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DIARY FOR NOVEMBER.

1. Thurs.. *All Saints.*
3. Satur... Articles, &c. to be left with Secretary Law Soc.
4. SUN.... *23rd Sunday after Trinity.*
11. SUN.... *24th Sunday after Trinity.*
14 Wed.... Last day for service for County Court.
18. SUN.... *25th Sunday after Trinity.*
19. Mon .... Michaelmas Term begins.
23. Friday. Paper Day Queen's Bench. New Trial Day Common Pleas.
24. Satur... Paper Day Common Pleas. New Trial Day Queen's Bench. Declare for County Court.
25. SUN ... *26th Sunday after Trinity.*
26. Mon.... Paper Day Queen's Bench. New Trial Day Common Pleas.
27. Tues.... Paper Day Common Pleas. New Trial Day Queen's Bench.
28. Wed.... Paper Day Queen's Bench. New Trial Day Common Pleas.
29. Thurs.. Paper Day Common Pleas.
30. Friday, *St. Andrews.* New Trial Day Queen's Bench.

THE

Upper Canada Law Journal.

NOVEMBER, 1866.

THE RETIREMENT OF CHIEF JUSTICE LEFROY.

History tells us that last century was fruitful in the birth of many great men, of whom some have gone to render their last account, whilst some of those still with us are living monuments of gigantic intellect and immense physical powers. Small wonder is it then that after the lapse of the best part of a century, their strength is on the wane.

The names of some of the eminent lawyers who have presided on the English Bench: Lord Lyndhurst, Lord St Leonards, Lord Brougham, and Chief Baron Pollock, for example, are sufficient to exemplify the statement.

Quite as remarkable a man in many ways as some of the above, is the Right Hon. Thomas Langlois Lefroy, late Chief Justice of the Court of Queen's Bench, in Ireland. He was born in the early part of 1776, and is therefore more than ninety years of age. He was called to the Irish Bar in 1797, was appointed Baron of the Exchequer in 1841, and in 1852, was promoted to the Chief Justiceship, an office which he resigned only a few months ago.

The long retention of office by one so advanced in years—who, it might be thought would gladly, at his time of life, be rid of the toils of Court, who had done much more than is the usual share of labour allotted to man, and might therefore gracefully have retired and left the work to be carried on by younger men—has been the cause of much discussion in England as well as Ireland, both in the Houses of Parliament and by outside members of the profession. As much as ten years ago the advisability of his removal, or rather a suggestion to him to retire, was moved in Parliament, but was at once put down. During the early part of this year however the subject was again brought up, and in a much more intensified form—motions not founded on constitutional precedents, or on the statutes in that behalf were brought forward in both Houses of Parliament by political opponents. whilst correspondents in Ireland, in the same interest, made statements more or less founded on fact, as to his partial, some even said total incapacity, to conduct properly the business of his Court, and referring particularly to his conduct on a trial for murder in King's County. These attacks only seemed to strengthen the resolve of the sturdy old Judge to stand his ground and choose his own time for retiring from the Bench. His view of the matter may best be given in his own words in his reply to an address from the Grand Jury of King's County at a recent assize:—

"Allow me to express my cordial thanks for the gratifying address I have just received. Such testimony as yours to the efficient discharge of my judicial duties during the long period for which I have presided at the assizes of your county must ever be a source of honourable pride and pleasure to me. And if under ordinary circumstances your address would be calculated to afford me pleasure, I owe it to you to say how much its value is enhanced by recent events, affording, as it does, the best refutation of the unworthy and unjust attack to which I have been lately exposed. Most of you were eye and ear-witnesses at the trial which was made the groundwork of that attack. Such an address from witnesses of your intelligence, rank, and independence may well compensate for any personal annoyance I have heretofore suffered from that attack. But it is on public rather than on personal grounds that attacks of this kind are to be deplored. Our law has provided ample security against incompetence or neglect of duty on the part of those who occupy the judicial seat, and no one who values the independence of our Judges can see with indifference those who should be the protectors of that independence becoming its assailants. No one can see without regret the remedy which was

intended to provide against incompetence set aside, and another course adopted for party purposes, which only tends to bring the administration of the law into contempt. Such a course might have intimidated a weaker man to fly from the post of duty, though in my case it only served to strengthen my determination never to yield to menace what a sense of duty had not led me to concede. But I forbear to dwell further on this topic, and I should gladly have avoided it altogether were it not that on this last occasion of addressing you judicially, I feel it due to the Bench and to the law itself to leave on record my protest against a course of proceeding as mischievous as it is unconstitutional."

The security against incompetence on the part of the judiciary to which he refers, is probably the acts of 12 & 13 Wm. III., cap. 2, and 1 Geo. III., cap. 23, from which it may be learned that the constitutional means of removing a Judge from the Bench is by an address to the Crown, moved by both Houses of Parliament. Thus there is given ample protection both to the public and to one who, in the position of a Judge, might reasonably be considered to be subject to improper pressure from a variety of sources—a pressure which it would be sometimes difficult to withstand were it not for the protection thus given combined with that inexorable fidelity to the trust imposed upon them, which has always distinguished the Judges of Great Britain.

The Chief Justice felt bitterly the course that was pursued by the Ministers of the Crown, whose duty it was, if he were shewn to be incompetent or untrustworthy, to remove him; or, on the other hand, to protect him from attacks, if the charges brought against him were not shewn to be sufficient, or founded on fact.

The subject looked upon as part of the constitutional law of the land, is well treated by one thoroughly versed in that branch of legal lore in the following words:—

"The great function of Parliament has been declared to be 'the maintenance of the Law, and the redress of grievances,' (6 Inst. 9 11.)

"The acts of 12 & 13 Wm. III., Cap. 2 and 1 Geo. III., Cap. 23, give power to Parliament to address the Crown for the removal of Judges from offices who are otherwise declared to be immovable, and points to the duty that devolves upon Parliament, to watch the course of the administration of justice. In the words of Sir Robt. Peel, Parliament, 'has not only the right to address the Crown for the removal of a particular Judge, but it has the right of exercising a superintending control over the manner in which they discharge their duties, and to institute enquiries relative thereto.

"But in the discharge of their high inquisitorial functions, Parliament has prescribed for itself certain constitutional rules and limitations to prevent undue encroachment upon the independence of the judicial office; and it devolves upon the advisers of the Crown as those who are peculiarly responsible for preserving the purity of justice inviolate, to guard against the intrusion of party influences in any proceedings of Parliament in matters affecting the administration of the law."

"But complaints to Parliament in respect to the conduct of the judiciary or the decisions of Courts of Justice," says the same writer, "should not be lightly entertained." It therefore becomes of interest to those who feel any interest in such matters, to know how a man of more than "fourscore years" *and ten* would occupy a position requiring the exercise, not only of a good memory, unremitting attention, and great legal knowledge, but also a considerable share of physical strength; and whether the complaints that were made were really founded upon facts which shewed the natural failings of the Chief Justice to be such, that it was incompatible with the public interests that he should any longer retain his seat on the bench.

It would be impossible for us to discuss this part of the subject at any great length. The reasonable conclusion, however, seems to be that there was an undoubted decline in the extraordinary vigor of the learned judge, which, however, contrasted strongly with what he had been than with what would have been expected of a judge of average capacity; a decline which prevented his thoroughly and effectually mastering a case before him, after the bodily and mental fatigue of a comparatively limited number of hours, and that after this time he could not sufficiently apply his mind or his memory to the case in point. But to say that his incompetence, so far as the instances adduced proved it, was such as to demand his instant removal, was, we think, to overstate the case.

Lord Chelmsford, in the debate on the Marquis of Clanricarde's motion, bringing up the alleged incompetence, stated, that from the year 1852 to that time there had been

only four writs of error from the Court of Queen's Bench, and during the last two years only one bill of exceptions had been offered to his ruling, and that for 25 years the Chief Justice had not missed a single circuit or town in any circuit, except in 1847, when he was suffering from low fever, and was obliged to be absent for six weeks.

Lord Chelmsford read also an extract from a letter written by Mr. Napier, the Ex-Chancellor of Ireland, wherein he says:—

"As to the Chief Justice, he is the best judge we have, although he is very old and not vigorous for complicated cases. But he always finishes his *nisi prius* cases sooner than the other chiefs."

This extract has been said to have "damned him with faint praise;" but even if the least favourable construction is to be placed upon it, this or even the most damaging allegations that were brought against him did not justify the unconstitutional manner in which the accusations were brought up Sir Robert Peel expressed himself very strongly on the inadvisability of putting even the proper machinery in force in such cases, for he denied "the wisdom, the prudence or the justice of arraigning a judge, unless upon some charge of personal corruption, of gross and grievous neglect of duty warranting his removal from the bench."

Political motives appear to have had some considerable share in dictating the course that was pursued by the enemies of the Chief Justice, and it is noticeable that the gravamen of their charge was that his age was so great that, *ipso facto*, he was incompetent, which in itself appears to show the weakness of the case for the prosecution—for one of the judges on the English bench, the Right Hon. Stephen Lushington, who still discharges the duty of his high office, is said to be a year older than Chief Justice Lefroy, and physically more feeble.

The place was wanted for the Whig Attorney General, Mr. Lawson; but the Chief Justice feeling aggrieved at the course which had been taken by his political opponents, and it is also said, having no love for the Whigs, determined not to give way to such a pressure, and accordingly refused to resign, as it was hoped he would have been induced to do, until after that party had gone out of office.

No sooner had Lord Derby and the Tories returned to power than the Chief Justice without solicitation resigned the high office which in spite of political opponents he had so long held.

The whole subject, as viewed from a constitutional and historical point of view, is interesting, and much more so, as being connected with such an eminent man as Chief Justice Lefroy, a man whose active career has been, we believe, longer than that of which any lawyer of this or any former age can boast.

SELECTIONS.

THE EXTRADITION OF LAMIRANDE.

He who would desire to laud the administration of justice in this land, to speak pleasant things of the energy and vigour of the Bench in carrying out laws and treaties with the purpose of doing substantial justice, or who would fain dwell with well buttered phrase on the manly and upright firmness of public officers in keeping within the limits of their duty, he, we say, who would like to speak or write after this fashion, had better avoid the subject of extradition, and our extradition cases. Some fatality hangs over them, some blunder besets them, some suspicion of crooked dealings ever attends them. The most recent case, that of Lamirande, only furnishes another unfortunate example. We see a man carried from our shores who in the opinion, be it right or wrong, of the judges of our highest Court, is innocent of the crime imputed to him. As far as the individual is concerned, for aught we know, there may be no room for sympathy or commiseration. Unfaithful to the trust reposed in him, fearing to face a jury of his countrymen, betaking himself beyond the seas, and, in the first instance, successfully evading his captors, he is probably as great a culprit as any poor rogue who is really and truly guilty of forgery as defined by our law. But we did not expect to see a counsel learned in the law, and holding high office, attempting to divert attention from the true issue by representations of the worthlessness of the individual, or forgetting that an innocent man may to-morrow be the victim of some hasty and high-handed proceeding, which would seek shelter behind the precedent of Lamirande's case, if such precedent were permitted by the silence and apathy of the public.

But one practical result seems likely to flow from the unfortunate occurences of the past few weeks. The privilege of the great writ is to be carefully guarded now, when the fair fame of the country has been tarnished, and when American citizens amongst us talk of placing themselves under the consular flag for protection. Henceforth, some (not all) of our judges have stated, the writ of habeas corpus is to issue immediately, and the prisoner is thus to be brought before the Court.

As a record of a case of no little importance it may be interesting that the facts should be stated, and we accordingly avail ourselves of

the statement drawn up by Mr. Justice Drummond, read by him in Chambers on Tuesday, the 28th of August, and subsequently forwarded to His Excellency the Governor General. We also append a letter written to the *Montreal Gazette*, by Mr. Ramsay, stating the case from an opposite point of view, for the satisfaction of those who may think the Judge's narrative too highly coloured.

The statement of Mr. Justice Drummond is as follows:—

"On the 26th July last a document under the signature of His Excellency the Governor General, purporting to be a warrant for the extradition of the petitioner, issued under the authority vested in his Excellency by the provisions of the statute passed by the Legislature of the United Kingdom of Great Britian and Ireland, in the sixth and seventh years of Her Majesty's reign, intituled "An act to give effect to a convention between Her Majesty and the King of the French for the apprehension of certain offenders," setting forth that the said petitioner stood accused of the crime of '*forgery by having, in his capacity of cashier of the Bank of France at Poitiers, made false entries in the books of the said bank, and thereby defrauded the said bank of the sum of seven hundred thousand francs;*' that a requisition had been made to His Excellency by the Consul-General of France in the Province of British North America, to issue his warrant for the arrest of the said prisoner, and requiring all the justices of the peace and other magistrates and officers of justice within their several jurisdictions, to aid in apprehending the petitioner and committing him to jail.

Under this document the prisoner was arrested, and after examination before William H. Brehaut, Esq., police magistrate and justice of the peace, was fully committed to the common jail of this district on the 22nd day of the current month of August.

On the following day, between the hour of 11 and 12 o'clock in the forenoon, notice was given in due form by the prisoner's counsel to the counsel charged with the criminal prosecutions in this district, that he (the counsel for the prisoner) would present a petition to one of the judges of the Court of Queen's Bench who might be present in Chambers at one o'clock in the afternoon of the following day, (the 24th) praying for a writ of *Habeas Corpus* and the discharge of the prisoner.

At the time appointed this petition was submitted to me.

Mr. J. Doutre appeared for the petitioner, Mr. T. K. Ramsay for the Crown, and Mr. Pominville for the private prosecutor.

A preliminary objection, raised on the ground of insufficient notice, was overruled, a manner so lucid, that I soon convinced myself, after perusing the statute cited in the warrant of extradition, that the warrant itself—the pretended warrant of arrest alleged to have been issued in France—*arrêt de renvoi*—and all the proceedings taken with a view to obtain the extradition of the petitioner, were unauthorized by the above cited statute, illegal, null, and void, and that the petitioner was, therefore, entitled to his discharge from imprisonment.

But as Mr. Pominville, whom I supposed to be acting as counsel for the Bank of France, wished to be heard, I adjourned the discussion of the case until the following morning. I would have issued the writ before adjourning, had the counsel for the prisoner insisted upon it. But that gentleman was no doubt lulled into a sense of false security, by the indignation displayed by the counsel for the Crown, when Mr. Doutre signified to me his apprehension that a *coup de main* was in contemplation to carry off the petitioner before his case had been decided.

On the following morning, Saturday, the 25th of this month I ordered the issuing of a writ of *habeas corpus* to bring the petitioner before me with a view to his immediate discharge.

My determination to discharge him was founded upon the reasons following.

1st. Because it is provided by the first section of the Act of the British Parliament to give effect to a Convention between HerMajesty and the King of the French, for the apprehension of certain offenders (6 and 7 Vic., ch. 75), that every requisition to deliver up to justice any fugitive accused of any of the crimes enumerated in the said Act, shall be made by an *ambassador of the Government of France, or by an accredited diplomatic agent;* whereas the requsition made to deliver up the petitioner to justice has been made by Abel Frederic Gauthier, Consul General of France in the Provinces of British North America, who is neither an ambassador of the Government of France nor an accredited diplomatic agent of that Government, according to his own avowal upon oath.

2ndly. Because by the 3rd section of the said statute, it is provided that no Justice of the Peace, or any other person, shall issue his warrant for any such supposed offender until it shall have been proved to him, upon oath or affidavit, that the person applying for such warrant is the bearer of a warrant of arrest or other equivalent judicial document, issued by a judge or competent magistrate in France, authenticated in such manner as would justify the arrest of the supposed offender in France upon the same charge, or unless it shall appear to him that the act charged against the supposed offender is clearly set forth in such warrant of arrest or other judicial document; whereas the Justice of the Peace who issued his warrant against the Petitioner, issued the same without having any such proof before him, as well as before me, in lieu of such warrant of arrest or other equivalent judicial documents, being a paper writing alleged to be a translation into English of a French document, made by some unknown and unauthorized person in the office of the counsel for the

prosecutor at New York, and bearing no authenticity whatever.

3rd. Because, supposing the said document purporting to be a translation of an *acte d' accusation* or indictment, accompanied by a pretended warrant for arrest and designated as an *arrêt de renvoi*, to be authentic, it does not contain the designation of any crime comprised in the number of the various crimes, for or by reason of the alleged commission of which any fugitive can be extradited under the said statute.

4th. Because by the first section of the said act it is provided that no Justice of the Peace shall commit any person accused of any of the crimes mentioned in the said act (*to wit murder, attempt to commit murder, forgery, and fraudulent bankruptcy*) unless upon such evidence as according to the laws of that part of Her Majesty's dominions in which the supposed offender shall be found, would justify the apprehension and committal for trial of the person so accused, if the crime of which he shall be accused had been there committed.

Whereas the evidence produced against the Petitioner upon the accusation of forgery brought against him before the committing magistrate, would not have justified him in apprehending or committing the Petitioner for the crime of forgery, had the acts charged against him been committed in that part of Her Majesty's dominions where the Petitioner was found, to wit, in Lower Canada.

5th. Because the said warrant for the extradition of the Petitioner, as well as the warrant for his apprehension, does not charge him with the commission of any of the crimes for which a warrant of extradition can be issued under the said statute; inasmuch as in both of the said warrants the alleged offence is charged against the Petitioner as "*forgery by having in the capacity of Cashier of the branch of the Bank of France at Poitiers made false entries in the books of the Bank, and thereby defrauded the said Bank of the sum of seven hundred thousand francs.*"

Whereas the said offence as thus designated does not constitute the crime of forgery according to the laws of England and Lower Canada, for, to use the words of Judge Blackburn, when he pronounced judgment concurrently with C. J. Cockburn and Judge Shee, in a case analogous to this (*Ex parte Charles Windsor*, C. of Q.B., May, 1865), "Forgery is the false making of an instrument purporting to be that which is not; it is not the making of an instrument purporting to be that which it is: it is not the making of an instrument which purports to be what it really is, but which contains false statements. Telling a lie does not become a forgery because it is reduced to writing."

The Gaoler's return to this writ of *Habeas Corpus* was that he had delivered over the prisoner to Edme Justin Melin, *Inspecteur Principal de Police de Paris*, on the night of the twenty-fourth instant, at twelve o'clock, by virtue of an order signed by M. H. Sanborn, Deputy Sheriff, grounded upon an instrument signed by his Excellency the Governor-General.

It appears that the petitioner thus delivered up to this French policeman is now on his way to France, although his extradition was illegally demanded, and although he was accused of no crime under which he could have been legally extradited; and although, as I am credibly informed, His Excellency the Governor General had promised, as he was bound, in honour and justice, to grant him an opportunity in having his case decided by the first tribunal of the land before ordering his extradition.

It is evident that His Excellency has been taken by surprise, for the document signed by him is a false record, purporting to have been signed on the 23rd instant at Ottawa, while His Excellency was at Quebec, and falsely certified to have been recorded at Ottawa before it had been signed by the Governor General.

In so far as the petitioner is concerned, I have no further order to make, for he whom I was called upon to bring before me is now probably on the high seas, swept away by one of the most audacious and hitherto successful attempts to frustrate the ends of justice which has yet been heard of in Canada.

The only action I can take, in so far as he is concerned, is to order that a copy of this judgment be transmitted by the Clerk of the Crown to the Governor General for the adoption of such measures as His Excellency may be advised to take to maintain that respect which is due to the Courts of Canada and to the laws of England.

As to the public officers who have been connected with this matter, if any proceedings are to be adopted against them, they will be informed thereof on Monday, the 24th day of September next, in the Court of Queen's Bench, holding criminal jurisdiction, to which day I adjourn this case for further consideration."

The following is Mr. Ramsay's letter:—

To the Editor of the Montreal Gazette.

Sir,—The *Herald* of this morning contains two columns of the report of a pretended judicial proceeding in the Lamirande case, accompanied by a characteristic attack on the Attorney-General It is very plain that the declamation of Mr. Justice Drummond and Mr. Doutre *apropos* of nothing, (for there was no case, and neither of them ventured to move for or take any rule or other proceeding,) was simply intended to give Mr. Cartier's enemies a pretext for abusing him,—so impossible is it, without rectitude of purpose and complete sobriety, to overcome the recollection of political defeat. But my object is not to review or attempt to answer the contradictions and absurdities of these tirades. I feel perfectly satisfied that nothing I can say or write

will ever prevent Mr. Justice Drummond from at all times preferring effect to truth; and therefore my explaining to him that to call the giving up of a prisoner on the warrant of the Governor, kidnapping, is simply a naked falsehood, would be pure waste of time. I shall therefore briefly state how and why Lamirande was given up, and from that it will at once be obvious that the outcry of Mr. Drummond and Mr. Doutre is simply beside the question.

We have a treaty with France enforced by an Imperial statute, by which we agree to give up persons accused of certain offences therein enumerated. The procedure is this: The French Government claims the extradition of the accused, and the Governor (in the colonies) issues his warrant, charging all justices, and officers of justice to aid in the capture of the fugutive. On his apprehension he is brought before a magistrate, who deals with the charge, or who ought to deal with it, precisely as if the offence had been committed here. This being done, the prisoner is either fully committed or he is discharged. If committed, the papers are forwarded to the Government, and the Governor issues his warrant for the extradition of the prisoner, who is at once delivered up, provided there is no other cause (*i. e.*, criminal cause) for his detention. It is an error to suppose that there is any right of appeal from the decision of the Governor; but if application is made in proper time a writ of *habeas corpus* may be procured, which would have the effect of bringing the prisoner before the Court or Judge to examine into the cause of his detention. In Lamirande's case no such writ was either granted or issued, and thefeore it is positively untrue that the prisoner was in the hands of the Court or Judge, as Mr. Drummond said. Without this writ there was no power known to the law to stop the execution of the Governor's warrant: and this I at once explained to Mr. Justice Drummond in Chambers on Saturday morning, when he first spoke to me on the subject. I then told him, that had the Sheriff consulted me, which he did not, I should have advised him to obey the warrant without a moment's loss of time. So unanswerable was this that Mr. Drummond shifting his ground, said that he had put in a commitment before the removal of the prisoner; but I afterwards found that what he was pleased to call a commitment, was no commitment at all; but an order not to deliver Lamirande up on any warrant whatever. What renders this proceeding doubly ludicrous is that Mr. Justice Drummond was the person most terribly severe upon Mr. Justice Mondelet for his order in the Blossom case; yet when Mr. Mondelet gave that order he was sitting as the Court of Queen's Bench, whereas when Mr. Drummond gave his, he was prowling about the town at night, without any official character whatever, but that of a Justice of the Peace. On Saturday afternoon Mr. Justice Drummond again shifted his ground, and he was pleased to tell me that it was my *duty* to interfere in some way or another, and prevent the Governor's warrant taking effect. For Mr. Justice Drummond's information, let me say that when I seek a guide as to duty, I shall endeavour to select some one more *immaculate than him*: but in so far as regards the present case, I may add, that I was very unlikely to commit an illegality to prevent the extradition, inasmuch as I highly approve of it.

And now one word to the prisoner. Lamirande was cashier of the Bank of France at Poitiers, and he there robbed his employers of 700,000 francs (£28,000 stg.,) falsified the books and entries (forged as the French court calls it) and fled to the United States. Being arrested there and about to be extradited, he managed to drug his guard and escape to Cannada, while his lawyer stole the *arrêt de renvoi*, or French indictment, which formed part of the record before the commissioner. And this is the person for whom Mr. Justice Drummond felt so lively a personal interest as to induce him to abandon the retirement of his home, and endure the fatigue of sitting in Chambers for, I believe, almost the first time since the beginning of vacation. While talking of conspiracy it would be however interesting to learn from Mr. Drummond, at whose invitation he undertook to adjudicate in Lamirande's case. The effort was not unpremeditated, for the interesting fact was duly *heralded* on Friday morning. Your obedient servant,

T. K. Ramsay.

Montreal, 27th August, 1866.

The Governor General telegraphed by the cable a statement of the case to the Colonial Secretary, and a private telegram was also sent to solicitors in London, but all efforts to detain Lamirande in England proved unsuccessful, chiefly because there was no Judge in London (vacation having commenced) before whom an application for *habeas corpus* could be made. Lamirande was accordingly taken to Paris.*—*Lower Canada Law Journal.*

TESTIMONY OF DEFENDANTS IN CRIMINAL PROSECUTIONS.

Bangor, Me, Feb. 24th, 1866.

My Dear Sir,—I received a few days ago a note from my friend Governor Cony, advising me that you were desirous of ascertaining the practical working of the change in the law of evidence, recently adopted in this state, by which the accused in criminal trials are, at their own instance, made witnesses.

The opinions of individuals on this subject will be more or less influenced by their pre-

* This gives the principal features of this singular case more or less discreditable to all the parties concerned. Proceedings have been taken by Justice Drummond to punish Mr. Ramsay for contempt, with what result we scarcely care to enquire as such unseemly conduct of both Bench and Bar finds no parallel we are glad to say with us in Upper Canada.—Eds. L. J.]

conceived views as to the wisdom and expediency of the proposed change. I had no doubt that the interests of justice required that it should be made, and, so far as I had any influence, freely used it in favor of its adoption. Nothing has since occurred to change or even weaken my previous opinions. I have tried criminal cases in which the accused being innocent, owed his honorable acquittal in no slight degree to his own testimony, and the clear and frank manner in which it was delivered. In one case, notwithstanding the innocence of the prisoner, as was subsequently most abundantly established, and notwithstanding his own testimony, the jury found him guilty. So being guilty, and yet testifying to his own innocence, the jury in some cases have justly convicted, and in others have erroneously acquitted the prisoner.

But erroneous verdicts will occasionally be rendered, whether the accused are admitted to testify or not, as long as juries shall be composed of fallible men. No rules of admission or exclusion of evidence can be established which will prevent misdecision. The results may not vary in many cases, whether the prisoner is received or rejected as a witness, but in all trials there will be a greater assurance of correct decision, and a greater confidence that justice has been done, than where evidence, and that perhaps of the greatest importance, has been withheld.

But the expediency of the law in question cannot be determined by the results of particular cases. It cannot depend on the opinions of individuals. It must rest upon the general reasoning applicable to the subject. All judicial decisions should be based upon evidence. All the evidence attainable and needed for a full understanding of the case should be forthcoming, unless the evils of delay, vexation, and expense, consequent upon its procurement, should exceed those arising from possible misdecision.

The exclusion of evidence is the exclusion of the means of correct decision. The greater the mass of evidence excluded, the less the chances of such decision, until, if all evidence be excluded, resort must be had only to lot.

It is but a few years since the most strenuous opposition was made to those changes in the law of evidence by which, in civil cases, parties and those interested in the result have become admissible witnesses. Those changes when proposed, struck with horror that class of minds whose conservatism consists in the love of abuses, and in the hatred of their reformation; a love and a hatred the more intense in proportion to the atrocity of the abuses existing, of which the reform was attempted.

These changes have been made, and being made have received the general approbation of the entire judicial body in England; in this country with hardly an exception. Indeed, the wonder now is how any one ever could expect justice would be done when the very material—*pabulum justitiæ*—as Lord Bacon terms it, was withheld from those whose duty it was to decide.

The propriety of admitting parties being conceded, the question naturally occurs, Why should they not be received in criminal as in civil cases? The object in all trials is the same—the ascertainment of the truth. The greater the evils of misdecision in criminal than in civil cases, the greater the necessity of resorting to all available sources of information for the purpose of averting those evils.

The truth is wanted from any and every source. The prisoner knows it. The law presumes him innocent. If regard be had to the legal presumption applicable to each and every prisoner, he should, being presumed innocent, be received to testify. Being innocent, he would not resort to falsehood to establish such innocence. Being innocent, and no other evidence of such innocence being attainable from any source, his exclusion is the exclusion of all possible means on his part of making out his defence. Being innocent, and other proof of the fact attainable, who does not perceive the importance of his evidence to explain all doubtful circumstances, so that he may not only be acquitted, but that the acquittal shall leave no stain behind.

Of all exclusions, that of a man presumed innocent would seem to be the most monstrous. Is he innocent, and shall he not be heard to establish his own innocence? Every motive, if innocent, is averse to falsehood.

Is he guilty? His guilt is not proved. It may be that he is, but it is not to be assumed in advance, and the assumption made the ground of exclusion—an assumption at variance with legal presumptions.

If guilty, and he is a witness at his own instance, the objection will be made that receiving his testimony may lead to perjury. But the essential sin of perjury is the falsehood uttered, aggravated more or less by the occasion of its utterance.

The prisoner being guilty pleads not guilty. In so doing he utters a lie, just as much as when he makes a false answer as to any other fact about which he is interrogated. The prisoner being a witness denies in detail what before he had denied in the gross. In the one case, it is a lie without, in the other it is a lie with circumstances. It is idle to say that the falsehood in its generality is not equally a lie as when it is compounded of many particulars.

True, in the one case the prisoner is under oath, in the other he is not. But the falsehood is the essential sin, and it exists as much in the one case as the other. The superadded ceremony may affect the legal but it cannot the moral character of the falsehood.

The obligation to utter the truth is of universal application. Undoubtedly, the prisoner being guilty cannot defend without the utterance of a lie; but if he cannot it may be a very good reason why he should not make the attempt, but a very poor one why he should

lie. No one who would not deprive a prisoner of the right of self defence, even by uttering a falsehood by way of plea, can consistently object to giving him the right of denying, explaining, or qualifying the charge as a witness.

The prisoner guilty, upon examination and cross-examination, may utter the truth. If so, justice is done. The great object of judicial proceedings is accomplishment.

Suppose the prisoner answers falsely, it by no means follows that his false answers will be credited. But the possibility of false testimony is no reason for exclusion. To exclude a witness because he may lie, is to exclude all witnesses, because there is no one of whom the truth can be predicated with assured certainty against the pressure of all conceivable motives acting in a sinister direction. The exclusion presupposes guilt which the law does not presume,—and probable perjury to sustain such guilt—two crimes: one committed; the other to be committed by the very person whom the same law presumes guilty of no crime whatever.

To exclude for presumed guilt is to determine in advance and before hearing, and adversely to the prisoner, the question in issue. It is, when the question of guilt or innocence is on trial, to exclude for guilt before guilt is or can be ascertained. The presumption of innocence logically requires the admission of the innocent.

But guilt is no ground of exclusion. The law admits the avowed accomplice, expecting a pardon, his pardon dependent upon the delivery of inculpatory evidence against the prisoner, whose innocence is a presumption of law. Admitted guilt received and heard; presumed innocence refused a hearing. Crime then constitutes no reason for the exclusion of a witness. The real ground of exclusion is that he is a party to the record. So that the participant in crime is heard, while the presumedly innocent party to the record is rejected, and for that reason alone. But the mere fact that a man's name is on the docket of a court, is no very good reason why his testimony, when required for the purposes of justice, should for such cause be rejected. In civil cases it has been deemed insufficient; much more should it be in criminal cases.

So, too, the law looks with great suspicion upon hearsay evidence. In the case of hearsay, whether confessional or other, there are at least two, and there may be more, witnesses whose conjoint testimony, original or reported, serves as the foundation of judicial decision. When the percipient and narrating witness are united in one and the same person, if he speak the truth and be believed, he determines the cause. In hearsay the narrating witness is not the precipient or effective witness: he speaks or purports to speak from the narration of others, and those others are the efficient witnesses. When the alleged confessions of a prisoner are received, *the efficient testimony consists in the statements thus reported.* But these confessions may have been misunderstood in whole or in part from inattention, misrecollected from forgetfulness, or misreported from design. They may be indistinct and incomplete, embracing but a portion of the truth; and the omissions which interrogation would have supplied, may produce the sinister effect of falsehood. The sanction of an oath and the securities to trustworthiness, afforded by examination and cross-examination, are wanting. Yet this very evidence thus seen to be inferior in trustworthiness is received, while the party present in court is not permitted to correct the errors of the narrating witness, whether arising from inattention, misrecollection, or design, nor if the confessions were indistinct or incomplete to supply the deficiencies arising from such indistinctness or incompleteness, and that too when under oath and subject to examination and cross-examination.

The securities against testimonial falsehood are the sanctions of religion, examination and cross-examination, and the fear of temporal punishment. These are all wanting in confessions, *as against the person whose confessions are offered to his prejudice.* They are attainable, and attained in all their strength, if the prisoner is examined.

The result is, that the *prisoner would be a witness in both cases.* In the one case without any of the securities for testimonial trustworthiness, *he testifies through the lips of the narrating witness by whom his confessional utterances are reported.* In the other case, when his testimony would be delivered under all the recognised safeguards against falsehood, it is rejected. Without any securities against falsehood, incompleteness, or indistinctness, the party is a witness; with every one attainable in their utmost efficiency he is excluded. Testimony recognised as inferior in every essential of trustworthiness is received, while the best evidence—the direct statements of the party under oath and subject to examination and cross-examination, are rejected.

The accused may lie, and the jury may be deceived thereby. While there is no witness whose statements may not be false, so there is no witness to whose statements, true or false, it can be made certain in advance that the just degree of credence will be given by the jury.

But what is the danger of deception? The prisoner is a witness at his own instance. Does he answer evasively, or, being cross-examined, does he refuse to answer? Silence may be equivalent to confession; evasion indicates that a true answer would endanger the person interrogated. Is the witness false in all his statements? Each particular falsehood endangers; the more numerous the falsehoods the greater the chance of detection and disproof. Is the answer partly true and partly false? Each truth is in eternal warfare with the accompanying lie. Truth and falsehood have no greater fellowship than has new wine

with old bottles. The truth uttered by the witness imperils the lie. Every truth he utters endangers himself. Every truth uttered by another, every true witness, increases his peril. The refusal to answer, the evasive, the false answer, the not less significant and expressive silence, are each and all circumstances of no slight force in leading the minds of those who are called upon to decide to a right conclusion.

The jury may, undoubtedly, place too great reliance upon the testimony of the prisoner, as they may upon that of any other witness. They are deemed competent to weigh and compare the various witnesses for and against the prisoner. Are they any the less competent to weigh his? Does his position add to his credibility? Are the circumstances which surround him such as to induce undue credence? Competent to weigh the testimony of parties in all civil cases, does that competency vanish when the prisoner on trial is called from the criminal bar to the witness stand? The appearance and manner of the prisoner, the probability of his statements, whether contradictory or contradicted, are all open to the consideration of the jury, and they are as competent to form a correct estimate of his testimony as of any other witness.

Hearing cases by the halves is but a bad way of getting at the truth. To receive the prosecutor and reject the prosecuted, to hear the accuser and refuse to hear the accused, would undoubtedly tend much to facilitate decision and relieve the judge of fact, of the difficulty of weighing and comparing conflicting testimony. Still greater would be the relief from labor and responsibility if no evidence was heard, and resort was had to the aleatory chances of the dice. This aleatory mode of deciding cases seems to have tickled the fancy of Rabelais, according to whom Mr. Justice Bridlegoose resorted to chance, "giving out sentence in favour of him unto whom hath befallen the best chance of the dice." But it is hardly worth the while accurately to adjust and carefully to determine the relative merits of trying cases by halves, and of deciding them by the throwing of dice.

In my judgment, the interests of justice require the admission of the party alike in criminal as in civil cases. The acquittal of innocence is thereby more probable; the conviction of guilt more assured. The prisoner, if innocent, will regard the privilege of testifying as a boon justly conceded. If guilty, it is optional with the accused to testify or not, and he cannot complain of the election he may make. If he does not avail himself of the privilege of explanation, it is his fault, if by his own act he has placed himself in such a situation that he prefers any inferences which *may* be drawn from his refusal to testify, to those which *must* be drawn from his testimony, if delivered. If he testifies, and truly, justice is done. If falsely, and justice is done, however much he may complain, the public will little heed his regrets.

I have hastily called your attention to some of the considerations bearing on this question. They will be found most elaborately examined in the masterly work of Bentham on the "Law of Evidence," where the reasons for the proposed change are stated with a cogency of argumentation unanswered and unanswerable.

I am, with great consideration,
Yours most truly,

John Appleton.

John Q. Adams, Esq.,
House of Representatives, Boston.
Chairman of the Committee on the Judiciary,

We have received the foregoing copy of Chief Justice Appleton's letter, upon the propriety of admitting defendants in criminal cases to give testimony, on their own behalf, if they so elect. The letter was addressed to the Committee on the Judiciary, at their request, and its suggestions adopted by them, and reported to the House of Representatives, in the form of a bill, which is expected to become a law of the Commonwealth of Massachusetts.

The suggestions of the learned Chief Justice was received by the profession with great interest and respect, upon all subjects, but especially in regard to evidence, which he has made a specialty for many years. The author is an acknowledged advocate of Law Reform in the department of procedure and practice, and his thorough and conservative manner of handling these important questions, has attracted deserved attention and regard, upon both sides of the Atlantic. His able letter to Mr. Sumner, in regard to the Right of Equality before the Law, for all races and classes of men, was republished in the London Review of Jurisprudence, the leading law periodical in the British Empire: and many of his other articles have attracted more attention in Europe than those of almost any other American law writer. We have thought, therefore, that we could not do the profession a more essential service, than by reproducing this letter in our own pages.

The views of the author upon this and kindred subjects have one very important merit, in our estimation, which we are not often able to perceive, in the same prominence, in the suggestions of most other advocates of legal reform. For the most part, and especially in this country, legal reform, although professedly carried forward under the attractive sobriquet of abrogating time-honoured abuses, and restoring simplicity and truth, has, fortunately or otherwise, fallen into the hands, for the most part, of a class of persons, who seem to be oppressively pervaded with a sense of false sympathy, for every one who comes in any way under the restraints or censures of the law. With that class of men the grand aim seems to be, to devise some scheme whereby every man will be able to set the law at defiance, and successfully to resist its

ministers. This may seem an overstatement of this view of the question, but we sincerely believe it is not.

Law reformers of this class assume in the outset, that almost every man who comes under the censure of the law is really innocent, and being so, the desideratum is, to bring such appliances to bear upon his case as will insure an acquittal. It is with this view, that the admission of defendants in criminal cases to testify in their own behalf has been advocated; chiefly, as we believe, because it is expected that in this mode, every innocent man will be enabled to escape conviction. And as the law presumes every man innocent until convicted, many have so roused their humanitarian sympathies in behalf of the unfortunate class accused of crime, as almost to desire their universal acquittal. It is this class of law reformers that has rendered the whole subject, so far as it applies to criminal procedure, distasteful and almost disgusting to men of conservative sympathies, and who have had much experience in the administration of criminal justice.

With this class of law reformers Chief Justice Appleton can have no sympathy. He believes that most men accused of crime are veritably guilty, and that they should be legally convicted and punished; and like a sensible man, he advocates the admission of defendants in criminal cases to testify in their own behalf, if they so elect, because he expects, that under the operation of such a law, the guilty will be more sure of conviction and punishment, and that the innocent will be more sure of escape; a result which every good man ought to desire. And we believe he is entirely right in his estimate of the effect of such a statute, and especially in regard to the guilty. For, whether they accept the proffered privilege or not, the effect will be almost sure to quicken the tendency toward, and to increase the certainty of their conviction. And it is in this view only that we should feel prepared to give our adhesion to the proposed change; and it has also been from our thorough conviction that it must and will have the effect to secure the conviction of many, who would otherwise have escaped, that we have hesitated in regard to so radical a change. We have all along had doubt, whether this is not virtually compelling a guilty man to give evidence, upon his final trial, against himself. For although the act in terms leaves the matter to his own election, no one can be so simple and unsophisticated, as not to comprehend, that if the respondent has the right to give testimony in his own behalf, and declines to avail himself of the privilege, it cannot fail to have almost the same effect as if he had given testimony against himself. The effect of the act therefore is, practically, to require defendants to testify in criminal cases of every grade, which is so essential a departure from the spirit and principles of the English law, that we should hesitate about adopting it. It is tendering the accused an alternative which, if he is guilty, he can neither accept or decline, without detriment, of a fatal character, to his cause. But we feel no disposition to discuss the matter further. The surest test will be to try the thing, and we apprehend that is the only test which will satisfy the public mind in America upon the point.

If the statute should operate severely upon criminals, we should expect a great public clamor against it, and its consequent repeal. Those classes in our American society which hold the balance of power in the country, are not always overscrupulous in regard to the measures which they support, or the interests which they serve. The better-disposed portion of law-loving and law-abiding citizens may now feel that such a law will be convenient, in order to suppress vicious practices, in regard to drinking-saloons and gaming houses. But when these same moral and pious people come to see that they are thereby in danger of losing so many voters, that they will soon be in danger of losing power themselves, the edge of their zeal will become very essentially blunted.

We have within the last few days received an intimation from a source entitled to the highest regard, that what one of our contributors said in the January 1866 number of the Register, p. 138, as to the reason for repealing this law in Connecticut, that it was done on account of the general prejudice against the law in that state, is altogether a misapprehension. Our present correspondent says: "So far as I ever knew, prejudice had nothing to do with the repeal. That law had one year's trial. The impression with the profession and the judges was, that mercy to the accused demanded its repeal. And I think I may safely say, that those usually denominated criminal lawyers * *, were loudest in calling for a repeal of that act. If the accused testified, the jury were told that a man who would commit a crime would lie to get himself clear; and the jury would think so and disregard his testimony. On the other hand, if for any reason the accused did not avail himself of the privilege of testifying in his own favour, the jury were told he might have done so, and would were he not conscious of guilt; and the jury would say so too." * * * "The repeal [right or wrong] was, therefore, the result of the one year's *experiment*, and not of mere prejudice,"—as asserted by our former contributor. We confess to a strong inclination in favour of the soundness of the view of our present correspondent.

We regret that our present correspondent should have felt any annoyance at what he calls "a fling at the whipping-posts on Fairfield Common," contained in the article of our former contributer, as if it might be regarded as a reproach to the noblest of the Old Thirteen—Old Connecticut—that she had not dug up her whipping-posts sooner, when they all stood for the double office of "town-posts" as

well. We assure that gentleman that the last thing we should ever think of countenancing, would be an intentional insult to the state of Connecticut—the bluest and the best of all the Old Thirteen in our humble estimation. We honour and love her most sincerely, with all her thoughts, and not the less for her repeal of this statute, and for the reason assigned as well as the fact. Justice to the accused, and reasonable forbearance in the expedients resorted to for convicting, will always enable a state the more rigorously and unflinchingly to enforce the punishment of offenders, after they are convicted.

Our own experience has long ago convinced us, that it is better to give the accused every reasonable ground to secure a fair and thorough defence, and then the public will acquiesce more readily in the infliction of punishment, to the full extent of the law. Facilities for convictions will prove of little avail if the hand of the executioner and of the executive officer, in every department, is to be paralysed by a maudlin sympathy with the *offender* the moment he becomes a *convict*.

I. F. R.

Sir Fitzroy Kelly, before he ascended the bench, endeavored year after year to induce the Legislature to make the evidence of persons accused of crime admissible on their trial. But the fear of encouraging perjury and of breaking in on the great principle that the burden of proof lies on the Crown, while the prisoner is regarded by the law as personally passive under the evidence against him and for him, has hitherto deterred the House of Commons from acquiescing in the view that it is expedient thus to alter his position at the bar. The example in the United States has not prevailed over the ancient custom or, as some would call it, prejudice of the old country. But that example is well worth attention, notwithstanding the difference between the two systems of political equality and political subjection of one rank to another. The distinction between prosecution in the name of an elected governor and a hereditary sovereign is formal rather than substantial, and, as respects the criminal himself, citizens of the Union are not, we suppose more credible when indicted than British subjects. It is however possible that the notion of equality under the one Government may be accompanied with less tenderness toward an accused person than is felt under the other when the great power of the Crown is arrayed against a single man. Yet on the whole it is probable that the greater willingness of the States to admit reforms in what may be termed the constitutional branches of the law, and their greater readiness in carrying out such reforms, are owing to the less danger that there is in displacing any institution where all are comparatively new, than where all have grown and hung together undisturbed during the progress of many centuries of national existence. In the State of Maine, in March 1864, an Act was passed to legalise the testimony of prisoners in criminal cases, and the like law has been enacted in others of the States. Last April, at Boston, the committee on the Judiciary, to whom was referred the order of the House of Representitives relative to such an alteration in the law, reported a Bill for the purpose through Mr. John Q. Adams. This report, with a letter to Mr. Adams from Chief Justice John Appleton, of Maine, by whose influence and exertions the measure in that State was enacted, has been published

[After stating the argument of the Report the writer continues].

Such are the arguments in the Boston Report. The attempted analogy between the cases of father and child, and employer and agent, on the one hand, and the sovereign power in a State and a criminal under the proposed law on the other fails at once, by reason that neither the child nor the agent testifies on oath: and now according to the common law an accused may make any statement he pleases not on oath. Besides, there is a confidential relation between the parties in the instances mentioned. In other respects the chief point in the argument seems to be the subjecting of a prisoner to the imputation or suspicion which would fall on him from his silence, when he had the opportunity of clearing himself on oath and subject to cross-examination. The cross-examination is the important thing. A prisoner would probably not gain more with the jury by his oath than by a simple statement. Swearing to a statement cannot carry much weight, inasmuch as the jury would assume that a guilty man would be willing to swear to anything which would procure his acquittal. But the question of perjury would raise a difficulty? Is a prisoner's perjury to be punishable? How if the attempt to escape be successful? If it be successful, is the man to be afterwards indictable for perjury, and, if found guilty, is he to be tried again or not for the original offence? The report does not go to the bottom of the matter, and may be criticised as being of a plausible complexion.

Chief Justice Appleton's letter appended to the report was written to ascertain the practical working of the change made in Maine, by which the accused in criminal courts are, at their own instance, made witnesses. If the letter had set forth this practical working it would have been valuable. But the Chief Justice writes from the point of view that the expediency of the law in question "must rest on the general reasoning applicable to the subject," so he notes but little on the practical working. "I have," he says, "tried criminal cases in which the accused, being innocent, owed his honorable acquittal in no slight degree to his own testimony, and the clear and frank manner in which it was delivered. In one case, notwithstanding the innocence of the

prisoner, as was subsequently established, and notwithstanding his own testimony, the jury found him guilty. So being guilty, and yet testifying to his own innocence, the jury in some cases have justly convicted and in others erroneously acquitted the prisoner." This tends to confirm our impression that the prisoner's statement, whether made on oath or in the present manner, will produce much the same effect on the jury, and that the real question is not whether the prisoner shall be sworn or not, but whether, being sworn, he shall or shall not be subjected to cross-examination.—*Law Times.*

SERJEANTS-AT-LAW.

The death of the Queen's ancient serjeant causes a vacancy in one of the most honorable posts at the English Bar, and recalls to the mind some singularly interesting particulars in our legal history. Serjeants now-a-days have lost their privileges, and compete for professional success on equal terms with other barristers, but they have an ancestry far older and more illustrious than "Her Majesty's Counsel." The earliest Queen's Counsel were certainly not created until the reign of Elizabeth, but serjeants-at-law were in existence long before the period fixed as the beginning of legal memory. Although their dignity has been sadly impaired of late years, a short account of who and what they were, and are, will not, we think, be unacceptable or useless to our readers.

Every servant of the Crown, of whatever kind, was originally termed "servieos," and where land was held in return for the performance of some particular sort of service, the the holder became a tenant by serjeanty, and was called a "serjeant," a term derived directly from the Latin word "serviens." Among the services rewarded by the creation of serjeanties was that of administering justice in the various counties and boroughs of England, and indeed of Normandy also. In those early times judges of assize were unknown, and justice was, therefore, administered chiefly by local officers. These were called "king's serjeants," or else serjeants of the particular counties or boroughs to which they might be appointed. In boroughs their existence cannot be traced lower than a very early date. The rise of commerce increased the number of incorporated towns, and gave such importance to the municipal authorities that ere long the king's "serjeant" had to make way for the mayor and aldermen. In one of two places, however, he still survived, and the city of London to this day has its "common serjeant," whom, however, by the favour of Edward the Second, the citizens, and not the Crown, elect. In counties the serjeants had a longer existence, but even there for hundreds of years their functions have been performed by justices of the peace and the judges of assize.

When we remember the state of popular education even as late as a century ago, we may doubt whether the change from a trained lawyer to a boorish squire, who, most probably, could not write his own name, would be advantageous. Gentlemen of the type of Squire Western and Justice Shallow do not often possess the judicial faculty. It is a curious instance of the tenacity of English customs that even at present, when a prisoner is given in charge to a jury at the assizes, the crier's proclamation, inviting further accusers of the prisoner at the bar to come forth "for he now standeth on his deliverance." commences thus :—"If any one can inform my lords the Queen's Justices, the *Queen's Serjeant*, &c.

Besides the serjeants occupied in local administration there were many in constant attendance on the king Their duty was to sit as assessors with the chief justiciary in the *Aula Regia*, or to act as advocates for the suitors there. Thus we find them acting in a double capacity—some being judges, others advocates, the same office being held at different times by the same person. Serjeants whilst employed as advocates were termed "serjeant-countors;" whilst employed as justices they were termed "serjeant-justices." Chaucer's "serjeant of the law" was both advocate and judge.

> Justice he was full often in assize
> By patent and by pleine commission;
> For his science and for his high renown
> Of fees and robes had he many on.
> Nowhere so busy a man as he there n'as,
> And yet he seem'd busier than he was.
> In terms had he cas and dom's alle.
> That fro' the time of William weren falle.

In America judges appointed for a term of years frequently return to the bar, and in England the same practice prevailed down to the Revolution of 1688, Pemberton, Chief Justice of the Common Pleas in Charles the Second's reign acted as an advocate during the reign of James.

Both classes of Serjeants were appointed by the Crown, and no person could exercise judicial functions in the Court of Queen's Bench and Common Pleas unless he was a Serjeant, unless he had been called to the degree of the "*coif*". The rule still prevails. Every judge, if not previously a serjeant is made one on his appointment. Otherwise he could not be included in a commission of assize. But it has long been customary to join all Queen's Counsel with the judges and serjeants in the commissions of oyer and terminer and gaol delivery, and also, by exercise of a power given under 13 & 14 Vic. c. 25, in that of assize and *nisi prius*. Hence, it follows that a Queen's Counsel can now assist an overworked judge not only to try prisoners but also in trying causes. As the Barons of the Exchequer go circuit like their brethren, they are also invested, upon their appointment, with the rank of serjeant. "Queen's Serjeants" are summoned to the House of Lords on the meeting of Parliament, and have a right, with

the judges (who, it may be observed, are summoned, not as judges but as serjeants), to a seat on the woolsack. But ordinary serjeants, that is, those with an ordinary patent of precedence, and those without even that, and who appear to be the modern successors of the old "apprentices in law," are not summoned. At present, we believe, there are no Queen's Serjeants. Mr. Serjeant Manning, Mr. Serjeant Wrangham, and Mr. Serjeant Shee held that position, the first named being, by seniority, the "ancient serjeant." The second is dead, and the latter is now a judge. To hold it, is invaluable to a man in large business, for it gives precedence over the whole bar, with the exception of the Attorney and Solicitor-General. It would be most appropriately bestowed on the most distinguished member of Serjeants'-inn. A recognised non-official leader of the bar is highly desirable; and a distingnished "Queen's Serjeant" would command the same respect from English barristers as the "Dean of Faculty" commands from the bar in Scotland.

We must say a few words as to the privileges which they at one time possessed. Originally they unquestionably enjoyed sole audience as advocates, but when the Common Pleas became fixed at Westminster the serjeants found it inconvenient to leave it, and, accordingly, other persons were licensed to act as advocates in the King's Bench and Exchequer. But until a time within the memory of the present generation, the Common Pleas was the exclusive preserve of serjeants. Chief Justice Willes, about a century ago, proposed to throw his court open, but he was overruled by the influence of Lord Chancellor Hardwicke. In 1834, however, a royal warrant was issued opening the court, and for six years all barristers practised there. It was afterwards held by the Privy Council that the warrant was illegal, and, accordingly, in 1840, the court was closed again against all but the brethren of the "*coif*." But the victory of monopoly was of short duration. In 1846 an Act of Parliament was passed (9 & 10 Vict. c. 54), whereby the privileges of the Serjeants in the Common Pleas were finally extinguished. We may mention that until last year serjeants without patents of precedence sat amongst the junior bar in the Queen's Bench and the Exchequer, but by the courtesy of the present Chief Justice of England and Chief Baron Pollock they have now been allowed seats "within the bar."

It is no slight expense to be made a serjeant. Rings with an appropiate inscription have to be distributed to certain great functionaries, and the fees at Serjeant's-inn are considerable. But then a barrister must expect to pay something for the honour of being addressed as "Brother" by the members of the judicial bench. Moreover it is an expensive thing to be made a Queen's Counsel. It is probable that the order of ordinary serjeants, at all events, though but a shadow of what it once was, will continue to exist. Men who might ask for "silk" as Queen's Counsel in vain, find no difficulty in getting the simple "coif" unaccompanied by a patent of precedence. Indeed, they are entitled to claim it after a certain number of years. It is a convenient, though rather ambiguous rank, being somewhere between the humble order of "stuff," and the exalted dignity of a full blown "silk." A barrister who has assumed it can no longer draw pleadings, but he can, without any breach of professional etiquette, take a smaller fee as a leader than a Queen's Counsel or serjeant with a patent. And he enjoys a distinctive social title which, doubtless, is occasionally of value to him.—*Solicitors' Jour.*

UPPER CANADA REPORTS.

COMMON PLEAS.

(*Reported by* S. J. Vankoughnet, Esq., M. A., *Barrister-at-Law, Reporter to the Court.*)

Hope v. White et al.

Illegal distress for rent—2 W. & M., sess. 1. ch. 5, s. 5—Assignment of rent—Distress by assignee—4 Geo. II., ch. 28, s. 5—4 Anne, ch 16, ss. 9. 10.

The action for double value, under 2 W. & M., sess. 1, ch. 5, s. 5, for illegal distress for rent, is not confined to the landlord only, but extends to those who distrain on his behalf, or in his name or right.

A landlord may assign rent, and since the statute 4 Geo. II. ch. 28, s. 5, rent seek may be distrained for, and by one who has not the reversion, as, for instance, the assignee of the landlord.

In this case, one of the defendants assigned certain rent to a co-defendant, who gave the tenant (plaintiff) notice:

Held, that such assignment conferred an estate, and that under 4 Anne, ch 16, ss. 9, 10, the assignee was entitled to distrain for the rent in question, whether the tenant attorned or not.

Semble, that debt might have been maintained by the assignee for the rent

This was an action under the 2 William and Mary, sess. 1, c. 5, sec. 5, brought by the plaintiff against the defendants for double damages, for a wrongful distress and sale when no rent was due.

The declaration also contained a count in trespass.

The defendants, McLean & Keller, pleaded not guilty under the 11 Geo. II, cap. 19, s. 21

The defendant White allowed judgment to go by default.

The trial took place at the fall assizes of 1865, held for the united counties of York and Peel, in Toronto, before *Adam Wilson*, J.

White was the owner of a piece of land in the township of Markham, being the front 75 acres of lot 7, in the 10th concession of that township.

By an indenture, made the 17th day of April, 1863, between him, of the first part, and Hope and one Banks, of the second part, he leased that land to them for seven years from the first day of April, 1863, at a rent of $200 a-year for the first two years, and at $262 50 per year for the remaining five years of the term, payable on the first days of October and April in every year during the term, without deduction on any account.

About this time White was indebted to the defendant McLean, and by an agreement under

seal, made between them, dated 21st July, 1863, in which the above-mentioned lease was in part recited, White assigned McLean the six months' rent to become due on the lease on the first day of October, 1864, and the six months' rent to become due on the first day of October, 1865. White, by the same agreement, authorized McLean to distrain for the rent, if necessary. He also signed a notice to Hope and Banks of this assignment, which, as appeared by other witnessses, plaintiff received.

On the 13th of April, 1865, the rent so assigned being in arrear and unpaid, McLean issued a distress warrant in the name of White, requiring Keller, the other defendant, to distrain the goods, &c., on the said leased premises, for $100, being the half-year's rent due on the first day of October, 1864. On the 22nd April, 1865, Keller distrained a pair of horses, nineteen sheep, and four cows. On the 3rd May he sold three cows, seventeen sheep and twelve lambs, for $122.62, the distress with costs being $116.48.

To establish his case plaintiff called the defendant Keller, who proved the warrant of distress, which was signed in the name of White by McLean, as his attorney He also proved the sale of the cattle, sheep and lambs under it, and that they realized $122.62 He said the plaintiff had denied that McLean had given him notice of the assignment, but admitted that he heard of it.

The plaintiff also called the other defendant, White. He said Banks was made one of the lessees that he might be made surety for the plaintiff. He was shewn a receipt, dated 26th August, 1864, which he said was his, for rent in full from plaintiff up to the first of April, 1865. He looked at a promissory note for $67 50, dated 26th August, 1864, and said this note plaintiff had paid him on account of rent. He looked at another promissory note for $87.50, and said this had also been given him on account of rent. He stated that he had rented part of the place back for $25 a-year, which was to be deducted from the rent on the lease; that the note for $87.50, with the $12.59 deducted, was rent for one half year, and the other note, 67.50, was the balance of the other half year; that the plaintiff had paid him at the house $20, and he had allowed his rent, $12 50, which made up the $100, and that in this way the rent was paid up to the 1st April, 1866. He said that he had negotiated these notes not long after he got them; that he had signed a notice to the lessees that he had assigned the rent to McLean; that he had been in the bankrupt court; that he liked every one to have his rights: McLean had not had his: that he had borrowed money from him and assigned the rent for its payment. He could not say whether he had told Hope of the assignment of the rent; McLean had agreed to wait before he distrained, saying he was not particular how long he waited, if he was secure; but this was said after White had settled with plaintiff in August for the rent, of which he told McLean at the time, when he said he would wait

Another witness valued the cattle and sheep at $181, and others gave general evidence that they were worth this amount.

At the close of the plaintiff's case counsel for McLean & Keller objected that as to McLean it was not shewn he had anything to do with the seizure, excepting that he signed the warrant as White's attorney, which did not make him liable for the distress; that as to the first count, that was an action against a landlord, and others could not be made liable for double value, which was a punishment to the landlord personally; and as it was against White, as landlord, the other defendants were not liable.

The plaintiff's counsel contended, in reply, that McLean had put Keller in motion and got the proceeds of the sale for his own benefit; that the second count was trespass against the landlord and the persons actually distraining, who were both liable. He referred to Arch. L. & T. 276.

The learned judge reserved leave to the defendants to move to enter a nonsuit on the first count.

The defendants called Alexander Muir, who said that he had written the assignment and witnessed its execution, and had drawn the notice of the assignment which was to be given to Hope, and White signed it.

Preston McLean, the brother of the defendant, McLean, said he took this notice of the assignment of the rent to McLean, shewed it to Hope, and offered to give him a copy of it, but he said he had heard of it from White himself, and that White's wife had told him not to accept of any paper; but he would as soon pay the rent to McLean as to White. This was in the end of July or beginning of August, 1863.

Another witness proved that plaintiff said he would not pay McLean, for he had not signed anything, but he knew of the transfer to McLean.

Another witness asked plaintiff if he had got a notice from McLean. He replied "Yes:" Preston had brought a paper which he would not look at, but White had told him he had made the transfer of the rent.

The learned judge submitted the following questions to the jury:

1st. Had the plaintiff notice of the assignment of the rent by White to McLean before or at the time when the note was given for $67 50? If he had not, then, had he notice at all before the distress?

2nd. Were the giving of this note and the settlement spoken of about the rent in October, 1864, made in fraud of McLean's right?

3rd. Was this note for $67 50 paid by Hope in full before the time of the distress on the 13th April, 1865?

To the first questions they answered, "No;" to the last, "Yes."

They found the value of the goods sold $162, which, doubled, made $324.

The verdict was accordingly for the plaintiff, with $324 damages.

In Michaelmas Term last, *D McMichael*, for the defendants McLean & Kellor, obtained a rule *nisi* calling upon the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered for these defendants, pursuant to leave reserved; or, why a new trial should not be had between the parties, on the ground that the verdict was contrary to law and evidence; and for misdirection, in charging the jury that the defendant White was the owner of the rent distrained for and entitled to receive and settle for

it, and that the defendant McLean was not entitled to distrain for it; and in telling the jury that others than the landlord could be made liable for double value; and that there could be no distress, if notes were taken for the rent; and because the verdict was contrary to law and evidence, and perverse, the jury having found that the plaintiff had no notice of the transfer of rent to McLean, contrary to clear evidence of notice; and that here was a fraudulent intention to settle in the absence of McLean; and because there was no evidence that the whole of the rent had been paid.

In Easter Term last, *Robert A. Harrison* shewed cause, and cited Arch. L. & T. 2 Ed. 289; 2 Wm. & M. sess. 1, ch. 5, sec. 5; *Parrott* v. *Anderson*, 7 Ex. 93; *Griffiths* v. *Chichester*, Ib. 95; *Palfrey* v. *Baker*, 3 Pr 72; *Hebden* v. *Hartsink*, 4 Ess. 44; *Reid* v. *Hutchinson*, 3 Camp. 329; *Lacey* v. *Forrester*, 3 Dowl. 668; *Lane* v. *Jarvis*, 5 U. C. Q. B. 127.

McMichael, contra, cited *Yates* v. *Tearley*, 6 Q. B. 282; *Burton* v. *Barclay*, 7 Bing. 745; Gilbert on Rents, 138.

J. Wilson, J.—B. F. White, one of the defendants, has allowed judgment to go by default, and does not complain of it; but the merits are all on the side of the other defendants, McLean and his bailiff Keller.

White, the original landlord of the plaintiff, to secure and pay money which he owed to McLean, assigned to him by deed certain rent then to become due from the plaintiff, in satisfaction of that debt. Afterwards, and after the plaintiff had notice of the assignment, and had assented to it, and before any part of the rent assigned had become due, he and White appear to have colluded to defraud McLean. In pursuance of it the plaintiff gave White his promissory notes in advance for the balance of the rent which had already been conveyed to McLean, after taking credit for certain deductions assented to by White, who, on his part, gave the plaintiff a receipt for the payment of this rent. When the rent became due, according to the terms of the lease, McLean claimed it, and the plaintiff set up the payment to White and his acquittal of the rent. On this McLean distrained in the name of White, by Keller his bailiff, and hence this action.

The plaintiff says, that under all the circumstances which the case discloses, no rent was due, and he claims damages for double the value of the distress, under the 2nd Wm. and Mary. He says that in any event these defendants are trespassers, and he can recover on the trespass count. He says White could not distrain, because he had conveyed the rent, and McLean could not, because he had not the reversion, but a rent-seck only, for which, he says, he could not distrain.

Before we speak of the points on which this case must turn, we must refer to some of the objections mentioned in the defendants' rule. They complain of misdirection; but according to the report of the learned judge who tried the cause, there was no misdirection. He suggested that if the rent was not payable to White, then the plaintiff had failed in proving his declaration; and that if rent could be conveyed, as his then view of it was, it had been conveyed, so that after notice to the plaintiff he could not pay it to White, and therefore the plaintiff had failed in making out his case. It was not necessary to rule whether McLean could distrain or not, as that was to be determined by the court, and in this view of the case the learned judge submitted to the jury, among other questions, the question whether notice had been given to the plaintiff of the conveyance of the rent to McLean, a question which, we think, the jury negatived against the clearest evidence.

Nor was there any misdirection in telling the jury that others were liable in this action on the statute of William and Mary besides the landlord; for he, and they who distrain on his behalf, are liable. The words of the statute are, "Where no rent is in arrear or due to the person distraining, as to him in whose name or right such distress shall be taken, that the owner of the goods may by action of trespass, or upon the case, to be brought against the person so distraining, &c., recover double damages."—See *Lockier* v. *Patterson et al.*, 1 C. & K. 271.

Nor did he direct that there could be no distress if a note had been taken for the rent; on the contrary, he intimated, as the law was, that the taking of a note for rent did not take away the remedy by distress.

The case presents this aspect, that if the rent to become due was conveyed to McLean, and the plaintiff had notice of it and assented, so as to become McLean's tenant, and there is evidence from which a jury may fairly infer attornment, then the plaintiff's case failed, for White was, in this view of it, no longer his landlord.

There has been a constant struggle since Lord Mansfield's time to adapt the rigid maxims of the common law to the every day dealings of the community, and to reconcile them to the common sense dealings of a restless, enterprising and commercial people.

The law does not admit of an assignment of choses in action; but it is an every day occurrence to assign them, and every day the assignee is permitted to use the name of the original creditor in their recovery, and the courts will restrain him as far as possible from colluding with his debtor to defeat the assignment. The case of *Trent* v. *Hunt*, 9 Ex. 14, followed by *Suett* v. *Finch* 13 C. B. 651, is an instance of this kind in that branch of the law to which this case belongs. If the plaintiff were to succeed in the case before us, it would be justly charged that the law permitted a great wrong to be done; first, by defeating an arrangement, honest, so far as we see, and very properly made; and, secondly, in allowing not the less culpable of the two to obtain double damages from that which originated in his own want of good faith and fair dealing.

It appears to us that if McLean can maintain his right to distrain, either as White's grantee, or in his own right, his justification and that of his bailiff are complete.

It is quite true, as has been contended, that at common law distress did not lie for rent-seck Litt., sec. 217, 218, but a writ of right or assize was the remedy; but, since real writs have been abolished, the remedy would have been gone but for the statute 4 Geo. II. ch 28, sec. 5, which gave distress for rent-seck.

But it is contended here, that he who distrains must have the reversion. This is not now law to the extent contended for: it is not law as regards a rent-seck, because of the statute of Geo. II. just quoted.

In *Dodd*, Appellant, v. *Thompson*, Respondent, 12 Jur. N. S. 625, the latest case on this point, the court held that a rent charge without a clause of distress was an estate of freehold, and that the grantee was not without remedy for its recovery, for the 4 Geo. II. ch. 28, enabled the grantee to distrain for it.

The whole case lies in a very small compass. If White could convey the rent to McLean and he could distrain, the plaintiff's case was fully answered. But, according to Coke, 225, a landlord can assign rent, and, if the tenant attorn, the assignee can distrain. By the statute 4 Anne ch. 16, secs. 9, 10, the grantee of rent can distrain if he gives the tenant notice, whether he attorn or not. The evidence shows clearly that the tenant had notice, but the jury have found perversely that he had not. There will, therefore, be a new trial, costs to abide the event.

A. Wilson, J.—The allegation in the declaration that the plaintiff was tenant to White *at rent payable by the plaintiff to White*, which is traversed by the plea of the general issue by statute was not, I think, proved. I thought so at the trial also, because White had assigned it to McLean, to whom it was in law payable.

If the rent were a mere chose in action, it would, notwithstanding the assignment of it to McLean, be still payable to White; for in law there can be no assignment of a mere chose in action. But, though rent *in arrear* is a chose in action—*Sharp* v. *Key*, 8 M. & W. 379; rent not due is not a chose in action—*Maund's* case (7 Co. 28); it is an incorporeal hereditament—2 Bl. Com. 41. When assigned by the landlord, who retains the reversion, it is a rent-seck only—Co. on Litt. secs. 225, 228.

A rent-seck might have been sued for by different forms of writs real—Co. on Litt. secs. 233, 235, 236; Gilbert on Rents, 83, 106, 110, 124. At the common law there was no remedy for a rent-seck until seisin was had of it—Gilbert on Rents, 117. Perhaps debt might have been brought by McLean for this rent in his own name, as the rent is not of a freehold nature—*Webb* v. *Jiggs*, 4 M. & S. 113.

A widow is dowable out of a rent-seck—Co. on Litt. 32 *a*; Parke on Dower, 112—which shews that such a rent is a *tenement*; and it is so distinctly treated in all the treatises and authorities; and the party has an estate in it—6 Co. 58 *b*.

The rent in this case was, therefore, clearly assignable in law, and conferred an estate on McLean. He was possessed of it as a tenement, although he had no interest in the land out of which it issued; and the assignee of it can, since the statute of 4 Geo. II., make distress for it in like manner as for service—2 Bl. Com. 43; Crabbe's Real Property, 153; Williams on Real Property, 270.

This is the opinion I entertained at the trial; and the last decision of *Dodds* v. *Thompson*, confirms all the previous cases and dicta on this point.

The rent was not, therefore, in the language of the declaration, payable *to White*. It is of no consequence that the distress warrant is signed in White's name by McLean, as his attorney; for it is old law, that if a person distrain for an unjustifiable cause, yet when he comes to avow he need not insist on the cause for which he distrained, but may justify for any lawful cause—*Greenvel* v. *The College of Physicians*, 12 Mod. 386; *Trent*, v. *Hunt* 9 Ex. 14; *Phillips* v. *Whitsed*, 2 E. & E. 84.

So Lord Kenyon, C. J., said, in *Crowther* v. *Ramsbottom*, 7 T. R. 634 "A man may distrain for rent and avow for rent service: if he can shew he had a legal justification for what he did, that is sufficient"

The plaintiff, then, in my opinion, failed to prove his declaration.

This point was not taken at the trial; but I mentioned it to the jury, and I stated that, in my opinion, the rent was not payable to White, for he had assigned it. Nor was it argued even before us. But I have no doubt the allegation is a material one and must be strictly proved; and it was disproved—*Ireland* v. *Johnson*, 1 B. N. C. 162.

The special facts, which shewed *how* the rent was payable to McLean, and *how* it was there was no rent payable to McLean, as, for instance in this case, that the plaintiff had paid White the landlord before he had any notice of the rent having been assigned, should, perhaps, have been expressly stated—*Waddilove* v. *Barnett*, 2 B. N. C. 538; *Johnson* v. *Jones*, 9 A. & E. 809.

Upon this ground there should certainly be a new trial; but, if upon this point, it should be on payment of costs, because the objection was not raised at the trial, nor taken or argued upon when it was mentioned.

But, as the finding of the jury was almost perverse on the question of notice, for it is perfectly clear the plaintiff had notice of the assignment, the new trial should be on the terms of the cost abiding the event.

As to the notice, I put the question to the jury to say whether the plaintiff had notice of the assignment when he gave the notes, or at any time before the distress; and they found the plaintiff had not notice before the distress, and that at that time the whole of the notes or rent had been paid by the plaintiff to White, or to the holder of the notes.

Upon this finding we are precluded from enquiring into the effect of the mere giving of notes, and calling that a payment of rent, or of the effect of giving notes in advance of rent not then due. The statute of 4 Anne, ch. 16, sec. 10, protects *payments* made by tenants before notice; and payments means "payment in due course, and not by anticipation."—*Burbridge* v. *Manners*, 3 Camp. 193.

There can properly be no payment before the day: it should be pleaded as payment at the day—*Sturdy* v. *Arnaud*, 3 T. R. 599. This point was not discussed, but it is an additional reason why the defendants should not get the advantage of it, which they have not at present by reason of the very strange finding of the jury.

I should simply have concurred in the judgment of my learned brother, who had prepared it, if it had not been that the rule represents me as

having directed the jury, among other things—1. That White was the owner of the rent, and entitled to receive and distrain for it; 2. That McLean was not entitled to distrain for it; and 3. That there could be no distress, if a note were taken for the rent,—for in no respect did I charge the jury in this manner.

I did not say White was the owner of the rent, or entitled to distrain for it. I gave no direct opinion upon it, although I had then, and for long before then, entertained the opinion that the assignee of rent, the owner of a rent-seck, could distrain for it in his own name; for so I read the statute of George the Second and the comments of the writers upon it. But I knew this view was not considered as perfectly free from doubt, and therefore, I refrained from positively committing myself.

But what I did say at the trial shewed what my opinion was, for I suggested that the allegation in the declaration, that the rent was payable to White, was not proved, but the contrary, for it was payable to McLean; and I requested the jury to say whether the plaintiff had or had not notice of the assignment of the rent to McLean; all of which would have been quite unmeaning if the rent were still White's or if McLean could not in any case distrain for it.

But I did tell the jury that, for the mere purpose of the trial, they might assume the rent did belong to White, because the question was afterwards to be considered by the court.

Nor did I say there could be no distress if a note were taken. Such a thing did not occur at the trial as all. The effect of giving a note is to suspend the remedy by distress during the currency of the note; but this has notning to do with the facts of this case, for the note given was due before the distress. I expressed no opinion whether a note could be considered payment under the statute of Anne. I have now sugge ted this for future consideration.

If I had observed the terms of the motion I would not have assented to the rule in its present form

I think on the merits there should be a new trial, costs to abide the event

Rule absolute for new trial, costs to abide the event.

PRACTICE COURT.

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

ON APPEAL FROM THE COUNTY COURT OF THE UNITED COUNTIES OF STORMONT, DUNDAS, AND GLENGARRY.

Alexander McLellan v. John McClellan.

Appeal from County Court—Motion to strike out—Sufficiency of bond.

Where the appeal bond allowed by the county judge is for a sum less than the verdict—*Held*, insufficient; but this court will not go behind the certificate of the county judge to enquire into the regularity of the prior proceedings, but will assume that every thing has been rightly done in the court below. *Pentland* v. *Heath*, 24 U. C. R. referred to.

[P. C., E. T., 1866.]

Kerr obtained a rule in Easter Term last, calling upon the appellant to show cause why this appeal should not be dismissed with costs, or be struck out from the paper or list of causes with costs, on the following grounds:—

1. The appellant has not given such security, and has not filed or produced, or left with the judge or clerk of the County Court appealed from, such a bond as by the statute in that behalf required, or any sufficient bond or security; and that the bond filed by the said appellant as such security, is not conditioned to pay the verdict which had been obtained against him.

2. The bond is only a security for $120, being only part of the verdict, and is insufficient, and does not comply with the statute

3. The sureties have not justified as bail are required to justify, although required so to do by the statute.

4 The affidavit of the sureties is not entitled in any court nor in any cause.

5. The sureties have not shown that they are resident housekeepers or freeholders.

6. They have not sworn they are worth property to the amount of the penalty of the bond, or justified to that amount over and above what will pay their just debts.

7. They have not sworn that they are not sureties or bail for any other persons, and on other grounds.

S. Richards, Q C., showed cause.

The judge of the County Court is by statute the person who has power to fix the amount for which security shall be given, and his decision is final; and he may direct the bond to be given for a sum less than the verdict, and costs, if he see fit

There is some difficulty as to the proper mode of intituling the affidavit of justification. The same strictness should not be required in such an affidavit when in a cause pending in the court, as if the rules of that court make special provision for the formalities to be observed.

The allegations by the sureties that they are worth so much, "all my debts being first paid," is just the same as "over and above all my debts."

These exceptions cannot now be revised here, because the judge's allowance of the bond has cured them all and is conclusive here. If there be anything defective or irregular, the application should be made to the court below to set aside the allowance of the bond.

If any of these objections are entitled to prevail, this appellant should be allowed to substitute another bond.

Kerr supported his rule, and contended that—

1. The statute describes the bond which must be given, and one of the requirements of the statute is, that it shall be conditioned to abide by the decision of the court appealed to, and to pay all sums of money and costs, &c. The county judge has power to name in what sum the bond shall be *over and above* a sum sufficient to secure the sums of money, &c.; but no power to name a sum less than the amount to be secured. He has a statutory power, and must see the statute complied with. 22 Vic., cap. 15, sec. 68. The court requires a strict compliance with the act. *Re Kernahan* and *Preston*, 21 U. C. Q. B. 461.

2. Sureties have not justified, as bail are required to justify. Affidavits must be entitled in the Court in which they are used. Arch. Prac. 1600-7; Rule of Court, No. 81, Trinity Term, 1856; *In re Lord Cardross*, 6 M. & W. 544; *Osborne* v. *Tatum*, 1 B. & P. 271; *Wigden* v *Burt*,

1 Dowl. N. S. 93; *Owen* v. *Hurd*, 2 T. R. 644, where it was held, that if either style of cause or court be omitted, the court cannot take any notice of the affidavits, even if objection waived by opposite side. *Doe Clark* v *Stillwell*, 6 Dowl. 306; *Bill* v. *Foster*, 8 Bing 335; Arch. Pract. 837, 840; *Edmunds* v. *Keats* 6 Dowl. 359; *Keough's Bail*, 1 Arnold, 243; *Hutchinson's Bail*, 2 Cr. & J. 487; *Rogers* v *Jones*, 1 Cr & M. 323; *Henshaw* v. *Woolwich*, 1 Cr & J. 150.

3 After the county judge has certified the proceedings, he has no authority to interfere, and this is the proper court in which to move. This court will go behind the certificate of county judge and see if proceedings regular. *Wood* v. *G T R.* 16 U.C.C P. 275; *Pentland* v. *Heath*, 24 U C. Q B. 464; *Tozer, qui tam* v. *Preston*, 13 U. C Q. B. 310.

Adam Wilson J.—The Con. Stat. for U. C., ch. 15, s. 68, provides that in case the party wishing to appeal gives security to the opposite party, by bond, executed by himself and two sureties, in such sum as the judge of the court to be appealed from directs, conditioned to abide by the decision of the cause by the court to be appealed to, and to pay all sums of money and costs, as well of the suit as of the appeal awarded and taxed to the opposite party.

And in case the sureties in such bond justify to the amount of the penalty of the bond by affidavit annexed thereto, in like manner as bail are required to justify.

And in case such bond and affidavit of justification, and also an affidavit of the due execution of the bond are produced to the judge of the court appealed from, to remain with the clerk of such court until the opinion of the court appealed to has been given, and then to be delivered to the successful party Then, at the request of the party appellant, the judge of the court appealed from shall certify, under his hand, to either of the superior courts of common law named by such appellant, the pleadings in the cause, &c.; whereupon the matter shall be set down for argument at the next term of the court appealed to, and that court shall give such order or direction to the court below, touching the judgment to be given in the matter, &c; and upon receipt of such order, the judge of the court below shall proceed in accordance therewith.

The first question then is, whether this court, as respecting the full or appellate court, has power to enquire into the regularity of the proceedings in the court below, upon and in respect of which the judge has certified the pleadings on to the court above?

He has certified them in fact, and if this court of appeal be now seized of the cause, what has now to be decided is—what order or direction shall be given to the court below, touching the judgment to be given in the matter, and what award shall be made as to the costs?

In *Kernahan* v. *Preston*, 21 U. C. Q. B. 461, to which I was referred by Mr. Kerr, the court of Queen's Bench refused to grant a mandamus, to certify a case, by way of appeal, to the judge of a County Court who had refused his certificate because the bond did not contain the clause; that the party appealing should abide by the decision of the cause by the court to be appealed to. The Court of Queen's Bench holding that the judge below had rightly declined to certify for such a cause, and they would not compel him by mandamus to violate the statute, even in a point of form. The chief justice said, in that case, "it is not necessary for us to say whether such a bond might or might not with propriety have been accepted."

In *Pentland* v. *Heath*, 24 U. C. Q. B. 464, the court made absolute a rule striking an appeal from the County Court out of the paper, because the condition of the bond was that the sureties instead of the appellant should abide by the decision of the Court.

In *Wood* v. *Grand Trunk R. Co.*, 16 U. C. C. P. 275, the court refused to hear an appeal in a case in which final judgment had been entered in the court below, and ordered the case to be struck out of the paper for argument.

In England, under the Imperial Act 13 & 14 Vic., ch. 61, s. 14, an objection may be taken in the appellate court that the conditions of the statute have not been complied with, and the case will be struck out of the paper, *Stone* v *Dean*, 1 E B. & E. 504; *Griffin* v. *Coleman*, 4 H. & N. 265, because the act gives the appeal, *provided* the appellant, within ten days, gives notice of appeal and do certain other acts to entitle him to appeal, which constitute these different acts to be done by him, conditions precedent to his appealing to the Superior Court. But our statute makes the acts conditions precedent *only to the judge of the court certifying the case*, and when he certifies it, the court above is authorized, and, I am inclined to think, compelled to act upon the case so certified.

It would seem that when a writ of error was brought, the court below was the proper court to make all amendments of the record. Pr. 114, 5. For any such reason as that error was brought against good faith, the court below too would vacate the allowance of the writ, *Gerard* v. *Tuck*, 8 C. B. 268.

The court above could only quash the writ for some defect apparent on the face of the writ, or where the record brought up was inconsistent with it. *Ibid.* See also fol. 262.

If the party did not under the former practice have the writ of error allowed and also put in, and perfect bail, there was no stay or supersedeas in the court below of any of the proceedings. So under the present County Court Act it has been held that if the necessary proceedings to procure the judge's allowance of the bond and to file it with the clerk have not been taken, the party who has the decision in his favour may proceed with his cause, for there is nothing to stay it. 16 U. C. C. P. 275.

I do not think, however, that if the judge had allowed a bond as sufficient which he should not have allowed, that the party having the decision in his favour could, if the bond was also filed, proceed in his cause in disregard of the judge's allowance granted; he would first have to move to set it aside. Now, why cannot he do so in the present case? Why should the court above not assume that everything has been rightly done in the court below, so long as it is not a condition precedent to our acting, that we must first be satisfied that all the preliminary steps have been duly taken in that court to support the appeal here?

It cannot be assumed that the judge below will wilfully diregard the statute and certify proceedings improperly, for that would be criminal conduct On the contrary, it must be assumed that he will correct whatever is erroneous, incorrect or irregular, upon a proper application being made to him for that purpose.

On the whole, I am of opinion that the Appellate Court has nothing to do with the facts or proceedings prior to the judge's certificate; these are all matters to be transacted in and dealt with the court below; and that all the Appellate Court has to do is to decide upon the proceedings actually transmitted and certified, with their sufficiency, and not with the regularity of these transmissions.

If I could entertain the application, I should be of opinion that a joint bond by the appellant and two sureties on the sum [only one sum] of $120, was not a bond or security proper to be given or allowed for the payment of a verdict of $229.50, beside the costs of the suit; and upon this ground alone, without going over the other objections, I should, if I could have exercised the power, have made the rule absolute for striking the cause out of the paper.

The plaintiff must apply to the judge of the County Court to set aside the proceedings which prevents the suit being prosecuted, where he will, no doubt, get the relief he is entitled to.

I must, however, from the view which I have found, and being bound by no decision which has been made yet, although I am not acting quite in accordance with one of them at least, discharge the rule—but without costs.

COMMON LAW CHAMBERS.

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

Hingston v. Campbell

Insolvent Acts of 1864, 1865— Official assignee—List of creditors.

A list of creditors of the insolvent, need not be appended to an assignment made to an official assignee.

A voluntary assignment must be made to an official assignee resident in the county in which the insolvent resides, and carries on his business; and the amending Act 1865, makes no change in this respect.

[Chambers, August, 1866.]

Osler obtained an interpleader summons calling on the plaintiff and Henry Charles Voigt, the claimant, their attorneys or agents to shew cause why they should not appear and state the nature and particulars of the respective claims to the goods and chattels seized by the sheriff of the County of Lennox and Addington under the writ of *fieri facias*, issued by the plaintiff in this cause; and maintain or relinquish the same and abide by such order as might be made therein.

The summons was obtained upon the usual affidavit of the deputy sheriff, setting forth the seizure by him of the goods in question on the 19th July, 1866.

Kerr, for the claimant, filed affidavits, shewing that on the 26th July, 1866, the defendant executed a voluntary assignment of all his estate and effects to the claimant as official assignee under the provisions of the Insolvent Act of 1864 and the amendment thereto.

C W Patterson for the execution creditor, objected that the assignment was irregular.

1. Because the requirements of the Insolvent Act of 1864 had not been complied with, in that a copy of the list of creditors or schedule of creditors of the assignor was not appended to the assignment as required by sec. 2, sub-sec 6, of that Act.

2. Because the assignment was not made to an official assignee resident within the County within which the insolvent had his place of business. He referred to the Insolvent Act of 1864, sec. 2. sub-sec. 4; and filed affidavits shewing that an official assignee has been properly appointed resident at Bath in the County within which the insolvent had his place of business, and that the claimant is an official assignee resident at Kingston, in another County.

Kerr, in reply as to the first objection referred to the Insolvent Act 1864, sec. 2 sub-sec 1, 2, 3, 4, and 29 Vic, Cap. 18, (amending the same), sec. 2; and argued that as under the latter Act, an assignment might be made without the performance of the formalities required by the above sub-sections of the Insolvent Act 1864, including amongst others, the production, at the first meeting of creditors, of a list of all his creditors; it follows that a copy of the list of creditors appended to the assignment was no longer necessary; for a copy could not be made of that which did not exist.

As to the second objection, he contended that under 29 Vic. Cap. 18, sec. 2, a voluntary assignment may be made to any official assignee in any County; arguing that the use of the word "any" shews an intention on the part of the Legislature no longer to limit the debtor to the particular official assignee, resident in his own County; but that he may select *any* official assignee provided he has been appointed under the Act of 1864. And that it is often more convenient to wind up the estate in a County, other than that in which the insolvent had his place of business. The majority of creditors and debtors may reside in another County. The bulk of his estate may be there, and as in the case when a creditor under the provisions of the old Act might be selected as assignee, resident in any County whatever, so the intention was to enable any official assignee wherever resident, to accept assignments. There are no words of limitation; the words "appointed under the said Act" are merely words of description, as is also the word "official." They were so used in the Insolvent Act 1864, sec. 12, sub-sec. 6.

Draper, C. J., overruled the first objection, holding that as the performance of the formalities, or the publication of any of the notices required by the Insolvent Act 1864, sub-sections 1, 2, 3, and 4 of sec. 2, are no longer necessary under the amendment act, if the assignment be made to an official assignee, a copy of the list of creditors produced at the first meeting of creditors, need not be appended to the assignment, for in fact no such meeting may be held. After considering the second objection, his Lordship delivered the following judgment:—

I grant the interpleader with some doubt. The claimant must be plaintiff, and will have to prove title, and the question of his right as assignee can be raised and decided in the full court. If the matter is left to me, I shall decide against the claimant, for I cannot satisfy myse

that the execution debtor could make an assignment to the official assignee of another County than that in which he resided and carried on business.

As the question had been, by consent, left to be summarily disposed of by the Chief Justice, he granted an order barring the claimant.

Order accordingly.

CHANCERY.

(Reported by Alexander Grant, Esq., *Barister at-Law, and Reporter to the Court.)*

Cartwright v. Gray.

Nuisance—Injunction.

Every one has a right to the air on his premises uncontaminated by the occupants of other property, though those who live in a city cannot insist on the complete immunity from all interference which they might have in the country. But the occupant of city property cannot justify throwing into the air in and around his neighbour's house any impurity which there are known means of guarding against.

The defendant erected in the city of Kingston a planing machine and circular saw, driven by steam, and was in the habit of burning the pine shavings and other refuse. He took no means to consume or prevent the smoke; and it being carried to the plaintiff's premises in sufficient quantities to be a nuisance, the defendant was decreed to desist from using his steam engine in such a manner as to occasion damage or annoyance to the plaintiff from the smoke.

Hearing before Vice Chancellor Mowat, at Kingston, in June, 1866.

Machar, for the plaintiffs, cited *Rex* v. *Neal*, 2 Car. & P. 485; *Rex* v. *Ward*, 4 Ad. & E. 384; *Rex* v. *White*, 1 Bur 333; *Bradley* v. *Gill*, Lutw. 69; *Hole* v. *Barlow*, 4 C. B N. S 334; *Simpson* v. *Savage*, 1 C. B. N. S. 347; *Rich* v *Basterfield*, 4 C. B. 805; *Bamford* v. *Turnley*, 9 Jur. N S. 377; *Elliotson* v. *Feetham*, 2 Bing, N. S. 134; *Regina* v. *Train*, 31 L. J. M. C. 160, Q B. 179; *Flight* v. *Thomas*, 10 A. & E. 590; *Sampson* v. *Smith*, 8 Sim. 272; *Crowder* v *Tinkler*, 19 Ves. 617; *Walter* v: *Selfe*, 4 DeG & Sm. 315; *Bankart* v. *Houghton*, 27 Beav. 425; *Tipping* v. *St. Helen's Smelting Co.*, 1 L. R. App. 66; *Spokes* v. *Banbury*, 1 L. R. Eq. 42; *Goldsmid* v. *Tunbridge*, 1 L. R. Eq. 163; *Mitchell* v. *Steward*, 1 L. R. Esq., 547; *Soltau* v. *DeHeld*, 2 Sim. N. S. 133.

R. Walkem, for defendant, cited *Attorney General* v *Cleaver*, 18 Ves. 111; *Walter* v. *Selfe*, 15 Jur. 416; *Cavey* v. *Lidbetter*, 9 Jur. N. S. 798; *Beardmore* v. *Treadwell*, 9 Jur. N. S 272; *Radenhurst* v. *Coate*, 6 Gr. 139; *Mumford* v. *The Oxford, Worcester and Wolverhampton Railway Co.*, 1 H. & N. 34; *Clarke* v. *Clark*. 1 Law Rep. Eq. 16; Drewry on Injunction, 238; Mitford on Pleading, 168; Addison on Torts, 16, 168.

Mowat, V. C.—The facts appear to be these: In December, 1864, the plaintiffs sold and conveyed to the defendant a lot of ground in the city of Kingston, near the residence of plaintiff, Richard Cartwright, and near the two other houses of which the two plaintiffs are joint owners. In the following year the defendant erected on this lot a carpenter's shop, with a planing machine and circula saw driven by steam. The plaintiffs complain of the smoke, noise and sparks produced in working the engine as nuisances.

The defendant burns all the pine shavings and other refuse of his business, and only a small quantity of hardwood, and the smoke arising therefrom is described by several witnesses as pungent and disagreeable, and also as soiling linen hung out to dry. I think it proved that, from the prevalent wind being in the direction in which the plaintiff Richard Cartwright's residence lies from the defendant's shop, the smoke goes generally in that direction; that from this cause, as well as the height of the house and other local circumstances, the occupants are liable to suffer more from the smoke than the occupants of the neighboring houses; and, comparing the testimony on both sides, I have no doubt that the character of the nuisance, as affecting the plaintiff's residence, is not overstated by one of the witnesses, who says: "The smoke is a heavy black smoke. It has been heavy at times in the yard of Mr. Cartwright's house, such that I could not see or breathe as freely as when there is no smoke. The smoke was so thick that if the windows had not been down it would have injured fine curtains or wall paper or the like. I have sometimes heard Mrs. Cartwright order the windows to be shut in consequence of the smoke. I saw the smoke two or three times a week, and sometimes every day of the week. It did not annoy me. It did not hurt the yard. It was like a heavy fog." This witness, a servant of Mr. Cartwright's, says the smoke did not annoy him, though he also says that it interfered with his seeing and breathing: but I think I must hold that such a degree of smoke as he and others describe is quite sufficient to justify the testimony of another witness, who, speaking from his own observation, pronounced it "certainly prejudicial to comfortable enjoyment, so far as respects the plaintiffs' house."

It is not alleged that the defendant has adopted any of the well known contrivances for consuming or preventing smoke. Now, according to the settled doctrine of the courts, as stated by Vice Chancellor, now Lord Justice, Knight Bruce, in *Walter* v. *Selfe*, 4 DeG. & Sm. 321, the plaintiff is clearly entitled to "an untainted and unpolluted stream of air for the necessary supply and reasonable use of himself and his family there; or, in other words, to have there, for the ordinary purposes of breath and life, an unpolluted and untainted atmosphere * * * *: meaning by 'untainted' and 'unpolluted,' not necessarily as fresh, free and pure as, at the time of building the plaintiff's house, the atmosphere there was, but air not rendered to an important degree less compatible, or at least not rendered incompatible, with the physical comfort of human existence: a phrase to be understood, of course, with reference to the climate and habits of England." I think that the inconvenience made out by the plaintiffs in the present case is, in the language of the same learned judge, "more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people." *Vide* also *Clarke* v. *Clark*, 1 Law Rep. App. 16; *Dent* v. *Auction Mart Co.*, 1 Law Rep Eq Ca.

244; *Curriers' Co.* v. *Corbett*, 11 Jur. N. S. 719; *Rich* v. *Basterfield*, 4 C. B. 805; *Rex* v. *White*, 1 Burr. 333.

The statement of the law which I have just quoted accords entirely with what was laid down in the late case of *St. Helen's Smelting Co.* (Limited) v. *Tipping*, 11 Jur. N. S. 785, which went up to the House of Lords: "A man may not use his own property so as to injure his neighbour. When he sends on the property of his neighbour noxious smells, smokes, &c., then he is not doing an act on his own property only, but he is doing an act on his neighbour's property also; because every man, by common law, has a right to the pure air, and to have no noxious smells or smoke sent on his land, unless, by a period of time, a man has, by what is called a prescriptive right, obtained the power of throwing a burden on his neighbour's property .....When great works have been created and carried on—works which are the means of developing the national wealth—you must not stand on extreme rights.....Business could not go on if that were so. Everything must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences—injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected." This was the language of Mr. Justice Mellor, and was held to be correct both by the other judges in answer to a question submitted to them in the House of Lords, and by the noble lords who took part in disposing of the appeal. Lord Chancellor Westbury said in his judgment: "If a man lives in a town, of necessity he must submit himself to the consequence of those obligations of trade which may be carried on in his immediate locality which are actually necessary for trade and commerce, also for the enjoyment of property, and for the benefit of the inhabitants of the town, and of the public at large." Here, the fault of the defendant's case is, it does not appear that the sending these clouds of smoke into his neighbours' houses is necessary at all, or that the defendant has taken any means to avoid it.

Lord Cranworth mentioned his charge, in a case he had tried while a Baron of the Exchequer, as an accurate statement of the law. The action, his lordship said, "was for smoke in the town of Shields. It was proved incontestably that smoke did come, and in some degree interfered with a certain person, but I said, 'You must look at it, with a view to the question whether, abstractedly, that quantity of smoke was a nuisance, but whether it was a nuisance to the person living in the town of Shields;' because if it only added in an infinitesimal degree to the quantity of the smoke, I thought that the state of the town rendered it altogether impossible to call that a nuisance."

This was a case at law, but the rule in equity is the same *Beardmore* v. *Tredwell*, 3 Giff. 699; was a bill to restrain a nuisance; and in the course of his judgment the Vice-Chancellor observed: "Where a man is injuring his neighbour to a very material extent, in a way not absolutely necessary and unavoidable in order to enjoyment of his own fair private right, this court is always disposed to interfere." The learned judge afterwards quotes with approbation the following language of Mr. Justice Willes, *Hoe* v. *Barlow*, 4 C. B. N. S. 334; *Vide Cavey* v. *Lidbetter*, 9 Jur. N. S 798; *Wanstead Board of Health* v. *Hill*, 13 C. B. 479. "The common law right which every proprietor of a dwelling house has to have the air uncontaminated and unpolluted, is subject to this qualification; that necessities may answer for the interference with that right, *pro bono publico*, to this extent, that such interference being in respect of a matter essential to the business of life, and being conducted in a reasonable and proper manner, and in a reasonable and proper place." The Vice-Chancellor adds, "If there be another place where it may be conducted without injurious consequences, or with less injury according to law, the right of a person complaining to have his air uncontaminated and unpolluted would be clear."

These and other authorities shew that while the plaintiffs cannot insist upon the complete immunity from all interference which they might have in the country, the defendant cannot, on that ground, justify throwing into the air, in and around the plaintiffs' houses, any impurity which there are known means of guarding against. See *The Stockport Waterworks' Co.* v. *Potter*, 7 H & N. 160; *Barford* v. *Turley*, 3 B. & S. 62; *Tipping* v. *St. Helen's Smelting Co.*, 4 B. & S. 608.

It was proved, on behalf of the defendant, that there are other establishments of various kinds in the same part of the city from whose works more smoke is sent forth than from the defendant's mill; and, on the other hand, the plaintiffs have given evidence that the smoke from these establishments, though they have been many years in operation, never reached the plaintiffs' houses so as to cause any inconvenience to their occupants. I have no doubt it is from the defendant's engine that the smoke now complained of comes; but, had it been partly or chiefly from the others, the fact would have been no justification of additional injury on the part of the defendant.—See *Rex* v. *Neil*, 2 C. & Payne, 486; *Spokes* v. *Banbury Board of Health*, 1 Law Rep. Eq. 51; *Radenhurst* v. *Coate*, 7 Grant, 239; *Attorney-General* v. *Sheffield Gas Consummers' Co.*, 3 DeG. Mc. & G. 332; *Spokes* v. *Banbury Board of Health*, 1 App. Eq. 50; and *Turnbridge Wells Improvement Commissioners*, 1 Law Rep. Eq. 169.

The learned counsel for the defendant argued that there could be no injunction except at the suit of the occupier, and that the other plaintiff was improperly made a plaintiff in respect of the other plaintiff's residence, and that no relief could be had in respect of a nuisance of this kind affecting the houses they have rented to others. But if the defendant is restrained as respects Mr. Richard Cartwright's residence, this renders the question immaterial as to the other houses, for the discontinuance of the nuisance, as to the former, would involve its discontinuance as to the latter; and if the one plaintiff is improperly joined, this does not under the present practice disentitle the other to relief. I do not find, however, that the rule at law which

forbids an action for a nuisance like that here except by the occupier, *Mumford* v. *The Oxford, Worcester & Wolverhampton Railway Company*, 1 H. & N. 34; *Simpson* v. *Savage*, 1 C. B. N. S. 347; is a rule of this court: The judgments in *Wilson* v. *Townsend*, 1 Drewry & Sm. 324; *Cleve* v. *Mahany*, 9 Weekly Rep. 882; *Jackson* v. *Duke of Newcastle*, 10 Jur. N. S. 688; and *Goldsmid* v. *The Tunbridge Wells Improvement Commissioners*, 1 Law Rep. App. 354; contain some observations the other way.

As to the sparks, the defendant has given evidence to shew that a screen, which he has put on the top of the pipe since the commencement of the suit has removed this cause of complaint. It is sworn that the screen is amongst the closest made, and closer than are generally made for this purpose, Sparks do still pass through, but not to the same extent as before, and there is no evidence that it would be possible by any contrivance to prevent them to a greater degree than the defendant has now done. No case was cited which would justify me in holding it a nuisance to make use of machinery driven by steam in this part of the town; and if a certain amount of danger to the houses in the neighbourhood is the necessary consequence, it seems to be a consequence which, as owners of town property, they must accept, subject to any right they may happen to have to damages at law in case of actual loss. The case is not the same as a corning-house to powder mills, as in *Crowder* v. *Tinkler*, 19 Ves. 619; which was cited by the learned counsel for the plaintiff in support of this branch of his case.

The claim of the bill founded on the noise by the engine, was not much pressed. The noise is less since the completion of the defendant's building than it was previously; and, on the whole evidence, does not appear to be such now as to interfere sensibly with the comfort of persons in average health living in the plaintiffs' houses. *Vide Soltau* v. *DeHeld*, 2 Sim. N. S. 133; *Scott* v. *Frith*, 10 Law T. N. S. 240; *Attorney-General* v. *The Sheffield Gas Consummers' Co.*, 3 DeG. McN. & G. 337; *White* v. *Cohen*. 1 Drew. 318.

My opinion on the whole case is, that the defendant has a right to use steam for propelling his machinery, but is bound to employ such reasonable precautions in the use of it as may prevent unnecessary danger to his neighbour's property from sparks, and unnecessary annoyance or injury to them from the noise or smoke; that though he seems, since the bill was filed, to have performed this duty as respects the sparks and noise, he has done nothing in respect to the smoke; and that the plaintiffs' complaint in reference thereto is well founded. The decree will therefore require the defendant to desist from using his steam engine in such manner as to occasion damage or annoyance to the plaintiffs, or either of them, as owning or occupying the houses mentioned in the bill. *Walter* v. *Selfe*, 4 DeG. & Sm. 321.

The defendant must pay the costs.

CHANCERY CHAMBERS.

(*Reported by* Richard Grahame, Esq., *Barrister-at-Law*)

Bowman v. Fox.

Vesting order—Sale under decree.

Where under a decree for sale the plaintiff becomes the purchaser of the property, the Court will not grant a vesting order in his favour.

[Chambers, September, 1866.]

This was an application for a vesting order on behalf of the plaintiff, who had purchased the lands and premises at the sale in the cause. No objection was made by the defendant to the application.

Mowat, V. C., refused the application, on the ground that as the Court could not compel the execution of a conveyance by the defendant to the plaintiff, it could not issue any order in his favour, which would have the same effect as a conveyance.

In Re Kerr.

Solicitor's Bill—Taxation of—Costs of Taxation.

[Chambers, September 27, 1866.]

In this case an order had been obtained by the solicitor for the taxation of his bill against a client. The client did not attend upon the taxation, and in consequence thereof the Master refused to allow the solicitor the costs of the taxation.

W. H. C. Kerr now applied for an order for the allowance of these costs.

The Judge's Secretary.—The Court has no power to give the solicitor his costs of taxation where the client has not taken out an order for the taxation, and where he did not attend the taxation upon an order taken out by the solicitor.

Bank of Montreal v. Power.

Amendment of Bill.

Quære.—Whether a bill can be amended after decree. It cannot be amended on an application *ex parte*.

[Chambers, September 27, 1866.]

Holmsted applied on petition *ex parte* for leave to amend after decree by correcting a description of the mortgaged premises

The Judges' Secretary.—The application cannot be granted *ex parte*, and *quære* whether a bill can be amended at all after decree. In *Barrett* v. *Gardner*, Chan. Cham Rep. 344, the Chancellor refused leave to amend, whilst in *Spafford* v. *Fry*, V. C. Spragge granted it. Under the circumstances the application must be refused. The petitioner had better file a new bill.

Edwards v. Bailey.

Master's Report—Silence of as to reference directed.

[Chambers, October 1, 1866.]

In this case a reference was directed to the accountant to enquire whether a sale or a foreclosure would be for the benefit of the infant defendant. By his report made under this decree, the accountant did not certify specially as to this reference, but the accounts were taken, and those of the incumbrancers who had proved

were ordered to be paid in the usual manner under a decree for sale. An application was now made for a final order for sale.

The Judges' Secretary.—The Accountant not having found specifically by his report whether a sale or foreclosure should be had, the order cannot be made

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(*Reported by* Mr. Charles Moss, *Student at Law.*)

Rice v. George.

Motion to dismiss for want of prosecution—Abatement of suit by death of a defendant.

A defendant, who is also executor of a co-defendant, by whose death a suit has been abated, cannot move to dismiss plaintiffs' bill for want of prosecution; his only course is to move that the plaintiff be ordered to revive within a certain period, otherwise that the bill be dismissed. Nor can a co-defendant, who has appeared and answered by the same solicitor as a defendant who is precluded from making such an application, move to dismiss; though he could do so if he had appeared and answered by a different solicitor.

A defendant may move to dismiss, notwithstanding replication has been filed and the cause is at issue.

[Chambers, October 13, 1866.]

Hector, Q. C., moved on behalf of Cleghorn and Agar two of the defendants for an order that the plaintiffs' bill might be dismissed for want of prosecution, or that the plaintiffs might be ordered to revive, one of the defendants, Benjamin Seamon having died.

The bill was filed in 1855, the answers were all filed before 1857, replication was filed some years ago, and the cause had been set down for hearing at the Spring Sittings in Toronto in 1866, when the plaintiffs' solicitor became aware of Seamon's death. Although there had been great delay in the progress of the suit, yet the plaintiff's solicitors were not solely to blame for it.

Geo. Morphy and *R. Sullivan* on behalf of the plaintiffs, contended that replication having been filed, the defendants could not move for want of prosecution, their only course being to proceed under Order 57, Sec. 6, and set the cause down for hearing. Also, that the suit having abated by Seamon's death, was an answer to the motion so far as it sought an order to dismiss, the proper motion in such a case being for an order that the plaintiffs do revive the suit within a limited time, and in default of their doing so that the bill be dismissed.

The Judge's Secretary,—I must hold in accordance with the decision in *Spawn* v. *Nelles*, Chan. Cham. R. 270, that a defendant is not obliged after replication filed to set the cause down for hearing in order to have the bill dismissed, but that he may apply in Chambers for an order to dismiss for want of prosecution. While the only course open to the defendants on the death of plaintiff is to move for an order that his representatives do revive the suit within a limited time, or in default that it be dismissed, and that on the death of a defendant the only course his representatives can take, is to move that the plaintiff do revive the suit against them, or in default that the bill be dismissed—yet the death of a defendant is no bar to a co-defendant moving to dismiss for want of prosecution. *Williams* v. *Page*, 24 Beav. 490; *Hall* v. *Green*, 2 U. C. Jur. 42.

In the present case, however, Agar, one of the defendants now applying being also an executor of the deceased defendant, cannot move to dismiss. Cleghorn appears by the same solicitor, and seems on that ground also prevented from moving. In *Winthrop* v. *Murray*, 7 Hare 150, it was held that a defendant who had filed his answer and was in a position to move to dismiss, could not do so if a co-defendant appearing by the same solicitor had not filed his answer; and see *Rees* v. *Jacques*, 1 Grant 352.

The proper order, therefore, to be made is that the plaintiffs do revive and bring the cause on for hearing at next term, and in default that the bill be dismissed, plaintiffs to pay the costs of this application.

Order accordingly.

Ardagh v. Orchard.

Final order of foreclosure—Delay in moving for—Notice of motion.

Where a party entitled to a final order of foreclosure neglects to apply until nearly two years have elapsed from the time his right to the order first accrued, the order will not be granted *ex parte*

[Chambers, Oct. 18, 1866.]

This was an application in behalf of the plaintiff for a final order of foreclosure. The money was payable under the report on the 17th November 1864. The application was made *ex parte* on the usual papers.

The Judges' Secretary,—Under such circumstances of delay the plaintiff is not entitled to the order *ex parte*, and notice of motion must be served on the party entitled to redeem, it not appearing that it would be either difficult or expensive to do so.

INSOLVENCY CASE.

(In the County Court of the County of Hastings.)

In re Frank Starling & Co. and re Starling and Arkle.

Insolvent Act—Application for discharge—Mailing notices.

On an application for a discharge under sec. 9, sub-sec. 10, of the Insolvent Act of 1864, *held* unnecessary to mail notices to creditors under sec. 11, sub-sec. 1.

[June 3, 1866.]

Application by petition on behalf of Starling and Arkle, insolvents, for a discharge in both matters, under sub-sec. 10 of sec. 9 of the above act.

Holden for assignees and opposing creditors, objected that notices of the applications had not been mailed, post-paid, as directed by sub-sec. 1 of sec. 11.

Dickson for petitioners, contra.

Sherwood, Co.J.—The Insolvent Act requires, by different clauses, notices of meetings of creditors and other notices to be given, without specifying what the name shall be, and there are only three cases in which the kind of notice is specially designated, viz.: in sec. 4, sub-sec. 13, in regard to the sale of real estate; and in sec. 9, sub-sec. 6, in regard to proceedings for confirmation of discharge given by creditors, and sub-sec. 10 of same section, in regard to insolvents applying to the court for a discharge. Sec. 11, sub-sec. 1, provides, "that notice of meeting

of creditors, and all other notices herein required to be given by advertisement (without special designation of the nature of such notice), shall be so given by publication for two weeks in the *Canada Gazette*.

It is quite clear that the notices referred to above, in which the nature of them is specially designated, are not included among those in which the notice mentioned in this clause is to be given. The clause after the description of the notice continues as follows:—"and in any case *the assignee or person giving such* notice shall also address notices thereof to all creditors," &c. and shall mail the same with the postage thereon, paid at the time of the insertion of the first advertisement.

Do the words "such notice" refer to the notices excepted by the first part of the clause? and the natural conclusion is, they do. These words seem to me to be used to distinguish one kind of notices from another; and to distinguish notices of meetings, and other notices, from these excepted in this clause, and whose nature is designated by the other clauses of the statute referred to by me. This clause could not have been intended to have been applied to all notices, because the sheriff, who is required by 8th subsec. of the 3rd sec. to give notice of a writ of attachment being in his hands, could not by any possibility know who the creditors of the insolvent were, and could not address them by mail.

The same remarks will apply to the 13th subsec. of the same section. It will be observed, too, that the necessity of mailing to each creditor, when the notice in the newspaper is only for two weeks, is much greater than when it is for the same number of months. A creditor might probably overlook an advertisement for the shorter period, from absence or otherwise, which would not be so likely in the case of the longer.

I grant the discharge.

UNITED STATES REPORTS.

SUPREME COURT OF PENNSYLVANIA.

Hoffman v. Bechtel.

Where a creditor employs legal process against a debtor in the usual way and without unnecessary delay, it is *primâ facie* proof of such diligence in collecting his debt as will give him a claim against a guarantor.

But this presumption may be overcome by proof that the creditor had special knowledge of assets or opportunity of collecting his debt, and that his failure to do so was the result of bad faith, or neglect to do what a prudent creditor who had no other security but the debtor's obligation would have done under the circumstances.

The opinion of the court was delivered by

Strong, J.—The contract of guaranty is peculiar. Unlike that of an ordinary surety, it is collateral and secondary. The creditor must resort in the first instance to the debtor, and the guarantor is liable only after the debtor has proved insolvent, and the creditor has used due diligence to obtain payment from him unsuccessfully. But what is due diligence? Perhaps it is impossible to define it with any degree of certainty. It must vary with the circumstances of each case, and hence it is a question for the jury: *Rudy* v. *Wolf*, 16 S. & R. 79. It cannot be less than such as a vigilant creditor ordinarily employs to recover a debt for which he has no other surety than the obligation of the debtor. The guarantor has certainly a right to expect an honest and intelligent effort of the creditor to obtain payment from the person primarily liable. Unless it be shown that legal process would have been fruitless, it is the creditor's duty to employ that process without unnecessary delay, and if he does, there is a legal presumption that he had been duly diligent. This is all that was decided in *Kirkpatrick* v. *White*, 5 Casey 176, and *Gilbert* v. *Henck*, 6 Id. 205. But this presumption is not a conclusive one. There may be cases in which something more may be due than simply suing out legal process, and letting it run its course. This is intimated in both the cases last referred to. In *Kirkpatrick* v. *White*, Judge Lowrie said, due diligence does not require the creditor to accompany the collecting officer and show him personal property, *unless he has some special knowledge relating to it*; and in *Gilbert* v. *Henck* the same judge said that when the principal is not liable to a *ca. sa.*, and the plaintiff has issued a *fi. fa.*, and it is returned "*nulla bona*," he has done all that the law requires of him in favor of the guarantor, "unless it be shown that the principal had property in some other county that was known to the plaintiff, or ought to have been, and that could be reached by ordinary execution process." Here is a clear recognition of a duty resting upon the creditor holding a guarantee of a third person, to do more in some cases than employ legal process against the debtor, and let it run its undisturbed course. He may often know that the debtor has tangible property quite sufficient to satisfy the debt, which the sheriff, without his aid, cannot discover. Surely, due diligence, in such circumstances requires him to do more than put an execution into the hands of the officer of the law. No jury would doubt that vigilant creditors would do more if they had no surety or guarantor for the debt. It is not, then, to be taken as an universal rule that a creditor has done his whole duty to one who had guaranteed the debt to him, when he has sued out legal process against the debtor, and placed it in the hands of the proper officer. The most that can be claimed for it is, that it makes a *primâ facie* case of due diligence, which may be overcome by proof of want of good faith in the creditor, and by proof that the failure to recover from the debtor was in consequence of the creditor's neglect to do what other prudent creditors, in like circumstances would ordinarily have done: *Brown* v. *Brook*, 1 Casey, 210; *Overton* v. *Tracy*, 14 S. & R. 327.

These principles lead to the conclusion that the court below fell into error in rejecting some of the evidence offered by the defendant. The offer which we think should have been received was evidence to prove that the debtor was the owner of a lot and two houses thereon, worth two thousand five hundred dollars, upon which the judgment entered on the bond, guaranteed by the defendant, was a lien; that the lot was subject to prior incumbrances, amounting to about five hundred dollars; that under the execution issued by the plaintiff the lot was sold for seventy dollars to the wife of the debtor; that the plaintiff paid no attention to the sale, absented himself

from it; that after the sale was made he came to the place, and remarked that he did not care, as he was secured for his claim; that he made no effort to have the sale set aside, and a resale ordered, and that he privately offered to the purchaser an advance on his bid if the purchaser would transfer the bid to him. We must, of course, now assume that all this could have been proved, and that it would have been had the court allowed the evidence to be given. The question to be answered then is, would it have tended to show want of good faith to the guarantor, or failure to use that diligence in collecting the debt from Henninger, the debtor, which prudent creditors ordinarily exert in collecting debts due to them? We think it would, and that it should have been submitted to the jury for them to find whether it was sufficient to overcome the *primâ facie* case made out by the plaintiff. We do not assert that it is the duty of a creditor, to whom a guaranty has been given, to attend the sheriff's sale of his debtor's property, and there bid upon it. Generally it is not. But there is much more in this case. All the facts are to be considered, and considered as bearing upon each other. The declaration of the plaintiff; the private offer to take the bid; the fact that the wife of the defendant was the purchaser; that the property sold for less than one-twentieth of its value, and that the plaintiff refused to apply to the court to set aside the sheriff's sale, all are more or less significant. It must be left to a jury to say whether they show that the plaintiff failed to use with good faith that diligence in collecting the debt from Henninger which prudent creditors ordinarily employ. If they do show that, they will avail for the defendant.

The other assignments of error are not sustained. The mere fact that the personal property was worth much more than it brought at the Sheriff's sale was of no importance in itself, and the charge given to the jury upon the facts in evidence was entirely accurate. But for the first reason we have mentioned, a new *venire* must be ordered.

Judgment reversed, and a *venire de novo* awarded.

GENERAL CORRESPONDENCE.

Recent legislation defects.

To the Editors of the Law Journal.

Sirs,—To show how loosely business is done in Parliament, it is only necessary to refer to the Acts of last Session. Mr. Wallbrigde attempted to prevent exception being taken in appeal to matters of form in Magistrate's proceedings. His Act is so worded as to throw everything in doubt. "*The* court *to which such appeal is made shall hear and determine the charge or complaint on which such order, decision or conviction shall be made or had upon the merits, notwithstanding any defect of form or otherwise in such* conviction." What is to be done where there has been an *order* or *decision* but no *conviction*? How is the case to be tried, in case the party elect to have a *jury*? Can in fact a jury be empannelled under the former law when by this one, the *Court* is to "hear and determine the charge or complaint" and supposing the *conviction* filed to be without "defect of form or otherwise." —Can the merits be gone into, if there are other defects in form or otherwise in the *other* proceedings had before the Magistrate. This want of care in wording a statute is likely to lead to as much confusion, as that portion of the former law of Appeal, remedied by the fourth section of this Act, enabling any one *not in custody* to appeal without giving *bonds* to pay the costs of the same, a privilege somewhat largely taken advantage of in most Counties heretofore, to the great loss of the communities of such Counties.

In casually looking through our new statutes, *just arrived*, though we have been subject to them a number of weeks, I perceive the same carelessness in drafting them, as above exhibited, shewing a necessity for a change of law clerk, or a change of ministry, or of the members of Parliament themselves. Turn back to the next page before this precious amendment to the appeal act, here you find that to practice in *County Courts* the Attorney or Solicitor need not take out any certificate at all. This will be good news to the 700, a majority of whom do the most of their business in the County and Division Courts, In casually looking over the Assessment and Municipal Acts I promise the profession that I can drive O'Connell's coach and four through many of their sections. But this is nothing uncommon. The Profession have generally had to teach the Politicians in the use of good Queen's English.

Chatham, C. W. Oct. Coke.

[We are afraid our correspondent expects too much from Legislators. Defects there are, doubtless, but those who have not had some experience in drawing acts of Parliament scarcely know the difficulties attending it.—Eds. L. J.]

Insolvent Act—Assignees—Boards of trade.

To the Editors of the Law Journal.

Gentlemen,—Under the Insolvent Debtor's Act official assignees are to be appointed by boards of trade. In this county it is proposed to inaugurate a board, and no statutory enact-

ment exists, that I know, affecting such organizations. Hence I take take it, if responsible parties meet and form a board, having rules, &c., a board legal enough to appoint official assignees would be created. Still I am in doubt whether a special act of incorporation ought not first to be procured, sanctioning, as it were, the board. Can yon enlighten me? Several deserving insolvents wish to avail themselves of the Act, but want to do so in this county, so as to avoid the expense of going abroad to foreign assignees, having little enough to live upon.

Please answer me in your excellent journal,

Yours,

A Subscriber.

Guelph, Oct. 15, 1866.

[The Insolvent Act of 1864, sec, 2. sub-sec. 4, and sec. 3, sub-sec. 10, meet the difficulty by providing that the Board of Trade in each County, or "the nearest Board of Trade," may appoint official assignees in and for each County.—Eds. L. J.]

New Municipal Act — Elections — Police Magistrates.

To the Editors of the Law Journal.

Dear Sir,—What is your view as to the provisions of the new Municipal Act, as to elections—say for towns? It seems to me clear, that next December the nominations for mayor, reeves and deputies must be made, and if various candidates are proposed, the election will take place in January. The 427th section seems to say so in the words that follow the words as to the time when the Act shall take effect, providing that so much of the Act as relates to the nominating of candidates for municipal office, &c., shall come into effect on the 1st day of November next.

There are doubts in many minds, also, under the 371st section. It seems that it is now obligatory, that, in all cities and towns having a certain population, a police magistrate shall be appointed, who, under the 372nd section, is to hold office during pleasure. The old Act made it a matter of choice with the municipal council, who, on recommending that a police magistrate should be appointed by the Governor, could have that privilege, having to pay for it themselves, however. Now, however, His Excellency seems to have the right, in fact must make the appointment; and the salary will, I take it, be defrayed out of the public purse. This seems just, for many cases coming before any police magistrate in a town really did not originate in the town, but abroad. There are many other reasons why this seems correct.

Please oblige with your views.

An Elector.

Galt, Oct. 13, 1866.

[The provisions, with reference to the qualifications of *both* candidates *and* electors, do not come into force until the 1st of September, 1867, section 427 having been amended by cap. 52 of the same session.

Sec. 427 seems clear enough. except as to the exact meaning of the word "qualification," and as affecting this it has been questioned whether or not an elector having property in several wards is entitled to vote in each at the coming election. It is generally thought that he cannot, but we should not endorse that view without further consideration.

Under the old act, police magistrates were paid by the corporation, but the present act does not, that we can discover, make any provision for their payment. This will be an interesting question for police magistrates to discuss until the next pay-day arrives.—Eds. L. J.]

Assignment of rent—Distress—Hope v. White.

To the Editors of the Law Journal.

Dear Sirs,—As I understand the case of *Hope* v. *White*, reported in the last number of the Common Pleas Reports, it is decided, that a lessee may assign the rent issuing out of a term of years, and that his assignee takes an estate in the rent, which under 4 Geo. II, cap. 28, sec. 5, enables him to destrain therefor. Without presuming to question the correctness of the decision, I would suggest one or two points, shewing the doubtful state of the law.

In *Prescott* v. *Boucher*, 3 B. & Adol 849, it was held, that "a person entitled to the rent reserved on a common lease for years, has no estate in the rent at all, he is entitled to the rent when it from time to time becomes due, as being an incident to his reversion, and not because he has any estate in the rent itself." See *Grant* v. *Ellis*, 9 M. & N. 113. Now only where there was an estate in the rent (such as

ancient rent service, grants of rent out of freeholds, &c.,) was the old real writ of assize available; for seizure of the rent had to be alleged, and there can be no seizure of rent issuing out of chattel interests. See *Grant* v. *Ellis, supra*, and Burton on Real Property, 8th edition, 345. The statute, 4 Geo. II, chap. 28, seems to point to estates in rents, and not to mere incidents of a reversion. In the case alluded to, McLean could hardly have possessed an estate in the rent, and if not, had he any interest on which the statute 4 Geo. II, chap. 28, could operate?

But further, by the judgment in *Hope* v. *White*, the old cases, deciding that on an assignment by lessee of his term of years he cannot reserve rent issuing out of the term, seem to be overruled. The decision in *Parmenter* v. *Webber*, Taunton 593, proceeds upon the assumption that rent reserved on a demise for years is not, nor can be made an estate, and that the person entitled to the rent must have a reversion in order to justify a distress; now under the reasoning and upon the principles of the decision in question, the distress in the case of *Parmenter* v. *Webber*, could have been upheld on the ground that the rent reserved was a rent seck, and because it was a rent seck, the right of distress was given by the statute of Geo. II.

If I might be allowed to guess at the effect of the authorities, I should with great diffidence state them thus:

1. Rents issuing out of freeholds, are in themselves estates, and can therefore be spoken of as rents to which incidents, such as distress, are annexed by statute.

2. Rents issuing out of chattels, are mere incidents of a reversion, depending for existence upon that reversion, if separated from it they cease to exist, as rents in the proper technical sense of the term, and become mere stipulated payments for use and occupation, for which the assignee may have an action of debt; but cannot resort to any remedy originating in the doctrine of tenure, such as distress, &c.

Such rents, therefore, having no independent existence, can scarcely be alluded to by the statute of Geo. II.

The passages from Coke, cited in the judgments in *Hope* v. *White*, appear to relate to rents issuing out of freeholds, as in subsequent sections he treats of remedies for their recovery, solely applicable to such rents.

Yours, &c

A Barrister.

Toronto, Nov. 1866.

[The report of *Hope* v. *White* will be found at p. 293, and the cases above referred to may instructively be examined in connection with it.—Eds L. J.]

REVIEW.

A Handy Book of Commercial Law for Upper Canada. By Robert Sullivan, M.A., Barrister-at-Law, and Charles Moss, Student-at-law. Toronto: W. C. Chewett & Co., 1866.

Information for the million has been one of the distinctive features of the 19th Century; the schoolmaster has been abroad, and there is scarcely a branch of law, physic, mechanics or any of the numerous ologies which has not had its Manual or Handy Book, to initiate the unlearned, or to give a condensation for those desiring a *multum in parvo*. The law, particularly, has abounded in works of this kind in England—the book before us is a very creditable effort of Young Canada in the same direction.

One of the best text books ever written, Smith's Mercantile Law, has been taken as a model, and not only as a model, but the arrangement of that work, as the authors state in the preface, has been closely followed and the language often used.

The first chapter is devoted to brief outlines, (1) Of the laws in force in Upper Canada (2) Respecting collection of debts by suits; which will be found very useful to mercantile men in giving them a good general idea of how and when, and in what courts cases are to be tried, and when judgments can be obtained and executions issued and the means of enforcing them. (3) The acts respecting fraudulent preferences. (4) The married women's act. (5) Bankruptcy—a very useful sketch of the Insolvent Acts in force here. This will be particularly so to all foreigners desiring commercial dealings with this country, as they always look to the bankrupt laws with great care in such or similar cases. (6) Proceedings against representatives of deceased debtors—rather an abstruse subject by the way, which could of course only be treated of shortly.

Chapter 2 treats of Mercantile Property, which is divided into, (1) Of the good-will of a business, and (2) Shipping, as being "two classes of personal property with which merchants especially are concerned." Chapter 3 treats of Mercantile persons, that is to

say, (1) Sole traders. (2) Partners. (3) Corporations and joint stock Companies, and (4) Principal and agent. Chapter 4 discusses Mercantile Contracts: (1) Bills and notes and other negotiable instruments. (2) Guaranty and suretyship. (3) Contracts with common carriers. (4) Contracts of affreightment. (5) Bottomry and respondentia. (6) Insurance. (7) Contracts of apprenticeship and of hiring and service; and (8) Contracts of sale. Chapter 5 speaks of Mercantile Remedies. (1) Stoppage in *transitu*, and (2) Lien.

It will thus be seen that a great deal of ground is covered, and though such a comparatively small work must of necessity be elementary and general, still, as the statements of the law on the various points touched upon are put concisely and clearly, a great deal of information is given on each in a small compass; and when we consider the great difficulty of condensing such important subjects as those treated, and of selecting for discussion the points of most importance and of greatest general interest, it cannot be denied that the task has been well done, and we hope that the public will shew their appreciation of it by availing themselves largely of the opportunity afforded them of obtaining so much information at so small a cost.

It is only, however, the professional man who can thoroughly appreciate that science of condensation which is so well exemplified in some of the Manuals published in England; and though the work before us will not be as useful to the profession as to the mercantile and business public, inasmuch as it gives no authorities for the propositions laid down, and is of an elementary character, it will nevertheless in the latter view be of utility to students, in giving them a general and, so far as we have seen, a correct idea of the most practical part of their future professional business, whilst merhants in the United States and in Lower Canada will for similar reasons find the book of much use to them in their transactions with this country.

The "get up" of the book is also good, and we notice that the style of cover used is similar to that introduced in Mr. O'Brien's Division Court Manual. The book contains 270 pages, and is supplemented by a full index, and the price has been fixed at $2.

MONTHLY REPERTORY.

Reg. v. Hollinrake.

Evidence—Deaf and dumb witness.

At the trial of a prisoner for assaulting with intent to ravish, it appeared that the prosecutrix was deaf and dumb, and her father, who had been sworn to interpret in the case, having stated that he believed hernot to be aware of the nature of an oath, the judge summoned an expert for his assistance, who, before being sworn to interpret, endeavoured to ascertain the extent of her intelligence, and reported thereon to the court. The judge thereupon allowed the expert to be sworn to interpret, and the prosecutrix, through him, to be sworn. The examination proceeded some way, and amongst her replies was one that she had consented to what had been done to her by the prisoner; and as she answered yes to almost every question, the expert informed the court that he was satisfied that he had been mistaken, and that she was unable to understand him, and the court thereupon decided that any further examination of her would be unsatisfactory. The counsel for the prosecution then proposed to call other evidence, which, after objection, was done, and the prisoner was convicted.

Held (1) that, although the prosecutrix had been sworn, the judge was justified in totally withdrawing her evidence from the jury, and that their verdict was not thereby invalidated.

(2.) Hypothetical questions stated for the guidance of the judge ought not to be reserved for this court.

(3.) *Quære.*—Whether, upon the expert stating that he had been mistaken, and that the means of communication between him and the prosecutrix were, from want of training or otherwise, so defective, that it would be unsafe to proceed with her examination, it was competent to the judge to discharge the jury, and adjourn the case in order that the prosecutrix might be properly instructed. (14 W. R. 677.)

APPOINTMENTS TO OFFICE.

CORONERS.

GILBERT C. FIELD, of the town of Woodstock, Esquire, M.D., to be an Associate Coroner, for the County of Oxford. (Gazetted, October 6, 1866.)

PHILIP PARKER BURROWS, of Millbrook, Esquire, M.D., to be an Associate Coroner, for the United Counties of Northumberland and Durham. (Gazetted, October 6, 1866.)

NIEL DUNLOP, of Loughborough, Esquire, M. D., to be an Associate Coroner, for the County of Frontenac. (Gazetted, October 6, 1866.)

GEORGE W. JONES, of the Village of Prince Albert, Esq., M.D., to be an Associate Coroner, for the County of Ontario. (Gazetted, October 6, 1866.)

GEORGE WILSON, of Humberstone, Esquire, to be an Associate Coroner for the County of Welland. (Gazetted, October 6, 1866.)

WILLIAM JULIUS MICKLE, of Petrolia, Esquire, M.D., to be an Associate Coroner for the County of Lambton. (Gazetted, October 6, 1866.)

MELTON H. STARR, Esquire, M.D., to be Associate Coroner for the United Counties of York and Peel. (Gazetted, October 20, 1865.)

NOTARIES PUBLIC.

JOHN McKEOWN, of Hamilton, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada. (Gazetted, October 6, 1866.)

WILLIAM HORATIO RADENHURST, of Perth, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada. (Gazetted, October 6, 1866.)

PEDRO ALMA, of Niagara, Esquire, Barrister-at Law, to be a Notary Public for Upper Canada. (Gazetted, October 13, 1866.)

ABRAM WILLIAM LAUDER, of the City of Toronto, Esquire, Barrister-at Law, to be a Notary Public for Upper Canada. (Gazetted, October 13, 1866.)

JOHN HENRY ANSLEY, of Simcoe, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada. (Gazetted, October, 13. 1866.)