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DIARY FOR MAY.

1. Thursday ..... Last day for notice to County of apportionment of Grammar School monies.
3. Saturday ..... Articles, &c., to be left with Secretary of Law Society
4. SUNDAY ..... *2nd Sunday after Easter.*
10. Saturday ..... Chancery Hearing Term ends.
13. SUNDAY ..... *3rd Sunday after Easter.*
14. Wednesday .... Last day for service of Writ County Court.
18. SUNDAY ..... *4th Sunday after Easter.*
19. Monday ..... EASTER TERM begins.
23. Friday ..... Paper Day, Q. B.
24. Saturday ..... Queen's Birthday. Paper Day, C. P. Declare for Co. Court.
25. SUNDAY ..... *Rogation.*
26. Monday ..... Paper Day, Q. B.
27. Tuesday ..... Paper Day, C. P.
28. Wednesday ..... Paper Day, Q. B.
29. Thursday ..... Paper Day, C. P.
31. Saturday ..... EASTER TERM ends. Last day for Court of Revision finally to revise Ass't Roll, and for Co. Court to revise Tp. Roll.

The Upper Canada Law Journal.

MAY, 1862.

PROCEDURE AT NISI PRIUS.

In the trial of every cause by jury there are functions appertaining to judge, counsel and jury, which functions are quite independent of each other, but the proper discharge of which are essential to the due administration of justice.

In common parlance, the jurors are the judges of the fact as the judge is of the law. Each counsel advocates the right of his client to a verdict on the law and facts, under the direction of the judge.

There are two sides to every cause brought before a jury. One must prevail. It is for the jury, taking the law from the judge, to decide between the parties and a true verdict give according to the evidence.

It is the duty of the judge to decide all questions as to the admissibility of evidence, to instruct the jury in the rules of law by which the evidence admitted is to be weighed, and generally to explain the principles of law governing the questions at issue.

The trial is as it were a legal combat—the counsel the combatants, the judge the moderator, and the jury the arbiters upon whose decision rests the result of the conflict.

In order to the economy of time and the decent administration of justice, law givers have found it necessary to make regulations for the conduct of counsel in their addresses to the jury.

It is as necessary that one party should begin as that the other should end. There is often a struggle for the right to begin, where it carries with it the right to reply. The "last word" with the jury by many is looked upon as an object of importance.

It is provided by the Common Law Procedure Act that the addresses of counsel to the jury shall be regulated as follows:—"The party who begins is allowed (in the event of his opponent *not* announcing, at the close of the case of the party who begins, his intention to adduce evidence) to address the jury a second time, at the close of such case, for the purpose of summing up the evidence; and the party on the other side is allowed to open the case and also to sum up the evidence if any, and the right of reply shall be the same as at present." Con. Stat. U. C. cap. 22, s. 209.

It will be observed that this enactment in no respect alters the previously existing law as to the right to begin and right to reply. It merely provides for intermediate speeches under a given state of circumstances.

First, let us consider what was the law as to right to begin and right to reply before the Common Law Procedure Act; and then, secondly, let us consider the meaning of the clause of the Common Law Procedure Act which we have quoted.

The issue or question to be tried is eliminated by pleadings. That issue has an affirmative and a negative. It is in general the duty of the party who affirms to make out his case. The burden of proof rests upon him. One test is this—what would be the consequence if no evidence were offered at all? If in such case the verdict ought to be given for one party, it is manifest that something must be done by the other to prevent that consequence. He who must give the evidence to prevent that result is the party to begin (per Alderson, B., in *Ceach* v. *Ingall*, 14 M.&W. 100). Another test is to consider—what would be the effect of striking out of the record the allegation to be proved, bearing in mind that the right to begin lies on whichever party would fail if this step were taken (per Alderson, B., in *Millis* v. *Barber*, 1 M. & W. 427).

To the rule as just stated there are a few exceptions, as in actions for libel, slander, and injuries to the person, in which cases plaintiff has the right to begin though the affirmative of the issue be on the defendant (per Parke, B., in *Cannam et al.* v. *Farnier*, 3 Ex. 698). We cannot at present enter into any examination of the exceptions. We must content ourselves with referring to Taylor on Evidence, 2 Edn. p. 319.

It is the practice of skilled counsel, conscious of a right to reply when beginning or opening a case, to confine themselves to a brief statement of the facts, and then to call the witnesses in proof of the facts stated. A party is not bound by an inadvertent statement made by counsel in opening a case, where such statement is promptly retracted. (*Jannette* v. *Great Western Railway Co.*, 4 U.C.C.P. 488.)

The party who begins, where there is evidence called for the defence, has the right to reply on the whole case. This is the general reply. It is for this that counsel so often contend and to this that success is so often attributed. Of course much depends upon the counsel who has this advantage, whether or not he make a good use of it. It is for him to use and not to abuse his privilege. Where counsel in a general reply abuses his privilege, he is certain to be followed by remarks from the presiding judge of a counteracting tendency. It is much wiser for counsel having the general reply to keep within the bounds of discretion. An opposite course is worse than no reply at all. It renders it necessary for the presiding judge to argue against him and appear to assume the functions of an advocate rather than those of a judge. The influence of the judge, whose position makes him impartial, is in such a case all powerful.

So much for the right to begin and right to reply. Now for the intermediate speeches. Each party has under certain circumstances a right to sum up evidence. Counsel for the party who begins has that right in the event of his opponent *not* announcing his intention to adduce evidence. Where counsel did not announce his intention to adduce evidence, in consequence of which the counsel who began summed up his evidence, the court refused to allow his opponent to change his mind and adduce evidence. (*Darby* v. *Ouseley*, 2 Jur. N. S. 497.) Where plaintiff's counsel opened the case and called his witnesses, and then, without requiring defendant's counsel to announce whether he intended or not to call witnesses, allowed him to address the jury, and at the conclusion of his speech announced that he did not intend to call witnesses, plaintiff's counsel was held to be too late to claim the reply. (*Gibson* v. *The Toronto Roads Company*, 3 U.C. L J. 11.)

The intermediate speech on either side is only allowed for the purpose of summing up evidence, that is, evidence proper for the jury. It is for the presiding judge to determine whether or not there is evidence to go to the jury. If he rule that there is no such evidence, there is no right to sum up that which does not exist. An address to the jury in a case where there is no evidence could only have the effect of inciting the jury to take the matter into their own hands and to decide in opposition to the ruling of the judge. It would be in fact allowing an appeal from the judge to the jury in a matter which is within the jurisdiction of the judge alone. No doubt there may be a discussion as to whether or not there is evidence to go to the jury. That discussion takes place in the presence of the jury as it does in the presence of any others at the time in court. The court is open to all; but the decision of this question, whether there is evidence or not, rests with the judge and none other. Where the judge is of opinion that there is no evidence, it is not the course for him to read his notes to the jury, telling them that he thinks there is no evidence and hoping that they concur with him, but he tells them that there is no evidence, and, unless plaintiff accepts a nonsuit, tells them in law to find a verdict for defendant. If the judge be wrong in such direction, the constitutional mode of correcting the error is either to tender a bill of exceptions, or more commonly to move the court in banc. and not to argue at the judge through the jury or at the jury through the judge (per Pollock, C. B., in *Hodges* v. *Ancrum*, 11 Ex. 214).

If counsel dispute as to the right to begin to sum up evidence or reply, it is for the presiding judge to determine the dispute. The parties for the time at all events are bound by his decision. If it be afterwards clearly made to appear that the judge was wrong in his ruling, and that substantial injustice has resulted therefrom to either party, that party can have the error corrected by an application to the court in banc. (*Brandford* v. *Freeman*, 5 Ex. 734; *Doe Baker* v. *Brazne*, 5 C. B. 655.)

COLONIAL COUNSEL IN ENGLAND.

The following is an extract, which we take from the *Lower Canada Jurist*, from a letter addressed by the Registrar of the Privy Council to Robert Mackay, Esq., an eminent advocate of Lower Canada.

COUNCIL OFFICE, WHITEHALL,
November 25th, 1861.

In answer to your question, I beg to inform you that the Bar of the Privy Council is an open bar to all all advocates duly qualified in the Colonies and Dependencies from which appeals lie to the Queen in Council; and consequently any Canadian advocate would be heard by their Lordships in Canadian appeals.

(Signed,) HENRY REEVE,
Reg. P. C.

The communication is an important one, and as such we copy it for the information of our readers. We do not think that the members of the Bar in Upper Canada have hitherto been aware that they have the privilege which it mentions. The privilege is of great value. The knowledge of Colonial law acquired by counsel in England on occasion of a particular appeal is oftentimes too slender to enable them to do justice to the interests entrusted to them. Therefore it may be that in cases of importance some of our local bar will be found both ready and willing to avail themselves of the privilege.

Any person who has been duly called to the Bar of any of Her Majesty's Superior Courts in England, Scotland or Ireland, not being courts of merely local jurisdiction, are entitled to be called to the Bar in Upper Canada.

It might be well for the English Benchers to consider whether or not reciprocity might not be extended to Colo-

nial barristers desirous of removing to England. Very few perhaps would be found courageous enough to entertain the idea of availing themselves of any such measure of reciprocity; but that of itself is no reason why some such measure should not exist. It would be a great compliment to the Colonies, many of which have courts and laws as nearly as possible similar to those of the mother country. We make the suggestion for what it is worth.

RECORDERS' COURTS.

There appears to be some fatality as to the time for holding Recorders' Courts—there is no certainty about it. There is not a Session of Parliament without some legislation on the subject.

By the Municipal Institutions Act, sec. 377, it was enacted that there should be four sessions, to commence

2nd Monday in January.
1st Monday in April.
1st Monday in July.
1st Monday in October.

By the 23 Vict., cap. 50, the times were altered as follows:

2nd Monday in January.
1st Monday in April.
1st Monday in July.
3rd Monday in November.

The Attorney General has during the present Session introduced a bill which enacts, that the times shall be as follows:

1st Monday in March.
1st Monday in June.
1st Monday in September.
3rd Monday in December.

We presume these alterations are intended to relieve Courts of Assize in cities of some portion of the criminal business which, under existing arrangements, falls to the lot of the Superior Court Judges, and which might as well be tried before inferior tribunals.

BILLS OF SALE AND CHATTEL MORTGAGES.

Attorney General Macdonald has introduced a Bill designed to set at rest the conflict between the Courts of Queen's Bench and Common Pleas, as to the effect of a writ of execution upon a Bill of Sale or Chattel Mortgage executed but not filed.

It amends section 1 of Consol. Stat. U. C., cap. 45, by adding thereto the words, "and every such mortgage or conveyance shall operate and take effect from the day and time of the execution thereof."

The amendment is to be so far retrospective as "to apply to and effect all mortgages and conveyances which have been heretofore executed under and according to the provisions of the Act 20 Vic., cap. 33, or under and according the provisions of Consol. Stat. U. C., cap. 45, except in those cases which may have been heretofore *adjudicated* upon in any of the Courts of Law or Equity in Upper Canada."

NEW CHANCERY ORDERS.

MONDAY, 28th April, 1862.

SITTINGS OF COURT.

Sections 1, 2, 3, 4 and 5 of Order number Three of the General Orders of the 23rd December, 1857, are hereby abrogated and discharged.

The Judges of the Court will sit separately and by alternate weeks as follows:

One Judge will sit daily in each week for the dispatch of all business other than Re-hearings and Chamber business.

The business before such Judge will be taken as follows:

Monday	Motions.
Tuesday & Wednesday	Hearings pro confesso; Motions for Decree; further directions; Appeals from Master's Reports.
Thursday, Friday and Saturday	Hearings of causes; Demurrers (excepting during Re-hearing Term.)

SETTING DOWN CAUSES.

The party who desires to have a cause set down to be heard is to enter it with the Registrar for that purpose, at least fourteen days before the day for which the same is so set down.

LISTS TO BE PREPARED BY THE REGISTRAR.

The Registrar is to prepare lists of all causes entered for hearing, making a separate list of all the causes to be heard before each judge. Each cause is to be set down in the order in which it has been entered with the Registrar. Causes are to be called on and heard according to the Registrar's list, unless the court order otherwise.

NOTICE OF HEARING.

Notice of hearing must be served by the party setting down the cause upon all proper parties for a proper day falling within the week in which the judge in whose list the same is set down is to sit; and such notice is to be served not less than twelve days before the day for which such notice is given.

RE-HEARING OF CAUSES.

There are to be Four Re-hearing Terms in each year, commencing respectively as follows:

1.—The second Thursday in March.
2.—The first Thursday in June.
3.—The second Thursday in September.
4.—The first Thursday in December.

All re-hearing of causes are to be in Re-hearing Terms only.

Applications in the nature of re-hearings to discharge or vary orders made in court are to be made in Re-hearing Terms only, except with the leave of the judge pronouncing the order sought to be discharged or varied.

APPEALS FROM ORDERS MADE IN CHAMBERS.

One judge will sit daily in each week for the dispatch of business in Chambers.

Matters adjourned from Chambers under section three of Order thirty-four of the General Orders of the 3rd June, 1853, and applications in the nature of re-hearings to discharge or vary orders made in Chambers, are to be heard in full Court, on the last Wednesday of every month, except during Examination Terms.

The foregoing orders are to come into operation on the twelfth day of May next: but causes may be set down and notice may be given of proceedings to be taken under the said orders from the day of the date hereof.

READING DEPOSITIONS IN OTHER CAUSES.

Any party shall be entitled in future, upon notice, without order to use depositions taken in another suit in cases where, under the present practice, he is entitled to use such depositions, upon obtaining the common order for that purpose.

EXAMINATION OF PARTIES TO SUITS.

Any party defendant may be examined as a witness without order, on behalf either of the plaintiff or of a co-defendant; and any party plaintiff may be examined as a witness, without order, by a co-plaintiff or by a defendant in cases where, under the present practice, such examination may be had upon the common order being obtained for that purpose.

RE-TAXATION OF COSTS.

It shall be competent for any party against whom costs have been taxed by a deputy master of this court to obtain, as of course, an order for a re-taxation of the same, before the taxing officer of this court at Toronto.

It shall be the duty of the party obtaining such order to deposit with the deputy master and registrar with whom the papers are filed a sufficient sum to cover the expenses of transmitting the same to Toronto, and of the return thereof.

In case less one-twentieth be taxed off upon re-taxation, the costs of such re-taxation shall be added to the bill already taxed.

This order is to apply to bills of costs already taxed as well as to bills that may hereafter be taxed; but it is not to apply to cases where the costs have been paid or final proceedings have been taken upon the taxation of costs already had. Process for the levying of such costs is not to be deemed a final proceeding within the meaning of this order.

(Signed,) P. M. VANKOUGNET, C.
J. C. P. ESTEN, V. C.
J. G. SPRAGGE, V. C.

HABEAS CORPUS IN THE COLONIES.

The Bill now before the Imperial Parliament respecting the issue of writs of Habeas Corpus to the Colonies from England, enacts that "no writ of habeas corpus shall issue out of England by authority of any Judge or Court of Justice therein into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established Court or Courts of Justice having authority to grant and issue the said writ and to insure the due execution thereof throughout such colony or dominion: Provided that nothing contained in this Act shall affect or interfere with any right of appeal to Her Majesty in Council now by law existing."

COMMON LAW PROCEDURE ACT.

Dr. Connor has, during the present Session of the Provincial Legislature, introduced a bill for the amendment of the COMMON LAW PROCEDURE ACT.

Section 1 enacts that when goods or chattels have been seized in execution by a sheriff or other officer under process of the above mentioned courts, and some third person claims to be entitled, under a bill of sale or otherwise, to such goods or chattels by way of security for a debt, the court or a judge may order a sale of the whole or part thereof, upon such terms as to payment of the whole or part of the secured debt or otherwise, as they or he shall think fit, and may direct the application of the proceeds of such sale in such manner and upon such terms as to such court or judge may seem just.

Section 2 enacts that, upon the hearing of any rule or order calling upon persons to appear and state the nature and particulars of their claims, it shall be lawful for the court or judge, wherever, from the smallness of the amount in dispute or the value of the goods seized, it shall appear to them or him desirable and right so to do, at the request of either party, to dispose of the merits of the respective claims of such parties, and to determine the same in a summary manner upon such terms as they or he shall think fit to impose, and to make such other rules and orders therein as to costs and all other matters as may be just.

Section 3 enacts that in all cases of interpleader proceedings, where the question is one of law, and the facts are not in dispute, the judge shall be at liberty in his discretion to decide the question without directing an action or issue, and, if he shall think it desirable, to order a special case to be stated for the opinion of the court.

Section 4 enacts that the proceedings upon such case shall, as nearly as may be, be the same as upon a special case stated under the Common Law Procedure Act; and error may be brought upon a judgment upon such case, and the provisions of the Common Law Procedure Act, as to bringing error upon a special case, shall apply to the proceedings in error upon a special case under this act.

Section 5 enacts that the judgment in any such action or issue as may be directed by the court or judge in any interpleader proceedings, and the decision of the court or judge in a summary manner, shall be final and conclusive against the parties and all persons claiming by, from or under them.

Section 6 enacts that all rules, orders, matters and decisions to be made and done in interpleader proceedings under this act

(excepting only any affidavits) may, together with the declaration in the cause, if any, be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, and to secure and enforce the payment of costs directed by any such rule or order; and every such rule or order so entered shall have the force and effect of a judgment in the superior courts of common law at Toronto.

Section 7 enacts that the joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist, and judgment may be given in favor of the plaintiffs by whom the action is brought, or one or more of them, or in case of any question of misjoinder being raised, then in favor of such one or more of them as shall be adjudged by the court to be entitled to recover; provided always, that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favor judgment is not given, unless otherwise ordered by a court or judge.

Section 8 enacts that, upon the trial of such a cause, a defendant who has therein pleaded a set-off may obtain the benefit of his set-off by proving either that all the parties named as plaintiffs are indebted to him, notwithstanding that one or more of such plaintiffs was or were improperly joined. or on proving that the plaintiff or plaintiffs who establish their right to maintain the cause is or are indebted to him.

Section 9 enacts that no other action shall be brought against the defendant by any person so joined as plaintiff in respect of the same cause of action.

Section 10 enacts that the plaintiff in replevin may, in answer to an avowry, pay money into court in satisfaction, in like manner and subject to the same proceedings as to costs and otherwise, as upon a payment into court by a defendant in other actions.

Section 11 enacts that such payment into court in replevin shall not, nor shall the acceptance thereof by the defendant in satisfaction work a forfeiture of the replevin bond.

Section 12 enacts that, in proceedings to obtain an attachment for debts under the Common Law Procedure Act, the judge may in his discretion refuse to interfere where, from the smallness of the amount to be recovered, or of the debt sought to be attached or otherwise, the remedy sought would be worthless or vexatious

Section 13 enacts that whenever, in proceedings to obtain an attachment of debts under the act above mentioned, it is suggested by the garnishee that the debt sought to be attached belongs to some third person, who has a lien or charge upon it, the judge may order such third person to appear before him and state the nature and particulars of his claim upon such debt.

Section 14 enacts that, after hearing the allegations of such third person under such order, and of any other person whom, by the same or any subsequent order, the judge may think fit to call before him, or in case of such third person not appearing before him upon such summons, the judge may order execution to issue to levy the amount from such garnishee, or the judgment creditor to proceed against the garnishee according to the provisions of the Common Law Procedure Act; and he may bar the claim of such third person, or make such other order as he shall think fit, upon such terms, in all cases, with respect to the lien or charge, if any, of such third person, and to costs, as he shall think just and reasonable.

Section 15 enacts that the provisions of the Common Law Procedure Act, so far as they are applicable, shall apply to any order and the proceedings thereon, made and taken in pursuance of the herein next before mentioned powers under this act.

Section 16 enacts that the superior courts of common law at Toronto, and every judge thereof, and any judge sitting at *nisi prius*, may at all times amend all defects and errors in any proceedings under the provisions of this act, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties, shall be so made if duly applied for.

Section 17 enacts that the judges of the said courts, or any four or more of them, of whom the Chief Justices shall be two, may from time to time make all such general rules and orders for the effectual execution of this act, and of the intention and object thereof, and for fixing the costs to be allowed for or in respect of the matters herein contained, and the performance thereof, as in their judgment shall be necessary and proper; provided that nothing herein contained shall be construed to restrain the authority or limit of jurisdiction of the said courts or of the judges thereof to make rules or orders or otherwise to regulate and dispose of the business therein

Section 18 limits the act to Upper Canada.

COSTS OF ARBITRATORS.

The practice of allowing arbitrators to be the judges of the amount of their own fees has been productive of much abuse—so much so, that we are glad to find the Attorney General offers to supply a remedy. He has introduced a Bill intitled, "An Act for regulating costs of arbitrators." It is short.

Section 1 enacts that the Judges of the Superior Courts of Common Law in Upper Canada, may from time to time establish a scale of fees to be paid to professional or special Arbitrators, such as barristers, attorneys, physicians, surgeons, engineers, architects, surveyors, and regular accountants, in all cases of arbitration in Upper Canada, and also fees to counsel and attorneys attending before arbitrators, and the allowances to witnesses for their attendance.

Section 2 enacts that every bill of costs upon any arbitration shall be taxed before the principal Master of the Court in which the same shall be pending, according to such scale of fees, and such Master may, in his discretion, call for evidence to satisfy him of the nature and importance of the questions submitted.

Section 3 enacts that no taxation of arbitrators' counsel or other fees under this Act, shall be made without an affidavit of the party, his agent or attorney preferring such bill. of the actual length of each day's sitting, and that the time charged for was *bonâ fide* occupied on the business of the arbitration; all other charges and disbursements to be proved in the usual manner.

Section 4 enacts that any arbitrator refusing to deliver his award to the party entitled to the same, on tender of his fees settled under authority of this Act, after a reasonable time shall have elapsed for the making up and executing the same, shall be deemed guilty of a contempt of court, and may be dealt with accordingly.

Section 5 enacts if any arbitrator shall recive for his fees a larger sum than shall be afterwards allowed on taxation, this difference shall constitute a debt due by him to the party who paid the same, and may be recovered with double costs (after demand and refusal) before any court of competent jurisdiction.

Section 6 enacts that the foregoing provisions which relate to arbitrators and witneses, shall apply to all arbitrations in the county court of Upper Canada, provided that the fees shall be reduced by one-third, and that the taxation shall take place before the Clerk of the county court.

SELECTIONS.

THE BENCH AND THE BAR.

LORD JUSTICE SIR JAMES LEWIS KNIGHT BRUCE.

Towards the latter end of the last century, John Knight, Esq. of Fairlinch, in Devonshire, married a lady named Margaret Bruce, and became the father of three sons: the first of whom was John Bruce Pryce, Esq., an active county magistrate in the neighbourhood of Cardiff, and father of Henry Austin Bruce, Esq., M.P. for Merthyr; the second was the Rev. William Bruce Knight, Dean of Llandaff; and the third was the subject of this sketch, who was born at Barnstaple in Devonshire.

In 1817 he was called to the Bar at Lincoln's Inn. He had previously married Miss Newte, daughter of Thomas Newte, Esq., formerly of Duvale, in Devonshire, by whom he has had several children, of whom three are now alive.

In 1829 he was made Queen's Counsel, and in 1841 became Vice-Chancellor. In 1842 he was appointed one of the members of the Privy Council, and knighted.

For some time, in the year 1850, the excellent Vice-Chancellor Wigram, owing to failing sight, was unable to sit in Court. In the same year the Vice-Chancellor of England, Sir L. Shadwell, became ill; and, in consequence, for several weeks, until the rising of the Court in August, the whole business of the three Courts was conducted by Vice-Chancellor Knight Bruce alone. At the close of the sittings the then Attorney-General, Sir John Romilly, expressed in an address in court the sense entertained by the Bar on the occasion. The address is given at the commencement of the 4th volume of De Gex & Smale's Reports, and was in these words:—

"Before the Court rises for the vacation, I am desirous of saying, on behalf of the Bar, a few words. It is now for several weeks that the whole business of the Court of Chancery, distributed among the three Vice Chancellors, has been borne by your Honour alone. That business, at all times very heavy at this season, has been this year greatly increased by the numerous applications which have arisen under a new practice introduced into the Court. I am requested by the Bar to testify our respectful admiration at the knowledge and abili[ty] with which this mass of business has been disposed of, and t[o] express our gratitude for the unvarying and unwearied attention with which your Honour has listened even to the youngest among us. I need not add, how gratifying it is to me to be made the organ of this communication."

Later in the same year, on the occasion of the death of the lamented Sir L. Shadwell, the Vice-Chancellor Knight Bruce addressed the Bar in the following words, also given in the book above referred to:—

"Mr. Attorney-General,—It is impossible for me to enter this Court to-day without a renewal of sorrow for the loss of one who has been so lately taken from us, and by whom this chair has been filled for so many years, that it is almost startling to hear from it another voice than his. With this feeling I am sure you all sympathise. We have lost at once a friend who was dear to us, and a Judge distinguished for his great knowledge of the law which he administered—distinguished for his various acquirements—distinguished for his unwearied patience—'swift to hear,' 'slow to wrath,'—pure and blameless in his life, an example of courtesy, gentleness and amenity, who never uttered a word intended to give pain, nor harboured one unkind thought, or one acrimonious feeling.—But he is gone.—*Flere et meminisse relictum est.*"

In 1851, when alterations were made in the Court of Chancery, and a fresh tribunal was appointed, Vice Chancellor Knight Bruce was, with Lord Cranworth, selected for the new office thus created, and became a Lord Justice of the Court of Appeal in Chancery.

SIR HUGH MACALMONT CAIRNS, M.P.,

Sir Hugh Macalmont Cairns is the second son of the late William Cairns, Esq., of Cultra, in the county of Down, Ireland.

Sir Hugh was born 27th December, 1819, and was educated at Trinity College, Dublin, which he entered in 1834, taking first class in classics, and other honours, throughout his Collegiate course. Sir Hugh commenced his legal career early. In 1844, he was called to the Bar. As a Chancery Barrister he soon attained high rank, and in 1856 was appointed one of Her Majesty's Counsel, and a Bencher of the Honourable Society of Lincoln's Inn.

In 1852, at the general election of that year, Sir Hugh Cairns was returned as M.P. for Belfast. When, in the spring of 1858, the conservative ministry under Lord Derby was formed, Sir Hugh was made Solicitor-General and received the honour of Knighthood. In this capacity he did good service on two occasions that will long be remembered: on the 19th of May, 1858, on Mr. Cardwell's motion for a vote of censure on Government for the despatch transmitted to the Governor General of India by Lord Ellenborough, in reference to the proclamation respecting the confiscation of Oude, Sir Hugh Cairns delivered a speech of great power, which was afterwards printed and widely circulated; and afterwards, in a speech which won universal applause for its clearness and philosophical precision, Sir Hugh obtained leave to bring in a Bill for the introduction of a reform, long and imperatively required. We refer to his Bill to simplify the titles to Landed Estates. Our leading law reformers had been talking about such a measure for years; and while they warned Sir Hugh of the difficulties in his way, they were compelled to confess their admiration and delight at his attempt. Even the *Times* acknowledged that on the latter occasion, besides the luminous arrangement and the clear and accurate statement which adorned it, the speech of Sir Hugh was distinguished from most of those usually heard within the walls of Parliament, by the abstract and philosophical nature of the principles on which it was based.

Sir Hugh married, in 1856, Mary Harriet, daughter of the late John Mac Neile, Esq., of Parkmount, County Antrim.

SIR WILLIAM PAGE WOOD, VICE CHANCELLOR.

Vice-Chancellor Sir William Page Wood, the second son of Sir Matthew Wood, Bart., M.P., was born on the 29th of November, 1801, and was named Page, after his mother, a Suffolk lady. He studied at Winchester—at the Auditoire, Geneva—and at Trinity College, Cambridge. In 1824 he took his Wrangler's degree; in 1825 he was elected a Fellow of Trinity; and in 1834 he was elected a Fellow of the Royal Society. In Michaelmas Term, 1827, he was called to the Bar, and in February, 1845, was appointed Queen's Counsel.

There was a general election in 1847, and Mr. Wood was elected for the city of Oxford, with his colleague, Mr. Langston without opposition. In 1849, Mr. Wood introduced a bill to substitute Religious Affirmation for Oaths in certain cases, and in 1850 he re-introduced the bill. In each year the bill passed the House of Commons, but was rejected in the Lords. The principles of it have since been fully embodied in the Common Law Procedure Act. When, in 1850, on the 28th of February, Mr. Hume moved a series of resolutions, with a view to the introduction of a household suffrage, vote by ballot, an increase in the number of representatives, the abolition of the property qualification, and the limitation of the duration of Parliament to three years, Mr. Wood spoke and voted in favour of the motion, stating that he differed in some details. When Mr. Gladstone introduced a bill in favour of giving the Church of England synodical action in the Colonies, Mr. Wood aided him by his speech and vote. On March 7th, 1850, Mr. Wood introduced a bill to prevent vestry and other meetings in churches, by authorizing the vestry to raise, by a rate, a sufficient sum to erect vestry halls. This bill became law. In the memorable debate in that year on Lord Palmerston's foreign policy, Mr. Wood was one of the speakers in its favour.

On the question of admission of Jews into Parliament, Mr. Wood bore a distinguished part. On March 12th, 1849, on the motion of Mr. Wood, a committee was appointed to search for precedents in the case. On the 26th of July, 1850 the Baron Rothschild came to the table of the House, introduced by Mr. Wood and Mr. John Abel Smith, to take the oaths and his seat. A discussion ensued. Mr. Hume moved an amendment, in favour of the Baron being sworn on the Old Testament, which amendment was carried; and when the Baron had done this, Mr. Wood argued that on the part of the Baron there had been a valid taking of the oath. One of the last acts of Mr. Wood, before taking office, was to support Lord John Russell's bill for counteracting the aggressive policy of the Church of Rome. Shortly after this, Mr. Wood voted in the majority on Mr. Locke King's motion for introducing the £10 qualification for electors in counties, which led to the resignation of Lord John Russell, and the acceptance of office by Lord Derby in 1851. On the latter nobleman's failing to form an administration, Lord John Russell returned to office, and announced his readiness to introduce a measure for Parliamentary Reform. He soon afterwards requested Mr. Wood's acceptance of the office of Solicitor General,—Lord Langdale's resignation of the Mastership of the Rolls having led to the appointment of Sir John Romilly to the Judicial Bench, and Sir. A. J. E. Cockburn having become Attorney-General. The date of his appointment is March, 1851. Oxford re-elected Mr. Wood, who was knighted (as is usual) on his appointment. In the general election for 1852, he was again elected by the city of Oxford to be her representative in the House of Commons. In the same year, the University of Oxford conferred on him the honorary degree of D.C.L. We have now reached the close of Sir William's political life. In 1849 he had accepted the office of Vice-Chancellor of the County Palatine of Lancaster, at the instance of Lord Campbell, then Chancellor of the Duchy, on the express condition that he was to be at liberty to introduce a bill for rendering that Court effective. This he achieved, and he resigned his office on being appointed Solicitor-General. In January, 1853, he was appointed one of the Vice-Chancellors of the High Court of Chancery. Sir William Wood has been a member of several royal commissions for amending the law; the most important of which were those for amending the practice of the Court of Chancery, and that for amending the law of divorce. He also acted with Lord Wensleydale and Sir Lawrence Peel on a commission for arbitrating between the King of Hanover and Her Majesty, on the King's claim to certain jewels in the possession of Her Majesty, as belonging to the crown of Hanover.

In January, 1830, Mr. Wood married Charlotte, only daughter of Major Moor, of Great Bealings, Suffolk.

ON THE RELIEF OF TRUSTEES DESIROUS OF RELINQUISHING THEIR TRUSTS.

Read at a General Meeting of the Society for promoting the amendment of the law, on Monday, Feb. 10th, 1862, by GEORGE ROCHFORT CLARKE *Esq*, M.A.

There is a part of the law relating to trustees, in which some amendment is required, and to which the attention of this Society should be directed. I, indeed, published two letters in January and March, addressed to Lord Chelmsford, then Lord Chancellor, on the subject. Since that time two acts have passed (22 and 23 Vic. c. 35—23 and 24 Vic c. 145,) which have diminished the difficulties of trustees whilst they continue in their trust; but nothing has been done to discharge the trustee altogether from his trust in the cases of which I am about to treat. The relief may be decreed but cannot be accomplished.

I allude to the case of a trustee, *entitled to be discharged* from his trust; who has filed a bill in Chancery for obtaining such discharge; in which suit an order has been made by the Court that he shall be so discharged, and that a new trustee shall be substituted in his place; followed by a reference to the proper officer to inquire and report as to the sufficiency of any proposed substitute; and no one can be found, satisfactory to the Court, who will accept the trust. In such a case, the Court is unable to give effect to its intention; and the object of this paper is to suggest that some attempt should be made to provide a remedy.

The position of the Court in such a case is thus described by Lord St. Leonards: "It is quite a mistake to suppose that a trustee, who is entitled to be discharged from his trust, is bound to show to the Court that there is some other person ready to accept the trust. The Court refers it to the Master to appoint a new trustee; but if no person will accept the trust, it may find itself obliged to keep the trustee before the Court, and not discharge him. The Court will, however, take care that the trustee shall not suffer thereby." (*Courtenay* v. *Courtenay*, 3 Jones and Lat., 533.)

The deed creating the trust may expressly entitle the trustee to be discharged. "The trustee may," in the language of Lord Langdale, "find the trust estate involved in intricate

and complicated questions which were not and could not have been in contemplation at the time when the trust was undertaken, and has, in consequence of that change of circumstances, a right to come to the Court to be relieved." (*Greenwood* v. *Wakeford*, 1 Beav., 581.) His longer continuance in the trust may become hazardous, or his character exposed to suspicion, by the misconduct of his co-trustee. (*Forshaw* v. *Higginson*, 20 Beav., 485.) The tenant for life may have encumbered his life estate with annuities and other charges, and the trustee may receive conflicting notices from contending incumbrancers, prohibiting him from allowing the *cestui que trust* to receive his income, and requiring him to pay the same to the incumbrancers, of whose title he cannot judge: or the *cestui que trust* may have passed through the Bankrupt Court or the Insolvent Court, and assignee may give notices, and require accounts: there may be lunacies or other incapacities: the trustee may have transferred to the Accountant General of the Court of Chancery all the trust moneys, under the Trustee Relief Acts (10 and 11 Vic. c. 96; 12 and 13 Vic. c. 74); he may have filed a bill, and obtained an order for the substitution of a new trustee; and yet, as Lord Leonard observes, the Court "may find itself obliged to keep the trustee before the Court."

The present practice of the Court of Chancery in many cases reduces such a trustee to a shadow, but retains him, through impotence, as a form, which incumbers, rather than assists, its proceedings. He ceases to act, and the Court acts, in his stead, as if it were itself the substituted trustee. For, as Sir John Romilly observes, "No person can be compelled to remain a trustee, and act in the execution of the trusts." (*Forshaw* v. *Higginson*, 20 Beav., 485.) By means of the Trustee Relief Acts he becomes divested of all funds, capable of being transferred, under those Acts, into the name of the Accountant General of the Court of Chancery, who thenceforth becomes virtually the trustee of those funds, subject to the direction of the Court. If there be real estate to manage, a receiver may be appointed; and when the tenants have attorned to such receiver, and he is invested with power to set and to let, to give notices to quit, and generally to manage the estate, what is he but subject to the direction of the Court, virtually a trustee, although the legal estate is not vested in him?

The old trustee thus becomes a shadow. Yet he remains a party in the suit, and is liable to be made a party in future adverse suits; and is subject to notices, on which he must take some step, and he incurs costs, and is harassed with an uncertain and undeserved responsibility. If proceedings at law are directed, his name must be used in all cases of covenant, or other contract made with him; as well as in ejectment and actions of tort, in respect of the estate legally vested in him. It would seem more reasonable that in such a case the estate, including choses in action, should at once vest in the Court, or that the Court should have power, until a more suitable trustee could be found, to transfer the trust, and, if I may use such an expression, with all its appurtenances, by a vesting order (as by 13 and 14 Vic. c. 60), without other conveyance to the Accountant General, or to a Trustee General in the nature of a receiver according to the quality of the estate; or an official trustee might be appointed to act as an officer of the Court, alone, or jointly with the Accountant General or the receiver, or the remaining trustee, if any; in a manner analogous to "the official trustee of charity lands." (16 and 17 Vic. c. 137, ss. 47-52; and 18 and 19 Vic. c. 124, s. 15.) The power of combining the office of receiver and of trustee already exists, inasmuch as the Court will appoint a trustee to act as the paid receiver, when no other fit person can be found; and as the Court, when appointing new trustees, even as the practice now exists, does not consider itself limited to the number of original trustees, one such official trustee alone, or in combination as above suggested, might be found to be sufficient. The trustee so substituted might be a bare trustee, or he might be invested with some or all of the powers of the old trustee, at the discretion of the Court in each case.

By the substitution of such a person, the estate, in cases of complicated trusts, would generally be benefited. In hazardous and difficult trusts, a trustee, in order to avoid involving himself and others in a suit in Chancery, will for a time act to the best of his judgment, and may, honestly and prudently for the estate, incur great expenses and liabilities, and remain for years in uncertainty whether the Court of Chancery will ultimately relieve him.

At last he applies to the Court to be discharged from the trust, and in the meantime to be directed what to do. No person can be found to take his place as trustee; the Court slowly acquaints itself with the merits of the case, having no particular confidence in the trustee, and the estate pays. It is probable that such estates would greatly benefit if they could be promptly placed in the hands of an experienced officer, having the entire confidence of the Court, and well acquainted with his powers and duties. The tenant for life, or his incumbrancers, could not justly complain of such an arrangement, inasmuch as they would have the remedy in their own hands, by finding a proper person to be substituted as trustee, and on the death of the tenant for life, each remainder man in succession would have a similar remedy.

Not only should the Court have power to appoint such person, but power should be given to the Court to wind up the trust as regards the old estate, and to give him such discharge as the Court might think him entitled to, by an order, which would operate as a release to the extent of the discharge, making such provision for the case of fraud, concealed or otherwise, as would harmonize with the present practice of the Court. The old trustee, if afterwards molested in any matter relating to the trust, should have power to plead the discharge in bar, at law, or in equity, to the extent to which it had been given, and also to apply to the Court for directions, and should be entitled to an equitable protection and relief in respect of costs or otherwise.

Should any objection exist to making the granting of such relief obligatory on the Court, such objection cannot apply to my present proposal to invest the Court with the necessary powers, and to leave it at liberty to deal with each case according to its discretion. Such discretion would probably be exercised in every case where the amount of property held in trust was ample to meet any expense occasioned by the appointment of an official paid trustee; and such discretion would be more freely exercised, if a separate officer, and, perhaps, ultimately an office, for the management of such trust estates should be established, towards the maintenance of which the trust funds under the management of such officer or office, might ratably contribute. But this is not a necessary part of my present suggestion, and even if such an officer were to be appointed or such office to be established, the trusts transferred to the care of such officer or office would, in the first instance, be limited to those very hard cases of which this paper treats. Though it is not improbable that the field of action would increase, as the convenience of having such an officer or office, for the temporary or permanent management of other trusts, should become apparent.

It cannot be reasonably objected, that it would be unjust to subject an estate to the charge occasioned by the appointment of such a trustee. For the right of such a trustee to relief in such a case is not only a right as against all parties, but is, if I may use such an expression, a right as against the estate itself: or a sort of equitable charge upon the estate in favour of such a trustee, to provide for him relief. For when an estate is settled by the intervention of trustees, the terms of the trusteeship are part of the settlement, and of the liabilities of the estate: and the provisoes and covenants for the relief

of trustees may be equitably considered to run with the estate as a charge upon it, so that the estate should bear all such costs and charges as may be necessary for the purpose of providing new trustees.

Neither can it be reasonably objected, that the cases now treated of are said not to be numerous. For the first answer to such an objection is, that where there is a wrong there ought to be a remedy. And another answer is, that until there is a remedy, the number of cases cannot be fully estimated: for such trustees know that it is useless to apply to a court of equity to be discharged from their trust, unless they are prepared with a substitute, and when that cannot be found they, their heirs and executors, as well as the estate, must rest hopelessly in their unhappy predicament. It may also be answered that such a trustee, as I suggest, would be found very convenient in many cases where it is desired to transfer the estate promptly, from an existing trustee. The trustee general might often prove a useful temporary resting-place, a cheap and speedy link in the conveyance, a safe and convenient party to be carried along in the suit. The necessity of appointing an administrator might often be avoided. The trusts of many sets of trustees, now carried along in the suit for conformity sake at considerable expense and inconvenience, might in many cases be vested for a time in one trustee general, so as to make one party in the suit for the time being; and such of the trusts as survived might be again restored to their former channels when the proper time should arrive. But though I throw out this in passing, yet all I propose at present is a remedy for an admitted wrong, by giving the Court of Chancery a discretionary power in an extreme case, upon the propriety of which most of us may agree. I therefore leave to the future, the discussion of the propriety of extending the application of such a trusteeship to other cases.

In conclusion, I thus sum up the present state of the law. The Lord Chancellor can decide that a trustee is justly entitled to be discharged from his trust, and even that the interests of all parties require that he should be so discharged; may restrain him from acting further in the trust; may take his place in performing every act belonging to the trust; may compel him or enable him to convey to one person one part of the trust estate, and may place the whole management of the residue of the trust estate in the hands of another; but cannot, after settling his accounts, remove him from the trust and end his suit with a quietus; though all parties be before the Court, and every fact known; and though the Court be most anxious to put an end to so unreasonable a state of things; all which would be remedied by providing a proper person to act as Trustee General or Official Trustee, and giving the Court power to substitute him or them, alone or in combination, in the place of the old trustee, till better could be found; and empowering the Court to give such a discharge to the old trustee as he might in all honesty and equity be entitled to receive.

A person well acquainted with the practice of the Court of Chancery, and who has great confidence in the equity of all its proceedings, may possibly think lightly of this grievance; but the trustee, who has before him the terror of an unascertained responsibility, and of unended litigation, is of another mind, and does not feel the grievance the less, because it does not afflict a multitude. He is equitably entitled to be quieted The Court thinks so, but wants the power. I propose to give the power. Let it once be decided that this defect ought to be remedied,—and, by all means, in a better way than I have suggested, if such can be found,—and the details will be easily dealt with.

I purposely abstain from entering into details, or making minute suggestions, inasmuch as my present object is to induce this Society to consider and decide whether an attempt shall or shall not be made to perfect this part of the machinery of the Court of Chancery; and if that be decided in the affirmative, we can then consider the most effectual mode of doing it.

DIVISION COURTS.

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

CHAPTER IV.—(*Continued from page 84.*)

Of the Officers.

THE CLERK AND BAILIFF.

The Act provides that for every Division Court there shall be *one or more* Bailiffs (sec. 24). But it is clear that they do not constitute *one officer*—so that if two Bailiffs be appointed to a Court each may perform all legal acts required of a Bailiff by himself and in his own name alone. (*Corregal* v. *L. & B. Railway Co*, 5 Man. & Gr. 219.)

The 23rd section speaks of the Judge's power to remove *any* Clerk or Bailiff, and the subsequent sections, particularly that providing for the securities to be given by officers, clearly show that every Bailiff has a separate and independent power.

The manner and form in which the Judge is to appoint Clerks and Bailiffs is not prescribed by the Act, and it may possibly be exercised by parol. (1 Ld. Rayd 166; Co. Litt. 616) But as the nomination and appointment is delegated to the Judge in his judicial capacity, the better opinion seems to be that the appointment should be in writing and under the official seal of the Judge or by order of Court. (Sec. 11 Co. Rep. 4.)

The 25th section requires the Judge's direction as to the sureties to be given by officers, and the section 26 prohibits Clerk or Bailiff from entering on his duties till their securities have been approved; and, in view of the whole subject, the safe and proper course is for the Judge to appoint the officer in writing, and when the necessary securities are completed and filed, to pass the order of appointment.

Section 25 enacts as follows: "Every Clerk and Bailiff "of a Division Court shall by a covenant according to the "form A, or in words to the same effect, give security "with so many sureties, being freeholders and residents "within the County, and in such sums as the County "Judge may direct and shall under his hand approve and "declare sufficient."

The Judge will of course, on appointing an officer, prescribe the amount of the security to be given, with the number of sureties, according to the requirements of this clause. In practice two sureties are commonly required to join in the covenant, but where the amount is large it is not unusual to have three or four.

The sums in which the sureties are to be bound will be regulated by the probable amount of business in the particular Court. The sum for the officer, Clerk or Bailiff, should be at least equal in amount to that of all the sureties added together. A distinction may probably with propriety be made between the Clerk and the Bailiff, and

as more monies are likely to pass through the hands of the former larger security might be required of him. In addition to the security covenant, section 24 contains the following provision: "Every Division Court Clerk and "Bailiff shall give security by entering into a bond to Her "Majesty with as many sureties in such sums and in such "form as the Governor directs for the due accounting for "and payment of all fees, fines and moneys received by "them respectively, by virtue of their respective offices, "and also for the due performance of their several duties."

According to the forms furnished by the Government it would appear that *two* sureties are to join with the officer in the bond, and that the sum in which the officer is to be bound is to be "double that of the ordinary receipts for "one year or more at the discretion of the County Judge," and each of the sureties in one half the sum for which the officer is bound. It will be proper therefore, in the act of appointment, to show what is required in the bond to be given to Her Majesty.

The following forms of appointment by Judge and order thereupon are suggested.*

(To be continued.)

PROPOSED AMENDMENT OF DIVISION COURTS' ACT.

Mr. Angus Morrison, M. P. P. for North Simcoe, has introduced a bill to amend the Act respecting Division Courts. The following are its provisions:—

1. Any suit cognizable in a Division Court may be entered and tried in the Court the place of sitting whereof is nearest to the residence of the defendant or defendants; and such suit may be so entered and tried irrespective of where the cause of action arose, and notwithstanding that the defendant or defendants may at such time reside in a County different from the one in which such Division Court is situate and such suit is entered.

2. It shall be sufficient if the summons in such case is served as provided for in the seventy-fifth section of the Division Courts' Act.

3. This Act shall be read as incorporated with and as part of the said Division Courts Act, and the foregoing sections shall be considered as inserted next after section seventy-one in the said Act.

* The forms are taken from those used by one of the most experienced County Judges in Upper Canada.

JUDGE'S ACT APPOINTING CLERK OR BAILIFF.

I, Judge of the County Court of the County of by virtue of and in pursuance of the powers to me given and belonging by the Division Courts Act, do hereby appoint A. B., of the, &c, Yeoman, Clerk (or "Bailiff," or "a Bailiff") of the Division Court of the said County, to hold the said office during my pleasure. And I do direct that the said A. B. shall give security by entering into a covenant for the due execution of the duties of his office as required by law, and with *two* sufficient sureties in $ each, such sureties to be approved by me.

Bond to Her Majesty, A. B. in $ two sureties each $ } Given under my hand seal at this day of 186 Judge

DIVISION COURT CORRESPONDENCE.

Owing to the crowded state of our columns, in consequence of our desire to make room for bills before Parliament, relating to law reform, we have been obliged to defer Division Court correspondence, including a valuable communication from Mr. Durand, until our next issue.

U. C. REPORTS.

QUEEN'S BENCH.

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

SHAW ET AL. v. SHAW.

Taxes—Property not liable assessed—Distress—Pleading—Departure.

To an avowry, in a replevin under a distress for taxes, the plaintiffs pleaded that the house and land mentioned were exempt from taxation, being vested in Her Majesty for the public use of the Province, and occupied as a Custom House. Defendant replied that the assessment was not struck out or rescinded by the court of revision, or by the county judge, nor declared by either of them to be exempt. The plaintiffs rejoined that the property never was assessed.

Held, reversing the judgment of the county court, that the rejoinder was not bad as a departure from the plea, but supported it against the replication.

Semble, that departure is still a fatal objection on demurrer.

The plea was held good in the court below, and the judgment on that point was not appealed from.

When a previous pleading of the party demurring is bad, but not objected to, though the opposite party cannot claim to be heard against it, the court may in their discretion give effect to the faults apparent.

In this case the replication was bad, on the same ground on which the plea was supported, but the plaintiffs did not demur.

(H. T., 25 Vic.)

Appeal from the county court of Frontenac, Lennox, and Addington. Replevin.—Defendant, as collector, avowed for a distress for taxes in arrear during the years 1855, 1856, 1857, and 1858, on a house and lot in the city of Kingston, which he alleged was assessed in 1855 and 1858 to James Hopkirk, occupant, or John Counter, owner, and in 1856 and 1857 to James Hopkirk, occupant, or the Bank of British North America, owners. The goods in question were alleged to have been taken on the premises in possession of the plaintiffs, being the occupants thereof.

The plaintiffs pleaded to the avowries, that the said land, house and premises therein mentioned, during the years 1855, 1856, 1857 and 1858, were vested in and held by Her Majesty, and for the public uses of this Province, for a term of years, ending on the first day of April, 1859, and were occupied by the said James Hopkirk in his official capacity as a collector of customs for the port of Kingston, and as the Custom House of the port of Kingston, and for the public uses of this Province, and were not occupied by the said James Hopkirk or by any other person, otherwise than in an official capacity, or occupied or owned by any private occupant, or by the said John Counter or the Bank of British North America, and the said land, house and premises were exempt from taxation during those four years.

The defendant replied to this plea, that the said several assessments in the defendant's avowries, and in the plaintiffs' plea thereto mentioned, were not struck out or rescinded in the assessment rolls for said ward for said years, or any of them, by the court of revision, or by the county judge of the united counties of Frontenac, Lennox, and Addington, nor were the said land, house and premises, declared by the said court of revision, or by the county judge, to be exempt from taxation in any of the said years.

The defendant also demurred to the plea, on the grounds—1. That it is not alleged in said plea that the assessments in the said avowries of the defendant mentioned were struck out or rescinded from the rolls by the court of revision of the city of Kingston, or by the county judge of the united counties of Frontenac, Lennox, and Addington, owing to their said alleged exemption from taxation, or from any other cause in any of the said years, or that any steps were taken under the assessment laws of

Upper Canada with this result in any of the said years, or that the said court of revision or county judge in any of the said years had declared or ordained that the said land, house and premises were exempt from taxation for the cause alleged, or for any cause whatsoever.

2. That the said assessment appearing on the said rolls is conclusive, and warrants the defendant in all that is alleged he did; that said plea is no answer to defendant's avowries, and that notwithstanding anything alleged in the said plea defendant was authorised in making the seizure, and is entitled to prevail in this action.

3. That from the allegation in the said plea the remedy of the parties interested was by appeal to the court of revision against the assessment for said years, and thence, if necessary, to the county judge; and failing this remedy, either by not applying it or being unsuccessful in it, the assessment irrevocably stands, and may be collected as permitted by law.

The plaintiffs joined in demurrer to the plea, and rejoined to the defendant's replication, that the said land, house and premises, and the description and extent thereof, were not set down, designated, or contained in said assessment rolls or collector's rolls.

To this rejoinder the defendant demurred, assigning as grounds:

1. That said rejoinder is a departure from the plaintiffs' plea to the defendant's avowries, and is repugnant to and inconsistent with the plea: the plea admitting the setting down and assessment of the said land, house and premises therein mentioned, (that is, in the avowries mentioned,) on the collector's roll as in the avowries mentioned, and the rejoinder denying that they were so set down or contained in the said roll, or in the assessment roll,—in fact, contradicting the plea.

2. That it is a departure from, in that it does not support, the plea, or avoid or answer the defendant's answer to it.

3. That it is a departure from the plea, in that if effective it puts forward a new and different answer to defendant's avowries to, and independent of, that contained in the plea, and should have been pleaded in answer to defendant's avowries and not by way of rejoinder to defendant's replication thereto.

4. That it indefinitely postpones the period of, or prevents the getting to issue, by alleging entirely new matter.

5. That in this action, the plaintiffs' plea to defendant's avowries being like a defendant's defence to an ordinary action, all matters in answer to defendant's avowries should have been pleaded at once; and that the matter of the rejoinder is, if true, matter for a plea to defendant's avowries, and not of rejoinder to defendant's answer to the plaintiffs' plea to them.

6. That this rejoinder is not authorised by any thing alleged or contained in defendant's replication to the plaintiffs' plea, nor is there any foundation for it therein, which replication it leaves entirely unanswered.

7. That the rejoinder does not allege the necessity of what it denies, or that it was required by law, nor does it indicate any consequence of the omission.

8. That it seeks to raise an immaterial issue.

Judgment was given in the court below for the plaintiffs on the demurrer to the plea, and for the defendant on the demurrer to the rejoinder; and the plaintiffs thereupon appealed from the latter part of the decision.

Richards, Q. C., for the apellants, cited Ch. Arch. Prac. 286; *Few* v. *Backhouse*, 8 A. & E. 793; *Scott* v. *Chappelow*, 4 M. & G. 336; *Shouldice* v. *Fraser*, 7 U. C. Q. B. 60.

Read, Q. C., and *Agnew*, contra, cited Consol. Stats. U. C., ch. 55, secs. 9, 60, 61; *Durant* v *Boys*, 6 T. R. 580; *Patchett* v. *Bancroft*, 7 T. R. 367; *Marshall* v. *Putman*, 9 Bing. 595; *Hutchins* v. *Chambers*, 1 Burr, 579, 587; *Regina* v. *Boulton*, 1 Q B. 66; *Allen* v. *Sharp*, 2 Ex. 352; *Earl of Radnor* v. *Reeve*, 2B. & P. 391; *Brittain* v. *Kinnaird*, 1 Brod. & Bing. 432.

The authorities referred to by the learned judge in the court below were, *The Municipality of London* v. *The Great Western Railway Co*, 17 U. C. Q. B. 262; *Charleton* v. *Alway*, 11 A. & E. 998; *County Court Rule No.* 88

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

Upon the principal question in this case, which was raised by the demurrer to the plaintiffs' plea to the avowry, the judgment given in the court below in favour of the plaintiffs is not appealed from. The defendant has acquiesced in the judgment, which establishes that he had no legal right to distrain the plaintiffs' goods.

It is the plaintiffs only who appeal against that part of the judgment which is in favour of the defendant, and which determines that the plaintiffs' rejoinder to the defendant's replication to the plea to the avowry is bad in law, and that the defendant was therefore entitled to judgment.

The learned judge held the rejoinder of the plaintiffs to be a departure from their plea to the avowry, and therefore held it to be bad in substance.

We think the weight of authority is in favour of holding a departure to be bad on general demurrer,—that is, to be a substantial defect, and not merely matter of form,—though doubts have been expressed whether since the Common Law Procedure Act, which abolishes special demurrers, it can be treated as a fatal objection.*

But we do not take the rejoinder in this case to be subject to exception of being bad for departure. The plaintiffs have not shifted their ground of defence. They no doubt mean still to rely on the fact that the premises were exempt from taxation by statute; and when the defendant, in answer to that defence, takes the ground that if there was such a reason for exemption it ought to have been advanced before the court of revision in order to have the assessment struck out of the roll, the plaintiffs could surely meet that by saying that the assessment was never on the roll, and therefore they could not apply to have it struck off. They were merely putting that forward as a reason why the defendant's objection to their plea could clearly not prevail. They might, it is true, have demurred to it, and if they had done so we think the court below must have held, consistently with the principles and the authorities on which the plea was held a good defence, that the replication could not be sustained; but still, if they had so satisfactory a defence to it in fact as that the premises had never been in fact assessed, and therefore there could be no appeal, they were at liberty to plead it, for it did not contradict their plea, but was consistent with it, and tended to support it.*

In *Smith* v. *Nicholls*, (5 Bing. N. C. 218,) Tindal, C. J., said, "that which is a departure in pleading is a variance in evidence; and if the evidence in support of the replication would sustain the allegation in the declaration, there is no departure."

In *Wright* v. *Burroughes*, (3 C. B. 696,) that *dictum* was cited, and the court decided in accordance with it, Wilde, C. J., holding that a rejoinder which merely shewed that a title which the defendant had relied upon in his plea was not repelled by that which was alleged in the replication, was clearly *in maintenance of the plea*, and was therefore no departure.

But if the rejoinder had been bad as a departure, still the replication to which it was an answer was also bad, on the same principle on which the plea to the avowry was held a good defence, for if the property was exempt from assessment by statute, there was no necessity for going to the court of revision in order to have their decision on the point, as the cases of *Milward* v. *Caffin*, 2 W. Bl. 1330, and *Charleton* v. *Alway*, 11 A. & E. 993, fully establish; and though undoubtedly the plaintiffs' counsel could not claim to be heard upon exceptions to the replication, not having either demurred or given any notice of exceptions intended to be taken on the argument, still the court can in their discretion give effect to apparent faults in the previous pleadings, and it would in general be better to do so than to allow the judgment to be inconsistent with itself.

In our opinion the judgment given in favour of the defendant upon the demurrer to the rejoinder should be reversed, and judgment entered for the plaintiffs on that demurrer.

Appeal allowed.

* See 2 Saund. 84 *f*, Stephen on Pleading, 6th Ed. 334, note *p*.

* See Stephen on Pleading 322, *Wright* v. *Burroughes*, 3 C. B. 685: *Smith* v. *Marstack*, 6 C. B. 495: *Owen* v. *Reynolds*, Fortescue 341.

Brown v. Livingstone et al.

Detinue, for cheque—Detention by the drawers alleging forgery—Pleading.

Detinue, for a cheque—Plea, that defendants received the cheque from the plaintiff to present and collect it from the bank on which it was drawn, that they did present it, but payment was refused by the bank manager, who retained and keeps the same alleging that the names of the drawers thereto are forged *Held*, on demurrer, that the plea shewed a good defence, for if the cheque was forged the detention was rightful, and if genuine, defendants lost control over it by no wrongful act, and the plaintiff's remedy was against the bank.

Declaration.—That the defendants, carrying on business in the city of Toronto, under the name, style and firm of The American Express Company, detained from the plaintiff a certain cheque belonging to the plaintiff for the sum of $200, dated the 30th of November, 1861, and drawn on the cashier or manager of the branch office af the Bank of Upper Canada in Hamilton, by certain persons carrying on business under the style and firm of E L. Ritchie & Co ; and the said plaintiff claims a return of the said cheque or its value, and $100 for its detention.

Plea —The defendants say that they received the cheque in the declaration mentioned from the plaintiff for the purpose of presenting the same to and for collecting the amount thereof from the cashier or manager of the branch office of the Bank of Upper Canada at Hamilton, upon whom the same purported to have been drawn by certain persons mentioned in said declaration as carrying on business under the name, style and firm of E. L. Ritchie & Co And the defendants further say, that they did present the said cheque for payment at the said branch office of the Bank of Upper Canada, and that payment thereof was refused by the said manager, who alleged that the said cheque was not drawn by the said firm of E L Ritchie & Co. And the defendants further say that the said manager of the said branch of the Bank of Upper Canada refused to return the said cheque to the defendants, and retained and kept the same, alleging that the said E. L Ritchie & Co. did not draw the said cheque, and that the signature purporting to be the signature of the said firm of E. L. Ritchie & Co thereto is not their signature, but is false and forged ; of all which the plaintiff had due notice before the commencement of this suit.

Demurrer.—That the said plea does not set forth any sufficient ground of defence to this action, and is no answer to the plaintiff's declaration.

Hector Cameron, for the demurrer, cited *Reeve* v. *Palmer*, 5 C. B. N. S. 84; *Jones* v. *Doucle*, 9 M. & W. 19; *Mathew* v. *Sherwell*, 2 Taunt. 439; *Wills* v. *Wells*, 8 Taunt. 264.

Gall, Q. C., contra.

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

There is nothing in the record in this case to shew that the defendants received the cheque from the plaintiff upon any bailment that would make them responsible for it under all circumstances, except in case of its loss or destruction by the act of God or the King's enemies. The declaration is in the common form of a declaration in detinue, and the defendants plead that the cheque was given to them by the plaintiff for the purpose of its being presented by them to the person on whom it was drawn, and collecting the money upon it. That for all that appears was a contract of an ordinary character, requiring no more care than a provident person would have taken of the cheque under like circumstances, if it had been drawn in his own favour and he had gone to present it.

It cannot be said that the person going to present it did any thing wrong when he handed it to the officer of the bank for payment. He supposed no doubt that all was right, and that he would get the money ; and he parted with the cheque for that purpose, and with that intent and no other. It cannot be held that he deprived himself of the power of returning it to the plaintiff by any wrongful act of his, for he was not expected to retain it, and he did nothing that was wrong in presenting it for payment. The defence is not that it has been lost by any casualty implying negligence in the defendants.

The person to whom it was presented had a right to the possession of it, in the ordinary course of business, so long as would allow of examining it and comparing the amount with the balance for which the person who signed the cheque had a right to draw. If the defendants had objected to let the cheque go into the hands of the bank manager, they would at once have excited suspicion of something wrong. Then when the manager looking at it affirmed it to be forged and detained it, he did only what was right if he believed it to be forged The defendants were not called upon to commit a breach of the peace in an attempt to force it from him.

The cheque is either forged or it is genuine. If it is forged the detention was a rightful act, and was no doubt rightly intended, and no injury has been committed. If it was a genuine cheque the plaintiff has a clear remedy against the bank, and must content himself with that. This action is detinue, and when it is admitted, as it must be, that the defendants had it not in their power to give up the cheque at the time when they are charged with having unlawfully detained it, and further, that it was by no wrongful act of theirs that they lost their control over it, there is no doubt that no authority can be found for sustaining the action under such circumstances. None of the cases cited are applicable. We think the plea shews a good defence.

Judgment for defendants on demurrer.

The Chief Superintendent of Schools, (Appellant,) in the matter of McLean v. Farrell.

School taxes—Right to collect after the expiration of the year—Appeal from the division court.

Held, on appeal by the chief superintendent of education, that a collector of school taxes might in 1861 collect by distress the taxes for 1859 and 1860, not having made his final return of such taxes as in arrear, and being still collector; and

Semble, that in this case the plaintiff who complained of the seizure having led to it by his own conduct, the proceeding should in the division court have been upheld at all events.

This was an appeal under "the Upper Canada Common School Act," Consol. Stats. U. C , ch. 64, sec. 108, from a judgment of the judge of the county court of Elgin, by the Superintendent of Education

The action was brought in the division court for selling a cow belonging to the defendant for the payment of school taxes.

It appeared that the seizure was made for school taxes for the years 1859 and 1860. Defendant swore that the rate bill was given to him as collector in 1860 to collect, as the rate for 1859 : that he went to the plaintiff, who promised to pay in a few days, but put him off from time to time until at last he was compelled to sell.

It was objected at the trial that the taxes imposed in 1859 and 1860 could not be collected in 1861.

The warrant was produced, and shewed that the plaintiff was taxed in 1859 for school taxes, $6.73, and in 1860 for $40 20.

The learned judge held that the defendant being *functus officio* so far as these taxes were concerned the sale was illegal, but considering that the plaintiff's conduct had been unreasonable he gave judgment in his favour for $11 only, being the amount for which the cow had been sold, without costs.

R. A. Harrison, for the appeal, cited Consol. Stats. U. C., ch. 64, sec. 27, sub-sec. 2, sec 127; ch. 55, sec. 93-112; *Newberry* v. *Stephens et al*, 16 U . Q B. 65; *Chief Superintendent of Schools* v. *McRae*, 12 U. C. Q. B 525.

No one appeared on the other side.

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

We do not see why *Newberry* v. *Stephens*, (16 U C. Q. B 65) should not govern this case, but we have not the case fully before us on the evidence. Was the defendant a collector of the school trustees only, or a township collector?

It does not appear whether the township collector had or had not made up his final return for 1850 when he acted in this matter. The defendant was collector, it seems, when he seized and sold the cow, and when these rates were due. It is not shewn whether he sold for the rates of 1859 only, or for those of 1860 also.

Either way, the object of the act is to prevent the collector after he has made his final return and stated his inability to collect any certain assessment in arrear, which would lead perhaps to some proceeding of another kind being taken for collecting the money, from going on and collecting the arrear himself, and thus producing confusion by a double proceeding. Here it does not appear that any final return of this tax had been made as an arrear incapable of being collected in the ordinary manner, and we do not see why the collector might not go on and make it ; and at any rate

in this case, as in others in the division court, the judge could give such judgment as law and equity might require, and so might have upheld a proceeding to which the plaintiff's own conduct and the indulgence shewn to him seem to have led.

We reverse the judgment, but do not with costs of the appeal.

Appeal allowed, without costs.

THE CORPORATION OF THE COUNTY OF LAMBTON v. POUSSETT.

Fees payable to Clerk of the Peace—Unauthorized charges paid—Right of County Council to recover back after accounts audited—Consol. Stat. U. C., chaps. 119, 120, construction of.

In this case the question was, whether certain fees could legally be claimed by the clerk of the peace, and how far the county, having paid them during several years upon accounts duly audited and passed, could recover back such as he was not entitled to. A special case was submitted in which the several charges were stated and classified in schedules, which will be found below, and the court gave judgment, deciding that some items were sanctioned by law, some not, and that some depended upon the circumstances under which the services charged for were rendered. The following general principles were also laid down as applicable to the whole case.

Where a clerk of the peace, at the request of the justices or municipality, or of the county auditors, renders services which he is not bound to render, and for which no fee is allowed, though he might be unable to sustain an action for his charges, yet, when they have been duly audited and paid under no misunderstanding, the municipality cannot recover them back; and the same rule is applicable to disbursements, as for stationery, office furniture, &c.

The Consol Stats U. C. ch. 119, making it penal in the clerk to receive more than the legally established fees for services performed by him, does not apply to services or disbursements not properly belonging to his office, but the enactment is not confined to fees demanded of individuals for public services, nor does the penalty imposed interfere with the right to re-claim fees received contrary to the act.

Where the fees are within that act, and have been paid, they may be recovered back as money illegally received, though his accounts containing them have been audited and passed.

Under Consol. Stats U. C., ch. 120, the clerks of the peace, and other officers, are not to make out their accounts against the government in the first instance, but against the county, who are to be paid or reimbursed by government after proper audit.

The schedule appended to that act was not intended to embrace all the expenses of criminal justice chargeable against the government, but only to remove all doubt as to those specified.

SPECIAL CASE.

This is an action on the common counts, brought by the plaintiffs against the defendant, for the recovery of $761.89, received by the defendant as clerk of the peace for the county of Lambton, for services alleged by him to have been rendered according to law for the year 1859 and a portion of 1860, and which sum of money the plaintiffs insist was received by defendant out of the funds of the county of Lambton, contrary to law; in which action the defendant pleaded the general issue.

The cause came on for trial at the Spring Assizes for the County of Lambton, for 1861, at Sarnia, before HAGARTY, J., when the following evidence was taken, and admissions made:

1st. Admitted by defendant that all the moneys mentioned were received by him.

2d. Admitted by plaintiffs that the services charged for were actually rendered, but defendant's right to recover therefor disputed.

Evidence for plaintiffs:

Archibald Young, sworn.—I was warden for 1860. I knew there were disputed accounts; there has always been a dispute between the clerk of the peace and the council, but no investigation till June, 1860. Previous reports had been made to the council that illegal charges were made. A committee was appointed in January, 1860, to examine; they sat in June, 1860, and reported to the June sessions the result, that a large amount of defendant's charges were illegal.

No. 1.	An account for quarter ending 31st March, 1859, was paid April, 1859	$228 33
2.	An account to June 30, 1859, paid in July, 1859,	144 31
3.	An account to Sept. 30, 1859, paid July, 1859,	143 06
4.	An account to Dec. 31, 1859, paid in Jan., 1860,	150 61
5.	An account to March, 1860, paid April, 1860	149 31
		$815 62
	Plaintiffs credit for actual disbursements	53 73
		$761 89

There is an item of $18 for a set of drawers to hold papers in office of clerk of the peace, not allowed by plaintiffs. These accounts were not investigated until this committee was appointed. I have been two years in council. I knew of no by-law or order to justify these charges. I am satisfied they were performed without order from council. Part of the dispute was, that the council were not liable for accounts audited and passed by the quarter sessions, unless satisfied of their correctness. These accounts were audited by the county auditors, and after audit warrants to treasurer issued by county warden, countersigned by the auditors.

Re-examined.—I signed one warrant for the account in 1860. It was only a matter of form signing after the auditors passing it. This system is now changed. I had no special resolution so to do. The warden's right to do this was disputed by the council.

Charles Taylor, sworn.—I was auditor for 1859 and 1860. The first account was March, 1859. Before this the quarter sessions had audited these accounts. We asked defendant were these charges right. He said they were right and legal, and we accordingly passed them. We continued auditing in this way.

Cross-examined.—I took the first account to one of the finance committee, and called his attention to it, expressly to some items which I doubted. Nothing was done on this. This was after the audit. I saw the drawers mentioned with defendant; he said they were necessary, as papers were in great confusion.

DEFENCE.

John Wilson, Q.C., objected, that as the plaintiffs paid with full knowledge, &c., they cannot now recover back from defendant. The learned judge overruled this objection, but reserved leave to move for a non-suit on this ground.

Alfred Fisher, J. P., sworn.—Book produced is record book of quarter sessions. I was present when order of July, 1854, was passed (copy put in); puts in tariff of 1845, established by judges under 8 Vic., ch. 38, published 1849, Mich. Term, 9 Vic.

Charles Taylor re-called.—In 1857, and since, constables' accounts were audited by county auditors. Defendant attended on these occasions with these accounts.

Alexander Vidal, treasurer of county, sworn.—Defendant attended with criminal justice accounts before the government county auditors. I considered his services indispensable for this, there being no county attorney. (This evidence refers to No. 6 class of charges.) As far as I knew of these disputed accounts, the government have not paid such charges direct to the clerk of the peace. I know that as treasurer no portion of this account has ever been paid or allowed by the government, either to the clerk of the peace or to the council, for such an officer. I am aware that some of these items now charged were claimed by defendant from government, and disallowed by the government county auditors; all these warrants produced were paid by me as treasurer, and allowed by council.

It was agreed upon the trial, and so endorsed upon the record by the learned judge, that the evidence taken should be made into a special case, with the accounts and exhibits filed, on which a nonsuit or verdict for plaintiffs might be entered for all or such portions of the items as the court might think the plaintiffs entitled to recover.

The plaintiffs contended that all the charges were illegal as against them; that if the defendant could charge them at all, it should be against the government, not the council. It was agreed at the trial that the defendant should present accounts with the special case, placing the charges in classes, under tariff or otherwise, as he claims them; and whatever sum should be ordered by the court, the same to be endorsed upon the record as the verdict, as if done at *nisi prius*. The court, as to costs, to direct as a judge would certify.

On the part of the plaintiffs, it was submitted that the several accounts produced at the trial, amounting to $761 89, and which was admitted to have been received by defendant, being accounts relating to the administration of criminal justice, were chargeable upon the consolidated revenue fund, and should have been so charged under 9 Vic., ch. 58, Consol. St. U. C., ch. 120, p. 975.

The defendant contended that none of the charges contained in these accounts are to be deemed expenses of the administration

of criminal justice within the meaning of the act above referred to, the expenses so to be deemed being limited by the schedule to that act, and none of the items in the defendant's accounts being embraced in that schedule.

1st. If the court is of opinion that the said accounts, or some portion of them, ought to have been charged to the government, and not to the county of Lambton, then a verdict to be recorded for the plaintiffs, and $761 89 damages, or such less sum as the court may find ought to have been charged to the government instead of the county.

2nd. If the court shall be of opinion that the said accounts do not come within the meaning of the act of parliament referred to, not being accounts relating to the administration of criminal justice within the meaning of that act, and if the court shall further be of opinion that the county of Lambton was not legally chargeable with the payment of said accounts, or some portion thereof, then a verdict to be recorded for the plaintiffs for such sum as the court may direct, not exceeding $131 40 (if the court shall be of opinion that these payments so made as stated can be recovered back.)

Pursuant to the understanding at the trial, the particular items of said accounts are arranged and classified, and each class represented by the items contained in the respective schedules hereto annexed.

Schedule No. 1, amounting to $74 25, the defendant claims to be entitled to under 8 Vic., ch. 38, and the tariff of 1845, and other statutes.

The charges represented by schedule No. 2, amounting to $8 25, the defendant claims under an order of the quarter sessions of the county of Lambton, made in July, 1854, in the following words, "It was ordered that the clerk of the peace obtain printed forms of recognizances, and other magistrates' forms, to be distributed amongst the magistrates for their use in cases of felony."

The charges represented by schedule No. 3, amounting to $101 35, defendant claims under an order of such sessions, made in November, 1854, in the following words: "The clerk of the peace having represented to the court that such instructions had been given to the county auditors as would preclude any allowance to him for correspondence, unless this court specially ordered him to write all letters that might be necessary in the discharge of the duties of his office, the court ordered that the clerk of the peace do write letters when necessary in the duties of his office, to all justices, coroners, constables, and other persons with whom it may be necessary to correspond, respecting any matter connected with the administration of justice or county business, and that he do pre-pay the postage of all letters sent by him by post, and that he be allowed such postage, and also the postage of all letters addressed to him in his official capacity; and also under the order made in July, and also under authority of that portion of the tariff of 1845, of which the following is a correct copy, namely, "All letters to officers of government or others upon special business connected with the administration of justice or other district purposes, when written by order of the justices, including a copy for the office"

The charges represented by schedule No. 4, amounting to $111 75, are not supported by any authority, but they have been uniformly paid to defendant in manner stated in the evidence at the trial, and defendant contends that they, as well as any other charges which may be held to be unsupported by legal authority, must be deemed voluntary payments, and cannot be recovered back.

The charges represented by schedule No. 5, amounting to $62 75, defendant claims under a resolution of the county council of date 15th of October, 1856, of which the following is a copy: "That the county clerk be authorised to grant a warrant to the constables for their fees and expenses at any time during the year, on receiving from any constable an account sworn to before any magistrate, and certified by him, and duly audited by the county auditors; and that it be the duty of such auditors to audit such accounts when called on so to do. Under this order defendant as clerk of the peace collected the constables' accounts up to June, 1860, and used from time to time, when a sufficient number of accounts had been sent in to him, to make a schedule of these accounts, give notice to the county auditors to attend the auditing, and remit the amount to the constables

The charges contained in schedule No. 6, amounting to $36, defendant claims under an order of sessions of July, 1854, of which the following is a copy: "It was ordered that the clerk of the peace be allowed six pounds per annum, as salary for clerk to the government auditors, and preparing the accounts for audit, the salary to commence from the 1st of January last," which said sum was afterwards audited and ordered to be paid by the quarter sessions.

The charges contained in schedule No. 7, amounting to 75 cts., defendant claims under letters from the Provincial Secretary's office, similar to the one of which the following is a copy: "Secretary's office, Quebec, 14th March, 1861, Sir,—I have the honour to transmit to you herewith a commission, associating Alfred Nash, Esq., with the coroners already appointed for the county of Lambton. You will please notify Mr. Nash, who resides in Warwick, of his appointment.—I have the honour, &c. (Signed) E. A. Meredith, Assistant Secretary. To the Clerk of the Peace, Sarnia, U. C."

The remaining charges, amounting to $66, the defendant will not support, and consents to a verdict being recorded for that amount.

Schedules referred to in the above case:

SCHEDULE No 1.

1.	Letter to Provincial Secretary, with copy of voters' list filed in my office, of the 75 cts. charged	$0 25
2.	Letter to the Inspector General for instructions as to audit of the criminal justice accounts in January next	0 25
3.	Letter, with half-yearly list of claims to unpatented lands, to the Commissioner of Cown lands	0 25
4.	Letter to Provincial Secretary, with copy of presentment of Grand Jury as to gaol	0 25
5.	Letter to Reeve of Bosanquet, in answer to his, respecting voters' list	0 25
6.	Drawing order for appointment of constables at the March sessions	1 00
7.	Receiving oath of allegiance of John Grant, Esq., J.P.	0 20
8.	Three copies of quarterly returns of convictions for commissioners of statistics	12 00
9.	Receiving and filing quarterly accounts of county officers	1 00
10.	Attending special sessions of justices to consider tenders for printing	1 50
11.	Copy schedule of convictions for office	4 00
12.	" " " printer	4 00

SCHEDULE No. 2.

1.	Making up assortment of blank forms for Neal Eastman, Esq, J. P, and mailing same	0 50
2.	Making up assortment of blank forms for W. Kimball, Esq, J. P.	0 50

SCHEDULE No. 3.

1.	Copy of presentment of grand jury as to gaol, for county council, and letter to county clerk therewith, and certificate (the certificate admitted by defendant to be wrong)	1 75
2.	Letter to Martin, sessions constable, about verifying his account	0 25
3.	Letter to Reeve of Florence, respecting an account against the county for a coffin made under order of coroner	0 25
4.	Letter to Mr. Morris, coroner, explaining to him why his account for inquest expenses has not been paid,	0 25
5.	Notices to constables of their appointments	80 00
6.	Letter to Sylvanus Cornell, J. P, advising on certain points enquired by him. (They had relation to his administering justice summarily)	0 50
7.	Letter to Wm. Robertson, Esq, J. P., respecting the supposed appointment of his father as constable	0 25

SCHEDULE No. 4.

1858, Decem.	Attending printer with advertisement for division court term	$0 25
	Attending to place up list of claims under Heir and Devisee Act in court house	0 25
	Entering return of baptisms in register	1 00
Feb'y 8.	Copy of advertisement of March sessions for printer	0 25
	Attending him therewith	0 25
	Notices to constables of their appointment at March sessions, at 20 cts. each	30 00
Mar. 24.	Attending the parties, delivering their warrants (after audit of quarter accounts)	0 50
	Paid for letter-book for clerk of the peace,	1 50
	Attending George Crossley, Esq, J. P., and advising him upon the circumstances under which to appoint a special constable	0 50

SCHEDULE No. 5.

1858, Decem.	Receiving and arranging constables' acc'ts.	2 00
	Schedule for county auditors and copy for office	1 00
	Attending both auditors to appoint meeting to audit	0 50
	Attending auditors with accounts	0 50
	Attending county clerk to prepare warrants	0 50
	Attending him afterwards for warrants when signed	0 25
	Attending the constables in town, delivering their warrants	0 50
	Attending county treasurer for amount due county constables	0 25
	Letters remitting their warrants	1 00

SCHEDULE No. 6.

1859, Mar. 24.	Half-yearly allowance for preparing criminal justice accounts, for allowance by the government county auditors	12 00
	Two similar items	24 00

SCHEDULE No. 7.

1859, June 29.	Letter to Henry Shoebottom, Esq., informing him of appointment to the office of coroner	0 25
	Attending county treasurer to instruct him to prepare returns of payments made by him under jury laws, and afterwards attending him for service (in consequence of requisition from provincial secretary)	0 50

The above case was argued in Trinity Term last by *Davis* for the plaintiffs, and *J. Wilson*, Q.C, for defendant.

The court, after hearing the argument, required each party to state more particularly in writing the ground or authority upon which each item in dispute was supported by defendant, or objected to by the plaintiffs; and during this term the following supplementary case was put in:

SUPPLEMENTARY CASE.

It having been suggested by the court that the parties in this cause should, in addition to the case already before the court, state further, the defendant on his part upon what ground he claims the items in dispute, and the plaintiffs upon what ground they resist the payment, it is agreed that the following further statement, signed in triplicate by the attorney for the plaintiff and by the defendant, shall be submitted to the court.

The defendant on the first point submitted, namely, whether the government is liable to pay all fees of the clerk of the peace, states that the Inspector-General refused to pay for services not defined in the schedule to the Act referred to in the case, Consol. Stats. U. C., ch. 120. And that when any of the charges mentioned in the schedule to the case, but omitted in the schedule to the Act referred to, have been presented, they are struck off, with a note in the following words: "not provided for."

This point will be brought better to the attention of the court by inspection of the tariff of fees allowed to clerks of the peace, made by the judges in 1845, under provision of the statute of 8 Vic., chap. 38, in which are the following items:—

No. 1.

Causing notice to be published of any special or adjourned session when directed	£0	2	6
Sending notice thereof to justice individually, for each notice	0	0	6
Attending each adjourned or special sessions	0	7	6

MISCELLANEOUS SERVICES.

Making out and delivering lists of orders on the treasurer, made at each court of quarter sessions	0	7	6
Copying orders of court, and carrying same to be published when requisite, for each order	0	1	3
Drawing every special order of the court of quarter sessions necessary to be communicated to any party, and entering it on record	0	2	6
Making up and transmitting to the Inspector General a return of a schedule of all convictions which have taken place before any justice or justices, or before the court, each list	0	5	0
Making and transmitting a return to the government of justices and coroners who have taken the oath, when required to be done, for each return	0	5	0
For every return or report required by statute or by the government, for which no remuneration has been provided in this table or by statute	0	5	0
Receiving and filing each oath of qualification of a justice of the peace	0	1	0
Drawing and recording appointment of inspector of weights and measures	0	5	0
Receiving and filing accounts, and demands at the general quarter sessions preferred against the district (county) in each session, and submitting for audit,	0	10	0
For filing each list, return or other paper	0	0	4
All letters to officers of government or others, upon special business connected with the administration of justice or other district purposes, when written by order of the justices, including copy for the office	0	1	8

The attention of the court is requested to the items in the tariff, and also in the schedule to chap 120, in respect to the division courts The Inspector General contends that the government does not provide for the orders for holding the division courts from time to time, the statute only applying to an alteration in the limits of division courts and the notices consequent thereon.

By the 22 Vic., chap. 124, Con Stats. U. C., p. 987, the clerk of the peace is directed to advertise and exhibit lists of convictions; for each schedule he is to be paid by the treasurer of the county £1.

No. 2.

The clerk of the peace draws up advertisements of each session and attends the printer therewith, also advertisements of division courts.

The clerk of the peace also distributes the annual statutes to justices and county officers. In respect to these two and some other services, the duty is not imposed by statute, nor is any remuneration provided by tariff.

The clerk of the peace, by direction of the Provincial Secretary, notifies justices and coroners of their appointment, but is not required by any statute to do so, nor is there any remuneration specified in the tariff for this duty.

The clerk of the peace also claims allowance for stationery, at the rate of six dollars per quarter.

None of the items in number one, except those as to division courts, are included in the schedule to chapter 120, Con. Stats., U. C.

In reference to the first point submitted to the court on the original special case, the court is asked to pronounce whether the items number one, for which a remuneration is provided by the tariff, are all or any of them chargeable to the government as

expenses of criminal justice; and also whether the items number two are a legitimate subject of charge by the clerk of the peace; and if so, whether they are a charge to the government as a part of the expenses of criminal justice.

The plaintiffs dispute the right of the court of quarter sessions to order the clerk of the peace to correspond with justices and others on matters connected with their offices. The opinion of the court is asked upon this, in reference to schedule three of the case.

One class of items is claimed in schedule six of the special case, as having been audited and allowed by the court of quarter sessions under the provisions of chapter 119, Con. Stats., U. C., section 7, p. 972, and that audit is final and binding on the county treasurer. The opinion of the court is asked whether the audit and order of the court of quarter sessions is to be obeyed by the county treasurer, without the further prior audit of the county auditors, or order of the county council.

All the items of the defendant's account are represented in the schedule to the case before the court. It is admitted in the case that the services have been performed.

All the items represented in schedule one to the case are provided for in the tariff of fees of 1845, and in the Con. Stats. U. C., p. 987, as shewn by the several items in this supplementary case under the head of number one.

The items in schedule number two to the case are claimed for services performed under alleged authority of the court of quarter sessions, by its order of July, 1854, stated in the case, and until the dispute in question always allowed as a proper charge, in manner stated in the evidence.

The items in schedule three are provided for under the order of sessions of November, 1854, as stated in the case.

The items in schedule four are some of them for advertising the courts, and others of the items are for notices to constables, under authority of the order of November, 1854, and an item for an office letter-book and for instructions to a justice as to the mode of appointing a special constable.

The items in schedule number five are claimed under the items in the tariff set forth in number one of this supplement as to accounts.

The items in schedule number six are claimed, as stated in the case, under the order of the court of quarter sessions, and upon its audit, which the defendant submits is final.

The items in schedule seven are claimed as items embraced in number two of this supplement.

ROBINSON, C. J.—The plaintiffs in this action are endeavouring to recover back from the defendant $761 80, which the defendant admits he has received out of the county funds of the county of Lambton, and which, in accounts rendered by him as clerk of the peace of the county, he claimed to be due for certain services rendered by him as such officer.

The first question is, whether he was legally entitled to be paid out of the county funds, the whole or any, and what part, of these fees which are in question; and if he was not entitled to recover all or any of them, then the next question is whether the plaintiffs are legally entitled, under the circumstances, to recover back from him whatever sums he ought not to have received out of the county funds.

It is not disputed that the defendant did render such services as he has charged for. The plaintiffs insist, however, that he had no right to claim payment for them out of the county funds.

It is admitted by the defendant that for $66, part of the sum in question, he cannot shew any authority, and he consents that for that sum that a verdict may be entered for the plaintiffs; the fees composing that amount being, as I assume, fees which do not come under any of the seven classes of charges respecting which our opinion is desired.

Then we have, first, to see whether such fees as come under class number one are legally chargeable against the county funds.

It is a preliminary question, however, whether any fees chargeable for services to be rendered by clerks of the peace, and which come within the schedule at the end of the chapter 120, Consol. Stat. U. C., given as a schedule of heads of expenses which shall be deemed to be expenses of the administration of criminal justice in Upper Canada within the meaning of the Act, are to be paid to the clerk of the peace out of the county funds in the first instance, and to be afterwards included in a general account against the government of all such expenses as by the statute the government is to pay out of the consolidated revenue; or whether the council can refuse to entertain such charges, and can refer the clerk to the government, as the party from whom he is to claim compensation; or whether a middle course is not the one proper to be taken—that is, that the clerk should make out his account of fees for services connected with the administration of criminal justice against the county, which account, with vouchers and report, should be sent to the government, with the accounts of other county officers, of such a nature as the statute contemplates, and to await audit and payment by the government to the municipality.

I do not know what system may have been pursued under the power of regulation given to the Governor in council by the second clause of the Act, but it would seem that it would be very inconvenient if the council were to pay such accounts to the several officers before audit by the government auditors and final allowance by the government, for then occasions might be constantly arising for reclaiming from the officers any sums that the government county auditors or the inspector general may have rejected.

In either case, I think the intention and effect of the statute, ch. 120, is that the counties shall be paid or reimbursed by the government all such expenses as come within that statute, and have been audited by the proper auditors according to the regulations of the government; and not that the clerks of the peace, sheriffs, coroners, constables, and criers, are to make out severally their accounts against the provincial government for such services.

I do not, therefore, think that the clerk of the peace can be properly told that for charges relating to the administration of criminal justice he is to make out and present his accounts to the provincial government, and not to the county.

As to the several lists or schedules, seven in all, on which our opinion is desired as to the admissibility of the charges, we required that the defendant should in the first place refer us to the particular authority, by statute or otherwise, on which he rests for the several items; and that the plaintiffs should, on their part, specify their objections and the ground of them as regards each item, for the judges cannot be expected to search through the whole statute-book to see whether there is not some enactment referring to services rendered by clerks of the peace, under which each particular charge may be supported or rejected.

I do not think that the schedule appended to chapter 120 was intended by the legislature to embrace all the expenses of criminal justice that were to be charged against the government, but only to point out that all the charges specified in it were to be deemed within the Act, and thus to remove all doubt as to such charges. The last sentence of that statute, page 980, makes that plain, for this is added to the schedule, "Together with all other charges relating to criminal justice, payable to the foregoing officers, specially authorised by any Act of the legislature."

Whether the schedule number one contains any charges that properly belong to the provincial government to pay as coming under the head of administration of criminal justice, I do not think material for us to consider, for that would not shew that the clerk of the peace is not entitled to charge them in his accounts against the county in the first place, and so of all the other charges. But the question is whether the several fees charged are fees to which he is entitled, and that is a question which we declined to go into until we were informed more particularly under what authority his several fees were claimed.

After it has been settled what charges are admissible and what are not, the question may arise which of them the council can justly claim should be paid (to the county, as it appears to me) out of the provincial revenue, and which not.

If the council has paid any charges which they have expected would be afterwards reimbursed by the government, and if they have found such charges rejected, either on the ground that they were for fees to which the clerk of the peace is not entitled, or for fees which, though properly demandable, are not chargeable against the provincial revenue, then a question will arise, whether the council having paid them under the sanction of their own

auditors, and upon their own judgment, can sue for them back because the government has declined to reimburse them.

If they are reclaimed from the defendant not as illegal charges, and if they were not in fact illegal charges, but are reclaimed because they were not chargeable against the provincial revenue under the statute 9 Vic., ch. 58, and were on that ground rejected by the government, then I think that no action can be supported by the county against the clerk to recover them back, whether in our opinion the Inspector General or the government auditors have or have not erred in drawing the distinction between the two classes of charges. It would be a question to be settled between the county and the government, in which the clerk of the peace would not be a party interested.

Then looking now at the case, after these explanations:

The first, sixth, and seventh charges contained in schedule number one are not supported, in my opinion, by any express legal sanction, and as this court has under such circumstances no authority, either to fix the amount for any of those services, or to pronounce that the clerk of the peace is entitled to any fee for them, we cannot properly enter into a consideration of any further question respecting them. The ground on which I think the charge number seven not admissible, is that the fee which is allowed for that service in the table of fees of 1845 is made payable by the officer to whom the oath is administered.

The charges in schedule number two, I do not find to have any legal sanction.

Of the charge in schedule number three, I do not find that the charge number five has any legal sanction.

The other charges may be all legal or not, according as the services for which they are made were rendered by order of the justices, as stated in page 22 of the printed tariff: and on that point I think that the recognition of them by the justices as incurred by their authority should, as a general rule, de deemed conclusive.

Schedule 4.—The charges in this schedule are admitted in the case to be unauthorised, and the only question in regard to them is whether, having been voluntarily paid with a knowledge of the facts, they can be recovered back.

Schedule No. 5.—I do not consider that the charges in this schedule have any legal sanction.

Schedule No. 6.—I do not find that there is any legal sanction for the charges contained in this schedule

Schedule No. 7.—I do not find that there is any legal sanction for the charges contained in this schedule.

There are some few of the charges of which we can only say, as in regard to charge 8 in schedule number one, that what is charged may or may not be right according to what the clerk may be able to shew had been required of him.

The fees for which alone I think the clerk of the peace can be said to have a legal sanction, supposing the service in each case to have been authorised, are, in schedule one, the charges 2, 3 4, 5, 8, 9, 10, 11 and 12; and in schedule 3 the charges 1, 2, 3, 4, 6 and 7, subject to the remark I have before made respecting them. Of these charges I do not consider that any one of the charges embraced in schedule number one comes properly within those expenses of the administration of criminal justice, which, under Consol. Stats U. C, ch. 120, are made charges against the provincial revenue. Of those in schedule three, I do not think that any one comes clearly within that statute.

The proper construction to be given to the statute, ch. 120, in my opinion is, that the legislature having evidently had before them the table of fees established in 1845 for the clerks of the peace, and made selections from it, (some of which it must be confessed seem to have no obvious connection with the administration of criminal justice), must be taken to have determined that the remainder of the clerk's fees in the schedule were not to be deemed expenses of the administration of criminal justice within the meaning of that act. And that the fees given in the schedule of the fees for the clerk of the peace in chapter 120, with the addition of "all other charges relating to criminal justice payable to that officer, specially authorised by any Act of the legislature, and immediately before the 9th of June, 1846, payable out of county funds," constitute all the fees of his office which are to be paid out of the provincial revenue. But it rests with those to whom the government has committed the duty under the statute, ch. 120, to audit and approve the accounts.

It only remains, I think, that we should express our opinion in regard to the right of the plaintiffs to recover back in this action against the clerk of the peace any fees which he has received, and for which we do not find that he had any express legal sanction.

I understand the clerk of the peace to be serving without a salary, and to be only remunerated by fees. In that case, if services are required of him for which he has no fee allowed him, and which he is not bound to render by any statute, or as necessarily belonging to his office, I take it he is no more bound to render such services than any stranger would be. If he does render them at the call of the justices, or in compliance with the request of the municipality or of the county auditors, he has at least an equitable claim to receive a fair compensation for the act done; and though he might not have been able to sustain an action at law for all such services (while for some he might), yet when the justices or the county council have audited and allowed such charges, and have paid them under no misunderstanding of the facts, nor any untrue representation of the officer, we consider that the municipality have not a legal right of action to sue for them back That would not be like the case of a public officer concerned in the administration of justice demanding a fee from an individual for a service rendered in the course of the administration of justice, or charging against and receiving from the government, or from a municipality, fees for services not rendered, or for which he had made charges not conforming to those authorised by law.

After auditors have had the accounts of the clerk of the peace before them, and have exercised their judgment upon them, and have passed them, not being misled by any improper conduct of the officer, I do not think they can reclaim in an action what they have so allowed. If they can, they can do it after the lapse of years, and long after the money which they have voluntarily paid for services rendered, and with a full knowledge of the facts, had been received and spent.

And so also as to such charges as those for stationery, a blank book for entering letters in, or a press to keep his papers in, I cannot hold that for them the clerk had a legal right to demand payment; but when those whose duty it was to audit and pay the accounts passed their judgment upon them, and looking at the circumstances, thought the disbursements were such as should in fairness be allowed for to the officer, I think there is no legal right to recover back the money from him.

The services allowed and paid to him for assistance rendered to the county auditors, are charges of which I take the same view. The county auditors need not have employed him, but they must have expected to remunerate fairly whatever person they did employ, and I think, if the defendant was called upon to give his time and attention to that duty, he had a claim to be paid for his time and trouble, which claim was at least just; and having been paid for it on an account rendered and audited, and when nothing illegal was done, and no imposition practised, he can keep what he has received as a compensation.

In looking over those charges of which it cannot be said that they have any express legal sanction, I do not think they are all such as that we can properly hold that an action can be sustained to recover them back after the accounts which contained them have been audited and allowed, and the money paid to the officer, with a knowledge on the plaintiffs' part of the facts, and in the absence of any untrue statement in regard to the service rendered, or of any infringement of an Act of Parliament in charging more than the fee allowed for the service.

But we must bear in mind that the chapter 119, of the Consol. Stats. of Upper Canada, section 8, makes it a penal offence in the clerks of the peace to receive any other or greater fee or allowance for any of the services performed by them than such as should be (and were) established under the authority contained in that act, unless such fees as might be allowed by some other Act of Parliament for other services. That clause does not apply, I think, to any disbursements made by the clerk of the peace, or services rendered by him which it did not properly belong to his office to render, and of course not to any fees for services which the justices were authorised to require him to render, and for

which when so rendered a fee is allowed by the tariff; but it does apply to such charges as the following in schedule number one, namely, 1, 6, 7; to charge 5 in schedule three, unless we can hold the notice to a constable of his appointment to come under the head of a letter upon special business, and so with the item in page 22 of the tariff, which I think would be a forced construction, though the charge itself is one that it would be reasonable otherwise to allow.

Also it applies to all the charges in schedule 4, except that item, "Paid for a letter-book for the clerk of the peace," which the justices could allow if they pleased; to all the charges, I think, in schedule No. 5; to those in No 6, as they seem to have been for services necessarily rendered by him in virtue of his office as clerk of the peace, for which no allowance is made in the tariff, or by any statute since, though it seems perfectly just that he should be allowed to charge and receive a fair allowance for so necessary a duty; also to the items in schedule 7, which stand in principle on the same ground, except the first of the items, which is a notification to a coroner of his appointment, for which no allowance is made, unless that can be called a letter "upon special business," which I think it hardly can be. But the service is one that ought to be rendered, and for which there should have been an allowance made in the tariff.

Then as to the last mentioned charges, beginning with schedule No. 1, and going through, as I have just done—as they are fees or allowances received by the clerk, contrary to the 8th clause of chapter 119, Consol. Stats U. C., is he liable to be sued for them, as money illegally received, after his accounts have been audited and passed?

That is a general question. We had occasion to consider it in the case of the *County of Haldimand* v. *Martin* (19 U. C. R. 178), which may be considered perhaps as in principle governing the present, though there were several matters to be considered in that case which were peculiar to it, and there is in this case, on the other hand, a peculiarity which makes against the defendant. I mean the clause in the statute, ch. 119, which expressly enacts, that no other or greater fee shall be received by any of the public officers mentioned in it, for services rendered by them respectively, than such as shall be established by the tariff which should be made under that Act, unless allowed by some other Act of Parliament for other services; and which imposes a penalty of forty dollars for any such offence.

Possibly the legislature meant by that, that the prohibition should extend only to the cases of fees that should be illegally demanded of individuals for public services, but I think we cannot understand in that sense only the plain language used. It may be argued also that the Legislature intended that the penalty should be all that the officer should be subject to, and that he should not be also required to refund the illegal fee or allowance. I think we cannot so determine.

And I also think that we cannot hold, in the face of that statute, that the fees received contrary to its express provisions are moneys which the officer in equity or good conscience may be allowed to hold, though he could not have recovered them by law. It seems to me that in a case like this, the language of the judges in *Steele* v. *Williams*, (8 Ex 626,) applies with peculiar force; and that case is an authority so strong and clear against the defendant's right to retain the money illegally received by him, that it leaves it only to be considered by us whether the same principle can be applied in this case, where the defendant received the money from the municipality out of the public funds, as must have been applied, according to that case, in regard to any illegal fees which he had received from an individual for a service rendered to him by virtue of his office, for which service he is by the tariff allowed to be paid by the individual, as is the case with regard to several items contained in the tariff.

I can find no authority for drawing a distinction in favour of the defendant, founded upon the fact that he is sued by the county which paid the illegal charges out of the public funds. On the contrary, public policy seems to require that the law should be at least as strictly applied in such a case as in the case of an individual who had paid the illegal fee But at the same time I do see very great inconvenience that would follow if accounts of this description should be allowed to be raked into long after they have been passed and paid, with a view of discovering any petty charges of a shilling or 1s. 3d, and making them the ground of a lawsuit to get back the money.

In *Brisbane* v. *Dacres*, (5 Taunt. 143,) the inconveniences and hardships of such a course are strongly pointed out, but I think we cannot apply the principle on which that case was determined to the case before us. The facts are in several respects so unlike that we could not rely on it as an authority in favour of the defendant.

I have endeavoured to make plain the conclusions I have come to. If my brothers concur in this view, we must leave it to the parties to apply what has been determined by us in such a manner as to shew for what sum the verdict should be entered, in addition to the sum mentioned in the case as submitted to, £66; and if it should be required, the master of this court will assist them in stating the account, and will refer to us if it should be necessary on any point that may seem doubtful.

BURNS, J., concurred.

MCLEAN, J., having been absent during this term, gave no judgment.

COMMON PLEAS.

Reported by E. C. JONES, ESQ., *Barrister-at-Law, Reporter to the Court.*

HOLDER, v. JACKSON.

Auctioneer—Contract with—Bidder—How far auctioneer is bound to accept all bids indiscriminately.

An auctioneer is not bound to accept all bids, as a matter of course, from persons present at his auction. An action, therefore, will not lie for refusing to accept such bids unless by reason of some special condition or terms of the sale (T T., 25 Vic.)

Declaration, third count.—Also, for that the plaintiff had the reputation of, and was in the habit of attending sales at public auction, and purchasing articles thereat both on his own account, and on commission for other persons; and the defendant, as such auctioneer aforesaid, held the sale at public auction, in the second count mentioned, under the conditions hereinafter mentioned, that is to say: "Terms and conditions of auction sale of household furniture, bar fixtures, &c., Kingston, September 7th, 1858: each and every article to be taken as it may turn out, good, bad, or indifferent; any lot in dispute at the time of being adjudged to be re-sold to the highest bidder. Terms of payment, cash, prior to the goods being removed or delivered, which is to take place after the sale is closed, and any articles remaining unsettled for agreeable with the terms of sale will be re-sold on account and risk of the purchaser, but persons purchasing to the extent of fifty pounds or upwards, can have a credit of three months by furnishing approved endorsed notes." And the Plaintiff relying upon the said conditions of sale hereinbefore recited, did attend the said sale, and bid in and purchased a large number of articles thereat, other than those in the second count mentioned; but the defendant, after the plaintiff had so bid in and purchased a large number of articles at the said sale, as last aforesaid, wrongfully, maliciously, and without reasonable or just cause, wholly refused to accept the plaintiff's biddings for other and subsequent articles put up by the defendant, so being such public auctioneer, for public competition and sale at the said auction, although such biddings were at different times tendered to the defendant. And the defendant thereby prevented the plaintiff from becoming the highest bidder, and purchaser of a large number of articles at the said auction, whereby the plaintiff lost a large sum of money on the articles already purchased by him at the said auction, and lost divers profits and the benefit of the credit mentioned in the said recited conditions of sale, and was injured in his said reputation and business of purchasing at auction on commission, and in his credit, and was otherwise damnified. And the plaintiff claims forty dollars.

And as to the third count of the declaration the defendant says that the same is bad in substance, on the ground that an auctioneer at a sale by public auction is not compelled to receive indiscriminately the biddings of persons attending the sale, but has an unqualified discretion to exercise as to any particular bidder's credit and responsibility, and the consequent right to receive or refuse his bid.

The following points were insisted on the part of the defendant on the argument of the demurrer herein:

1st. That an auctioneer at a sale by public auction is not compelled to receive indiscriminately the biddings of persons attending the sale, but has an unqualified discretion to exercise as to any particular bidder's credit and responsibility, and the consequent right to receive or refuse his bid, and the conditions of sale are not estoppel.

2nd. That the plaintiff at the said auction sale was not bound to purchase, therefore there was no consideration to bind the defendant to sell, so that there was no mutuality. The contract was all on one side, therefore *nudum pactum*, and there was no complete contract of sale.

3rd. That the plaintiff should have averred that in the event of his having become the purchaser of goods at the said sale to an amount to have entitled him to the credit mentioned in the conditions of sale, that he had in his possession, or was prepared to, and could have furnished promissory notes for the amount of his purchases, that would have been approved of by the defendant according to the conditions of the sale.

G. W. Draper, for defendant, contended that the declaration was bad, because it did not aver that plaintiff was willing to purchase to £50, or give security. Gist of the action is whether an auctioneer has a right to refuse to take a bid or not He cited Addison on Contracts, 39; *Payne* v. *Cave*, 3 T. R. 148; *Cooke* v. *Oxley*, 3 T. R. 653.

C. Gildersleeve, contra, contended that the plaintiff had the right to purchase, if the property was sold at auction. He cited *Fuller* v. *Abrahams*, 6 Moon. 306.

RICHARDS, Q C., for the defendant, referred to *Warlow* v. *Harrison*, 28 L. J Q B. 18; *Wardell* v. *Harrison*, 5 Jur. N. S. 313; S. C. 6 Jur. N. S. 66.

DRAPER, C. J.—The declaration charges the defendant with wrongfully, maliciously, and without reasonable or just cause refusing to accept plaintiff's biddings at an auction for articles offered for sale, when the plaintiff had already been the highest bidder for, and had certain other articles knocked down to him as the purchaser thereof. The inducement laid is that plaintiff was in the habit of buying at auctions for himself and on commission for other persons, (not averring notice thereof to defendant.) That defendant as an auctioneer was holding a sale at public auction on the following conditions: every article to be taken as it may turn out to be good, bad, or indifferent; any lot in dispute at the time of being adjudged to be re-sold to the highest bidder. Terms of payment, cash, prior to the goods being removed or delivered, which is to take place after the sale is closed. Any articles remaining unsettled for agreeably to the terms of sale to be re-sold on account and risk of the purchaser. Persons purchasing to the extent of £50 or upwards, can have a credit of three months, by furnishing approved endorsed notes. Plaintiff does not assert that he was the highest bidder for any article which was not adjudged to him, but that the refusal of his bids prevented his becoming the highest bidder. Nor does he aver that he purchased some articles with intent to buy others, enough together to amount to £50; that defendant's refusal to accept subsequent bids prevented this, whereby he was obliged to pay cash for what he did buy. His claim rests on the assumption that an auctioneer at a public sale must receive the bidding or offer of any and every person present and does a wrong to any person whose bidding or offer he declines to notice and receive.

I can understand that possibly an auctioneer may do a wrong to the seller, by refusing bids. As he is agent for the seller *ab initio* he has, I apprehend, the right to settle not merely the terms of sale, but to regulate the biddings; as for example, to say he will not receive any bid which does not advance a given sum upon the last preceding bid. He is under no contract with the intending purchasers, unless it arises from the expressed terms or conditions of sale, until by accepting their bids he becomes bound to complete the sale according to those conditions, as in case his conditions state the sale to be without reserve, he is bound as by a contract to sell to the highest bidder who is not the owner or agent for the owner, in other words, a bid by or on behalf of his principal is contrary to the contract to sell *without reserve*, and the auctioneer cannot receive it to the prejudice of the last preceding bidder. *Warlow* v. *Harrison*, (5 Jur. N. S. 313, and 6 Jur. N. S. 66.)

But in a sale such as it is stated in this count, I do not understand on what ground any person can claim as a right to be allowed to bid—to offer to become a purchaser. It will be going beyond any authority I have seen to hold, that by holding an auction under such circumstances there is an implied duty or contract to deal with any person who presents himself, and that the auctioneer, with due regard to his responsibilities to his principal has not a right to refuse to deal with any particular person. The principal might refuse from mere caprice to sell to A. B. or C., and might direct the auctioneer to refuse to sell to certain parties, and I can see no reason why the auctioneer (the agent) is bound by law to accept offers or bids, any more than his principal would be. There are no special circumstances shewn to prevent his exercising a discretion, which may be very necessary under the circumstances easy to imagine. In the absence of authority to the contrary, and in the absence of any sound reason that I can perceive to uphold a contrary decision, I think the defendant should have judgment on this demurrer.

Per cur.—Judgment for defendant.

WILSON ET AL. v. THE CORPORATION OF THE UNITED COUNTIES OF HURON AND BRUCE.

Reference—Order of—Counsel—Authority to bind by undertaking—Agent of defendants' attorney—As such power to bind defendants—Award.

The rule for a reference in this cause was granted on reading the consent to refer endorsed on the record at *nisi prius*, it stated that the cause and all matters in difference between the parties should be referred to S. C, and among other things, stated that the evidence as taken before the judge at *nisi prius* should be read before the arbitrator, and that any question of law which should arise, at the request of either party should be referred to the court. and costs of cause, reference and of the award to abide the event. The order of reference as made a rule of court differed from the above memoranda, in these among other things—1st, by directing these costs, &c, should be in the discretion of the arbitrator. 2nd, that the arbitrator should not be required to reserve any legal questions for the decision of the court.

Messrs W. P & B acted throughout this matter as agents for the defendants' attorney, all the papers in the suit being served upon them; and W., one of the members of the firm, was counsel for the defendants in the cause both at *nisi prius* and before the arbitrator.

It was proved that on an undertaking of W as counsel for defendants not to raise any question of law, the terms of reference were altered as above by consent of W. and of counsel for the plaintiffs.

On motion to set aside the award and final judgment, *held*, that W. had power and authority either as counsel or as agent for the defendants' attorney in his discretion in the matters in this suit to bind the defendants; and that accordingly defendants were bound by his (W's) undertaking as above, and the award must therefore be upheld.

(M. T. 25 Vic.)

R. A. Harrison obtained a rule *nisi* in the Practice Court, returnable here, calling on the plaintiffs to shew cause why the agreement dated 17th of August, 1861, should not be declared null and void on the ground that Adam Wilson, Esq., had no authority to enter into it so as to bind defendants, or, why so much of the order of reference and rule embodying the same as directs that the arbitrator shall not be required to reserve any legal question for the opinion of the court, but that his conclusion on the law and facts should be final; and that the arbitrator shall have power to fix the period for payment of any sum he may award, should not be rescinded or varied upon the ground that the order and rule depart from the terms of the consent for a reference, and why the award and final judgment entered in this cause should not be set aside on the following grounds: 1st. That the arbitrator exceeded his authority in determining questions of law and awarding as to costs in a manner not authorised by the terms of the original reference. 2nd That the arbitrator in doing so acted under an agreement, dated the 17th of August. 1861, purporting to have been made between Hector Cameron, Esq., attorney for the plaintiffs, and Adam Wilson, Esq., acting for defendants, which agreement, so far as the said A. Wilson was concerned, was in excess of any authority which he possessed, and in no manner binding on defendants. 3. That the arbitrator ordered payment of the sum of money at a future day when no authority so to do was given by the terms of the original reference. 4. That the award is contrary to law in this, that under the first count of declaration in respect to which the arbitrator awarded the plaintiffs $65/60, the plaintiffs are not in law entitled to recover from the defendants the said sum, or any sum whatever. 5. That the award is con-

trary to law and evidence, in this, that under the third count, in respect to which the arbitrator awarded to plaintiffs $59 2, plaintiffs are not entitled to recover from the defendants the said sum, or any sum whatever. 6. On grounds disclosed in affidavits and papers filed. Or why, notwithstanding the agreement of the 17th of August, 1861, and the award, the cause should not be again referred to the arbitrator upon the terms of the original reference, freed of the provision of the agreement of the 17th of August, 1861, on the ground that the agreement is not binding on the defendants, and was in excess of the authority of the said A. Wilson.

The rule was granted on reading, first, the consent to refer, endorsed on the record at *nisi prius*, which was that the cause and all matters in difference be referred to the arbitration of S Connor, Q. C., with power to examine witnesses under oath, and the same power of amendment as a judge at *nisi prius*. Award to be made before the first day of Easter Term, then next or such other time as the arbitrator might in writing enlarge the reference to. A verdict to be taken for the plaintiffs, with $20,000 damages, subject to be reduced, increased, or a verdict entered for d fendants by the arbitrator. The evidence as taken by the judge at *nisi prius* to be read before the arbitrator, and any question of law arising in the case to be referred to the court, at the request of either party; costs of the cause, reference and award to abide the event.

The order of reference as made a rule of court differed from this, by directing that the costs of the cause, reference and award be in the discretion of the arbitrator; and that the arbitrator should not be required to find specifically on the issues, but might award damages generally on the various counts. And by directing that each party should produce books, papers, &c., to the arbitrator, and that the arbitrator should not be required to reserve any legal questions for the opinion of the court, but his conclusion and award on the law and facts should be final, and that he should have power to fix the period for payment of any sum he might award, without delaying plaintiffs' right to enter judgment.

The award, dated the 24th of August, 1861, after divers recitals determined the first and third counts of the declaration (the first count being a special count on a contract entered into between plaintiffs and defendants, and the third being an aggregate of the common counts) in favour of the plaintiffs, and the arbitrator assessed damages of plaintiffs, in respect of the matter in the first count, and the issues joined thereon, at $6500, and in respect of the matter in the common counts at $6962. The arbitrator ordered the costs of the cause in respect of the first and third counts, when taxed to be paid by defendants. No damages were assessed to plaintiffs on the second count, and no costs thereon given to either party. Each party were to pay their own costs of the reference. The defendants to pay the costs of the award The verdict to be reduced, and the judgment entered for plaintiffs on the first and third counts for the respective sums above mentioned, amounting together to $12,462. The amount of judgment including costs, when taxed, and of award to be paid by defendants to plaintiffs on the 15th of October, 1861, but that delay was not to affect the plaintiffs' right to enter judgment.

The affidavit of Robert Gibbons, warden of the united counties, stated, among other matters, the making of an agreement, dated the 16th of August, 1861, between the counsel for the defendants, Adam Wilson, Esq., and the plaintiffs' attorney, to the effect following: that such agreement should be taken as part of the order of reference, and as if embodied in the original submission. That the arbitrator should not be required to find specifically on the issues, but might award or assess damages generally, or on the different counts. That the costs of the cause, reference, and award, should be in the discretion of the arbitrator. That the arbitrator should not be required to reserve any legal questions for the opinion of the court, but his conclusion and award on the law and facts should be final, and that he should have power to fix the period for the payment of any sum he might award, but that provision was not to affect the plaintiffs' right to enter judgment under the reference and award.

Mr. Gibbon's affidavit then stated that Mr. Wilson had no authority whatever from the defendants to enter into that agreement, nor any power or permision so to do. That defendants had no knowledge of said agreement until about the 20th of September. That defendants desired and intended to have all legal questions referred to the court. That the award was not served on defendants' counsel until the 12th September, 1861, and defendants had no knowledge of its contents until it was too late to move to set it aside.

Malcolm C Cameron, the defendants' attorney, also made an affidavit, that he did not authorise Mr Wilson to enter into the agreement set out in the award, nor had he any knowledge thereof until he received the award about the middle of September last. That such agreement was entered into by Mr. Wilson, without the knowledge, permission, or authority of the defendants, or their attorney. That several legal question were raised before the arbitrator by defendants' counsel, (Mr. Wilson,) which, if referred to the court, would, as the attorney believes, be found in favour of defendants. That the award was not served on defendants, or their attorney, nor had they any knowledge of the contents thereof until it was too late to apply to the court against it last term.

An additional affidavit of Mr. Gibbon was put in, reiterating the statements of the former one, and adding, that from the moment the defendants became aware of the contents of the award, and the consent of Mr. Wilson to the alteration of the rule of reference, it was determined to resist the award and to apply to set it aside. That he never led the plaintiffs to believe the money would be paid as directed by the award, of which they had notice served on them until after last term, nor were they aware of the publication of the award, nor had they any notice thereof until after the period aforesaid. Annexed to this affidavit is the affidavit of Alexander M. Ross, treasurer for the united counties, stating that he was the principal party engaged in advising with the counsel in this case, at Toronto, and was in frequent communication with A. Wilson, Esq., Q. C., who was acting for defendants, and is well acquainted with the facts attending the case and arbitration. That he has carefully read over the affidavit of Mr. Gibbons, and knows it to be true in substance and in fact, except the paragraph denying that Mr Gibbon ever led the plaintiffs' attorney to believe the money would be paid, and that he believes to be true.

The defendants' attorney made a second affidavit denying that Mr. Wilson had authority or permission from defendants or their attorney to make the agreement of the 17th of August, 1861, and asserting that the award was not served on defendants or their attorney, nor had they any knowledge of its contents or any notice of the publication thereof until it was too late to appiy to the court last (*i. e.* Trinity) term to set it aside, and that judgment has been entered and execution placed in the sheriff's hands in this cause.

The plaintiffs' atttorney made an affidavit stating that immediately after the commencement of this suit, the defendants' attorney instructed him to serve all papers in this suit on Mr. Adam Wilson, or on the firm of Wilson, Patterson & Beaty, of which firm Mr. Wilson is a member, and treat him and his firm as the agents of him, the defendants' attorney, in consequence of the usual agent of the defendants' attorney being retained on behalf of the plaintiffs. That Mr. Wilson and his firm acted throughout this suit as agents for the defendants' attorney, and received and served all papers and documents herein. That the award was made and published by the arbitrator herein, on the Saturday before last Trinity Term and the plaintiff's attorney having received notice on that day from the arbitrator that he had published his award, he served on the same day notice on Mr. Wilson that the award was published. That it was distinctly understood by both parties during the argument before the arbitrator that the award would be published before Trinity Term. That on the first or second day of Trinity Term the plaintiffs' attorney had a conversation with Mr. Wilson as to the award, when Mr. Wilson spoke in general terms of the contents of the award. That up to or about the 24th of October, 1861, plaintiffs' attorney had no intimation that the defendants meant to contest the award, but had been previously led to believe by conversation with the treasurer, and with the attorney of defendants, that they acquiesced in the award and would pay the amount, and that at the request of the attorney for defendants he delivered to him his bill of costs and affidavit of disbursements about the 1st of October. That Mr. Wilson acted as agent for the defendants' attorney, and as counsel for defendants throughout the whole case. That the arbitrator was not

requested to state any question of law for the opinion of the court, there having been merely a conversation whether he should be so requested That after the evidence had been given and a long argument concluded, a discussion arose between the counsel and the arbitrator as to the authority of the latter, and the necessity for reserving any question of law. Mr. Wilson stated that the only question of law as to the first count that could be raised was in reference to the agency of Bosanquet & Co. That the arbitrator intimated that he would have to find as a fact that the said firm were the agents of the defendants alone, and such finding would virtually determine the suggested question of law, and from the evidence, the finding on the questions of fact necessary to raise questions of law must be in favour of the plaintiffs, when Mr. Wilson suggested that if the plaintiffs' counsel would leave the whole question of costs to the arbitrator, and allow him to fix a time for the payment of the money awarded, he (Mr. W.) would be disposed not to raise any question of law, and after consideration for a day or two, the agreement altering the terms of the reference was arrived at; the only inducement for the plaintiffs' counsel to consent to alter the terms of the reference was to avoid further delay. That the defendants' attorney was not present at the trial, nor at any sitting of the arbitrator, nor at the argument of the demurrers but Mr. Wilson attended at all the sittings of the arbitrator, nearly thirty, except two or three at the beginning and the whole management of the case from the drawing of the pleas until the taxation of costs on the 24th of October, 1861, was entrusted to and conducted by Mr. Wilson.

Richards, Q C, and Hector Cameron shewed cause, citing *Swinfen* v. *Swinfen*, 18 C. B., 485, and 3 Jur. N. S. 1109; S. C. 1 C B. N. S. 364, and 5 H. & N. 890; *Thomas* v. *Harris*, 27 L. J. Ex. 353; *Chambers* v. *Mason*, 5 C. B. N S 59; S C. 4 Jur. N S. 1037; *Hall* v. *Featherstone*, 3. H. & N. 284; In re Hobler, 8 Bea. 101; *Rees* v. *Waters*, 16 M. & W. 269.

R. A. Harrison, in support of the rule, cited *Wade* v. *Simeon*, 13 M. & W. 647; *Furnival* v. *Boyle*, 4. Russ. 142; *Hargrave* v. *Hargrave*, 12 Beav. 408; *Colledge* v. *Horn*, 3 Bing. 119; *Brooks* v. *Parsons*, 1 D. & L. 691; In re Burt, 5 B. & C. 668; *Hayward* v. *Phillips*, 6 A. & E. 119; *Potter* v. *Newman*, 4 Dow. P. C. 504

DRAPER, C. J.—The first question is, whether this application is not too late. The rule *nisi* was moved on the 4th day of Michaelmas Term (21st November) in the Practice Court returnable here. The award is dated the 24th August last. The following Monday, August 26th, was the first day of last Trinity Term. No application of any kind was made until the 24th of October, 1861, when a summons was obtained in Chambers to stay proceedings. This appears only from the statement of counsel in argument, from some of the affidavits referred to in drawing up the rule *nisi* being marked as filed in Chambers on the 24th October, 1861, and attached to the copy of award and other papers put in on moving for the rule *nisi*. The delay to move is accounted for on the part of the defendants, by statements contained in the two affidavits of the warden of the united counties, (the defendants,) and in two affidavits of the defendants attorney, one of each having been sworn the 21st October, 1861, and used on the application in Chambers; the others being sworn on the 16th and 18th November respectively. The one first sworn by the warden, states that the award was not served on defendants' counsel until the 12th of September, 1861, nor had defendants any knowledge of its contents until it was altogether too late to set the same aside last (Trinity) term.

The first affidavit made by defendants' attorney states that the award was not served on defendants or their attorney, nor had they any knowledge whatever of the contents thereof until it was too late to apply to the court last (Trinity) term.

In his second affidavit the warden repeats his former statement, and adds that defendants had no notice whatever served on *them;* that such award was not made until after last term; nor were *they* aware of the publication of the award, nor had *they* any notice whatever thereof until after the period aforesaid.

And the second affidavit of the defendants' attorney states that the award was not served on the *defendants* or their attorney, nor had they any knowledge whatever of the contents or any notice of the publication thereof until it was too late, &c.

There is a palpable inadvertance involving an apparent inconsistency in the manner in which the term "defendants" is used, as if they were individuals instead of being a corporation. It would have been more to the purpose to deny notice and knowledge on the part of those officers of the corporation, notice to whom would be notice to the "defendants." The second affidavit of the defendants attorney is inconsistent with the idea that in denying notice or knowledge to or on the part of the "defendants" he can refer to and include implied or legally imputed notice or knowledge, or he would not have stated that the award was not served on the defendants or their attorney, since service on him as their attorney would for all purposes now under discussion, have been service on them; notice of publication or of the contents of the award to him would have been notice to, or service on, his duly authorised agent as the defendants' attorney would have been notice to, and service on, himself.

On the other side two affidavits are made by the plaintiffs' attorney, the first sworn on the 26th of October, the last on the 29th November. In the first it is stated that the defendants' attorney and their treasurer within the last month "both led him to believe that the money would be paid on the 15th October as directed." That the defendants counsel, meaning Mr. Wilson, was aware of the terms of the award within the first two days of Trinity Term, although a copy of the award was not then served, "but a notice of publication of the award was served on the defendants before the first day of Trinity Term." And further, that Mr. Adam Wilson acted as agent for the defendants' attorney and as counsel for the defendants. This affidavit was known to the warden when he made his second affidavit, as the 15th paragraph thereof shews, and must, I think, have been also known to the defendants' attorney. And yet in all the affidavits filed on behalf of the defendants, all reference to Mr. Wilson as agent for the defendants' attorney is most studiously avoided, not a word is said of any communication to or from him on the subject of his making the agreement of the 17th August, or of his being agent of the defendants' attorney, or of his having had notice of publication, or even being served with the award, though the warden swears the award was not served on the defendants' counsel until the 12th of September, 1861, a fact not otherwise appearing on the papers before us, except by an endorsement on the copy of the award, which is attached to an affidavit of the defendants' attorney sworn the 10th November, that such copy was not served until the 12th of September, 1861, as appears by the memorandum thereof endorsed thereon by the counsel for the defendants.

The second affidavit made by the plaintiffs' attorney states more fully that on the same day the award was made, he served Mr. Wilson with notice that the award was published. That Mr. Wilson, on the first or second day, knew generally the contents of the award, and that he acted as agent for the defendants' attorney. And that plaintiffs' attorney was told by defendants' attorney to serve all papers in the suit upon Mr. Wilson, or the firm of Wilson, Patterson & Beaty, of which Mr. Wilson is a member, and to treat him and his firm as the agents of the defendants' attorney in this suit, and that Mr. W. and his firm acted throughout this suit as agent for defendants' attorney, and received and served all papers and documents therein. And again, that defendants' attorney was not present at the trial or any of the sittings of the arbitrator, and that the whole management of the defendants' case from the drawing of the pleas until the taxation of the costs was entrusted to and conducted by Mr. Wilson.

From the manner in which Mr. Wilson's alleged want of authority to make the agreement of the 17th August is pressed upon us, I do not doubt that his character as agent of the defendants' attorney would have been repudiated if he had not filled that position. I conclude that Mr. Wilson especially, and his firm generally were agents in this cause for the defendants' attorney; and that they had notice of the publication of the award before Trinity Term. I doubt as little that if there had been any omission on Mr. Wilson's part duly to advise the defendants' attorney of the proceedings, we should have heard of it unless the matter was so entirely left to Mr. Wilson's management as to make this unnecessary. The very guarded and confined language in which the defendants' attorney denies notice or knowledge, fails to satisfy me that he was not informed by Mr. Wilson of the steps and proceedings taken in the cause, and I think justifies the conclusion that he had an ac-

tual as well as imputed knowledge which arose from services on and notice to, his agent.

And if the application had been merely to set aside the award, I should have been prepared to hold it too late, not having been made in Trinity Term, or possibly because not made within the first four days of that term.

But a difference is taken in this case, where a judgment entered upon an award is moved against, and it appears settled that such a motion is not so limited in point of time, but it can only be made on objections apparent on the face of the award, and the argument for the plaintiffs is, that the agreement of the 17th of August being set out on the award, the objection is open on this motion, and that as Mr. Wilson had no authority to bind the defendants by it, the award is bad.

The form of the objection is that Mr. Wilson, as defendants' counsel had no authority to change the original submission, and vary and extend the authority given to the arbitrator.

I take it to be sufficiently established that Mr. Wilson filled not only the character of counsel for defendants, but also of agent to the defendants' attorney. Many decided cases shew the authority of an attorney to refer a cause, to select the tribunal by which the matter in dispute between his client and the opposing party shall be decided, and some of them extend to counsel also. I refer generally to *Swinfen* v *Lord Chelmsford*, 6 Jur. N S. 1042; *Filmer* v *Delber*, 3 Taunt. 486, which is approved in *Fawell*, v. *the Eastern Counties Railway Company*, 2 Exch. 344, a case particularly applicable, for there as here, the defendants were a corporation, and there, though not here, it was objected that it should be shewn that their attorney had authority under seal to defend or refer the cause. The language of the judges as to the authority of the attorney to refer a cause is explicit, and if this be so, it carries with it power to alter or vary the terms of the submission. The case of *Hatton* v. *Royle*, 3 H & N. 500, does not conflict with this view while the case of *Withers* v. *Parker*, 4 H. & N. 524, and in error, 5 H. & N. 725, shews the authority of the agent for the attorney to be as effectual in the matters entrusted to him as that of the attorney himself.

Upon either ground, therefore, viewing Mr. Wilson as counsel for the defendants, or as agent for the defendants attorney, especially entrusted as he was, I am of opinion that he could and did bind the defendants by his agreement of the 17th August, 1861. This is the only objection apparent on the face of the award, or at all events any others apparent on the award depend on it, and as I think it fails, the rule must be discharged.

Hagarty, J.—In this application it is admitted that the reference was duly made at *nisi prius* as endorsed on the record. This was signed by Mr Wilson as representing the defendants. It contains a provision that any question of law should be referred to the court at the request of either p. 'y.

The chief point urged against the award is the agreement of the 17th August, 1861, as an alleged excess of authority on Mr. Wilson's part. This gentleman, as is abundantly evident, was entrusted either as counsel or agent for defendants' attorney with the management of the defendants' case before the arbitrator.

It appears to me to be of no moment whatever as to which position he filled. It is sufficient to say that on him devolved the legal management of the case, and it is not pretended that he acted otherwise than in perfect good faith and to the best of his judgment. I also consider that in this branch of the application it is quite immaterial whether he had or had not authority to make this agreement. To my mind it disposes of the question simply to state the fact that the arbitrator was not requested by defendants' counsel or agent to reserve any legal question for the court.

It must be borne in mind that we are not now discussing any dispute between the client and his professional adviser, but we are asked to set aside an award and judgment as against defendants on an alleged excess of authority.

I think the law would be in an intolerable state, and the conduct of suits rendered almost impracticable, if the court were bound to accede to defendants' view of the powers and duties of an advocate. It is matter of every day practice for counsel to take the responsibility of the entire management of a case, to decide on not pleading a particular defence, to decline calling or cross-examining a particular witness, to take or to abstain from taking legal exceptions; to accept a nonsuit, withdraw a juror, &c, &c

As the court of Exchequer decided in *Swinfen* v. *Lord Chelmsford*, "counsel has complete authority over the suit, the mode of conducting it and all that is incident to it, such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as in his discretion ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial," &c. I do not think that even the vivid imagination of the counsel for Mrs. Swinfen, in all the stages of her celebrated litigation, ever conceived much less induced him to urge that the conduct of a counsel in such a matter as not asking an arbitrator to reserve a legal question for the court, could, if not assented to by his client, invalidate an award otherwise good.

This disposes of the substance of the application. I think we can hardly be expected to consider it as a fatal objection in the defendants' mouth, that the large sum ordered to be paid by them was made payable at a future day and not forthwith. Such day, moreover, being now long past. As to the costs, they stand very much in the same position. By the admitted reference, they were to abide the event, which was against the defendants. The arbitrators' decision places the payment on a more favourable footing for defendants

As to whether this application is too late, I have not considered it fully. I incline to agree with the plaintiffs. In my view, the case wholly fails on the merits. I think the rules should be discharged with costs.

Per cur.—Rule discharged.

CHANCERY.

(Reported by Thomas Hodgins, Esq., LL B., *Barrister-at-Law).*

Stanbury v. Milliken.

Judgments—Priority—Partnership.

Judgments recovered against two, out of three, members of a firm for a partnership debt, are available only against what may appear upon winding up the partnership to belong to the two judgment debtors.

This was a motion to dispense with payment of the purchase money of certain property into court. The question raised was whether judgment creditors of two partners of a firm—which firm were the original mortgagees—were entitled to rank on the proceeds instead of the assignee of the firm. It appeared that plaintiff was a derivative mortgagee, Ross, Mitchell & Fisken being the original mortgagees. Bone & Co., and Gagne & Co. were creditors of Ross, Mitchell & Fisken, but only sued and recovered judgment against Ross and Fisken; after which Ross, Mitchell & Fisken were adjudged bankrupts under a Scotch sequestration and their estate vested in one Robson as trustee. It was alleged that as Ross, Mitchell & Fisken had paid off plaintiff that the judgments could attach, but Ross, Mitchell & Fisken alleged they paid off plaintiff as acting for their trustee Robson.

McDonald for Robson, Ross, Mitchell & Fisken.

McGregor for Bone & Co. and Gagne & Co.

Davis for the purchaser.

Spragge, V. C.—The Master finds the plaintiff has been paid off by Ross, Mitchell & Fisken and that nothing is due to him, and he then finds the amount paid by them as due to Robson, the trustee of their sequestered estates. He also finds the judgments of Bone & Co. and Gagne & Co, proved against the interests of Ross and Fisken after settlement of partnership affairs. In settling the priorities the Master places Bone & Co. and Gagne & Co. as incumbrancers upon the estate of Milliken, in addition to the mortgage to Ross, Mitchell & Fisken—this is erroneous. Suppose the judgments of Bone & Co and Gagne & Co. had been against Ross, Mitchell & Fisken instead of against the two partners, their priority would have been the second on that of Ross, Mitchell & Fisken upon the estate of Milliken to the extent of their judgment. The judgments are against the two only; it is admitted, however, for the purpose of this argument that the judgments are for debts of Ross, Mitchell & Fisken Another question is, what is the effect of such a judgment? Now, what was determined by *Ex parte Higgins* and the *Commercial Bank* v. *Ave-*

rill (Gr.) was that the joint debt is merged in the judgment recovered. The judgment recovered is not against the partnership, though in respect of a partnership debt, and now only available against what the two judgment debtors have in the partnership or may appear after winding it up after payment of the creditors of the partnership, and is of course available against them individually. It therefore became unnecessary to consider whether the plaintiff was paid off by Robson as is alleged, or by Ross, Mitchell & Fisken as found by the Master.

O'Reilly v. Wilkes.

Deed or Mortgage—Breach of Covenant.

Certain trustees conveyed to A. and took back from him a deed to erect buildings on the property to the value of £2,000, or in default that he would execute a re-conveyance. *Held* to be a mortgage for £2,000, and that subsequent purchasers and incumbrancers were entitled to redeem.

The Bill set forth that the plaintiffs are the trustees of the marriage settlement of Caira Robbins Wilkes, wife of George Samuel Wilkes, a defendant hereunto appointed under and in pursuance of the powers in the said settlement, and of an act of the Parliament of Canada, passed in the session held in the fourteenth and fifteenth years of the reign of Her Majesty Queen Victoria, and chaptered one hundred and sixty-nine.

That in pursuance of the powers vested in them by the said act and for the purpose of securing the erection of buildings on a portion of the remainder of the land vested in them for the purposes of the said settlement and making other improvements thereon, plaintiff agreed to sell to the said Wilkes, at the written request of the said Caira Robbins Wilkes, the parcels of land hereinafter more particularly described, for the sum of two thousand pounds, which was to be expended in erecting buildings and making other such permanent improvements on that other parcel of land vested in plaintiffs as such trustees.

That in pursuance of such agreement for sale, plaintiff by deed dated the 26th August, 1854, conveyed to the said Wilkes certain lands.

That in further pursuance of such agreement, by an Indenture dated the said 26th August, 1854, the said Wilkes re-conveyed the said two parcels of land to plaintiffs in consideration among other things herein stated, of the premises (being the said agreement for sale) and for the purpose of securing the performance of the condition of the said indenture, and the indenture was declared to be made upon the condition that if the said Wilkes should and did erect buildings and make other improvements upon that part of the remainder of the said real estate held upon the said trusts, according to plans and drawings of said buildings and improvements to be approved of by the said Caira Robbins Wilkes and plaintiffs, or two of them, which the said Wilkes was to furnish to the value of two thousand pounds, and interest thereon from 23rd March, 1854, within two years from that day, the value thereof to be ascertained and determined by architects and builders to be named by plaintiffs, or two of them, then the indenture should be void and of no effect; and the said Wilkes covenanted with plaintiffs that he should and would within the said two years furnish plans and drawings of the buildings and improvements above mentioned, and submit the same to the said Caira Robbins Wilkes and plaintiffs, or two of them, and would obtain their approval, and would within the said two years erect the buildings and make the improvements corresponding with said plans and drawings, on that part of the estate above mentioned, of the full value of two thousand pounds and interest thereon as aforesaid, without any default whatever; and after breach of the said covenant or default in performing the stipulations contained in the above condition, he would execute all proper conveyances unto plaintiffs to convey said parcels or tracts of land to them upon the trusts and for the uses mentioned in said settlement and Act of Parliament, free from all incumbrances created by him or any one examining under him.

That the said Wilkes had not fulfilled his said covenant, and had neglected to furnish any plans or drawings of the proposed buildings and improvements, and submit them to plaintiffs and the said Caira Robbins Wilkes, or any of them, and the said Wilkes hath not expended the said sum of two thousand pounds, or any sum, in making improvements in pursuance of the said agreement on the lands in that behalf mentioned.

The prayer was that the said George Samuel Wilkes may be decreed specifically to perform the said covenant to convey to plaintiffs the said premises free from incumbrances, and for relief against other defendants.

Proudfoot for the plaintiff.

Wood for defendant Morrell.

Hector for defendant Skelsey.

Hodgins for the infant defendants.

Esten, V. C.—The bill in this cause recites that in pursuance of a settlement and of an Act of Parliament (14 & 15 Vic., c. 169), an agreement was made with the defendant, Wilkes, for the conveyance of certain property to him, and that he should erect buildings and make other permanent improvements thereon to the extent of £2000. The Act gave a power to the trustees to sell portions of the trust property and to invest the proceeds in improving the other portions. Some time after the passing of the Act the trustees conveyed the land to Wilkes for the consideration set out in the deed, namely, £2000, which was to be expended in erecting buildings upon the same property. He then mortgaged back to them—that is, he makes a deed with a condition that upon default he would reconvey and execute all such conveyances as might be necessary—and he also covenants to expend the money in the manner set out in the instruments. The defendant, Wilkes, makes default, and the trustees' estate thereupon becomes absolute. The bill then is filed to have the property reconveyed to the trustees under the covenant. The parties are Wilkes and those to whom he sold or mortgaged, for of course those who received title from him are bound by his covenants—the deeds having been registered and all parties having notice. At the examination of witnesses the defendant, Wilkes, and Mr. Wood, the solicitor for Morrell, were examined as to certain improvements said to have been made upon the property, so as to set the value of them against the amount claimed by the plaintiffs. Wilkes states he did not perform the covenant to expend money on the property—that what he did expend was not intended to be in part performance—that it was his wife's money—that he felt rich and thought he could perform the covenants hereafter. Mr. Wood states that when he applied to Wilkes about the improvements when taking the Morrell mortgage, Wilkes told him he would get the amount of them endorsed on the deed to the trustees I must, however, leave the evidence of both out of the question. The money expended is stated to have been his wife's, and it is not reasonable or proper to suppose that it was expended in part performance of his covenants. The intendment seems to be against its being so. Then what decree am I to make in this suit? Am I to make such a decree as the plaintiffs ask? All claiming under Wilkes had notice of his covenants and are bound by them. And then if I should make a decree as the plaintiffs ask, am I to order a reconveyance without giving further time to perform the covenants? And then what time am I to give? If Wilkes had two years to perform the covenants, how many years, or months, or weeks, am I to give to the other defendants to erect the buildings? I cannot fix a time. I must look at the whole transaction as I think it ought to be looked at, and as I think it was intended to be—and declare the deed to the trustees to be a mortgage for £2000. It could not be material whether the £2000 was to be paid in money or expended on the property—for the property had passed from the trustees to Wilkes. I think there should be the usual decree of foreclosure as on a mortgage, or a sale if the defendants wish it. The bill must be dismissed as against the infant defendants with costs.

CHAMBERS.

Reported by Robert A. Harrison, Esquire, Barrister-at-Law.

Wilson et al. Judgment Creditors, v. The Corporation of the United Counties of Huron and Bruce, Judgment Debtors, and the Bank of Montreal, Garnishees.

Garnishee clause of C. L. P. Act—Money paid under sec. 138 of the assessment act as redemption money of land sold for taxes, not a debt

Moneys paid by the owners of land sold for taxes within one year from the day of sale as redemption moneys to the County Treasurer, for the use and benefit

of the purchasers, and banked in the name of the County Treasurer, cannot be attached at the instance of a creditor of the Corporation of the County as a debt due by the Bank to the Corporation of the County

(Chambers, April, 1862)

Hector Cameron, in November last, obtained an order in this cause to attach debts due to defendants by garnishees and a summons to garnishees to pay over.

This was granted on an affidavit which did not shew the grounds of deponents' belief that the garnishees were indebted, though the fact of belief was stated, nor did the affidavit shew that there had been any execution issued against defendants, and its return, nor what was the nature of the debt believed to be due from the garnishees to the defendants.

R. A. Harrison shewed cause, and at the same time moved to rescind the attaching order. He objected,

1st, that the order could not be made when the judgment debtor was a corporation; for the judgment debtor, if a corporation, could not be examined. C. L. P. Act. Con. Stat. chap. 22, sec. 287, 288.

2nd. When the judgment debtor is a municipal corporation, the Con. Stat. U. C. cap 54, sec. 221, gives a special remedy, which must be followed.

3rd. A foreign corporation cannot be garnishees. *Lundy* v. *Dickson*, 6 U. C. L. J. 92.

4th. If remedy is granted at all, it cannot be till that given (see No. 2) is exhausted.

5th. Affidavit of belief insufficient without shewing nature of debt or ground of belief. *Cataraqui Road Co.* v. *Dunn*, 3 U. C. L. J. 27; *Hazlewood* v. *DeBergne*, *ib.* 28.

6th. Amount of debt should be shewn either in affidavit or summons to pay over. *Melbourne* v. *Tulloch*, 3 U. C. L. J. 184.

7th. The alleged debt not due by the garnishees to the judgment debtors. Con. Stat. U. C. cap. 55, secs. 110, 111, 112, 124, 137, 138, 143.

He also objected,

1st. That money in garnishees hands in name of Treasurer and not for judgment debtors.

2nd. Cannot be paid either to judgment debtor or judgment creditor without a breach of trust.

3rd The debt contemplated by the statute is a personal debt.

4th. No privity between judgment debtors and garnishees. *Stephens* v. *Badcock*, 3 B. & Ad. 355; *Baron* v. *Husband*, 4 B. & Ad. 611.

An affidavit was filed on behalf of the garnishees, made by the Treasurer of the judgment debtors, that in November, 1861, there was no money deposited with the garnishees in the name of the judgment debtors, and that the judgment debtors have no claim whatever on the garnishees; that some time before the attaching order the garnishees had an account open with the Warden of the corporation of Huron and Bruce, but at the time of service of the order and since, there have been no funds to the credit of that account; that when the attaching order was served deponent had $3,107 55, which he deposited with the garnishees in his own name simply, and not otherwise; that of this sum he had before the attaching order was served, issued cheques for $845 98, which were in the hands of *bona fide* holders; that $109 50, was the property of the Liverpool & London Insurance Company, of which he (deponent) was agent; that $388 25, was his own, and the whole balance was money received by him as redemption money paid by the owners of land sold for taxes, which money was held by him for the benefit of parties who had purchased said lands, and held the sheriff's certificate, which certificate might be presented to him (deponent) at any time.

Richards, Q. C, supported the order and summons, citing *Barlow* v. *Roberts*, 6 H. & N. 93; *Ex parte Turner*, 6 Jur. N. S. 1172

DRAPER, C. J., I am of opinion that the summons must be discharged and the attaching order vacated

I proceed entirely upon the objection No. 7, and the affidavit, though I may add that this case confirms me in the propriety of the position adopted by several of the judges of requiring in the first instance that the affidavit on which the attaching order is granted should disclose the nature or character of the debt sought to be attached.

The only money which the judgment debtors can have even a pretext to claim are those stated in the affidavit to be redemption moneys. It is enough to see what that phrase means to dispose of this matter.

Certain lands have been charged with taxes; the taxes having been sufficiently long in arrear, the treasurer of the county within which the lands are situate issued his warrant to the sheriff to levy the taxes thus in arrear. The sheriff acting on the warrant sells the land, and thus levies the taxes in arrear, and must pay to the treasurer the moneys thus collected. These moneys may or may not according to circumstances, be the property of the municipality of the county; but the taxes are thus satisfied.

Within a year from the sheriff's sale the owner of the land sold may redeem it. This is done by paying to the treasurer, "for the use and benefit of the purchaser or his legal representatives, the sum paid by him, and ten per cent. thereon." The treasurer, it is true, receives this money *virtute officium*, but the statute appropriates it at the very instant of payment for the use and benefit of the purchaser who, by reason of this payment loses the right to obtain a conveyance from the sheriff. Nor does it, in my opinion, make any difference that the county is responsible to the parties interested for paying over moneys received by him. The county has the treasurer and his sureties to look to for indemnity. Thus then the money was never for an instant the money of the judgment debtors in this case, and it cannot be said to be their money deposited with the garnishees either legally or equitably.

Whether under any possible circumstances the Bank of Montreal still holding the redemption money might have been called to pay it over to the successor of the present treasurer it is unnecessary to enquire. As the matter stands the judgment debtors have no claim against the garnishees, and therefore the judgment creditors must fail on this application.

Barlow v. *Roberts*, 6 H. & N. 93, does not apply. There is no analogy between attaching a debt due to a testator's estate on a judgment recovered against the executors and the present case.

Ex parte Turner, 6 Jur. N. S. 1172, is also, I think, clearly distinguishable.

WILSON ET AL. JUDGMENT CREDITORS v. THE CORPORATION OF THE UNITED COUNTIES OF HURON AND BRUCE, JUDGMENT DEBTORS, AND JOHN MCDONALD, ESQUIRE, SHERIFF OF THE UNITED COUNTIES OF HURON AND BRUCE, GARNISHEE.

Garnishee clause of C. L. P. Act—Money in hands of sheriff arising from sale of lands not a debt. Con. Stat. U. C. cap. 55, secs. 124, 127.

Moneys in the hands of the sheriff arising from a sale of lands for taxes pursuant to sec 137 of the Assessment Act, under a warrant directed to him pursuant to sec. 124 of that act, cannot be attached at the instance of creditors of the Corporation of the County in which the lands are situate, as being a debt due from the sheriff to the Corporation of the County.

(Chambers, April, 1862)

This was an application similar to the last. The first six objections were repeated; also the 7th, referring to the assessment. Con. Stat. U. C. cap. 55, secs. 110, 111, 112, 115, 124, 137, 143, 154, 160, 161, 163, 165, 166, 193.

In this case it appeared that the moneys in the garnishee's hands were collected by him under a warrant from the treasurer of the United Counties of Huron and Bruce, to levy on certain lands stated in a schedule annexed, the arrears of taxes set opposite to each lot. The sale was made on the 26th November, 1861, and not being finally concluded was adjourned till the 10th December following. The attaching order was dated on 26th November, 1861. The debt of the judgment creditors was recovered on a claim for work and labour, and on an alleged breach of contract respecting certain debentures made by the judgment debtors. The judgment debtors had, as was sworn before the commencement of this suit, issued debentures to the amount of £13,000, on the credit of the taxes which the garnishee was directed to levy, which debentures are unpaid, and a much larger amount is due upon them than the garnishee has collected.

S. Richards, Q. C, for judgment creditors.

R. A Harrison for garnishee.

DRAPER, C. J.—This case differs from the last in some respects. The moneys which the garnishee has collected are *prima facie* at least, the moneys of the judgment debtors.

I understand that on behalf of the garnishee it is asserted that the lands by the sale of which the taxes are to be levied are the lands of non-residents, and if this be conceded then the moneys collected by the sheriff, the garnishee, are by the assessment act declared to belong to the "Non-Resident Land Fund," (sec 154) and the treasurer's duty is to open an account with every municipality with that fund, and the County Council may issue debentures on the credit of that Non-Resident Land Fund, (sec. 160) which as I understand in the present case has been done, which debentures are to be negotiated and the proceeds paid into that fund, and the interest on the debentures, and the principal when due, are to be paid out of that fund. A provision is made for distributing the surplus money of the non-resident land fund, reserving a sum dependent on the amount of such debentures which is unpaid, and each municipality of the county is to have a rateable portion of such surplus, according to the arrears due on non-resident lands in such municipality.

I take the effect of this to be a specific appropriation by the Legislature of the moneys arising from the sale of lands of non-residents for taxes, and that such specific appropriation is as effectual to prevent the judgment creditors obtaining payment of the moneys, as a prior assignment of the debt would be in ordinary cases.

The same order must be made as in the last case.

PRIVY COUNCIL.

BEFORE LORD CHELMSFORD, LORD KINGSDOWN, LORD JUSTICE KNIGHT BRUCE, SIR EDWARD RYAN, LORD JUSTICE TURNER, SIR JOHN TAYLOR COLERIDGE.

MAROIS, *Appellant* and ALLAIRE, *Respondent*.

Right of Appeal to the Privy Council.

Held, that notwithstanding the 34 Geo. III cap. 6, s. 30, and the 12 Vic cap. 57, s. 19, the judgment of the Court of Queen's Bench is not final in all cases, where the matter in dispute does not exceed the sum or value of five hundred pounds sterling, and does not relate to any fee of Office, duty, rent, revenue, or any sum of money payable to Her Majesty, or to any title to lands or tenements, annual rents, or such like matters or things, where the rights in future might be bound, and that the Privy Council can in its discretion allow appeal in such cases.

That the case of *Cuvillier* v. *Aylwin* (2 Knapp 72) did not receive that full and deliberate consideration, which its great importance demanded.

That the case of *Cuvillier* v. *Aylwin* is overruled.

(10th February, 1862.)

The action before the Superior Court in Quebec, was one directed against four defendants, who were sought thereby to be condemned, jointly and severally, to pay to Allaire, the plaintiff, the sum of £165 3s. 7d., with interest at 4½ per cent, for a few weeks previous to the institution of the action, borrowed by them (as plaintiff pretended), trading as bankers in partnership, under the name of "La Caisse d'Economie de St. Roch," from him, the plaintiff.

It was pretended in the Superior Court, that all the defendants were officers of La Caisse d'Economie de St. Roch, a charitable institution founded under the auspices of La Société de St. Vincent de Paul, and that by the constitution and by-laws of that Caisse, none of its officers were to receive any compensation for their services; that the defendants, instead of properly discharging their duties, traded for their own benefit with the monies of the Caisse, the consequences of which were its bankruptcy, and the non-payment to the plaintiff of the amount of his deposit.

The Superior Court condemned the four defendants, jointly and severally, to pay to the plaintiff the sum of £165 3s 7d. with interest at 4½ per cent. from 13th April, 1855, and costs.

An appeal was instituted by Marois from that judgment, but it was confirmed, the motives only being changed.

On the 10th February, 1862, the following judgment was pronounced by the Lords of the Judicial Committee of the Privy Council on Marois' petition for leave to appeal.

This petition for leave to appeal depends upon the same Act of the Province of Lower Canada as the case of *Macfarlane* v. *Leclaire* from the Court of Queen's Bench at Montreal, which their Lordships have just disposed of (34 Geo. III. cap. 6), but the questions raised in the two cases are entirely different. Upon the present petition it is not denied that the matter in dispute is not of the value of £500 sterling, but the petitioner prays that he may have leave to appeal granted to him upon the special circumstances of his case. The sum actually recovered in the action against the petitioner is only £165 3s. 7d with interest at 4½ per cent, but he states that in consequence of his having been held to be liable to the plaintiff in that action as a member of an incorporated society carrying on a banking business for a loan or deposit made by the plaintiff to or with the Banking Company, other depositors in the Bank have brought numerous actions against him, by which he is sought to be rendered liable to claims amounting to upwards of £4,000. It was argued, but not very strongly pressed, that the existence of these actions following upon the judgment might possibly bring the case within the class of exceptions in the 30th section of the Act, and so entitle the petitioner to appeal, although the immediate sum or value in dispute is less than £500. It would be difficult, however, without straining the words of the Act, to make the exceptions apply to the petitioner's case. But the petitioner contends, that although he is precluded from an appeal in consequence of the insufficient value of the matter in dispute, and is unable to bring himself within the exceptions, that it is still open to him to apply to Her Majesty in Council for leave to appeal, and that the peculiar circumstances of his case justify the application.

He maintains that the jurisdiction by way of appeal from all Colonial Courts is a prerogative of the Crown, which cannot be taken away except by the express words of an Act of the Legislature to which the Crown has given its assent; and that in the Colonial Act in question, not only are there no words to take away the prerogative, but that it is expressly reserved by the 40th section, in which it is declared that nothing in the Act contained shall be construed in any manner to derogate from certain specified rights of the Crown, "or from any other right or prerogative of the Crown whatsoever." But here the petitioner is met by the case of *Cuvillier* v. *Aylwin* (2 Knapp, 72), in which the very point which he raises was decided in the Privy Council against him. If the question is to be considered as concluded by this decision his petition must be at once dismissed; but upon turning to the report of the case, their Lordships are not satisfied that the subject received that full and deliberate consideration which the great importance of it demanded. The report of the judgment of the Master of the Rolls is contained in a few lines, and he does not appear to have directly adverted to the effect of the proviso contained in the 40th section of the Act on the prerogative of the Crown.

Their Lordships must not be considered as intimating any opinion whether this decision can be sustained or not, but they desire not to be precluded by it from a further consideration of the serious and important question which it involves. The petitioner must understand that the prayer of his petition will be granted, but at the risk of a petition being hereafter presented from the opposite party, upon which his appeal may be dismissed as incompetent.

Their Lordships will, therefore, humbly report to Her Majesty that leave ought to be granted to the petitioner to enter and prosecute his appeal upon lodging a deposit of £300 in the Registry of the Privy Council as security for the costs of the respondent.

Petition granted.

GENERAL CORRESPONDENCE.

Assessment—Income—when taxable—Personal Property.

DRUMBO, 10th April, 1862.

TO THE EDITORS OF THE LAW JOURNAL.

SIRS,—1. A., a clerk in a store at a salary of $400 a year, has no real or chattel property; says it takes the whole of his salary to clothe and board him during the year. Is he liable under the Assessment Law to be assessed for his salary as an income?

2. B. has a House and Lot in a village, is assessed for it $200; is also a clerk in a store at a salary of $400, has no

chattel property; says it takes all of his salary to support his family, or the most of it, and any part of his salary it does not take to support his family he expends in improvements on his house and lot, for which he is already assessed. Is he liable to be assessed for his income, or salary as an income?

3. C., an Innkeeper, is assessed for his house and lot $1000, has no chattel property, makes $2000 a year at his calling as an Innkeeper, but says it takes it all to keep up the expenses of his house. Is he liable to be assessed for what he makes as an income?

4. D., a Carpenter, has a small house and lot in a village, for which he is assessed $200, has no chattel property, makes at his trade $800 a year, but says it takes it all to support his family and improve his property, for which he is already assessed. Is he liable to be assessed for an income?

5. E., a School-teacher, owns 100 acres of land, is assessed for it $2000, has chattel property to the value of $400, but says he owes debts to the amount of his chattel property, but is receiving $400 a year salary for teaching. Is he liable to be assessed for his salary as an income?

6. F., a Tanner, has a tannery and a house and lot in a village, is assessed for them as real property $1500, has $1000 worth of stock on hand, but says he owes for his stock, therefore is not assessed for it, but derives an income from his trade as a tanner, of $500 a year, but says it takes it all to support his family and carry on his business. Is he liable to be assessed for his income?

7. G., a Merchant, is assessed for real property to the sum of $1000, has a stock of goods in his shop to the value of $4000, but says he owes for them all, so he is not assessed for his stock, but derives an income from his calling as a merchant of $1000 a year, but says it takes it all to support his family. Is he liable to be assessed for his income?

My opinion of the law from the 34th clause of the Consolidated Assessment Act is, that if B as clerk in a store last year received a salary of $400, although it may have taken it all to improve his house and lot and to support his family as he alleges, and he has no chattel property, that he is liable to be assessed for his salary as an income. What is your opinion?

Yours, &c.,
COUNCILLOR, 5th Ward, Blenheim.

[We cannot see any difficulty in applying the law to the several cases put by our correspondent. It is by sec. 34 of the Assessment Act provided that "no person deriving an income *exceeding* $200 per annum from any *trade, calling, office* or *profession*, shall be assessed for a less sum as the amount of his nett personal property than the amount of such income during the year then last past; but such last year's income *shall be held* to be nett personal property unless he has other personal property to a greater amount." Each of the persons mentioned by our correspondent is deriving an amount exceeding $200 per annum from a trade, calling, office or profession. His income of last year must be held to be the nett amount of his personal property. On that he is taxable, whether or not he spends it in the support of his family, improvement of his house, or otherwise. We therefore answer each question put by our correspondent in the affirmative.—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

C. P. HARROP, *Appellant*, v. FISHER, *Respondent*. *May* 3.

Bill of exchange—Indorsement.

A bill of exchange, payable to the order of the drawer, and handed over by him without any endorsement to the person who discounts it, cannot be indorsed by that person, *per proc.* for the drawer, without any further authority to do so.

Q. B. HEYS v. TINDALL. *May* 25.

Negligence of house agent—Question for jury.

Plaintiff had employed defendant as a house agent, to let or procure a tenant for her house. Defendant introduced as such tenant an insolvent person, being aware of his condition at the time.

Held, that defendant was liable to indemnify plaintiff the loss she had suffered through the incompetency of the tenant to pay the rent and other expenses.

Held also, that the judge was right in directing the jury to use their knowledge of business in deciding what was the duty of the defendant as a house agent.

Ex. C. *May* 14.

TARN *and another* (*Executrix and Executor, &c.*) v. THE RAILWAY PASSENGERS ASSURANCE COMPANY.

Life insurance—Accidental death—Drowning—Evidence.

A. had effected an insurance with defendants, whereby the defendants were to pay the assured a certain sum if he should sustain any injury caused by accident or violence within the meaning of the policy. Proviso, that no claim should be made by the assured in respect of any injury, unless caused by some outward and visible means of which satisfactory proof could be furnished, or for injury caused by natural means. A., being at Brighton, went to bathe, and his clothes were subsequently found, but there was no proof that he was ever after seen alive. A body, much decomposed, was afterwards washed ashore, at a possible distance from Brighton, which A.'s relatives thought was his.

Held (reversing the judgment of the Court of Exchequer), first, that there was evidence to go to a jury of the identity of the body, and death by accidental drowning; and secondly, that assuming the identity of the body proved, and the death to be caused by the external action of water, irrespective of disease, the injury was one caused by accident within the meaning of the policy, and that the representatives of the assured were entitled to recover

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Ex. C. CASTLE AND OTHERS v. SWORDER. *May* 25

Vendor and vendee of goods—Constructive acceptance by vendee—Statute of Frauds—Bailment.

A. sold to B. by parol certain goods (spirits). It was agreed that they should remain in A.'s bonded warehouse for B. for six months, rent free, after which the price should be payable. An invoice of the specific goods was sent by A. to B., and the goods were entered in A.'s warehouse books as transferred to B. After the six months B. applied to A. to take back the goods or else resell them for him (B.)

Held, that there was evidence to go to the jury of a constructive acceptance of the goods by B. within the 17th section of the Statute of Frauds, 29 Car. 2, c. 3.

Judgment of the Exchequer reversed.

C. P. CHAPPELL v. COMFORT AND ANOTHER. *May* 29.

Ship and shipping—Demurrage—Assignee of bill of lading.

A ship was chartered under a charter party to bring a cargo from D. to L., certain working days being allowed for unloading at L. A bill of lading was signed by the master, by the terms of

which the cargo was to be delivered to the assignee of the bill, "paying freight." In the margin of the bill of lading it was stated that there were eight days for unloading in L. The bill of lading was assigned, and the assignee received the cargo in L., and paid the freight. The vessel having been detained over the eight days in unloading,

Held, that the assignee of the bill of lading was not liable to pay for demurrage on such detention.

E. X. COLLARD v. THE SOUTH EASTERN RAILWAY CO. *May* 34.

Carriers—Goods sent for sale and injured—Measure of damages.

Hops were delivered to a railway company to be carried to London, and were injured by water on the road, some being destroyed and the remainder requiring several days' preparation before they could be rendered marketable. In the interval the market fell.

In an action against the company a verdict was found for the plaintiff.

Held, that the jury were right in taking into their consideration the difference between the value of the hops on the day when they should have been delivered and the day on which they were actually delivered in a marketable condition.

Q. B. BARTLEY v. HODGES. *June* 4.

Colonial sequestration—Debt contracted in England.

A certificate of discharge under the insolvent law of Victoria is no defence to an action on a bill of exchange drawn upon defendant by an English creditor, and accepted by defendant in England.

E. X. JONES v. PLATT. *May* 8.

Interrogatories administered before declaration—Infringement of patent—Statute of limitations.

The Court refused leave to administer interrogatories in an action for infringement of a patent before declaration, where the patent had expired more than five years before the writ was issued, and the interrogatories were directed to a discovery of the articles made and sold by the defendant during a period of several years.

Q. B. PAYNE v. REVANS. *May* 27.

Malicious prosecution—Reasonable and probable cause—Malice—Jury.

In an action for a malicious prosecution the question of malice was never in terms left to the jury. The Court made a Rule absolute for a new trial, although the rule *nisi* was not obtained on the ground of mis-direction.

Q. B. REGINA v. BOYES. *April* 30.

Privilege of witness to refuse an answer tending to criminate himself—Duty of Judge to compel witness to answer.

Upon the trial of the defendant for bribery a witness was called upon to give in evidence the receipt of a bribe by him from the defendant. Upon his objecting to answer, on the ground that his answer would criminate himself, a pardon under the great seal was offered and accepted by him; but he still refused to answer on the same ground.

Held, that as the pardon protected the witness against every proceeding except an impeachment by the House of Commons, and as there was no probability whatever, under the circumstances of the case, that witness would ever be subjected to such a proceeding for the matter which he was called upon to give in evidence, he was not privileged from answering.

Held also, that the Judge was bound to compel the witness to answer.

C. C. R. REGINA v. PARKER AND ANOTHER. *June* 1.

Evidence—Confession—Inducement in presence of persons in authority.

Upon an indictment of two brothers—J. for stealing and G. for receiving—it was proved that J. and a third brother, W., were in the service of the same master; that J. G. and W. were at G.'s house when a policeman found the stolen goods there, and sent for J. and G.'s master, and, the five having gone together into G.'s parlor, charged W. and J. with stealing and G. with receiving; that upon this W. said, "Well, J., you had better tell Mr. W. (their master) the truth." Neither the master nor the policeman dissented nor made any remark, whereupon J. confessed. On his way to the station, J., of his own accord, made a further confession. Upon being taken before the magistrates they discharged W., but committed J. and G. for trial.

Held, J. and G. having been convicted on the evidence above, that the conviction was right.

E. X. *May* 1.

WESTHEAD AND OTHERS v. SPROSON AND ANOTHER.

Guarantee of past and future debts of another—What consideration valid.

A. guaranteed to B. the past and future debts of C., in consideration of B. agreeing to supply C. with such goods as C. might require, and B. might think fit to supply.

Held, that a future supply of goods by B. to C. was a condition precedent to a right on B.'s part to sue the guarantor for the past debts of C.

That an agreement to supply only such goods as B. "might think fit," was not a good consideration for the guarantee.

Q. B WILT, AMOR v. AMISS. *April* 19, 28.

Donatio mortis causâ—Policy of life assurance.

A policy of life assurance may be the subject of a *donatio mortis causâ*.

B. C. *June* 11.

DAVENPORT v. VICKERY (In the matter of an award).

Arbitration—setting aside an award—Improper reception of evidence.

Where a letter book, containing copies of letters which had been adduced in evidence before an arbitrator, and marked by him as read, was, at the close of the case, left in his hands in order that he might, before making his award, refer to the copies so adduced; and he referred to a copy of a letter contained in the book which had not been marked as having been adduced in evidence, HILL, J., directed that the case should be referred back to the arbitrator, in order that the party against whom the letter complained of had been used might have an opportunity of explaining its contents; but refused to set aside the award.

Q. B. DAY v. HEMING. *June* 4.

Demurrer to pleas—Action for work and labour—Illegal contract.

Where a printing press is not registered according to the provisions of 39 Geo. III., c. 79, s. 23, a plea setting up this as a defence to an action for work done by the plaintiff in printing a book for defendant is good. In this case the pleas in which this defence was pleaded, were held bad, as not excluding a due registration of plaintiff's printing press, and the Court refused to allow an amendment.

C. P. *May* 30.

DE PASS AND OTHERS v. BELL AND WOODHOUSE.

Bill of exchange—Consignment of goods—Bankruptcy.

The plaintiffs, consignees of goods, accepted a bill drawn by the consignor, under an agreement that they were to be paid the amount of the bill out of the proceeds of the goods, the deficiency, if any, to be made good, and interest on the amount of the bill from maturity till the goods were realized to be paid by the consignor. The consignor becoming bankrupt, without having negotiated the bill, it was presented by the defendants, the assignees, and paid to them by the plaintiffs in ignorance of the character in which they held. The goods realising less than the amount of the bill.

Held, in an action brought by the plaintiffs to recover the deficiency, that they were not entitled to recover.

C. P. LEADER AND ANOTHER v. RHYS. *May* 2.

Costs 15 & 16 *Vict*, *c.* 54, *s.* 4—*Detinue—Return of goods—Nominal damages—County court.*

In detinue for goods of a greater value than £50, where the goods had been returned after action brought, and the jury had awarded only nominal damages for their detention,

Held that the plaintiff is entitled to costs, though the Judge refused to certify under 15 & 16 Vic., c. 54, s. 4, on the ground that the plaint could not have been entered in the county court.

The test of the jurisdiction of the county court is the actual value of the goods sought to be recovered.

Q. B. LEE v. GRIFFIN. *May* 9.

Statute of frauds—Work and labour—Contract.

A. agreed to make for B two sets of artificial teeth, according to a model of her mouth, which he took for the purpose

Held that this was a contract for the sale of goods within the 17th section of the Statute of Frauds, and that A. could not recover on the common count for work, labour and materials.

Q. B. *Ex parte* MANSERGH. *June* 11.

Certiorari—Court martial—Proceedings in colonial courts.

The Court will not interfere by *certiorari* to review the proceedings of a court martial, except where a person's civil rights have been affected.

The Court has no power to quash the proceedings of a Court in India or elsewhere out of England and its adjacent parts.

C. C. R. REGINA v. DAVIS. *June* 1.

Assault—Evidence—Bailiff of county court—Warrant sufficient proof of authority to arrest—Sheriff.

Upon indictment for assaulting a bailiff of a county court in the execution of his duty, the production of a county court warrant for the apprehension of the prisoner, is sufficient justification of the act of the bailiff, in apprehending the prisoner, without proof of the previous proceedings authorizing the warrant. (WILLIAMS, J., *dubitante.*)

Q. B. REGINA v. GRAHAM. *June* 6.

Vestry meeting—Election of churchwarden—Illegal closing of the poll by chairman.

The chairman of a vestry meeting, held for the purpose of taking a poll for the election of a churchwarden, has no power to close the poll on account of disturbance.

REVIEWS.

OSGOODE HALL EXAMINATION QUESTIONS, GIVEN AT THE EXAMINATIONS FOR CALL WITH AND WITHOUT HONORS, AND FOR CERTIFICATES OF FITNESS, WITH CONCISE ANSWERS, AND THE STUDENT'S GUIDE; A COLLECTION OF DIRECTIONS AND FORMS FOR THE USE OF STUDENTS-AT-LAW AND ARTICLED CLERKS. By Calvin Browne and Edward Marion Chadwick, Students-at-Law. Toronto: Rollo & Adam, Law Booksellers and Publishers.

For a long time past, the examinations at Osgoode Hall for call to the bar and for certificates of fitness have been in some degree conducted on paper. The questions are put and the Student under examination is required to answer them on paper. His answers are afterwards examined, and upon the result his success in a great measure depends.

The questions from term to term put are based upon particular books. Among these may be mentioned Blackstone's Commentaries, Vol. I.—Addison on Contracts—Smith's Mercantile Law—Byles on Bills—Story on Partnership—Williams on Real Property—Watkins on Conveyancing—Dart on Vendors and Purchasers—Coote on Mortgages—Jarman on Wills—Russell on Crimes—Story's Equity Jurisprudence—Justinian's Institutes—Story's Conflict of Laws—Taylor on Evidence—Stephen on Pleading—Statutes—Pleading and Practice in Law and Equity generally.

The authors of the book before us have made a collection of these questions, and at great trouble appended the answers. The result is a volume of nearly 400 pages, royal 8vo. So far as we have been able to judge, the questions are answered with much care. The authors not only have given us the particular answer to each question but very wisely referred to the authority upon which the answer is given. In this way a person in doubt as to the correctness of a particular answer is enabled to satisfy his mind and so remove the doubt.

The chief use of a work of the kind is to aid the student in the prosecution of his studies. The abuse of it will be to study the book itself, and not the many books to which it relates. The authors are particularly careful to state that the design of the work is to aid the student in the reading of the books upon which he will be examined, and not that their book should be read in lieu of the books appointed for examination.

We have no hesitation in stating our belief that the book, if used as designed by the authors, will be of great benefit to the student, but if used contrary to their design will be worse than useless. The mere "cram" will never do for the rigid self examination. It is intended that the text book shall be first diligently read, and then that the student, in order to test his knowledge of it, shall examine himself by the book now before us, occasionally referring to the answers to verify his knowledge, not to supply it.

The work is printed in good clear type; the paper is not so good as it might be, but quite as good as one generally sees in books published in Canada. The binding is sheep, and upon the whole the volume presents a creditable appearance.

The authors may well be envied by their fellow students. The process of preparing such a work for the press must have had the effect of thoroughly grounding them in the books upon which they have worked. The completion of their undertaking has had the effect of giving their names to fame—if not to fortune. We fear, however, that pecuniarily there is not much encouragement to writers of law books in Canada.

The price of the volume is only $2. We wish it a ready sale. It deserves it. No student should feel satisfied without procuring a copy. We are told that so far the sale has been all that can be desired.

APPOINTMENTS TO OFFICE, &c.

SHERIFF.

JOSEPH A. WOODRUFF, Esquire, to be Sheriff of the County of Lincoln.—(Gazetted April 12, 1862.)

NOTARIES PUBLIC.

JOHN WEBSTER HANCOCK, of Berlin, Esquire, to be a Notary Public in Upper Canada.—(Gazetted April 12, 1862.)

CHARLES P. HIGGINS, of Ingersoll, Esquire, to be a Notary Public in Upper Canada.—(Gazetted April 12, 1862.)

SYDNEY JOHNSON WALKER, of Odessa, Esquire, to be a Notary Public in Upper Canada.—(Gazetted April 12, 1862.)

MICHAEL FLEMING, of Sarnia, Esquire, to be a Notary Public in Upper Canada.—(Gazetted April 19, 1862.)

WILLIAM A. MITTLEBERGER, of St. Catharines, Esquire, to be a Notary Public in Upper Canada.—(Gazetted April 19, 1862.)

THOMAS WARDLAW TAYLOR, of the City of Toronto, Esquire, to be a Notary Public in Upper Canada.—(Gazetted April 19, 1862.)

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COUNCILLOR—Under "General Correspondence."