication of the defendants to the several pleas of the plaintiffs, and the issue thereby intended to be raised in reference to the *assessment rolls*, it appears to me that the plaintiffs are equally entitled to judgment. The plaintiffs simply take issue on the various facts set forth in the avowry, some of which are facts which operate in favour of the plaintiffs, but the defendants certainly can have no right to raise any other issue not raised by the pleas.

BURNS, J.—It does not appear to me the defendant has shewn any legal authority in the avowry pleaded for distraining the plaintiffs' goods. He relies chiefly, first upon the 24th section of the Assessment Act, Consol. Stats. U. C., ch. 55, which enacts that "when the land is assessed against both the owner and occupant, the assessor shall on the roll add to the name of the owner the word "owner," and to the name of the occupant the word "occupant," and the taxes may be recovered from either, or from any future owner or occupant, saving his recourse against any other person; and secondly, upon the provisions of the 104th section, giving the council power to appoint the collector or any other person to collect taxes where the collector has failed or omitted to collect the taxes by the 14th of December in each year.

The first matter for consideration is what is the true meaning of the expression, that the taxes may be recovered from any future owner or occupant, and the expression in the 96th section, "*the collector shall levy the same with costs, by distress of the goods and chattels of the person who ought to pay the same.*" Are they to be construed with reference to the time during which it may be said the collector's roll is in force for each year's taxes, or are they to be understood, as the defendant contends for in this case, as extending over and covering any length of time, so that the plaintiffs' goods are liable to be distrained upon for taxes assessed to another person in respect of the property six years before, and the property having passed through the hands of several persons, perhaps, in the meantime? I entertain no doubt what the proper meaning is.

By the 49th section the assessors are directed to complete their rolls in every year between the 1st of February and such day, not later than the 1st of May, as the council of the municipality appoints. The assessor of course sets down in his roll the facts in regard to owners and occupiers as he finds them at the time he makes the assessment. Between that time and the time the collector should return the roll, under the 103rd and 104th sections, the property assessed may have changed both ownership and occupancy, by sale, devise, or in various other ways, and in such cases the new owner or occupant may be said to be the proper person or party to pay that year's taxes.

The 105th section directs that the collector shall state in his return of the roll the reason why he could not collect that year's taxes, and if there be no property to distrain, should say so. The land is not thereby excused those taxes, for the 107th section enacts that it shall be a special lien upon it, and therefore it would be incumbent upon a purchaser to make enquiry, for the land itself would be liable to be sold, but that is a very different matter from distraining a purchaser's goods after a lapse of half a dozen years for the unpaid taxes.

The avowry states that the collector for the years now claimed returned the rolls as required by law. The 111th section of the act enacts that after the collector's roll has been returned no more money on account of the arrears then due shall be received by any officer of the municipality to which the roll relates, and the 112th section declares that the collection of the arrears shall thenceforth belong to the treasurer of the county alone. If the provisions of the statute have been carried out in respect to the non-payment of the taxes for 1855, the treasurer of the county may now be taking the steps he is directed to do to sell the land, at the same time that the defendant under the authority he says he has from the municipal council of Kingston, is selling the goods of the plaintiffs for the same taxes.

This brings me to the next matter for consideration, namely, the allegation in the avowry, that in the year 1861 the defendant was appointed, by a resolution of the council, to collect the unpaid taxes remaining upon the rolls of 1855 and 1859, and to collect them from the person or persons who ought to pay the same. The defendant relies upon the 104th section as the authority for the council deputing him now to make collection of those taxes, and it would seem that it is imagined, by combining such an authority with what is enacted in the 24th section of the act, that a power exists by which, as exercised in the way stated here, the goods and chattels of a stranger may be rendered liable to the unpaid assessments against another person, after the lapse of any number of years.

The provisions of the 103rd and 104th sections, when combined in the same act, are not altogether consistent with each other. The first of these names the 14th of December in each year, or not later than the 1st of March in the next year, as the council may appoint, when the collector shall make his final return of the roll to the treasurer, whereas the latter section says that in case the collector does not collect the taxes by the 14th December, or such other day appointed by the council, the council may by resolution authorize the collector, or any other person in his stead, to continue the levy and collection of the unpaid taxes, but no such resolution shall alter or affect the duty of the collector to return his roll. These provisions were consistent enough with each other when they were respectively enacted, because they were enacted in different years. The first was by 16 Vic. cap. 182, sec. 46, and that gave the council authority to extend the time of payment of the taxes from the 14th of December to the 1st of March in the following year, and for the time of making the final return of the roll to such period. The second provision, which was enacted by 18 Vic. cap 21, sec. 3, gave the council authority to extend the time for making the return still further, and authority also to appoint another person instead of the collector of the year to collect the unpaid taxes In order, however, to shew that it was the same years roll that was being dealt with, and reading the two sections together, as they should be, that it was a provision for extending the time of collection and final return of the collector's roll, the legislature use the expression that the new or additional power given to the council was in order to continue the levy and collection of the unpaid taxes, but that authority should not alter or affect the duty of the collector to return his roll. We have acted upon that view of the subject in the several cases cited in the argument, and have held that so long as the collector held the roll not returned, and time given, his authority to collect remained in force.

In the present case it is admitted that the collectors for the years 1855 and 1859 have returned the rolls of those years according to law, but it is contended that the council has the authority to appoint a person, notwithstanding the return of the roll, to collect the unpaid taxes of those years, and make the goods of a stranger to the lands assessed in those years liable for it. It is unnecessary in this case, I think, to express any opinion to what extent the legislature meant the 24th section and the power given to the collector by the 96th section to be carried, in making the goods of persons other than those appearing upon the assessment roll liable for the taxes, beyond the time within which the collector should return his roll, for the case may be decided upon the effect of the 110th, 111th and 112th sections of the act, which place the power of collecting unpaid taxes after the roll has been returned in other hands than the collectors of the municipality. After the collector's return of the roll the municipal council of Kingston had no authority to appoint any one to collect any of the unpaid taxes; the duty of collecting the unpaid taxes from the land belonged to the treasurer.

HAGARTY, J.—The avowry distinctly avers that the collector's rolls for the years 1855 and 1859 respectively were returned by the collector as required by law, and that after the return thereof the defendant was appointed by the council as collector to collect the taxes unpaid thereon.

I am of opinion that after the formal return of the roll by the collector, it is not in the power of the council to appoint any person to collect the unpaid rates by distress and sale. Another course is pointed out by the statute to enforce payment, by sale of the land.

Mr. Justice Burns has entered fully into these points, and I concur in his opinion.

The plaintiffs do not apparently rely on this bar to the defendant's proceedings, as their demurrer does not object to the avowry on this ground, and in their pleas they actually traverse the fact *of the rolls being returned as alleged in the avowry.*

We cannot, however, pass over the statement, fatal as we deem it to the defendant's justification.

Judgment for the plaintiffs on demurrer.

COMMON PLEAS.

(Reported by E. C. Jones, Esq, *Barrister-at-Law, Reporter to the Court.)*

Smart v. The Niagara and Detroit Rivers Railway Co.

Special endorsement—Summons—Balance on account stated—Interest.

Held, that an endorsement on a writ of summons as follows "1861, Dec 31st To balance of account due and owing by the within named defendants at this date for work and labour done and performed by the plaintiff for the defendants at their request, and for moneys paid by the plaintiff for the defendant at their like request, $5,950 47," with the usual claim for interest from that date, was a sufficient endorsement to entitle the plaintiff to sign judgment on default of appearance, and on a motion to set aside the judgment, &c, the indulgence was granted on payment of all costs, and giving security for the debt.

D. B. Read, Q.C, obtained a rule to show cause why the judgment signed in this cause should not be set aside with costs, on the ground that the claim of the plaintiff, as endorsed on the writ of summons, is not such a claim as might be specially endorsed on such writ so that final judgment could be signed thereon, and because such judgment was obtained without the knowledge of the defendants, their officers, attorneys or agents, and in breach of faith and violation of certain promises made by the plaintiff to the president of the said railway company, and that the plaintiff has or had no right of action against the defendants for the sum sued for, or for which judgment is signed, or any part thereof, the same not being due by the defendants to the plaintiff, and because the defendants have a good defence on the merits and on grounds disclosed in affidavits and papers filed, or why the defendants should not have such relief on grounds disclosed in affidavits and papers filed without imposing the terms of giving security for the amou . of the judgment and costs as required by an order made in this cause on the 24th June, 1861, by the Hon. Mr. Justice Richards.

He moved on the affidavits used on the application in Chambers, all of which on both sides were before the court.

On hearing the parties at Chambers, an order was made on the 24th June, 1862, by Richards, J., that the judgment and all subsequent proceedings in this cause be set aside on the defendants giving security to the satisfaction of the deputy clerk of the crown at Woodstock for the amount of the said judgment, within four weeks from the date of that order, and upon payment of the costs of the said judgment and subsequent proceedings, and of opposing that application, within the said time, and upon payment of the costs of any action brought by the above-named plaintiff on the said judgment; and this order was without prejudice to an application being made next term to the full court to set aside the said judgment and all subsequent proceedings if the defendants should not take advantage of the terms of that order, proceedings in this cause being stayed during the above limited period of four weeks, and also being stayed in any of said actions on said judgment for the said time.

The special endorsement on the writs was as follows: "1861, Dec. 31. To balance of account due and owing by the within named defendants at this date, for work and labour done and performed by the plaintiff for the defendants and at their request, and for moneys paid by the plaintiff for the defendants at their like request. $5,950 47.

"The plaintiff claims interest on £1,487 12s. 4d. from the 31st day of December, 1861, until judgment. *N.B.* Take notice, &c., and the sum of £5 for costs."

Beard showed cause to the rule, referring to *Standing* v. *Torrance*, 4 U. C. L J. 235; *Rodway* v. *Lucas*, 10 Ex. 667; *Hodsoll* v. *Baxter*, 1 E. B. & E. 884, C. L. P. Act, 48 sec.; *Knight* v. *Pocock*, 17 C B. 177; *Bayntun* v. *Satchell*, 17 C.B. 383; *Maltby* v. *Murrells*, 5 H. & N. 819; *Bank of Upp r Canada* v. *Vanvochis*, 2 U.C. Prac. Rep. 383; *Hawkins* v. *Hessell*, 12 M. & W. 777; *Leigh* v. *Baker*, 2 C. B. N. S. 367; *Mearns* v. *Grand Trunk Railway Co.*, 6 U. C. L. J. 62.

Read, Q C., contra, cited *McKinstry* v. *Arnold*, 4 U.C. L. J. 68; *Ball* v. *Whitney*, 11 U.C. C. P. 240; *Rogers* v. *Hunt*, 10 Ex. 474.

Draper, C. J.—I agree with the view taken by my brother Richards, of the right of the plaintiff to sign judgment for want of an appearance, the writ having been specially endorsed with a claim of a balance of an account for work and labour. This, as expressed, appears to me a liquidated demand. There might be more question as to the claim for interest, but it has become so settled a practice to allow interest on all accounts after the proper time of payment has gone by, and particularly upon the balance of an account which imports that the accounts on each side are made up and only the difference claimed, that I do not think we should treat the claim for interest as vitiating the special endorsement: and I feel the less inclined to interfere because the objection is patent on the face of the roll, and a writ of error will therefore lie, as in *Hodsoll* v. *Baxter*, E. B. & E. 884, where Watson, B., observes that the intention of the legislature was to comprehend all cases except claims for unliquidated damages; and further, because there seems to me to have been a want of attention amounting to indifference or even neglect, to the plaintiff's repeated applications, and a careless mode of dealing with letters and papers, which has created uncertainty in the leading affidavits filed on the part of the defendants, and which deprives them of much of that weight which might otherwise have been given to them. And apart from this consideration, these affidavits, when examined in connexion with those of the plaintiff, fail to satisfy me that the neglect to appear to the writ, and to make whatever defence the company have, is at all answered or accounted for.

As to the terms of the order, they are no more than just to the plaintiff, because as to the costs the defendants ought to pay them as a condition of indulgence; and as to security, it is not suggested that there will be the slightest difficulty in procuring it, and it is the only mode of preserving to the plaintiff the advantage he has obtained in the event of its finally appearing that he has a right to recover.

I think the order should, however, be so far varied as to give the defendants fourteen days further time from this day to fulfil the conditions imposed, and with that direction I think the present rule should be discharged, the defendants to pay the costs of the rule.

Per cur.—Rule discharged.

Modeland et al. v. Maguire.

Apprentice—Partnership—Dissolution of—Release of apprenticeship by—Pleading.

The declaration claimed damages by reason of the defendant's son, who was bound to plaintiffs under articles of apprenticeship, absenting himself.

Pleas, 1st. *Non est factum.* 2nd. That before breach of the covenant the defendants dissolved partnership.

Upon demurrer, *held* bad, for not shewing that the apprentice was bound to the defendants as partners, and that by a dissolution it would render the service impossible, and thereby cancel the obligation.

The declaration alleged that the defendant by his deed bearing date the 18th of August, 1856, covenanted to and with the plaintiffs that John Maguire his son, an infant under the age of twenty-one years, should well and faithfully serve the plaintiffs as an apprentice to the trade or calling of a waggon maker, and that the said John Maguire should not absent himself from the service of the plaintiffs for the period of three and one-half years from the 18th day of August, 1856.

Breach, that the said John Maguire did wrongfully absent himself from the service of the plaintiffs during the period last aforesaid, for a long time, to wit, for the space of twenty months, contrary to the terms of the said covenant.

1st *plea.*—*Non est factum.*

2nd *plea.*—The defendant says that at the time the said deed was made the plaintiffs were partners in the business of waggon makers, and as such carried on the said business. And the defendant further says, that before any breach of the said covenant the said plaintiffs dissolved partnership, and were no longer engaged in the said business as partners, and therefore the said John Maguire could not serve them as apprentice, as in the said covenant provided.

Demurrer.—That said second plea does not shew that the said son of defendant was bound to serve plaintiffs as partners.

That said plea does not shew that one of the partners was incapable of teaching said apprentice, and refused to do so

Cameron, Q. C., for plaintiff, cited *Lloyd* v. *Blackburn*, 9, M & W. 363; *The King* v. *Peck*, 1 Salk. 66; *Baxter* v. *Burfield*, 2 Strange 1267; *Inhabitants of Buckington* v. *The Inhabitants of St. Michaels Sebington*, 2 Lord Raymond, L. J. 1352; *Tasker* v. *Shepherd*, 30 L. J. Ex. 207; Chitty on Apprenticeship, 83; *King* v. *St. Martin's*, 2 Ad. & E. 655.

McMichael, contra, referred to *Ellen* v. *Topp*, 6 Ex. 424; *Popham* v. *Jones*, 13 Com. B. 225.

DRAPER, C. J.—The indenture declared on is not set out by either party. The plaintiffs have declared on it according to what they deem to be its legal effect, and the defendant adopts that representation of it. This would be consistent with the defendant's covenant, being in substance similar to that in *Popham* v. *Jones*, in which there was no reference to, or assertion of the plaintiffs being partners; and if, as is suggested by *Maule, J.*, a service of one might be a service of both, this plea would contain no answer to the declaration. I think there is no doubt a business may be carried on by two persons who are not co-partners. A capitalist may engage the service of a person skilled in a particular trade, and an apprentice might be bound to the two. It should appear, in order to make this plea an answer to the declaration that the covenant was so framed, that if the plaintiffs were partners, the dissolution of the co-partnership would, by rendering the service impossible, cancel the obligation to serve. Were this so, we should have to consider whether the principle of *Tasker* v. *Shepherd* (6 H. & N. 575) would govern.

As it is I think the plaintiff should have judgment on this demurrer.

Per cur.—Judgment for plaintiff.

CHANCERY.

(*Reported by* ALEXANDER GRANT, Esq., *Barrister-at Law.*)

DRAKE v. THE BANK OF TORONTO.

Pleading—Usury—Bank directors and managers—Trustees. &c.

The rule of the court that a person seeking to impeach a security on the ground of usury, must offer to pay the amount actually advanced and interest, applies equally to the assignee of the debtor, although ignorant of the terms on which the security was affected.

The plaintiff in a bill to impeach a security held by an incorporated bank, stated that the notes held by the bank, and in respect of which the bank claimed a lien under their charter upon certain stock, had been "discounted for the said G., R. & H. upon an illegal and corrupt agreement, whereby and by reason whereof the said bank should and did receive from G., R. & H. upon the discount of the said promissory notes a much larger and greater rate of interest than at the rate of 7 per cent. per annum, and that it was only through and by reason of such discount upon such usurious consideration that the said bank became and now is holder of the said promisory notes." *Held*, a sufficient allegation of the usury between a stranger and a party to the transaction to let in the evidence of the usury.

Semble.—The directors and managers of incorporated banks are *quasi* trustees for the general body of stockholders, and if any loss should accrue to the bank by their infringing the statute against usury, they would be liable individually to make good the loss to the bank.

The bill in this case was filed by Elijah Drake and William Henry Bull, against the Bank of Toronto, William B Phipps, Frederick W. Jarvis, sheriff of York and Peel, and Henry A. Joseph, setting forth that about the 17th of November, 1860, Bull, acting on behalf of his co-plaintiff, received for a valuable consideration from the co-partnership firm of Gillyatt, Robinson, & Hall carrying on business in Toronto, their promissory note for $1500, payable at 27 days after date, to Drake, or order; and that by way of securing this as well as other notes, the firm deposited with Bull a certificate of stock or scrip of the Bank of Toronto, for twenty shares of the capital thereof, of $2000 value, and which stock had been fully paid up, accompanied by a memorandum in the words following:

"We have this day deposited with Elijah Drake the annexed Bank of Toronto scrip, for twenty shares of the capital stock of said Bank of Toronto amounting to $2000, as security for the payment of our note this day given, for $1500, 27 days after date, with full authority to sell said shares of said stock at public or private sale, on the non-payment at maturity of our aforesaid note, and in case said shares of said stock shall not bring sufficient to pay said note, we agree to pay whatever sum may be remaining due after said sale, and we have this day appointed H. R. Forbes our attorney, to transfer said shares of said stock. Said Elijah Drake is further authorised to hold said shares of said stock as security for any notes, obligations, or indebtedness of ours either as makers or endorsers, given to or held by him, or to W. H. Bull, or to W. H. Bull & Co., and in case of non-payment thereof to sell and transfer at his option said shares of said stock."

And at that time the firm delivered to Bull the power of attorney to Forbes therein referred to; that Bull on the 20th of November became the holder of another note of the firm for $800, payable in 12 days after date; which not being paid at maturity, Bull requested Forbes to transfer the stock to Drake or Bull, in order to perfecting their security, but that the bank, acting through their cashier or manager, refused to allow such transfer to be affected, alleging as grounds for such refusal, that the power of attorney to Forbes was executed by Gillyatt, Robinson & Hall in their partnership name, and not by the partners individually, although such stock stood in their partnerships name and style of Gillyatt, Robinson & Hall. Also, that the firm were liable to the bank as endorsers of promissory notes endorsed by, and by the bank discounted for the firm, which were then current, and in respect of which the bank under its charter claimed to hold a lien or security on such stock.

The bill further alleged that the plaintiffs had been informed that the promissory notes so held by the bank, and in respect of which they set up such lien on the stock had been discounted by the bank upon an usurious consideration, and in contravention of the statute in that behalf, The bill then enumerated five notes so held by the bank, amounting in all to $2391.91, all payable to the order of the firm, and endorsed by them, which said notes the plaintiffs alleged were by the "The Bank of Toronto discounted for the said Gillyatt, Robinson, & Hall, upon an illegal and corrupt agreement, whereby and by means whereof the said bank should and did receive from Gallyatt, Robinson, & Hall, upon the discount of the said promissory notes, a much higher and greater rate of interest than at the rate of 7 per cent. per annum, and that it was only through and by reason of such discount upon such illegal and usurious consideration that the said bank became and now is the holder of the said promissory notes;" and charged that the notes in the hands of the bank were utterly void, and that in respect thereof the bank had no lien or claim upon the stock.

It appeared that Gillyatt, Robinson & Hall had made an assignment in trust for the benefit of creditors, to the defendant Joseph, and that Phipps had recovered judgment against the firm, and sued out execution thereon, which he had placed in the hands of the defendant Jarvis as such sheriff, and under which it was alleged he was about to proceed to sell the stock in question.

The bill, amongst other things, prayed, that under the circumstances, the plaintiffs might be declared entitled to the stock in preference to the bank; that the bank might be ordered to suffer a transfer thereof to be made, or that a sale thereof might be made, and the proceeds applied in payment of plaintiffs, in preference to the bank.

The bank answered the bill denying all knowledge of the transactions in question, and that the notes were discounted on usurious consideration, and submitted "that the pretended usury is so vaguely, generally, and indifferently pleaded and alleged in the bill that the plaintiffs are not entitled to give any evidence thereof."

The cause having been put at issue, was set down for the examination of witnesses before the court. In the course of the examination of the witness Robinson, a question was put for the purpose of obtaining an answer establishing the usury alleged in the bill, when it was objected by

Strong, for the Bank of Toronto.—That under the statements in the bill the plaintiffs were not at liberty to prove the fact of usury, it not having been alleged with sufficient certainty as to time, the amount of money lent and foreborne, and the amount of the excess of interest charged. The rule he contended, being,

that these facts must be alleged and proven with as much distinctness in this court is in a court of law. The allegation, as it stands, is a mere general allegation of usury, this, as in the case of a general charge of fraud, is insufficient, as the defendants are in reality ignorant of the case to be made, and are unprepared to meet it.

A Crooks, for the plaintiffs.—The statements in the bill follow substantially the words of the act, (22 Vic., ch. 58.); which is sufficient; the particularity insisted on by the other side, is only required where the parties to the transaction are themselves the litigants, not where the objection is taken by strangers.

Willes on Pleading, page 175; *Bond* v. *Bell*, 4 Drew. 157; *Mansfield* v. *Ogle*, 7 D. M. & G. 181. *Thibault q t.* v. *Gibson*, 12 M. & W. 88; *James* v. *Rice*, 1 Kay, 231. were amongst other cases referred to.

[Estes, V. C.—I think as between a stranger and a party to the transaction the usury is stated with sufficient particularity, and that the evidence ought to be received.]

Afterwards the evidence was proceeded with, the principal witnesses being Robinson, and the manager of the bank. Robinson in his evidence, after enumerating several notes discounted by his firm at the bank, and the amount of discount charged on each, stated that the bank still held one of these notes, that the funds of this note were placed to his credit by the bank, the rest having been retired; that the proceeds were placed to his credit by the bank. With a portion of them he purchased a draft on New York for $1000, from the bank, at 1 per cent. premium; that he had no occasion to purchase the draft—did not desire to remit funds to New York - that he believed Mr. Cameron, the cashier, was aware of this fact. Mr. Cameron always told him that it did not pay them to discount at 7 per cent; that they would not do so. It was thoroughly understood between Mr. Cameron and him that he should take drafts on New York, or Montreal, on the discount of bills or notes, and the draft in question was taken in persuance of the general understanding. "When I presented bills for discount at the bank Mr. Cameron frequently told me that it did not pay them to discount at 7 per cent." Mr. Cameron stated this frequently, but that it came to be understood between them that the firm should take drafts on discounts; it was commonly done, Mr. Cameron always reminding witness that he must take drafts on his applying for discounts. Mr. Cameron instructed the book keeper what premium to charge; had no voice in fixing the rate of exchange. When the discount in question took place the understanding had been thoroughly established, and the draft was taken in pursuance of the general course of dealing Sometimes these drafts were redeposited at par, sometimes he sold them on the street. The witness further stated that on the 17th of October, 1860, the firm obtained a discount from the bank, the proceeds of which, $1483.40, were placed to their credit, with which proceeds they purchased a draft on Montreal for $1500, for which they paid three-forth per cent, premium, viz., $11 85, the ordinary rate of exchange on Montreal about that time at the bank being one-forth per cent as witness knew, from having purchased drafts for cash about the same time. That on the 31st of October, 1860, they obtained a discount from the bank, and with the proceeds purchased a draft on Montreal for $1600, at three-forths per cent., which witness believed he re-deposited at par on the same day, on which day there was a large amount at the credit of the witness; about the same time the witness believed he purchased drafts from the bank at one-fourth per cent. premium. This witness stated other transactions much to the same effect, and during all this time the firm had purchased drafts from the bank on New York and Montreal, as they needed them for cash at one-half per cent. on New York, and one forth per cent. on Montreal.

The manager of the bank, in his evidence, swore that one of the directors stated to him and the president of the bank that Gillyatt, Robinson & Hall had large transactions in the States, and would require, in the course of their business, a large amount of New York funds, and in this representation agreed to take their account and paper that would be satisfactory; that Robinson confirmed this statement afterwards, and stated to witness that they would require a large amount of New York funds to pay for their purchases in Boston; that this was the inducement to taking their account. He denied any arrangement with Robinson or his firm that they should take drafts on New York or Montreal, on discounts, otherwise than that the bank understood they would require drafts on New York and Montreal in the conduct of their business; that the rate of exchange on those cities is regulated by the supply and demand; that there is no fixed rate—it varies sometimes daily. The banks charge different rates constantly in the same day; that Robinson was generally charged three-fourths per cent. for drafts on Montreal, although all the customers of the bank were not charged that rate—the rate charged each individual depending entirely upon the nature and state of his account; that the bank had different rates for different parties; a stranger buying would be charged the rate marked on the counter, which is so marked for the day—sometimes for the hour. A customer requiring heavy discounts might be charged a higher or lower rate than marked on the counter, according to the state of his account. The other evidence materially bearing on the case is stated in the judgment.

At the hearing of the case,

A. Crooks and *Blake* for the plaintiffs.

The error into which the other side has fallen, is in treating this suit as one for redemption: this it clearly is not, but simply one to compel the perfecting of the title of the plaintiffs to the bank stock held by them as security. The rule that a mortgagor, in coming to impeach a mortgage for usury, is bound to tender the principal sum advanced and legal interest, does not apply when the same relief is sought by a second mortgagee. *Belcher* v. *Vardon (2 Coll. 162)*; *Fitch* v. *Rockport (1 McN. & G. 184)*; *Cole* v. *Savage* (10 Page, 583).

As to the fact of the usury having been committed, it is not necessary to prove a direct contract or agreement; that, in many instances, could never be proved. When parties contemplate entering into such an agreement some devise or cloke is invariably resorted to, and the question for the court to decide is, whether a jury, looking at all the circumstances of the case, would or would not say that usury was intended. By the statute the bank cannot take a higher rate of premium for its drafts when a discount is required to purchase than when cash is paid; this would clearly be in violation of their charter, and the act is equally violated by their requiring a draft to be taken when not wanted by the party, as when a draft is wanted by their demanding a rate higher than that usually asked. When goods were furnished in whole or part the onus of proving that the goods were sold at the market value was upon the lender: here drafts were taken by the firm which they did not require at an increased premium; in other words, goods were sold to them above their market value. *Harris* v. *Boston* (2 Camp. 348); *Lowe* v. *Waller* (2 Doug. 736); *Pratt* v. *Wiley* (1 Esp. 40); *Harrison* v. *Hannel* (5 Taunt. 780).

Mowat, Q.C, and *Strong*.—The rule with respect to the necessity for a party seeking to impeach a security on the grounds of usury tendering the amount of principal and legal interest, is greatly strengthened by the recent alteration of the law regarding usury, for if that rule prevailed at a time when usury was viewed with so much disfavour, still more will such a rule be upheld and allowed to prevail now that the law has been so much relaxed; and here it is contended that the bank has a lien, and it is immaterial how that lien is created, whether by law or act of the parties, the same rules will apply. The *Upper Canada Building Society* v. *Rowell* (19 U. C. Q. B. 124). *Commercial Bank* v. *Cameron* (9 U. C. C. P. 378), shew that the courts will take into account the fact of the relaxation of the usury laws, although in strictness it might be thought that the particular transaction might have been an evasion of the law.

The evidence in the case does not establish that when the particular discounts now impeached were made the firm should take drafts for the proceeds of such discounts; it was never made a condition of their obtaining a discount that drafts should be purchased by them, nor was any agreement made that they should pay more than the current rate of premium, nor that a draft should be taken when not required by the parties. The evidence shews that the drafts purchased were not for the same amounts as the discounts, and not purchased on the same day.

It was also objected that this court had not the power to compel the bank to allow the transfer to be made; the proper proceeding being by mandamus.

ESTEN, V. C.—The facts of this case are, that a mercantile firm of Gillyatt, Robinson and Hall, being indebted to the plaintiffs on a promissory note for $1500, deposited with them scrip for twenty shares of the capital stock of the Bank of Toronto, belonging to them, as collateral security for that note, and any other note or debt which they might owe to the plaintiff Drake, or to Henry Bull, or "enry Bull and Company, and delivered to the plaintiff a power of attorney to one Forbes, signed with the partnership name, authorising him to transfer the stock in the books of the bank into the name of the plaintiff so soon as default should be made in payment of any of the debts for which it was to be held as security. Henry Bull afterwards became possessed of a note for $800, on which Gillyatt, Robinson & Hall were liable, and default being made in payment of this note, and afterwards of the note for $1500, the defendants, the Bank of Toronto, which is a corporate body, established for the purpose of conducting the business of bankers, were required to permit a transfer to be made of the stock in question in their books into the name of the plaintiff, which they refused, on the ground, first, that the power of attorney was null and void, being signed only with the partnership name; and second, that Gillyatt, Robinson and Hall were indebted to them on several promissory notes of third parties, endorsed by the firm, and discounted for them by the defendants, and that the defendants had a lien on the stock in question for this indebtedness by virtue of the 21st clause of the act by which the bank was established. Meanwhile Gillyatt, Robinson and Hall had made an assignment of all their property to the defendant H. A. Joseph, upon the several trusts, for the benefit of their creditors; after which, however, the creditors accepted a composition, and released their debts, the composition being secured or guaranteed by Mr. Joseph, who thereupon became entitled to the estate for his own benefit, and Gillyatt, Robinson, and Hall have no longer any interest in it. Pending these proceedings Mr. Joseph applied to the bank to renew in part a note of one Vandell, being one of the notes upon which Gillyatt, Robinson and Hall were endorsers, as before mentioned, telling them that if that course was not adopted Vandell would fail, and his note would become a loss, and offering, if the bank would comply with his proposal, to guarantee the payment of the rest of the paper, held by the bank, of Gillyatt, Robinson and Hall; which offer the bank declined, declaring that they relied on their lien on the stock, and were indifferent as to the payment of the notes. The plaintiffs, upon learning the claim advanced by the bank, applied through their attorney, Mr. Boyd, to pay to the bank what was due upon the notes, upon having the notes delivered to him, and the stock transferred into their name, but the bank refused to accept this offer; and thereupon the present suit was instituted, in which, in addition to the facts before stated, the plaintiff insists that the notes held by the bank, and for which they claim a lien on the stock, were discounted by them upon an usurious contract; that consequently no indebtedness existed to them on the part of Gillyatt, Robinson and Hall, and they had no lien on the stock in question, which it was their duty to allow to be transferred as requested, and praying that he might be declared entitled to the stock in preference to the bank, and that the bank might be ordered to permit a transfer of it to be made into the name of the plaintiff; or that a sale might be made of it, and the plaintiffs paid their debt in preference to the bank; or in case of any loss, that the bank should make it good; or that the plaintiffs might be allowed to redeem the stock and the notes, or that they should be marshalled; or that, if any loss should have happened on the notes, by reason of the refusal of the bank to deliver them to the plaintiffs, that the bank should make it good.

It should be mentioned, that the bill contains a sort of minor case against another defendant of the name of Phipps, who had obtained judgment against Gillyatt, Robinson and Hall, and had threatened to proceed to a sale of the stock under execution, and the bill prays that he may be restrained from so acting. The defendants, the Bank of Toronto, answered the bill, denying the alleged usury, but insisting that the plaintiffs must, at all events, pay what was really advanced, with legal interest, and relying upon their lien on the sto . The bill was taken *pro confesso* against Phipps.

The sheriff of York and Peel is also a party to the bill, and H. A. Joseph, the assignee of Gillyatt, Robinson and Hall, as interested in the equity of redemption of the stock and notes. Evidence was entered into on both sides, and the case was argued fully with much ability. The first point discussed was whether, supposing the transaction to be usurious, the plaintiffs were bound, as a condition of obtaining relief from this court, to tender the principal sum advanced and legal interest. It was contended that the bank had no lien on shares of stock for any debt due to it from the holder of them, under any circumstances: that when the debt or liability claimed by it against such holder was tainted with usury and void, the bank could not prevent a transfer of the shares; that the equitable doctrine respecting the payment of the sum really advanced, and legal interest, did not extend to a subsequent incumbrancer or purchaser from the mortgagor; and that the bill did not, in the first place, pray redemption, but sought to compel the performance of a duty incumbent on the bank. The 21st clause of the act was certainly intended to give to the bank a sort of security on the shares of its stock held by its debtors for the amount of their debts. No transfer can be made until all debts are paid. This must be intended as a security. The mere retention of the stock until payment operated as security; and I apprehend that the dividends accruing in the meantime can be applied by way of set-off in satisfaction of the debt. On the final arrangement of the affairs of the bank all debts would be deducted from the stock before its avails would be paid to the holder. If, in addition to these rights, the stock is to be considered as the property of the debtor, so that the bank could proceed to a sale under execution upon a judgment obtained against him, in preference to all intermediate sales and dispositions either by the owner or under legal process, the security is greatly augmented. But, under any circumstances, it is a security of considerable importance, and whether it is created by the act of the party or the operation of law can be of no importance to the application of the equitable doctrine which has been mentioned. It is said, however, that where there is no legal debt there is no security. But the same remark is applicable to an usurious mortgage. If the mortgage were tainted with usury it was a nullity. No estate passed to the mortgagee: the mortgage-deed was a mere piece of paper—no debt existed. The court, however, would not lend its aid to destroy it but upon terms which it considered equitable. So, in the present case, to compel a transfer of the stock would be to annihilate the security, and if the aid of the court be wanted for that purpose, it must, as appears to me, be on the same terms. Such would be my judgment if the relief were sought by Gillyatt, Robinson and Hall; but it can make no difference that the party seeking relief is not the mortgagor, but an incumbrancer claiming under him. How can he stand in a better position than the person under whom he claims—at all events, as a plaintiff seeking relief?

I have examined all the cases cited by Mr. Crooks, and they all appear to me to recognise the doctrine in question, and no distinction is made between the mortgagor and a purchaser or incumbrancer claiming under him Even the case of *Belcher* v. *Vardon* recognises the doctrine; if it had not, relief would have been given without even proving the debt under the fiat. The case in 10 Paige (*Cole* v. *Savage*) recognises the doctrine expressly, and the case in 1 Johnston (*Rogers* v. *Rathbun*, 1 J. C. C. 367) in effect; the case of Lord *Mansfield* v. *Ogle* is distinguishable, and so are the cases in bankruptcy. My opinion, therefore, is, that if the aid of this court is required to destroy this security, whatever it may be, and however imperfect it may be, it must be upon the terms of paying to the bank what they would have been entitled to receive upon a legitimate discount of the notes in question, supposing the actual transaction which occurred to have deviated from that standard.

This consideration introduces the second question, whether the transaction in question was not in fact usurious; which, however, in consequence of my determination on the first point, becomes of little practical importance. My sole concern is with the four transactions which form the subject of this suit; and which occurred respectively on the 26th of September, the 17th of Octo-

ber, the 31st of October, and the 16th of November, 1860. The three first transactions involved purchases of drafts on New York and Montreal respectively, and the usury imputed to them consists in an alleged charge of one-half per cent. for these drafts respectively over and above the market price prevailing at the times of the respective purchases; three-fourths per cent. being charged for the drafts on Montreal, the market price being one-fourth per cent.; and one per cent. being charged for the drafts on New York, the market price being one-half per cent. I have no doubt that if upon a discount of bills or notes the borrower should be paid wholly or in part with a draft charged at a rate beyond the market price for cash at the time, it would be usury.

The cases reported in 2 Campbell, 348 and 375, and other cases of that class place this beyond doubt. A bank choosing to discount paper receives the rate of interest allowed by law, which must be deemed a sufficient remuneration, and exercises care in securing responsible endorsers, so as to guard against all risk, and must pay cash, or what is equivalent to cash, to the borrower. It may pay wholly or in part in a draft, but it must be at the market price of the day, for cash, and any departure from this rule would be usury. If the market price only were charged, it would not seem to render the transaction objectionable that the borrower did not require a draft, and that it was in a measure forced on him, provided the sale were upon such terms that he could realize what he paid upon a re-sale. The question is, whether upon the three transactons I have mentioned the purchase of drafts was upon terms exceeding the market price for cash prevailing on the days on which they occurred respectively. The evidence on the subject is that of Messrs. Cassels, Robinson, and Cameron Mr. Cassels proves that during a period embracing the times of these purchases, the rates of exchange on Montreal and New York respectively were one-half and one-quarter per cent. He says, however, that no agreement existed amongst the banks on the subject, but that for the most part the larger banks adopted the same rate. He shews, however, that at one time when the bank of which he is manager was charging one per cent. for drafts on New York, the bank of Upper Canada was charging one-half per cent., adding, that he believed a particular reason existed for it Robinson states in his evidence that it was an understood thing between him and Mr. Cameron, that upon every discount obtained by his firm from the bank, a draft should be purchased on New York or Montreal; that Mr. Cameron fixed the rates without consulting him, or allowing him a voice in the matter; and that the rates charged upon discounts were three-fourths per cent for drafts on Montreal, and one per cent. for drafts on New York; that during the six months ending on the 31st of October, 1860, his firm obtained discounts to the amount of $22,000 and upwards, and purchased draft. on Montreal and New York to the amount of over $23,000 at the respective rates of three-fourths and one per cent, while during the same period they purchased drafts to a large amount, for cash, on the same places, at the respective rates of one-quarter and one-half per cent.; that Mr. Cameron frequently said to him that it did not remunerate them to discount at 7 per cent.; that it came to be understood that whenever he obtained a discount he must purchase a draft; that this understanding was thoroughly established at the time of the transactions in question; that he purchased a draft on New York at one per cent in connexion with the discount which occurred on the 26th of September, and re-sold it on the street at par; that this was in pursuance of the understanding in question; that he purchased drafts on the 17th and 31st of October, at the rate of three fourths per cent. on Montreal, and one per cent on New York out of the proceeds of discounts which occurred on those days respectively. Mr. Cameron in his evidence stated that there was no fixed rate of exchange on Montreal or New York; that it varied from day to day, and from hour to hour; that it was regulated by circumstances, amongst which he instanced the state of their funds at the places on which they drew at the time; the state of the account of the party with whom they were dealing; the nature of the funds in which they were paid; that a party purchasing a draft on a discount would be charged a higher rate than a party paying cash and maintaining a good balance in the bank. That a rate was always exhibited on the counter for the day, and sometimes for the hour; and that a stranger purchasing exchange for cash would be charged according to this rate.

Mr. Cameron heard Robinson's evidence given, and did not contradict many particulars stated by Robinson in his evidence. Upon this whole evidence I should hesitate, if I were on a jury, to affix to these transactions the character of usury, whatever suspicion I might entertain. It is possible, consistently with this evidence, that on the days on which these transactions occurred, the defendants, the Bank of Toronto, might have charged the same rates for cash as were charged to this firm on these discounts. There is nothing in the evidence to shew that this was not the case. Robinson purchased no drafts for cash on those days, nor does he prove any transaction of this nature between the bank and any other person on those days, nor what the current rates on those days respectively were It is true that during the six months ending on 31st of October, he purchased in connexion with discounts at the above mentioned rates drafts to a greater amount than he obtained discounts. This fact, however, would not prove that the discounts in question in this cause involved the purchase of drafts at all; much less would it shew that drafts were purchased at more than the current rates; in short it is not shown that in these transactions drafts were purchased by this firm at more than the current rates for cash, or that they were forced upon them against their will. I dare say some such understanding existed as Robinson mentions; but it might exist legally. I dare say also, that Robinson purchased the drafts in question in pursuance of this understanding, and perhaps without requiring them; but it may have been done voluntarily, and without the bank being aware that he did not require them, and without their charging him more than the current rates. What I mean is, that the understanding may have been nothing more than this, namely, that the bank preferred those customers who required exchange; that they would not continue the accounts of those who did not require exchange, although they would not force a draft upon any one, or charge more than the current rates; and it is possible that the knowledge of this fact may have induced Robinson sometimes to purchase drafts when he did not require them but of his own accord, and without being required so to do by the bank. It is possible, consistently with this evidence, that the transactions in question may have been legally conducted, and I should not, therefore, if I were on a jury, ascribe the character of usury to them, and I think I must arrive at the same conclusion acting as a judge of the law and fact.

The third point discussed was as to the right of the plaintiff to have these securities marshalled, so that if the bank exhausted the stock they might stand in its place *quoad* the promissory notes. I should think the doctrine would apply to such a case, and that relief of this sort would be given; but it appears to be of no practical importance under the circumstances of the case, as the plaintiffs must pay the bank what is due to it, and will then be entitled to a transfer of the stock, and a delivery of the securities. The bank cannot be compelled *a priori* to take its satisfaction out of one fund more than out of the other, although if the funds should be realized, it would be thrown upon that which was not common to both parties. This is what I understand by the doctrine of marshalling.

The fourth point argued, was, whether the bank should be charged with the amount of Vandell's note, lost, as is alleged, through their refusal to accept Mr. Joseph's offer; but the answer to this claim is, that the bank was not bound to accept that offer, and Joseph, if he desired to preserve Vandell's note, should have paid the amount due to the bank, and dealt with the note as he should think fit. As to Phipps, there is no doubt that he must be enjoined from selling the stock. He can stand in no better position than the judgment debtor; and a decree may be pronounced against him with costs of this part of the suit. The sheriff seems to me an unnecessary party, and must have his costs. As the main subject of the suit, the usual decree must be pronounced for redemption and foreclosure or sale.

I may add, that I have been unable to trace the supposed defect in the fourth discount, occurring on the 16th of November. With regard to the offer made through Mr. Boyd, if the amount due to the bank had been actually tendered, and they had refused to received or deliver the securities or transfer the stock, and

thereby rendered a suit necessary, they might have been charged with the costs of it; but it does not appear that the money was actually offered to the bank, and it cannot be doubted that if any such offer had been made it would have been accepted.

The plaintiffs being dissatisfied with this decision of his Honor, brought the cause to be re-heard before the full court. On the re-hearing

A. Crooks and *Blake* again appeared as counsel for the plaintiffs.

Strong, for the defendants.

VANKOUGHNET, C.—Although a perusal of the whole evidence in this cause connot fail to impress one with a strong feeling that in the dealings of this bank with the firm of Gillyatt, Robinson & Hall, an attempt has been made to elude the provisions of the recent statute of this province, prohibiting the taking by any bank of more than seven per cent. per annum for the loan and forbearance of money, I do not think the evidence here is of that clear and conclusive character to warrant relief being granted to the plaintiffs on that ground. When the legislature was repealing the laws restricting the amount of interest to be taken by private persons for the use of money, it saw fit to retain those restrictions in their full force, so far as the banking institutions of the country are concerned; feeling no doubt, that as there are conceded to those bodies vast and important privileges and advantages in the conduct of their business, they ought to be restricted in the amount of interest they should be permitted to charge; and there can be no doubt as regards them the laws against usury remain in force, and in a proper case will be applied with the utmost regour. And while at this point, it may be well to direct attention to the position which gentlemen having the control and management of the monied institutions of the country occupy; for I have no doubt that should at any time a serious loss be sustained by a bank in consequence of the managers or directors attempting to envade the usury laws, those gentlemen may be held personally bound as trustees for the general body of the stockholder to make good such loss.

In the present case, if the plaintiffs had succeeded in clearly establishing the alleged usury, relief could have been granted to them only on condition of submitting to pay the sum actually advanced, together with legal interest. I think the decree pronounced by my brother *Esten* must be affirmed, and the present re-hearing dismissed with costs, to be taxed by the master.

ESTEN, and SPRAGGE, V. CC., concurred.

DANIELS v. DAVIDSON.

Mortgage with power of Sale—Demurrer for want of equity, and for want of parties.

A person conveyed one acre of certain lands, part of 200 acres, in fee to one D., and afterwards mortgaged the 200 acres, including the one acre, to one S., which mortgage contained a power of sale. The conveyance to D. of the one acre was not registered till after the mortgage, but before the power was exercised. *Held*, that under a mortgage with a power of sale duly registered, any sale made under the power will cut out any deed intermediately made by the mortgagor and registered—and if the power of sale in such a conveyance can, under the registry laws, give to a deed executed by virtue of its priority over a deed made subsequently to such a conveyance, but made and registered prior to the exercise of the power, the same effect must be given to it in relation to a deed executed before the conveyance containing the power, but not registered until after that conveyance—Effect of Stat. 8 Vic., ch. 34, s. 6, with reference to a power of sale contained in a mortgage.

The bill in this case, which was filed by Alexander Daniels, set forth, that on the 25th day of April, 1846, one George P. Goulding, being seized in fee of all and singular that certain parcel of land, being lot number 19, in the 5th concession of the Township of Mariposa, in the county of Victoria, containing 200 acres, did, by indenture bearing date the 25th day of April, 1846, convey and assure for valuable consideration by a good and sufficient deed in fee simple unto the plaintiff, one acre of the south half of the said lot, and described therein as village lots numbers 1, 2, and 5, on the north side, and 5 on the south side in said lot number 19; that plaintiff did not cause his deed to be registered until the 12th day of August, 1847; that on the 18th day of June, 1846, the said George P. Goulding and Lewis S. Church, who was interested in the said lands by an indenture by way of mortgage, conveyed the whole of the said lot number 19, containing 200 acres, and including the said one acre so conveyed to plaintiff as aforesaid, in fee simple, for the sum of $4,135, to one Abraham Cutler, who, on the 20th day of June, 1846, caused the same to be registered previous to the registration of the deed to plaintiff before mentioned; that on the 14th day of December, 1846, the said Abraham Cutler assigned the said mortgage to the defendant Thomas Clark Street; that in the month of June, 1848, the said Thomas Clark Street, with full notice of the said deed to the plaintiff, under and by virtue of a power of sale contained in the said mortgage, sold and conveyed, or pretended to sell and convey, the said lot of land, containing 200 acres, including the said one acre so conveyed to the plaintiff as aforesaid to the defendant Samuel Davidson; that plaintiff never received any notice whatsoever from the said Thomas Clark Street, or from any person or persons on his behalf, of the said sale of the said 200 acres, nor was plaintiff aware of the said sale, or that the defendaut Samuel Davidson claimed title to the said land thereby, until recently, but was led to believe that the said Samuel Davidson was the assignee of a mortgage made by the said George P. Goulding and Lewis S. Church to one William L. Perrin.

Plaintiff submitted, that his said deed being duly registered nearly twelve months before the pretended sale by the said defendant Thomas C. Street, under the power in the said mortgage, the said Thomas C. Street sold and the several other defendants purchased, with full notice of plaintiffs title to the said land, and that by reason of the want of notice to plaintiff of the said sale, under the power contained in the said mortgage, the said sale and conveyance by the said Thomas C. Street to the said Samuel Davidson, and the subsequent purchases by the other defendants, were wholly void, and the said defendants took no title thereby, or if any, only subject to the right of plaintiff to redeem.

The defendant, Thomas Clark Street, demurred to this bill—generally, for want of equity as against him, and for want of parties, alleging that George P. Goulding and Lewis S. Church (as mortgagors) were necessary parties.

J. H. Cameron, Q.C., for the plaintiff.

S. Brough, Q.C., for the defendant Street.

THE CHANCELLOR.—This bill in effect alleges that the plaintiff, having acquired a title in fee to one acre, one of two hundred acres of land, from one George P. Goulding, by deed bearing date the 25th April, 1846, the said Goulding, and one Church, who had an interest in the said land, subsequently mortgaged the whole two hundred acres to one Cutler, to secure the repayment of $4,136, and that this mortgage was registered on the 20th June, 1847, prior to the registration by the plaintiff of his deed, which took place on the 12th August, 1847; that on the 14th December, 1846, Cutler assigned this mortgage to the defendant Thos. Clarke Street; that in June, 1848, the assignee, acting under a power of sale contained in the mortgage, but with full notice of the plaintiff's deed, sold, without notice to the plaintiff, the said land to the defendant Davidson, who has made sales of portions thereof to the other defendants.

The bill, while admitting and submitting that by reason of the prior registration of the mortgage, the plaintiff's deed of the one acre became in respect thereof a subsequent incumbrance, insists that inasmuch as the plaintiff's deed was registered prior to the sale to Davidson, the latter and all claiming under him bought with full notice of that deed; and that by reason thereof, and of the want of notice to the plaintiff of the intended sale under the power, the same is as against him inoperative, and he claims the right to redeem.

To this bill the defendant has demurred for want of equity, and on the ground that the mortgagors ought to be a party to the bill.

On the argument, Mr. Cameron, Q. C., very properly abandoned the position assumed by the bill, that notice to the plaintiff of the sale, if it could be made at all under the mortgage, was requisite, as it does not appear that there was any stipulation for notice in the power of sale; but he strenuously and ably urged—and I was much impressed with the argument—that the deed to the plaintiff having been executed before the creation by the mortgage of the power of sale, and having been registered before the execution of the power, the sale under the latter could not have priority over

the plaintiff's deed; that the registry laws did not provide in such a case, for the registration of a power, but merely for the registration of a deed, which in itself operated by way of consequence; and that the plaintiff's deed, having priority of registration over the deed executed under the power, took precedence of it. There is great room for argument in support of this position; but on reflection, I think it cannot be sustained under the law as it has been administered and understood to exist. In the first place, it is said that the registration of a mere power, though coupled with an interest, would be ineffectual against a subsequent conveyance of the estate, registered or unregistered, as the registry law—at all events as it stood in 1846—did not provide for the position of such a document, or the right given by it. Is this so clear? In the first place, it is urged, on the other side, that a power coupled with an interest—as for instance a mere power of sale over an estate to repay a loan—cannot be revoked, unless it be by force of the registry laws. Cannot it then be secured from such revocation by force of the same laws? We must look at their intent and object to consider this. The statute 9 Vic. cap. 34, sec. 2, gives the effect therein prescribed to all deeds and conveyances, "whereby any lands, &c., may be in any wise affected in law or equity." A deed is not necessarily a conveyance. It is an instrument under seal, and when executed *inter partes* is called an indenture. Suppose an indenture, whereby A. acknowledges the receipt from B. of a sum of money, covenants to repay it, and in default gives to B. power to sell the land, such a deed certainly affects the land in equity, and would be executed by this court if necessary.

I am not, however, driven to decide upon this more naked position. In the present case the mortgage which contains the power of sale is a consequence, and the bill admits that the plaintiff's deed must be postponed to it so far as it is a mortgage; but he argues, as already stated, that the power of sale is inoperative as against him. It was, I believe, conceded—and at all events it has been too long admitted law for me to venture to question it—that if a mortgage with a power of sale be registered, any sale made and deed executed legally under that power will cut out any deed intermedially made by the mortgagor and registered. If this be so, it must dispose of the whole question, because it can only be by force of the registry laws that the exercise of the power of sale could have any such effect. If it is only the conveying part of the deed that by the registry laws can gain priority or effect, and not the power of sale, then it would follow that a deed made and registered subsequently to such a conveyance would cut out a deed executed afterwards under the power, and yet by universal practice and consent such has not been its effect. If the power of sale in such a conveyance can therefore, under the registry laws, give to a deed executed by virtue of it priority over a deed made subsequently to such a conveyance, but made and executed prior to the exercise of the power, the same effect, in my opinion, must be given to it in relation to a deed executed as here before the conveyance containing the power, but not registered till after that conveyance.

Demurrer allowed.

Bank of Montreal v. Woodcock.

Judgment creditor—Registration.

Where a bill has been filed prior to the 18th of May, 1861, *all* judgment creditors who had their judgments duly registered, are entitled to be treated as parties to the cause, though not actually named in the bill, and not added as such in the master's office until after that date, without having placed *fi fas.* against lands in the hands of the sheriff.

This was an appeal from the report of the master of this court at Woodstock, upon the ground that he had refused to allow the claim of a judgment creditor.

Burton for the apellant.

Leys, for subsequent incumbrancers, contended that the apellant had no right to prove, he having omitted to sue out a *fi. fa.* against lands, as had been done by the other judgment creditors.

Barrett for the plaintiffs.

Esten, V. C.—This is an appeal by a judgment creditor, whose claim has been disallowed by the master under these circumstances. the suit, which is for foreclosure or sale, was pending on the 18th of May, 1861, the judgment in question was registered in December, 1858. The appellant was added as a party in the master's office, and proved his claim in October, 1861, but it was rejected by the master, and excluded from his report, on the ground that at th date of it more than three years had elapsed since the registration of the judgment, and that it had not been re-registered. The appeal is on the ground that the claim ought to have been allowed, and I am of that opinion. It has been decided in this court that the effect of the 11th section of 24 Vic., ch. 41, is to preserve the charge created by a judgment registered before the 18th of May, 1861, the owner of which would be a proper party to a suit pending on that day. The charge created by this judgment was therefore preserved; and it could not be re-registered, because the 64th section of the 22nd Vic, ch. 89, which provides for the re-registration of judgments was repealed by the 24th Vic., ch. 41. The charge of the judgment in question was created by its previous registration, this charge is preserved generally; the provision that it should cease at the expiration of three years without re-registration was repealed. The legislature could not have meant that the rights which it had saved should expire for want of an act which it had rendered impossible. It was ingeniously and plausibly argued, that the only effect of the 11th section of 24 Vic., ch. 41, was to leave the rights of judgment creditors, parties to suits pending on the 18th of May, 1861, in precisely the same state in which they would have been if that act had not passed, and as in that case the charge created by such judgment creditor's judgment would have expired upon the expiration of *three* years without re-registration, the same result must follow under the 11th section of 24th Victoria, ch. 41. If this view is correct it must equally follow that this section also provided for the re-registration of judgments, but as this cannot be seriously, and was not in fact, contended, I think the proposed construction of this section incorrect. I rather think the intention of the legislature was to dispense with re-registration in regard to the comparatively few judgments which were saved as a charge upon lands by the 11th section of the 24th Vic., ch. 41, and which would diminish in number every day, and shortly become altogether extinct. The inconvenience intended to be obviated by re-registration would in regard to these judgments be so slight that the legislature did not think it probably worth while to re-enact with respect to them the 64th section of 22 Vic., ch. 89.

It was also argued that the judgment creditor should have issued his writ of execution, and delivered it to the sheriff, and thereby preserved the lien of his judgment. This proceeding would not have preserved the existing lien, but created a new one. I do not perceive the bearing of this argument on the question. The right arising from a writ against lands delivered to the sheriff for execution, was very different from the lien or charge preserved by the 11th section of 24 Vic., ch. 41. That enabled the judgment creditor to pray a sale of the estate in equity; the other merely enabled the judgment creditor to redeem the estate if in mortgage. If a judgment creditor had filed a bill for a sale before the 18th of May, 1861, and the three years had expired before he had prosecuted his suit to a conclusion, he could not have continued it, although he might have delivered a writ against lands to the sheriff before the 1st of September. The 12th section of 24 Vic., ch. 41, was only intended to regulate priority amongst judgment creditors.

I think the exception should be allowed without costs.

Boddy v. Finley.

Duress—Costs.

A party, having been arrested on a charge of obtaining money under false pretences, agreed, in presence of the magistrate who had issued the warrant, to execute a mortgage on his farm to secure the amount; whereupon he was discharged, and he, together with the complainant who had sued out the warrant, went to a conveyancer and gave instructions for the conveyances which he subsequently executed. Afterwards a bill was filed by the mortgagor to set the instrument aside as having been obtained by duress and oppression. The court, under the circumstances, refused the relief sought, but as the conduct of the defendant had been harsh and oppressive, dismissed the bill without costs.

The facts are stated in the judgment.

Fitzgerald for plaintiff. *Roaf* for defendant.

Spragge, V. C.—The conveyance impeached in this suit was executed under the following circumstances: the plaintiff was the owner of the west half of lot number one, in the second concession of the township of Malahide, subject to a mortgage to one Wilson for $700. He sold the west half of this parcel of land to the defendant for $400. The defendant in his answer says that he

knew of Wilson's mortgage covering the whole half lot, but that the plaintiff represented it to be only for $242. This is not at all sustained by evidence, which establishes, I think, that the mortgage was for $700, and that this was known to the defendant. The plaintiff's avowed object in selling to the defendant was to raise money in order to its being applied on Wilson's mortgage. The sale was in October, 1857.

Early in 1859, the defendant seems to have been informed that the plaintiff was selling off some farm stock, and was about to leave the province, and he took a course which does appear to me to have been a very unwarrantable one under the circumstances. He caused the plaintiff to be arrested under a criminal charge of obtaining money under false pretences, the foundation for the charge being the dealing between the parties upon the purchase of the land to which I have referred. The arrest itself was made in a violent and offensive manner. The defendant and the constable went together to the house of the plaintiff, each armed with a pistol—the defendant's loaded, but, as he says, not exhibited; the constable's loaded, as he says, only with powder. It was a five-barrel revolver, and was produced at the arrest, and the plaintiff threatened with it. The plaintiff was handcuffed at first, but the handcuffs were afterwards removed, and the three, the plaintiff, the defendant, and the constable, proceeded together to the house of the magistrate by whom the warrant was issued. On the way the plaintiff agreed that he would convey to the defendant the east half of the parcel of land which he owned, by way of securing him against the Wilson mortgage; and this agreement was repeated in the presence of the magistrate, who said that if the defendant was satisfied that the plaintiff would do as he had promised, he would discharge the warrant. It was suggested by the defendant that the magistrate should himself draw the necessary papers, but he observed that he might make some mistake, and advised them to go to a conveyancer. The plaintiff was not discharged until he had promised to give the security.

I observe here that there was nothing unreasonable in the defendant being indemnified against the Wilson mortgage, or in its being done by such instruments as were executed, though it would have been better if it had been done in one instrument.

After the plaintiff had been discharged from his arrest, he, and the defendant went together to a Mr. Meneray, who lived in the village of Warwick, at a distance of about two miles from the magistrate, they together gave instructions to Mr. Meneray for the drawing of the papers: the plaintiff then, without the defendant, went alone into the village to see a relation as he said; the defendant remained, and mentioned to Meneray that the plaintiff had been arrested. When plaintiff returned he executed the papers, without, as Meneray says, so far as he could judge, any compulsion, The defendant left first, and the plaintiff then said to Meneray that he, the plaintiff, from some misinformation that he had received, had been inclined to do a very rash act for which he might be sorry hereafter.

If these instruments had been given before the discharge of the plaintiff, as was the case in the cause reported in Aleyn, (Page 92) I am of opinion that they could not stand. But the plaintiff was not under duress when he executed them, and if at that time he was a free agent, I am not prepared to hold that the previous oppressive conduct of the defendant is sufficient to invalidate the deeds The question seems to be, as put by Lord *Eldon*, (Note *a* to *Countess of Strathmore* v. *Burns*, 2 B., C C, 351) whether or not the mind was so subdued, that though the execution was the free act of the party, it was the act speaking the mind, not of that person but another.

I have examined the several cases cited and some others, and it seems to me the test is that put by Lord *Eldon*, and trying the case by that test, I cannot but think that the plaintiff, in executing these instruments, was his own master in mind and body. He probably executed them because he had promised to do so when under arrest, but I see no reason to suppose that he apprehended a re arrest or any further violence if he did not fulfil his promise.

I think the bill must be dismissed but without costs. The conduct of the defendant was not only harsh and oppressive, but, as appears by the evidence, quite unjustifiable in the transaction, and I think I ought not to give him his costs.

CHANCERY CHAMBERS.

(*Reported by* A. GRANT, Esq., *Barrister at-Law, Reporter to the Court*)

DICKENSON v. DUFFILL.

Practice—Security for costs—Government officer.

The mere fact of a plaintiff being in the service of the Crown, and absent from the jurisdiction of the court, is not sufficient to exempt him from giving security for costs, to do so, it must be shown that he is absent from his domicile in the service of the Crown.

The plaintiff in this case was acting Deputy-Inspector-General of Canada, and, as such, resident at Quebec, out of the jurisdiction of the court. The defendant Hawkins, before answering the bill, had obtained upon præcipe the usual order for security for costs, which the plaintiff moved to discharge, on the ground that, under the circumstances, he was entitled to be exempted from giving such security.

Hodgins, in support of the application.

Hawkins, in person, *contra*.

The cases cited appear in the judgment.

SPRAGGE, V. C.—The plaintiff seeks to take himself out of the general rule, that a plaintiff residing out of the jurisdiction of the court must give security for costs. The plaintiff's residence is in Quebec, in Lower Canada, and he stands upon the same footing as to the courts of Upper Canada as a British subject residing in Scotland or Ireland does to the English courts.

His ground of exemption is, that he is in the service of the Crown, being Acting Deputy-Inspector-General, and is in the active discharge of his duties in that capacity, at the seat of Government, Quebec.

If the being in the service of the Crown were itself a ground of exemption, it may be that the plaintiff has established it—though I am not clear that the public duties in which the plaintiff is employed are of such a nature as to be a ground of exemption—but I think being in the service of the Crown is not of itself sufficient. The case of *Chappell* v. *Watt* (2 L. T. N. S. 283) establishes this. The plaintiff seeking exemption must be absent from his domicile in the service of the Crown; not merely in the service of the Crown, and absent from the jurisdiction of the court in which he is suing. The plaintiff there was an officer serving with his regiment in Ireland, but inasmuch as it appeared that his domicile was in Ireland, he was held not exempt. The court held that the true ground of excuse was not, that an officer could not come over to conduct his own suit, but that by the command of a superior authority he is obliged to go out of the jurisdiction; and Mr. Justice Crompton states the rule thus: "The real rule is, is the plaintiff kept away from his English domicile by the order of the Crown?"

In the case of *Evelyn* v. *Chippendale* (9 Sim. 497), relied upon by the plaintiff in this case, the plaintiff, a half-pay lieutenant in the royal navy, held the offices of harbour-master and captain of the port, in Barbadoes, where he had resided sixteen years; the former of these offices was in the gift of the House of Assembly, the latter in the gift of the Governor. And it was because he held the latter office, an office under her Majesty, as the Vice-Chancellor put it, that he was held not compelable to give security for costs.

In a suit evidently between the same parties, though reported as *Evering* v. *Chiffenden* (7 Dowl. 536), a similar application in the Court of Queen's Bench was refused; Patterson, J., observing, "*Prima facie* when it is said that he is a resident abroad in the service of the Crown, it must be supposed that he is an Englishman. If then he is so, he is a resident abroad for a temporary purpose in the service of her Majesty; and I do not see the difference between this case and that of Lord *Nugent* v. *Harcourt*. This is not the case of voluntary absence from the country, but the plaintiff is fulfilling a duty which I take is always performed by a naval officer." It was thus placed upon the ordinary footing of a plaintiff absent from his English domicile by the order of the Crown. The opinion of the Vice-Chancellor in 9 Simons is more brief, but I apprehend, from what he did say, that he went upon the same principle.

In Lord *Nugent* v. *Harcourt* (2 Dowl. 578) the principle is very clearly expressed: "In the case of an officer in the army, the

absence is certainly involuntary. But I think if an Englishman is not permanently abroad, but is absent for temporary purposes in the service of his Majesty, he stands in the same situation as if he were compulsorily abroad, and therefore ought not to be compelled to find security for costs. If he had gone abroad for his own convenience merely, it would have been different."

The principle established by all these cases is, that to entitle a plaintiff to exemption from the ordinary rule, his domicile must be within the jurisdiction of the court in which he is bringing suit, and his absence from it must be occasioned (unless in the case of mere temporary absence, as for travelling) by his being engaged in the service of the Crown, it being assumed in the case of an Englishman that his domicile is in England, and his absence being looked upon as temporary.

The plaintiff here does not show that his domicile is within the jurisdiction of the court in which he is suing; and I cannot agree with his counsel that there is any presumption that it is so. His name, it is urged, is English. The presumption upon that would be that his domicile is in England; assuming that he is not a foreigner, which, I suppose, should be assumed, as he is in the service of the Crown. There can be no legal presumption that his domicile is in Upper Canada, any more than in Nova Scotia or New Brunswick. all that can be said is, that it is more probable that it is either in Upper or Lower Canada than in any other colony, or in England, from the nature of his appointment.

I desire to add, that I very much doubt whether such an appointment as the one in question, though in the name of the Crown, is of a nature that ought to exempt a plaintiff from giving security for costs. Suppose this plaintiff an Englishman, and suing in one of the courts in England, would his position be such that he could be regarded as having his domicile in England, but temporarily absent in the service of the Crown? An Englishman residing in India, in the civil service of the East India Company, has been held to be domiciled in India. This appears from the case of *Arnold* v. *Arnold* (2 M. & C. 256), and other cases referred to in the *Attorney-General* v. *Napier* (6 Ex. 217), where the question of domicile was a good deal discussed. In the latter case the language of Mr. Baron Parke is, "If a natural born subject, domiciled in England, enters into her Majesty's service, and goes abroad, at the Queen's command, into foreign service, it is quite clear that his original domicile has not been parted with by him. He goes for a temporary purpose, and is supposed to be there for a time only, but not for the purpose of fixing his permanent abode abroad." This language appears to me wholly inapplicable to a person holding such an office as the plaintiff holds, and suing in an English court, even more inapplicable than to the case of an Englishman who holds an appointment in the civil service of the East India Company; at least in this, that a permanent abode *would be much less probable in India than in Canada. There is,* of course, the difference, that the appointment of the plaintiff is under the Crown, but the force of that is only that it indicates temporary absence from England—a presumption that his original domicile there has not been parted with—a presumption that, I think, could scarcely be held good in the case of the plaintiff holding an appointment in Canada substantially under the Colonial Government. The case of an appointment in the civil service of the East India Company is, in fact, though not in name, upon much the same footing.

But the plaintiff is not (as in the case supposed) bringing suit in England, but in Upper Canada, where, as I have said, there is, I think, no presumption in favour of his domicile.

[After the matter was first argued, it was mentioned again, and and a further affidavit from the plaintiff produced.]

SPRAGGE, V. C.—I do not think this affidavit is receivable, and did not mean to give leave to file it for use upon this application, a course which would be wholly irregular. I was asked not to give judgment until a further affidavit could be procured, and said I would abstain from giving judgment for the present, leaving it to the plaintiff to take his own course.

The question has, however, been further argued upon this new affidavit, subject to the objection to its reception. I do not think that it strengthens the plaintiff's case. He styles himself formerly a resident of Upper Canada. He says, "I resided in Upper Canada several years, say from the year 1833 until the removal of the seat of government to Lower Canada; that if I were not in the civil service of this province I would at this time, to the best of my belief, be residing permanently in Upper Canada." And he then mentions certain property which he owns in Upper Canada, but upon none of which does he appear to have resided.

I understand from this affidavit that Upper Canada was not the plaintiff's domicile of origin, but at most his acquired domicile; that he resided at Kingston from 1833 until the removal of the seat of government to Lower Canada. This first took place in 1843, I think. He does not inform us where he has been since, but, I take it, his affidavit means that he removed to Lower Canada with the government, in whose service he now is. If so, then for the last eighteen years or thereabouts his residence has been wherever the seat of government might from time to time be. He intimates no intention of making Upper Canada again his domicile, and all that we can say about Upper Canada is, that at a certain period it was his acquired domicile, and would, as he believes, have continued so if he were not in the civil service. But being as he is in the civil service, Upper Canada has ceased to be, so far as his affidavit shows, his acquired domicile.

In proceeding upon the facts stated in the affidavit, I do not mean to say that it is admissible—it is clearly not so upon this application, filed as it is after argument; but the case of *Lillie* v. *Lillie* (2 M. & K. 404) would lead me to doubt whether the plaintiff is not bound by the description of residence in his bill, and cannot amend it by affidavit, for in that case the description in the affidavit was clearly sufficient to exempt the plaintiff from giving security for costs, but he was compelled to give security, because the description in the bill was not sufficient to exempt him.

The additional case to which I have been referred, *Clark* v. *Fergusson* (5 Jur. N. S. 1155), does not seem to throw any light upon the point. The plaintiff described himself as of Longborough, near Galashiels, in Scotland, a lieutenant in her Majesty's ship *Gladiator*, now on service, and Sir John Stuart said, "The bill stated, though not perhaps with as much precision as might be wished, that the plaintiff was 'an officer in her Majesty's ship *Gladiator*, now on service,' and that averment was substantially sufficient to exempt him from giving security for costs." I cannot suppose that Sir John Stuart meant to say that an officer of a ship, not in service with his ship, was entitled to exemption—that would be at variance with the well settled rule. His reading of the allegation evidently was, that the plaintiff was on active service with his ship, and this is evident from his remarks as to want of precision in his allegation in the bill; in any other view it was precise enough. It is immaterial whether Sir John Stuart was right in his reading of the allegation—that was a mere matter of construction; but he certainly did not mean to controvert the rule, that the plaintiff must be absent on active service, or to question *the case of Lillie v. Lillie, which was cited to him.*

Upon the allegations in the bill, and upon the plaintiff's first affidavit, he proceeded upon the presumption that his domicile was in Upper Canada, a presumption for which I see no ground. The affidavit last filed does not proceed upon such presumption, but upon the fact of a former residence in Upper Canada, as a country of acquired domicile, and the continued ownership of property therein; but in either view there is an absence of that which forms in England the true ground of exemption, a temporary residence abroad from his domicile in the service of the Crown. The plaintiff does not establish, either by presumption or evidence of fact, that his domicile is now in Upper Canada.

I think it would be pushing the rule of exemption beyond its legitimate bounds to hold a person exempt from giving security for costs under the circumstances disclosed in this case, and would operate unfairly to defendants. I think the application should be refused with costs.

The plaintiff subsequently dismissed his bill and filed a new one, stating certain facts to exempt him from being called upon to give security, whereupon

Brough, for the defendants, moved upon notice for an order that the plaintiff should pay the costs of the former suit, and give security for costs in the second cause, before they could be called upon to answer the bill, referring to *Spires* v. *Sewell* (5 Sim. 193), *Budge* v. *Budge* (12 Beav. 385).

Scott, contra.

SPRAGGE, V. C.—The defendants have not obtained an order for leave to read the affidavits used upon a like application in a former suit between the same parties, and I think that without such order they are not entitled to read them. I must, therefore, dispose of this application upon the affidavits filed in support of, and in opposition to it; together with the affidavit of the plaintiff filed in the former suit, which is read by the plaintiff, under an order obtained by him for that purpose.

The affidavit of defendant Hawkins in support of the application, states shortly "that the above-named plaintiff, to the best of my knowledge and belief, resides at the city of Quebec, in Lower Canada." The plaintiff seeks to exempt himself from the ordinary rule, that a plaintiff residing out of the jurisdiction of the court must give security for costs, by stating his position by affidavit as follows: "That I hold the office of Deputy-Inspector-General of the province of Canada, under and by virtue of an order of his Excellency the Governor-General in Council, dated the 7th day of April, A. D. 1855.

"That by virtue of the instructions of her Majesty's provincial government I am required at present to reside at the city of Quebec, in this province, such city being at present the seat of the executive government.

"That I am now, and have been since my appointment as aforesaid, in active service as such Acting Deputy-Inspector-General, in the civil service of the Crown, in this province."

It is to be observed that the plaintiff's affidavit is wholly silent upon the subject of domicile, original or acquired.

He rests his right to exemption simply upon the ground that he holds a public appointment in the service of the crown; that he is in the active discharge of its duties, and that he is at present required to reside at Quebec, the seat of the executive government. I have no hesitation in saying that in my judgment this forms no ground for exemption. In disposing of the application in the former suit, I stated my view of the principle upon which exemption is allowed, to be, that the plaintiff seeking exemption must be absent from his domicile in the service of the crown, not merely in the service of the crown and absent from the jurisdiction of the court in which he is living. It is the latter position only that the plaintiff shows here. The authorities to which I referred in my former judgment convince me that this is not enough. I must therefore grant the defendant's application.

HODGSON v. BANK OF UPPER CANADA.

Notice of motion to dismiss—Evidence.

Held, that it is not necessary, in a notice of motion to dismiss, to specify the evidence to be read on the hearing of the motion.

This was a motion on behalf of some of the defendants to dismiss the plaintiff's bill for want of prosecution. The notice of motion merely set out that "application would be made to a judge in Chambers for an order dismissing the plaintiff's bill for want of prosecution," without stating that any evidence would be read or referred to.

The motion was objected to on the ground that no evidence, either of filing the answer or service of the answer, could be brought before the court under the notice of motion.

SPRAGGE, V. C.—I think the notice of motion sufficient. The plaintiff had not to be informed that a registrar's certificate would be used; and besides, the object of specifying in the notice the evidence to be used is, that the party receiving it may examine the evidence, and perhaps answer it. The certificate is not prepared until the day when the motion is made. The order may go on the usual terms.

WATERS v. PETERS.

Married woman—Next friend—Insolvency of next friend—Solicitor—Costs of application—Dismissal of bill.

(Oct. 25, 1862.)

On the 22nd August last, a solicitor of the Court of Chancery filed a bill on behalf of Mrs. Waters, a married woman, by one Ramsay, her next friend, who was procured by the solicitor to act as next friend, without the privity and consent of the married woman, and at the time being insolvent, and no security for costs given, and no written authority of the next friend being filed with the bill.

Browne, pursuant to notice, moved, on behalf of Peters, one of the defendants, for an order to take the plaintiff's bill off of the files, with costs of this application to be paid by the solicitor who filed the bill. In support of the notice it was contended, first, that a defendant had a right to make a motion of this kind (*Hall* v. *Bennett*, 2 S. & S. 78); second, that a bill cannot be filed on behalf of a married woman, without first obtaining her consent (Daul. Ch. Prac. 3 ed. 106; *Andrews* v. *Cradock*, Prac. Ch. 376; *Cook* v. *Fryer*, 4 Beav. 13; Mit. Plead. 28); third, that before the name of any person can be instituted as next friend of any married woman, such person shall sign a written authority to the solicitor, which must be filed with the bill (Aych. cap. 12); fourth, that the next friend was insolvent, and had given no security for costs, therefore he was not a proper party to act as next friend (Daul. Ch. Prac. 3 n. 106, Amer. 1 n. 144; *Pennington* v. *Aline*, 1 S. & S. 264; *Hind* v. *Whitmore*, 2 K. & P. 458); fifth, that the solicitor is liable for costs, if he file the bill without first obtaining his client's proper authority (*Allan* v. *Bone*, 4 Beav 493; *Malens* v. *Greenway*, 10 Beav. 564; *Hall* v. *Bennett*, 2 S. & S. 78; *Hood* v. *Phillips*, 6 Beav. 176).

Foster, contra, contended that a defendant had no right to make an application to have a bill dismissed, and referred to *Cook* v. *Fryer* (above cited) to show that the judge must be satisfied that the married woman wishes the bill dismissed, and that she is the proper person to make the application; that solicitor not liable to costs (*Jerdan* v. *Bright*, 6 L. T. N. S. 279)—in this case a motion was made to take a bill off the file, on the ground that the plaintiff had not authorized the solicitor to file it; the bill was taken off of the file, and the court did not order the solicitor to pay the costs; that as to filing the consent of the next friend with the bill, it is only necessary by an English statute, 15 & 16 Vic. cap. 86, sec. 11, consequently does not apply to this country.

VANKOUGHNET, C.—Unless the plaintiff's bill be amended by substituting for Ramsay a proper person, with the consent of the plaintiff, as her next friend, within one month from the date of the service on the plaintiff of the order to be taken out herein, the bill in this cause must be taken off of the files; and the solicitor who filed the said bill must pay to the defendant Peters his costs of this application, and all necessary costs incurred thereunder.

THE BANK OF UPPER CANADA v. POTTROFF.

Staying proceedings in the Court below, pending appeal.

The Consolidated Statutes, cap. 13, sec. 16, sub-sec. 4, as to giving additional security pending appeal, does not apply to mortgage cases.

(Nov. 15, 1862.)

The defendant, William Freeman, applied for an order to stay proceedings in the Master's office, pending an appeal from the decree made in the cause, having filed the ordinary bond under the orders of the Court of Appeal, conditioned for the effectual prosecution of the appeal by him the said defendant William Freeman.

It was contended on the part of the plaintiffs that in addition to the ordinary bond, the defendant appealing should be compelled (before obtaining any order to stay proceedings in the court below) to give security to the satisfaction of the court for the payment of the debt and costs ordered by the decree to be paid.

SPRAGGE, V. C.—The defendant Freeman, the appellant, is assignee of a mortgage. The plaintiffs are judgment creditors of the mortgagor. The question was one of priority, and was decided in favour of the plaintiffs. From this decision Freeman appeals. I am satisfied this does not come within the exceptions of the act, and that the ordinary bond is all that the applicant is required to give. No exception is taken to the bond filed.

Order to go, staying proceedings in the Master's office, pending the appeal.

COMMON LAW CHAMBERS.

(*Reported by* CHRISTOPHER ROBINSON, Esq., *Barrister-at-Law.*)

McKENZIE ET AL. v. McNAUGHTON ET AL.*

Application to set aside judgment—Delay—Misnomer—Amendment.

A summons was served on the 19th February, 1859, and final judgment signed for want of appearance on the 24th December, 1860, and execution issued Defendants, on the 21st January, 1861, moved to set aside the judgment on the ground that it had been signed more than a year after the summons was returnable, and without giving a term's notice. *Held*, that the application was too late.

One of the defendants, *Edmund* M. correctly styled in the summons, was by mistake named in the judgment roll and executions *Edward* M. *Held*, amendable.

This was a summons to shew cause why the final judgment in this cause should not be set aside with costs.

1st. Because the defendants were served with process (summons) on the 19th of February, 1859, and no proceedings taken till the 24th December, 1860, when final judgment was entered against all the defendants (one of the defendants, *Edmund* McNaughton, being deing designated therein as *Edward* McNaughton) for want of appearance, for £809 0s. 9d. and costs.

2nd. Because there was a variance between the judgment roll and execution and the writ of summons, the style of the cause in the summons being the same as in this summons, while the style of the cause in the roll and executions called defendant *Edmund* McNaughton *Edward*.

3rd. Because the plaintiffs did not give a term's notice, although more than a year had elapsed since the last proceeding.

In answer to the summons the plaintiff's attorney made an affidavit to the effect that the delay in entering judgment was agreed upon between him and the defendants: that the defendants undertook not to enter appearance, as they had no defence, and had engaged to pay off the debt within eighteen months, and had made small payments from time to time, but little more than sufficient to keep down the interest; and that in December last, finding that other people were pressing, he entered up the judgment. He swore also that he believed the application to set aside the judgment was made, not at the instance of the defendants, but of a creditor of theirs who took out an execution against them for a large debt, and placed it in the sheriff's hands a few minutes only after the execution in this case was delivered to him. In this affidavit it was alleged that the agreement with the plaintiff's attorney for delay was made between him and Andrew McNaughton, one of the defendants.

On the part of the defendants, Andrew McNaughton made an affidavit that after his first interview with the plaintiffs' attorney about this suit he always believed that the suit had been withdrawn: that this application was not made on behalf of any other of their creditors, but with the idea that if he could succeed in getting the judgment set aside he could then make arrangements to pay all the creditors equally: that he had often applied to the plaintiffs' attorney for an account of their debt, but had never received one.

It was not denied that the name of *Edward* was by mistake given as the christian name of one of the defendants in the judgment roll instead of *Edmund*, the name properly given in the summons.

ROBINSON, C. J.—By the Common Law Procedure Act, section 81, it is enacted that a plaintiff shall be deemed out of court unless he declare within one year after the writ of summons is returnable.

The judgment being entered on the 24th December, 1860, the defendants move against it for irregularity in being signed too late, that is, more than a year after the summons was returnable; but they come, as appears, not before the 21st of January, 1861, which is too late, according to the practice, and I think this is a case in which the application should not be favoured.

The same objection, of being too late in moving, applies to the other ground of not giving a term's notice, if indeed such an objection could be taken when the defendants have not appeared.

As to the mistake in the christian name of one of the defendants, Edward for Edmund, that can be cured by amendment, as the summons gives the true name.

I think that the name of the defendant, Edmund McNaughton, should be amended in the judgment roll and the writ or writs of execution that have issued under it, by making it conform with the name in the summons, and that this summons should be discharged, but not with costs.

COCHRANE v. SCOTT ET AL. AND COCHRANE v. CROSS ET AL.

Reference to arbitration—Costs.

Two actions for false imprisonment were referred to arbitration at the assizes, *no verdict being taken*, costs to abide the event. In one the arbitrator found £20, in the other £10. The plaintiff having proceeded by attachment on the award, *held*, that he was entitled to full costs without a certificate.

Such a case is not within the 155th rule of court, for the plaintiff cannot be considered as proceeding upon a final judgment.

Quære, whether under C. L. P. A., section 331, a judge's order is not necessary to have taxation revised by the principal clerk.

The plaintiff in this case applied to revise taxation, on grounds which sufficiently appear in the judgment.

BURNS, J.—Both of these cases were actions against the defendants for false imprisonment, in consequence of the writs to hold to bail being set aside for irregularity. When they came down for trial at the assizes at Stratford, in the spring of 1858, by consent of parties the causes were referred to an arbitrator, no verdicts being taken. The costs of the cause in each and the costs of the reference were ordered to abide the event. The arbitrator made his awards, and in the first case awarded £20 to the plaintiff, and in the second case £10. The plaintiff proceeded then to tax costs, and the deputy clerk of the Crown for the county of Perth taxed to the plaintiff full costs in each case. The plaintiff after that proceeded to demand the sums awarded and costs, and upon non-payment applied to the court to enforce the awards by attachment. The defendants resisted these applications, and the matter came on to be heard in Trinity Term last, before me in the Practice Court. The rules were made absolute for the attachment, but ordered to lie in the office a certain length of time, to afford an opportunity to have the costs taxed correctly and upon a proper scale, as a question was raised with respect to the costs as taxed by the deputy clerk of the Crown.

The order then made was special, directing an application to be made to a judge in Chambers, at least that was what I contemplated at the time. I had overlooked the provisions of the 331st section of the Common Law Procedure Act. Upon looking at that section now, I see I have made a note in the margin to that section in my copy, that some of the profession say, and have acted upon it, that they may as a matter of course have the costs re-taxed by the principal clerk: I doubt that being the true construction: the revision I think should be by a judge's order for the purpose. Be that as it may, however, the defendants in these cases avail themselves of the construction put upon the clause by the profession, and carried the taxation before the principal clerk. The plaintiff declined to attend this taxation, because he considered it a violation of the order made when directing the attachment to lie in the office till a taxation procured in accordance with it. The master in the first place taxed the plaintiff's costs on the scale of the county court, and then allowed the defendants their costs, that is, the difference of costs between the two courts to be deducted from those; and in the second case he allowed the plaintiff only division court costs, and taxed to the defendants their full costs.

The application now before me is made by the plaintiff, that the master shall review his taxation, and the question is simply this, whether he has taken a correct view of the matter. At the time of the argument I was under the impression that this very point had been before me in some shape sometime since, and I find it was in *Jones* v. *Reid* (1 U. C. P. R. 247). In some measure the same question was before Mr. Justice Richards in *Morse* v. *Teetzel* (Ib. 376). In this last case an order was made for full costs, but that case differs from *Jones* v. *Reid* and from this case, for no verdict was taken in either of them, and it is through the verdict the court deals with the question of costs, and under the rule of court by means of the final judgment.

I still adhere to my opinion expressed in *Jones* v. *Reid*, that where the parties refer a case to arbitration without taking any verdict, the different provisions of the statutes referred to do not apply. The provision in the rule of reference that costs shall abide the event, are not equivalent to saying that the plaintiff shall not have costs without a certificate, for the judge who tries

the cause may grant the certificate, notwithstanding the verdict be within the jurisdiction of the inferior court. A judge cannot certify, in my opinion, when there is no verdict which enables him to say the court has possession of the couse; that is, I mean cannot certify under the different statutes.

Then as to the rule of court. The case of *Jones* v. *Reid* was decided before the new rules, but I apprehend there has been no difference in that respect. The 155th rule is that costs shall be taxed on the scale of the inferior courts, if there be no special order of a judge, in any action of the proper competence of the county court *in which final judgment shall be attained without a trial* If the plaintiff had gone to the master with an award upon which he could have obtained a final judgment, and was entering up that judgment, then the master would have been right. This is not such a case. The plaintiff proceeds upon the award and not upon any judgment, and therefore the question is just this, whether, when an award is made in a case where no verdict has been taken, but the parties are proceeding upon the award, it is to be considered as a final judgment within the meaning of the 155th rule. I think it is not, and therefore the master was wrong in thinking he had jurisdiction to deal with costs on the smaller scale.

The case of *Jones* v. *Reid* was decided in the Practice Court, from which there could be no appeal, but this case being in Chambers the defendants have a right to apply to the court to rescind my order if my view of the law be incorrect.

The summons for revision must be absolute, but it will be without costs.

BALFOUR v. ELLISON ET AL., EXECUTORS OF ÆNEAS SAGE KENNEDY.

Judgment—Right of subsequent creditors to move against.

A judgment will be set aside on the motion of a subsequent judgment creditor only when it has been procured by fraud, and the process of the court thus abused If a nullity upon any other ground, a stranger cannot be prejudiced by it; and if irregular only, he has no right to complain.

J. B. Read, on behalf of a subsequent judgment creditor, moved to set aside the judgment issued in this cause, and the *fi. fa.* issued thereon. Several grounds of objection were taken, and among others, that if such judgment is intended to be a judgment by default of defendant's appearance to the action, the said judgment is not justified by the writ of summons filed, as the judgment contains no copy of the special endosement on said writ, as required by the statute in that behalf: that the said judgment is fraudulent and void as against creditors of the said Æneas Sage Kennedy, deceased, on account of the plaintiff having caused the same to be entered without sufficient authority from the defendants so to do; or on the ground that, if such authority was given, it was by the plaintiff's collusion, or that of his attorney or agent, and for a much greater sum than ought to be recovered by the plaintiff against the estate of the said Æneas Sage Kennedy: that there is no judgment to warrant the *fieri facias* issued, the judgment signed in this cause not being against the estate of the said Æneas Sage Kennedy, or even against the defendants as his executors, but against the defendants personally.

BURNS, J.—The question raised by the affidavits of Bown, a subsequent judgment creditor, that the plaintiff's judgment was a collusive one, and fraudulent, is met by the plaintiff, and I think anything like fraud or collusion is sufficiently answered and repelled, and therefore I can neither set aside the judgment nor grant an issue to try the validity of it upon that ground.

All the other objections resolve themselves into regularity of the plaintiff's proceedings, and certainly there seems no want of points of irregularity as the papers stand at present, but perhaps they may be amended and set right upon an application for the purpose. The plaintiff's judgment was not obtained upon a specially endorsed writ, as would appear by the judgment, though the writ of summons was specially endorsed. The affidavit of Mr. Read, attorney in this suit for the defendants shews that an appearance was entered by him, and after service of the declaration he suffered judgment by default as the least expense to the estate.

The writ of *fi. fa.* in the sheriff's hands does not appear to be supported by the judgment, certainly, for the judgment is not entered against the defendants as executors. If Bown can obtain a priority over the plaintiff by reason of there being no judgment to warrant the execution, then he can do so by notifying the sheriff of it, and to proceed upon his execution, but I know of no authority which authorises a stranger to the action asking the court to interfere with the proceedings of another party, whether those proceedings amount to an irregularity or to a nullity. If the proceedings are void the stranger cannot be prejudiced, and if irregular only, he cannot complain. I know of no other ground of interference than when it is complained that the power and process of the court is used for a fraudulent purpose. See *Perrin* v. *Bowes*, (5 U. C. L. J. 138.)

Rule discharged, with costs.

UNITED STATES REPORTS.

IN THE QUARTER SESSIONS OF SCHUYLKILL COUNTY.

THE COMMONWEALTH v. HELLER.

The separation of the jury after a sealed verdict had been agreed upon in a case of misdemeanor, is not good cause for a new trial.

PARRY, P. J.—After the jury had retired to deliberate upon their verdict, the court adjourned until the afternoon; but before the judges had left the bench, the constable in charge of the jury informed the judges that the jury had agreed upon their verdict, and were ready to deliver it. The president judge (one of the associates being present and concurring) directed the constable to tell the jury they might seal up their verdict and bring it into court when the court met that afternoon. Neither the defendant nor his counsel were present when this direction was given. In giving this direction the president judge followed the practice of his predecessor on the bench, and in accordance with his own impression of the practice in similar cases. At the opening of the court in the afternoon, the jury delivered a sealed verdict to the court, finding the defendant guilty. The verdict was recorded by the clerk, and acknowledged by the jury as their verdict, in the usual form.

These are the facts on which the reason assigned for a new trial is founded, and presents for decision the question, "Whether the separation of the jury by permission of the president judge, after the sealing of their verdict, and before its rendition in court, is a valid ground for a new trial."

Lord Coke says (Co. Lit. 227, b.) "By the law of England, the jury, after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drink, fire or candle, which some books call an imprisonment, and without speech with any, unless it be the bailiff, and with him only if they be agreed. After they be agreed, they may in causes between party and party, give a verdict, and if the court be risen, give a *privy* verdict before any of the judges of the court, and then they may eat and drink, and the next morning in open court, they may either affirm or alter their *privy* verdict, and that which is given in court shall *stand*. But in *criminal cases of life or member*, the jury can give no privy verdict, but they must give it openly in court. And hereby appeareth another division of verdicts, viz., a *publick* verdict, given openly in court, and a *privy* verdict given out of court before any of the judges as aforesaid." "After the verdict is recorded, the jury cannot vary from it, but before it be recorded, they may vary from the first offer of their verdict; and that verdict which is recorded shall stand; also, they may vary from a *privy* verdict."

In Jacobs' Law Dictionary, under the word "Verdict," it is stated, a privy verdict is "given out of court, before one of the judges thereof; and is called *privy*, being to be kept secret from the parties until it is affirmed in court;" (1 Inst 227.) But a privy verdict is, in strictness, no verdict; for it is only a favor which is allowed by the court to the jury for their ease; the jury may vary from it, and when they come into court may give a contrary verdict, but this must be before the privy verdict is recorded; (5 Mod. 351.) No privy verdict can be given in criminal matters which concern *life*, as felony, &c.; but it must be openly in court;

because the jury are commanded to look upon the prisoner when they give their verdict, and so the prisoner is to be there present But in criminal causes, where the defendant is not to be personally present at the time of the verdict, and in informations, a *privy* verdict may be given (Raym. 191 ; 1 Vent. 97).

In Trials per Pais (vol. 1, 260), a case is cited from 1 Vent, 124, in which the court was moved to set aside a verdict in ejectment for the plaintiff, on the ground that the jury, after they had given their privy verdict in favour of the plaintiff, they were treated at a tavern by the plaintiff's solicitor, before the affirmance of the verdict in court. Counsel was heard on both sides, and the court delivered their opinion seriatim, that the verdict should stand.

In the case of *The King* v. *Wolfe et al.*, 1 Chitty, 401, an indictment for a conspiracy, it was decided, after an argument before the Court of Queen's Bench, that the dispersion of the jury with the permission of the judge, during the interval of the adjournment, in case of a *misdemeanor*, does not vitiate their verdict, and that the separation of the jury is a matter of discretion with the judge. The judges delivered their opinions seriatim. Chief Justice Abbott, in his opinion, said, "If we entertained any doubt upon a question of this kind, which is of importance by reason that the subject matter relates to the trial by jury, we should pronounce a very deliberate opinion ; but as as none of us entertain any doubt, it is unnecessary to take any further time for consideration." He further said, "I am of opinion that in case of a *misdemeanor*, their dispersion does not vitiate the verdict; and I found my opinion upon the admitted fact that there are many instances of late years, in which juries upon trials for misdemeanors have dispersed and gone to their abodes during the night for which the adjournment took place ; and I consider every instance in which it has been done, to be proof that it may be lawfully done It is said that in some of these instances the adjournment and dispersion of the jury have taken place with the consent of the defendant. I am of opinion that that can make no difference." "I am also of opinion that the consent of the judge would not make, in such a case, that lawful which was unlawful in itself; for if the law requires that the jury shall at all events be kept together until the close of a trial for misdemeanor, it does not appear to me that the judge would have any power to dispense with it. The only difference that can exist between the fact of the jury separating with or without the approbation of the judges, as it seems to me, is this, that if it be done without the consent or or approbation of the judges, express or implied, it may be a misdemeanor in them, and they may be liable to be punished; whereas if he gives his consent, there will be no such consequence of a separation." "It seems to me that the law has vested in the judge the discretion of saying whether or not, in any particular case, it may be allowed to the jury to go to their own homes during a necessary adjournment throughout the night."

Holroyd, J., said: "I am entirely of the same opinion, that the separation does not render the verdict invalid. I do not find any authority in law which says that the separation of the jury in a case between party and party, or in the case of a misdemeanor, that does avoid the verdict."

Bailey, J., said: "The case is put on the plain, simple, dry ground, whether, because the jury separated, and the defendant gave no consent to that separation, and did not know until after the verdict was given *that that separation had taken place, he is* as a matter of right entitled to call upon the court to vacate the verdict and grant a new trial. Now, upon that naked point it seems to me that he has no right to make that application."

Best, J., said: "I am of the same opinion. It appears to me that no mischief can result from allowing jurors to separate, a discretion being always vested in the judge as to the propriety or impropriety of keeping them together in each particular case."

This decision of the court seems to have settled the question in England; for, after a careful search through the digests of the English reports, no case has been found in which it has been again raised.

In New York it has been held in several cases that the separation of the jury before the rendition of the verdict in court, does not avoid the verdict In *The People* v. *Douglas*, 4 Cow. 32, Woodward, J , in delivering the opinion of the court, said: "On looking into books, we do not find the mere separation of the jury has ever been held a sufficient cause for setting aside a verdict, either in a civil or criminal cause, if we except the case of *Commonwealth* v. *McCaul*, Virg. Cases, 271 (this was a capital case). "The question has been learnedly examined in several cases, and especially in that of *The King* v. *Wolfe et al*, 11 Chitt. 401, which appears to be a case which excited very general interest, and led to the utmost research of counsel and the Court of King's Bench." In reference to this decision in *The King* v. *Wolfe et al.* Justice Woodward further said: "What the King's Bench would have said of a capital case, it is true, does not directly appear, because the cause under consideration was one of a misdemeanor, but the reasoning of the judges is applicable to both cases; and we think that the mere fact of the separation, unaccompanied with abuse, should not avoid the verdict even in a capital case."

In *Smith* v. *Thompson*, 1 Cow. 221, after the jury had retired, and before they had agreed upon their verdict, two of the jurors eluded the care of the constable. One of them went to a tavern, and the other to his own house, and the next morning returned to the jury-room, and afterwards agreed upon the verdict, and rendered it in court. The court held this to be no ground to set aside the verdict.

In *Horton* v. *Horton*, 2 Cow. 589, after the jury had agreed upon their verdict, and while the court were at dinner, without *the knowledge of either party, the jury separated, but the court* held this no cause for a new trial.

The same principle was decided in *Douglas* v. *Toucy*, 2 Wend. 352; *Burn* v. *Hoyt*, 3 J. R. 255.

In Kentucky it has been held that the separation of the jury after agreeing upon their verdict, but before its rendition in court, will not vitiate the verdict (1 Bil. 265).

In Ohio it has been expressly decided that where juries separate after agreeing upon the verdict, without leave of the court, it is not a ground for a new trial (3 Ham. 52).

In South Carolina it has been decided that a separation of the jury in a *capital case*, and before rendering a verdict, is no cause for a new trial (1 Dev. & Bat. 500). And in the same State, it has also been held that the separation of the jury in all cases is within the discretion of the president judge (2 Baily, 565).

In Connecticut and New Jersey it has also been held that mere separation of the jury before the rendition of the verdict in court, although irregular if done without permission, does not vitiate the verdict. (See the cases cited in *People* v. *Douglas*, 4 Cow. 32, and the cases collected in a note to *Smith* v. *Thompson*, 1 Cow. 221.)

The law upon this point, as settled by the decisions in England and in this country, cannot be better stated than in the words of Justice Woodward, part of whose opinion is above quoted, "that though the jury separate, if there be no further abuse, this shall not vitiate the verdict, though it would be a contempt of the court if contrary to their instructions, and would be punishable as such."

The very question raised by the facts, and the reason for a new trial in this case, appears to have been decided in *The State* v. *Eagle*, 13 Ohio, 490; the syllabus of which is thus stated in 2 U. S. Dig. sup. 417: "The court may instruct a jury to seal up their verdict in a criminal case, and separate, should they agree while the court was not in session; and such instructions given instantly, on the announcement of the adjournment, is the act of the court, and sufficient."

But independently of direct authority in favor of the validity of *a verdict, where a jury has separated by permission of the judge,* after having agreed upon it and sealed it up, no reason can be adduced against it that would not operate with greater force against a separation during the progress of the trial, and before the charge was delivered. The juror is under no greater obligation by his oath not to separate after, than before the rendition of the rendition of the verdict. The oath of the constable is, "That he will not suffer any person to speak to them, nor speak to them himself, *until they have agreed, unless it be to ask them if they have agreed.*" When they have agreed upon their verdict, the obligation of the oath is at an end. And the practice of receiving a *privy* verdict by the judge in England shows the construction placed by the courts upon the extent of the obligation of the oath. The practice of sealing the verdict in this country, seems to have been substituted for the privy verdict in England, for both must be rendered in court to be of any effect; and as it is clear, from the authorities cited, that a privy verdict could always have been

rendered in England in cases of *misdemeanor*, there seems to be no reason why a judge should not direct a jury to seal up their verdict during the temporary adjournment of the court. The court have it in their power to correct any abuse or misconduct on the part of the jurors either before or after the rendition of the verdict, and no injury to any one is likely to result from a continuance of the practice; and as none has been alleged in this case, no reason has been shown for a new trial.

The motion is denied, and a new trial refused.

SUPREME COURT OF PENNSYLVANIA IN AND FOR THE WESTERN DISTRICT.

EWING v. THOMPSON.

U. S. appointments—How revoked—Certiorari.

Where, in the United States, an office is not removable at the will of the Executive, the appointment is not revocable, and cannot be annulled.

The effect of a writ of *certiorari*, directed to an inferior tribunal, is to suspend the powers of the superior court. The judicial proceeding can progress no further in the court below, but it is not clear that collateral proceedings are affected by it.

The opinion of the court was delivered by Strong, J.

Three prominent questions are raised by this motion. They are:—Has the complainant a legal right to the office of Sheriff of the city and county of Philadelphia? Does the defendant unlawfully invade or threaten to invade that right? If he does, is the invasion of such a character as to call for the exercise by this court of its preventive power?

On the 27th day of November, 1861, the Governor of the commonwealth issued a commission to the complainant, reciting that by the election returns of the October election of that year, it appeared that he had been chosen sheriff of the city and county of Philadelphia, and authorizing him to perform the duties and enjoy the privileges of said office for the term of three years from the second Tuesday of October, 1861, if he should so long behave himself well, and until his successor shall be duly qualified. Under this commission he entered upon the duties of the office, and he has, in fact, acted hitherto as sheriff. If this commission is still in force, beyond controversy he has a legal right, not only to the office, but to its undisturbed enjoyment. This we do not understand to be controverted. The next stage in the inquiry, therefore, is whether anything appears which invalidates the commission. The defendant produces a commission from the Governor to himself, dated October 21, 1862, reciting that it appeared from the returns of the same election, held in October, 1861, that he has been chosen sheriff of the said city and county, and authorizing him to hold, exercise and enjoy the said office of sheriff, with all its rights, fees, perquisites, emoluments and advantages, and to perform all its duties for the term of three years, to be computed from the second Tuesday of October, 1861, if he should so long behave himself well, and until his successor should be duly qualified. The two commissions are for the same office, for the same term, and both recite the same election returns. The second does not profess to be founded upon any amended return. It makes no allusion to any contest of the election, and it does not in terms revoke, annul or supersede the commission previously issued to the complainant. What, then, is its legal effect?

Had there been no contest of the election of sheriff or of the election returns, it could not be maintained that the commission issued in October, 1862, annulled, vacated or superseded the commission given to the complainant in November, 1861. The power of the Governor to revoke a commission once issued to an officer not removeable at the pleasure of the Governor, may well be denied. Even where he has the power of appointment of such an officer, an appointment once made is irrevocable. Much more would it seem is a commission issued by him incapable of being recalled or invalidated by himself, when the appointing power is located elsewhere, and when his act in issuing the commission is not discretionary with him, but is only the performance of a ministerial duty. Under the Constitution, the Governor does not appoint a sheriff, and he has no choice as to whom he will commission. The appointment is made by the electors, and it is the duty of the Chief Executive to commission the person whom they have designated according to the forms of law, and a vested right is consummated in the person commissioned, a right which nothing but a judicial decision can take away, or authorize him to recall. The observations of the supreme court of the United States in *Marbury* v. *Madison*, 1 Cranch 137, bear forcibly upon this subject. That was an application for a mandamus to compel the delivery of a commission for an office to which the applicant had been appointed by the President of the United States, and for which a commission had been made out but not delivered. The office was one which the law created, and of which it fixed the duration of tenure by the officer, but under the Constitution the President had the appointing power. Chief Justice Marshall, in delivering the unanimous opinion of the court, made the following observations:

"Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern, because the act is at any time revocable, and the commission may be arrested if still in the office. But when an officer is not removable at the will of the executive, the appointment is not revocable and cannot be annulled. It has conferred legal rights which cannot be resumed. The discretion of the executive is to be exercised until the appointment has been made. But, having once made the appointment, his power over the office is terminated in all cases where, by the law, the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it."

In this case it seems to have been held that neither the appointment nor the commission can be withdrawn. The executive may undoubtedly be authorized by law to revoke a commission or supersede it for cause, though he has not the power of appointment, and though the duration of the tenure may be determined by the Legislature. Whether he could when the tenure as well as the mode of appointment is defined by the Constitution, is perhaps not so clear, unless the commission has issued to one who was not elected or appointed. But the law has made the return the only evidence of an election, in the first instance, and conclusive until it has been corrected or shown to be false by a judicial determination. The defendant cannot stand, therefore, on his commission alone. He is compelled to show that the executive was authorized to issue it, before he can contend successfully that it has superseded that previously granted to the complainant.

This brings us to inquire whether the proceedings which have taken place in the court of quarter sessions empowered the Governor to grant the commission and thereby supersede that which *was issued upon the original* return. These proceedings are not referred to in the second commission, but if they conferred a power, the commission must be held to have issued under it, rather than be void. Prior to the date of his commission a contest of the complainant's election and the return thereof had been initiated in the court of quarter sessions, under the provisions of the Act of Assembly of July 2nd, 1839, and in that contest a decree was entered on the 18th day of October, 1862, that the complainant was not elected, but that the defendant had received a majority of the votes given, and that he was duly elected. On the same day a *certiorari* was sued out of this court by the complainant to remove the record of the contest in the court of quarter sessions, and it was served. The object of that writ was to stay further proceedings in the court below, and to remove the record of the case into this court. That such is the effect of a *certiorari*, except in cases where the Legislature has made a different rule, is the doctrine of all the cases. It is not itself a writ of *supersedeas*, but it operates as one by implication. Originally in fact, and now always in theory, at least, it takes the record out of the custody of the inferior court, and leaves nothing there to be prosecuted or enforced by execution.

Very many of the English as well as the American authorities are collected in *Patchin* v. *The Mayor of Brooklyn*, 13 Wendell 664. There are very many others, all holding that a common law writ of *certiorari*, whether issued before or after judgment, to be, in effect, a *supersedeas*. There are none to the contrary. In some of them it is ruled that action by the inferior court after service of the writ is erroneous; in others, it is said to be void and punishable as a contempt. They all, however, assert no more than that the power of the tribunal to which the writ is directed is

suspended by it; that the judicial proceeding can progress no further in the lower court. It is not so clear, either in reason or authority, that collateral action is erroneous or void. If an execution has been issued upon a judgment before the service of a *certiorari*, the power of the sheriff to go on under the execution is not suspended. It requires a formal *supersedeas* to suspend it. The court may even issue a *vend. ex.* to enable its completion. An execution issued after *certiorari* served is erroneous, and perhaps void, because its issue is the act of the court to which the superior writ has been sent, and of the party whose further proceeding has been stayed.

An election contest is in some respects peculiar. True it is a judicial proceeding, but so far as the court in which it is conducted is concerned, it terminates with the judgment or decree. No execution of the decree is entrusted to the court, or is under its control. When the truth of the return is contested, the duty of the court is to ascertain what should have been the true return, and declare it. Then its duty has been done. The regularity of its proceeding may be revised in the superior court, and, no doubt, a *certiorari* removes the record in such a case. It cannot, however, operate upon the inferior court as a supersedeas, for, after a decree, there is no possible action of that court to be stayed. If it stays anything it can only be the action of the Executive in issuing a new commission in view of it, rather than upon it, or action under the new commission when issued, by the substantial party to the decree in whose favor it has been made. But the issue of a commission by the executive, after the service of a *certiorari*, is not disobedience to the writ, for that goes only to the judges. It is not, therefore, a contempt, as action by the judges and the parties would be. He is no party to the contest, either in form or in substance. In reason, therefore, there is an obvious difference between the effect of a *certiorari* upon the court to which it is sent, or the parties to the judicicial proceeding removed, and the executive who has no connection with the record. Nor do the authorities show that a *certiorari* operates upon any other than the court and the parties.

We are, therefore, not prepared to hold that on the 21st day of October, 1862, after the decree declaring what was the true result of the election had been made in the court of quarter sessions, the executive had not authority to issue a commission to the defendant. Especially are we not prepared so to rule upon this motion, which is an appeal to our judicial discretion, while we are sitting only at Nisi Prius. The commission of the defendant is not necessarily invalid, because the election contest is still pending in the sense in which a cause adjudicated in an inferior court is said to be pending after its removal, by *certiorari* or writ of error, to a court which is superior. Had it issued one day before the service of the *certiorari*, but after the decree of the court of quarter sessions, and had the officer commenced his duties, no one will contend that it would have been avoided or interrupted by the mere subsequent service of the writ, any more than an execution partly executed is stayed by the service of a *certiorari* on the court which had awarded it. And yet, had the *certiorari* sued out by the complainant been four days later than it was, the election contest would be a pending proceeding just as truly as it now is. A *certiorari*, after a judgment, like a writ of error, is, in fact, a new suit. It enables him who obtained it to aver errors in the record removed, not to re-try the facts in this court. A judgment in it may, indeed, be followed by a new trial in the lower court, but there is no re-trial here. It is not on this account, not because the action may in this sense be said to be pending, that proceedings are stayed in the court where the trial was held, but it is because in contemplation of law its record is removed to another tribunal.

But while we do not hold that the *certiorari* served on the court took away from the executive the power to issue the commission to the defendant after the decree correcting the election return, a power which the decree unimpeached gave him, we do hold that the service of the writ affects the defendant. He was a party to the contest in the quarter sessions, not in name, but in substantial truth. It was his right which was in controversy, and his were the fruits of the decree. Upon him, therefore, the *certiorari* may operate. When it was served and the record was removed, he had not begun to execute the duties of the office, or to act under the decree and his commission. His position is like that of a party who has an execution in his hands not delivered to the officer, when the writ comes and stays his further proceeding. His title to his commission is not taken away, but his right to proceed under it is suspended until the final decision under the revisory writ. It may be that the decision of the supreme court on the hearing of the *certiorari* will result in setting aside the decree of the court of quarter sessions, and thus leave the original return and the commission of the complainant in full force. On the other hand, if the decree be affirmed, the right of the defendant to his commission, and to the emoluments of the office from the 21st day of October last will be established. His title will then have commenced at the date of his commission. It does not, however, give him a present right to assume the office, or interfere with its duties.

The second question is easily answered in the affirmative. The bill and affidavits show that there has been and still is a disturbance of the rights of the complainant, made by the defendant, no doubt under the belief of right, but still unlawful.

The remaining inquiry is whether the case is such an one as gives the court, in the exercise of its equity, power to grant an injunction. It is a bill preferred by an individual asserting a personal right invaded. Yet it is not to be overlooked that it affects public interests. The office of sheriff is a most important one, and the question which of two persons claiming it may lawfully perform its duties is one in which the whole community is interested. We ought not to leave the matter in doubt. Though we cannot now determine finally who has the right, we can and ought to determine who is the sheriff in fact, and prevent a conflict, until there should be an adjudication that shall terminate finally the election contest. We therefore feel constrained to award an injunction.

A speedy, final decision of the contested election is imperatively demanded by public considerations. In the light of these, individual interests and personal convenience are of minor importance, though they are by no means to be disregarded. We have no power to compel a hearing on the *certiorari* before the return day of the writ, but we have power to dissolve the injunction now raised, and we have power to impose terms upon the allowance of a common law writ of *certiorari* after judgment. It is not a writ of right, and will never be allowed for merely technical errors which do not affect the merits. Bac ab. *certiorari* A. We will use some of these powers unless the parties agree in writing to a hearing on the writ of *certiorari* before the supreme court in banc at Pittsburgh, on the 15th day of November, 1862. We cannot treat the writ as not allowed, but we can revise the allocatur and quash the writ if there do not appear to be sufficient grounds for it.

And now to wit: Nov. 1st, 1862, this motion came on for hearing before the supreme court, at nisi prius, and was argued by counsel, whereupon, after due consideration, it is ordered, adjudged and decreed that, on the complainant's giving security, according to the Act of Assembly in the sum of five thousand dollars, the said John Thompson, his agents and servants, be enjoined from interfering or intermeddling with the office of sheriff of the city and county of Philadelphia, or from disturbing or molesting the complainant in the peaceable possession and enjoyment thereof until final hearing of a certain writ of *certiorari* sued out by the supreme court to remove the record of a contested election between the complainant and defendant, or until further order.

And it is further ordered that the defendant have leave to move the court, on the 15th day of November, 1862, to quash the *certiorari* for having been issued without special cause previously shown, unless the plaintiff shall then show sufficient cause, on giving five days' notice

GENERAL CORRESPONDENCE.

Notaries Public—Fees.

To the Editors of the Law Journal.

Gentlemen,—You are aware that many persons, not of the legal profession, are appointed in Upper Canada to be Notaries Public. Especially is this the case in localities where there is no resident Lawyer.

The commission they receive reads: "To have, use, and exercise the power of *drawing*, passing, keeping, and issuing all deeds, contracts, charter parties, and other mercantile transactions; and also to attest all commercial instruments that may be brought before them for public protestation; giving and granting unto them all the rights, profits and emoluments appertaining and rightfully belonging to the said calling of Public Notary."

By Con. Stat. U. C., cap. 42, sec. 22, I find 50 cents given as fee for protest, and 25 cents for each notarial letter; and Con. Stats. Canada, cap. 57, sec. 1, repeats these fees; but I have been unable elsewhere to discover what "emoluments appertain" and "rightfully belong" to Notaries Public, for the "deeds, contracts, charter parties, mercantile transactions," &c., which they are empowered to "draw, pass, keep, and issue."

In the rural districts, where there are no Lawyers, the great bulk of the local conveyancing of Upper Canada finds its way into the hands of the Notaries Public; and being, with but few exceptions, men of intelligence, I have no doubt the instruments they prepare are satisfactory to their patrons. But can it be possible that no provision has been made for their fees? I have conversed with many of them—all as ignorant in relation to the "rightful emoluments" to which they are entitled, as I am myself. As their numbers are fast becoming formidable, can you throw light upon their "profits?"

Then again, nearly the whole of the Notaries Public are Commissioners for taking affidavits, &c., in B. R.; but in vain do they turn for information as to fees to the Con. Stats., for beyond providing for the payment of 20 cents for bare administration of affidavit, there appears to be nothing said; while they are empowered to receive "recognizance or recognizances of bail," &c., from parties for whom they must necessarily in many instances prepare the documents.

Some information on the matters spoken of above would greatly oblige a numerous class of readers.

Yours, &c.,

Merrickville, Oct. 24, 1862. JOHN MUIR.

[1. In Upper Canada, conveyancing is open to all the world. Any man who deems himself possessed of sufficient intelligence may prepare "deeds, contracts, charter parties," &c. The price is not regulated by any statute or rule of court. It fluctuates like the prices of the country tavern keeper or the village blacksmith. It may be less or more, according to the bargain entered into between the contracting parties.

2. A Commissioner for taking affidavits, recognizances, &c., is an officer of the courts. His fees are regulated by the rules of court. In the tariff made by the Judges of the Queen's Bench and Common Pleas we find the following:

COMMISSIONER.

For taking every affidavit.....	£0	1	0
For taking every recognizance of bail.....	0	2	6

These are the only fees which the Commissioner is by law entitled to receive. These are the only duties which properly appertain to his office. His duty is to *take* affidavits, recognizances, &c., not to *draw* affidavits, recognizances, &c. If he do the latter he does more than is expected of him, and he must get his pay as best he can.—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

C. P. BUCKMASTER ET AL. v. RUSSELL.

Statute of Limitations—Acknowledgment of debt—New promise.

The following contained in a letter: "I have received a letter from Messrs. P. & L., solicitors, requesting me to pay you an account of £40 9s. 6d. I have no wish to have any thing to do with the lawyers, much less do I wish to deny a just debt. I cannot however get rid of the notion that my account with you was settled when I left the army in 1851. But as you declare it was not settled, I am willing to pay you £10 per annum until it is liquidated. Should this proposal meet with your approbation, we can make arrangements accordingly."

Held, not a sufficient acknowledgment to take the debt out of the Statute of Limitations by which it was previously barred.

Quære whether, if the offer in the letter had been accepted, an action would have lain for the annual instalments?

EX. WHITE v. BEETON.

Condition precedent—Part performance of agreement.

The plaintiff by an agreement, in consideration of a sum of money to be paid him by the defendant for certain shares held by plaintiff in a loan and discount society, promised that all the property of the said society and all the interest and emoluments arising therefrom should vest in and exclusively belong to defendant. The plaintiff transferred his shares to defendant, who received and accepted them; but A. & B. refused to deliver the shares in their hands respectively.

In an action by the plaintiff for payment—*Held*, that the transfer of the shares of A. & B. was not a condition precedent to plaintiff's right to recover; and that even if it were so, the defendant had made himself liable by accepting part of the consideration.

M. R. POOLE v. MIDDLETON.

Vendor and purchaser—Specific performance—Contract to sell shares in a joint stock company—Powers of directors jus disponendi.

Specific performance was decreed of a contract by a shareholder to sell shares in a joint stock company, although the directors of the company objected to the transfer of the shares being made to the person with whom the contract was entered into.

A clause in the deed of settlement of a joint stock company that no shareholder shall transfer his shares except in such manner as the directors should approve, does not authorize the directors to prohibit a shareholder from contracting to sell his shares.

Shares in a joint stock company are in the nature of property, and are subject to the *jus disponendi* incident to property.

L. J. PICKLES v. PICKLES.

Power—Appointment—Fraud.

P. being tenant for life, with an exclusive power of appointment among his children, grants to G. a lease of certain property, and at the same time executes a will appointing the daughter who concurs with her father in a bond to uphold G's title; and P. having died, one of his sons filed a bill against his sister to upset the appointment, on the ground that it was made in consequence of a corrupt bargain.

Held on the evidence, that the appointment was not made on any previous bargain, but that it was the result of instructions long before given; and bill dismissed with costs.

EX. DICKENSON v. JACOBS.

Attorney and Client—Negligence—Attorney paying costs of setting aside proceedings.

The court will not, on a summary application, order an attorney to pay the costs of setting aside proceedings for irregularity, even where he has admitted that it was owing to his error, and has promised to pay, unless there is clear evidence of the nature of the negligence, and that it was gross.

EX. BROMLEY v. JOHNSON.

Contract—Parol—Reduction into writing—Evidence.

When, after a parol contract, before the parties separate, one asks that he may have a note of it, and the other writes out a note or memorandum of it, which purports to contain, and does contain all the essential elements of it, the latter must be taken to contain the terms of the contract, and the previous parol contract cannot be referred to.

C. P. THE G. S. NAVIGATION CO. v. SLIPPER.

Ship—Charter party—Loading cargo—Bar of harbor—Liability for freight.

Where, by charter party, a vessel is to go to a certain port, or so near thereto as she may safely get, and there load a cargo and bring it home, and the vessel goes to the port in question and loads the cargo inside the harbor, for which cargo the master signs bills of lading, but finds that with such cargo on board the vessel cannot pass the bar of the harbor—here the charterer having done all that was required of him—may refuse to put the cargo on board a second time (outside the bar), and the vessel sailing away without the cargo, the charterer is not liable for the freight stipulated for by the charter party.

B. C. CHADWICK v. STRICKMELL.

Order of judge at Chambers—Enforcing—Attorney—Attachment—Rule of Court.

An order of a judge made at Chambers before it can be enforced by attachment must be made a rule of court.

EX. THE DANUBE AND BLACK SEA RAILWAY AND KUSTENDJIE HARBOR CO. v. XENOS.

Contract—Refusal to perform—Breach.

A contracted with B to do a certain act on a day fixed. Before this day A deemed that he had made the contract. B, in a letter to A, said that "he was ready to perform his part of the agreement, and that if A persisted in his refusal to perform the same on his part he should hold A responsible for all loss that might ensue; and that unless B received by the next day a withdrawal of A's denial, he would conclude that A intended to persist in refusing to perform the agreement, and would forthwith proceed to make other arrangements."

No withdrawal took place, and B made other arrangements. Subsequently, before the day fixed, A consented to perform the contract.

Held, affirming the judgment of the Court of Common Pleas, that the breach of contract was complete on the non-withdrawal by A of his denial of the contract.

EX. BIFFIN v. BIGWELL.

Husband and wife—Agreement to live apart—Husband's liability for necessaries.

The husband is not liable for necessaries supplied to the wife, on her orders, while she is living apart with an allowance, under an agreement between them, unless her assent was caused by threats such as might act on a reasonable mind, and the mere fact that there was a threat of confinement in a lunatic asylum is not shown to have operated on her mind, is not necessarily enough to make the agreement invalid, and render him liable for necessaries supplied to her without his privity.

EX. CRONSHAW v. CHAPMAN.

Execution—Taking goods of wrong party—Liability of execution creditor.

Where, under process of execution from a county court, some goods of a stranger had been taken, the mere fact that the execution creditor told the bailiff that goods would be claimed by a third party, but that such claim was not to be regarded.

Held not to amount to a direction to take all the goods or any which were not liable to be seized, so as to make the execution creditor personally liable.

EX. POPHAM v. PICKBURN.

Libel—Privileged publication—Newspaper—Medical reports.

The defendant having published in his newspaper a report read at a vestry meeting containing a statement to the effect that certain returns of the plaintiff, a medical man, to the registrar under the statute, were wilfully false (such report not having been published by the vestry).

Held, that the publication of it was not privileged.

C. P. LAWRENCE v. WALMSLEY.

Equitable plea—Promissory note—Surety.

To a declaration on a promissory note the defendant pleaded as an equitable plea that he made the note jointly with E, for the accommodation of E, and as his surety; that at the time of making the note the plaintiff, having notice of the premises, agreed, in consideration of the defendant's making the said note as surety, to call in and demand payment of the said note from E within three years; that a memorandum of the agreement was to be endorsed upon the note, which, by mistake, was not done; that the plaintiff did not demand payment of E within three years, whereby he lost the means of obtaining payment from E, who has since become insolvent.

Held, on demurrer, that the plea was good, on the ground that the plaintiff had not performed the condition, in consideration of which the defendant became surety.

B. C. FAWKES v. LAMB.

Principal and agent—Broker—Contract—Evidence—Sale note.

Where a written contract for the sale of goods was silent as to the time for which warehouse-room was allowed by the seller to the buyer, it is competent for either party to show, by parol evidence, what time is allowed in such a transaction by general custom, but not to show that the parties themselves had agreed by word of mouth, that a certain definite time had been allowed.

Plaintiff, a broker, having goods of T in his possession for sale, contracted with defendant by a sale note, delivered by the plaintiff to the defendant, to the following effect:—"I have this day bought, in my own name, on your account, of T," certain goods, and signed by plaintiff, "A. Fawkes, Broker."

Held, in action on a contract supported by this evidence, that T, and not the plaintiff, was the person entitled to sue.

CHANCERY.

V. C. W. RE PHŒNIX LIFE ASSURANCE CO., HATTON'S CASE.

Winding up—Contributory—Invalid transfer.

A, a shareholder in a joint stock company, to avoid his liability for a call, of which he had received notice, transferred his shares to B, a man without means, who was procured by A's solicitor with a promise of indemnity, and paid for executing the transfer, but not informed of the pending call. The directors refused to accept the transfer, and A's name remained upon the register, without any steps taken by him to obtain its removal.

Held, that the attempted transfer was invalid, as a mere device to avoid payment of the call, and that A remained liable as a contributory.

REVIEW.

A MANUAL OF COMMON LAW AND BANKRUPTCY, FOUNDED ON VARIOUS TEXT-BOOKS AND RECENT STATUTES. By Josiah W. Smith, B.C.L. London: V. & R. Stevens, Sons & Haynes, 26 Bell Yard, Lincoln's Inn, 1862.

This book, though small in size, is large in contents. It is an epitome of about sixty standard text books, designed by the learned author to be a companion to his well known and much prized Manual of Equity. "Multum in parvo" should be inscribed on its title-page.

To the student the work will be a treasure; and to the practising attorney or barrister it will be a key to the several works on which it is founded, and in their absence, in some degree, a substitute. Though, as the author observes, it is in its nature, and the purposes for which it is adapted, different from the works on which it is founded, and from all other works on common law, and therefore cannot be regarded as competing with any of them. But, as the author also very properly observes, none of them will serve as a substitute for it.

The work bears on its face the impress of originality, and on its every page the handiwork of an experienced and able law writer. It is both clearly and concisely written. Probably no man at the bar, other than the author, would have conceived, much less executed, so novel and so useful a work.

We bespeak for it a ready sale. No student should be without it. It is an apt introduction to the wide field of legal literature afforded by the numerous text works in general use. No practitioner should be without it. It in the office will be a ready reference library, and on circuit will be a small but compendious companion.

The price is moderate (11s. 6d. sterling), considering that it is printed and bound in a manner worthy of the eminent law publishers, V. & R. Stevens, Sons & Haynes. Their agents in Toronto are Messrs. Rollo & Adams. We recommend such of our readers as feel disposed to buy the work to pay them a visit.

The work is divided into four parts, and each part is divided into three or more titles, which in their turn are subdivided into three or more chapters.

The first part treats of rights and wrongs concerning the person, character or reputation. The second, concerning the subjects of property as cognizable at common law. The third, concerning certain relations of life as cognizable at common law. The fourth, as to the enforcement of private rights and the redress of and protection from private wrongs or civil injuries.

The condensation is really wonderful. The whole range of legal literature is embraced in less than 450 pages. Brevity and perspicuity are well combined. The book is so readable as to be perfectly intelligible to lay as well as professional men.

THE LUZERNE LEGAL OBSERVER. Scranton, Pensylvania.—We welcome our contemporary in his new garb. There is now a strong family likeness between us and our contemporary. We are flattered to know that he has made us his model. At all times we have been glad to receive our contemporary. In future we shall watch his progress with increased interest.

THE MONTHLY LAW REPORTER. Boston, Massachusetts.—We observe an increase of matter in the numbers of the current volume of the *Reporter* without a corresponding increase of price. Considering the great rise in the price of paper in the United States, this speaks volumes for our contemporary. The Reporter is an admirable periodical. It appears to be well supported and so far as we can judge richly deserves support.

THE LONDON QUARTERLY REVIEW, Leonord, Scott and Co., New York.—The quarterly number for October is received. Its contents as usual are both of interest and of value. The first article is a criticism on *Les Miserables* the last work of Victor Hugo. The criticise is by no means harsh. Though blemishes are pointed out good parts are not concealed. The work is said to bear undoubted traces of having been the produce of much honest toil and many noble aspirations. The second article, the *Platonic dialogues* is written by a man having a just conception of the greatness of the great Philosopher, Plato. The pure love of truth which pervades the works of Plato is an example to all philosophers. Considering the time at which he lived his writings are wonderful. The light of Christianity serve only to exhibit in greater splendor the magnificence of his intellect. The third article *Political Memoirs*, points out the difficulty of making a proper estimate of Statesmen from mere journals or diaries. The fourth article *Belgium*, is an interesting sketch of this interesting little kingdom and its people. The remaining articles four in number, are of more or less interest. Of these the last—*The Confederate struggle and Recognition*—is one that at the present time will command much attention. The writer eloquently argues for the recognition of the South. He prophesies that the North never can and never will succeed. He supports his conclusions by an able review of the struggle and its causes.

GODEY'S LADY'S BOOK. We must not forget to say a word in praise of this favorite magazine, now that it is beginning a New Year. The number for January 1863 is before us. It is a holiday number. Well may it be so called. The embellishments are all that one can desire. It opens with an emblematical title page containing a likeness of Washington taken from Stuart's great picture. There are between seventy and eighty engravings embracing almost every article that a lady can work with her needle. The publisher announces his intention to commence the year with a determination to surpass anything he has before done. The number before us is a real earnest of that intention. Godey, in war or in peace is always the same; regular in his visits, and at all times a welcome visitor. The following are the terms to subscribers in the British Provinces:—

One copy per year $3, Two copies per year $5, Three copies per year $6, Five copies per year $11 25.

No American postage to pay.

APPOINTMENTS TO OFFICE, &c.

CORONERS

WILLIAM A. HOWELL, of Jarvis, Esquire, M.D., to be an Associate Coroner for the County of Haldimand.—(Gazetted November 8, 1862.)

WILLIAM TEMPEST, of Oshawa, Esquire, M.D., to be an Associate Coroner for the County of Ontario.—(Gazetted November 15, 1862.)

NOTARIES PUBLIC.

WALTER D. DICKENSON, of Prescott, Esquire, to be a Notary Public for Upper Canada.—(Gazetted November 8, 1862.)

GEORGE A. DREW, of the Village of Elora, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada.—(Gazetted November 15, 1862.)

JAMES F. SMITH, the younger, of the City of Toronto, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada.—(Gazetted November 15, 1862.)

H. H. STOVEL, of Mount Forest, Esquire, to be a Notary Public for Upper Canada.—(Gazetted November 15, 1862.)

JAMES GEDDES, of the Town of Mount Forest, Esquire, to be a Notary Public for Upper Canada.—(Gazetted November 15, 1862.)

REGISTRARS.

ISAAC CLEMENS, of the Township of South Waterloo, Esquire, to be Registrar of the South Riding of Waterloo, in the place and stead of Ward Hamilton Bowlby removed.—(Gazetted November 8, 1862.)

TO CORRESPONDENTS.

"JOHN MUIR"—Under "General Correspondence."

LAW STUDENT.—Younger sons of Peers are not so numerous in Canada as to make your question of general interest to our readers. Therefore not answered in our columns.