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DIARY FOR APRIL.

1. SUNDAY ..... *Palm Sunday.* [der's Court begins.
2. Monday..... County Court Term and Surrogate Court Term begins. Recor-
3. Tuesday..... Chan Ex. Term, Barrie and Ottawa, commences.
6. Friday ..... *Good Friday.*
7 Saturday..... County Court and Surrogate Court Term ends.
8. SUNDAY..... *Easter Sunday.*
9 Monday..... Toronto Spring Assizes.
10. Tuesday ..... Chan. Ex. Term, Goderich and Cornwall, commences.
11 Saturday..... Last day for notice of hearing, Chancery.
15. SUNDAY..... *1st Sunday after Easter.*
22. SUNDAY..... *2nd Sunday after Easter.*
24. Monday..... Chancery Hearing Term commences.
29. SUNDAY..... *3rd Sunday after Easter.* [den's to give lists of their lands.
12. Monday..... Last day for comp'g Assessment Rolls. Last day for Non-Resi-

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.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

APRIL, 1860.

NOTICE TO SUBSCRIBERS.

As some Subscribers do not yet understand our new method of addressing the "Law Journal," we take this opportunity of giving an explanation.

The object of the system is to inform each individual Subscriber of the amount due by him to us to the end of the CURRENT *year of publication.*

This object is effected by printing on the wrapper of each number— 1. *The name of the Subscriber.* 2. *The amount in arrear.* 3. *The current year to the end of which the computation is made.*

THUS "*John Smith* $5 '60." *This signifies that, at the end of the year* 1860, *John Smith will be indebted to us in the sum of* $5, *for the current volume.*

So "*Henry Tompkins* $25 '60" *By this is signified that, at the end of the year* 1860, *Henry Tompkins will be indebted to us in the sum of* $25, *for* 5 *volumes of the "Law Journal."*

Many persons take $5 '60 *to mean* 5 *dollars and* 60 *cents. This is a mistake. The "60" has reference to the year, and not to the amount represented as due.*

THE 91ST CLAUSE.

Some one observes that the generality of mankind is governed by words and names, and that he who would set up as a skillful manager of the masses, so long as they have ears to hear, need not enquire whether they have any understanding whereby to judge, but with two or three popular empty words well turned and humored, may whistle them backwards and forwards, upwards and downwards, till he is weary, and get upon their backs when he is so.

It may be very convenient to raise the cry, "down with *imprisonment* for debt!" "abolish the 91st clause," which sanctions it. But it happens *to be false* that the 91st clause sanctions imprisonment for debt.

Not being entire believers in the observations we have quoted, but assuming that those interested in the question have "understandings whereby to judge, as well as ears to hear," we purpose noticing what the 91st clause does actually authorise, though we have examined the subject before, and may perhaps go over some of the ground a second time.

It is easy enough to establish *our* position, but it is truly difficult to lay hold of anything having the resemblance of an argument in all the sentimental matter, which has been published, urging a repeal of the 91st clause, or to discover any point urged sufficiently tangible for the purposes of discussion.

One writer says "the law has worked harshly," another declares "it serves no good purpose for the creditors," another says "it is an unenviable monument to the memory of its framers," others again say "no one should be allowed to sue for a debt under $100." And one who claims some affinity to the law, bolder still declares, "'tis strange, we (the Editors of the *Law Journal*) do not see the *point* at issue between the advocates of the abolition of imprisonment for debt, and those in favor of imprisonment and 91st clause. The point is simply this, should *an honest* but *poor creditor* be incarcerated like a felon for a certain number of days or months. The sentiment of universal humanity says 'no;' but if the debtor commit fraud then let him be as a felon."

We accept the *issue* not because of any merit in the communication of the particular writer who proposed it, but because it is a re-hash (in brief form) of what has been said by several others on the same subject.

We also say, *do not punish the honest but poor creditor, but* if a debtor *commit fraud* let him be punished not as for a felony (we would be unwilling to deal with him so severely) but as for a misdemeanour. And we repeat that the honest debtor, however poor and unfortunate, has nothing to fear under "the 91st clause."

Surely the creditor has some rights. The man who has lent his money or sold his property to another, may reasonably enquire what means his debtor has of liquidating the demand. And he *may* summon that debtor to appear before the judge to give a statement of his affairs. But the debtor has two courts, in general about three months to think over the matter before *he is* bound to appear, and if there should be any sufficient reason for his not attending at the end of three months, and it be shown to the Court, he is in no danger of imprisonment.

When he appears he is not required, as a recent writer in a somewhat inflated and sentimental strain, says, to be interrogated "in the presence of any gang who may choose to assemble from the filthiest crevices of society;" for the examination is not a public one but in the Judge's Chambers or in the Court room after the ordinary suitors have retired. The direction in the 162nd section of the Division Courts Act makes provision for this.

Should a defendant be summoned for the purpose of annoyance or insult or if indeed on any ground, it appears that the defendant ought not to have been summoned, the judge may and ought to award him compensation for his trouble and attendance, and for the amount of such compensation the debtor will be entitled to an execution against his judgment creditor (sec. 166); but on the other hand if the debtor refuses to be examined or on his examination "fences" and equivocates, will not give a candid statement of his affairs, or say what property he has or whether or not he has means of paying the debt, is it not reasonable to presume that there is some fraud at the bottom? "Truth fears nothing but to be concealed."

In a word, if his answers are clearly unsatisfactory in these particulars, why should he not be punished?

This brings us to the *fourth* ground authorising a commitment which is divided into four heads. (1) That the party obtained credit from the plaintiff or incurred the debt or liability under false pretences or (2) by means of fraud or breach of trust, or (3) that he wilfully contracted the debt or liability without having had at the time, a reasonable expectation of being able to pay or discharge the same, or (4) has made or caused to be made any gift delivery or transfer of any property, or has removed or concealed the same with intent to defraud his creditors or any of them." All these are frauds and as such are punishable by imprisonment, if proved to the satisfaction of the court out of the defendants own mouth, or by examination of witnesses. And lastly if it be satisfactorily established that the debtor *has means and ability to pay*, and will not pay the judgment against him, such being clearly a fraud on his creditor, he is liable to be committed to gaol, but in no case whatever can he be committed for a longer period than forty days.

There is this provision also in favor of the debtor (as mentioned in the letter of "Another Law Student," which we publish), that after once having been examined and discharged he cannot be again summoned, unless the creditor previously satisfies the judge on affidavit that proper grounds exist for his being again called up to be questioned.

Now the foregoing embodies the whole "91st clause" provision (as it is called) and the law as consolidated to be found in secs. 160 to 173 of the Division Court Act.

One cannot well understand how any person capable of judging, can with the act before him venture to assert that "the 91st clause" authorizes imprisonment for debt. It is false to say that it does. Those who have an interest in misrepresenting the effect of the law we may expect will tax their ingenuity for the purposes of deception; but with those who have not such designs it can only be great simplicity of mind or strange perversion of judgment which leads them to advocate a repeal of the law on the grounds so absurdly urged. The law enables fraud to be punished—nothing more.

But some of these persons, such as "An Old Barrister" in this number, change their ground and say, "Oh, but *whatever the law authorizes*, the fact is, poor debtors *are* imprisoned simply because they do not pay their debts." A strange argument against a law, and not we believe founded on fact. We challenge proof,—let "cases in point" be shown. We do not believe they could be produced, and if they could the objection would not be to the provision of the law but the mode in which it is administered,—quite a distinct matter.

Now from time to time we have presented facts and figures showing how well, how beneficially, and how humanely the law has been worked, and in our last number we showed a return from the County of Waterloo embracing 10,372 suits for an aggregate of $248,918, and on these suits 245 "91st clause summonses issued" for an aggregate of $10,355, and upon the unwithdrawn ones over 50 per cent. was realized, while but 9 actual commitments took place.

The public are indebted to the Clerks of this County for the full and detailed information given, and in spite of the sneering remark that "clerks are interested witnesses," their testimony will be believed. They speak from their books. It is not conjecture with them. They give their names and are men whose testimony is on every ground entitled to credence and respect. Nor are they to be threatened into silence by menace from any quarter. They speak out as becomes them when the public need reliable information, which they, the clerks, are peculiarly well qualified to furnish.

But still another ground has been taken. It is ignorantly asserted that a substantial difference exists between judgment debtors in the Division Courts and in the Superior Courts, that it is in the Superior Courts *alone* wherein fraud *must* be established to reach the debtor. False again, as we have shown.

The provision in the Superior Courts is, that the creditor may apply to a Judge for an order, &c., for the examination

of the debtor touching his estate and effects, &c., (nearly the same language as in the Division Court Act,) and "if such debtor does not attend as required by the order, &c., and does not allege a sufficient excuse for not attending, or if attending he refuses to disclose his property or his transactions respecting the same, or if it appears from such examination that such debtor has concealed or made away with his property in order to defeat or defraud his creditors or any of them, a Judge may order the debtor to be committed to the Common Gaol of the County *for any time not exceeding twelve months* (sec. 41 cap. 24 U. C. Consolidated Statutes, p. 286).

Let any one compare this with "the 91st clause," and say in which Court the debtor has greater protection.

In the main particular both provisions are alike, both are for the *punishment of fraud*, and neither authorize "*imprisonment for debt.*"

What then are we to think of the case which needs false assertions for its support; what of the arguments based on such assertions?

If the wisdom of any measure is to be judged by its effects, we say with confidence the "91st clause" has attained the end for which it was designed,—*the prevention and punishment of fraud.*

SALE OF DEADLY POISONS.

Our attention has been directed to this subject, and we would refer to the Consolidated Statute of Canada, chapter 98, the provisions of which are not generally known. At all events, they are violated in every part of the country. This law, before the Consolidation was by many persons supposed not to apply to Upper Canada, and the question, whether it did or did not, was in truth somewhat complex. The Commissioners for revising the Statute appear, judging from the schedule, to have arrived at the conclusion that it did, on the strength of Stat. 14 & 15 Vic., c. 61, Sec. 5, 19 Vic. ch. 94, and 22 Vic. ch. 103.

There is no doubt now that the law is in force in Upper, as well as Lower Canada, and the Consolidated Statutes not yet being generally distributed, persons may go on ignorantly violating the law, in the absence of a timely warning. We, therefore, give the substance of the enactment.

Sec. 1. Prohibits Apothecaries, Chemists, Druggists, Vendors of Medicine *and other persons*, from selling or delivering "any arsenic, corrosive sublimate, strychnine, or other poison, "mineral, or vegetable, simple or composite, commonly known "as deadly poisons, &c.," to any person who does not then produce and deliver a certificate from a legally authorized Physician or Surgeon, or from some Priest or Minister resident in the locality, addressed to the person selling, and mentioning the name, residence, and business of the person requiring the poison, and stating the purpose for which it is required, and that it ought to be sold. And this certificate or note is required to be kept by the person selling for his justification.

The second Section imposes a penalty of $40 on any person contravening the foregoing provision, and in default of payment, authorizes committal for three months to the Common Gaol.

And Section three, authorizes prosecutions by a Common Informer, (who gets half the penalty), before a Justice of the Peace.

We will endeavor to procure from some medical friend, and publish in our next number, a list of the poisons that would in a medical point of view, come within the first Section which is most extensive in its range. In the meantime, we recommend those who sell Drugs and Medicines to act with caution, and require the note or certificate in every case where there is any doubt, whatever, as to whether the article sold is a deadly poison.

The certificate may be in the following form:

To Mr. A. B., Chemist and Druggist, (*or as the case may be*), (state residence).

Mr. C. D. of the (*state residence*)), requires [*one pound of arsenic for manufacturing purposes in his business of* (as the case may be)], and in accordance with cap. 98 of the Consolidated Statute of Canada, I certify that it ought to be sold to the said C. D.

Date, &c. E. F.,
Church of England Minister, (or as the case may be.)
Residing at ——, in the county of ——.

The foregoing form may be varied according to the circumstances of each case. The seller of the poison ought in all cases to make a note of the sale upon this certificate for reference, in case of an after judicial investigation.

PROCEEDINGS IN ERROR IN A PLAIN CASE, TO REVERSE A JUDGMENT ON DEMURRER.

By F. Stewart MacGachen, Esq., Barrister-at-Law.

Note.—The references. Sec. 1, &c., refer to the Sections of the Consolidated Statutes for Upper Canada, c. 13. and those to Orders 1, &c., refer to Orders of Court of Error and Appeal, July 3rd, 1850.

Before any other step is taken, security for costs, as required by Stat. 12 Vic. c. 63, s. 40. must be given.

It must, unless otherwise specially ordered, be given by Bond, (Order No. 3), to the defendant in 100*l.* to the satisfaction of the Court appealed from, that the appellant will effectually prosecute his appeal, and pay such costs and damages as may be awarded in case the judgment is affirmed, or in part affirmed. (s. 15.) It is to be executed by the appellant, or one of them if more than one, and two sufficient sureties, (or if the appellant or appellants are absent from, or do not reside in Upper Canada, then by three sufficient securities), in the following form. (Order 4.)

"Know all men by these Presents, that we, A. B., of——, C. D., of——, and E. F. of——, are jointly and severally held and firmly bound unto G. H. of——, in the penal sum of £——, of lawful money of Canada, for which payment, well and truly to be made, we bind ourselves, and each of us by himself, our and each of our heirs, executors and administrators, respectively, firmly by these presents. Witness our hands and seals, respectively, the — day of—, in the year of Our Lord —,

Whereas (the appellant) alleges and complains that in the giving of judgment in a certain suit in Her Majesty's Court of Queen's Bench, (or Common Pleas), in Upper Canada, between (the defendant) and (the appellant) manifest error hath intervened, wherefore the said (appellant) desires to appeal from the said judgment to the Court of Error and Appeal. Now the Condition of this obligation is such, that if the said (appellant) do, and shall effectually prosecute such appeal, and pay such costs and damages as shall be awarded in case the judgment, aforesaid, to be appealed from, shall be affirmed, or in part affirmed, then this obligation shall be void, otherwise shall remain in full force. (Order 5.)

The parties to the bond as sureties are then to make an affidavit in this form:—

In the (style of Court.)

A. B., *Plaintiff* v. C. D., *Defendant.* } E. F., of——, and G. H., of——, severally make oath and say: and first this deponent, E. F., for himself saith, that he is a resident inhabitant of Upper Canada, and is a householder (or freeholder) in——, and that he is worth the sum of (the sum in which he stands bound by the penalty) over and above what will pay all his debts: and this deponent G. H., for himself saith, that he is a resident inhabitant of Upper Canada, and is a householder (or freeholder) in——, and that he is worth the sum of (as the case may be), over and above what will pay all his debts.

(Signed) E. F.,
G. H.

Sworn by the above-named deponents, E. F. and G. H., at——, in the County of——, the — day of——, 18—, before me,

X.Y., a Commissioner, &c.

[Order 9.]

The bond and affidavit are then to be filed in the principal office of the Court appealed from. (Order 3.) Fee for passing the bond, 5*s*, for filing, 1*s*.

Fourteen days notice is to be given of the time and place at which application will be made to the Court from whose judgment it is intended to appeal, or to a Judge in vacation, for the allowance of the security, which is to contain the names and additions of the obligors, (Order 10) and may be in this form:

In the (style of Court).

A. B., *Plaintiff*, v. C. D., *Defendant.* } Take Notice, that a Bond for the security required by the statute 12 Vic.c 63, s 40, and by the Consolidated statute for Upper Canada, cap. 13, s. 15, has been executed by the plaintiff and by two Justices, and that the names and additions of the said sureties, are E. F. and G. H., both of the——, of——, in the county of——, in the Province of Canada, ——, and that they have by affidavit respectively made oath, that they are resident freeholders in Upper Canada, and severally worth the sum of One Hundred Pounds, over and above what will pay all their debts. And further, take notice, that on——, the — day of —— instant, at noon, application will be made to the presiding Judge in Chambers for the allowance of such security.

Dated the — day of——, 18—.

——, Plaintiff or Defendant.

Or ——, Plaintiff or Defendant's Attorney.

To ——, Plaintiff or Defendant's Attorney,

Or to ——, Plaintiff or Defendant's Attorney,

and to ——, his Agent.

The allowance of the security may be opposed by affidavit. In the absence of any such opposition, the affidavit above mentioned is to be sufficient in the discretion of the Judge to warrant the allowance of it. (Order 10.)

If allowed, the officer of the Court is to endorse on the Bond, the word "allowed," prefixing the date, and signing his name to it, upon which the security is to be deemed perfected. (Order 12.) Upon perfecting the security, the action is to be stayed in the original cause. (Sec. 16.)

1. When, however, the judgment directs the payment of money, the bond is to be double the amount of the judgment, unless it is in debt, or bond, for a penal sum, or upon a warrant of attorney, or cognovit, or otherwise, exceeding in amount the sum really due, in which case it is to be in double the true and real debt and costs only; and the amount recovered, and of such true and real debt and costs is to be stated in the condition, or recital to the condition, to the bond, or security, immediately after the statement of the nature of the action, and the condition shall be to the effect that the appellant shall effectually prosecute such appeal, and if judgment so to be appealed from, or any part of it, is affirmed, shall pay the amount directed to be paid by the judgment, or the part of it as to which the judgment is affirmed (if it is affirmed only in part), and all damages which shall be awarded against the appellant in the appeal. In cases, however, where the security to be given is in a sum above 500*l*, it is to be in the discretion of the Court appealed from, or of a Judge thereof in vacation, to allow security to be given by a large number of obligors, apportioning the amount among them as appears reasonable. (Order 6.)

2. When the judgment appealed from is in ejectment, the security last mentioned is to be in double the yearly value of the property in question. (Order 7.)

3. When the matter relates to the taking of any annual or other rent, customary, or other duty, in fee, or such like demand of a general and public nature affecting future rights, the amount in which security is to be taken, in addition to the security required for costs, is to be fixed by an order of a Judge. (Order 7.)

4. Where the Judgment directs the assignment or delivery of documents or personal property, execution is not to be stayed till the things directed to be assigned or delivered have been brought into Court, or placed in the custody of

such officer or receiver as the Court appoints, nor till security has been given to the satisfaction of the Court appealed from, in such sum as that Court directs, that the appellant will obey the order of the appellate Court.—(Order 16--1.)

5. When it directs the execution of a conveyance or any other instrument, execution is not to be stayed till the instrument has been executed and deposited with the proper officer of the Court appealed from, to abide the order of the appellate Court. (Sec. 16—2.)

6. When it directs the sale or delivery of possession of real property, or chattels real, execution is not to be stayed till security has been entered into to the satisfaction of the Court appealed from, and in such sum as that Court directs, that during the possession of the property by the appellant, he will not commit, nor suffer to be committed, any waste on the property, and that, if the judgment is affirmed, he will pay the value of the use and occupation of the property from the time of the appeal, to the delivery of the possession thereof; and also, in case the judgment is for the sale of property, and the payment of the deficiency arising upon the sale, that the appellant will pay the deficiency. (Sec. 16—3.)

In the cases mentioned, 2, 3, 4 and 6, the recitals and conditions in the bond, are to be such as shall conform to the provisions of the rules, with such further or other conditions, in cases where the judgment is not for the payment of a sum of money only, as the Judge approving the security may think fit to order. (Order 8.)

When the security in these last mentioned cases has been perfected and allowed, any Judge may issue his *fiat* to the Sheriff to whom any execution has been issued, to stay the execution, which is to be thereby stayed, whether a levy has been made under it or not. (Sec. 17.)

The party alleging error, must also deliver to the clerk of the Crown of the Court where the suit was instituted, a memorandum in writing, (Sec. 33), in this form:

In the (style of Court).

The — day of ——, in the year of our Lord, 18—,
(*day of lodging note of error*).

A. B., vs. C. D. } The plaintiff (*or* defendant) says, that there is error in law in the record and proceedings in this action, and the defendant (*or* plaintiff) says, there is no error therein.

(Signed) A. B. plaintiff (or C. D. defendant, or E. F. attorney for plaintiff *or* defendant). (Sec. 34.)

The Clerk is to file the memorandum and give to the party lodging it a note of the receipt of it, (Sec. 34), which may be in this form, and which may be written at the foot of a copy of the memorandum.

Received on the — day of ——, A. D. — from the attorney in this cause (or the above named plaintiff *or* defendant), (*if there is any attorney, or* the plaintiff or defendant above named), a memorandum in writing, in the above form, and which has been filed by me according to cap. 13, of the Consolidated statutes for Upper Canada.

(Chitty's Forms, p. 259.)

M. M. (signature of clerk.)

The attorney must then serve on the opposite party or his attorney, a copy of the note of receipt, together with a statement of the grounds of error intended to be argued (sec. 34), which may be in this form.

In the (style of Court).

A. B., plaintiff, v. C. D., defendant,

Herewith is a copy of the note signed by the Clerk of the Crown, of the receipt of the memorandum alleging there is error in law in the record and proceedings herein, which memorandum has been lodged with him, under the provisions in that behalf, in the cap. 13 of the Consolidated Statutes for Upper Canada, and the grounds of error intended to be argued herein, are that (here state the grounds of error or some of them)

Dated ——

Yours, &c.,
Plaintiff (or Defendant's) attorney.

To the above named Plaintiff,
(*or* Defendant), *or* A. Z. his attorney.

(Chitty's Forms, p. 259.)

The Roll is to be made up, and a suggestion (see below) entered by the appellant, within ten days after the service of the note of receipt of the memorandum alleging error. In default of it, the respondent may sign judgment of *non pros.* unless the Court appealed from, or a Judge gives further time. (Sec. 39.)

(SUGGESTION.)

The — day of ——, in the year of Our Lord, 18—.
(*Day of making the entry on the Roll.*)

The plaintiff, (or defendant) says, there is error in the above record and proceedings, and the defendant (or plaintiff) says, there is no error therein. (Sec. 37.)

Upon the suggestion being entered, and after security required to be given by the appellant has been duly allowed, the attorney for the appellant makes out copies of the pleadings, together with the reasons of appeal and the reasons relied on for supporting the judgment, as also the opinions of the court below, when not published in the Reports. They are submitted to the attorney for the opposite party, and when agreed upon are printed, and copies are then to be considered the printed cases of the appellant and respondent respectively. (Order of Court of Error and Appeal, 27th June, 1856.)

They are to be printed on one side only, on good paper, in demy quarto form, with small pica type. (Order of Court of Error and Appeal, 21st December, 1858.)

The appeal is then to be entered with the Clerk of the Court of Error and Appeal (the Registrar of the Court of Chancery, sec. 7), the fee for which is four dollars, and the cause may then be set down for argument in that Court (Sec. 42). Notice of its being set down for argument,

should be given to the opposite attorney, of which this may be a form:

In the (style of Court.)

A. B., plaintiff, v. C. D., defendant.

Take notice, that this cause was this day set down for argument, on ——, next, and that the same will be argued accordingly.

Dated the — day of ——, A.D. —

Yours, &c.,

——,

Plaintiff (or defendants) attorney.

To ——, Esq.,

Defendant (or Plaintiff) attorney. (Chitty's Forms.)

The appellant must, at least four clear days before the day appointed for hearing the argument, deliver to the Clerk, a printed copy of the appeal book for each of the Judges, or, in default, the appeal may be dismissed with costs. (Sec. 45 and Order of Court of Error and Appeal, 27th June, 1858.)

When in an appeal against a judgment in any action personal, the Court of Error and Appeal gives judgment for the defendant in error, interest is to be allowed by the Court for such time as execution has been delayed by the appeal. (Sec. 50.)

When the judgment of the court is delivered it is to be entered, for which the fee is two dollars. It is then to be certified by the clerk of the court to the proper officer of the clerk below, who is thereupon to make all proper and necessary entries thereof; and all subsequent proceedings are to be taken thereupon, as if the judgment had been given in the court below (sec. 12), the first proceeding being to make the judgment of the court above a rule of the court below, which is done as a matter of course by the clerk of that court on payment of a fee of 2s 3d., and 4d. for each paper filed.

LAW SOCIETY, UPPER CANADA.

TRINITY TERM, 1859.

ARTICLED CLERKS' EXAMINATION.

SMITH'S MERCANTILE LAW.

1. By whom must a notice of dishonour be given to an indorser of a bill or note, so as to render him liable, and will such notice enure to the benefit of any other party than the one giving it.
2. How is the property in a bill o. note payable to bearer, or to a specified person respectively, transferred?
3. What is a guarantee? State what is essential to render it binding.
4. In what case is the insured entitled to a return of the whole or part of the premium?
5. What are the two ways in which a lien arises?—give instances.

WILLIAMS ON PERSONAL PROPERTY.

1. What is the distinction between a specific, a demonstrative, and a general legacy?
2. What is an executor *de son tort?*
3. What are a husband's rights over *choses in action* of his wife?
4. If a less sum than the amount due is paid by a debtor, to which of the several items can the creditor appropriate the payment?

BLACKSTONE'S COMMENTARIES.

1. How are Justices of the Peace appointed, and what are their duties?
2. What are waifs?
3. On what grounds can a master justify an assault in defence of his servant?

WILLIAMS ON REAL PROPERTY.

1. Is a woman in any and what cases entitled to dower in her husband's equitable estate? Does her right to dower out of such estate depend on common law or statute?
2. How must a rent charge be created?
3. What is the effect of a release of a part of the lands subject to a rent charge?
4. What right of deposition has a husband over a term of years belonging to his wife?
5. What covenants for title is a purchaser entitled to in a conveyance from a trustee for sale?

STORY'S EQUITY JURISPRUDENCE.

1. In what cases will a Court of Equity restrain waste by one of two tenants in common at the instance of the other?
2. Will the publication of private letters by the receiver be restrained by injunction at the suit of the writer?
3. What will be sufficient in a Court of Equity to open a stated account?
4. In what cases will a bill to perpetuate testimony lie?
5. Will the Court of Chancery restrain by injunction, proceedings in other Courts, of a criminal nature? Is there any exception to the general rule on this subject?

STATUTES AND PRACTICE.

1. In what case does the Statute of this Province permit actions of replevin to be brought?
2. Where a party pleads and demurs to the same pleading, in what order are the issues of law and fact to be tried?
3. Where a *Ca. Re.* has been obtained against a defendant, is any thing further necessary to entitle the plaintiff in the same cause subsequently to issue a *Ca. Sa.*?
4. In what case is attachment for contempt abolished?
5. What is the effect of pleading a plea on equitable grounds without leave of a Judge?
6. If a sole plaintiff die before decree, what steps must be taken by the defendant to obtain an order for the dismissal of the bill for want of prosecution?
7. At what stage of the cause can a defendant in a suit in equity obtain an order to elect? and how is such an order obtained?
8. In what cases is the Court of Chancery authorized by statute to make a "vesting order?" What is the effect of such an order?
9. Is a party to a suit in equity entitled to treat an order clearly irregular as void, and disregard it; or is he bound to obey it until set aside?
10. Is a defendant against whom a *pro confesso* decree has been made entitled, upon any and what conditions, to have the cause re-heard?
11. Can a bill be taken *pro confesso* against an infant defendant?

EXAMINATION FOR CALL.

BYLES ON BILLS.

1. If a bill is dishonoured by non-acceptance, and afterwards by non-payment, from which time does the Statute of Limitations commence to run? Give your reasons.
2. Is there any exception to the rule that a party taking a note over due takes it subject to all its equities? Does the position of his assignor make any difference in this respect?

3. Who is the principal debtor in a bill of exchange? Does the fact that the bill was an accommodation one make any difference in this *at law* as regards other persons?

4. Upon what does the negotiability of bills of exchange and promissory notes respectively depend?

5. When a bill or note is transferred without indorsement, in payment for goods, is the party transferring it, as a general rule, liable for the price of such goods, if the bill or note is not paid? Give your reasons.

TAYLOR ON EVIDENCE.

1. What is the meaning of the rule "that the best evidence which the case is susceptible of should be presented to the jury?" Does this rule supply any and what test for distinguishing between primary and secondary evidence?

2. What will amount to such an inducement held out to an accused person as will render such confession inadmissible as evidence against him; and by whom must it have been held out to have this effect?

3. In what class of cases is reputation admissible evidence?

4. What is the effect of a judgment *in rem* and a judgment *inter partes*, respectively?

5. In what cases and against whom are depositions taken on former trial admissible as evidence?

6. What are the several functions of a Judge and of a jury with regard to written instruments produced at a trial?

SMITH'S MERCANTILE LAW.

1. Where a sale has been made to a broker dealing in his own name, but in reality as an agent, whom can the vendor treat as liable to him; and does the fact of the principal being a foreigner make any difference?

2. What is the distinction between a bill of lading and a charter party?

3. At what time is it necessary that there should be an insurable interest to render a life policy valid; and how does life insurance differ in this respect from other contracts of insurance?

ADDISON ON CONTRACTS.

1. What is the distinction between a pledge and a mortgage as regards—1st, the right to the property; 2nd—the right to possession during their continuance?

2. What is the difference between dependent and independent covenants?

3. What is the rule with regard to consideration in 1st—simple contracts; 2nd—bills and notes; 3rd—contracts under seal?

4. What is essential to render a contract binding for goods above the value of ten pounds?

BLACKSTONE'S COMMENTARIES.

1. What are the rights of individuals?

2. In what light does the law of England regard marriage?

WILLIAMS ON REAL PROPERTY.

1. Where is the legal estate in the following limitations: bargain and sale to A. B. and his heirs, to the use of C. D. and his heirs? Lease and release to A. and his heirs, to the use of B. and his heirs. A statutory deed of grant to A. and his heirs, to the use of B. and his heirs? Give the reasons for your answer.

2. Who becomes entitled to the residue of an estate *pur autre vie*, upon the death of the original tenant living *cestui que vie* where no special occupant is named in the grant? Upon what statutory enactments does this disposition of such an estate after the death of the original tenant depend? What alterations in the law do these statutes make?

3. Was a limitation in a deed of estate to take effect after the determination of a precedent estate in fee, good at common law? Is there now any and what mode of assurance by deed in which such a limitation would be valid?

4. An estate is limited to A. for life, remainder to B. for life, remainder to C. in tail, remainder to D. in fee, how can C. convert his estate in tail into an estate in fee?

5. Give an instance in which the person entitled to a first charge upon an estate by way of mortgage would formerly have lost the benefit of that charge by the effect of merger? What alteration in the law on this subject has been made by statute in Upper Canada?

6. If tenant in tail in possession enter into a written agreement for the sale of his estate, can the purchaser enforce specific performance of the contract in equity? Would the Court of Chancery decree a specific performance of such a agreement against the heir in tail? Give reasons for your answers.

7. Define a contingent remainder, and distinguish it from an executory devise, and from a shifting use. Is there any and what statutory enactments in Upper Canada as to the destructibility of contingent remainders?

STORY'S EQUITY JURISPRUDENCE.

1. Will a Court of Equity, in any and what cases, decree specific performance of an agreement for the sale of chattels?

2. If an infant enter into an agreement for the purchase by him of land, can he maintain a bill for the specific performance of the contract? Give reasons for your answer.

3. Will the Court of Chancery decree the delivery up for cancellation of a deed or other instrument void at law, and to an action on which there would be a good defence at law? Will such a decree be made where the instrument is upon its face void at law?

4. Give a definition of a *Donatio mortis causa*. What are the distinctions between such a gift and a legacy; and how does it differ from a gift *inter vivos?*

5. Is there any and what difference in the principle upon which a Court of Equity acts in setting aside a purchase by a solicitor from his client, and that upon which it proceeds on setting aside a purchase from a *cestui que trust* by his trustee?

6. Give an instance in which the equitable doctrine of marshalling of securities is applicable.

STATUTES AND PRACTICE.

1. In what way may the performance of conditions precedent be now stated in pleading; and how must the performance be traversed by the opposite party?

2. What are the usual conditions in a replevin bond?

3. What must a Judge certify to entitle plaintiff to full costs, in an action of trespass where the verdict is for less than forty shillings?

4. In what cases has a Judge the power to order a compulsory reference, and at what time can this be done?

5. Who are the necessary parties to a bill filed to carry into execution the trusts of an ordinary deed of assignment for the benefit of creditors?

6. What is essential to make a suit in equity *lis pendens*, so as to be constructive notice?

7. What alteration has been made in the practice as to granting commissions of lunacy, by a late Act of Parliament?

8. At what stage of a cause can the plaintiff give notice of motion for a decree?

9. What is the abatement of a suit? In what manner is an abatement before decree remedied?

LECTURES

ON THE JURISDICTION AND PRACTICE OF THE HIGH COURT OF ADMIRALTY OF ENGLAND.

BY JOHN MORRIS, ESQ.

(*Continued from our last.*)

3. MORTGAGES.

Prior to the statute of Vic., the Court had no jurisdiction either to enforce a mortgage, or to recognise the claims of a mortgagee as a part owner, &c. He had not the legal title; consequently, he had not any *locus standi* in this court. Whether he could have appeared in a suit instituted by some

one else, merely to protect his interest, appears to have been doubtful; but now, by the statute of Victoria, when any ship is under arrest by process from the Admiralty, or when the proceeds have been paid into the registry of the court, it has full jurisdiction to take cognizance of all claims and causes of action of any person in respect of any mortgage of such ship and to decide upon any suit instituted by any such person in respect of any such claim or cause of action.

A mortgagee cannot now, any more than he could formerly, *initiate* a suit in the Admiralty Court. He cannot arrest a vessel as a part owner. If a vessel only, but not the freight, be arrested for wages, the mortgagee may come in as against the ship; but he cannot, by an independent suit, assert his claim as against the freight. In the case of *The Fortitude* (2 W. Rob. 217; 8 Jur. 23), in which this point was raised, some remarks were made by the present learned judge of the court, in giving judgment, from which I have made a few extracts. Referring to the question which was raised as to the jurisdiction of the Court, the judge pointedly remarked,—"When I look to the question as one of jurisdiction, I find that if the Court has jurisdiction, and refuses to exercise it, the remedy is by mandamus; if the Court has not jurisdiction, the remedy is by prohibition; if the Court has jurisdiction, and yet, under peculiar circumstances, it could not be exercised advantageously for the suitor, then an injunction would properly come from the Court of Chancery." Then, referring to the construction to be put on the 3rd section of the statute of Victoria, which relates to mortgages, he said, "Two conflicting constructions are sought to be put on this section; they appear to be these —on behalf of the mortgagees, the parties taking out the warrant, it is said, that this vessel having been arrested, and being in mortgage, this question arises out of the mortgage, and comes fairly within the words 'any mortgage.' The construction put on this by the other party is this;—he says, 'No, it does not mean any question arising out of the deed of mortgage, but simply any question arising as to the ship being mortgaged.' I confess, my mind leans to the latter construction, because I think it assimilates to the principle on which the Act was passed; it is a remedial Act, intended to remedy the inconvenience sufficiently, but not to carry it further. The circumstances of the present case do not, as appears to me, bring it within the remedy, or within the principle of the Act; not within the principle, because the Court exercises its ordinary jurisdiction with justice, without resorting to the statute; not within the words, because I think the more proper construction is to restrain the enabling power to the ship alone. In this form of action, if maintainable in this Court, the Court might be called upon to adjudicate upon the right to freight, without reference to any other question as to the nature of the suit. This is not a proceeding to make freight contribute *pari passu* to other liens; that is not the question; but to adjudicate as to the title to the freight itself—a question quite independent of the jurisdiction belonging to this Court. That question was forced upon the Court in the *Dowthorpe* (2 W. Rob. 73); freight being in its hands, and being in its power having been arrested by the ancient ordinary process of the Court; the Court did not voluntarily call it in for a special purpose." See contra as to the present practice, 17 Jur. 744.

4. BOTTOMRY.

We have just seen that the court has no jurisdiction in the case of an ordinary mortgage, except under special circumstances; but where the ship is hypothecated by a bottomry bond, the Court has jurisdiction. The reason given for this, in one of the cases at common law in which a prohibition was applied for, was, that it was not reasonable that the Common Law Courts should hinder the court of Admiralty from giving a remedy where they can give none themselves.

Where the master is in a destitute situation in a foreign port, and unable to obtain the necessary supplies for his vessel on the personal credit of himself or his owners, he can, by a bottomry bond, pledge the ship as security for such supplies, whether obtained in money or goods. It is essential to the validity of a bottomry bond—(1) That the ship is pledged, and not the owners; the repayment of the money must be dependent upon the safe arrival of the ship at its destination. This is what is termed sea-risk, which the lender must undertake, or the bottomry bond is not valid as such, nor can the Admiralty Court maintain jurisdiction without sea-risk (*The Royal Arch*, 30 L. T. 199). (2). As a general rule, the bond must be taken in a foreign port, but this is liable to exceptions. Thus, in one case (where a British vessel was in an English port, on her homeward voyage from the East Indies, the owner, who resided in Scotland, had died insolvent, and his representative declined to make any advances for necessary repairs, without which the vessel could not proceed to her destination), Dr. Lushington said, that the validity of these bonds "does not depend upon the mere locality of the residence of the owner." He added, "it depends, I think, upon the absolute necessity of the case, where the master is in such a condition that it is impossible for him to meet the necessary disbursements, and he has no means of procuring money but upon the credit of the ship." It is quite clear that a valid bottomry bond cannot be made in an English port where the owners reside in England; even, I apprehend, if they are first communicated with, and assent to it, because such an instrument would be within the Restraining Statutes, not being made on the sea nor out of the realm. An hypothecation by the owners in a home port, although in form a bottomry bond, would be open to the same objection—it would be construed to be, in effect, a mortgage; although in America the Admiralty jurisdiction has been exercised in such a case. Recent decisions show that, even when given in a foreign port, the owners must, if possible, be communicated with before giving a bottomry bond, and that a very strong case is required to dispense with the necessity for such previous communication. Where the telegraph is available, it would, I should think, be impossible to uphold a bottomry bond without first communicating with the owners. (3.) The next test is necessity. Mr. Edwards says, that necessity is as much looked too in the Admiralty Court in these cases as is the consideration on an ordinary contract in the common law courts.

The rule, where there are several bottomry bonds given on the same ship, is, that the last in order shall be the first to be paid; thus reversing our ordinary common law notions of priority. The ground of this rule is, that the last loan furnished the means of preserving the ship and bringing it to its destined port, and that without such assistance the former lenders might have lost their security.

The master has power to hypothecate the cargo as well as the ship and freight, but the former cannot be made available till the latter have been exhausted. Dr. Lushington said, in one of the cases, "it appears, that where the bondholder has directly, or by intendment of law, a lien on the freight and cargo, the owner of the one may have the aid of the Court of Admiralty to bring the other into contribution, and that the Court will apportion the liability between the two; and where there are several bonds, some binding the ship and freight, others the ship, freight, and cargo, that the Court will marshal the assets, directing one claim to be satisfied from the cargo, and another from the ship and freight." *

* The doctrine of this case, however, seems much shaken by a late case, were three bottomry bonds had been taken: 1st, on ship and freight; 2nd, on ditto; 3rd, on ship, freight, and cargo; and the proceeds of ship and freight were sufficient to pay the last two bonds only

Application by the holder of the first bond that assets might be marshalled, so as to compel the owner of third bond to go upon the cargo (which was sufficient to pay him) leaving proceeds of ship and freight applicable for first and second bonds; opposed by owners of cargo on the ground that their cargo was not on board when first bond given, and that effect of such marshalling of assets would be to make the cargo pay the first bond, and that it had been decided by Lord Stowell, in the case of the *Prince Regent*, cited in that of the *Dowthorpe*, 2 W. Rob. 85, that were ship, freight, and cargo were all hypothecated, the bondholder must, nevertheless, exhaust his remedies against ship and freight, before he could call

These remarks illustrate the powers of the Court: it is a court both of law and equity. † Not that it has any general equitable jurisdiction, it can and does administer most enlarged equity. It even goes to the extent, in bottomry cases, of controlling extortionate interest, but this of course is a power which is very cautiously exercised.

Not only has the Court power to apportion liability and marshal assets, as between different bondholders, but also as between the bondholders and other claimants, such as wages, salvage &c. As to the principles which the Court applies in the exercise of this important equitable jurisdiction, you may profitably consult the last chapter of Abbott on Shiping (on Maritime Lien), which has been added to the recent additions of that work.

The Court of Chancery has concurrent jurisdiction in cases of bottomry bonds, and will interfere by injunction to restrain proceedings in this court in case of fraud, or if it appears that the questions at issue can be better decided in the former court; but now that the powers of this Court have been enlarged, and its procedure improved, injunctions would, I should think, be very sparingly granted.

5. NECESSARIES.

In most of the countries governed by the civil law, repairs and necessaries form a lien upon the ship. Not so in this country. Here a shipwright has a lien for work done to the ship, but it is lost if he parts with possession. The shipwright, therefore, who has once parted with possession of a ship, and a tradesman who has provided ropes, sails, provisions, or other necessaries for a ship, are not, by the law of England, preferred to other creditors, nor have any particular claim or lien upon the ship itself for the recovery of their demands.

Until stopped by prohibitions, in and after the reign of Charles II, the Admiralty Court appears to have held that repairs and necessaries constituted a lien upon the ship; and even after prohibitions had been obtained on original suits instituted by what were called material men, it was still the constant practice of the Court to allow them to be paid out of the proceeds in the Registry; and this practice was upheld with a high hand by the Court of Admiralty, until condemned by the Judicial Committee of the Privy Council in 1835, on an appeal in the case of the *Neptune*, reported in 3 Knapp. p. 94, The marginal note in that case is as follows:—"Material men have no lien for supplies furnished in England on the proceeds remaining in the Registry of the Court of Admiralty, of a ship sold under a decree of that Court for the payment of seamen's wages. A mortgagee in possession of such ship, so sold, is entitled to the remainder of such proceeds after payment of seamen's wages and costs."

This case is worthy of an attentive perusal, not only as a leading case on Admiralty law, but also as an interesting case on the question of lien generally.

The law still remains the same, except as to necessaries supplied to foreign vessels. The provision in the statute of Victoria applicable to this has been already noticed. It only remains to observe, that the act does not expressly create any lien upon the ship: it merely gives to the Court power to enforce payment. This it exercises by its ordinary process—viz., arrest of the ship. Where, however, there has been great delay, and the ship has changed hands, the Court may refuse to enforce payment against the ship;* there being no express lien. This is an important distinction, and will at once suggest the expediency of enforcing this remedy without delay.

As to what amounts to necessaries within the meaning of the statute, see *The Alexander*, 6 Jur. 241; *The Sophie*, 1 W. Rob. 369; *The Ocean*, 2 W. Rob. 368.

6. SALVAGE AND TOWAGE.

Salvage is defined in Lord Tenterden's work as "the compensation that is to be made to other persons by whose assistance a ship or its lading may be saved from impending peril, or recovered after actual loss." "This compensation," he adds, "is known by the name of salvage, and at present is commonly made by payment in money; but in the infancy of commerce, was more frequently made by the delivery of some portion of the specific articles saved or recovered.

"All foreign codes of maritime law, both ancient and modern, contain provision and enactments on this head. In some of them the value to be paid is fixed at a certain portion of the articles saved, or of their value, according to their nature and quality, or the circumstances of the case. But it is obvious that positive and settled rules are little adapted to the administration of justice in varying and unsettled cases; and what can be more various and unsettled than the degree of labour experienced on the ocean, or the degree of peril to which persons who engage in the meritorious task of assisting the distressed on that element are at different times exposed? And, therefore, in the case of wreck, or derelict at sea, the law of England, like the law of some other countries, has fixed no positive rule or rate of salvage; but directs only, as a general principle, that a reasonable compensation shall be made."

It is further stated in the same work, that "a person who, by his own labour, preserves goods which the owner, or those entrusted with the care of them, have either abandoned in distress at sea, or are unable to protect and secure, is entitled, by the common law of England, to retain the possession of the goods saved, until the proper compensation is made to him for his trouble. The compensation, if the parties cannot agree upon it, may, by the same law, be ascertained by a jury in an action brought by the salvor against the proprietor of the goods, on his implied contract (if the circumstances justify an inference of it) to make compensation for the service rendered in respect of them; or the proprietor may tender to the salvor such sum of money as he thinks sufficient; and, upon refusal to deliver the goods, bring an action against the salvor; and, if the jury think the sum tendered sufficient, he will recover his goods or their value, and the costs of his suit. †

The Common Law courts have concurrent jurisdiction with the Admiralty Court in case of salvage; but in the case of valuable property and numerous proprietors and salvors, the jurisdiction and proceedings of the latter court are admirably adapted to the purposes of justice.

Indeed, in an ordinary salvage case, there are practical difficulties in the way of proceedings at common law; because where, as is usual, there are several salvors, it is not enough to assess the amount to be paid, but it is necessary to apportion the amount between the different salvors according to their respective deserts, and the common law courts have no machinery for doing this. Again, in the Admiralty Court, the judge is assisted, where necessary, by the nautical skill and experience of two of the elder brethern of the Trinity House. A tribunal so constituted is better able to decide a case of this kind than a judge and jury.

But although admirably adapted for the trial of important cases, yet the delay and expense, necessarily incident to the proceedings of a tribunal sitting at a distance from the subject in contest, will often be injurious to the parties. The Legislature has endeavoured, therefore, to introduce a more exped-

upon cargo to contribute.—*Held*, on the authority of the *Prince Regent*, holder of third bond must exhaust proceeds of ship and freight before he can apply to cargo, and, therefore, Court could not marshal assets as prayed, effect of which was first bond went unpaid. (*The Priscilla*, Dec. 2, 1859, reported the next or the following day, in the *Shipping Gazette*.)

† The following note is by the same gentleman as the notes at pages 52 and 53 —"It is correct to say that the court is one both of law and equity, when there is no such distinction in the Roman law? But perhaps no other means of expression could have been found to bring home to most of your hearers the fact that under a good system of law all just relief can be granted, without a distinction of courts or rules."

* The Alexander, 6 Jur. 1067. † Abbot on Shipping, 605.

itious and less expensive mode of adjustment. The result of the statutes on the subject is, that where the sum claimed for salvage does not exceed £200, it shall be referred to the arbitration of two justices of the peace, and, by consent, also if it exceed that amount; but with a right of appeal to the Court of Admiralty where the sum in dispute exceeds £50. Disputes with respect to salvage within the cinque ports are to be determined by commissioners specially appointed for the purpose by the Lord Warden, with an absolute right of appeal, without reference to amount.

Prior to the statute of Victoria, the jurisdiction of the Admiralty Court was confined to cases where the salvage was performed at sea, or between high or low water-mark. The Court had no jurisdiction whatever as to towage claims; they were only cognisable in the common law courts; but now, by the 6th section of that statute, the jurisdiction is, as we have already seen, given to the Court in all cases of salvage and claims in the nature of towage, whether the service were performed upon the high seas, or within the body of any country. See also, as to salvage, 17 & 18 Vic. c. 104, s. 476.

It seems to have been a notion formerly that it was necessary for salvors, in order to maintain their rights, to remain on board the vessel which has received their assistance. But Lord Stowell decided that this was not necessary. The Court of Admiralty is not bound by any technical common law notions as to losing a lien by giving up possession. Even if possession be given up by the salvors, the Court, by its ordinary process, and as the first step, arrests the ship, and so makes it available to answer the claim of the salvors.

The amount of salvage to be allowed, and the apportionment thereof among the persons engaged in the salvage service, must rest a good deal on the discretion of the judge, guided of course by the principles which precedent and experience have established, although the special circumstances of each case often give rise to questions of considerable difficulty.

"Salvage," said Sir John Nicholl, * "is not always a mere compensation for work and labour; various circumstances, upon public considerations—the interests of commerce, the benefit and security of navagation, the lives of the seamen, render it proper to estimate a salvage reward upon a more enlarged and liberal scale. The ingredients of a salvage service are—first, enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their lives to save their fellow-creatures, and to rescue the property of their fellow-subjects; secondly, the degree of danger and distress from which the property is rescued, and whether it was in imminent peril, and almost certainly lost, if not at the time rescued and preserved; thirdly, the degree of labour and skill which the salvors incur and display, and the time occupied; lastly, the value. When all these circumstances concur, a large and liberal reward ought to be given: but where none, or scarcely any, take place, the compensation can hardly be denominated a salvage compensation: it is little more than a mere remuneration *pro opere et labore*."

The owners, in order to avoid the expenses, must make a sufficient tender to the claimant. This, if after the commencement of proceedings, should be done by what are called formal acts of Court, analagous to our summons to stay in a common law action. As to the rule of the Court with reference to costs, where a tender is made and refused, but afterwards held by the Court to be sufficient, see *The Williams*, 11 Jur. 174. It is not of course to give costs against the salvors who decline a tender.

7. DAMAGE.

This head includes damage to a ship by collision, and *injuries* to the person by assaults, &c., at sea. These are cases of *tort*, as distinguished from the preceding heads, which are cases of contract or quasi-contract.

Assaults to the *person* at sea are still, I apprehend, cognisable in this court, although the remedy appears not to have been resorted to in modern times. The increased powers vested in magistrates for dealing with trivial cases of assault, and the fact that the Common Law Courts have concurrent jurisdiction in important cases, may account for the remedy in this court having become almost obsolete. In fact, there appears to be no special advantage in proceeding in this court rather than at law, except it be that the expense might be less. For obvious reasons the vessel cannot be arrested in a mere personal suit for tort. The judge may, no doubt, award damages as compensation, and formerly the Court had and exercised the power of arresting the defendant in personal actions (exactly as by its ordinary process it arrests the ship) as a first step, and compelling him to find bail; but there is no instance of the exercise of this power since the abolition of arrest on mesne process at common law, and, although not formally abolished, it would, no doubt, now be considered obsolete. The remedy, however, against the person according to the present procedure (that is, without the power of preliminary arrest) is, I doubt not, still open, and might, if desired, be resorted to, instead of proceeding at common law; but the remedy is limited to assaults, &c., committed at sea, as it is clear that the statute of Vic., extending the jurisdiction in damage cases, is confined to damage done to the ship.

With reference to the mode of estimating damage to the person, Lord Stowell has thus decribed a singular rule which formerly prevailed in the Admiralty Court.* "It is within my recollection," he says, "that in cases like these, which were formerly more frequent than they are at present in these courts, it was common for each maritime witness to assign what he thought a proper compensation for a punishment unjustly inflicted, by declaring that he would not take such a punishment for less than such a sum, and estimating the compensation by the value which each man put upon his own individual skin. Of course, that was an estimate that afforded little light to the judgment of the person who had to decide the question, and having been discontinued, it now affords him none."

Collision cases (no longer confined to cases happening at sea; sec. 3 and 4 Vic., ch. 95), now form the largest and most important class of cases which come before the Court.

The assistance which the Court is in the habit of obtaining from the Trinity Masters makes it generally a more desirable tribunal for the trial of collision causes than a judge and jury at Nisi Prius.

This Court, under the statute of Victoria, contains power to direct issues to be tried by a jury; but this power has, I believe, only been exercised in one case.† It has been urged as a reason why this power has not been more used, that the issues in a case of collision are rarely questions of mere fact, and that to throw them down before a jury, not conversant with nautical practice, may, however great the vigilance of the judge, involve a decision irreconcilable with the principles of admitted science. It has been thought, too, to approximate to an absurdity, to examine and cross-examine witnesses regarding laws and rules which are incontrovertible, and ought to be well known to the Court, oftentimes with no effect but to confound the understanding of twelve men wholly unused to such inquiries, to whom the language of seafarers is strange, and who, haply, have enough to do, in cases relating to matters with which they are familiar, to guard their minds against the undue influence of a popular address, and of the first and last word.‡

Recent experience in our common law courts has shown that trial by jury in civil cases has, as a recent writer has termed it, its "dark side." Only a few days ago, a patent case came on for trial before the Lord Chief Justice and a

* *The Clyfton*, 3 Hagg. 117.

* 1 Hagg. 288. † 1 W. Rob. 420. ‡ *Anne and Mary*, 2 W. Rob. 190.

special jury. I cut out the following from the newspaper report of the case:—

"The Lord Chief Justice said, these patent cases were nuisances. Laymen, perfectly unacquainted with the points which they were called upon to determine, were not in such an advantageous position at the end of several days as a scientific person would be in as many minutes.

A juryman said he could confirm his Lordship's view. He had served upon a jury in the Court of Exchequer in a very similar case, and he believed that half of the jury were so confused by the conflicting testimony they could scarcely arrive at any conclusion.

The Lord Chief Justice said, it was very difficult to decide between conflicting evidence in ordinary cases, but especially so when the subject matter was not within their cognisance.

A verdict was then taken for the plaintiff, with the damages in the declaration, subject to a reference.

What would be a proper tribunal for the trial of patent cases is not the question now before us. I take this extract merely as confirmatory of what I have already said as to a trial by judge and jury not being the best fitted for cases in which nautical skill and experience are requisite. How much better is the mode of trial adopted in the Admiralty than that which, as in this patent case, is too often the result of an attempted trial at *nisi prius!* A reference, however fitted for the settlement of matters of account, is not a proper tribunal for the decision of important questions of law and fact. Such a mode of trial would, indeed, be a poor exchange for that now in use in the Admiralty Court, where unlike a reference, the proceedings are conducted in public, and reasons are invariably given for the decisions, which reasons can be reviewed in a competent court of appeal.

The present learned judge of the Admiralty Court, in order as far as possible to provide against conflicting evidence, has wisely provided, by the rules of Court, that each party in a collision cause shall, by what are called "preliminary acts," *i.e.* as the first step in the cause, set down in writing all the leading particulars connected with the collision, according to the form given by the rule. These particulars are sealed up, and are not, except by special order, again opened until the hearing. This proceeding renders it impossible for either party so to frame his evidence, as to meet the case set up by his adversary.

"When it appears doubtful which vessel was to blame, or whether such a degree of blame may not be imputable to each as to render it difficult to decide who, if either, ought to make compensation, then it seems to be preferable to proceed in the Admiralty Court; because, if it should then appear that the navigators of both the ships were equally to blame, but that only one of the ships was materially damaged, the Court has a peculiar and singular jurisdiction, to decree that the owners of each vessel shall make good a moiety of the entire damage; although in a court of law, when the mischief done was the result of the combined neglect of both parties, both are in *statu quo*, and neither could recover any compensation from the other."* This suggests an important consideration for you in determining whether to proceed at law or in this court in a case of collision. "When the ship that has occasioned the damage is foreign, or the owner or person to be sued resides abroad, or is insolvent, so that a verdict at law for damages might not be enforced, it is certainly preferable to proceed in this court,"† where you can at once arrest the ship.

Although I do not profess to discuss the law administered by the Court, except so far as it may be necessary to mark out the metes and bounds of its jurisdiction, yet I can hardly omit while on this head, to draw your attention to two most important statutory provisions; whereby (1) the liability in collision cases is limited, in the case of British ships, to the value of the damage-doing vessel *immediately* prior to the collision, and of the freight, *i.e.* in fact, the whole interest of the owner. To the extent of such value the owner is personally responsible, but not beyond that amount, except as to the costs if he improperly contests his liability, and also according to the admiralty decision, to interest, but on this latter point there has, I believe, been a conflicting decision in Chancery.‡ (2) Rules are made for lights and fog signals, and also for meeting and passing, a kind of "rule of the sea;" and it is expressly provided, that if a collision ensues from a breach of these rules, the owner shall not be entitled to recover.§ As to (2), you should carefully study the provisions of the Act, and the decision thereunder, if consulted in any collision case, as they have an important bearing on almost every question in connection with it.

Having now drawn your attention to the principal heads of the jurisdiction of the Court as at present exercised, it is scarcely necessary for me to remark on the reasons which have excluded other maritime matters from the cognisance of the Admiralty. Charter-parties, marine insurance, and such like, being entered into or effected on land, come within the Restraining Statutes, according to the construction put upon them by the Common Law Courts, and these Courts, being able to afford relief in such cases, hesitated not to prohibit the Admiralty from entertaining them. Whether the Admiralty jurisdiction should now be extended to include such matters, will come more appropriately under consideration in a subsequent period of these lectures.

* 2 Chitty's General Practice, 515. † 2 Chitty's General Practice, 515.

‡ In Admiralty Court—
Interest held to be due plus value of ship: *The Dundee*, 2 Hagg. 143.
Sed contra in Chancery—
African Steam Ship Company v. *Swanzy*, 2 Hay & Johnson, 660; cited to, but disclaim in Dundee upheld in Admiralty Court by, Dr. Lushington, in the *Huang Ho*, May, 1859, not yet reported,

§ Merchant Shipping act, ss. 295 to 299, and the Admiralty Rules as to lights and fogs.

DIVISION COURTS.

OFFICERS AND SUITORS.

CORRESPONDENCE.

SELKIRK P. O., March 9th, 1860.

To the Editors of the Law Journal.

GENTLEMEN,—You will oblige me by answering the following questions, in your valuable *Journal*.

1st. What is the proper fee for a Division Court Clerk to charge for drawing an affidavit and administering an oath to Bailiff? I find there is a difference in practice since the Consolidated Statutes became law, some Clerks still charge 20cts., and some only 15cts.

2nd. Is a Clerk entitled to a receiving fee of 20cts., on a Foreign Summons, if that summons is returned to him by Bailiff (not served)?

3rd Is any Clerk (upon receiving a summons from a division in another County) bound to have the summons served, without the fees necessary to make such service being sent to him along with the summons, and if the fees are not sent, can he legally refuse to have the service made? My reason for asking this question is this, that many Clerks send summonses for service to other divisions, and the receiving Clerk gets them served, pays the Bailiff's fees and other expenses out of his own pocket, sends them back again to the Clerk from whom he received them, and often has to wait months before he gets his pay, and sometimes never gets it at all. What is the legal remedy?

4th. What is the proper mode of proceeding in the following case:—Plaintiff A. sues defendant B., who once lived in the same Division and County which A. now sues in, but who has since removed to another County. A. gets judgment, and the Clerk sends a transcript and certificate of judgment, to the Clerk of the other Division where B. resides. Upon the re-

ceipt of the transcript and certificate, the Clerk of the Division at once issues execution against the goods of B. In the meantime, and before the Bailiff can make any seizure, B. removes to the Division where the cause of action arose. A., the plaintiff, finds that B. is come back again, and immediately applies to the Clerk of said Division, to issue an execution. Is it legal for him to issue one, not having received any return of the transcript sent? and even if he had received a return, would he be justified in so doing after once issuing a transcript?

Yours truly,
EDWARD R. KENT, *Clerk*,
6th Division Court, Co. of Haldimand.

[1st. The proper fee is 15 cents.

2nd. The Clerk performs the service required of him, and whatever may be the Bailiff's return, we do not see that it can affect the Clerk's fees—at least as we understand the question, for it is somewhat ambiguously worded.

3rd. We think not. The Clerk of the home Court, ought to send the proper fee with the summons, or at least a sum on account of fees. The Clerk of the foreign Court would have a remedy by action against the Clerk of the home Court.

4th. It would not be "legal" for the Clerk of the Court to issue execution, not having received any return of the transcript sent. Under section 139 of the Act, the cause is in effect removed, and no action can, in our opinion, be taken in the original Court, until the cause is, so to speak, removed back again, which may be done by transcript certifying the proceedings had. There is much difference of opinion, however, as to the effect of the removal. We have stated ours. But when convenient, the Clerk would do well to procure the special order of the Judge, for the issue of the execution.

The Editors of the Law Journal.

Owen Sound, 12th March, 1860,

GENTLEMEN,—I intended the first word of the fifth line, and third paragraph in the first letter, on page six, of the January number for this year, to be *men*, not *means*. I do not like it believed that I have made an erroneous imputation. The words omitted in the letter just referred to, seem to me to be warranted by the article "Division Courts" commencing on page 108, of *Law Journal* for 1858, May number.

You are of opinion, and through a case now decided, I have reason to believe, that a bailiff may duly seize, advertize and sell goods that he had good reason to believe were properly liable to the process under which he so acted, and months after may be held accountable to the, then for the first time, claimant, for the value of the goods.

The writ commands the bailiff to levy on the goods of the party, but the bailiff seldom or never *knows positively* that the goods do belong to the party. This position may be illustrated by the following case:—

Since I wrote you last, I was waiting, concealed, whilst an execution debtor concluded a purchase that was followed by an immediate delivery. I seized the goods so bought and delivered within sixty seconds of the said delivery, and within ten minutes after the seizure the goods were so persistently claimed by a third party that I was obliged to interplead.

But a case might occur in a yet more embarrassing form, as thus: bailiff may be present and see a judgment debtor purchase and receive a span of Horses on Thursday, on the following Saturday, under execution, bailiff may seize, and in due time may sell them; months after, but for the first time, claimant may come along, and afterwards prove that he bought the Horses from defendant on the intervening Friday, and hold bailiff liable for the full value of the team.

Now considering that the legislature has provided indemnity for bailiff, when clerk is involved, that there is an appearance of protection for bailiff *when acting under execution*, that it is unreasonable to conclude that it was gravely intended to compel bailiff for the sake of the miserable pittance that the gets for his services, to incur such a weighty liability, and that he is required to seize, not to *discover* and *identify* the property, I would like you to say if you think it is compulsory upon bailiff to sell, or do anything that would incur risk of loss, when he does not know the property to belong to the party, or if the bailiff may fairly and lawfully require the beneficial party to point out the property, or if bailiff is to exercise his discrimination whether he may lawfully require beneficial party to assume the risk, by giving bailiff an indemnifying bond?

Yours truly,
PAUL DUNN.

[We presume Mr. Dunn refers to Sec. 196 and 197 of the Division Court Act, which by no means aid his view. The effect of those provisions is merely, that if the clerk issue an irregular or defective warrant to the bailiff, he and not the bailiff is liable in respect to the defect or irregularity. Bailiffs like sheriffs are bound to use due diligence in discovering property, and must make true returns to executions at their peril. A bailiff cannot compel an indemnity, he must sue out an interpleader, or take it upon himself to sell on his own responsibility.—EDS. L. J.]

To the Editors of the Upper Canada Law Journal.

London, C. W., 20th March, 1860.

GENTLEMEN,—In your *Journal* for February I noticed your criticism on the MS. which I left at your office on the 31st of January last.

This I accept in proportion to the extent of your understanding of all the circumstances involved. I am unable, however, to perceive how it can be in any way just or impartial to dispense with three instances of recognized law principles in favor of Adam Hope, to my disadvantage, as by your shewing has been the case.

1st. Dispensing with and ignoring the law and custom affecting the holders of Promissory Notes 2nd. The doctrine which disqualifies Assignees from sueing "*for choses in action.*" 3rd. Accepting the Assignor's absurd affidavit, being interested in the Estate Assigned, and therein referring to a document which did not then exist, (*vide* my truthful remarks on this document.)

But the truth is, no final judgment took place on the merits. On the first hearing of the case on the 28th April last, Judge Small, acting upon the obviously just law regulating Promissory Notes, in connection with Thos. Gordon's acknowledgment adduced, that the Note was good when he took it, and that he held it over a year, pronounced Judgment for the Defendant; but as the Plaintiff's agent demanded proof of Thos. Gordon's signature to said acknowledgment, a factitious move to evade an immediate affirmation of the Judgment and retain an avenue open for future policy and sharp practice, it appears that the perfection of the Judgment was suspended to await that proof.

On the occasion of the next Division Court, which took place on the 2nd June following, the Judge and Clerk were deputies, Judge Small and the usual Clerk being absent, I attended to ascertain whether or not the Plaintiff abandoned his frivolous case, being given to understand that he intended to do so; but after waiting a while I was surprised to hear the cause called *de novo*. Hence, thereupon, I represented the predicament of the case to the new Judge, and sought time to bring Thos. Gordon to Court, which he granted by ordering the acting Clerk to remove the case to the bottom of the list of cases for trial. That being done, as I supposed, I sought

for and obtained a Subpœna to bring *Thos. Gordon into Court* to affirm his signature to the aforesaid acknowledgment, and on leaving the Court I engaged a Law Student to attend upon the case.

By former conversation which I had with Mr. Gordon about the matter, he stated that Adam Hope endeavoured to make a tool of him, and that he would not attend any Court about the matter in question. This being the case, I anticipated trouble in finding Mr. Gordon,—which became realized,—and not finding him I made affidavit to that fact.

On returning to Court with this affidavit to plead an adjournment of the case thereon, I was astonished by being informed by my agent, that upon his looking over the list of cases to ascertain the position of the case by the progress of the Court in the disposal of the cases for trial, that he was greatly surprised to find that Judgment had already been entered against me and in favor of the Assignee mentioned, and that without any Plaintiff or Agent therefor being in Court.

From these truthful premises I leave you and the public to make legitimate inferences.

I remain, your's respectfully,
MARCUS GUNN.

[We have no further remark to make on the case submitted by Mr. Gunn, except this, that so far as we understand the facts adduced he has not had a fair trial,—in truth no trial. Had it been his good fortune to have been able to establish his case by legal evidence we believe the result would have been quite different. Here, as far as we are concerned, the matter must drop.—ED. L. J.]

[The three following letters, which we take from the *British Whig*, are fair specimens of the arguments *pro* and *con* about the 91st clause, which one usually sees in the lay press. Though evidently not intended for publication in our Journal, we deem it well to give our readers the benefit of them in connexion with our editorial remarks elsewhere.]

To the Editor of the Daily British Whig.

SIR,—As the matter is being fully discussed with a view to the abolishment of imprisonment for debt in the Division Courts, but all on one side of the question, through the medium of your valuable paper, both by an "Old Barrister" and a "Law Student," it would perhaps be advisable to present it in a different light, and on the other side, as well for the benefit and consideration of both creditor and debtor, as for the sake of argument.

It is contended that the 91st clause of the Division Courts Act should be repealed, thereby saving debtor from examination before the judge, as to his effects, debts, etc., even though he should have used some means of fraud to have the effect of causing the bailiff to return his warrant "nulla bona;" no bones, as it was expressed not long since by a well known magistrate —and if that is so I will remove my case to the Superior Court by a suit of "seize her Rarey" (*certiorari*). I think Mr. Editor, it would be doing injustice to creditors and debtors both, to have repealed—as a few swindling debtors who seem to meet their own ends, view it—"that very formidable and threatening 91st clause." As for the creditor, he now depends upon it if other means fail, to cause a dishonest debtor to settle the debt; that clause is, as it were, "the indorser" for the debtor, the security and remedy for the creditor, and he will and justly too, avail himself of its benefit. If you have perused the late numbers of the *Law Journal*, you will there have seen the statements given by a great number of the Division Courts Clerks throughout Upper Canada (and who are a well informed and respectable set of men) by which it is clearly shown that very few debtors, indeed, are imprisoned, preferring rather, when it comes to the point, to satisfy the debt, than suffer the punishment which most of them so meritoriously deserve; and in very few instances is the debtor unjustly imprisoned. As to the imprisonment itself, that lies entirely in the discretion of *the Judge*; and who, better than he, is able to decide whether debtor has acted honestly or not? Also, by sections 21 and 23 of 22nd & 23rd Victoria, chapter 33, the enactment is to the following effect:—If on the examination of the judgment debtor before the Judge, it to said Judge appears that the party had not good cause for summoning the debtor, the Judge "shall" award the debtor a sum of money, by way of compensation, for his trouble and attendance, to be recovered against the creditor; and the debtor if after his examination, has been discharged, no further summons is allowed to issue out of the same Division Court at the suit of any creditor, without an affidavit satisfying the Judge that the debtor, on such examination, had not made a full disclosure of his estate, effects and debts; or that the debtor, since his examination, has acquired the means of satisfying the debt.

By the letters of your correspondents, I have before mentioned, it was argued "that debtors in Supreme and County Courts, cannot be disposed of as in the Division Courts." I would say in reply to that: Division Courts debtors cannot, if they are about to leave Canada, and owing a party up to the amount of £24 10s., be imprisoned and held to bail, under a writ of Capias; but if it were a Supreme or County Court debt "then as a matter of course," a Capias will issue, because if a debtor is about to clear off, any party being a creditor, or having a cause of action against the party, so departing, the party who has a cause of action to the amount of £25, and satisfies the Judge to that effect, in affidavit, and also that there is a good and probable cause for believing that the party, going away, is about to leave Canada with intent to defraud his creditors generally, or said party in particular; the Judge will allow a Capias to issue, together with an order by him made therein, stating for what amount debtor can be held to bail.

But Mr. Editor, a person owing £24 10s., can sell off his effects, etc., pocket the proceeds, laugh at his creditors, be sued and let judgment be entered, execution issued and returned *nulla bona*, be served with a judgment summons, then make tracks; and during all the time of the case pending, torments the creditor by continually telling him he will leave Canada, and prevent him from ever obtaining his debt; *these* are the fellows who wish to have that very disgraceful 91st clause, which is a *torment* and a *terror* to *them*, repealed.

Then if abolishment of the law of imprisonment for debt were to take place, persons, unless they were good responsible parties, would not be able to obtain credit for small amounts, which would be in most instances a great detriment and injury to a poor man, who not having just then the money, but, may, if he gets what is required, be able to pay his creditor in a short time. For instance, a poor man goes to B, and says, I have a chance of making a good speculation, if I can only get about £10 in cash, or certain articles to that amount I require: to which request B. answers, I can neither let you have the money nor the articles; supposing you should fail in the speculation, or want to defraud me, what security have I for the return of my money or goods? Echo of course, would answer "none," for the poor man's security is gone. The grasping and crushing ninety-one "claws," are almost certain to unfold with the ring of cash, not obtained by the wring of oppression, but by just means, from a swindling debtor, for an honest creditor; what is fair play for one is fair play for the other; if an act is passed to abolish imprisonment for debt, let it relate as well to the Courts of Record, as to the Division Courts. The greater part of the community are of opinion the laws of imprisonment are just; are not the editors of the *Upper Canada Law Journal* of the same opinion? are not a great many leading men of the Bar, and the very judges themselves of the same opinion also? and do not the Legislature hesitate to differ?

No Mr. Editor, I will tell you what Act we want passed before the Legislative Council and Assembly, and this very session if possible "An Act to prohibit the distilling, importation use, or sale of intoxicating liquors, within the Province;" if

that act were passed, it would save the necessity of passing one to abolish imprisonment. I will say nothing further concerning the injury done by the use of intoxicating liquors; ere this will be published, the able and manly speech of his Honour Judge McKenzie will appear in your paper, speaking at great length, and to the point.

Yours truly,
ANOTHER LAW STUDENT.

To the Editor of the British Whig.

Kingston, 18th March, 1860.

SIR,—An attempt is made in your issue of this date, to show that the 91st clause of the Division Courts Act—now advanced to the 100—because, no doubt, of the great good it has found to have done to the human race, is, if not a benevolent, at least a harmless law.

Either one of two things must be admitted, which is, that the 91st clause is not only not harmless, but most heathenish, if judged by its effects, or that those administering it in some localities in Canada, should long before now have been called to an account by the Government for misconstructing and misapplying it. I do not for a moment mean it to be understood here or elsewhere, that Kingston is one of those localities, for Judge McKenzie's humanity and enlarged views of honor and justice, forbid it; but the fact of oppression is incontrovertible. There is no justification for such Legislative obscurity as deprives a subject of his liberty by misinterpretation or mistake.

That persons have been incarcerated in numerous instances, not because of fraud or equivocation, but simply because they had not the wherewith to pay, is unquestionable; and if the 91st clause did not contemplate this, why let it remain from day to day, while Parliament is in session, without amendment leaving it with the Judge to continue to act upon it, according to its own words, "as he thinks fit!" Truly a law which leaves it with the Judge to put what construction he chooses upon it, without positive definition, must be held an unenviable monument to the memory of its framers!

Trusting for the credit of Canada, to see the 91st clause very soon expunged from its legal records,

I am, Sir, your most obedient servant,
AN OLD BARRISTER,

(*To the Editor of the Daily British Whig.*)

KINGSTON, 21st March, 1860.

SIR,—* * * * As to your correspondents "A Law Student" and "An Old Barrister"—by the latter it is contended the sentence in the 91st clause, "as he thinks fit," gives too much power to the judge, and there ought to be an amendment. He does not suggest the manner in which such amendment could or should be made; why does he not do so? Really if he knows of any substitution that would give greater satisfaction, let him state what it is; no doubt he is striving for the benefit of the public as well as myself. Your other correspondent, "A Law Student," misconstrues the meaning of a correspondent of yours of the 15th instant. A Law Student, states that correspondent, of 15th instant, says "imprisonment for debt is a fallacy," and then goes on to comment on it. But, Mr. Editor, that correspondent (of 15th inst.), after shewing good authority, says:—Thus is shewn the fallacy of the statement that a debtor may be imprisoned "simply" because he owes money, meaning that a debtor who has acted honestly and upright in every way, and has not the means of paying the debt, is not imprisoned. Give your correspondent of 15th instant his due, and do not let him be picked to pieces on a mere misconstruction The following I copy from a letter of your correspondent, A Law Student, dated 16th instant, and appeared in your issue of the 18th instant: It is scarcely worth mentioning that the debtor who owes £5, or trifles of that kind, is not disposed of in the way spoken of as "the judge sees fit." On the following day an erratum appeared to the effect that the £5 above mentioned was intended to have been £500. I would, as to that opinion with regard to a judgment debtor, beg to differ. A party owing £500 can be disposed of and imprisoned for any time not exceeding twelve months by order of a judge. If you will please look at 22nd Vic., chap. 96, s. 13 (now Consolidated Statutes of Upper Canada, chap. 24, s. 41), you will there find it enacted somewhat to the following effect;—"That any person who has obtained, or is entitled to enforce, a judgment on any Court in Upper Canada (meaning the Superior and County Courts), may apply to any judge of such court for an order that the judgment debtor shall be orally examined upon oath before the judge, or any other person named in such order, touching his estate and effects, as to the means he had of paying the debt when contracted, as to means acquired since, as to disposal of property, etc., etc.; and in case such debtor shall not attend, and shall not allege sufficient excuse for non-attendance, or attending shall refuse to make a sufficient disclosure, concerning his affairs, etc., or has acted in any way to defraud his creditors or any of them, such judge 'may' order debtor to be committed to the common gaol of the County in which he resides for any time not exceeding twelve months."

I would, with your leave, Mr. Editor, say something further as regards the abolishment of imprisonment. It is the wish of some of your correspondents to abolish imprisonment for debt in the Division Courts only. It is my opinion that if the law of imprisonment be abolished let it have effect in all the Courts. The Superior and County Courts have equal facilities and every advantage the Division Courts have, and indeed much greater, as you by this time fully understand. Then if it ought to be abolished why not abolish it as before suggested? Even if that were really done the debtors would not be satisfied; it has already be experimented on. An act was assented to and passed on the 9th of December, 1843, entitled, 'An act to abolish imprisonment for debt, and for other purposes therein mentioned.' What was the effect of that Act? Why, sir, the very individuals by whose prayers and for whose benefit it was passed, were the very first to cry out against it in order to have it repealed, and to again satisfy them it was repealed on the 29th March, 1845. So, Mr, Editor, it would have the very same effect were it tried again. It would either do that or establish the cash system and do away with credit altogether

Perhaps, Mr. Editor, I have wearied both yourself and subscribers by my long correspondence. If I have you must overlook it, as in doing so I had an eye to the interests and welfare of the public, and with a view they should fully understaud the subject.

I am, Sir, your obedient servant,
ANOTHER LAW STUDENT.

U. C. REPORTS.

QUEEN'S BENCH.

Reported by C. ROBINSON, ESQ., *Barrister-at-Law.*

GUNN v. MCPHERSON ET AL.

Promissory note—Endorsee, being also payee, against endorser—Pleading.

Declaration by G against M. & W, on a promissory note for $100, made by M payable to G. or order, by G. endorsed to W. and by W. to the plaintiff. *Plea*, by W., that G., the payee and endorsee and the plaintiff is the same person and as such payee endorsed to defendant W. *Replication*, that before making of said note the plaintiff agreed to lend to defendant M. $100 provided he would make and procure W. to endorse said note as surety for the payment thereof to the plaintiff; that in pursuance of such agreement M made and W. for his accommodation endorsed, and M. delivered said note to the plaintiff so endorsed, and defendant lent M. the $100, which has not been paid.

Held, on demurrer, replication good.

APPEAL from the county court of Middlesex. The plaintiff declared against McPherson and Wright on a promissory note for

for $100, made by defendant McPherson payable to Hugh Gunn, or order, endorsed by Gunn to the defendant Wright, and by Wright to the Plaintiff. McPherson did not appear. The defendant Hugh Wright pleaded, that Hugh Gunn, the payee and endorser of the promissory note in the declaration mentioned, and the plaintiff in this action is one and the same person, and that the said plaintiff as such payee endorsed the said note to the defendant Hugh Wright, as in the declaration mentioned, and that he, the said defendant Hugh Wright, is an endorser subsequent to the plaintiff on said note, and so the defendant Hugh Wright says that the plaintiff had no right to maintain this action against him, as the said defendant Hugh Wright would be entitled to sue the plaintiff as endorser of the said note to him, the said defendant.

The plaintiff replied that before and at the time of the making of the said note he agreed to lend and advance the sum of $100 to to the defendant Donald McPherson, provided the said Donald McPherson would make the said promissory note in the declaration mentioned, and procure the defendant Hugh Wright to endorse the same as surety for the payment of said note to the plaintiff; and the plaintiff further saith, that in pursuance of said agreement, to wit, on the day and year in the declaration mentioned, he, the defendant Donald McPherson, made the said promissory note in the declaration mentioned, and the defendant Hugh Wright, for the accommodation of the said Donald McPherson, then endorsed the same to the plaintiff, with intent thereby of becoming surety and endorser to the plaintiff of the said note; and the said defendant Donald McPherson, after the said endorsement by the defendant, to wit, on the day and year aforesaid, in further performance of the agreement delivered to the plaintiff the said note so endorsed by the defendant Hugh Wright, and the plaintiff gave to the defendant Donald McPherson the said $100 and time for the payment thereof until the said note became due; and the plaintiff further said, that no part of the said money had been paid to the plaintiff.

The defendant demurred to this replication; and judgment having been given against him in the court below, appealed.

R. A. Harrison, for the appellant. *Reed*, Q. C., contra.

Wilders v. *Stevens*, 15 M. & W. 208; *Williams* v. *Clarke*, 16 M. & W. 836; *Morris* v. *Walker*, 15 Q. B, 594; *Peck* v. *Phippon*, 8 U. C. R. 73 *Foster, et al* v. *Farewell*, 13 U. C. R. 449; *Moffat* v. *Rees*, 15 U. C. R. 527; *McMurray* v. *Talbot*, 5. U.C.C. P. 157, were referred to.

ROBINSON, C. J., delivered the judgment of the court

This replication is good, under the authority of the case of *Wilders* v. *Stevens* (15 M. & W. 208), and the other cases cited in the in the judgment in this court in *Foster* v. *Farewell* (13 U. C. P. 449).

Appeal dismissed.

O'BRIEN v. FICHT

Promissory note—Fraud and failure of consideration pleaded together—Proof of the latter only, and not covering the whole demand—Pleading.

To an action on two promissory notes defendant pleaded that they were given for the assignment to him of the plaintiff's right to two lots of Crown Land, of which the plaintiff falsely and fraudently represented that he was locatee; that the plaintiff had no claim to said land, and the notes were obtained from defendant by fraud.

Held, that on shewing the plaintiff's title to on of the lots to have been bad, without proving fraud, the defendant was entitled to succeed as to that part of the claim for which the consideration had failed.

Such a defence, however, should properly be pleaded only to that part of the demand covered by it.

APPEAL from the county court of the County of Brant. This was an action upon two promissory notes, for £25 and $119 respectively, made by defendant, payable to the plaintiff.

Plea.—That before and at the time of the making of the two several promissory notes in the declaration mentioned, the plaintiff fraudently and falsely represented and pretended to the defendant that he had a good and legal claim to certain lands, namely, lots number eleven in concession C., and thirty-four in concession A., in the township Howick, in the County of Huron, the same being Crown Lands, by virtue of his having located the same, and paid thereon the first instalment, and thereby securing to himself and his assigns the right to complete the payment of the residue of the purchase money thereof, and sue out a patent therefor, and thereby, and by means of such fraudulent and false representations, induced the defendant to purchase from the plaintiff his said pretended right to and right of purchase of the said lands; and the defendant did then purchase and take an assignment from the plaintiff of the said lands, at and for the sum of £75, and to secure the payment thereof, did make and deliver to the plaintiff his, the defendants three several promissory notes, each for the sum of £25, to fall due and become payable respectively at six months, one year, and two years after date, with interest; and the defendant further saith, that the said promissory notes, as in the declaration mentioned, are parcel of the same identical notes so made and delivered as aforesaid, and in this plea secondly and lastly mentioned; and the defendant further saith, that at the time of the said purchase, and the making and delivery of the said notes, of which the said notes in the declaration mentioned are parcel, the plaintiff had not secured a legal claim to the said two two lots, nor had he or his assigns a right to complete the purchase thereof, and sue out a patent therefor, of all which said several premises the plaintiff had notice; and the defendant in fact says that the said promissory notes in the declaration mentioned were obtained and procured by the plaintiff and others in collusion with him, by fraud, covin, and misrepresentation.

On this plea the plaintiff took issue.

At the trial the plaintiff was proved to have sold to the defendants two rights to separate parcels of Crown land, which he represented himself to have acquired by purchase. Each was valued in the transaction between them at $150, and three notes were given for the money. One of these for $100 had been paid, but after that it came to the defendant's knowledge that the plaintiff's right to one of the lots would not and could not be recognised by the government, because that lot had been sold to another party by the government, before the agent for the Commissioner of Crown Lands issued the ticket under which the plaintiff claimed, and there was some evidence to shew that the plaintiff knew that to be so before he sold to the defendant. Of that lot the first purchaser alluded to had been many years in possession. The defendant had neither had possession nor received any benefit whatever from his purchase of that lot.

The learned judge charged the jury that if they thought the fraud was not proved, of which the evidence was but slight, it was still competent for them to enquire into the question as to the partial failure of consideration, and if it existed, to deduct that amount from the plaintiff's claim.

The jury reckoning the $100 already paid, gave their verdict for the balance between that sum and the purchase money of the one lot to which the plaintiff appeared to have a right, which he had assigned to the defendant, which, including interest, amounted to £14 15s., and rejected the plaintiff's claim for so much of the two notes sued upon as represented the price paid or to be paid for the other parcel of land.

The charge was objected to, and a rule *nisi* having been obtained for a new trial, on the ground of misdirection, was discharged; whereupon the plaintiff appealed.

M. C. Cameron, for the appeal, cited *Coulter* v. *Lee*, 5, U. C. C. P. 201; *Haigh* v. *Brooks*, 10 A. & E. 320; *Lundy* v. *Carr*, 7, U. C. C. P. 371.

E. B. Wood, contra, cited *Forman* v. *Wright*, 11 C. B. 481; Chitty on Bills, 10th Ed. 47, 49, 384.

ROBINSON, C. J., delivered the judgment of the court.

The verdict that was given appears from the evidence to be in every respect just, but legal objections have been taken by the plaintiff to the learned judge's ruling, and if we saw that they were well founded we should have to give way to them, though they are not reasonable objections. We think however, that the judge took a sound view of the law. The case of *Forman* v. *Wright* (11 C. B. 481) fully supports the principle that, although a defence of this nature may be set forth in a plea which charges fraud as well as want of consideration, the allegation of fraud is not necessary to be established if want of consideration is clearly made out; it will be enough if the defendant proves so much of his plea as establishes a legal defence, and what need not have been inserted may be rejected.

Here there was not a total want of consideration as to the whole amount of the notes, but a total want of consideration for a certain part of the amount covered by the notes: that is, for the price of

of one of the lots valued at $150, and when the objection goes to a precise part of the consideration, as in this case, so much of the demand may be met by such a plea. The plea would have been better pleaded, we think, to so much of the demand only as the defence applied to, but the learned judge considered that it would be idle to grant a new trial on that ground, as in furtherance of justice the defendant would be allowed to amend his plea.

We think the appeal should be dismissed with costs.

Appeal dismissed.

COMMON LAW CHAMBERS.

CHISHOLM v. GOODMAN.

Seduction—Death of Plaintiff—Right of Personal Representative to continue Action.

Where the plaintiff, a widow, brought an action for the alleged seduction of her daughter, and recovered a verdict for $2,000, but upon the application of defendant that verdict was set aside upon payment of costs, and plaintiff subsequently died before the costs were paid, a summons was made absolute to enter a suggestion of the death of the plaintiff, and to proceed with the action in the name of the personal representative.

(March 5, 1860.)

This was an action brought by a mother for the alleged seduction of her daughter. It was commenced on the 22d day of January, 1859. The plaintiff declared on the 14th day of February following.

Issue was found on 22d of same month. The action was tried at the last Spring Assizes held at Niagara, when the plaintiff recovered a verdict for £500.

The defendant applied for a new trial, and the Rule was made absolute in Trinity Term last upon payment of costs. The plaintiff died on the 24th day of October last. She died intestate, and in February letters of administration of her goods and chattels were granted to William Wilson Ball by the Surrogate Court of the County of Halton, and he thereby became the legal representative of the plaintiff.

At the time of the alleged seduction the plaintiff, the mother of the girl seduced was alive, but the daughter then lived with her uncle at the Town of St. Catherines.

The administrator obtained a summons calling upon the defendant to show cause why he should not be allowed to enter a suggestion of the death of the plaintiff, and that he was the legal representative of the plaintiff deceased, and why the action should not thereupon proceed in the name of the said administrator.

It was said in the course of the argument, that at the time of the death of the plaintiff the costs of obtaining the Rule absolute for a new trial had not been paid.

Anderson showed cause. He contended that the cause of action did not survive, and that upon the death of the plaintiff the action abated. He referred to Consol. Stat. U. C. cap. 22, s. 133 and 139, p. 212, 213, and to Broom's Legal Maxims, *Actio personalis moritur cum persona*, p. 702.

Harrison contra argued. 1. That this action is not an action for libel, slander, assault, or other injury to a man's person, feelings, or reputation, but an action for seduction, the gist of which is loss of services including cost of medical attendance, &c., resulting in a loss to the personal estate of deceased, which was thereby diminished. 2. That before plaintiff's death there having been a verdict for £500 in her favor, if that verdict had not been moved against the proceeds would have gone to increase the personal estate. 3. That the verdict having been set aside conditionally, that is, upon payment of costs, which costs were not paid at the time of the plaintiff's death, the verdict was then as if it had not been moved against. 5. That the mother, though now dead, having been resident in Upper Canada at the time of the birth of the child, the uncle or other person who by reason of the relation of master would at common Law have been entitled to maintain the action, could not by the express language of Consol. Stat. U. C., cap. 77, s. 3, p. 804, do so. 5. That unless leave were given to enter the suggestion there would not be any remedy for a gross wrong. He referred to Com. Dig. Administrator B. 13.

MCLEAN, J.—Having taken time to consider the application and having consulted some of his brother Judges, including the Chief Justice of Upper Canada, on a subsequent day made the summons absolute.

UPTHEGROVE v. WINTERS.

Insolvent debtor—Weekly allowance—Seduction—Consol. Stat. U. C. c. 26, ss. 2 & 11.

A prisoner in execution for seduction is not entitled to weekly allowance, or at all events not entitled to be discharged from custody for non-payment of it.

(Chambers, January, 1860.)

This was a summons for defendant's discharge, and granted upon the ordinary application, for non-payment of the weekly allowance; but on hearing the parties, it was admitted that defendant was in custody in execution, on a judgment recovered for seduction, and that this fact was to be taken into account.

It was also agreed that the judge should treat the case as if a summons were before him served by plaintiff for defendant's recommittal to custody, under the 11th section of the Consolidated Statutes, cap. 26, "The Insolvent Debtors Act."

Carrol for plaintiff.

John McNab for defendant.

DRAPER, C. J.—I presume this act must now be construed as one general declaratory enactment of the statute law respecting the relief of insolvent debtors, though it consolidates the provisions previously existing in entirely independent statutes. It is one act, to be expounded altogether.

The question seems to be, is the fact that the judgment was for seduction, sufficient cause against the defendant's discharge? (*vide* ss. 2 & 11, and caps. 18 & 30) or, in other words, is a prisoner in execution for any of the causes mentioned in sec. 11, entitled to the weekly allowance? If he is, then can such a construction be placed on the eleventh and second sections together, as to authorize, on a proper application, the suspension of a weekly allowance for a period not exceeding twelve calendar months? The enactments are apparently somewhat conflicting. The law puts the application for weekly allowance, and for discharge from custody, in some respects on the same footing.

As to not being worth £5 (though there are exceptions in the latter case not existing in the former), and as to answering interrogatories, the principle seems the same. Inability to pay the debt, and an absence of all resources excepting a trifling amount, in short, indigence or insolvency, seem the foundation of either relief. One entitles the creditor to detain his debtor in custody by paying the weekly allowance; the other entitles the debtor to his discharge, subject to the power of the court or a judge to order the applicant to be "recommitted," under certain circumstances. The term *re*-committed is not, perhaps, the most precise, when the debtor is already in close custody; it may, I apprehend, be construed "further" committed, *i. e.*, not on *ca. sa.* merely, but on a rule of court or judge's order for a fixed time, at the end of which the debtor will be as of right discharged.

I feel it difficult to hold that a debtor in execution, committed by such a rule or order, which could only be made where, in the opinion of the Legislature, imprisonment should be inflicted by way of punishment, can be entitled to call on the plaintiff to maintain him. It appears repugnant to the spirit of sec. 11, to treat such a debtor as within the benevolent contemplation of the enactment which provides a weekly allowance for an unfortunate debtor. On the other hand, it may be urged that it could not be intended that a *quasi* criminal should be starved, and that a debtor coming within the plain meaning of the eleventh section, who perhaps could not legally claim the gaol allowance of food, as a person committed for crime, should be left to the humanity of the gaoler or of the charitable for his subsistence.

Between these difficulties, I think that I shall be acting more in the spirit of the act in holding that the gaoler would extend to him the same allowance as is afforded to criminals, than to say that he shall escape the consequences of fraud or vice, or to inflict a further loss on the plaintiff, whom he has defrauded or even more deeply injured.

In the present case, the defendant has friends, who are able to assist him to some extent, sufficient to keep him from suffering, and I do not fear any danger of his being left to starve. I shall venture to act upon the opinion which I have formed of the act, and to hold that the fact that the defendant is in execution in an action for seduction, is sufficient cause for his not being discharged for non-payment of the weekly allowance; and, acting on the consent of the parties, as if a cross-application for his recommittal

were *before me, I will make* an order that he be recommitted to close custody for six calendar months, to be computed from the day on which he was first committed on the *ca. sa.*, either party to be at liberty to apply to the full court.

THE QUEEN, ON THE RELATION OF COUPLAND v. WEBSTER—DAY, RETURNING OFFICER.

Municipal Election—Equality of Votes—Casting vote of Returning Officer—When to be given—Costs.

It is the duty of the Returning Officer, at the close of the election, to declare publicly the Candidate standing highest on the roll, to be duly elected.

If there be an equality of votes, the Returning Officer ought there and then to give his casting vote.

Where a Returning Officer, in ignorance of his duty on the second day of the election closed of the poll, and on a subsequent day, gave his casting vote in favor of one of the Candidates, the election was held to be void; but as the Returning Officer appeared to have acted in good faith, and without any evil intent, costs were not given against him.

As to the person against whose election complaint was made, he having duly disclaimed, and not in any manner taken his seat, costs were not imposed upon him.

(February, 1860.)

The election for Ward No. 1, of the Township of Nottawasaga, was held on Monday and Tuesday, 2nd and 3rd January, 1860. Coupland and Webster were candidates. On the second day one Kelly, a freeholder of the Ward, and duly entered on the roll, but a non-resident tendered his vote for Coupland: Webster objected to him as non-resident. It was replied that on the preceding day one Wilson had voted for Webster, although admitted by all to be a non-resident. After some discussion, it was agreed by all parties that the Returning Officer should strike out the name of Wilson, and also reject Kelly. This was accordingly done.

At the close of the poll on Tuesday, the Returning Officer added up the votes, and announced that there were 60 votes for Webster, and 61 for Coupland, but he reserved his decision to enable him to get legal advice as to the vote of one Taylor, who voted for Coupland—Wilson's vote was not counted.

It appeared that on the Thursday following, the Returning Officer proceeded to Collingwood, and took advice, and being informed that he had wrongfully struck out Wilson's name, thereupon restored it, and thereby made the votes even, gave his own casting vote for Webster, and returned him as elected, and sent the Poll Book and Return to the Township Clerk.

Next morning he called together some electors at the polling place, and informed them that he had made a mistake, and of his having corrected it and voted for Webster, and that the latter was duly elected.

Coupland applied for the seat. Webster, on being served with the *Quo Warranto* summons, disclaimed in proper form.

On the argument no question was raised against the right of non-resident freeholders to vote.

McCarthy for relator: *McMichael* for Returning Officer.

HAGARTY, J.—In my opinion, the Statute clearly requires the Returning Officer, at the close of the poll, to declare publicly the candidate standing highest on the Roll to be duly elected, and if there then be an equality of votes, to give a casting vote. Consol. Stats., U. C., page 546.

All this, I think, should be done publicly at the close of the poll.

Such a course as the Returning Officer has thought proper to adopt in the present case, might lead to the very gravest abuses, destroy all confidence in the fairness and purity of elections, and cannot, in my judgment, be supported.

I had some doubts whether Coupland should have the seat, or a new election be ordered. Had both Wilson and Kelly's votes been counted, (nothing turned on Taylor's.) Coupland would have had a majority of one. As the Returning Officer chose to add up the votes on the second day, omitting the erased vote of Wilson, Coupland also had a majority. I do not see how it can be permitted that Coupland should be placed in the position of having Kelly's vote rejected on account of a compromise, allowing him, as it were, "to pair off" with Wilson, and after all was over, then an apparent equality should be created by reinstating Wilson on the poll, and still leaving Kelly rejected.

Webster disclaims, and therefore his interest is at an end.

It is clear that Kelly tendered his vote distinctly for Coupland, and that he was open to no objection except that urged against Wilson, viz., non-resident.

I think, therefore, that I can only do substantial justice by awarding the seat to Coupland, as the choice of the majority. The law, I consider, permits me to add Kelly's name in such a case as this, and the evidence of his vote being tendered for Coupland, is unequivocal.

As for costs, I cannot see any reason for awarding them against Webster. He appears to be free from any imputation of blame, and the mere fact of his being a candidate, (as he clearly was,) and disclaiming as soon as he heard of the legal objection to his return, and without taking his seat, ought not, I think, to subject him to costs.

As to the Returning Officer I have had much doubt. I think his conduct was clearly illegal, but that it was done all in good faith, and without any evil intent.

It appears that he was not the regular Returning Officer: that he was chosen by the electors, and after much objection acted, as he says, under the belief that by refusing he would incur a penalty.

I have come to the conclusion that his error arose altogether from ignorance of the duties of such a position, and that his having to pay his own costs of defence here, will be a sufficient punishment.

BROWN AND BROWN v. STEVENS.

Ca. Sa.—Bail—Render—Alias Ca. Sa.—Setting aside.

If a plaintiff issue a *Ca. Sa.* upon which a defendant is arrested and gives bail to the court, plaintiff cannot in the same suit issue an alias *Ca. Sa.* and cause defendant to be arrested a second time on the same judgment.

But, where defendant had endeavoured after the arrest under the *Ca. Sa.* by a contrivance to effect an escape so as to relieve his bail of the debt, and charge the sheriff therewith, the court refused to set aside his arrest under an alias *Ca. Sa.*

Semble: before the issue of an alias under such circumstances, the original writ should be returned and filed.

(11th November, 1859.)

This was a summons calling upon the plaintiff to shew cause why the alias *Ca. Sa.* issued in this cause and the arrest made under it, and all subsequent proceedings thereon, should not be set aside for irregularity with costs.

1. Because defendant was arrested on the original writ of *Ca. Sa.* and gave bail to the Sheriff of Hastings for the limits.

2. That he had duly observed the conditions of the recognizance and was still entitled to be on the limits by virtue of the first arrest and his recognizance.

3. That the arrest under the alias writ was a second arrest of defendant for the same cause of action under the same judgment, while the first arrest was in full force and effect.

4. That when the alias *Ca. Sa.* issued the first writ had not been filed or returned to the Deputy Clerk of the Crown, from whose office both writs were issued.

5. That the Sheriff having arrested defendant under the first writ and returned thereon, that he had so arrested him the plaintiffs could not legally issue an alias *Ca. Sa*, and have defendant arrested thereon

6. That the second arrest was made without the approbation or knowledge of plaintiff.

The Judgment roll was produced, and it contained an award of the first *Ca. Sa.*, and the Sheriff's return, that he had taken the defendant thereon, and admitted him to the limits.

The first *Ca. Sa.* issued 25th April, 1855, indorsed for £223 16s. 2d., with interest, &c., on which the Sheriff returned, that he had arrested the defendant, and admitted him to the limits. Ira Shibly and John Reynolds, being his bail. The arrest was made 1st May, 1855.

On 16th October, 1857, an alias *Ca. Sa.* issued, on which the Sheriff on the 24th October, arrested the defendant, and had him in close custody at the time of the application.

The original *Ca Sa.* was not filed when the alias was issued—nor was it at the time of this application, filed in the office.

The defendant swore he had never left the limits, nor in any way committed a breach of the recognizance.

In February, 1857, Reynolds, one of his bail, died, leaving a will and a large estate above his debts. But Shibly the other bail, on 15th June, 1857, in company with the plaintiff, James Brown, who survived the other plaintiff, met the Sheriff and his Deputy, while in a public street of Belleville within the goal limits,

and took steps to surrender defendant to the Deputy Sheriff, and *did say to him or the Sheriff, that he surrendered him to their* custody. That immediately afterwards, he withdrew the attempted surrender of him, and gave to the Sheriff a writing, stating that he withdrew it and would still hold himself liable for bail; whereupon the Sheriff and his Deputy at once voluntarily allowed defendant to go out of their custody, and have the benefit of the gaol limits as before, until he was arrested under the alias writ.

Since the said in part surrender by Shibly, the plaintiff voluntarily allowed defendant to be at large on the limits, until the last arrest, but he has never since his first arrest been off the limits.

Shibly, his bail, was said to be worth £5,000, and perfectly responsible.

On the plaintiff's side affidavits were filed by James Brown, the surviving plaintiff, that after the defendant was admitted to the limits on the first arrest, he was informed and believed that Shibly, one of the bail, surrendered the defendant to the Sheriff, who thereupon voluntarily or negligently permitted him to go at large, without plaintiff's consent. That on several occasions before, defendant was committed to gaol after his second arrest, and after he was surrendered by Shibly, he told deponent repeatedly that he had been surrendered by his bail, and that he had taken legal advice, and was told that in law he was not in custody in this cause; but the Sheriff had allowed him to go at large voluntarily, after he had been surrendered by his bail, and that he would swear to this.

Brown also swore that he believed defendant had the means of satisfying the plaintiff.

Ira Shibly, one of the bail, swore that in July, 1857, after Reynold's death, being desirous to be released from his bail bond, he rendered defendant to the Sheriff, and demanded to be released, and that immediately on doing so, he was informed that he was discharged from his liability. That two or three hours afterwards, at defendant's request, he again expressed his willingness to the defendant himself, to renew his bail, as defendant engaged to put in new bail within three months. But that the Sheriff, after the render of defendant, and during deponent's negotiation with defendant, permitted him to be at large at the solicitation of the defendant, and at his (Shibly's) request. That on several occasions after such render, the defendant told him that the sheriff had no right to give him license to be at large. That the Sheriff must pay the debt, and that he (Shibly) was free of liability, that as the Sheriff had not put him in gaol when he was rendered, he was a free man. That the deponent told the defendant that if the Sheriff had done wrong, it was done innocently and at their united request, and that it was wrong that the sheriff should be made to pay the debt.

The deputy sheriff swore that after the death of Reynolds, viz., on the 24th October last, he notified the defendant that he had reason to believe that Shibly had become insufficient to pay the amount sworn to, stating his grounds for that belief, and also for apprehending that Shibly was about to leave the country, and offered to take some other responsible person. That the defendant at once said he would get no more bail; that he was advised he was free from the debt, and he intended to remain so; that Shibly had rendered him to the sheriff, and he had been allowed to go at large, which released him and his bail. That the deputy therefore arrested the defendant (having, it is supposed, the alias writ then with him), and brought him to the court house; and while there, and before he was put in gaol, the deponent repeatedly offered to send for any person whom he would receive as bail, but he insisted on being locked up. That on the 24th October last, when he spoke to the defendant, as stated above, Shibly, being present at the door of the court-house, gave deponent distinct notice that he surrendered the defendant to him, and that he would insist that he was discharged, and demanded his bond back.

William R. Ponton swore that the defendant had repeatedly stated to him, within the month of October, that the surrender made by Shibly in June (or July) last, and the act of the sheriff in allowing him afterwards to go at large, had freed him from the debt, and that he would do nothing to alter his position. That he distinctly said he had been surrendered to the sheriff, and would swear to it; and that the sheriff had voluntarily allowed him to go at large after his surrender.

The objection was taken, that the alias *fi. fa.* could not legally issue, as it did, from the deputy's office in Hastings, because all papers had been before transmitted to the principal office, and was abandoned on the argument, the plaintiff being allowed by statute to take out executions from the deputy's office under such circumstances.

The other objection—that the alias writ of *ca. sa.* was taken out without the consent or knowledge of the surviving plaintiff—was denied on oath by the plaintiff, and of course failed.

The omission to file the first writ before taking out the second, was also relied upon.

ROBINSON, C. J.—According to the affidavits of Mr. Shibly, the bail, and of the deputy sheriff, and Mr. Ponton, in addition to the affidavits made by James Brown the plaintiff, there is every reason to believe that the defendant had been contriving and endeavoring by management to throw the debt upon the sheriff, by contending that an indulgence at one time shown himself by the sheriff, had the effect of releasing him and his bail, and leaving the sheriff liable; and when he finds that the plaintiff, adopting his representation of the matter, has exercised his right of taking further process against the defendant's person, notwithstanding the alleged voluntary escape, to which it is not shown by the defendant and denied by the judgment plaintiff that he was in any measure a party, when the defendant departed from his former statement that he had been surrendered by the sheriff, and of being allowed by him to escape, and rests his right to discharge on the grounds that he was all the time in legal custody on the limits under the first writ, and so could not be arrested a second time in execution in the same suit.

The case of *Baker* v. *Ridgway*, 2 Bing. 41, is very much in point, to show that the Court will not interfere summarily to release a debtor who has been so acting, upon the principle that no man shall be allowed to take advantage of his own wrong.

The defendant swears now that he never in fact was surrendered. According to his first account, there was an intention on the part of his bail to surrender him; but the intention was abandoned, and he was in fact taken to gaol in the manner spoken of, in June last; and if his account of what passed is correct, no doubt he continued on the limits under the first writ as before, in which case a second arrest in execution in the same suit under a new writ could not properly take place, because a plaintiff is not allowed to act vexatiously in arresting his debtor twice for the same cause. But we cannot look upon the plaintiff in the cause as having acted vexatiously, since, according to the defendant's repeated declarations, he insisted that his custody under the first writ was at an end, in consequence of the sheriff having voluntarily allowed him to escape; and if that were so, the plaintiff was entitled to a new writ against his person. If, on the other hand, the facts were as he now represents them to be, then there was no occasion for a new *ca. sa.*, and he has been all the time in legal custody under the first writ, and in that view of the case I would not summarily discharge him from custody.

If the taking out a second writ has had the effect of destroying the binding authority of the first, which it would not have unless it is itself intended to be treated as a valid process, then the party is legally in custody under the second writ. If otherwise, then I should hold that the defendant has failed in the contrivance by which he has endeavored to relieve himself from the effect of the first arrest; for the second arrest would have entitled the plaintiff to hold him in custody. There was no surrender here, according to the terms of the 306th section of the Common Law Procedure Act 1856, by anything that is stated to have taken place in June or July. There could be no color for contending that the defendant might be treated as surrendered by his bail, by what the deputy sheriff swears took place at the court-house on the 24th October.

On the circumstances as they appear, I will not discharge the defendant upon this application, but follow the course taken in *Baker* v. *Ridgeway*—leave him to take any remedy by which he may be advised that he can establish his right in strictness to be discharged.

In the meantime it is for the plaintiff and the sheriff to be advised whether it is essential for them to take any proceedings

that may give a more definite form to the defendant's custody as *under the one writ or the other*, or as having been surrendered by his bail, or whether they will retain the defendant in the position in which he is, claiming a right to avail themselves, under the peculiar circumstances of the case, of any authority for his detention which the facts as they existed can be held to furnish.

If it be seen that the defendant has led the plaintiff into the taking out a second writ, by contending that he had been surrendered, and afterwards allowed to escape, which state of things he now repudiates, the court would be unwilling to release the defendant, if there be any means of keeping him in custody which it may be in the power of the plaintiff or sheriff to advance. Moreover, I need not anticipate what the court may think proper to do, if the defendant is not content to abide by my decision.

If on other grounds I had not felt that I ought not to discharge the defendant, and thought it necessary to decide on the point of practice, that the first writ should have been filed with or without such return upon it as would show the right to a second writ, I would allow the plaintiff to file the original *ca. sa. nunc pro tunc*; but, for the reasons I have already stated, and acting in accordance with the case of *Baker* v. *Ridgway*, I refuse to discharge the defendant, and simply discharge this summons. And I will add the expression of my present opinion, that if the facts were as the defendant himself represents them to have been, and if the plaintiff was misled into the course he has taken by the defendant having before the second arrest maintained that he had been surrendered to close custody and escaped, and so was relieved from the first arrest, he would not be suffered to set up anything done towards a second arrest under such circumstances as having destroyed the authority of the first arrest. And it is further to be considered, that according to the express words of 8 & 9 Wm. III. cap. 29, sec. 7, if it is true, as the defendant now asserts, that he was suffered to escape after he was committed to close custody, the plaintiff might legally take out new process against his body or goods, as if he had never been taken in execution; and this seems to remove any difficulty about the not filing the return of the first writ.

Summons discharged.

In Re Harrison v. A. and B., Attornies.

Attorney.—Money collected—Order to pay over.

Quære.—Does the loaning to an attorney of money in his hands for his client disentitle the client after the expiration of the term of the loan, to the usual order against his attorney to pay over the same, and if so, will not a subsequent agreement by the attorney to hold the said monies as monies collected by him, restore the parties to their original positions and rights.

Where the fact as to whether money collected by an attorney, was afterwards loaned to him by his client is disputed, an undertaking signed by the attorney to hold the money as money collected for his client, and if not paid by a certain day, consenting to an order against himself to pay over the same, will be enforced against him, and the usual order will be made.

This was a summons, calling on Messrs A. and B., attorneys, &c., to show cause why they should not pay over to Mr. Harrison the sum of 253*l*, and interest, from the 26th of September, 1857, as having been collected by them for him, as his attorney.

The applicant filed the following undertaking:—

"B——, 16th May, 1859."

"We hereby admit that there is due to Duncan B. Harrison at this date, for money belonging to him, collected by us, as his attornies, after charging him with all costs we have against him, the sum of 253*l*. And we hereby undertake, that unless we pay over the amount of the same with interest, on or before the 18th July next, he shall be at liberty to make application to either of the Superior Courts against us in a summary way for payment of the said amount and interest.

"(Signed) A. & B."

Also, the following notes of hand:—

"B——, 26th May, 1859."

"£55."

"On demand we promise to pay to Duncan B. Harrison, or order, the sum of fifty-five pounds, being the amount received by us on George Geddy's mortgage of House in Bowmanville."

"(Signed) A. and B."

"B——, *September 29th*, 1857."

"£150."

"On demand, we promise to pay D. B. Harrison, Esq., or order, one hundred and fifty pounds, Ha. Cy., being the amount of his claim, collected by us from the Grand Trunk Railway Company."

"(Signed) A. & B."

The applicant swore that A. and B. were attornies of the court, and until recent were practising law in partnership in Bowmanville. That during 1857—58, when they were in partnership, employed them in various matters, as his attornies, in collecting monies for him by suit, from mortgages left by him for collection. That he repeatedly applied to them for a settlement, but they refused, that at length he obtained the above undertaking.

It was objected to the application, that as the money was converted into a loan, and securities to run for the same, the undertaking could not give the Court jurisdiction in a matter in which it had not jurisdiction before.

To this it was replied, that the money was never converted into a loan, and that the applicant did not rely upon the undertaking for power to make this application, that he had a right to do so independently of any such undertaking.

Richards, J.—As at present advised, I think an order should go directing the said attornies to pay to Duncan Harrison, 253*l*, with interest from the 16th May, 1859, on or before the 25th day of August, instant, together with the costs of this application.

It is admitted on all hands that the moneys referred to were collected by Messrs. A. and B., as attornies.

It is contended on their behalf that by Mr. Harrison's consent, these moneys were loaned to Mr. A, and if I understand the affidavit correctly as to the larger part of the sum claimed, viz.: the demand against the Grand Trunk Railway Company, this arrangement was made before the money was collected.

The note given by A. and B., dated 29th September, 1859, in Mr. B's handwriting, shows that both co-partners promised to pay the 150*l* on demand, "being the amount of his claim, collected by us from the Grand Trunk Railway Company." There is no promise to pay interest.

The affidavits are conflicting as to whether this money was really loaned to Mr. A, or A. and B, the note referred to repels the presumption of it being loaned to A. alone.

The memorandum is signed by both of the attorneys, and dated 16th May, 1859, by it they respectively admit 253*l* to be due Mr. Harrison, for moneys belonging to him, collected by them, as his attornies, and undertake that unless the same were paid with interest on or before the 16th July, Mr. Harrison should be at liberty to apply to the Court in a summary way for payment of amount and interest.

It is not pretended that anything has occurred since the 16th May to change the effect of this acknowledgment and undertaking, and I see no reason why they should not be bound by it.

The proposition is, that admitting the money to be collected by Messrs. A. and B, as attornies, yet, if by agreement it was to remain a loan, the subsequent agreement that it should be in their hands as moneys collected by them as attornies, will not bind them, and, therefore, the application must fail.

If it were necessary to decide the question on this point, alone, I should hesitate much before adopting that view. If the agreement between the parties is good for one purpose, I do not well see why it should not be equally binding for another, or in other words, if the agreement between the parties could convert money collected into a loan, why could not an agreement between the same parties restore the same money to its original character.

However, the fact as to the conversion of the money into a loan is not admitted, the affidavits on that point being conflicting.

I think the ends of justice will be best subserved, by holding these gentlemen to their agreement and undertaking. They have had all the benefit of the delay which was to be given to them under it, and they ought in justice to be bound by it. They are both professional men, and they know very well the effect of signing an undertaking like the one produced. It is not as if such a document were given by an unprofessional person who may have been deceived. To let professional gentlemen avoid such agree-

ments, they must shew facts clear and precise to warrant that course. I think they have failed to do this, and the order must go. I have directed the amount to be paid during the Term, so that the attornies if they wish to set aside my order may apply for that purpose during the Term, and the applicant take steps to enforce the order this Term if he shall be so advised. I would feel disposed in relation to any process to enforce the payment of the amount, to order it to lie in the office for some little time, unless it could be shown that the delay would prejudice the collection of the demand.

Order accordingly.

LUNDY v. DICKSON.

C. L. P. Act.—Attachment.—Debt.—Verdict.—Foreign Corporation.

Held that a debt due by a foreign corporation to a resident of Upper Canada, cannot be attached by service of the order to attach upon the agent of the corporation of this Province.

March 14th, 1860.

In this case an order had been granted on the application of the plaintiff, (the judgment creditor,) by Mr. Justice Burns, under the 288th sec. of the Common Law Procedure Act, (Consolidated Statutes of U. C., p. 247,) to attach a verdict recovered by the defendant, (the judgment debtor), against the Equitable Fire Insurance Company of London, (England,) which verdict had been moved against by them, and the rule *nisi* for a new trial discharged, but no judgment had been entered on the verdict.

The affidavit on which the order to attach had been granted, stated that the verdict had been recovered, and the rule for a new trial discharged by the Court, and that therefore the verdict had become absolute.

It was also stated that the action was brought on a Policy of Insurance, and was for a total destruction by fire of the property insured.

A summons was issued calling on the Company to shew cause why they should not pay over to the plaintiff the amount of the said verdict, or so much as might be sufficient to satisfy the judgment in this cause.

Hellmuell, for the plaintiff.

M. C. Cameron, for the defendant.

Two objections were raised against the plaintiff's application.

1st. That as the judgment had not been entered in the suit of the defendant against the company, the verdict rendered, although absolute, was not a debt within the meaning of the 288th Sec. of the C. L. P. A. (Con. Stat. of U. C. p. 247.)

2nd. That the company being a foreign corporation, a debt due by them to a party in Upper Canada, could not be attached at all, because the 17th sec. of the C. L. P. A. (Con. Stat. of U. C., p. 188), provides only for the service of a summons on their Agent here for the purpose of a suit against themselves, and makes no provision for the service on them by an order to attach a debt due by them to a resident of Upper Canada.

ROBINSON, C. J.—Held that the service on the Agent of the company in Upper Canada of the garnishee order and summons, did not bind them, inasmuch as the 17th section of the C. L. P. Act, speaks of the service on such Agent only of a writ of summons issued against such corporation.

Summons discharged without costs.

PRACTICE COURT.

IN THE MATTER OF THE ARBITRATION OF JOHN MCCLUNY AND JAMES MOTLEY.

Arbitration—Three Arbitrators—Award by two—Misconduct of Arbitrators—Setting aside Award.

1. Where parties submit matters in difference to arbitrators to be decided by three or any two of them, all the arbitrators must be notified of their appointment, and of the time of sitting
2. If any one of three arbitrators refuses to act the remaining two, on being satisfied of that fact, may proceed without him, and this they may do at any stage either before or after they have entered upon their duties.
3. If two of the arbitrators take upon themselves, by consent of the litigant parties, in the absence of the third arbitrator, to decide upon all the matters referred, it does not afterwards rest with either of the litigants to object to that which has taken place, and would not have taken place but with his concurrence
4. Where, however, the award was made in a hasty manner on the day of the submission, the third arbitrator not being informed of the sitting, and there being a misapprehension on the part of one of the litigants as to what was referred, the award was set aside.

(Practice Court, Mich. T. 1860.)

The parties on the 29th September submitted to the award of William Clemens, John Somers and William Brent, or any two of them, by an agreement under seal, all and all manner of actions, cause and causes of action, suits, controversies, claims and demands whatsoever then pending, existing or held by and between them, and they covenanted with each other that the award to be made by the said arbitrators, or any two of them, should in all things by them and each of them be well and faithfully kept and observed; provided the said award was made in writing under the hands of the said William Clemens, John Somers and William Brent, or any two of them, and ready to be delivered to the said parties within the time limited.

On the same day an award was made under the hands and seals of William Clemens and George Somers, but it was not executed by William Brent, though in the commencement of it it professed to be made by the three arbitrators to whom were submitted the matters in controversy existing between John McCluny and James Motley, as by their submission in writing more fully appeared.

The two arbitrators then alleging "that they have heard the evidence and allegations of the parties, and examined the matters in controversy to them submitted, awarded that James Motley shall pay to John McCluny the sum of three hundred and forty dollars in full satisfaction of all the costs, charges and expenses incurred by or in consequence of the said arbitration. And they further awarded and adjudged, that James Motley "shall *give up possession* of the farm immediately, with the exception of the house and part *of the stable which he can have for his own use for one month, and* the potato ground for one week."

And the arbitrators declared that it was not their intention in rendering their award to deprive John McCluny of his privilege as landlord to distrain the goods and chattels of James Motley for the amount of the award which they allow him as rent for his farm.

During the last term a rule was obtained by the tenant Motley calling upon McCluny to show cause why the award should not be set aside on the following grounds:

1. That the submission was to three arbitrators, William Clemens, John Somers, and William Brent, or any two of them, and that Somers and Clemens proceeded with the arbitration and made the award without Brent having received any intimation or notice that he had been appointed an arbitrator, or of the sitting of the arbitrators—or their intention to proceed with the arbitration—or of the making or intention to make the award, and that the said William Brent had no opportunity of attending the sitting of the said arbitrators, or of being present when the award was made and proceeded with, and was not present when it was made.

2. That the said William Clemens and John Somers proceeded with the arbitration, and made and executed their award without giving to the said James Motley an opportunity of being heard or of producing before them any evidence on his behalf, and without due notice being given to him of the sitting of the arbitrators or of their proceeding with their arbitration.

3. That the award was not final in this, that it awarded that the said James Motley shall pay to the said John McCluny the sum of three hundred and forty dollars in full satisfaction of all the costs, charges and expenses incurred by or in consequence of the said arbitration, and in a subsequent part of the said award the said sum was said to be allowed to the said McCluny as rent for his farm and does not say that it is to be in full of all matters in difference, and does not award mutual releases but leaves the real matters in difference between the parties untouched and undecided, and is therefore abortive.

4. That the award is uncertain and inconsistent in this, that the sum awarded to be paid by Motley to McCluny is first awarded in full satisfaction of the costs, charges and expenses incurred by or in consequence of the arbitration, and in a subsequent part of the award the said sum is said to be allowed to John McCluny as rent for his farm, without stating what farm, and thereby leaving it uncertain what that amount is to be paid for; and also that the said award directs that Motley shall give up possession of the

farm immediately, with the exception of the house and part of the stable, which the award says he can have for his own use for one month and the potatoe ground for one week; but the award does not state of what farm possession was to be given up, or to whom or what house or what stable, or what part of the stable, Motley was to have for his own use for a month, or what potatoe ground he was to have for a week.

5. That the arbitrators exceeded their authority in this, that they ordered Motley should give up possession of the farm *immediately* with the exceptions therein mentioned, which they had no authority to do, the question of possession of any farm never having been submitted to them; and the said Motley holds possession of the farm presumed to be referred to in the award by a lease, which has not yet expired, and will not expire for some years. And that no question as to the possession of the said farm under the said lease, or the duration of the lease, was ever referred to the said arbitrators; and that the possession of the said lease or the farm mentioned therein, or the duration of said lease, was never a matter in difference between the said Motley and McCluny.

McLEAN, J.—It appears by the affidavits on both sides, and by the submission, that the differences, whatever they were, existing between these parties were referred to three arbitrators, whose award was to be made on the same day the submission was entered into, and the award of the three or of any two so made was to be final.

No notice of his appointment or of the arbitration was ever given to William Brent, one of the number, but the other two immediately after the submission was executed proceeded without hearing the parties or examining witnesses to make the award in question.

Now there is nothing more *clearly established* than that when parties submit matters to be decided by three or any two of them, all the arbitrators must be notified of their appointments and of the time of sitting, so that all may have an opportunity of attending, and the parties may have the benefit of the consultations and advice of all whom they have constituted the judges of the matters submitted. If any one of the three refuses to act the other two, on being satisfied of that fact, may proceed without him, and this they may do at any stage, either before or after they have entered upon their duties. And if two take upon themselves *by consent of all parties* to decide upon all the matters referred in the absence of the third arbitrator, it does not afterwards rest with either of the litigants to object to that which has taken place, and would not have taken place but with his concurrence.

In this case it is stated by Motley, in one of his affidavits, that when he executed the submission he thought and understood that all the arbitrators would have held the arbitration, and that the decision of any two of them in that case would be binding, —that he understood that the three arbitrators would appoint a time for the holding of the arbitration, and that he would have had an opportunity of producing certain evidence with respect to the differences between McCluny and himself with respect to the rent and the deduction to be made therefrom. That he *never intended* to submit and *did not submit* his differences with McCluny to the award of Clemens and Somers only. And that he never intended to submit and did not submit to arbitration his lease from McCluny, or the cancelling thereof, or the shortening of the term for which he was to hold the same. That the only matters which were submitted were the yearly value of the farm which he Motley held from McCluny, and such accounts and matters of dealing besides the farm arising out of other transactions, such as work done for McCluny, and matters of account which he held against him, and which he intended to set off against the amount of rent due.

That the two arbitrators *immediately* after the execution of the submission proceeded to make their award without hearing him (Motley) or his testimony in relation to the matters in difference, and *without giving him an opportunity of putting in his account*, which he then held and still holds against McCluny.

He swears too that *he did not consent* or *agree to the arbitration* being held or the *award being made* without William Brent, the third arbitrator, being present at the arbitration and taking a part therein, and that he intended to submit his account to the arbitrators if an opportunity had been afforded him of so doing, but that he had no opportunity of being heard, or of producing his account, or any evidence.

The circumstances stated in that affidavit are such as if uncontradicted would indicate a very precipitous and harsh proceeding on the part of the arbitrators towards Motley,—but it is relieved in a great measure from bearing that character by the affidavits of McCluny and the two arbitrators.

McCluny states that Motley rented a farm from him, for which he undertook to pay £100 a year rent, for four years, commencing on the 1st October, 1858. That in the course of the spring following, he had great difficulty in procuring seed to sow, and complained of being harassed by creditors whom he could not pay, and asked to have the farm taken off his hands, and to be paid for the work he had done on it. That when that proposition was acceded to and a time appointed to receive the premises from Motley, he declined giving them up, alleging that he had made up his mind to hold till the end of the year, as he could not see where he could go to. That in September last, near the close of the year, Motley again proposed to give up the farm and to *arbitrate upon the value thereof for the past rent*. That in consequence of such proposition, the arbitrators, John Somers and William Clemens, were chosen, and that both Motley and himself were present attending the arbitrators That the *only set off* or claim which Motley can have against him *is* for pasturing two colts and two heifers for some months, and for drawing a few loads of furniture when he (McCluny) was moving, but that *Motley was indebted to him, at the time of the arbitration, over* $100 *over and above any claim which he may have.*

Then the arbitrators swear that they were severally chosen by the parties to decide certain matters in *difference between* them, both parties stating that James Motley *had been* a tenant of McCluny, and had agreed to leave the place rented by him, having found that the rent was more than he could pay; that the arbitration was held, *amongst other things*, to decide what rent should be paid for the time then past; that it was agreed, by consent of all parties, that if Somers and Clemens should disagree, *they* should call in William Brent as a third arbitrator, but not otherwise; that the only matter for them to award upon was the deduction to be made in the rent for the time passed, and the time that Motley should continue to occupy the house, part of the stable, and the potato ground, as his potatoes had not then been all dug; and that these matters were to be decided by the arbitrators looking over the premises and exercising their own judgments, which was done. That both parties were present, assenting and agreeing to what was going on; and that after the award was made and read over to them, Motley stated that he was perfectly satisfied with it, and mentioned that he could pay on it to McCluny one hundred and fifty dollars in money, and with wheat and potatoes could make it up to two hundred dollars. That if Motley had objected to the two arbitrators carrying on the arbitration, or had desired that Brent might be present, or expressed any dissatisfaction at any of the proceedings, the arbitrators would not have signed the award; but that on the contrary Motley expressed himself satisfied with what was being done, and, after the award was made, with what had been done.

It is difficult to reconcile these affidavits. On the one side it is shown that a most imperfect and hasty award was made by two instead of three arbitrators, embracing matters not referred nor intended to be referred, without affording any opportunity to Motley to make any defence whatever; and on the other side it is shown that the sitting of the two instead of three arbitrators was with the entire concurrence of all parties, and that all they did was perfectly satisfactory. However that may be, it is abundantly evident from the affidavit of Motley that at least one of the parties has become very much dissatisfied with the award, and that he thinks himself greatly agrieved by the arbitrators taking upon themselves to decide upon matters which were not referred to them.

By the preamble or recital of the submission, it is stated that differences had for the past six or eight months been existing and pending between the parties in relation to divers subjects of controversy and dispute, and the reference is "of and concerning all and all manner of actions, cause and causes of action, suits, controversies, claims and demands whatsoever then pending, existing

or held by and between them." Of the divers subjects of controversy mentioned in the recital, and all that may be embraced within the terms of the reference, the arbitrarors seem to have come to their decision only as to the deduction to be made in the rent for the time past and the time that Motley should continue to hold the house and part of the stable and potato ground. Now it is manifest that the decision as to these matters has not made a conclusive settlement of the "divers subjects of controversy and dispute" between them.

Motley asserts that he has an account against McCluny, which he has had no opportunity of bringing forward as a set-off against the claim for rent. The amount of such account, it is alleged by McCluny, is but small, and it may be so, but it is quite evident that there is an account, and that, though it might have been settled by the reference, it still remains a subject of controversy between the parties. Besides this objection, there seems to be a misapprehension or misunderstanding as to what was actually referred. On the part of Motley, he alleges that the farm contains a less quantity of cleared land than was represented by McCluny, and that he claimed a deduction from the rent on that account, but never had any intention to have his term abridged or his lease in other respects made the subject of a reference; while on the part of McCluny it is stated that the whole arbitration was with a view to settle all matters so that the lease and the farm might be surrendered.

From the fact that when Motley was asked by one of the arbitrators, when the award was made, to give up his lease, he refused to do so, a strong presumption arises that he could not then have supposed that he was to give up the premises; and yet, if he expressed satisfaction with the award, as the arbitrators swear he did, and at the same time understood by it that he was required to give up the farm immediately, and the house, &c., within a month, it is difficult to imagine why he should decline to give up the lease.

There are various objections urged against the award, but it is not necessary to notice them all. It appears to be so imperfect and inconclusive, and the proceedings so irregular and unsatisfactory, that, though perhaps it would be better for all parties to let matters stand as they are, I do not see that I can do otherwise than to set aside the award.

Rule absolute to set aside award.

CHANCERY.

MOFFAT v. HYDE.

Practice—Amending Decree—Motion or petition—Orders of 1828.

Where a necessary direction is omitted in a decree, the Court will amend it, although the decree has been passed and entered.
In such a case, the proper mode of proceeding is by a petition.

This case had been heard upon further directions, and a decree of foreclosure had been drawn up and entered, when it was found that no provision was made for foreclosing the owner of the equity of redemption. A motion was made *ex parte* before the Chancellor, under the English orders of 1828, and cases decided thereunder; but the Chancellor declined making any order, and directed the matter to be brought on by petition. Accordingly a petition was presented, and

SPRAGGE, V. C., after looking into the authorities, made the order as asked for.

SEXTON v. SHELL.

Vendor and Purchaser.—Parol Evidence.—Specific Performance.

Where a vendor files his bill for specific performance against a purchaser on a contract partly performed, the evidence of the contract must be clear and unmistakeable, and the acts done must be such as cannot be referred to any other than the contract as alleged, nor done with any other intention than in part performance of such contract.

This was a bill filed by the vendor against the defendant, alleging a contract for the sale of land partly performed. The facts of the case are stated in the judgment.

A. Crooks, for the plaintiff.

Strong, for the defendant.

THE CHANCELLOR.—This is a bill for specific performance for the sale of a lot a land in Scugog. It states that the plaintiff being owner in fee, agreed to sell the lot to the defendant for £500, with interest, to be paid in five years,—the amount to be paid in logs and square timber cut off the land. The bill alleges a parol contract partly performed, that the defendant was let into possession and cut a large quantity of logs under such parol contract, and then it prays specific performance. The defendant contends that the facts of the case are insufficient to bind either vendor or purchaser, or to enable the Court to enforce specific performance, the argument being that it is possible to refer this part performance to a contract for cutting timber as to an acceptance of title; and that it being capable of being referred to another contract, the plaintiff cannot succeed. There are cases which seem to indicate this, as *Frame* v. *Dawson*, (14 Ves. 386), and the principle on which those cases proceed, is I think, settled:—that those who make representations on which others act, cannot afterwards deny those representations. The statute of frauds lays down a rule of evidence for the protection of either party; and it has declared that a contract for the sale of land, must be signed by the party to be charged; but it has sometimes arisen, that owing to a partial performance, the case has been held to be taken out of the statute, and I have no doubt but such acts as those of *Shell*, are acts of part performance,—being let into possession, and cutting timber,—and that they are sufficient to exclude the statute, and that the defendant would be bound by the contract. But is this a contract? The evidence in support of it is very unsatisfactory. The contract is proved by admissions said to have been made by the defendant in casual observations to laborers, and their evidence is full of discrepancy. One swears that the defendant was to have any time for the completion of the contract,—another swears that he was to have had five years. But it is alleged that the land without the timber was sold, and if so, a witness who was asked, says, that £500 would be an extravagant price. But then, again, there is no evidence that the timber was to have been reserved for the plaintiff, and Mr. Crooks asks me to infer such was the case. The only fact I have by which to find out such a contract, is that after the sale, the plaintiff cut timber on the lot—but what timber? Did he mean to retain an absolute control, or did he mean that the defendant was to be at liberty to cut timber so as to pay for the land? If so, it appears to me that according to the contract set up in the bill, the plaintiff might reserve a right over the timber for ever. It appears to me to have been a contract for work and labor, and if so, I think the bill should be dismissed with costs.

MCAVOY v. SIMPSON.

Vendor and Purchaser.—Specific Performance.—Election of Remedy—Waiver.

A Vendor sued upon the covenants of a Bond and obtained judgment, he then filed a bill setting out the agreement and praying foreclosure.
Held that his bill was improperly framed, but that he might amend on payment of costs.
Quære:—Was his action at law a waiver of his remedy by specific performance.

The bill set out, that the plaintiff, and one Simpson, deceased, entered into a bond for the sale and purchase of a certain lot of land in Garafraxa, for a certain sum, that default had been in the payment of said sum, and prayed that said sum might be paid, or in default foreclosure. The bond had been lost but evidence taken in a court of law was put in. To this the principal defendants set out that the plaintiff had sued on his bond and obtained judgment, and under it had sold all the real and personal estate of said Simpson, and that consequently having elected his remedy at law, he was barred from relief in equity. The cause was then brought on by way of motion for a decree.

A. Crooks, for plaintiff, contended that although the bill was framed as if for foreclosure, yet that the court would look to the facts of the bill, and under the prayer for general relief, decree the plaintiff entitled to specific performance. The action at law was not a bar, for the action was only for instalments due, and did not put an end to the contract.

Strong, for the infants, argued, that the bill was demurrable in its present shape, and that plaintiff was barred by his action at law.

Hodgins for defendants, Simpson and Marshall. The action at law must be held to have put an end to the contract. The plaintiff after bringing parties before the court to answer his specific prayer, could not turn round and say that he asked a different

relief. Marshall had no interest in the place, and the bill must be dismissed as against him.

The cases cited were, *Sainter* v. *Ferguson*, (1, M. & G. 286, s. c. 14 Jur. 255), *Barker* v. *Smark* (3 Beav 64), *Orme* v *Broughton*, (10 Bing 533), Dart, V. & P. Fry on Sp. Perf, 25.

Esten, V. C.,—I think the agreement is proved, but it would be satisfactory, though not necessary, to see the bond given by the plaintiff, which must be in the defendant's custody. The bill ought not to be entertained in its present shape, but the plaintiff may have leave to amend. I think the plaintiff should pay the the costs up to the present time, and that the bill should be dismissed as to Marshall with costs. The cause to stand over with these directions.

This is subject to the question of waiver by the plaintiff bringing his action at law. My impression is against the waiver and in favor of the plaintiff. The case of *Orme* v. *Broughton*, is the case of the administrator of a purchaser suing for damages, and it was there held it would bar other actions or suits, but *quære*, could he here sue for specific performance? Mr. Fry also states, that when a plaintiff has proceeded at law and recovered damages for the breach of the contract, he cannot afterwards sue in equity for specific performance. *Sainter* v *Ferguson*, is the case of a surgeon agreeing not to practice in a certain place under a penalty of £500 The plaintiff brought his action and recovered £500 as liquidated damages and signed judgment, and it was there held that after the verdict giving liquidated damages for the breach of the agreement, the contract was at an end, and that equity could not interfere. In *Barker* v. *Smark*, the plaintiff was compelled to elect; but per M. R. "The plaintiff will not be prejudiced for if he fail in one remedy, he may resort to the other. I think the objection should not prevail.

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

Consolidated Statutes—Municipal Law.

Township of Rainham, March 9, 1860.

Gentlemen,—The following questions being of general interest, answers to the same in the next issue of your valuable journal, are respectfully requested by the subscriber.

1st. Are the Consolidated Statutes issued to the different municipalities, intended by the Government to be in possession and for the sole use of the Reeve of such municipality to whom they are directed; or are they, on the other hand, intended to be kept in the office of the Clerk, for the use of the municipality?

In my opinion the words pasted in each volume ("The property and for the use of the office,") would indicate that the latter is the proper place for them, but our Reeve takes a different view, on the ground that they are directed to him, and I am aware that such is the view taken in some other municipalities. What is your opinion?

2nd. Can a candidate (at a municipal election) be proposed and seconded, after one hour has elapsed from the time of opening the poll, and would the election of such a candidate be valid?

I am, gentlemen, yours truly,

Township Clerk, *Rainham.*

[1. The Reeve of a Township has no more right to the Consolidated Statutes issued for the use of the Township, than he has to the chairs and tables in the Clerk's office.

2. The Statute is, we think, directory, not imperative. The Returning Officer *may* (not shall) close the election in one hour after commencing the same, if within that time no more candidates are proposed, &c. If, notwithstanding the expiration of the hour, he keep the poll open, and shortly afterwards receive a second candidate, which candidate is elected, we apprehend his election, if not impeached on other grounds would be valid.—Eds. L. J.]

Judgment—Execution—Registry—Priority.

To the Editors of the Upper Canada Law Journal.

Gentlemen,—I beg leave to submit the following question for your consideration, trusting, that you may be pleased to give your opinion in the next issue of the Journal.

A. and B. are two judgment creditors, and D. is a mortgagee. A. registers in the Registry Office a certificate of judgment, on 4th January, 1859. D. registers in the same office, his mortgage, on the 5th January, 1859, and B. places a writ of *fi. fa.* against lands in the Sheriff's hands, of the same county, on the 7th January of the same year. A. afterwards follows with a *fi fa*, lands also, and hands it to the same Sheriff, on the 15th of January, 1859. On the 20th of January, 1860, the Sheriff offers for sale the property mentioned in D.'s mortgage, under B.'s execution, being the first in his hands. B. thinking to secure himself, purchases at a sum which pays the two executions, and the Sheriff returns them satisfied. Query, Does the mortgage hold good, and what of A.'s certificate?

27th March, 1850. W.

[We can not do more than refer our correspondent to the article on the Law of Registered Judgments, in the number of the *Law Journal* for last September. Correspondents must understand that we do not intend to give specific answers to questions on general law, unless our answers will be useful to our readers generally. So far as the case put by our correspondent, W. is concerned, few beyond himself we think would feel much interested in the result of his inquiry.—Eds. L. J.]

To the Editors of the Law Journal.

Municipal Law—Assessment—Mortgagee—Licenses—Disqualification.

Beamsville, March 9th, 1860.

A question has arisen in our Municipality as to the legality of the assessment of certain Mortgages, and I am desired by our Council to enquire of you,—Is a Mortgage given by A. to B. to secure the payment of money borrowed assessable: or, in other words, if A. borrows money of B. and gives B. a Mortgage, can B be assessed for the amount the Mortgage calls for.

And further, are persons holding a Shop License for the sale of Spiritous Liquors by the gallon or quart, having obtained that License under the By-laws of the Municipality, disqualified from holding a seat in the Council.

Your's truly,

Rowly Kilborn.

1. It is expressly provided by the Assessment Act that "So much of the personal property of any person as is secured by

a mortgage upon land, or is due to him on account of the sale of land, the fee or freehold of which is vested in him," shall be exempt from taxation (Consol. Stat. U. C., p. 671, s. 9 sub. s. 15). The reason is obvious. The land is rated at its full value, and the mortgagor pays taxes upon it as if not at all mortgaged. If the mortgagee also were obliged to pay taxes the land, as regards the amount of the mortgage, would be doubly rated, and this is not intended by the Legislature.

2. There is no decision on this point. Our impression is, that a person holding such a license would be disqualified to hold a seat in the Council from which or under which he holds his license. He would, we imagine, come fully within the mischief intended to be prevented by the Act (Con. Stat. U. C., p. 546, s. 73).

REVIEW.

THE LOWER CANADA REPORTS: Editors, Monsieurs LeLievre and Angers; Printer, Augustin Cote, Quebec.

Number two of these Reports is received. It contains the reports of six decided cases in the courts of Lower Canada, all of which are important. One (*The Queen* v. *St. Louis et al*) is important in Upper Canada. It determines that a shareholder in an incorporated company, under the circumstances mentioned, cannot commit larceny from the company nor be guilty of obtaining its money under false pretences.

THE ATLANTIC MONTHLY. Boston; Ticknor and Fields.

April number received. Since this young but rising Magazine has been placed under the control of Ticknor & Fields, the well known Boston publishers, it has continued gradually to gain in public favor. We look upon it as one of the best Magazines of the age, and without question the most able Magazine published on this continent. Unusual ability is displayed in its every department. And the reader is lead from grave to gay in a manner as agreeable as instructive. The number now before us opens with an article on the Laws of Beauty, which, though not elaborate, is learned, and characterized by a display of much thought, and is evidently the result of deep reflection. The lovers of philosophy will not fail to make this article the subject of study.

THE LONDON QUARTERLY. New York; Leonard Scott & Co.

The quarterly number for January contains the following articles: 1. The Three Colonies of Australia; 2. Cotton Spinning Machines and their inventors; 3. China and the War; 4. The Roman Wall; 5. Religious Revivals; 6. Life and Works of Cowper; 7. Reform Schemes. An essay in a quarterly is become a most formidable document. It is no longer the expression of some evanescent thoughts but an elaborate and exhausting disquisition on the subject in hand. That above mentioned on cotton spinning machines is a history of cotton spinning machines and their inventors. That on the religious revivals is an attempt to deal with a difficult and extraordinary subject and one concerning which there is much diversity of opinion. The conclusion of the writer is, that the revivals are productive of good and much to be encouraged.

THE NORTH BRITISH REVIEW. New York: Leonard, Scott & Co.

The quarterly number of this able but erratic review, as usual, abounds with much to interest—much to gainsay—much to doubt—and much to think about. In it there is a very singular contribution headed the Silence of Scripture, wherein the writer comments with much emphasis about the silence of Scripture on many points of interest but not of vital importance to the Christian, such as the personal appearance of Christ, history of the Virgin Mary, &c. The writer argues that from the silence of Scripture on these and similar points all must feel that the Christian Churches have a larger charter of freedom than in our local and ecclesiastical differences we imagine, and promises at no very distant day to return to his subject. An article on "Form and Colour" we recommend both to the philosopher and the artist. The followers of Wesley will find in "Wesleyan Methodism" much useful information.

THE ECLECTIC MAGAZINE, APRIL, 1860. New York: W. H. Bidwell.

Whenever we receive a number of this welcome magazine, we at once turn to the embellishments. In the number for April we have a good likeness of the late Lord Macaulay, and a most striking likeness of Longfellow the poet. The embellishments are a most attractive feature. For works of art they cannot be surpassed, and the Editor usually manages to make most acceptable selections. The letter press is, as usual, varied and interesting.

GODEY'S LADY'S BOOK, APRIL, 1860. *Louis A. Godey, Philadelphia.*

The engravings in "Godey" have not only the merit of being beautiful, but instructive. The "Lady's Book" is a universal favourite with ladies, and so well it may be. For thirty years its Editors have labored to make it worthy of their patronage, and in this they have succeeded in a marked degree. And notwithstanding its great success, no exertion is spared to secure a continuance of that public support which has been so honestly acquired. Terms, for one copy, $3 per annum.

THE UNITED STATES INSURANCE GAZETTE. Edited and published by G. E. Currie.

The number for March is received, and is the first received for several months. We are always glad to see the Insurance Gazette. It is a most industrious compilation of facts and statistics bearing on a topic about which not only underwriters but law reformers and legislators are much concerned.

APPOINTMENTS TO OFFICE, &c.

RECORDER.

WILLIAM HORTON, of the City of London, Esquire, Barrister-at-law, to be Recorder of the City of London.—(Gazetted 17th March, 1860.)

CORONERS.

HENRY GOODMAN, to be an Associate Coroner for the County Lincoln—(Gazetted 3rd March, 1860.)

ALFRED WYATT, to be an Associate Coroner for the County of Ontario.—(Gazetted 3rd March, 1860.)

NOTARIES PUBLIC.

JAMES HANVEY, of St Thomas, Barrister-at-law, to be a Notary Public for Upper Canada.—(Gazetted 3rd March, 1860.)

ALEXANDER SHAW, of Lancardine, Attorney-at-law, to be a Notary Public for Upper Canada.—(Gazetted 17th March, 1860.)

GEORGE DOUGLAS FERGUSSON, of Fergus, to be a Notary Public for Upper Canada.—Gazetted 24th March, 1860.)

TO CORRESPONDENTS.

A DIVISION COURT CLERK—ANOTHER LAW STUDENT—AN OLD BARRISTER—PAUL DUNN—MARCUS GLYN—ANOTHER LAW STUDENT—Under "Division Courts."

TOWNSHIP CLERK OF RAINHAM.—W.—ROWLY KILBORN—Under "General Correspondence."

The communication of our correspondent "Subscriber" is not such a communication as we are usually disposed to answer. It is not of sufficient general importance and is besides too long for insertion, and looks too much as if addressed to us to save a fee to counsel. For the satisfaction of our correspondent we may however state that, so far as we have formed any opinion on the case stated it is against C's right to relief in Equity. He could not go into Equity with clean hands. What was assigned was not an endorsed note but a joint judgment.—EDS. L. J.