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DIARY FOR MAY.

1. Tues. . *St Philip and St. James.*
6. SUN... *Rogation.*
10. Thurs. *Ascension.*
13 SUN... *6th Sunday after Easter.*
16. Wed... Last day for service for County Court.
20. SUN... *Whit Sunday.*
21. Mon... Easter Term begins.
24. Thurs. Queen's Birthday.
25. Friday Paper Day Q.B. New Trial Day C.P.
26. Satur. Paper Day C.P. New Trial Day Q.B. Declare for
27. SUN... *Trinity Sunday.* [County Court.
28. Mon ... Paper Day Q.B. New Trial Day C P.
29. Tues... Paper Day C.P. New Trial Day Q B.
30. Wed... Paper Day Q B. New Trial Day C.P.
31. Thurs. Paper Day C.F. Last day for Ct. of Revis. fin. to revise A. R. & for Co. Coun to rev. Tp. Roll.

THE

Upper Canada Law Journal.

MAY, 1866.

FALSE ECONOMY.

We take the following suggestive observations from the *Philadelphia Legal Intelligencer*:—

"As has been expected for some time, the President Judge of the Court of Common Pleas of Philadelphia has fallen a sacrifice to that spirit of niggardly false economy, with which both State and municipial authorities have treated the public servants engaged in the administration of public justice. Overburdened with the regular business of a court of justice, it has been the aim of the Legislature to add to the duties of our judges, until the greater portion of the local government has been placed under their direction. On one day sitting in the *Oyer and Terminer* upon a case of homicide, the next, disposing of the most intricate questions of Chancery Jurisdiction in the Court of Common Pleas or Orphans' Court; now trying the squalid habitues of the prison, and then disposing of an intricate and tedious will case. A man would need an iron constitution to stand the wear and tear of such an unreasonable amount of mental labor, as that under which our beloved brother has sunk "to the rest which knows no waking." There can be no doubt, that an excess of labor, and exposure to the malaria of ill constructed, unventilated, and over-crowded court rooms, has hastened, if it did not actually cause, the decease of Judge Thompson."

These remarks are as applicable in this country as across the border, and we have often had to allude to a similar state of affairs as to the County Judges, whose shoulders are supposed to be broad enough to bear, and their heads clear enough to master all that incongruous mass of business which devolves upon them.

But whilst this is undoubtedly true as to them is it not also true of our Superior Court Judges. May it not be said of some of them as it was said by a member of the Bar in Philadelphia, when speaking of the late Judge Thompson: "I regard him as a sacrifice to the public good. I want to point to his dead body, that the Legislature may obviate this killing labor by dividing the duties between a larger number."

Such a reason as that alluded to would, one might imagine, be sufficiently strong to induce those in authority to make some change, and thereby save valuable lives; but perhaps the voice of an interested public may be of more influence.

Now, the public often complain of business not being attended to by their lawyers, but it does not necessarily follow that the fault is that of the lawyers alone. Nor is it the fault of the judges, they do all that human beings can well do to keep pace with the work that crowds upon them. But it is quite impossible for the same person to be in more places than one at the same time; for instance, it is not possible for a judge whilst presiding at *Nisi Prius* to hear arguments and decide cases in Judge's Chambers; and this brings us to the particular part of the subject which we desire now to speak of, and that is the present most unsatisfactory state of affairs as regards the holding of Common Law Chambers and Chamber business generally during the sittings of the City of Toronto and County of York Spring and Fall Assizes.

Whilst these courts are being held the country assizes are also going on, the judges, with the exception of the judge holding the courts in Toronto, being absent. Some one of these, on his way from one part of the country to another, or after one court is over and before another begins, may happen to be in town for a few days and take Chambers, and so relieve the judge who is busily engaged from morning till night in a crowded, ill-ventilated court-house, from a part of the heavy work which falls upon him. But the advantage which is derived from this scanty assistance is partly counterbalanced by the necessary uncertainty of the movements of the judges, dependent as they are on the length of time occupied by the different assizes and the impossibility of making any appointment with any reasonable chance of keeping it.

When "no judge is in town," to use a phrase common amongst Chamber men and agency clerks, the difficulty in the way of having business done is much greater. No reasonable man could expect a judge fatigued and worried with assize business to be able, even with the best wishes, to give any sufficient time to the consideration of matters, which, though often of great importance and requiring prompt attention and it may be much careful thought and research, must of necessity be postponed to the more pressing calls made upon him as judge of assize.

The consequences to the profession and suitors, to say nothing of the overworked judge, are most injurious, and the evil requires an immediate and sufficient remedy. The health of the judge is impaired by overwork, the profession are kept in a perpetual state of worry, cases are not properly attended to, decisions, if given at all, are given without the possibility of careful consideration, much business is entirely neglected, in many cases great hardship is inflicted upon innocent persons, the *habeas corpus* Act is practically suspended, fraudulent debtors remove themselves and their goods out of the Province, goods are wrongfully taken possession of and perhaps destroyed without redress, town agents come to grief with their principals in the country, and principals again with their clients. In fact things get into a state of "pi." The only person who seems to be the better of it is the clerk, who during this period makes a small fortune by "enlargements;" he, however, without much gratitude, complains that his life is rendered miserable by fierce enquiries as to whether there is a judge in Chambers, or if not, why not, or when there will be, or how otherwise.

The present state of things amounts to a nuisance which must sooner or later be abated, and now as to what appears to be the best means of doing this. Could it be done by a different arrangement as to the time of holding the different assizes? We think not—the time of the judges is so fully occupied with sittings in Term, in appeal, and in their respective courts, preparing and delivering judgments, holding assizes, sittings of the Heir and Divisee Commission, &c., that no other better arrangement could well be made. We do not think any reasonable man imagines that the judges have not enough to do at present to keep their time fully occupied, or that a little less work and a little more leisure and time for research would be injurious to the public interests. If, therefore, the staff of judges is not large enough to do all the work that has to be done, the conclusion is obvious, namely, that it must be increased.

Some persons, without, we think, sufficient thought of the probable consequences, say—appoint a Chamber or a Practice judge, and thus remove the difficulty. Whilst agreeing with these views, so far as the appointment of another judge is concerned, we object to the appointment of any person *as a Practice judge only*. We could easily conceive that such a judge would by degrees and without knowing it make a practice of his own, his ideas would become contracted, and many other evils that we could name would, we think, be likely to arise from such an arrangement. A large and varied experience is absolutely necessary for the various questions that are perpetually coming before a judge in Chambers for adjudication. Each of the judges should have his share of the business belonging to the Bench in general, and that certainly includes Chamber business.

Whether there should be an additional judge of the Court of Queen's Bench or the Common Pleas, or both, or whether the additional judge should be styled and preside as the President of the Court of Appeal, though still taking his turn, more or less, at the work of the other judges, or in whatever way it may be thought best to arrange details, it is clear, we think, that something must be done, and that without delay, to facilitate the transaction of business in Chambers during the periods of which we have written.

CITY REGISTRY OFFICE.

We have already called attention to the situation of affairs with reference to Chamber business. That is a grievance of which practitioners in Toronto, as well as those in the country, have just cause to complain. But there is another which exclusively affects the former, and this is the inconvenient and unreasonable distance that the City Registry Office is situated from the business part of the city.

How this has been tolerated so long we do not know, except that it is on the principle

that what is everybody's business is nobody's business. Our city fathers with a degree of judgment and public spirit that does them infinite credit, built a thing which they had the hardihood to call, and which they expected the City Registrar to use as a Registry Office, regardless of the remonstrances of the Registrar and members of the profession. Why the Registry Office for the City of Toronto should be in every respect inferior to every similar office Upper Canada, it is hard to say, except perhaps that our municipal matters are managed, if possible, with even more slovenliness and carelessness (as far as concerns the *public*) than those of any other municipality of which we have any knowledge.

But however this may be, there is no doubt of the fact that the City Registrar has removed the books of his office to the extreme west of the City, thereby causing the greatest possible inconvenience and loss of time to the profession and the public; and under the circumstances of no better accommodation being provided for him, he is not generally considered as having acted improperly. He has, we believe, where he is a good safe, and sufficient office room—when you get there; but the office must be moved to some more convenient locality, and when removed must not be held in a building, which, however well it might do for a small smoke house, is not calculated for the Registry Office for the City of Toronto.

Complaints reach us from every side, as to what appear in many cases to be over-charges by Registrars under the late Act. If these Registrars cannot be a little reasonable in their demands, another Act will be necessary, which may considerably reduce their emoluments.

SELECTIONS.

DIVISION OF LABOR.

One great instrument in the advancement of modern civilization has been the minute division of labor, that has apportioned work among numerous classes of men, each class doing only one thing. The days in which wool was grown, sheared, cleaned, carded, woven, and made up into clothing under the care of a single family, have long since passed in every civilized state. No planter of cotton thinks of making his own shirts,—no owner of an iron mine makes his own tools.

Yet something of this old fashioned waste of labor still prevails among lawyers. The same men practise in all the courts, to a greater or less extent. The same man will draw up a pleading, copy it, direct its service, argue a demurrer to it, try the issues of fact, make up the case, argue the appeal, and enter judgment. Within the same week, he will search a title, make an abstract, prepare a deed and a mortgage, and attend to all branches of conveyancing. He will advise clients upon the law of real estate, insurance, shipping, commercial paper, sales, trust, and crimes of any kind. He will try causes in the common law courts of the state, the surrogate's court, the federal courts, and the criminal courts. He will get out a mandamus, a certiorari, an injunction, an attachment, enter upon a statutory arbitration, push a claim for reduction of taxes, and conduct twenty other dissimiliar proceedings, without calling for outside assistance. These, and the hundred other things that a lawyer undertakes, may possibly be done well by an "admirable Crichton" of the bag. But Crichtons are scarce, and bunglers many. We appeal to the consciousness of lawyers in general, to judge whether they are generally able to do such an immense variety of work to advantage. We appeal to the learned judges to say whether their labors are not vastly increased by the shortcomings of a profession which seeks to concentrate all kinds of business in every office—or rather to scatter all business over all the offices. Long practice at such multiplicity of labors may benefit the mind of the lawyer, but what is the expense to the client? Is not such an education in aptitude and readiness too costly?

It seems to us that it would be far more economical, and in every way more advantageous, for lawyers to divide up their work on fair terms. Thus, one who devoted his whole time to real estate business could well afford to do such work for his fellow-lawyers at half price, while a lawyer in active court practice would make a better profit by letting out his real estate matters at half his fees, than he could by doing the work himself. Nearly all lawyers doing an extensive business would find it to their advantage to have their briefs prepared for them by persons specially adapted to that line of work. Some, if not all, of the most eminent members of the bar pursue this system; and their juniors practise a mistaken economy in doing such work themselves, without aid. With a good brief in hand, an argument may be fully prepared in an evening, which, without such assistance, would require a week's study.

The changes which we suggest cannot be made in a day, but we commend them to the reflections of the bar, trusting that our suggestions may lead some of its younger members to aim at perfecting themselves in those branches of law for which their nature, circumstances or training may qualify them, and to resist the temptation to do a little of everything, while doing nothing well.—*N. Y. Transcript.*

UPPER CANADA REPORTS.

COURT OF ERROR AND APPEAL.

On an Appeal from the Court of Chancery.

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

Weir v Mathieson.

University—Professorship—Tenure of office—Jurisdiction—Visitor—Trust.

The fact of power being given to the board of trustees of a university by the charter of incorporation to dismiss professors or other officers of the college upon impropriety of conduct proved, does not take away the inherent power of the governing body, free from all interference by the ordinary courts of justice, to dismiss at pleasure where no special agreement has been entered into, it being held that the tenure of the office of a professor appointed by the board of trustees with ut any agreement as to tenure, is a general hiring, and as such, during pleasure, and not during good behaviour.

The right to receive his stipend out of the general funds of a college in the incorporation of which no specific fund is provided for the foundation and support of his office, does not establish a trust between a professor and the governing body of the college of which the Court of Chancery can take cognizance.

The jurisdiction in all matters relating to the internal government of a college, and therein of the appointment and removal of professors and other officers, lies in the visitor of the college, and the Court of Chancery cannot interfere to restrain the governing body in respect of matters appertaining to the functions of the visitor.

[E. & A., March 16, 1866.]

By royal letters patent dated the 16th day of October, 1841. Her Majesty constituted certain persons therein named, being ministers of the Presbyterian Church of Scotland, in connection with the Church of Scotland, as members of such Church to be a body corporate under the style of the Queen's College at Kingston, "and by that name to have perpetual succession as a College with the style and privileges of an University, for the education and instruction of youths and students in Arts and Faculties.

The letters patent further declared that the said Corporation should consist of 27 trustees, and amongst other powers conferred upon the trustees it was declared that they should have full power to elect and appoint to the college, a principal, and such professors, master, tutors and other officers, as to the said trustees should seem meet and that "if any complaint respecting the conduct of the principal, or any professor, master, tutor, or other officer of the said college, be at any time made to the Board of Trustees, they may institute an enquiry and in the event of any impropriety of conduct being duly proved, they shall admonish, reprove, suspend, or remove the person offending as to them seem good. Provided always, that the grounds of such admonition, reproof, suspension, or removal be recorded at length in the books of the said Board," and further that the said trustees should have power to make statutes and rules concerning amongst other things, the good government of the college, the number residence and duties of the professors, the management of the revenues and property of the college, the salaries, stipends, provision and emoluments of the professors, officers and servants thereof, and also touching and concerning any other matter or thing which to them should seem necessary for the well being and advancement of the college, provided that such statutes and rules, should not be repugnant to the said letters patent, or to the laws and statutes of Upper Canada, and further that five of the trustees should be a quorum for the despatch of all business except for the choice or removal of the principal and professors for any of which purposes there should be a meeting of at least thirteen trustees, and further, that the said trustees should have power to meet at Kingston, or at such other place as they should fix upon their own adjournments, and likewise so often as they should be summoned by the chairman or in his absence by the senior trustee, provided that no such meeting should be called unless the chairman was notified in writing by three members of the Board to do so; and that notice of the time and place of meeting should be given in one or more of the public newspapers of the Provinces of Upper and Lower Canada, at least thirty days before such meeting, and that every member of the Board, resident within the Province, should be notified in writing of the time and place of meeting; and the principal and professors of the college were constituted the College Senate for the academical superintendence and discipline over the students and all other persons resident within the same In the year 1852, the Rev. John Cook, D D, first principal of the college, and one of the trustees was directed by the then Board of trustees to proceed to Scotland, and seek out and recommend for appointment by the Board, professors to fill the vacancies then existing in the college, and in accordance therewith, the respondent, the Rev Geo Weir, who was then Rector of the Grammar School at Banff, in Scotland, was desired by Dr Cook to accept the professorship of classical literature, being one of the professorships then vacant in the college, and in September of that year, being still in Scotland, Mr. Weir accepted the office, and on the 8th June, the Board of trustees passed a resolution confirming his appointment, since which time he continued to discharge the duties of his professorship until February, 1864, when the following resolution was passed at a meeting of the Board of Trustees:—"Resolved that from the facts which have come to the knowledge of the trustees and the alarming state of the college, the trustees deem it necessary, and in the interest of the college to remove Professor Weir from the office of professor of classics and secretary to the senatus, and in the exercise of their power to remove at discretion, they hereby do remove him from these offices accordingly forthwith; and that the treasurer do pay to him his salary in full, to the end of the present session, and six months thereafter in lieu of notice, and that the secretary be instructed to communicate this resolution to Mr. Weir."

This resolution was passed without Mr. Weir being present or having received any notice to appear before the Board, or being called upon to make any defence or explanation.

In passing this resolution the Board of trustees acted upon a code of statutes, rules, and ordinances enacted under the authority of the charter at a meeting held on the 26th day of January 1863.

The particular statutes affecting the case being the following:—

"10. All officers shall be appointed, shall have their duties prescribed by, and shall hold office only during the pleasure of the trustees, except in cases where a special agreement may have been made, and shall be entitled to such salaries and emoluments as may be from time to time agreed on.

14. The trustees may, on their own motion and without complaint being made, deal with the principal, professors, janitors, or any other officer where they see cause. In such case, it shall not be necessary that the grounds of censure, suspension, or removal be recorded. * * * Any officer being removed shall be entitled to claim salary only up to the date of removal."

On the 12th of March, 1864, Mr. Weir filed a bill in the Court of Chancery setting out the above facts, and charging that the property and effects of the college arising from gifts donations and bequests from members of the church of Scotland and others, and from other sources where held by the trustees in trust to pay the salaries of the professors and other expenses of the college—and that as the tenure of office of the professors of Queen's College was intended and was always regarded by the trustees themselves to be similar to the tenure of professorships in the Scotch Universities which, was *ad vitam aut culpam*, the tenure of his office was for life unless removed for impropriety of conduct. The bill further impugned the legality of the meetings at which the statutes were passed, and the validity of the statutes themselves on the ground that the requsite formalities in notifying the trustees, had not been taken, and also that the statutes were repugnant to the charter in various particulars.

The legality of the meeting of the 9th and 10th February, 1864, and consequently the validity of the plaintiff's removal were also called in question by the bill on the ground that the requisite notifications had not been given and that the meeting was otherwise informal. The bill prayed that the resolution of February, 1864, might be declared illegal and void on the ground that the meeting at which the same was passed was not duly held, and upon the ground that there was no complaint made or impropriety of conduct proved against the plaintiff; and that the same was a breach of trust and contrary to the duties reposed by the charter in the trustees, inasmuch as it was passed without proper deliberation and under the influence of prejudiced statements; that the statutes upon the grounds above stated might be declared illegal and void; that the plaintiff might be declared entitled to hold his professorship until duly removed or suspended for impropriety of conduct duly proved; that the resolution of removal might be cancelled, and the trustees restrained from impeding the plaintiff in the discharge of his duties as professor and from withholding from him his salary, and that the defendants who voted for the resolution might be ordered to pay the costs of the suit.

An application was made shortly after the filing of the bill for an injunction in the terms of the prayers of the bill, which was granted by the late V. C. Esten.

Answers were afterwards filed by eighteen of the trustees as well as the College, the leading points raised being that the trustees had power to appoint professors, masters, &c., for such time as they thought proper: that plaintiff was not appointed for life, nor did he accept the appointment on condition that it should be for life; that the provisions of the charter respecting the trial of complaints did not take away any discretionary power the trustees would otherwise have, but were only obligatory where no such power existed; that the Board had discretionary power to dismiss Mr. Weir in the manner they did, and that having acted in the exercise of such discretion the same could not be questioned by the court, and denied any improper motive for the removal which arose from a conviction in the minds of the major portion of the trustees that the same was necessary for the best interests of the College. The answers further submitted that the College being founded by Royal Charter her Majesty was the visitor thereof, and that the plaintiff's only remedy was by petition to the Crown

The cause was brought on for examination and hearing before the Chancellor, at the sittings at Kingston in the autumn of 1864, when a great deal of evidence was given as to the conduct of the plaintiff, the circumstances attendant upon his removal and the feelings a number of the trustees entertained towards him, which it is unnecessary to state at length

His lordship made a decree in favour of the plaintiff which was afterwards reheard before the full court, and the decision sustained. The judgment of V. C. Spragge therein, will be found reported in 11 U. C. Chan. R. 395.

From the order made on such rehearing the defendants who answered the bill appealed, and the case was brought on at the winter sittings of the Court of Error and Appeal.

The appellants reasons of appeal were stated as follows:—

1. Because the Court of Chancery did not possess jurisdiction to grant the relief which it assumed by the decree to give to the plaintiff.

2. Because the jurisdiction to give the relief sought by the bill is exclusively confined to the visitor or visitors of the College.

3. Because the plaintiff's proper mode of redress for the supposed injury was by appeal to the Crown, the Queen being the visitor of the University.

4. Because the trustees had a jurisdiction final and conclusive and free from all control of the ordinary courts of justice in the matter of the removal of the plaintiff from his office.

5. Because the plaintiff's tenure of office was not during good behaviour, but during pleasure only.

6. Because the relief sought by reason of the personal and confidential character of the office of a professor was beyond the scope of the jurisdiction of a court of equity.

7. Because the decree in effect gave relief by way of specific performance where the remedy was not mutual inasmuch as the Court of Chancery does not possess jurisdiction to compel the plaintiff to perform the office of professor.

The respondent's reasons against the appeal were as follows:

1. Because the circumstances stated in the pleadings and appearing in evidence gave the

Court of Chancery jurisdiction to restrain the appellants from interfering with the respondent Weir in the performance of his duties as professor.

2. Because the action of the appellants in endeavouring to remove the respondent Weir from his professorship without cause assigned or complaint proved was in violation of the duties of the trustees under the charter.

3. Because the action of the trustees was not only illegal but entered upon *malâ fide*.

4 Because the appellants as trustees of the incorporation are governed by the regulations of the charter with reference to their powers and duties and any attempted violation of such regulations, it was the province of the Court of Chancery to restrain.

5. Because the rspondent Weir was as well under the charter as under the general principles of law entitled to be notified of any grounds of complaint and to be heard thereupon before removal.

6. Because the trustees had no summary power of dismissal over the professors.

7. Because the statutes that assumed to confer that power were illegal and contrary to the charter.

8. Because the respondent Weir was not in any way answerable for the alleged difficulties in the college, which was the ostensible reason for his removal.

9. Because upon all the grounds taken in the Court of Chancery the plaintiff was entitled to the decree pronounced.

Strong Q. C., *M C. Cameron*, Q. C., and *Maclennan*, for the appellants.

The government of the College is vested in the visitor or visitors. Here the Crown grants a charter, and the endowment is by private bounty; and if no visitor were appointed, the visitatorial power would rest in the Crown. Trustees are appointed, however, with comprehensive visitatorial powers; and though not named visitors, are such in fact *Green* v. *Rutherforth*, 1 Ves. 472; *Attorney-General* v. *Locke*, 3 Atk. 164; *Philips* v. *Bury*, 2 T. R. 352, S. C. 1 Ld. Raym. 5; 2 Kent's Com 274, 303; *Attorney-General* v. *Crook* 1 Keen 121, 1 C. P. Cooper 33; *Ex parte Wranghem*, 2 Ves. Jr. 609; *Attorney-General* v. *Clarendon*, 17 Ves. 498; *Attorney-General* v. *Black*, 11 Ves. 191; *Queen's College. Cambridge*, Jacob. 1; *Attorney-General* v. *Dixie*, 13 Ves. 519; *Dartmouth* v. *Woodward*, 4 Wheaton, 681.

The powers of the visitor are without control, excluding the case of a misappropriation of the revenues, where they have the management of them. *Attorney-General* v. *Locke; Philips* v. *Bury; Attorney-General* v. *Foundling Hospital*, 2 Ves Jr. 42; *Dr. Walker's Case*, Cases temp. Hardw. 212; *Whiston* v. *Rochester*, 7 Hare, 545; *Regina* v. *Rochester*, 17 Q. B. 1.

The Court of Chancery has erroneously assumed jurisdiction on the ground of a trust in the plaintiff's favour. This case differs from that of a schoolmaster, in whose favor or in whose benefit the income of land is appropriated, and cannot be distinguished from *Whiston* v. *Rochester*; *Attorney-General* v. *Magdalen College*, 10 Beav 402; *Regina* v. *Rochester*, 17 Q. B 1; *Regina* v *Chester*. 15 Q B. 513; *Regina* v. *Darlington*, 6 Q. B. 682.

The 15th clause of the charter merely directs the manner of proceeding where. upon complaint made, an inquiry is obligatory upon the trustees, but does not abridge their power to proceed without complaint in the exercise of their discretion *Attorney-General* v. *Locke* (cited *supra*).

In the case of *Willis* v. *Child*, 13 Beav 117; *Philips' Charity*, 9 Jur. 959; and *The Fremington School Case*. 10 Jur. 512; 11 Jur. 421, there was an obvious trust; and the case of *Daugars* v. *Rivaz*, 28 Beav. 233, upon which the other side mainly rely, is put by the master of the rolls expressly on the ground of a trust; but there the office of the plaintiff was of the essence of the corporation. The plaintiff's office in this case is not so. It is in the power of the trustees to abolish and revive it at pleasure, and to attach any salary to it they think proper. *Attorney-General* v. *Daugars*, 10 Jur. 966; *Attorney-General* v. *Bedford*, 2 Ves. 505; *Attorney-General* v. *Lubbuck*, 1 C P. Cooper, 34.

The plaintiff contends that his office is for life, but it is not shown that there is an office. The charter does not create it, and the trustees have not done so, and in fact could not do so without acting *ultra vires*. This is the case of a general hiring, as to which the law is well settled. The appointment was by resolution, without any formality, and not under seal; and to entitle to a freehold office, a deed is necessary.

It cannot be inferred or assumed that the tenure is for life, and it has not been made out in evidence. There is nothing in the nature of the office making it necessarily for life. In many of the English universities professorships are held for short periods, or during pleasure; and an act of the Imperial legislature has lately removed the intolerable grievance of irremovable professors in the University of Edinburgh.

This corporation, like others, can only act through a common seal in creating such an office It has not so acted, and therefore this is a mere ordinary hiring. Ventris. 355; Vin. Abr. Corp. G. 2 pl. 7; Year Books, 13 H. 8, fol. 12 · Grant on Corporations, 58; 2 Ld. Raym. 1345.

In the case of *Daugars* v. *Rivaz*, the master of the rolls did not mean to overrule the case of *Whiston* v. *Rochester*. but thought his decision could stand beside it; but the decree in this case and *Whiston's case* cannot stand together. *King* v. *Catharine Hall*, 4 T. R. 233; *King* v. *Ely*, 5 T. R. 475; S. C. 2 T. R 338; *Attorney-General* v. *Clare Hall*. 3 Atk. 664

The plaintiff must establish, first, a life tenure, and, second, a trust, before he can maintain his decree. He has failed in both, and the decree must be reversed.

Crooks, Q C., *Blake*, Q C., and *Cattanach*, for the respondents.

The appellants must show the decree clearly wrong.

Under the charter, the trustees cannot remove at their will and pleasure. If they do so, their proceeding is *ultra vires*, and the court has jurisdiction to interfere and restrain them. Assuming the jurisdiction, the question becomes one of tenure. This is not a question of contract, but the case of an office, which it is the duty of the trustees to fill. [Draper, C. J.—Where do you found the office?] In the charter, and in the law of the land. [Draper, C. J.—The charter gives

the power to create the office, does not create it.] The charter treats the office of professor as incident to the university, and thus impliedly if not expressly creates it; and the trustees have so interpreted it. They took it for granted that the office existed, and made the appointment; and as against the incumbent, they are estopped from denying that the office exists. The existence of the chair must be conceded, and the appointment is during good behaviour, and he cannot be removed except for misbehaviour. 2 Kyd on Corporations, 50. The power of the trustees is limited to the number and duties of the professors; there is no power as to the tenure. 2 Kyd, 102.

The circumstances under which the charter was granted, and the tenure of the professorships in the Scotch universities, must be looked to for its interpretation. A professor is a public officer, and as such cannot be removed without trial. *Gibson* v. *Ross*, 7 Cl. & Fin. 241. The position and status of a professor is highly dignified, and not to be compared to menial offices. 1 Kyd on Corporations, 37, 40; 2 Kyd, 59; Malden on Universities, 110, 117; *Gibson* v. *Ross*; *Attorney-General* v. *Pearson*, 3 Mer. 353.

The visitatorial power is internal. *Thompson* v. *The University of London*, 10 Jur. N. S. 669; *Ex parte Buller*, 1 Jur. N. S. 709; 2 Kyd, 174, 267. The visitor can only act with reference to matters within his jurisdiction. If he exceeds this, the court will restrain him. It is only in reference to a member of the *domus* that a visitor can act. *Davidson's Case*, 2 Kyd, 241.

Persons exercising powers under acts of Parliament will be restrained by the Court of Chancery from exceeding them, and trustees and visitors are subject to the like supervision. *Tinckler* v. *Wadsworth*, 2 DeG. & J. 264; *Ware* v. *Regent's Canal Co*, 5 Jur. N. S. 25; *Stockport* v. *Manchester Canal Co*, 9 Jur. N. S 266; *Willis* v. *Child*, 13 Beav. 117; *Long* v *Gray*, 9 Jur. N. S. 805; 1 Moore, P. C. N. S. 461.

The evidence shows that the trustees acted *mala fide*, even if they had jurisdiction. *Dummer* v. *Chiltenham*, 2 Kyd. 59, 2 Ld. Raym. 1240.

The case of *Daugars* v. *Rivaz* establishes the trust here in favour of the plaintiff, as the plaintiff is interested in the endowment, and entitled to be paid so much out of it as is annexed to his chair. The case of *Long* v *Gray* 1 Moore, P.C. 461 establishes the jurisdiction of the court both on the ground of trust and of proceeding illegally. Even if the ordinary salary did not constitute a trust, the plaintiff's allowance from the commutation fund, of which the trustees have the administration, constitutes a specific trust in his favour. The college was in fact commuted with as representing the clerical professors, and the court will see that the plaintiff is not illegally deprived of the benefit of that arrangement. The statutes under which the plaintiff was removed, were not duly passed, as there was not the necessary quorum of thirteen members present, and the court will set them aside. The by-laws cannot have an *ex post facto* operation. 2 Kyd, 109, 112, 122.

The existence of the office is to be assumed, as it is not denied by the answers. The charter did not contemplate any more formal creation of office than the appointment of a principal, and the principal and professors are put on the same footing in the charter; and the Crown could not have meant that the principal, who is the nominee of the Church of Scotland, should be dismissable at pleasure. The conclusion, therefore, is, that as soon as a person is appointed to one of the recognized professorships, he is entitled to hold it until removed for cause. The court has jurisdiction where trustees, being visitors, have exceeded their powers. Suppose an undisputed life tenure, and the visitors remove, the court will *interfere, as they have acted ultra vires*. The question is not whether they have done right or wrong, but whether they have exceeded their powers; and if they have done so in not strictly pursuing the power, the act is a nullity; and what the plaintiff asks is, that it may be declared so; and that notwithstanding it, he is still professor, and must be reinstated. There is no incompetency in the existence of a power to abolish the chair, and the plaintiff having a freehold in the office. Freehold estates in land are liable to determination on the occurrence of particular events, and the same rule applies to this office.

Strong, Q.C., in reply.—The trustees have the fullest power, under the charter, to deal with this office. They have the power to make by-laws. In *Gibson* v. *Ross* (cited *supra*) this power was construed to mean power to regulate the office. The Court of Chancery, by its decree, has assumed jurisdiction to quash the by-laws of the college, which courts of law have alone power to do. The argument that the principal and professors are on the same footing as regards their offices, and that if the one was removable so was the other, is fallacious, the only inference being that the office of professor not being created by the charter, as that of the principal is, it was left entirely to the trustees. The case of *Gibson* v. *Ross* 7 Cl. & Fin. 241 alone and by itself establishes the right of the trustees to dismiss the plaintiff, Queen's College being, as the academy from which the plaintiff was removed in that case, a private corporation, though for a public purpose. *Philips* v. *Bury*, 2 T R. 352; S. C. 1 Ld. Raym. 9; 2 Kent's Com. 274, 303; 2 Kyd, 195; and see two American cases, *Allen* v. *McKean*, 1 Sumner, 277; and *Dartmouth* v. *Woodward*, 4 Wheaton, 518, 681.

The plaintiff's case cannot be sustained on the argument based on the commutation of the Clergy Reserves. The trustees are not trustees of this fund for him. When the plaintiff leaves the college he will continue to receive his allowance from the fund, provided he remains in the church, quite independently of the college.

Hagarty, J., delivered the judgment of the court.

I propose first to consider the question of jurisdiction.

The charter authorises the trustees to appoint a principal and such professors, masters, and tutors, and such other officers as to them shall seem meet. As soon as there should be a principal and one professor the trustees have authority to constitute the "College Senate" for the exercise of academic discipline and all the professors should be members thereof. The trustees have power to make statutes and rules to regulate the

numbers, residence, and duties of the professors; and their salaries, stipends and emoluments, and the same to revoke, vary and alter. Whenever there should be a principal and four professors, the senate should have power to confer degrees in Arts and Faculties.

The charter was granted in 1842, and in 1853 the then first principal, Dr. Cook, was directed by the trustees to proceed to Scotland and engage professors for the college, and the plaintiff was offered and accepted the professorship of Classical Literature, at a salary of £350 a year. The endowment of the college consisted of gifts and subscriptions. No fund or property appears to have been provided from any public source. The Crown did nothing beyond granting the charter. Annual collections are made for bursaries, and moneys and property by gift and bequest have been obtained from individuals. The Provincial Legislature has usually made an annual grant to this college with several others. No particular fund is set apart or exists for the support of the chair of Classical Literature—the stipend seems to be paid from the general funds of the college

It seems conceded that to ground the jurisdiction of the court, there must be the relation of trustees and *cestui que trust* between the defendants and the plaintiff, that there must be a *trust* in the sense in which that word is understood in a court of equity, to warrant its interference. The charter does not create the office held by plaintiff This office is not of the essence of the corporation. The creation of a chair of Classical Literature was wholly the act of the trustees; under their chartered powers they were not bound to create it, and it was conceded in argument that they have the power to suppress it altogether. The corporation existed prior to its creation, and can exist after its suppression, exercising all its university functions. From the vast mass of cases bearing more or less on the question, two or three may be selected. *Whiston* v. *The Dean and Chapter of Rochester*, 7 Hare, 532, decided by Sir James Wigram, in 1849, appears not to have been cited in the court below. The charter of Henry VIII., establishing the cathedral church, provided that there should be always a "*Preceptor puerorum in grammatica*," a stated salary was assigned to him from the church funds

The plaintiff was appointed master of the Grammar School in 1842, at a fixed salary, and in consequence of certain differences with the Dean and Chapter, was dismissed by them. He filed his bill to restrain them from removing him or appointing a successor, and after a very able argument by Sir J. Romilly for plaintiff, and Roundell Palmer for defendants, Sir James Wigram refused with costs a motion for injunction.

He says "I never entertained a doubt that if it could be established that the Dean and Chapter were trustees for the master of the Grammar School, he would be entitled to the assistance of the court in enforcing the execution of the trust. If the appointment of plaintiff as schoolmaster gave him a right to this stipend prescribed by the statutes as a *cestui que trust* as against his trustees, there is no question whatever that the mere circumstances of defendants being a corporation or an ecclesiastical body would not remove the case from the jurisdiction of the court." After an adjournment to look into authorities, the learned judge says, "The answer that I feel compelled to give after examining, I believe, every case that was cited in argument bearing upon it, is, that this is not a case of trust, in the sense above explained (referring to certain cases) in which the master upon the true construction of the statutes ought to be considered only as an officer of the Cathedral Church, appointed for the purpose of performing one of the duties imposed on the church by the statutes of the founder. I cannot in this case, for the purposes of the question I have to determine, distinguish the position of the master from that of the master in *Attorney General* v. *Magdalen College*, 10 Beaven. 402, or from other cases in the books in which secular questions have arisen between colleges and bodies and persons holding offices appointed by the founder, but which persons have not been members of the collegiate body I cannot upon the construction of the statutes in this case, say that the master is not one of the "*ministri*" spoken of. But if the contrary of this could be maintained, I cannot discover a ground for holding that the master is a *cestui que trust* of the Cathedral Church, only because he receives a stipend payable out of the common funds of defendants which would equally oblige me to hold that every officer to whom a living and a stipend are given, is also a *cestui que trust*. The case of *Attorney General* v. *Magdalen College*, is a direct authority in point, and I am satisfied with following that authority. * * "The only question I have to determine, is, whether the Court of Chancery in the exercise of its ordinary jurisdiction by bill in a case in which no trust exists, can try the right to the office of schoolmaster from which the defendants have exercised the power of excluding him. I am of opinion this question must be answered in the negative. Excluding trust, I cannot find a single authority which supports the proposition." The plaintiff afterwards applied to the Queen's Bench, but failed there because he had not appealed to the visitor named by the founder. Sir James Wigram did not make this any ground of objection, he said, "Supposing the Bishop to be the visitor and that he had not interfered, I do not know why the court should not in a plain case, declare the right of the plaintiff."

The Attorney General v. *Magdalen College* was before Lord Langdale, M.R. The statutes provided for the perpetual maintenance of a schoolmaster with "a named stipend out of the common goods of our College." The Master of the Rolls says, "If, on the true construction of the statutes, the schoolmaster and usher ought to be considered only as officers appointed and to be appointed for the purpose of performing the duty of the College in giving instruction to such persons as might attend them, and *the duty of appointing them is not otherwise annexed to the mere property of the College* than by the obligation to pay certain annual sums of money, and is not of the nature of a trust the execution of which it is within the jurisdiction of this court to enforce, but the observance of which according to the statutes of the founder is to be regulated and enforced and

adequately provided for by the authority of the visitor, then the breach of duty, whatever it may be, ought to be redressed by the visitor and not here. * * * The College has, no doubt, a very important duty to perform with reference to the school, and the performance of that duty may be enforced by proper authority, but unless it be a duty founded on a trust which this court can execute, the performance of the duty is not to be enforced here. The revenues of the College belong to the College for its own use, subject, indeed, to the performance of all duties incumbent on the College to perform, but *not subject* to any trust to be executed in this court. * * Though there is sufficient proof of the duty or obligation there is not, in my opinion, evidence of a trust, as the word trust is understood in this court"

The Vice-Chancellor speaks of the plaintiff in this case as "not being a member of the collegiate body." I do not at present see that it would have affected his decision had the master of the schools been by the statutes a member of the Chapter. In the case before us the plaintiff is certainly a member of the body corporate. The charter is curiously comprehensive: it declares that certain ministers and laymen named, "and all and every such person or persons as now is or are or shall or may at any time hereafter be ministers of the Presbyterian Church of Canada in connexion with the Church of Scotland, or members of the said Presbyterian Church in such connexion and in full communion with the said Presbyterian Church shall be and be called one body corporate and politic, &c &c." The plaintiff is certainly one of the body corporate—he is also a member of the College Senate—but he is outside the governing body of trustees to whom the management of the property and revenues are alone entrusted.

All the cases cited seem distinguishable. In *Dummer* v. *Corporation of Chippenham*, 14 Ves. 245, the defendant held rent charges for the support of a free school, and brought ejectment against plaintiff, the master having dismissed him, as he said, corruptly, on political grounds, and not on the ground assigned by them. He asked discovery from the corporators named individually, and a demurrer to his bill was overruled. Lord Eldon says, "Defendants are entrusted in their corporate capacity with the management of certain property *clothed with a trust for the maintenance of a schoolmaster*, and for this purpose I represent the case thus: that the corporation have the power of nominating the master and dismissing him at their will and pleasure. A corporation as an individual with such a power over an estate devoted to charitable purposes would, in this court be compelled to exercise that power not according to the discretion of this court, but not corruptly. * * My opinion is that this is a case in which the court will call upon individuals to answer." *Willis* v. *Child*, 13 Beaven, 117, also relied on was the case of the Ludlow school. A school-house was appropriated to and held by plaintiff and all had been settled years before under a scheme for the government of the charity settled by a previous decree of the Court of Chancery reported in 3 M. & Cr. The case of *Phillips charity, ex parte Newman*, 9 Jur. 962, before Knight Bruce, Vice-Chancellor, was a petition under the Romilly act by the schoolmaster and others. It appeared that a scheme had been settled some years before by the court to regulate the Latham free school, and the schoolmaster, besides a fixed sum, had after certain deductions, *one-half of certain rents and profits*. After holding the office some time he was dismissed and reinstated by an order of the court in 1839 in a case not apparently reported. After some years he was again dismissed and again petitioned and was again reinstated, the dismissal being irregular.

In the *Fremington School case, ex parte Ward*, a dwelling and school-house had been devised to trustees to permit and suffer the schoolmaster to occupy while holding the office, and take the issues and profits and also certain rents of other premises were to be paid to the schoolmaster. The Vice-Chancellor held that the master had "acquired upon his appointment a freehold or an interest in the nature of a freehold and the revenue belonging to it, whether legal or equitable it is not necessary to enquire. Of course I do not say that he became an irremovable master. On the contrary, I assume the competency of the electors or a majority to remove him for a just cause. This power however they were, as I conceive, bound to exercise not otherwise than judicially."

In the *Berkhampstead case*, 2 V. & B. 134, also the master was entitled to two-thirds of certain funds arising from rents under a previous scheme for the charity arranged by decree of the court, Lord Eldon said: "If on the original instrument a trust is expressed as to the application of revenue this court has jurisdiction to compel due application."

So in the *Chipping Sodbury case*, before Lord Lyndhurst, the master had a school-house and residence, and certain moneys had been contributed to provide a residence and it was sought to eject him therefrom.

Where services are wholly in the nature of personal service the court will not interfere to restrain the removal of an officer. The last case on this subject is *Mair* v. *Himalaya Tea Company*, 13 L. T. R. 586. Wood, Vice-Chancellor, says: "Assuming the construction of the deed most favourable to plaintiff, that he was an irremoveable agent on the terms of his taking the shares, still what could the court do? It could not act on the contract in equity in favour of the plaintiff, as the duties of an agent were in the nature of personal service and as such incapable of being enforced in equity, and so the court could not enforce the fulfilment of the agreement on the agent."

The strongest case in favour of plaintiff is that of *Daugars* v. *Rimmer*, decided in 1860 by Sir John Romilly, Master of the Rolls, (who argued unsuccessfully for the plaintiff in *Whiston's case*, 7 Hare). Daugars was pastor of the French Protestant Church in London, and being dismissed, by defendants, the elders and deacons, sought to be restored. King Edward VI. had incorporated a church for foreign Protestants, the corporation being a superintendent and four ministers. After some years the Germans and French separated into different congregations. The charter did not provide for the government or distribution

of the funds. The French Church had two ministers, and was governed by a consistory of the two ministers and the elders and deacons

The Master of the Rolls says: "On examining the rules it appears that two funds have been created and now exist, one dedicated for the support of the poor and the other for the maintenance of the ministry and other church matters. * * Wholly apart from the charter of incorporation a fund exists for the support of the ministry of the church. * * It appears that the funds of the institution are under the control of the governing body and the defendants have practically the power of witholding from plaintiff the emoluments assigned to and accepted by him This constitutes a trust which they have to perform and which they are bound to perform in favour of the person who fills the office of pastor, and assuming the plaintiff to be wrongly deposed I am of opinion the relation of trustee and *cestui que trust* does exist between the elders and deacons and the pastor." It is to be noted that the corporate body under King Edward's charter is not a party to the bill. The Master of the Rolls held this to be unnecessary, and indeeed the case seems to be wholly treated as between individuals. The plaintiff as pastor or minister was one of the consistory of ministers and elders and deacons. His office may be said to be of the essence of the association and the existence of the fund for the ministry and the other purposes seems to be the ground of the assumption of the relation of trustee and *cestui que trust*.

The strong impression left on my mind, is, that in all the cases in which a Court of Equity has interfered to restore an ejected officer, it has been on the ground that there was a right of some specific kind to moneys or lands appropriated to the office. As in the case of a schoolmaster, to whom a revenue derived from a specific source, or a house, or rent charge, &c, was directly appropriated—and this as distinguished from a mere claim, to be paid a stipend or allowance taken from some general fund. In other words, when the applicant can point to any specific moneys, or any rents, or land, and say, that money, rent or house, was expressly set apart for me as holding this office, and was held by others for the holder of the office, then the court finds the trust established, and assumes jurisdiction to prevent a wrongful disturbance of the officer. But when nothing but the right to receive a fixed stipend out of a common fund of an institution, applied to many various purposes and expressly for the performance of a duty not essential to the existence of the institution, there is nothing on which the court can properly fasten a trust I therefore think the plaintiff fails on this branch of the case.

Mr. Lewin (page 365, 4th ed. 1831), points out the distinction thus, "With the visitorial power the Court of Chancery has nothing to do, (the office of visitor being to hear and determine all differences of the members of the Society among themselves, and generally to superintend the internal government of the body, and to see that all rules and orders of the corporation are observed) it is only as respects the administration of the corporate property that equity assumes to itself any right of interference."

There is of course a marked distinction between the mere dismissal of one salaried officer and the appointment of another to succeed him, and a misappropriation of the trust funds. The latter case would, I presume, be always open to the jurisdiction of the court and any person interested could invoke its aid But it seems an abuse of terms to call the plaintiff's dismissal in this case any improper dealing with or perversion of the trust estate. He, in my opinion, to ground the jurisdiction, must shew that as regards some portion of the fund he is *cestui que trust* and the defendants trustees for him.

If there were a visitor named under the charter, it would seem that it would be his province to arrange such a difficulty as has occurred in this case; falling as it seems within the definition given above of the visitorial power. The jurisdiction and duty of the court where there is a misappropriation of trust funds, is explained by the Master of Rolls in the well known case of *Attorney General* v. *St. Cross Hospital*, 17 Beaven 435. There the funds had been utterly perverted from their proper purpose. He says, "Where there is a clear and distinct trust, this court administers and enforces it as much where there is a visitor as where there is none. This is clear both in principle and authority. The visitor has a common law office and common law duties to perform, and does not superintend the performance of the trust which belong to the various officers, which he may take care to see are properly kept up and appointed." No visitor is named here, and the further difficulty arises from the fact that the Crown gave no endowment although creating the corporation for the public purposes of a university.

In the ordinary case of a royal foundation, the Crown would be the visitor, and would, through the Lord Chancellor sitting in camerâ, act as such, as Lord Eldon did in 1821, sitting for the King in the case of Queen's College deciding what persons were duly elected as principal or fellows. Lord Hardwicke, in *Green* v. *Rutherforth* 1 Vesey, 462, (a case frequently quoted), says, "The original of all such powers is the property of donor, and the power every one has to dispose, direct and regulate, his own property, like the case of patronage. If the charity is not vested in the persons who are to partake, but in trustees for their benefit, no visitor can arise by implication, but the trustees have that power," and it was held that a subsequent gift of property under particular trust by a third person, not the founder, the visitor had not jurisdiction to interfere as to it. Again, in *Attorney General* v. *Dedham School*, 23 Beav. 356, the Master of the Rolls seems to take a similar view. Sir Jas. Wigram says, in Whiston's case, "Where there is no visitor, the Court of Queen's Bench may be the proper court to redress the wrong."

On this branch of the case, I am of opinion that if the alleged breach of trust were such as on the authority of the cases would be cognizable in equity, the existence of a visitor would not necessarily be a bar.

I have met with no case like the present, in which a professor in a college under such a charter as this has sought for reinstation. I see nothing in the voluminous statement of facts laid before me to induce us to make a precedent, if

there be none. As Buller, Judge, says in *Rex* v. *Bishop of Ely*, 2 T. R. 337, "I have never been inclined to assume a jurisdiction on any subject which I have not found to have been previously exercised by the court, particularly in questions between members of the colleges of the universities. In such cases my inclination is against the jurisdiction of the court, unless I am compelled by legal authorities to support it."

Unless the right of plaintiff to the intervention of the court were most clearly shewn, I think if the court have discretion to refuse interference that this is pre-eminently a case in which the plaintiff should have been left to seek a compensation in damages, if wrongfully dismissed. It is of vital importance to such an institution that confidence and harmony should exist between the trustees and the professors. That an apparently irreparable breach has taken place between them is apparent on the facts before us.

The remarks of Knight Bruce, Vice-Chancellor, in *Pickering* v. *Bishop of Ely*, 2 Y. & C. 249, are in point. The plaintiff held the ancient office of Receiver General of the Diocese of Ely, by grant from the Bishop, binding on his successors for life, with an annuity of £10 from the revenues, with diet for himself and forage for horses. A large portion of his fees were from drawing of leases, &c. He filed his bill to restrain the Bishop from taking away from him this conveyancing business. The Vice-Chancellor says, "Being of opinion that the alleged rights of the plaintiff, in the breadth and length in which he claims to be protected in them, are of a nature neither usual or convenient, nor without hardship or pressure upon the Bishop, I consider it more fit for a court of equity to leave the plaintiff to obtain redress by damages or otherwise in a court of law, than to exercise its peculiar jurisdiction by compelling the Bishop specifically to submit to the practical exercise of such rights, if rights they be." He then notices the want of mutuality; and that if the Bishop sued plaintiff in equity to compel a performance of his duties, he would be refused relief. He says, on that and the other grounds he dismisses the bill.

The same judge comments approvingly of his course in this case in a case some years later of *Johnston* v. *Shrewsbury R. Co.* 3 Deg. M. & G. 927. A large number of cases cited have been decided under statute 52 Geo. III. ch 102, 1 E. R. 584, called Sir S. Romilly's Act, passed in 1812, the proceeding being avowedly under that statute. It enacts, "in every case of a breach of any trust or supposed breach of any trust created for charitable purposes, or whenever the direction or order of a court of equity shall be deemed necessary for the administration of any trust for charitable purposes, it shall be lawful for any two or more persons to present a petition to the Lord Chancellor, &c, stating such complaint and praying such relief as the nature of the case may require, &c." Such petition has to be verified in a particular manner, and shall be first allowed by the Attorney General. An appeal is allowed to the House of Lords. The *Berkhampstead* case, the *Fremington School* case, and *Philip's Charity*, &c., were all expressly under this act. *The Ludlow case* (*Willis* v. *Childe*) was under a special act 9 & 10 Vic. ch. 18. Grammar schools are regulated by 3 & 4 Vic. ch. 77. This act may be regarded as affecting procedure rather than jurisdiction, as in many cases the court declines disposing of large questions on petition under the act, but directs parties to proceed by information. 15 Sim. 262.

It would not be right, perhaps, for this court to dismiss the plaintiffs bill for want of equity, without expressing an opinion on the nature of his appointment and the right to dismiss him on the part of the trustees. The late learned Vice-Chancellor Esten, in his short judgment on granting the interim injunction, considered that the plaintiff held his appointment during good behaviour while the duties of his office were performed, that his legal remedy was inadequate, and that he was entitled to the protection of the court.

After the evidence was taken before the learned Chancellor at Kingston, he appears to have held that as the legal questions had been determined by the Vice Chancellor, he thinks he should hold the plaintiff entitled to a decree, although he doubted the jurisdiction of the court to interfere.

On the rehearing, the only reported judgment is that of my brother Spragge, who reviews the authorities, decides in favour of the existence of the jurisdiction and for the full relief of the plaintiff, but without express reference to the question whether the case was such as called for its exercise.

A large number of authorities have been cited in the very carefully considered arguments of counsel; and it may be right at once to remark that it is not easy to establish a complete accord amongst all cases.

As to the tenure of office. The charter gives no express directions on this point, and Vice-Chancellor Esten says that "the trustees have power to appoint for life or for a term of years, or during pleasure." Apart from any implication of law arising from the nature of plaintiff's office under the charter, we see nothing in the evidence of any contract for any engagement of plaintiff beyond a general hiring, which the law would probably hold to be a yearly hiring, determinable as such in the usual manner. The charter gives full powers to the trustees to regulate the number, residence and duties of the professors, the management of the revenues and property of the college, and the stipends, &c., of the professors, officers and servants thereof, and also from time to time to vary and alter their statutes.

Section 15 enacts that, if any complaint respecting the conduct of the principal, or any professor, master, tutor, or other officer of the college, be made to the trustees, they may institute an inquiry; and in the event of any impropriety of conduct being duly proved, they shall admonish, reprove, suspend, or remove the person offending, as to them may seem good. Section 16, provided always that the grounds of such admonition, reproof, suspension or removal, be recorded at length in the books, &c. Section 25 provides that five trustees, lawfully convened, shall be a quorum for the despatch of business, except for the disposal and purchase of real estate, or for the choice or removal of the principal or professors, for any of which purposes there shall be a meeting of at least thirteen trustees.

If the effect of these clauses be to prevent the removal of a professor except for impropriety of conduct, &c., the view of the late Vice-Chancellor as to a power to appoint during pleasure can hardly be supported. The sections no doubt allow such a complaint to be made and an enquiry and a power of correction or removal, and it is further clearly provided that a professor cannot be removed except at a meeting of at least thirteen trustees. If the effect of the charter be *that the tenure of office of a professor is for life*, subject to the removal only for expressed impropriety of conduct, then it seems to me that the trustees could not lawfully appoint during their own pleasure, as my brother Spragge points out at page 399 of his judgment. (11 U. C. Chan., 399); see also *Darlington School* case.

The plaintiff, under the charter, is a member of the senate. As such it may be agreed that he is a corporate officer, and falls within the rule to be found in many books, that, as in Grant on Corporations, 34, "Where a charter gives power to appoint an officer, an appointment for life will be intended, unless it appears otherwise either from other parts of the charter or the nature of the office," citing *Dighton's case*, 77, 82; 1 Vern.; Comyn's Digest; Franchise F. 32.

It is not easy to find any direct authority as to the tenure of a professor. Is it *an office* in the sense used in many of the text writers? Is he a public officer in the same sense?

In a removal case in 7 East, 167, *Rex* v. *Mersham*, the question was whether a person came within the statutes 3 Wm. & Mary, ch. 11, as "holding a public office or charge," Lord Ellenborough says, "An office must be derived immediately or mediately from the Crown, or be constituted by statute, and this is neither one or the other, but merely arising out of a contract with the parish, which the parish officers, with consent of the parishioners, are by the statute enabled to make with any persons for the maintenance and employment of the poor." The question might admit of a different consideration if any distinction had been established between a *public officer* and a *public charge*, but I can find no such distinction either in any adjudged case or in the sense of the statute." Again he says, "Perhaps the best criterion for determining whether this man were an officer was to consider whether he were indictable for the negligent discharge of the duty which he engaged to perform. Lawrence, J., says this is clearly no office, but only an employment arising out of a contract."

Bagg's case, 11 Reports, 98 is always cited on this subject of tenure, but it concerns the disfranchising of a freeman in a borough. The *Darlington School case*, reviews many of the authorities. There the schoolmaster under this charter was removable in the discretion of the governors. Chief Justice Tindal notices the plaintiff's contention that his appointment was during good behaviour "So that he had in contemplation of law a freehold in his office," * * "if he had, as in *Bagg's case*, a freehold in his freedom for his life, and with others, in their politic capacity, an inheritance in the lands of the corporation; or if the office of schoolmaster resembled that of a parish clerk as in *Gaskin's case*, 8 T. R 209, the inference drawn from these cases would be correct. But, looking to the terms of Queen Elizabeth's Patent, we think the office in question is, in its original creation, determinable at the sound discretion of the governors whenever such discretion is expressed, and that it is in all its legal qualities and consequences not a freehold but an office *ad libitum* only." He subsequently declares that whatever tenure was created by the charter, the governors had no power to make by-laws altering it.

As to corporate offices, it had long been asserted on *Bagg's case* "that there can be no power of amotion unless given by charter or prescription." Lord Mansfield, in *Rex* v. *Richardson*, says, "We think that from the reason of the thing, and from the nature of corporations, and for the sake of order and government, this power is incident as much as the power of making by-laws. But the chief difficulty with us is whether the office of plaintiff is in itself of that public character which warrants the interference of either a court of law or equity beyond the investigation of any claim for pecuniary damages from a wrongful dismissal.

Queen's College had no public endowment or foundation. It had a Royal Charter of Incorporation, a power to grant degrees but no right of visit or inquiry was reserved to the Crown.

The case cited of *Gibson* v. *Ross*, 7 Cl. & F. 250, in the House of Lords, expressly decides, that the mere fact of being incorporated by charter did not make the Tain Academy other than a private institution. The Lord Chancellor (Cottenham) says, "It has been decided that when individuals establish a school to be maintained from private funds the regulations under which public schools are conducted are not to be deemed applicable to them. A public schoolmaster is a public officer, and as such cannot be dismissed without an assigned and sufficient cause. But it is clear that in the case of a private trust this rule does not apply. . . . There arises another question, namely, one relating to the effect of an incorporation. I asked in the course of the argument whether there was any line of distinction drawn between the case of a private establishment the members of which had been incorporated and a case in which no such incorporation had taken place, and I could not find any such distinction had ever been adopted. If so, then I am sure that your Lordships would not for the first time introduce a distinction. Nothing could more disturb the arrangement of a private establishment than that a subordinate officer in it should be considered to have a fee in his office." Again, "If the charter of incorporation impose any restrictions on them they would by this acceptance of it be considered to enter into a contract with the Crown to exercise their authority subject to those restrictions." . . . "It is clearly established that a private society would have the right to dismiss a master, and there is no difference here between these parties and any other private society except that these parties are incorporated."

Lord Hardwicke said, in *Attorney General* v. *Pearce*, 2 Atk. 87, "The charter of the Crown cannot make a charity more or less public, but only more permanent than it would otherwise be, but it is the extensiveness which will constitute it a public one." This was a case merely on the construction of words of bequest in a will.

The subject is much discussed in 2 Kent's Com. 276. He says, "A hospital founded by a private benefactor is in point of law a private corporation though dedicated by its charter to general charity. A college founded and endowed in the same manner is a private charity, though from its general and beneficial objects it may acquire the character of a public institution." . . . Every charity which is extensive in its object may in a certain sense be called a public charity, nor will a mere act of incorporation change a charity from a private to be a public one. . . . A charity may be public though administered by a private corporation. . . . The charity of almost every hospital and college is public while the corporations are private. To hold a corporation to be public because the charity was public would be to confound the popular with the strictly legal sense of terms, and to jar with the whole current of decisions since the time of Lord Coke" At page 292 the same author points out the distinction between "amotion and disfranchisement," the former applying to officers the latter to members

In the celebrated case of Bowdoin College, *Allen* v. *McKeans*, 1 Sumner, 277, Mr. Justice Story elaborately reviews the law, noticing at large the equally famous *Dartmouth College case*, in 4 Wheaten, 518, he says, "that Chancellor Kent has stated the law with his usual accuracy and clearness," and adds, "that a college merely because it receives a charter from government, though founded by private benefactors, is not thereby constituted a public corporation controllable by the government, is clear beyond all doubt. So the law was understood by Lord Holt in his celebrated judgment in *Phillips* v. *Bury*." He proceeds, "if we examine the charter of Bowdoin College we shall find that it is a private and not a public corporation. It answers the very description of a private college as laid down by Chief Justice Marshall in *Dartmouth College* v. *Woodward*. It is an eleemosynary institution incorporated for the purpose of perpetuating the application of the bounty of the donors to the objects of that bounty. Its trustees were originally named by the founder and invested with the power of perpetuating themselves. They are not public officers, nor is it a civil institution but a charity school or a seminary of education incorporated for the preservation of its property and the perpetual application of that property to the objects of its creation. It is not expressly stated in the report but it may be inferred, that Bowdoin College had university powers to grant degrees, as in one of the by-laws it speaks of 'fees for any diploma, or medical or academical degree.'" Dartmouth College was by Royal Charter empowered to grant "any such degree and degrees as are usually granted in either of the universities, or any other college in Great Britain."

Queen's College is a very wide corporation embracing all members and laymen of the Presbyterian Church in Canada in connexion with the Church of Scotland in full communion with said church. The government is vested in twenty-seven trustees, and all the congregations in the Province admitted on the roll of the synod may name one person who shall be put on a list of names from which, under certain restrictions, new trustees must be selected.

I am not prepared to hold that to this coporation we are not to apply the rules of law referred to as governing such institutions in the great American cases. It rests wholly with the trustees to create the office of a professor, and such an office is not, as it seems to me, of the essence of the corporation. The latter could exist without it.

If the charter were silent as to provisions for the removal of a professor I should at once hold that such an officer is removable by the trustees, and his office or situation at once by their decision be vacant, subject to any claims for salary in the usual way if the engagement be of a yearly nature, but not subject to any jurisdiction of either a court of law or equity to restore; that the service would be of a peculiarly personal character and damages for any proved breach of contract the only remedy.

It is conceded that the trustees could abolish the Chair of Classical Literature, and that its incumbent's rights would cease with it Mr. Weir could be "amoved" from the office of professor, although he could not without cause be "disfranchised" as a member of the corporation, according to Chancellor Kent's definitions. His dismissal from his situation still leaves him a member of the corporate body. It seems also conceded that the trustees can alter and regulate the emoluments of any professor. This power is important to be considered. Unless the plaintiff can maintain his right to a legal interest or estate in the office and its emoluments as they were at his induction, if he be always liable to any reduction in the discretion of the trustees, or to an optional abolition of the office by the same body—it seems more a matter of form than substance to urge his right to a restoration by legal process.

The office is not essential to the existence of the corporation or to the discharge of its functions. It exists at the discretion of the trustees and its emoluments also depend upon them.

It only remains to consider if the words of this Charter restrict the right of removal which (in the absence of such words) I think, clearly exists. I have had very serious doubts for a long time on this aspect of the case, nor do I give my present opinion without much hesitation. It seems apparent I think, that any removal of a professor must be at a meeting of at least thirteen Trustees. (Charter, sec. 25.) The supplemental answers shews that this took place in May, 1865, after Bill filed. But does sec. 15 declare the only manner and the only cause for which a professor can be removed? If any complaint respecting the conduct of the Principal or any Professor, Master, Tutor, or other officer of the said College be at any time made to the Board of Trustees, they may institute an enquiry, and in the event of any impropriety of conduct being duly proved they shall admonish, reprove, suspend or remove the person offending as to them may seem good. Provided always that the grounds of such admonition, reproof, suspension or removal be recorded at length in the books of the said Board. These sections do not seem to have been followed in the plaintiff's case. Is he still therefore *de jure* Professor of Classical Literature.

If a Professor can only be removed in the manner prescribed by this section the same rule must certainly apply to the other persons named viz : "Masters, Tutors, and other officers," all of whom would be equally irremovable, except as therein provided. Sir James Wigram in the case already cited, pointed out that if the master of the grammar school could make out the existence of a trust in his favour, the janitor on being discharged might equally come to court for restoration. A master, tutor, casually employed or any other of the many "officers" about a university might on one construction of this section be equally irremovable with the Principal. Once granted that the office is one under the original charter in the sense contended for by plaintiff it seems to follow on the authorities that its holder takes it with all its original rights of tenure and that no attempt is legal to shew that even by agreement he cannot be reduced to a lesser interest. We may give effect to the 15th and 16th sections by confining them to cases in which on complaint made the officer can be dismissed, leaving him no claim for legal damages thereby. This would be a dismissal for cause.

On the other hand a dismissal such as took place in this case at the May meeting would be at the discretion of the Trustees, and may leave them liable to an action for arrears of salary in the absence of a notice terminating at the proper time on the usual principle.

There seems no alternative between this construction and declaring that every professor, master, tutor, or other officer, holds his appointment irremovably except for cause in strict pursuance of the 15th section. The words used in the charter declare no distinction between the higher and the lower officers, and the rights urged by plaintiff must, if he succeed, be conceded to many below him in position.

I have already stated that I consider he fails to establish his rights merely as inherent to his holding of such an office under such a charter, and that his main dependence must be that any proceeding to oust him must be under those sections.

We should pause long before giving effect to plaintiff's argument, with its inevitable consequences. As Lord Cottenham said in *Gibson* v. *Rors*—"There are many cases in which it would be highly inexpedient for the interest of a body like these trustees, that a man should continue in his situation though it might be difficult to shew a legal ground for his removal. He may be unsuccessful in the discharge of his duties, he may have great abilities but yet be unable effectually to exert them in the instruction of his pupils This might be a great evil to an institution of this nature, and yet it might not amount to a cause which in a court of justice would justify the dismissal of the master. At the same time it must be admitted that the circumstances I have mentioned would form a good ground of desiring the master dismissed.

It is needless to enlarge this list of such things as amount to, not perhaps, legal disqualifications. An unstained moral character, high intellectual attainment, and unsparing activity in the discharge of duty may, and often do co-exist with unhappy forms of temper—restless irritability, and morbid sensitiveness or jealousy, which may utterly unfit for the useful discharge of the delicate duties of education and the creation of respect and confidence amongst fellow workers and pupils. The court anxiously avoided all intermeddling with the merits or demerits of individuals in the unfortunate disputes that have resulted in this litigation. It is sufficient to say that wherever the blame rested a state of things was disclosed most injurious to the best interests of Queen's College.

We are anxious to carry out the benevolent directions of the last section of the royal charter which enjoins on courts of justice that its language "shall be construed and adjudged in the most favourable and beneficent sense for the best advantage of our said College."

I have bestowed much consideration on the argument of plaintiff as to his legal right as professor, and have at last (although not without considerable doubt) arrived at the conclusion that he was removable by the trustees at a meeting where the prescribed statutable number of members was present, although not for cause under the 15th section.

I think the appeal must be allowed. That the plaintiff's bill in the court below should be dismissed. I think the case against him as to the want of jurisdiction in the court below is reasonably clear. That his interest in his office is not such as he claims ; and lastly, that the case disclosed is one in which neither a court of equity or law should interfere, except on the very clearest and most conclusive pressure of authority and precedent.

Bill dismissed with costs.

QUEEN'S BENCH.

(Reported by C. Robinson, Esq., Q.C., *Reporter to the Court.)*

Auston v. Boulton.

Mortgage—Assignment—Failure to pass the land mortgaged.

An assignment under seal, annexed to a mortgage, stated that the assignor, "bargained, sold, assigned and transferred" unto the assignee, "his heirs and assigns, the annexed *mortgage, and all the right, title and interest therein," of the assignor,* "to have and to hold the same unto the said, &c., his heirs and assigns, to his and their sole use for ever."

Held, that the land, which was the subject of the mortgage, did not pass by these words; but,

Held, that had the instrument been a devise, instead of a deed operating *inter vivos*, the land would have passed under the term "mortgage."

[Q. B., H. T., 1865.]

The first count of the declaration stated a conversion in the lifetime of the testator, and the second count a conversion after his death.

Pleas.—1. Not guilty.

2. To the first count, that the goods were not the goods of the testator.

3. To the first count, Not possessed.

4 Being second plea to second count, that the goods were not the goods of the plaintiff.

5. Being third plea to second count, Not possessed.

The cause was tried before the Chief Justice of Upper Canada, at the last Fall Assizes, held at Cobourg, when the plaintiff was nonsuited. The facts were, that the plaintiff as executor, claimed to recover a steam engine, boiler, heater,

smoke-pipe, carriage, &c, belonging to a saw mill erected on lot No. 7, in the 5th concession of the township of Haldimand.

The plaintiff's title was under an indenture of mortgage in fee, dated the 25th of February, 1858, made by John Taylor of the first part, Ann his wife, for the purpose of barring her dower, of the second part, and Wm. A. Garrett of the third part, for securing the payment of £1,000, with interest, on the first day of January thereafter, and also certain other liabilities therein referred to, upon the land before mentioned; and under a deed of assignment made by Garrett to the testator, dated the 12th day of March, 1858, which was annexed to the indenture of mortgage.

This assignment stated that, "In consideration of the sum of five shillings, the assignor bargained, sold, assigned and transferred unto the said James Auston, his heirs and assigns, the annexed mortgage and all my right, title and interest therein. To have and to hold the same unto the said James Auston, his heirs and assigns, to his and their sole use for ever."

On these facts, the learned Chief Justice was of opinion that the land, on which the saw mill was erected, did not pass to the testator.

In Michaelmas term last, *J.D. Armour* moved for and obtained a rule *nisi* to set aside the nonsuit for the alleged misdirection above stated, and for a new trial.

J. H. Cameron, Q. C., now shewed cause. He referred to *Moran* v. *Currie*, 8 U. C. C. P. 60; *Doe d. Wood* v. *Fox*, 3 U. C. Q B. 134.

Armour, contra, cited Cruise's Digest, title xxxii. Deed, ch. 20, sec. 73; Shep. Touch. ch. 5; *Martin* v. *Mowlin*, 2 Burr. 969; Kent's Com. 6 ed. iv., 194; *O'Neil* v. *Carey*, 8 U. C. C. P. 339; *Powell* v. *Baker*, 13 U.C.C.P. 194; *Toland* v *Bruce*, 8 U. C. Q. B. 14; *Edgar* v. *Norton*, 8 U. C. C. P. 587; *Vanderlinder* v. *Vanderlinder*, 14 U. C. C. P. 129, as to the construction to be placed on deeds; and to *Doe d. Guest* v. *Bennett*, 6 Exch. 892, as to the construction to be placed upon wills.

A. Wilson, J., delivered the judgment of the court.

The case chiefly relied upon was *Doe d. Wood* v. *Fox*. The mortgagee granted, &c., *a certain indenture of mortgage*, executed by George Fox, bearing date, &c., on certain lands, together with the bond therein referred to, to have and to hold the said bond and mortgage, and the debt thereby secured, and all the interest thereby conveyed by the mortgage *in and to the lands* therein described. &c.

Sir J. Robinson, C. J., in giving judgement, said, "If the premises granted were lot A., and the *habendum* was of lot A. and B., that would not pass B., because that would be a simple addition to the granting part, not an explanation or qualification of it; but this is different. The *habendum* here shows that when Clement granted the mortgage, he meant the estate mortgaged: there is no repugnancy."

Mr. Armour, in this present case, relied upon the concluding part of the judgment just referred to, "That when Clement granted the *mortgage*, he meant the *estate* mortgage;" as if the Chief Justice had said that there was no weight in, or necessity for, the *habendum* in that case, and that the meaning in question was to be gathered from the premises alone. I do not so understand the case; for the Chief Justice said, "We must look at all parts of the deed to see what was intended by each;" and the case of *Moran* v. *Currie* is decided expressly upon the ground, that while the premises were the same in *Doe d. Wood* v. *Fox*, the *habendum* was wanting.

If this had been a devise, instead of a deed operating *inter vivos*, the land would have passed under the term 'mortgage." The case of *Crips* v. *Grysil*, (Cro. Car. 26), and, after some subsequent fluctuation, the case of *Guest* v. *Bennet*, (and see also *Rippon* v. *Priest*, 13 C. B. N. S. 308), determine this, and probably the same effect would be given to the present assignment in equity; but at law we do not think that a bargain and sale of a "*mortgage* and all my right, title and interest *therein*," will pass the land, which is the subject of the mortgage.

The rule will therefore be discharged.

Rule discharged.

Henderson v. Gesner et al.

Promissory note—Stamps.

The plaintiff in September, 1865, sued the maker of a promissory note, due in January, 1865, payable to H. or bearer, and by H. endorsed to the plaintiff. Defendant pleaded that it was not duly stamped when the plaintiff became a party thereto, nor until it fell due; and the jury were directed that it was sufficient if the stamps were put on before action brought.

Held (reversing the judgment of the County Court), a misdirection, for the plaintiff became a party to the note by becoming the holder or endorsee, and was bound to stamp it then.

[Q. B., H. T., 1866.)

Appeal from the County Court of the County of Kent.

The declaration was against Gesner, the maker of a note for $170 86, dated 24th October, 1864, payable to Henry Henderson, or bearer, three months after date: that Henderson endorsed the note to defendant Stewart, who endorsed it to the plaintiff.

The defendant Stewart, who alone defended, pleaded want of presentment and notice: and, 3. That he endorsed the note without value, to accommodate Gesner, and so endorsed before the issuing or delivery of the same to the plantiff by Gesner, and the plaintiff became a party to it and accepted it so made and endorsed; but the said note had not at the time it was so made and delivered to the plaintiff, and at the time when the plaintiff became a party thereto and accepted and received the same, the stamps required by law thereto affixed, impressed or placed thereto, to wit, revenue stamps of the denomination of bill or note stamps to the value of six cents, nor were the same affixed thereto in double value as required by law, to wit, twelve cents in such stamps, by the plaintiff when he became the endorser thereof, nor till the note became due.

Issue was taken on these pleas.

The payee's name was the same as the plaintiff's, but no evidence of identity was given, so that it might be assumed that the plaintiff's interest in the note accrued after defendant Stewart's endorsement.

The notary swore that four three cent stamps were put and obliterated on the note by the

plaintiff before it became due: that the plaintiff put on two stamps shortly after the note was drawn, in October, 1864, and two nine cent stamps before the note fell due.

Defendant's son swore that the note attached to the notarial instrument was presented at his father's house to him, and there were no stamps on it then.

The learned judge directed the jury to find for the plaintiff, if they found the stamps were put on before action brought; and they gave a verdict for the plaintiff.

After motion in term a rule for a new trial was discharged, on the alleged authority of *Stephens* v. *Berry*, 15 U. C. C. P. 548.

The propriety of this direction was the only point raised on this appeal.

J. B. Read, for the appellant.

Kingstone, contra.

Hagarty, J., delivered the judgment of the court.

It would seem that no stamps were on this note when originally made.

The case seems governed by the words of 27-28 Vic. ch. 4, sec. 9, "Except that any subsequent party to such instrument or person paying the same, may at the time of his so paying or becoming a party thereto, pay such double duty by affixing," &c., &c., "and such instrument shall thereby become valid."

The act of 1865, 29 Vic. ch. 4, which became law on the 18th of September, 1865, and which it is enacted shall be construed as one act with the preceding act, in its fourth clause says: "No party to or holder of any note, draft, or bill of exchange, shall incur any penalty by reason of the duty thereon not having been paid at the proper time and by the proper party or parties, provided that at the time it came into his hands it had affixed to it stamps to the amount of the duty apparently payable upon it, that he had no knowledge that they were not affixed at the proper time and by the proper party or parties, and that he pays such duty as soon as he acquires such knowledge; and any holder of such instrument may pay the duty thereon, and give it validity under sec. 9 of the act cited in the preamble, without becoming a party thereto."

The case of *Stephens* v. *Berry* was decided wholly on the act of 1864. Richards, C. J., says: "I think we are certainly bound to decide, that when a person becomes the holder of an unstamped bill so as to sue and does sue on it, he must, to make it valid in his hands, have put the double stamp on it before commencing the action. Indeed, I personally take a much stronger view of the necessity of a holder protecting himself by the double stamp, when the bill without it would be void. The holder, in my judgment, can only be considered safe when he put on the proper stamp at the time he would in law be considered as having taken and accepted the bill as his own, or within a reasonable time thereafter."

This note matured in January, 1865. The action seems to have been commenced in September following, and the trial was in December ast.

The new act imposed new duties from the 1st of January, 1865, with certain directions as to obliterating stamps from and after the 1st of October, 1865. The fourth section is silent as to time of operation, and the fifth directs its being construed as one act with the previous one.

If we should read sec. 4 as part of or explanatory of sec. 9 of the former act, there would be no room to question the correctness of the learned Chief Justice's "personal" view.

But when the latter statute became law the note had been six months at least in the plaintiff's hands. He was then the holder of it, and the action was pending before the statute was passed.

By sec. 9 of the earlier act the note was void if not duly stamped at its making, &c., except in the case of any subsequent party affixing the double stamp at the time of his becoming a party thereto. This note, therefore, if no subsequent party stamped it on becoming a party, was avoided. If the plaintiff has saved it by stamping, it must be because as a subsequent party he stamped it on becoming such party. He therefore became a party in some way, and no other way can be imagined than by becoming the holder or endorsee of the note. He did not become a party by merely bringing the action.

We therefore think the direction given to the jury cannot be upheld.

The statute would be completely defeated if the stamps could be affixed at any time before action commenced. Parties could hold notes and pass them from hand to hand, and only affix stamps if legal proceedings became unavoidable.

If the fact really were, as is most probable, that the plaintiff is the payee and first endorser of the note, the time of his first connection with it is quite plain.

We think the appeal must be allowed, and that the rule for a new trial in the court below should be made absolute without costs.

Appeal allowed.

Baldwin v. Peterman.

Action on promissory note—Proceedings in insolvency for same cause of action—Equitable plea in bar.

Declaration, on a promissory note made by defendant payable to plaintiff.

Plea, on equitable grounds, *in bar* to the further maintenance of the action, averring the pendency of proceedings commenced by plaintiff against defendant, under "The Insolvent Act of 1864," for the same cause of action, subsequently to the declaration in this cause.

Held, or demurrer, plea bad.

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

Declaration, on a promissory note made by defendant payable to plaintiff.

Plea, for a defence on equitable grounds, that after the last pleading in this action, and on, to wit, the twenty eighth day of November, one thousand eight hundred and sixty five, the said plaintiff took proceedings against the said defendant, under the provisions of "The Insolvent Act of 1864," and procured the issue of a writ of attachment and summons against the said defendant, his estate and effects, and that an action was then pending by virtue of said writ of attachment and summons against the defendant at the suit of the plaintiff for the same debt and causes of action as in the declaration mentioned, as by the record and proceedings thereof, remain

ing in the County Court of the United Counties of York and Peel, appeared; and that the said parties in this and the said last mentioned suit were the same parties; and that the said suit was then depending in the said court; and that the said plaintiff had under and by virtue of the said writ of attachment and summons, procured the seizure and attachment of the estate and effects of the said defendant, which were worth much more than what was sufficient to pay the claim of the said plaintiff; and that the said plaintiff was then prosecuting his said claim under the provisions of the said act, with a view to the summary enforcement thereof; and the defendant said that he should not be harrassed by the plaintiff further prosecuting this action; and that the matters preceding the defendant was ready to verify, wherefore he prayed judgment of the said writ and declaration, and that the same might be quashed.

Demurrer, that the proceedings under the provisions of the Insolvent Act of 1864, in the said plea mentioned and referred to, did not constitute any bar to the maintenance by the plaintiff of the said suit, or any defence to the action.

Ferguson, for the demurrer, cited 49 Geo. III. ch. 121, sec. 14; Eden on Bank. 111; *Ex parte Wilson*, 1 Atk. 152; *Ex parte Ward*, 1 Atk. 153; *Ex parte Lewis*, 1 Atk. 154; *Ex parte Dickson*, 1 Rose, 98; Insolvent Act of 1865, secs. 16, 17; Insolvent Act of 1864.

J. A. Boyd, contra, cited Cook's Bk. Law, 130, 133, 138, 239; *Ex parte Emery*, 4 De G. M. & G. 917, *per* Lord Justice Turner; Insolvent Act of 1864, sec. 3, sub-sec. 7; *Ex parte Prowse*, 1 Gly. & Jam. 29, *Twiss* v. *Massey*, 1 Atk. 68; *Read* v. *Sowerby*, 3 M. & S. 78; *Short* v. *McMullen*, 6 U. C. Q. B. 407; Bac. Ab. Tit. "Abatement;" *Grant* v. *Hamilton*, 3 C. P. 422; *Place* v. *Potts*, 8 Ex. 705, S. C. 17 Jur. 168; *Morgan* v. *Harding*, 11 W. R. 65; *Kemp* v. *Potter*, 6 Taun. 149; *Harley* v. *Greenwood*, 5 B. & Al. 101.

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

In *McMaster* v. *Kell*, in 1798, reported in 1 B. & P. 302, the plaintiff obtained judgment against defendant, and charged him in execution in Trinity Term, 1797, for £600. On 22nd May, 1798, a commission of bankruptcy issued on the petition of the plaintiff, under which the defendant was declared a bankrupt. The plaintiff was the only person who proved against him, and was chosen sole assignee. On application to discharge the defendant out of custody the rule was refused. Eyre, C. J., said: "Suppose the Lord Chancellor should think fit to supersede the commission, because the party had been charged in execution! It is much fitter for the Court of Chancery to interfere, since that court may either supersede the commission or direct the bankrupt to be discharged out of custody."

In *Percy et al* v. *Powell*, in 1802, 3 B. & P. 6, plaintiffs sued out a commission of bankruptcy against defendant, as petitioning creditors, founded on the same debt on which they afterwards arrested him. On subsequent application the court refused to discharge him. In disposing of the case the court said they could not tell but the defendant might contest the commission of bankruptcy.

In *Ex parte Prowse*, 1 Gl. & Jam. 94, it is stated, "Where a petitioning creditor has not prosecuted his commission so far as to give an interest in it to others, it would be a matter of course to supersede it, unless the bankrupt should oppose."

The case of *Harley* v. *Greenwood*, 1821, reported in 5 B. & Ald. 95, is a leading one on the point, and is an express authority that even since the passing of the Bankruptcy Act, (49 Geo. III, cap. 121, in 1809), containing the clause (14) introduced by Sir Samuel Romilly, which in effect provided that claiming or proving under the commission should be considered as electing to proceed under the commission, yet that this would not be a good plea to a debt proved under the commission under that act. Bayley, J., said, "If it be a bar at law, it must become so by the positive enactment of the statute. * * * The commencing of an action in one court does not destroy the right of the party to commence an action for the same debt in another court. The defendant may, indeed, plead the pending of the former action in abatement, but he cannot plead it in bar." He, then, after referring to the fact that the statute does not say that proving a debt shall be a bar, argues there are many reasons why it should not. Suppose, after the debt is proved, the commission is superseded. Then suppose the action restrained till the commission actually superseded, the Statute of Limitations might run against the claim. The remedy suggested for any inconvenience or injustice is, to apply to expunge the proof of the debt, or to stay the proceedings in the court of law.

In *Spencer et al* v. *Demett*, 13 L. T., N. S., Ex., on the 13th January, 1866, this case was recognised as authority and acted on. There the action was for goods sold and delivered. The defendant pleaded, on equitable grounds, that the plaintiff had proved his debt in bankruptcy, and elected to take the benefit of the proceedings, whereby defendant was in equity discharged. This plea was demurred too.

The provisions, as to electing to take under the bankruptcy proceedings, were to the same effect as those contained in 49 Geo. III. In argument, it was said, that the final examination in bankruptcy had not taken place, and until that was the case it was never known whether the bankruptcy would be superseded or not, and the proper course was to apply to a judge in chambers to stay proceedings, or to the Bankruptcy Court to expunge the proof. Pollock, C. B., said: "The objection to the plea seemed to be that it was pleaded in bar. Judgment on it would be final, and what would be the result if the bankruptcy afterwards were superseded!" It was admitted, in argument, that when legal pleas only could be pleaded, the defendant must have applied to the court to stay proceedings; but, it was contended, that since the Common Law Procedure Act gives power to plead the equitable defence, it was good, as the defendant would be entitled to an injunction in equity. Pollock, C. B, "The injunction, to which he would be entitled, would only be until the bankruptcy would be superseded. An equitable plea

must be an answer to the action in full. The defendant must say, "I bring forward something which shews that you are not now entitled in equity to go on, but that you never will be.'" So there was judgment for the plaintiff on the demurrer.

These authorities plainly shew the plea is not a good plea in bar, even with the provisions of the English Bankruptcy Act, because a Court of Equity never would grant an unconditional injunction on the facts shewn. Our statute contains no such stringent provisions as to election or petitioning creditors' debt, as are contained in the English acts, and much of the reasoning under those acts is inapplicable here.

It may be urged that this is in effect pleading the pending of another action in abatement. I doubt if any such plea can be pleaded by way of equitable defence; but it is pleaded after issue joined on other pleas, and not in the manner that a plea in abatement is usually pleaded. It seems hardly a proper plea to set up here; for the action to be abated is the one first commenced, and the proceedings, in which the subject matter of the abatement arose, was taken, after this action was at issue.

The case of *Place* v. *Potts et al.*, 8 Ex. 705, seems an express authority that this is not a good plea in bar, and that it would not be proper to plead it as it is now pleaded here. That was an action for freight, and defendants pleaded after the commencement of the action, and in bar to its further maintenance, that, in consequence of certain proceedings in the Admiralty Court in relation to a bottomry bond on the same vessel, they were monished and compelled to bring the full amount of the freight into court, and they had done so. In giving judgment Baron Parke said: "Now, if the effect of payment of freight into that court, by virtue of and in pursuance of a monition is merely to suspend the remedy of the owner of the ship for freight until that court shall have decided the question on the bottomry bond (in which case they would hand over either the whole of the freight or so much of it as would be more than sufficient to satisfy the bond, if it were good, to the party paying it), the plea would *be in suspension of the action only, and consequently bad*, inasmuch as there cannot be such a *plea;* for if the nature of the case is such as to make it right that the cause of action should be suspended, and, consequently, such as to demand the interference of another court, the remedy would be by application to its equitable jurisdiction."

I have looked at all the cases referred to by Mr. Boyd, and as far as I can understand the principles set forth in them, the proper mode of relief, when a party, who has proved a debt in bankruptcy, is proceeding at law, under the English Bankruptcy Acts, as well before as since the statute of 49 Geo. III., is to apply to the Court of Chancery to strike out the proof, or to the Common Law Court to stay proceedings.

I have not as yet arrived at the conclusion that under our Insolvency Act an insolvent has the same right to take those proceedings that a bankrupt had in England, even before the statute of 49 Geo. III, and our statute contains no provisions on the subject at all analogous to those contained in that act and repeated in subsequent statutes.

Many of the arguments and suggestions quoted from the decided cases refer peculiarly to this case, for it was admitted on the argument that the proceedings against the defendant in insolvency had been set aside on the ground, as I understand, that the estate of the defendant had not become subject to compulsory liquidation.

There will be judgment for the plaintiff on the demurrer.

Judgment for plaintiff on demurrer.

PRACTICE COURT.

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

Darling v. Sherwood.

County Court appeal—Bond—Sureties.

The 27 Vic. cap. 14, is intended for the benefit of persons suing in the name of others, and its only effect is to extend the words "any party to a cause," in cap. 15, sec. 67 C. S. U. C., to the case of the beneficial plaintiff.

Where on an appeal by the defendant in the court below the bond was executed by two sureties only, *Held*, that on that ground the appeal must be struck out of the paper with costs.

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

This was an appeal by the defendant in an action brought in a County Court from a judgment of that court, discharging a rule *nisi* for a new trial. After the appeal had been set down for argument, *Robert A. Harrison* obtained a rule *nisi*, calling upon the appellant to shew cause why the appeal should not be set aside and struck out of the paper with costs, upon the ground, that the appellant had not filed in the court below the bond required by the statute

From the affidavits filed, it appeared that the bond had not been executed by the appellant himself, but by two sureties alone. It was stated that the defendant did not reside in the county, but at some distance therefrom, and that, consequently, he had not been able to execute the bond within the four days allowed for filing it.

Moss, shewed cause, and argued that the words of the statute 27 Vic. cap. 15, were wide enough to include every case, as well that of defendant as of plaintiff. That to confine the operation of the statute to the case of beneficial plaintiffs suing in the name of others, was giving such persons an unreasonable advantage, because a greater necessity existed for their joining in the bond, than for real plaintiffs or defendants, because the latter classes were already liable for costs, as parties to the suit.

Harrison supported his rule, referring to *Tozer q. t.* v. *Preston*, 23 U. C. Q B. 310, and *Pentland* v. *Heath*, 24 U. C. Q. B. 464, and argued that the preamble of the statute shewed that its only objects were beneficial plaintiffs, not parties to the record, citing Dwarris on Statutes.

Morrison, J.—In the two cases referred to by Mr. Harrison, the Court of Queen's Bench felt difficulty in giving a satisfactory construction to the effect of the Amending Act, 27 Vic. cap. 14, upon secs. 67 and 63 of the County Court Act, Con. Stat. U. C. cap. 15. The present case is somewhat different from either of the cases cited here; the defendant below is appellant, and the

bond filled in his behalf is one executed by two persons, but not by the defendant, which bond, after reciting the proceedings in the court below, is conditioned that the defendant shall abide by the decision of the Court of Queen's Bench. The only construction I can give to secs. 67 and 68 of cap. 15, as amended by the 27 Vic, is to read the first part of sec. 67 as if it stood thus: "In case any party to a cause, *or any party being a beneficial plaintiff in a cause, not named in the record, suing in the name of another* in the common law side, in any of the County Courts, is dissatisfied, &c., the judge, at the request of such party, &c., shall stay the proceedings for a time not exceeding four days, in order to afford the party time *to execute* and perfect the bond required to enable him to appeal the case." And the 68th section, as amended, stands: "In case the party willing to appeal gives security to the opposite party, by a bond executed by two sureties, &c., the judge of the County Court, at the request of the party appellant, shall certify," &c After a consideration of the two clauses with the Amending Act, I cannot bring myself to either of the conclusions contended for by Mr. Moss, or that the intention of the legislature was to dispense in every case with the execution of the bond by the appellant, or that such is the construction to be given to the statutes, nor can I see that the legislature intended to make any other change in the practice, other than that of avoiding the strict application of the effect of the words, "any party to a cause," at the beginning of the 67th section, and extending these words to apply to and include the beneficial plaintiff, in cases where the party suing is only a nominal plaintiff. The two sections, as amended, are far from being clear and unambiguous, and as suggested by the learned Chief Justice of Upper Canada, in *Tozer q. t.* v. *Preston*, we may hope that all doubts as to the effect of these two clauses will be set at rest by an explanatory act. Mr. Moss pressed that the appeal should be allowed to stand, as since the application, a proper bond had been executed, and that judgment in the court below had not been entered, but as it did not appear that the learned judge had allowed the bond, I did not think that the application could be entertained.

Rule absolute to strike out the appeal.

Campbell v. Kempt, formerly Campbell v. Kempt and Corbett.

Service of rule nisi for new trial—R. G., Mich. T., 27 Vic. —Style of cause.

A rule *nisi* for a new trial was moved on 20th May, and issued on 22nd May, but not served till the 25th May, too late for its argument during the then Easter Term. It was accordingly, on 27th May, enlarged till the next term. On an application made in this court to set the rule as de. it was held that the delay in the service of the rule to so late a period in the term that the usual four days could not elapse before shewing cause, was not ground to sustain the application.

An objection to the style of the cause after an alleged entry of a *nolle prosequi*, overruled.

[P. C., M. T., 1865.]

Hector Cameron, in Easter Term, 28 Vic., obtained a rule *nisi* calling on the defendant to shew cause on the first day of the then following term (Trinity), why a rule *nisi* for a new trial, entitled in the original cause, granted by the Court of Common Pleas during the same term of Easter, should not be set aside and rescinded on the following grounds:

1. That the rule was not served until the 25th day of May, although granted on the 20th, and not being returnable on the first or any other day of the then next term.

2. That the rule was improperly styled in the suit of the plaintiff against both defendants, although a *nolle prosequi* had been entered of record against the defendant Corbett before such rule was granted.

Mr. Cameron filed his own affidavit, showing that the rule for a new trial was served in his office, as agent for the plaintiff's attorney, on the 25th of May, and also stating that a *nolle prosequi* had been entered of record at the trial of the cause as to defendant Corbett. The copy of the rule filed by Mr. Cameron was dated as though issued on the 22nd of May.

In Michaelmas Term last, *C. S. Patterson* showed cause, filing an affidavit of the defendant's attorney, to the effect that this action was commenced in the county of Victoria: that the writ of summons issued from the office of the deputy clerk of the Crown at Lindsay, in which office the subsequent proceedings in the cause were all filed, and that he made a search on the first day of September last, when he found all the papers filed in the cause, and that no *nolle prosequi* was entered in the cause or filed in the office. It appeared also, that on the 27th May, the last day of Easter Term, the rule *nisi* for a new trial was enlarged until the first day of Trinity Term, and on the same day Mr. Cameron obtained his rule in this court.

Morrison, J.—No case was cited to me, nor can I find any authority for making this rule absolute on account of the non-service of the rule *nisi* for a new trial before the 25th of May, or on the ground of delaying the service of the rule to so late a period in the term that the usual four days could not elapse before shewing cause, and I take it that the practice is now settled by our rules of Michaelmas Term, 27 Vic. Those rules were drawn up for the purpose of preventing parties delaying the argument of such rules, and the third rule was framed for the purpose of limiting the period in which a rule for a new trial had to be served after being granted, and that rule entitled the opposite party on or after the 5th day, if not served, to enter a *ne recipiatur*

As to the second objection, the cases of *Wafe* v. *Taylor et al.*, 9 U. C. Q. B. 609, and *Luckie* v. *Gomperty*, C. & M. 56, are authorities in favour of the defendant Nothing is here shewn as to the entry of the *nolle prosequi*, except that something was done at the trial, while it appears, from a search made in the proper office long after this application, that no entry or proceeding in the nature of a *nolle prosequi* discharging the defendant Corbett has been filed. I am, therefore, of opinion this rule should be discharged.

Rule discharged.

Sharpe v. Leitch.

C. L. P. Act, sec. 261—Seizure of money made by sheriff under execution.

Money made under an execution at the suit of A., cannot be retained by the sheriff as seized under an execution *against* A., and the court will order such money to be paid over to him, notwithstanding the seizure.

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

Upon a writ of *ven. ex* in this case, the sheriff of Peterborough made the sum of £231 14s. out of defendant's lands. The sheriff had also in his hands a *fi. fa.* against the goods of plaintiff and one Waters, at the suit of the Bank of Toronto. The sheriff thereupon returned to the *ven ex.* that he had made of defendant's land £231 14s., £100 of which he had paid to plaintiff's attorney, and the residue (£131 14s) he had seized under the *fi. fa.* of the Bank of Toronto, &c.

J. A Boyd obtained a rule this term calling on the sheriff to show cause why he should not pay over to the plaintiff the sum of £131 14s. mentioned in his return to the *ven. ex.*

Beaty showed cause, and pointed out a difference between the Imperial Statute and our own C. L P. A., sec. 261, which authorises the sheriff to seize any money or bank notes [including any surplus of a former execution against the debtor] belonging to the person against whose effects the *fi fa.* has issued; the parenthetical words not being in the former act.

J. A Boyd, contra, cited *Collingridge* v. *Paxton*, 11 C. B. 682.

Hagarty, J.—I find it hard to distinguish the cases.

In the case cited, the writ was delivered to the sheriff on the 16th June, and two days afterwards the sheriff seized certain bank notes, the property of defendant. Before the delivery of this writ, a *fi. fa.* against the plaintiff was received by the sheriff at the suit of one Dryden, which remained unexecuted at the time of the levy on the bank notes on the former suit. The sheriff returned, that immediately on seizing the bank notes and coins, he seized, retained, and specifically set them against and appropriated them to be paid to the plaintiff Dryden in the suit against the then plaintiff, and paid them over to Dryden's attorney.

A motion was made that the sheriff do pay over to the plaintiff's attorney the moneys so retained and appropriated, with costs, and after argument in full court, the rule was made absolute.

Jervis. C. J., said: "As money, the produce of goods seized, remaining in the hands of the sheriff does not become the property of the execution debtor, so neither does money seized by the sheriff."

Maule, J., said: "The intention of the statute was to subject money, bank notes, &c., to seizure in the same way as any other chattels were before, except that where money is seized, it is not necessary that the forms of a sale should be gone through. But though the sheriff may and ought to, if the execution creditor desire it, hand over the money to him, it does not follow that it becomes by the seizure the property of the execution creditor." He says also, that the legislature could not have intended "that money and bills and other securities taken under a *fi. fa.* should be seizable in the hands of the sheriff, but that other property and money, the proceeds of the sale of goods, should not."

It has not been suggested that any subsequent decision has shaken the authority of this case, and it must govern my decision.

The words introduced in our act make the surplus proceeds of any former execution against the same debtor liable to seizure on a new writ against him. This cannot, I think, affect the decision. The sale of a debtor's goods of course divests his property therein. The proceeds, not required to pay his creditors, become his in the *sense, that he* can recover them from the sheriff, and the statute expressly allows them to be seizable on any other execution.

It is not necessary to discuss the cases arising on the garnishment clause. The statute there allows a debt due to the judgment debtor to be attached, which is very different from the act governing this case.

I make the rule absolute in the sense of the motion, with costs.

Rule absolute, with costs.

VanNorman v. Bridgeford.

Verdict taken subject to award—When judgment may be entered.

An application to set aside a judgment, founded on a verdict which was taken for the plaintiff subject to a reference to arbitration, the judgment having been entered up before the expiration of four days succeeding the day of making the award, was refused.

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

A verdict was taken by consent for plaintiff at the last fall assizes, subject to the award of an arbitrator, to be made before the 15th November following, with power to enlarge the time for making the award, which power was exercised by an enlargement to the first day of Michaelmas Term, and again to the 1st December. An award was made on 22nd November, that the verdict for plaintiff should stand for a named sum.

Michaelmas Term commenced on Monday, November 20th (the award being therefore made on the third day of term), and the plaintiff entered up final judgment on Saturday the 25th November, a notice of taxation having been served the day preceding.

On Saturday 2nd December, the last day of the same term, *Robert A. Harrison* obtained a rule to set aside the award on grounds afterwards abandoned, and the judgment on the grounds that it was entered before the rule of reference was made a rule of Court, and that judgment was entered up before the expiration of four days succeeding the day of the making the award.

In Hilary Term last *VanNorman* shewed cause.

Robert A. Harrison, contra.

Hagarty, J.—The first objection may be disposed of by stating that it does not appear on the affidavits or papers filed, whether or not the order of reference was made a rule of court.

In Chitty's Archbold 1598, it is said when a verdict is taken subject to the certificate of a barrister, the party in whose favour the certificate is given is entitled to sign judgment at the same time, as if the case had been tried, as the certificate relates back to the time when the

verdict was given. The case there cited of *Cromer* v *Chart*, 15 M. & W. 310 is expressly in point. The verdict there was for plaintiff subject to a reference. The time was duly enlarged to the first day of the second term after the assizes; the award was made just before the beginning of the second term, and judgment was signed without waiting for any four days of a term. The precise point was taken on motion to set aside the judgment, and the full Court of Exchequer held the jugdment regular. They held that it must be considered as a judgment on the verdict as taken at the assizes, and liable to all its consequences. "We must take it that the parties have agreed to the verdict with all its consequences." * * * "If it is suggested that there is any hardship in the party being deprived of his four days for moving, the answer is that the parties having agreed to a state of things which shuts them out from that benefit by agreeing that the arbitrator shall certify within a certain time, but not at any particular moment." * * * "There is always a judge sitting, by application to whom any injustice may be prevented."

This case was decided in 1846, and is referred to on this point in the last edition of Russell 635. *Laurie* v. *Russell*, 1 U. C. P. R. 36 (before the late Mr. Justice Burns) is also expressly in point, and follows the case in 15 M. & W. In *Williams* v. *McPherson*, 2 U. C. P. R. 49, the same rule is recognized, though the facts were wholly different, being a general reference, not merely of the cause, but of all matters in difference, and as far as I can gather from the report, judgment was entered before the term following the assizes; and Richards, C. J., quotes approvingly the language of Burns, J., in *Laurie* v. *Russell*: this was in 1856.

I think the rule must be discharged with costs.

COMMON LAW CHAMBERS.

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

In re Andrew Cleghorn and the Judge of the County Court of the County of Elgin, and Duncan Munn.

Insolvent Act of 1864, *sec.* 4, *ss.* 4, 16—*Jurisdiction of county judge to order payment of claim by assignee—Costs—Dividends—Appeal from assignee—Prohibition—28 Vic. cap.* 15.

A demand for wages alleged to be due by the insolvent to the claimant was made, as a preferred claim, to an assignee in insolvency. The creditors, at a meeting, passed a resolution authorising the assignee to pay all claims for wages, but the assignee refused payment of this claim as made. At this time no dividend sheet had been prepared. A summons was subsequently issued by the County judge, calling on the assignee to shew cause why he should not pay the claim. The assignee not appearing on this summons, evidence was taken before the judge, and an order made for the payment forthwith, with costs, of a sum less than the original demand. The assignee afterwards paid the claim as reduced, but refused to pay any costs; upon which the judge's order for the payment of the claim and costs was made a rule of court and execution issued thereupon against the goods of the assignee. Upon an application by the assignee for a writ of prohibition to prohibit further proceedings in the county court on the writs or orders, &c., it was *held*—

1. That the County judge had no power to adjudicate upon the claim until it had been decided upon by the assignee. It might have been brought before him as on an appeal from the decision of the assignee, but not for his decision in the first instance, and in this case there was nothing to appeal from.
2. That the assignee should not have been ordered, so far as appeared, to pay costs.
3. That the direction by the creditors to pay these preference claims without putting them on the dividend sheet was illegal
4. That the power given to the judge by s. 4, ss. 16, to control the assignee is in the nature of giving him personal directions as to his duties, enforceable by imprisonment on default, but that the judge has no power to enforce his orders by judgment and execution though it might possibly compel an assignee to pay costs incurred by his disobedience by making it a condition that he should pay them before he could be could be considered purged of his contempt.
5. *That the only remedy of the assignee under these circumstances* was to apply for a prohibition.

Remarks as to how far admitting jurisdiction waives right to prohibition.

[Chambers, Jan. 23, 1866.]

A summons was issued on 20th December last' calling on the Judge of the County Court of the County of Elgin, and on Duncan Munn, to show cause why a writ of prohibition should not issue to prohibit the further proceeding in the same County Court upon two writs of *fi. fa.* issued on 29th November, 1865, at the suit of Munn, against the goods of Andrew Cleghorn, assignee to the estate of Charles Roe, an insolvent, and upon the rules of court or judgments upo which the said writs of *fi. fa.* issued, and the orders of the judge mentioned in the rules of court, on the ground that the judge had no jurisdiction in the matter to which the said orders, rules, judgments and writs relate,—the resolution of the creditors of the said Roe, to enforce which the orders were made, not having been validly passed by the creditors under the Insolvent Act of 1864, and, even if valid, not containing any instructions which the said judge could lawfully enforce; and no duty being imposed by the terms of the said act upon the said assignee, such as the said orders assume to enforce. And on the ground that the judge of the County Court, even in cases in which he had jurisdiction to enforce the performance of the duties of assignees, has no power to award costs, but can only proceed for contempt of court.

From the papers filed, it appears that the estate of Charles Roe, of St. Thomas, in the county of Elgin, was put into compulsory liquidation; and Andrew Cleghorn, of the city of London, was about the 6th February, 1865, appointed assignee of the estate.

That at a meeting of creditors held at London, on 21st of May, 1865, the following resolution was adopted by the creditors then present:—"That the assignee be authorized to pay at once all claims for wages, upon being satisfied of their correctness, according to the provisions of the statute in that behalf."

That at this time no dividends had been allotted, or dividend sheets prepared, nor had any dividend been made up at the time this application was made.

That Munn claimed wages out of the estate, amounting to $127 35, and demanded payment shortly after the meeting of creditors held in May, and the assignees refused payment.

About the 11th of July last, Munn filed a petition, addressed to the judge of the County Court of Elgin, signed by his attorney on his behalf, praying that a summons might be granted calling on the assignee to show cause why he should not pay the claimant the amount of his

claim, or so much thereof as, upon examining witnesses thereon, might be found due to claimant; and that the assignee be ordered to produce all books, &c, and also to show cause why the judge should not order the said claim to be peremptorily paid.

The attorney of Munn, with the petition, filed his own affidavit, in which he stated that, after the meeting of creditors and on the day thereof, the assignee told him that he would settle about said claim soon after the said 24th May. That since that day he had on two occasions demanded payment of the claim from the assignee, but he on both occasions refused, and refused to appoint a day for receiving evidence of the claim, and said he would not pay that or any other claim for wages, without a judge's order.

The assignee, in his affidavit, states he had no notice of the filing of the petition by Munn, on which the summons issued. He also stated that it is not true that he said he would not pay the claim of Munn, or any other claim for wages, without a judge's order. But when he, the assignee, had declined to pay Munn's claim, Munn's attorney said he would get a judge's order and compel him to do so. Whereupon the assignee said, "if you compel me to do so, I cannot help myself."

The claim of Munn was as follows:

Charles Roe to Duncan Munn.	Dr.
To 19 days' wages, from Nov. 11, 1864, to Nov. 29, inclusive, as seaman, on schooner Josephine, at $1 25...	$23 75
Amount of due bill dated Oct. 4. 1864, for wages due me for sailing Indian Maid to Oct. 3, 1864.	59 35
To wages from Oct. 4, 1864, to Nov. 10, 1864, inclusive, at $35 per month	44 25
	$127 35

The summons issued on July 11, 1865, by the judge of the County Court of Elgin, upon reading the petition of Munn and the affidavit of his solicitor, requiring Andrew Cleghorn, the assignee of the estate of the insolvent (Roe), to show cause why he should not pay the claimant the amount of his claim filed, or so much thereof as might, upon examining witnesses, be found to be due and payable to claimant; and he was also required to produce the books, and to show cause why the judge should not order the claim to be peremptorily paid.

The summons was served on the assignee on the 19th of July.

On the 24th of July, the matter was proceeded with before the judge. Evidence was gone into. It was proved that a note, given by the insolvent for $59 35, was on a settlement for wages due Munn, as a mariner on board of a vessel, to the 4th of October, and in addition another sum of $23 75, in the whole $83 10; and that Munn was paid on account of the due bill, $35 25; leaving due him $17 85. The learned judge thought Munn entitled to be paid that sum, and ordered the same to be paid him accordingly forthwith, with costs.

The assignee did not attend on this summons; and he stated in his affidavit, that believing the judge had no power to make the order asked for, he did not attend on the summons.

On the same day, a formal order was drawn up, by which the judge ordered "that Andrew Cleghorn, the said assignee, do, upon service on him of a copy of this order, forthwith pay to the said claimant, his solicitor or agent, the sum of forty-seven dollars and eighty-five cents, being the amount found to be due to the said claimant, with costs of this application.

The costs of the application were taxed on the 25th July, at £5 9s. 6d.

This order and allocatur were served on the assignee, on the 29th July, and the amount payable thereunder and the costs were demanded of him, but he refused to pay.

On the 19th day of August, a summons was issued on the application of the assignee, calling on the claimant to show cause why the order of the 24th of July should not be set aside with, without, or on payment of costs; and on the 14th of August, this summons was discharged with costs. This order discharging the summons was served on the assignee about the 22nd August.

On the 22nd of August, the assignee paid the attorney of the claimant $47 85, he being satisfied of the validity of his claim to that extent. He refused to pay the costs which were demanded of him in relation to the proceedings taken. The attorney for the claimant, on receiving the amount of Munn's claim for wages, stated that the same was paid and received without prejudice to his claim for costs on the order granted. These orders were made rules of the County Court of the County of Elgin, on the 3rd of Oct., 1865; and, on the 9th of November, writs of *fi. fa.* were issued to the sheriff of the county of Middlesex, on these rules. The first endorsed to levy of the goods and chattels of Andrew Cleghorn £5 9s. 6d., costs taxed on the judge's order; also £5 13s. 6d. costs taxed on making the same a rule of court, and entering judgment thereon, with interest on both sums from the date (29th November), and £1 for the writ. The other was endorsed to levy of the goods and chattels of Andrew Cleghorn £5 0s. 11d, the costs taxed on the order made on the 14th of August, and £5 2s. 6d., being the costs taxed on making the same a rule of court, and entering judgment thereon, with interest on both sums, and also £1 for the writ.

Each writ was also endorsed to pay sheriff's fees and incidental expenses.

It appeared from the affidavits, that the assignee had not appealed against either of these orders to either of the superior courts of common law, or to the court of Chancery, or to any judge thereof, and that no application had been made to set aside the judgments, or either of them

E Crombie shewed cause.

C. S. Patterson supported the summons.

Richards, C. J. — The application is made under Prov. Stat. 28 Vic. cap. 18, the 1st, 3rd, 4th, 5th and 6th sections of which are similar to Imp. Stat. 1 Wm. IV. cap. 21, which permits applications for prohibition on affidavits, and directs how certain proceedings shall be taken therein, with provisions as to costs, &c.

The Insolvent Act of 1864, sec. 5, points out the mode in which claims against the estate of an insolvent are to be placed on the dividend

sheet; and if any dispute arises as to the right of a creditor to rank on the estate of the insolvent, the matter is first disposed of by the assignee, and he makes his award, and this award may be appealed from. The act seems to be framed in the view that the assignee enquires into the claims of the creditors of the estate. On being satisfied of their correctness, he places them on the dividend sheet, and any creditor or the bankrupt may object within a certain time to the correctness of any claim so placed upon the dividend sheet.

When any dividend is objected to, or any dispute arises between the creditors of the insolvent, or between him and any creditor, as to the correct amount of the claim of any creditor, or as to the ranking or privilege of the claim of any creditor upon the dividend sheet, he calls for proofs and hears the parties, examines the books, makes an award as to the claim and the costs of contesting it. Unless that award is appealed from within three days from notice of it, the same becomes final.

This award may be appealed from to the judge of the County Court; and if any of the parties are dissatisfied with his decision (in Upper Canada) they may appeal to either of the superior courts of common law, or the court of Chancery, or to any one of the judges of the law courts. This power of appeal is extended by 29 Vic. cap. 18, sec. 15, passed 18th September, 1865, to any order of a judge made in any matter upon which he is authorized to adjudicate under the oath. But the party must apply for the allowance of the appeal within (formerly five, now) eight days from the day on which the judgment of the judge is rendered.

The proceedings in this matter do not seem to have been taken in the order prescribed by the statute, for the assignee does not seem to have decided on the claim before the application was made to the learned judge of the County Court.

The sections of the Insolvent Act referred to on the argument, as applying to the case, were sec. 4, sub-secs. 4 and 16. Sub-sec. 4 declares that the assignee shall be subject to all rules, orders and directions, not contrary to law or the provisions of the act, which are made for his guidance, by the creditors, at a meeting called for that purpose. Sub-sec. 16 provides that the assignees shall be subject to the summary jurisdiction of the court or judges, in the same manner and to the same extent as the ordinary officers of the court, and subject to its jurisdiction, and the performance of his duties may be enforced on summary petition in vacation, or by the court on a rule in term, under penalty of imprisonment as for contempt of court, whether such duties be imposed upon him by the deed of assignment, by instructions from the creditors, validly passed by them and communicated to him, or by the terms of the act.

Sec. 5, sub-secs. 4, 10, 18, sub-sec. 4, in the preparation of the dividend sheet, due regard shall be had to the rank and privilege of every creditor. By sub-sec 10, clerks and other persons in the employ of the insolvent, in and about his business or trade, shall be collocated in the dividend sheet by special privilege for any arrears of salary or wages due and unpaid to them, not exceeding three months.

Sub-sec. 18 relates to disputes on demands being objected to, which are to be decided by award of arbitrator. I have already stated the substance of it.

Sec. 7, sub-secs. 1 & 2, provides for appeal from the award of assignees to the judge of the County Court, and from the decision of the latter to one of the superior courts of law, or the court of Chancery, or to a judge of any of the said courts.

Sub-sec. 6 of sec. 7 decides that the costs in appeal shall be in the discretion of the court, or of the judge appealed to, as the case may be.

From the best consideration I have been able to give the statutes, I do not think the learned judge of the County Court had the power to adjudicate on the claim of Munn, until it had been decided upon by the assignee. The decision of the assignee might be appealed from; but I cannot see any thing in the statute authorizing the judge to take up the claim in the first instance, and order a certain amount to be allowed. The order also directs the *costs* of the application to be paid by the assignee. The amount of Munn's account as claimed was not allowed him, and the assignee was quite justified in not allowing the whole amount, for it was not due him. The direction of the creditors was only to pay the amount of the wages, on his being satisfied with the correctness of the claim. Why he should have been directed to pay the costs does not clearly appear.

The direction by the creditors to pay these preference claims without putting them on the dividend sheet, would seem to deprive the other creditors or the insolvent of disputing the correctness of the amount allowed, which seems contrary to the spirit if not the letter of the statute.

The power given to the county judge to control the assignee (sub-sec. 16 of sec. 4) seems to be in the nature of giving him personal directions as to his duties, to be enforced in case of disobedience by imprisonment. I do not think, under this section of the statute, the judge had power to enforce his orders by directing judgment to be entered and execution issued against his goods. The judge might possibly compel the assignee who refused to obey his orders to pay the costs incurred in compelling obedience, by making it a condition that he should pay the costs before he should be considered as purged from his contempt. But to order an execution to issue to levy from him the debt allowed, which should certainly be paid out of the estate, as well as the costs, which, if he was wrong, should be paid by himself alone, does not seem quite consistent, nor authorized by the statute.

If the proceeding before the county judge was an appeal from the award of the assignee, there is this difficulty about it, that there had been no dividend sheet prepared and no amount allowed, and the assignee had not decided on Munn's claim There was in fact at that time nothing to appeal from. If it could be considered as an appeal, and coming within sec. 7 of the statute, then the assignee might have appealed against the judge's decision, as the law stood when it was made. He could not appeal against the order of the judge under the statute 17 of last

session, for at the time the order was made the statute had not passed.

The only remedy of the assignee appears to be to apply for the prohibition. It may be contended that the assignee, having applied to set aside the first order of the judge, voluntarily placed himself within the jurisdiction of the court or judge, and, having failed in his application, the power existed to compel him to pay the costs of resisting the application. This would be undoubtedly correct as a general principle where the judge had the power to make the first order, but it seems to me that the right of the judge to amerce the assignee in costs, depends on the question whether he could properly have made the original order, and that as to both orders and writs of execution the same rule must apply.

On the whole, I am of opinion the learned judge of the County Court had no authority to make the orders on which the rules of court were obtained and judgments entered, on which the *fi fa.* against the goods of Cleghorn were issued, and that a writ should go to prohibit further proceedings in the said County Court of the county of Elgin, on the said two writs of execution, and on the rules of court, orders, judgments, &c. As this however is the first application on which this question has arisen, if the claimant, Munn, desires to take the opinion of the court on the subject, I will direct the assignee to declare in prohibition before the issuing of the writ.

UNITED STATES REPORTS.

SUPREME COURT OF UNITED STATES.

Minnesota Company v. National Company.

The Court rebukes, with some asperity, the practice of counsel who attempt to make them bear the "infliction of repeated arguments," challenging the justice of their well considered and solemn decrees; and sends the case of such parties out of court with costs.

This case came here by writ of error to the Supreme Court of the State of Michigan, and under the name of *The Minnesota Mining Company*, plaintiff in error, *versus The National Mining Company and J. M. Cooper*, defendants in error, the action below being for the recovery of real property. Though nominally different the parties were in fact the same parties who litigated the case of *Cooper* v. *Roberts*, adjudged by this court at December Term, 1855. The same title was again, in effect, brought in issue, and the same question again, in effect, agitated. When the question was heard at December Term, 1856, it was elaborately discussed by counsel, and deliberately considered by the court, and an unanimous decision given in favor of the party claiming, as the present defendant in error now in fact claimed. Nevertheless, the losing party, unwilling to acquiesce in a single decision, brought the case again before the court by a second writ of error. This second writ was heard at December Term, 1857. The counsel on that occasion labored with great zeal and ability to convince the court that its first decision was erroneous, but were unsuccessful.

In both the cases last referred to, the controversy came before this court on writs of error in ejectment to the Circuit Court of the United States for the District of Michigan.

Veiled under the new forms stated at the beginning of the case, to wit, the forms of a writ of error to the highest State Court of Michigan, and with the names of Mining Companies for parties, and with some other unimportant variations, the matter was now brought for a third time before this tribunal; no counsel presenting himself to argue the case for the plaintiff in error, and the argument being by brief of non-appearing counsel only.

Mr. Buel for the defendants in error, after protesting against what he declared to be an abuse of the suitor's privilege and of this court's well known longanimity, was beginning to argue the case on merits, when he was stopped by the Chief Justice, who informed him that the court, as at present advised, thought such argument unnecessary; and that he might consider himself, for the present, and unless he received intimation to the contrary hereafter, as relieved.

The court having examined the case in conference, and being satisfied of its nature as above set forth, Mr. Justice Grier, after declaring this identity, delivered himself, in behalf of their Honors, with some emphasis, as follows:

This is another, and it is to be hoped the last attempt to persuade this court to reverse their decision in this case.

Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only; but when courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change. Parties should not be encouraged to speculate on a change of the law when the administration of it is changed. Courts ought not to be compelled to bear the infliction of repeated arguments by obstinate litigants, challenging the justice of their well-considered and solemn judgments.

The decision of the Supreme Court of Michigan, in conformity with the opinion of this court twice pronounced upon the same title is hereupon

Affirmed with costs.

GENERAL CORRESPONDENCE.

Kidnapping—29 *Vic.*, *Cap.* 14.

To the Editors of the U. C. Law Journal.

Gentlemen,—An error appears to have been made in the draft or copies of this Act to which it would be well to call attention. The 2nd sec. provides that all the provisions of the 97th Cap. of C. S. C. respecting accom-

sories before or after the fact should be applicable to this Act, whereas Cap. 97th C. S. C. was repealed by 27 & 28 Vic., Cap. 19.

Yours &c.,

Walkerton 28th, March 1866. Lex.

Clerk of the Peace—Fees.

To the Editors of the U. C. Law Journal.

Sir,—Will you have the goodness to afford me space in the *Law Journal* to ask if the Clerk of the Peace or County Attorney can charge a fee of *one shilling* for looking at the *Canada Gazette*. I had occasion, a few days ago, to request the junior partner of the courteous and very obliging County Attorney (not a hundred miles from Toronto) to allow me to look at the *Gazette* in his office, and on returning it I was informed that I must pay a fee of twenty cents for the search. If the charge was made for the *politeness* of the gentleman in question, I have nothing to complain of; but if made for merely looking for a few moments at a public newspaper, I have grave doubts whether it can be honestly made. I suppose if it was an *imposition* it ought to be exposed.

Yours, &c.,

April 20, 1866. J. F.

[We notice in the tariff of fees for Clerks of the Peace, as given in *Keele's Justice*, the following: "For every search under three years, (to be paid by the party making the same) $0.20." We suppose, unless the whole thing were a joke, that it is under the supposed authority of the above item that the charge was made. But we can scarcely conceive it possible that such a charge could seriously be made for a mere act of common courtesy. If our correspondent is not under some misapprehension as to this, we should certainly agree with him that such a transaction "should be exposed."—Eds. L. J.]

Articled Clerks.

To the Editors of the U. C. Law Journal.

Gentlemen,—Would you give an opinion on the following, and thus oblige many articled clerks, besides the writer. Have the Benchers of the Law Society power, under cap. 21 of the statutes of the first session of 1865, to admit articled clerks whose term of service expires between the second Saturday before the first day of term, and the first day of term? Of course the articled clerk, whose time expires as aforesaid, cannot leave the requisite affidavit of due service under the contract of service, which causes the difficulty. Your valuable opinion on the above will confer a favor. Yours truly,

An Articled Clerk.

[We have been told that the Benchers of the Law Society have admitted clerks whose position has been similar to that of our correspondent. More than this we cannot at present say.—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

EX. Noble v. Ward. Jan. 4.

Statute of Frauds, s. 17—Contract in writing—Subsequent parol variation.

A subsequent parol variation of a contract in writing for the sale of goods under the 17th section of the Statute of Frauds is wholly void and does not rescind the original contract which may be sued upon notwithstanding. (14 W. R. 397).

C. P. Jan. 12.

Hirschfield v. Smith.

Bill of exchange—Foreign bill—Action against indorser—Notice of dishonour—Alteration in indorsement.

In an action by holder against indorser of a bill of exchange, drawn by a Frenchman in England, and directed to and accepted by a Frenchman in France, payable in France, and indorsed by the drawer in blank, and delivered to the defendant, an Englishman, in England, who indorsed in blank and delivered to the plaintiff, a Frenchman, in England, who indorsed and delivered to B., a Frenchman, in France.

Held, that the bill was a French bill, and that it was sufficient for the plaintiff to show that he had given the defendant notice of dishonour in accordance with the law of France.

Rothschild v. *Currie*, 1 Q. B. 43, followed.

After the defendant had indorsed, an alteration was made, by or on behalf of the plaintiff, in the drawer's indorsement, by inserting thereover a date and consideration, and the rate of exchange at which payment was to be made.

Held, that these alterations had the effect of altering the rights and liabilities of the defendant, and that therefore they rendered the bill void. (14 W. R. 455.)

Monthly Repertory.

C. P. Jan. 20.

Phillips and Others v. Poland.

Bankrupt—Debts contracted subsequent to Bankruptcy—Arrest—Protection—Creditor.

Where freedom from arrest by any creditor is granted to a bankrupt under 12 & 13 Vic. c. 106, s. 112 (before his final discharge), the bankrupt is not thereby protected from arrest by a creditor, whose debt accrued after the adjudication, for "creditor" in that section means a creditor who could prove under the bankrupicy. (14 W. R. 433.)

Q. B. Jan. 24.

Winsor v. The Queen.

Criminal procedure—Trial for murder—Discharge of jury without a verdict—Second trial on the same indictment—Record of second trial setting forth the discharge of the jury on the first trial and the grounds thereof—Error thereon—Rule of practice—Review of discretion of a judge by a court of Error—Examination of one prisoner as a witness without having taken a verdict as to such witness—Admissibility of evidence not a proper subject for the consideration of a court of error.

On a writ of error on a record from a Court of Oyer and Terminer and gaol delivery, which record showed that at the Lent Assizes the plaintiff in error and one H. had, on indictment for murder, been put on their trial, and that the jury had been sworn, and the case on the part of both the Crown and of the prisoners had been respectively duly concluded; and that the jury had, on the evening of a Saturday, retired to consider their verdict, and had remained in deliberation until a few minutes before twelve o'clock, and had then declared that they were unable and unlikely to agree; and that for this and other reasons stated on the record the judges of assize had discharged the jury; and that, at the Summer Assize following (from which this record was brought up), it was prayed, on the part of the Crown, that the plaintiff in error might be tried separately on the aforementioned indictment, and that the other prisoner, H., might give evidence on behalf of the Crown; and that the plaintiff in error was then, in pursuance of the prayer, put on her trial, and that H. did give evidence on behalf of the Crown; and that the trial proceeded to a verdict of guilty, and judgment against the plaintiff in error (there being no verdict averred in the record against the other prisoner).

Held, that the discharge of the jury on the first trial was no ground of error against the judgment on a subsequent trial on the same indictment.

That it was in accordance with the present rule of practice for a judge in his discretion to discharge a jury who say they cannot agree on a verdict, and that a court of error cannot review the discretion of a judge so discharging a jury.

That such subsequent trial is no violation of the rule that "no one shall be twice vexed on the same charge."

That the admissibility of evidence is not a subject which can be considered by a court of error. (14 W. R. 423.)

EX. Bryant v. Richardson. Feb. 8

Infant—Necessaries.

In the absence of special circumstances to make them so, cigars and tobacco cannot be necessaries for an infant. (14 W. R. 401.)

C. P. Feb. 10

Walton v. The London, Brighton and South Coast Railway Co.

Contributory negligence—Leaving horse and cart unattended.

The plaintiff's horse and cart were standing at his shop-door unattended, and close behind them were drawn up the defendants' horse and cart, also unattended. The defendants' cart came into collision with the plaintiff's cart, and the plaintiff's horse broke through his shop-window.

Held, that there was evidence of contributory negligence on the part of the plaintiff, which the judge was bound to leave to the jury. (14 W. R. 395.)

C. C. R. (Ir.) Feb. 12.

Reg. v. Wallace.

Where an Act of Parliament makes a gazette evidence, if it purport to be printed "by the Queen's printers," or "by the Queen's authority," a gazette purporting to be printed by A. B. without giving his style as Queen's printer, and purporting to be printed "by authority," is not receivable.

Quære—Would evidence *aliunde* be admissible to show that A. B. was the Queen's printer, and that the authority was the Queen's authority? (14 W. R. 462.)

CHANCERY.

V. C. W. Hadley v. Robins. Feb. 10

Sale by order of the court—Conditions of sale.

Where conditions of sale incorrectly state the effect of the trusts of a reversionary interest, the purchaser of that interest is not bound to accept the title. (14 W. R. 387.)

V. C. W. Feb. 16

The Peninsular, West Indian, and Southern Bank (Limited) v. Darthez.

Injunction to restrain proceedings at law—Delay—Answer.

Where a defendant has not, within a reasonable time, put in his answer to a bill charging fraud against him, he cannot resist an injunction to restrain him from proceeding in his action at law. (14 W. R. 454.)

V. C. W. Feb. 19.

Acomb v. Landed Estates Company.

Practice—Company—Affidavit as to documents.

A person properly made a party for discovery, as secretary to a company, cannot evade making such discovery simply by resigning his situation after the filing of the bill. (14 W. R. 357.)

V. C. W. Feb. 24.

Re Tarsey's Trust Estate.

Bequest to an unmarried woman "for her own sole use and benefit absolutely"—Separate estate.

Notwithstanding the remarks of Lord Westbury in *Gilbert* v. *Lewis*, the court will hold a direct bequest to an unmarried woman "for her own sole use and benefit absolutely" to create a valid separate estate for her benefit, when it appears from the will that the testator contemplated the probability of the legatee's marrying, and when it does not so appear that he intended, by the use of the word "sole," to exclude some person other than the legatee's possible husband from the benefit of the bequest. (14 W. R. 454.

V. C. W. Kelly v. Morris. Mar. 1.

Copyright—Infringement.

Copyright may exist in a compilation. The publisher of a work may not use the information published by another person to save himself trouble and expense, even when that information is accessible to all. (14 W. R. 496.)

L. J. Chadwick v. Turner. Mar. 8.

East Riding Registry Act — Concealed will — Notice—Priority—Practice.

The East Riding Registry Act, 6 Anne, c. 35, affords no protection to devisees where no memorial either of the will under which they claim, or of a contest or impediment affecting its registration, is registered within the times prescribed by the Act.

A registered title can be affected only by notice which is clear and distinct, and by that which amounts in fact to fraud.

Where one of several defendants appeals from the whole decree, the plaintiff is entitled to open the appeal. (14 W. R. 491.)

PROBATE.

Re Bellamy. Feb 20.

Will written partly in ink and partly in pencil—Probate of—Intention—Appearance of document—Indorsement of envelope—Codicil.

Where a will seemed to have been first written in pencil and afterwards traced with ink, but not completely, words in some cases being written in ink above, and apparently in substitution for, the pencil writing, and in other parts the pencil writing standing alone.

The court declined to include the pencil writing in the grant of probate of the will.

The fact that a will is found with a codicil in an envelope indorsed as containing the codicil only will not raise any presumption that the will was not meant to take effect. (14 W. R. 501.)

Re Dobson. Feb. 6.

Probate—Will not contingent.

"In case of any fatal accident happening to me, being about to travel by railway."

Held, not to render a will contingent.

REVIEWS.

A Journal for Oil Men and Dealers in Land. By J. D. Edgar, of Osgoode Hall, Barrister-at-Law; with a new and correct map of the Oil Districts, by J. Ellis, jun.

We fancy we hear our professional readers asking what are "*oil* men?" Fat men, lean men, rich men, poor men, tall men and small men, have for a long time been topics of daily discourse. But "oil men" is an innovation of modern days. They are men interested in the buying and selling of "oil land," or of coal oil itself in the crude or refined state. For all such this interesting little brochure is intended. All such by the study of this book may become sufficiently learned to understand the ordinary requirements of law—as to agreements for the sale of land—mode of enforcing agreements, and grounds of refusal to fulfil agreements—about title to land in Upper Canada—leases, mortgages, and points relating to oil and mineral lands. The remarks of the writer are free from professional technicality.

He mentions in his preface that "any attempt to popularize the rules of law is deprecated by some professional men." We know of none such. A liberal education is not complete without some knowledge of the elements of law, and the more it is popularized the better will be the education of those who acquire even a popular knowledge of its principles. It is true that a little law is said to be a dangerous thing. With the use to be made of the learning when supplied we are not at present concerned. But this we can say, that the man who fancies he can make himself a lawyer by reading "handy books of law" is greatly mistaken. We, however, agree with Mr. Edgar that "a man cannot always have his solicitor at his elbow, and even when he has, he naturally desires to know something about the nature of the security in which he is investing his money." If his solicitor be not at hand and not at all communicative, the perusal of the little book before us will afford some instruction to him on such matters. If he discreetly use the knowledge thus acquired, he may profit by it. But if he imagine that he knows enough of law on the subjects treated of to dispense with his solicitor, the chances are that an appeal to his solicitor during the pendency of an expensive law suit will be the reward of his self-sufficiency.

This, however, is no reason why popular law books should not be freely purchased by the classes of the public for whom they are intended. The author means well, and is not responsible for the misguided use to which foolish or vain men may apply the knowledge he supplies them. He cannot with his books give to the purchaser either brains or discretion, and if through the want of the latter learning be misapplied, the fault does not rest with the author.

The book before us is preceded by a well-executed map of the oil district, which of itself is of as much value as the selling price of the book, and the typography of the work is greatly to the credit of Messrs. Rollo & Adam, the enterprising publishers.

(*Examination Papers, as perused and settled by John Punch, Gent., one, &c.*)

COMMON LAW.

Can a "declaration on promise" be made to a "femme sole" without "protestation?" What is the effect of acceptance in such cases? Is the common form, "Well! I declare," sufficient to secure "quiet enjoyment" without any "further assurance?" Supposing yourself "accepted at sight," or by parole, according to the custom of London, would you allow the "parole to demur?"

STATUTE LAW.

What is "The Coal-Whippers' Act?" What are the provisions of the Mutiny Act as to coal-whipping? Can coal be "privately whipped?" Are colliers ever "lashed alongside?" How many lashes can be given in such cases? Is there any *lighter* punishment? Who was "Old King Cole?" Who were his "fiddlers three?"

"Every fiddler had a good fiddle,
And a very good fidle had *he*."

Is this a *coal metre?* Did the property in the fiddles vest in the King or in the fiddlers?—*Punch.*

JUDICIAL SAYINGS.

(*Selected from the Reports by* J. M. S. G. Schank, *Notary Public.*)

Writ of Right.—The issuing out a writ of right is odious in the sight of the law. This proceeding was always so disliked, that so far back as 1783 Lord Kenyon brought a Bill into Parliament to provide that if the demandant in a writ of right failed he should pay costs, and that (contrary to the old practice) the demandant and not the tenant should be the party to begin. In 1826, when I had the honor of a seat in Parliament, I also procured a Bill, with similar provisions, to pass the House of Commons, but it was thrown out by the Lords; and now the writ is abolished altogether by the statute 3 & 4 Will. 4, c. 27, except in the particular cases provided for by sec. 37: (*The Vice Chancellor*, 5, L J., N. S., 14, Ch)

Terms.—In almost every trade there are certain terms and expressions used by the persons dealing in them, which are not intelligible to strangers to the trade. For instance, in the trade of insurance the word "average" is in constant use, having a meaning quite different from its ordinary understood sense. So also, there is the word "prompt," which is to be found almost universally in London bought and sold notes and contracts of sale. This word, as used, would be unintelligible to persons unacquainted with trade terms and language, and I apprehend that when such terms have been long in use and of frequent occurrence in courts of law, the judges are as much bound to know their meaning and apply them, as they are bound to know and apply the ordinary terms of law, which are quite unintelligible to persons not lawyers. By the "prompt day" is understood the day for payment on sales of goods not payable by bills, which varies in different trades: (*Pulling's Treatise on the Laws of London*, 464; *Martin, B.*, 32 L. J., N. S., 262, Q. B.)

From Rolls we learn this lesson brief—
A Romilly, with rare luck gifted,
Shows how a lawyer like a leaf
Is by a little *rustle* lifted.—*Punch.*

APPOINTMENTS TO OFFICE.

NOTARIES PUBLIC.

STEPHEN FRANKLIN LAZIER, of the City of Hamilton, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada. (Gazetted April 14, 1866.)

JOHN JENNINGS BROWN, of the City of London, Esquire, Attorney-at-Law, to be a Notary Public for Upper Canada. (Gazetted April 21, 1866.)

EDWARD DEANE PARKE, of the City of London, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.

JOHN A. KAINS, of St. Thomas, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada (Gazetted April 28, 1866.)

CORONERS.

WILLIAM S. FRANCIS, of Invermay, Esquire, M.D., to be an Associate Coroner for the United Counties of Huron and Bruce. (Gazetted April 14, 1866.)

ST. JOHN CASS TISDALE, of the township of Hamilton, Esquire, to be an Associate Coroner for the United Counties of Northumberland and Durham. (Gazetted April 21, 1866.)

ROBERT BURNS, of Pakenham, Esquire, M.D., to be an Associate Coroner for the United Counties of Lanark and Renfrew.

GEORGE D. MORTON, of Bradford, Esquire, M.D., to be an Associate Coroner for the County of Simcoe. (Gazetted April 28, 1866.)

MEMBERS OF "CENTRAL BOARD OF HEALTH," UNDER C. S. C., CAP. 38.

ROBERT LEA MACDONNELL, of the City of Montreal, Esquire, M.D.

GEORGE S. BADEAUX, of the City of Three Rivers, Esquire, M.D.

EDWARD VAN COURTLANDT, of the City of Ottawa, Esquire, M.D.

HAMNETT HILL, of the City of Ottawa, Esquire, M.D.

JEAN E. J. LANDRY, of the City of Quebec, Esquire, M.D.

JOSEPH CHARLES TACHE, of the City of Ottawa, Esquire, M.D.

JAMES A. GRANT, of the City of Ottawa, Esquire, M.D.

JOHN R. DICKSON, of the City of Kingston, Esquire, M.D.

J. CLEOPHAS BEAUBIEN, of the City of Ottawa, Esquire, M.D.

WILLIAM T. AIKINS, of the City of Toronto, Esquire, M.D.

JOHN D McDONALD, of the City of Hamilton, Esquire, M.D., and

CHARLES G. MOORE of the City of London, Esquire M.D.

TO CORRESPONDENTS.

"S. J. L."—All the answer we can give to your question has been already given.

"Lex"—"J. F."—"An Articled Clerk"—Under "General Correspondence."