DIARY FOR OCTOBER.

1. Wed... Clerk and Deputy Clerks of Crown and Master and Registrar in Chancery to make quarterly returns.
6. SUN .. *19th Sunday after Trinity.*
7. Mon... County Court Term begins.
12. Sat.... County Court Term ends.
13. SUN .. *20th Sunday after Trinity.*
15. Tues .. Law of England introduced into Upper Canada 1792.
18. Fri.... *St. Luke the Evangelist.*
20. SUN .. *21st Sunday after Trinity.*
25. Fri.... *Crispin.*
27. SUN .. *22nd Sunday after Trinity.*
28. Mon... *St Simon and St. Jude.*
31. Thurs. *All Hallow Eve.*

CONTENTS.

The Local Courts'
AND
MUNICIPAL GAZETTE.

OCTOBER, 1872.

TO OUR READERS.

The *Local Courts' and Municipal Gazette* became a distinct publication from the *Upper Canada Law Journal* in the year 1865. The reasons for that change were fully given in the first page of the January number of that year. It was there stated that at first a large measure of support came from County and Division Court officers, but that at that time (1865) this had somewhat changed, and professional men and County and Division Court officers stood nearly on a par as to numbers on the subscription list. This change has continued so that now the support of the latter class has become so small as not to warrant the extra expense attendant upon a separate publication, whilst the number of our subscribers amongst the profession has increased in a most satisfactory and encouraging manner. The reason for this change is easily accounted for. In the first place, the business of the Local Courts has greatly fallen off, so that many who could well afford the luxury of a legal paper have been reluctantly compelled (we quote the words of many who have so expressed themselves) to withdraw their subscriptions; and in the second place, officers now-a-days are pretty well versed in their duties, and do not require the same advice and information which it has been our province and our pleasure to give them. We think that for this result we may, without egotism, take some credit to ourselves. We think we have been enabled in many ways to induce a greater uniformity of practice, and to inculcate more sound views of the duties of local officers than obtained before we entered the field.

We do not, however, wish our readers to understand that we do not intend in future to do all in our power to supplement and continue what we have so far accomplished for the benefit of those who were at the first our principal supporters; but a due regard for our own interests compels us, to prevent a loss to ourselves, again to make a change by discontinuing the publication of the *Local Courts' Gazette*

after the end of this year. We shall, however, reserve full space (and our borders will be enlarged for that purpose) for the discussion of all matters affecting the Local Courts and County and Municipal officers, and we trust to receive the same support from our friends "of that ilk" as formerly. We must, moreover, owing to the increased price of printing and all other expenses, increase our annual subscription to the *Law Journal*, which we shall send to the present subscribers of the *Local Courts' Gazette* unless they express a desire to discontinue their subscription.

We thank our many kind friends among the County and Division Court officers for their support, and for many expressions of satisfaction and good-will. We trust they will be able to continue their support and encouragement when the *Local Courts' Gazette* shall have again merged in the *Canada Law Journal.*

Our advertising columns announce the publication of a new work by Mr. S. R. Clarke, of Toronto, Barrister-at-Law, on the Criminal Law of Canada, which we have reason to think will be not only a success in itself, but also of immense service to the Profession and Magistracy in the Dominion at large. We have not yet had an opportunity of examining it, but a cursory glance would seem to show that it will prove a most valuable treatise on the criminal law as it applies to this country.

A pretty fair test of the confidence of the public and profession in their Judges is the number of appeals from their decisions. A return to an address of the House of Commons of Canada gives a statement of the number of cases taken before the Privy Council in 1869, 1870 and 1871, from Ontario, Quebec, New Brunswick and Nova Scotia, and the information given is highly suggestive. There have been only two cases actually appealed from Ontario; and though appeal bonds were filed in two other cases, no further action will probably be taken in them. Quebec has sent no less than twenty-one cases to the Privy Council, six in 1869, five in 1870, and ten in 1871. This points to a pleasant state of uncertainty in the minds of the profession in the Province of Quebec, as to what the law is in a variety of cases, and shews a laudable desire on the part of the litigants "to get to the bottom of it." The Supreme Court of New Brunswick has, during the same period, granted leave to appeal in six cases; but the courage of those concerned has partly failed them, for only three have been transmitted to England, and no action appears to have been taken in these. Only one case has been appealed during the same three years from Nova Scotia; and the further information is given in the return, that only three cases in all have been taken to England from that Province since 1860, when Sir Wm. Young was appointed Chief Justice of the Supreme Court. It will thus be seen that, taking into consideration the business done in Ontario, the number of appeals is almost nominal as compared with Quebec, and much less than those in the other Provinces. The encouragement given to those who desire to have a *final* decision is not very great; for, out of all the cases referred to England, judgments have been given in only three of the Quebec appeals, and in none of the others; two of the Quebec judgments having been reversed, and one confirmed.

We lately culled out a few judicial strictures upon the way in which some of the Canadian County Court Judges do their work. We observe from a late judgment of Sir Robt. Phillimore, in an Admiralty appeal, that his spirit has been vexed from a like cause. He mildly called attention to the fact that there were two things which concurred to render it impossible for the court to come to any satisfactory conclusion on the materials before it. First, it appeared that the notes of the evidence were merely rough notes taken by the learned Judge of the County Court of Northumberland for his own guidance, and though no doubt (as he charitably puts it) sufficient for his purpose, yet they could not be regarded as satisfactory for the purpose of an appeal. Second, that he (Sir Robert) was without the assistance which, in many cases of the kind, he had derived from a statement of the reasons which influenced the court below in arriving at the decision appealed against. *The Busy Bee*, 20 W. R. 813. From all which it would appear that there are County Court Judges who are alike all the world over.

A friend lately sent us a West Indian newspaper, which contains the charge of Chief Justice Peel to the Grand Jury at Antigua. It appears that one result of the confederation

of the Leeward Islands, proclaimed on 30th March last, was the extinction of grand juries in that colony. The learned Judge "regrets the cessation of an institution which history tells us has often done good service in the cause of liberty and justice;" and he thus continues: "Its value has been most apparent in troublous times. Often and again, in England's stormy story, in her many fits of political and religious frensy, have Grand Juries—those of London and Middlesex especially—thwarted the vengeance of an angry monarch, an unscrupulous government, or of a victorious faction, and interposed between them and their intended victim."

LAWYERS IN PARLIAMENT.

The elections for the Dominion House of Parliament being now over, it may not be out of place to see how the legal profession in Ontario is there represented. We find on looking at the list, that out of the eighty-eight members for Ontario, some twenty are barristers, and of these seven are Queen's counsel. It would be highly uninteresting to discuss the question as to the propriety of having a large number of lawyers in Parliament, and we presume the usual number of "clap-trap" speeches have been made on that subject whenever a suitable occasion was presented by a member of the legal fraternity being a candidate, without in the slightest degree affecting the result of his election. But it is interesting to note the classification of those who have been elected.

Of course the first on the list is the statesman and great constitutional lawyer, who has for so many years ruled the destinies of this Dominion, but who has during that time been separated from the practice of his profession. The most prominent figures next to the Minister of Justice are, on one side of the House, the veteran and eloquent leader of the Bar in Ontario, the Treasurer of the Law Society, and on the other, one who, though his junior by many years, has in a short period of time, by his high talent and great learning, obtained a reputation at the Equity Bar of this Province which has never been equalled, and who is as well known to the country at large as he is in the profession. Of the rest, however, there are not very many whose names are familiar either on circuit or at Osgoode Hall. This may be to some a matter of surprise, but a little consideration will easily explain the reason. In fact, we need not recapitulate in our own language what has already been stated publicly by lawyers in Parliament on this subject. Mr. Blake, in one of his speeches, said, when replying to some attack made upon him:

"When I went into public life, I was an active member of a large firm, and had a large and increasing share of the profits, producing to me at that time over £3,100 a year. Now my position is very different, for I have a fixed income from the firm of £1,200 a year only, while I should be receiving over £3,000 if I had remained in private life. I can gain nothing from the increased profits of the firm," &c.

Small encouragement this to ruin one's health in the public service. Even if in receipt of an official income in addition, Mr. Blake's salary would be considerably less than what he would receive from his profession. Of course, professional men who enter public life do not do so (at least we do not care to discuss the standing of those who do, if such there be) for the purpose of increasing their incomes; but those who thus devote themselves to their country, have other ills to bear than the mere loss of incomes. This part of the subject has been amplified by Mr. Harrison, when replying to an address of his constituents asking him again to become a candidate for West Toronto. His observations contain so much sound common sense, and so fully cover the ground, that we reproduce them. He says:

"I cannot longer owe a divided allegiance, part to professional and part to parliamentary duties, * * * and I cannot, after mature deliberation, hesitate as to the choice.

"What is it to be a member of the Parliament of Canada? It is yearly, at a most inconvenient time, to leave one's home, to neglect one's business, to work hard for the public, with the prospect of little or no thanks; to be abused when honestly doing what one's conscience conceives to be for the public interest; to have the worst possible motives imputed; to work day by day in committees of the House, considering all manner of details; to pass sleepless nights in an unhealthy atmosphere; and so to continue from year to year, and in the end, to be cast aside or elevated to office—and, if so elevated, to live life of great drudgery and respectable poverty.

"What is it to be a member of the Canadian bar? It is to attend to one's business, to be well paid for what one does, to be praised for the honest discharge of duty, to be free from the imputation of unworthy motives, to work when and so often as one pleases, to have one's rest

when rest is needed, to obtain a position worthy of honourable ambition, to retain it so long as one's health and energies will permit, and so to work from year to year in the almost certain hope of independence.

"It may be said that these views are selfish. No doubt they are so. But the law of self is a fundamental law of nature. The man who affects to disregard this natural law is as surely pun ished as the man who violates human law. An empty pocket and broken health are too often the penalties of faithfully serving the public, to the neglect of one's immediate interests.

"There are, in almost every constituency, some men who can serve the public with less inconvenience to themselves than others. Men who, by reason of large fortune, are independent of the sheriff, may safely do so. Men who have nothing to lose, and so nothing for the sheriff, may also do so. But the middle man, who has something to lose, and is desirous of increasing that something for the sake of his family, has everything to lose and little to gain. What is the gain? Perhaps after years of toil a position in the Government, a position which enables the malignant to attack with greater malignity, a position which demands of the sufferer unwearied exertions for less pay than the salary of a bank manager or the income of a second-class lawyer. And yet men are found, election after election, to summon caucuses, to attend conventions, to accept nominations, to address public meetings, to be slandered by one political party for enlisting under the banner of the other political party, to banish themselves from house and home, and yearly to imprison themselves for two or three months at hard labour within the walls of a House of Parliament. It is well that there should be such men. Selfishness is, I admit, a low spring of action; ambition is a more popular one. Some men are vain of distinctions. The ability to write M.P. after one's name, or to have the prefix of "Honourable" is, by some, deemed worthy of all the sacrifices which I have detailed. I have counted the cost, and am no longer prepared to continue the sacrifice. If ambition alone were the object of my life I would, perhaps, continue in public life. But one, in flights of ambition, is frequently reminded that humanity needs sustenance, and that other calls, if not so lofty, are not, on that account, to be despised."

We may here *en passant* quote an observation on the above remarks of Mr. Harrison by Mr. Goldwin Smith, in the *Canadian Monthly*, when speaking of the demoralizing tendency of political struggles:—

"The parting address of Mr. Harrison, of course, afforded a butt for the arrows of small wit. Yet, amidst the torrent of electioneering trash, it was, perhaps, the one thing worthy of a moment's remembrance. We shall find that it is necessary to make public life tolerable to sense and self-respect, or to pay for their exclusion."

Of course, there are prominent men, leaders of political parties, who will be found ready, though not willing, to sacrifice their own ease and comfort on the call of patriotism or ambition, but these are so few as to form the exception; and whilst we honour these for their patriotism, or pity those for their ambition, we can scarcely wonder that so few of those who have taken a first place at the Bar, think it worth their while to venture on the stormy sea of politics.

SURROGATE COURT ADVERTISEMENTS.

In the palmy days of Chancery practice, administration suits were considered fair game for the profession. One of the English Vice-Chancellors, who loved his joke, was wont to say when pronouncing judgment on applications of this kind, "Let the usual order go for the destruction of the estate according to due course." But now-a-days, "*Nous avons changé tout cela.*" Yet still a strict eye has to be kept upon all matters pertaining to the estates of deceased persons. Very often there is no one who has a personal interest in keeping down the expenditure connected with the adjustment of such estates.

Our attention has been lately called to a quite unnecessary outlay for disbursements in publishing advertisements of the Surrogate Courts for next-of-kin and the like, prior to grant of administration. Take, for instance, cases arising under the 35th section of the Act, C. S. U. C. cap. 16, where a citation or summons is published pursuant to the 26th Rule of Court. It is true that this rule requires the judge to direct by special order in what papers the citation or summons is to appear by way of advertisement, but neither statute nor rule of court requires that both the order and the citation should be published, as is almost invariably done. There is no propriety in publishing—no necessity to publish the order: all that is accomplished by so doing is to double the length and the expense of the advertisement. The order is intended, not for the information of the persons cited, but for the guidance of the officers of the court and the solicitors in charge of the business.

COMMERCE IN LAND.

In former years, Mr. Cobden was one of the most conspicuous movers in England in agitating for the adoption of a scheme tending to reform the law relating to land, in its possession, enjoyment and disposition, and in matters referring to its title by inheritance or purchase. His views were, that the law should be so changed as to give greater freedom to the alienation of land, so that owners willing to sell, and persons of means willing to buy, should be able to deal together with safety and expedition, and also without undue expenditure in searching and clearing up the title. To this end, he favoured the adoption of the law of primogeniture, and was prepared to advocate the incorporation into English law of certain portions of the French legal code. Since his time, there has been a movement in the same direction going on in England to a greater or less extent. The last manifestation of its progress is to be seen in the proceedings at the Social Science Congress for this year.

Mr. Jacob Waley, one of the conveyancing counsel of the Court of Chancery, read a very comprehensive and able paper concerning the best means for facilitating the transfer and disposition of land,—having special reference, of course, to property in England. He does not deal with the subject of registration of title, which gives Canada an immense advantage in the ease and simplicity, to say nothing of the smallness of expense, with which land can be transferred from owner to owner. But he suggests certain changes in the mechanism of the English system, which are of value here in so far as we have adopted the English law of real property. These details he has grouped under six divisions, as follow:

"I. It will hardly be questioned that the length of time allowed by law for the assertion of dormant claims largely contributes to the expense and difficulty of the preliminary investigation to which the title to land is subjected upon transfer. Now, the length of time which ought to operate as a bar to an unasserted title must, of course, differ according to circumstances. When the law is not easily accessible or put in motion, when communications are imperfect and intelligence travels slowly, so that opportunities are given to the powerful and the crafty to wrest the devolution and ownership of land out of its lawful course, a longer time must obviously be allowed for the assertion and restoration of displaced titles. No one, probably, has ever perused our older law books, from Littleton downwards, without noticing the great space and importance given to the subject of disseisin or forcible dispossession of the rightful owner of land, and inferring the comparative lawlessness of the times when disseisin was regarded as among the ordinary contingencies of landed property. At present a possession, adverse to the true legal title, has very rarely any other foundation than accident; and when a misconception of this kind has once occurred, it is rarely brought to light otherwise than by accident. Such windfalls of fortune it seems consistent with a sound jurisprudence rather to discourage than to promote. Even under the old law, a fine followed by non-claim for five years operated in most cases as a conclusive bar; and it appears to me that in the circumstances of modern society, a period of five years, instead of the twenty now given by the Statute of Limitations of the 3 & 4 Will. IV., would be quite sufficient to allow for the assertion of dormant or displaced rights, with the addition, say, of ten years more in cases of infancy and absence.

"II. Under the present Statute of Limitations of 3 & 4 Will. IV., an adverse possession gained by time against a tenant for life is inoperative against his successors in interest, each of whom gets a new period of twenty years from the time at which his own interest would commence. It has been suggested, and in that suggestion I concur, that adverse possession should operate against the estate—that is to say, not merely against the limited owner, during the currency of whose interest the adverse possession takes place, but against the whole series of owners having successive interests, who for this purpose should be considered as represented by the owner entitled to the possession and barred by the non-assertion of his rights.

"A proposal to the above effect was, I believe, contained in a bill unsuccessfully promoted some years since by Lord St. Leonards. It may appear unjust that the *laches* of the tenant for life should bar the remainderman, but I think that the injustice is apparent only, the impression being due to our technical conceptions as to the ownership of land. If the limited owner, instead of being called tenant for life, were regarded as owner of the estate, but with a limited power of alienation, there would be nothing repugnant in the estate being bound by his *laches*. Besides, the case of land being recovered by the remainderman after the tenant for life has been barred by adverse possession, is so rare as to render it inexpedient that it should be the subject of special legislative provision. *In ea quæ frequentius accidunt subveniunt jura.* It must be admitted that both the changes here contended for, namely, a shortening of the period of limitation and the operation upon the estate of adverse possession as against

a limited owner, would require the broad and free exercise of the jurisdiction to deal with cases of fraud so as to prevent unjust acquisition by trustees and others having peculiar means of knowledge or influence, or owing to collusion between the limited owner and the wrongful possessor.

"III. As under the course of dealing by which a purchaser is protected—roughly indeed, but on the whole pretty effectually—against concealed incumbrances, the possession of the title deeds is that on which he has mainly to rely as evidence of the safety of the title, it is most desirable to eliminate those risks which arise when the ownership of the title deeds is not accompanied by the full and unencumbered ownership of the estates. The predicament of an owner in fee, who by settlement has reduced his estate to a tenancy for life, and who, retaining the title deeds, would, by mere suppression of the last settlement, be able to present all the outward signs of absolute ownership, is constantly present to the apprehensions of the conveyancer. The danger occasioned by this facility for fraud might be obviated, if the law required, as a condition of the validity of settlements of land against a subsequent purchaser, that the settlement should be enrolled, say, at the Common Pleas, at which searches have in ordinary course to be made before the completion of the purchase. For the purpose of such an enactment, a settlement might be defined as an instrument (not testamentary) by which successive interests are created in land or the proceeds of land, or by which the land is subjected to any charge otherwise than for the payment of money lent.

"IV. Though I think that the system ofsettlement by which persons in being are restricted to the enjoyment of land or of the income of the proceeds during their lives, and the corpus is retained for the next generation, is one which has unanswerable claims to be preserved, I do not hold the same opinion with regard to the ingenious and elaborate system of protection to estates tail, which prevents alienation by expectant heirs, and which is supposed to be one of the most powerful means of keeping estates in the same family from one generation to another. To what extent the transmission of family estates is really perpetuated by this system is a matter on which opinions would probably differ. My own opinion is that the perpetuation of estates in the same family would not be materially affected by the abolition of the system of protection.

"But regarding, as I should, with regret, any large inroads on the permanence of landed property as a family possession, I nevertheless consider that this permanence, so far as not secured by the sentiments and principles of the proprietary class, has no claim to be specially protected by law. I think, therefore, that it would be a beneficial change, calculated to promote the free circulation of land both by removing restrictions to which it is needlessly subjected, and by dispensing with a mass of technical difficulties, if estates tail existed only for the purpose of defining and limiting the devolution of the land, so long as not disposed of by the act of the tenant in tail, and if the tenant in tail, whether in possession or reversion, had in all cases the full power of disposing (subject, of course, to prior interests) of the fee simple of the land.

"V. The want of a real representative or person who, upon death, can exercise the same powers over the real estate as the executor has over the personal estate, has been long acknowledged, and should be supplied. I think that the personal representative might, without inconvenience, have in all cases the power to sell or mortgage the real estate of the deceased, and to receive the money. The practical conveyancer, who probably finds in informal wills the most frequently recurring obstacle to alienation, will best appreciate the importance of an improvement by which this source of difficulty will be got rid of.

"VI. The last alteration which I am about to propose, is a great extension of the existing facilities for the letting on lease and for the sale of settled estates. The Settled Estates Act was itself an important measure of relief, of which advantage has been extensively taken. But the power of letting property for any purpose for which it may be adapted, and of selling it into the hands best able to develop its capabilities, is one which ought in the public interest to exist universally, and to be easily exercisable. The machinery of notices and consents required by the Settled Estates Act ought, as it appears to me, to be dispensed with. A power of leasing, at least as extensive as the Court of Chancery can exercise under the Settled Estates Act, might, I think, be exercisable as a matter of course, and without the intervention of the court, by a limited owner in possession, the obligation to take the best rent, without any fine or premium, being in general a sufficient guarantee that the interest of the lessor will be in accordance with that of his successors in estate. As regards a sale, it may be reasonable that the limited owner in possession should be required to make an *ex parte* application to the Court of Chancery for leave to sell; and as he could not be allowed to receive the purchase money, he might, on the same application, obtain the appointment of trustee to receive the money, and hold it upon trusts corresponding to the interests in the land."

ONTARIO CONTROVERTED ELECTIONS.

Since the meeting of the local House in December last, two petitions have been presented under "The Controverted Elections Act of 1871."

The first of these was complaining of the election of Mr. James S. McCuaig, who had been returned for the County of Prince Edward, upon the vacancy caused by a former election for the county being declared void upon a petition. The election was held on the 22nd and 29th of last December, and the petition was filed on the 22nd of January following. The complainants were four voters at the election, and the seat was claimed for his opponent, Mr. Gideon Striker. The case came on for hearing before Mr. Justice Morrison, at Picton, on the 23rd of August last, and resulted in the respondent being unseated, and Mr. Striker declared duly elected. The trial occupied little more than an hour, and no point of special importance was determined.

The other petition was against the return of Mr. Christopher Finlay Fraser, who had been elected to fill the vacancy caused by the death of the late Mr. McNeil Clarke, for the South Riding of the County of Grenville. The election was held on the 19th and 20th of March last, and the petition, claiming the seat, was filed on the 25th of April by Mr. William Ellis, the opposing candidate at the election. The respondent was charged, both personally and by his agents, with the commission of corrupt practices. Recriminatory charges of a similar nature were made by the respondent against the petitioner. The trial began at Prescott, before Vice-Chancellor Mowat, on the 3rd of September last, and continued until the 14th of the same month, when judgment was given declaring the election of Mr. Fraser void, and that no person was duly elected. The case was determined, by consent of parties, upon the scrutiny, the petitioner having abandoned his charges of corrupt practices. No decision was given upon the recriminatory charges. The present case was another illustration of the practical impossibility of carrying a lengthened scrutiny to its conclusion under the system now in force, owing to the immense expense which such a process involves. Here the scrutiny occupied the greater part of a week, at the end of which time comparatively small progress had been made, and a final decision was arrived at by the respondent admitting to be bad a number of votes sufficient to deprive him of his majority.

Some idea may be formed of the expense entailed upon the parties, when it is stated, that besides the respondent, who is himself a member of the legal profession, and took an active part in the management of the case, four counsel, together with the attorneys for each party, attended daily in court during the fortnight which the trial occupied, and that the number of witnesses subpœnaed was several hundred.

Mr. Brough, the very efficient Registrar of the Court on this petition, is preparing a report of the case for this journal, which, from his thorough knowledge of the subject, cannot fail to be a valuable addition to the series of election cases which we have published from time to time, and which cannot be elsewhere obtained.

MAGISTRATES, MUNICIPAL, INSOLVENCY & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

MUNICIPAL CORPORATIONS.

Held, that the fact of a municipal council having undertaken to indemnify an officer for *lawful* acts done in his official capacity, does not entitle him to look to them for indemnity against the consequences of unlawful acts, as for instance, in this case, of a wrongful distress; and that plaintiff could not be allowed to impeach the judgment of a competent Court by which he was held to be a wrongdoer.—*Irwin* v. *Corporation of Mariposa*, 22 C. P. 367.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

CARRIAGE BY SEA.

A special contract, entered into between a shipowner and a passenger by sea, contained a provision that the shipowner would not be answerable for loss of baggage, "under any circumstances whatsoever."

Held, that such a stipulation covers the case of wilful default and misfeasance by a shipowner's servants.

Martin v. *The Great Indian Peninsular Railway Company*, (17 L. T. Rep. N. S. 349; 37

L. J. 27, Ex.; L. Rep. 3 Ex. 9) explained.—*Taubman* v. *The Pacific Steam Navigation Company*, 26 L. T. N. S. 704.

FIXTURES—DISTILLERY.

On the death of the owner of a distillery the still goes to the heir or devisee with the realty.

The widow professed to sell the property, but had no authority to do so under the will except for her own life; the purchaser removed the still, sold it, and put in a new one. Finding after the widow's death that his title was defective, he removed the still, and it was

Held, that the devisee was not entitled to have the new still restored, but was entitled to the value of the old still.—*McLaren* v. *Coombs*, 22 C. P. 587.

MARRIED WOMAN'S ACT, 1872.

Under the Married Woman's Property Act, 1872, a wife may be the sole defendant in an ejectment brought to recover possession of land owned by her husband, who is permanently resident out of the Province.—*Warren* v. *Cotterell*, 8 L. J. N. S. 245.

PROMISSORY NOTE PAYABLE IN FOREIGN COUNTRY AND CURRENCY.

A note payable in the United States, in American currency, and all the parties to which reside in this country, may be sued upon here.

The note in this case was payable by defendant to plaintiff, and sent to him on application for payment of an account, and after acknowledgment of its receipt, stated to have been "placed to your credit: the endorsers are not known to us, but on your stating that each one is good for the amount, we accept the note in settlement of your account to date." At the maturity of the note defendant wrote expressing regret at his inability to meet it and requesting plaintiff to draw upon him, and that he could hold the note until payment of the draft: he subsequently telegraphed him that he would remit in a few days.

Held, a question, on the evidence, for a Judge or jury, whether plaintiff had accepted the note in satisfaction or discharge, or not, and it having been found that he had not, the Court refused to interfere.—*Greenwood* v. *Foley*, 22 C. P. 352.

TRADE FIXTURES.

Where an article is affixed to the soil by the owner of the fee, though only by means of bolts and screws, it is to be considered as part of the land; at all events, where the object of setting up the article is to enhance the value of the premises to which it is annexed for the purposes to which those premises are applied.

Trover for looms by mortgagees against the assignees of M., a bankrupt, the mortgagor. M. had carried on business of a worsted spinner. By a mortgage, dated 1869, he conveyed to the plaintiffs in fee the said mill, in which he carried on his business, "and also all the steam-engine, shafting, going-gear, machinery, and all other fixtures whatever, which now or at any time hereafter, during the continuance of this security shall be set up and affixed to" the premises. The defendants subsequently, on M. becoming bankrupt, were chosen as his assignees, and as such took possession of and sold the looms on the premises; and it was in respect of this conversion that this action was brought. The looms were placed in various rooms in the mill. They were driven by steam-power, which gave motion to the shafting and going-gear, from drums on which the required communication was given to the looms by means of leather bands, which could be applied to or disconnected from the looms at pleasure. It being necessary for the working of the looms that they should be kept steady and perpendicular to the line of shafting, they were annexed to the floor by means of two nails driven through their feet. After the nails had been driven in, the looms could not be moved without drawing the nails, but this could easily be done without any serious injury to the floors. It was not necessary that the nails should have heads, although, as a fact, they have either flat or square heads; but spikes without heads would have equally answered the purpose; and if such spikes had been used, the looms could have been lifted up and removed, and put back again, without disturbing the spikes. The mortgage deed was not registered under the Bills of Sale Act.

Held, (affirming the decision of the court below), that the looms were fixtures, which passed with the freehold under the mortgage.

Longbottom v. *Berry* (22 L. T. Rep. N. S. 385; L. Rep. 5 Q. B. 723), affirmed.—*Holland and another* v. *Hodgson and another*, 22 L. T. N. S. 709.

VENDOR'S LIEN.

On the sale of land notes were taken by the vendor for a portion of the purchase money.

Held, that the vendor retained his lien for the amount unpaid, although, in fact, the vendor did not intend to retain any lien; and one witness in the cause swore that "the notes were taken in payment of the land"—it appearing that there was no agreement or arrangement that there should be no lien.—*Rachel McDonald* v. *Archibald McDonald*, C. R. 678.

CANADA REPORTS.

ONTARIO.

COMMON PLEAS.

(*Reported by* S. J. VANKOUGHNET, *Esq., Barrister-at-Law.*)

CRAIG v. MILLER.

Sale of goods at auction—Catalogue distributed before sale—Terms announced at sale—No warranty.

In a printed catalogue of articles for sale, a bull was stated to be "a sure stock-getter," but at the commencement of the sale the auctioneer publicly announced that the seller (defendant) warranted nothing:

Held, that plaintiff (the purchaser) in an action as for a breach of warranty, was obliged to shew that a warranty, if any, contained in the catalogue, was imported into the sale at auction at which he bought.

[22 C. P. 348.]

The plaintiff, in two counts, declared as for a breach of warranty of a bull, as a sure stock-getter, and, in three counts, for inducing the plaintiff to buy the bull by fraudulent representations that it was a sure stock-getter, when in fact the defendant well knew that it was not, and for fraudulently concealing the fact, of which the defendant was well aware, that the bull was impotent, and unfit for purposes of breeding.

At the trial, before the Chief Justice of this Court, the plaintiff abandoned the counts as for fraudulent representation and concealment, and the question turned wholly upon the counts for breach of warranty.

The plaintiff proved no written contract whatever. He based his right to recover upon the fact that the defendant circulated a catalogue of cattle *to be sold* by public auction, on Wednesday, January 18th, 1871. At the foot of the pedigree of the bull in question, in the catalogue, was the following note: "N.B.—Duke of Riggfoot took first premium in his class, and sweepstakes for the best bull on the ground, at the Northern Ohio Fair Association of 1870, and also at the Lake County Fair, held in Painesville, competing against a great many of the best bulls in the United States; is a sure stock-getter, and has been used for two years, with good success, in the herd of Mr. James Waitson, Atha P. O., Ontario."

The plaintiff himself was called on his own behalf, and swore that on the morning of the sale he got one of those catalogues at the defendant's house; that he was at the sale at its commencement by the auctioneer, and that he heard nothing announced by him to the effect that nothing would be warranted.

At the close of the plaintiff's case, *M. C. Cameron*, Q.C., for the defendant, moved for a non-suit upon the ground that the plaintiff had not proved any warranty. Leave was reserved to him to move upon this point, and subject to such leave, the case proceeded.

It was proved by the auctioneer and his clerk, and another person who bought at the sale, that before entering upon the sale, when announcing the terms of sale, the auctioneer, in a public manner, notified the audience that he had the orders of the defendant to declare that the seller would warrant nothing, and that buyers must buy at their own risk, and that the defendant, who was also present at the same time, said that he warranted nothing.

The learned Chief Justice told the jury that if there was a warranty at all, it only applied when the warranty was made, not that the bull would thereafter be a sure stock-getter; and he said further, that if the terms of sale were fairly and openly announced at an auction, and the audience distinctly informed that the vendor positively refused to warrant anything, it was not necessary to repeat this as every lot was put up, and persons coming in after commencement must be bound by it.

The jury rendered a verdict in favor of the defendant.

Harrison, Q.C., obtained a rule *nisi* to set aside the verdict as against law and evidence, and the weight of evidence; and for misdirection in not telling the jury that the plaintiff was entitled to rely upon the warranty which, as he contended, was contained in the catalogue, and that he was not bound by anything said by the auctioneer, the plaintiff not having heard the announcement.

M. C. Cameron, Q.C., shewed cause, contending that the catalogue contained no warranty as it was not signed, and that even if it did, the auctioneer's announcement at the commencement of the sale, was a withdrawal of it. He referred to *Gunnis* v. *Erhart*, 1 H. Bl. 289; *Powell* v. *Edmunds*, 12 Ea. 6; *Eden* v. *Blake*, 13 M. & W. 614.

Harrison, Q.C., contra, drew attention to the wording of the catalogue, and contended that it amounted to a warranty, and that in the absence of proof that the announcement of the auctioneer had come to the ears of the plaintiff, he had a right to consider the memorandum contained in the catalogue as a warranty, and, if the bull did not answer the description therein given, to sue for a breach thereof. He cited *Power* v. *Barham*, 4 A. & E. 473; *Powell* v. *Horton*, 3 Sc. 110; *Allan* v. *Lake*, 18 Q. B. 560; *Nichol* v. *Godts*, 10 Ex. 191; *Simond* v. *Braddon*, 2 C. B. N. S. 324; *Josling* v. *Kingsford*, 13 C. B. N. S. 447; *Chisholm* v *Proudfoot*, 15 U. C. 203; *Percival* v. *Oldacre*, 18 C. B. N. S. 398; *Horsfall* v. *Fauntleroy*, 10 B. & C. 755.

GWYNNE, J., delivered the judgment of the Court.

The jury have by their verdict found, in effect, that it was openly and fairly announced by the auctioneer, at the opening of the sale, that nothing sold would be warranted, and that buyers should buy at their risks, and we see no just ground of objection to the charge of the learned Chief Justice.

To entitle the plaintiff to recover, it was necessary for him to establish that the contract under which he purchased contained a warranty to the effect declared upon. Now, in this case, there is no written contract relied upon, although, in the natural course of sales at auction, there is generally such a contract signed by the auctioneer, as agent for the purchaser as well as the seller. In this respect this case is distinguishable from *Power* v. *Barham* (4 Ad. & El. 473) and cases of that description, which did proceed upon a written contract. Now the question here is,

wherein, in the absence of a written contract, is the contract of sale to be found? The actual sale took place at the auction, the terms of which, according to the evidence and the finding of the jury, were fairly and openly announced at the opening of the sale, that there would be no warranty. This was at the same time repeated by the vendor. Assuming that the plaintiff did not hear this announcement, it was no less publicly made by the auctioneer and his principal, the vendor. This was a plain declaration by the seller of the terms upon which he intended to contract, notwithstanding any thing which there might be in the catalogues distributed announcing the intended sale

It appears to me, under these circumstances, that the contract must be taken to have commenced when the terms of the sale were announced to the general public by the auctioneer, at the commencement of the auction, and ended, in so far as this particular beast is concerned, when it was knocked down to the plaintiff. If the seller or the auctioneer was sueing plaintiff upon his contract of purchase, as in *Eden* v. *Blake* (13 M. & W. 614), it might be, perhaps, that the plaintiff could object that the catalogue had deceived him, and that he had not heard the terms announced, to the effect that there would be no warranty, &c. But here the case is reversed, for upon the plaintiff lies the onus of proving that what is contained in the note, extracted from the catalogue, not only is a warranty of the nature insisted upon, but that it was contained in the contract upon which he purchased; and it was not if (as *Eden* v. *Blake* establishes) the vendor, before the sale to the plaintiff, made a deviation from the terms stated in the catalogue; and this we think he did do effectually, when, as found by the jury, the auctioneer made the announcement, at the opening of the sale, which was proved in evidence here. Upon the authority of *Hopkins* v. *Tanqueray* (15 C. B. 130), I think that the application to nonsuit the plaintiff, if the verdict had been in his favor, should have prevailed, for in the presence of clear evidence as to the terms of sale, as announced to the general public, we could not, upon an allegation that the plaintiff had not heard the announcement, from any thing which appears here, import into the contract of sale *with him*, a term which a bidder, who had heard the terms of sale, could not have claimed to be part of *his* contract, if *he* had been the purchaser instead of the plaintiff. If the plaintiff intended to insist, when the beast was knocked down to his bid, that the representation now relied on amounted to a warranty, and that he purchased upon the faith of it, it lay upon him to shew that the representation so relied on, was *in fact* imported into the *actual sale* which took place at the auction: this he has failed to do, and I see no ground whatever for disturbing the verdict. The fallacy of the plaintiff's argument, as it appears to me, consists in attributing to the catalogue the character of the contract of sale, which the plaintiff, upon whom the onus lies of establishing the contract, does not shew it to have been; whereas, on the contrary, I think the evidence sufficiently shews that it was not. The rule therefore must be discharged.

Rule discharged.

Ex rel McMullen v. Corporation of Caradoc.

Municipal corporation—Boundary of road allowance.

Held, that a municipal corporation has no power to declare certain posts planted by a surveyor to be the true boundaries of an original road allowance which they direct to be opened. They may give a description of the boundaries, but ought not to declare such boundaries to be the true boundaries, such being then a matter in dispute.

[22 C. P. 356.]

In Hilary Term last, *F. Osler* obtained a rule to shew cause why By-law No 176, intituled, "A By-law to open the side line between 8 and 9, in 2nd concession north of the Longwood Road, in the Township of Caradoc," should not be quashed, with costs, on the following grounds: 1. That the council had no power to pass such a by-law; 2. That the by-law was void on its face; 3. That if they had the power, it was not a proper exercise of their discretion, and that they should have left parties interested in the boundaries of the side line to ascertain the same by action.

Affidavits were filed on both sides.

The by-law was passed 18th November, 1871. It recited that it was desirable that the side road between lots 8 and 9 in the 2nd and 3rd concessions should be opened up, and according to a survey made by one Springer, a Provincial Land Surveyor, said road was bounded as follows, &c., &c. It then enacted that said road, as described in the by-law, should be and was thereby declared to be the side road between said lots 8 and 9, in the 2nd and 3rd concessions, &c., and that said road should be opened on 18th November then next.

A contest had existed for several years between the proprietors of lots 8 and 9 as to the true position of the allowance for road between the lots. For some years there had been a line travelled as the road, and public money and statute labour expended thereon.

In 1867 the council had the ground surveyed by Mr. Springer, and in his view the true road allowance was some rods further west than the travelled road, and one Bateman, acting as pathmaster, and others, entered on McMullen's lot, No. 8, and commenced cutting trees, &c., on the supposed new line of road.

McMullen brought an action against him, which was tried in the fall of 1869, as a question of survey, and a verdict was recovered by McMullen, which was upheld by this Court on motion. This was against Springer's evidence. It was alleged that Bateman was interested, and that by his interest and influence, the council had espoused his side of the quarrel, and after passing a by-law in March, 1869, which was quashed by this Court, no cause being shewn against it, the present by-law was passed.

The affidavits were voluminous, and bore almost wholly on the question of survey, each side producing a good deal of testimony.

In Easter Term, *J. H. Cameron*, Q.C., shewed cause. No injury is done to any one by this by-law. If the council proceed to open the side line, as defined by the by-law, they will do it at their peril, and the question may be tested in an action against them: sec. 205, Municipal Act.

The weight of evidence, on the affidavits filed, is in favor of the line as opened by the council; therefore the Court should not interfere in this summary manner, but leave the applicant to his legal remedy. On the former application no

cause was shewn to the rule to quash, and it became absolute on default merely, and the council were no parties to the action of trespass.

F. Osler, contra. The council, in passing this by-law, are interfering in a dispute between private parties. A side road, which was opened by by-law, has existed between the lots in question since 1851, and there is no public necessity for opening a new road. This is not a proper exercise of the discretion of the council. If the applicant is really enclosing a part of the side road, he can be indicted, and the question ascertained in that way. The Court has already quashed a similar by-law, and the question has been fairly tried between the parties really interested, and it is apparent that the real object of the council in passing this by-law is not so much to open the road as to assist one man at the expense of another. Conceding that the council has power to open any side road, they can only declare that the original allowance for road shall be opened; they have clearly exceeded their power in enacting that a road, as defined by metes and bounds by any particular surveyor, shall be the side road. From the peculiar language of sec. 205, the applicant may be embarrassed in any suit he may bring against the council for anything done under the by-law, unless it is quashed. He referred to *Burritt* v. *Corporation of Marlborough*, 29 U. C. R. 119.

HAGARTY, C. J.—It is impossible to try the question on a motion of this character.

The question before us is not whether the by-law was a wise or proper exercise of corporate powers, but whether it is legal. If the by-law confined itself merely to declaring that the road should be opened, giving Springer's metes and bounds, by way of description, I think we could not interfere. The defendants had a clear right to open an original allowance, and in so doing they must, at their peril, be correct as to its true position.

We cannot, I think, accede to either of the two first objections. It is not altogether void on its face. It affects to give a description by certain fixed boundaries in accordance with posts put down by Springer. These may be right or they may be wrong. When the defendants attempt to enforce it, that question may be determined.

Mr. Osler's argument was in effect that, as a *bond fide* contest was existing as to the true boundary, the corporation could not adopt one side or the other. The answer seems to be, that the by-law merely carries out a clear statutable power. It authorizes the opening of the original allowance; but it in no way makes the boundaries to be as Mr. Springer places them, unless the latter gentleman be correct, which is a matter to be proved, if questioned.

It seems to me that the very reason which prevents this Court holding this by-law to be illegal, is that which should have prevented the defendants from exercising their statutable power, viz., the uncertainty as to the true boundary. If it were shewn to us clearly that the proposed boundaries would force the road through a man's property, unquestionably protected by statute law or exemption, that might be a ground for interference. Here the by-law is right (however indiscreetly adopted), if Springer's survey be right.

Unless, therefore, we are prepared to try a boundary case, with much conflicting testimony on affidavits, we must not wholly set aside this by-law.

The by-law is to open the original allowance, and cannot, as we think, authorize a trespass on any land shewn not to be part of such allowance.

The case of *Ex rel. Burritt* v. *Corporation of Marlborough* (29 U. C 119), differs widely from the present. There the by-law was to open an original allowance, as to the true position of which there seemed to be no dispute. For sixty years a conventional road had been used in lieu thereof, and there was strong evidence to shew that the proprietors had given this latter road, without compensation, instead of the original allowance. Richards, C.J., says: "The question is, whether these proprietors, if they, or those under whom they claim, opened the road without receiving compensation therefor, and being in possession of the concession road, are not entitled thereto in lieu of the road laid out; and, if they are, can they be deprived of the same by a by law directing it to be opened as an original allowance, * * * In my view, I do not think we should permit a by-law to stand which assumes to dispose of the rights of these parties as if they had no claim whatever to this road allowance, and for that reason, if for no other, we should quash the by-law if we are satisfied that the facts bring the party seeking to quash it within the provisions of the statute."

But I agree in holding that we should not allow any part of the by-law to stand which declares that the particular boundaries there given shall constitute the true original allowance. We do not question the right to open the allowance, nor do we interfere with any description they choose to give. But we think we must not embarrass any property owner in the fair trial of his rights, by leaving the by-law with a *quasi*-legislative declaration as to its operation.

The present state of the statute law as to the possible effect of a by-law not quashed by the Court, is a strong reason for removing this clause. My brother Gwynne has pointed out the words which we think must be expunged.

I think there should be no costs on either side. The relator only partially succeeds, and three-fourths of the voluminous evidence produced bears wholly on the survey question, with which we do not think we can interfere. We give no costs.

GWYNNE, J.—The by-law appears to partake of the vice of the former one, in so far as it purports to declare and enact that the side road, as set out by metes and bounds, and described in the by-law, shall be and is thereby declared to be the side road between the said lots 8 and 9 in the 2nd and 3rd concessions of the Longwood Road in the township of Caradoc. If the limits assigned be not the true limits of the side road, as originally surveyed, the council has no jurisdiction to enact and declare that they shall be; and whether the declaratory enactment have any validity or not, a person *bona fide* contesting the true site of the road, has, I think, reason to complain of such a clause being inserted in the by-law, as calculated to expose him to difficulties at any rate, if not to prejudice him in the conduct of any litigation which he may institute for

the purpose of bringing the point in difference up for judicial enquiry; but, in enacting that the original road allowance shall be opened, although describing that road by metes and bounds, I do not see that the applicant can be prejudiced, for in any litigation arising upon the point, it would, I apprehend, in such a case, be necessary to establish that the metes and bounds assumed to be are in fact the true limits of the original allowance. The first clause of the by-law will have, therefore, to be quashed, which will be effected by expunging all between the words "township of Caradoc." in the first enacting clause, and the words "that the said side road," in the second.

Judgment accordingly.

COMMON LAW CHAMBERS.

JAMESON AND CARROLL *v.* KERR, GALLEY *v.* KERR.

Replevin—Assignee in insolvency—Con. Stat. U. C. cap. 29, sec. 2—Insolvent Act, 1869, sec. 50.

Goods are repleviable out of the hands of a guardian in insolvency, notwithstanding Con. Stat. U. C. cap, 29, sec. 2.

[Chambers, Feb. 8, 1872.—*Mr. Dalton* and *Gwynne, J.*]

J. H. Macdonald for Jameson and Carroll, and *Clarke* for Galley, moved before Mr. Dalton for orders to replevy certain bricks which had been seized by the Sheriff of the County of York, under an attachment in insolvency against one Moran, and handed over by the sheriff to Mr. Kerr, an official assignee, as guardian. The applicants claimed these bricks as their property, having purchased them from Moran.

Mr. Dalton refused to grant orders for writs of replevin on the ground that section 2 of the Replevin Act precluded replevin under such circumstances. From this decision the applicants appealed to a judge. The matter was then argued before Mr. Justice Gwynne, who, reversing the decision of Mr. Dalton, ordered writs of replevin to issue. The further facts of the case appear in the following judgment of

GWYNNE, J.—These were two summonses by way of appeal from two orders made by Mr. Dalton in these cases, whereby he discharged two several summonses asking for writs of replevin to issue in these suits, and refused to grant the writs of replevin upon the ground that the goods sought to be replevied were in the custody of Mr. Kerr, an official assignee, as guardian, under a delivery to him, by the sheriff, of the goods in question, seized under a writ of attachment issued from the County Court in compulsory liquidation against one Moran, an insolvent.

The evidence offered upon affidavits by the applicants is strong to show, and conclusive, if not contradicted, that the goods in question, namely divers kilns of bricks, were the property respectively of the applicants. No affidavits are offered in opposition to the title set up by them; it may be that Mr. Kerr, being official assignee, can admit nothing. The case, therefore, stands thus: that the evidence of title offered by the applicants, although not admitted, is not denied; the property seized is shown to be of that nature that, having regard to the business of the respective applicants, namely that of builders, they may be exposed to very serious injury if the property should not be restored to them, which any damages which they might recover in actions of trespass would not reimburse them for, and Mr. Dalton, I am informed by himself, felt this so strongly that he would have granted the writs without hesitation, if he had not considered himself fettered by the language of the second section of the Replevin Act, Consolidated Statute U. C. ch. 29.

By that section it is provided that "the provisions herein contained shall not authorize the replevying of or taking out of the custody of any sheriff or other officer any personal property seized by him, under any process, issued out of any court of record for Upper Canada." The section is consolidated from 18 Vict ch. 118. In order to put a correct construction upon this section, it will be necessary to consider what was the law before the passing of the Act from which this section is taken, for the purpose of consolidation, and what was the object of the Act.

Although it was held in England in the cases collected and cited in *Harling* v. *Mayville*, 21 C. P. 499, that replevin lay for *any wrongful taking* of property from the possession of the true owner, still it never lay where the taking was in execution under a judgment of a superior court, and the reason is given by Parke, B., in *George* v. *Chambers*, 11 M. & W. 160, citing Chief Baron Gilbert's treatise on Replevin, p. 138, as his authority, where it is said, "If a superior court award an execution, it seems that no replevin lies for goods taken by the sheriff by virtue of the execution; and if any person shall pretend to take out a replevin and execute it, the court of justice would commit him for contempt of their jurisdiction, because by every execution the goods are in the custody of the law, and the law ought to guard them, *and it would be troubling the execution awarded, if the party upon whom the money was to be levied should fetch back the goods by replevin*, and therefore they construe such endeavour to be a contempt of their jurisdiction, and upon that account commit the offender; that is, if a person attempt to defeat the execution of the court, they will treat it as a contempt, and punish it by attachment of the sheriff." In *Rex* v. *Monkhouse*, 2 Str. 1184, the court granted an attachment against a sheriff for granting a replevin of goods distrained on a conviction for deer stealing, for the reason that the conviction was conclusive and its legality could not be questioned in replevin; and in *Earl Radnor* v. *Reeve*, 2 Bos. & Pul. 391, the court said that it had been determined that when a statute provides that the *judgment* of commissioners appointed thereby shall be final, their decision is conclusive, and cannot be questioned in any collateral way; and so not in replevin.

In *Pritchard* v. *Stephens*, 6 T. R. 522, where goods taken under a warrant of distress granted by commissioners of sewers were replevied, and the proceedings in replevin moved into the King's Bench, the court refused to quash the proceedings, leaving it to the defendant in re-

plevin to put his objection in a formal manner on the record. In that case Callis is cited, p. 200, where he says, "If upon a judgment given in the King's Court, or upon a decree made in the court of sewers, a writ or warrant of *distringas ad reparationem* or of that nature be awarded, and the party's goods be thereby taken, these goods ought not to be delivered to be taken either out of this court or out of any other court of the King, *because it is an execution out of a judgment*," and it is said there, citing another passage of Callis, p. 197, that there is a distinction between those goods that remain in the custody of the officer under the seizure and those that afterwards come into the hands of a purchaser, saying that the former are not repleviable; however, the court refused to quash the proceedings, leaving the defendant to raise his defence upon the record, although the goods were replevied out of the hands of the officer acting under the decree and warrant of the court of sewers.

Thus, then, the law stood in England, that for any wrongful taking a replevin lay except where the taking was in execution under a judgment of a superior court, or of an inferior tribunal whose judgment was by statute made final and conclusive, to which may be added the further exception where the taking was in order to a condemnation under the revenue laws: *Cawthorne* v. *Camp*, 1 Anst. 212, or for a duty due to the crown: *Rex* v. *Oliver*, Bun. 14, and the reason of the law that goods taken in execution could not be replevied was that it could not be endured that the cause of justice should be frustrated by permitting the party, *upon whom the money was to be levied*, in satisfaction of a judgment of a superior court, or of a judgment or conviction made final by a statute, *to fetch back* the goods by replevin, and so delay the plaintiff in his recovery of the fruits of his judgment. The reason then given for the courts in England holding it to be a contempt of court for a party to proceed, and consequently for their not permitting him to proceed by replevin, in respect of a seizure under an execution issued out of a superior court, applies only to the case of a replevin brought or attempted to be brought by him against whom the execution issued. While adopting the same principle, there have been, in the supreme court of the State of New York, several cases of replevin being maintained even against a sheriff in respect of goods taken in execution.

In *Clark* v. *Skinner*, 20 Johnson, 465, it was held that replevin lies at the suit of the owner of a chattel against a sheriff, constable, or other officer who has taken it from the owner's servant or agent while employed in the owner's business, by virtue of an execution against such servant or agent, the actual possession of the property in such case being considered as remaining in the owner, and not in the defendant in the execution. Platt, J., giving judgment says, "Suppose John Clark (against whom the execution was and from whom the goods were taken) had taken the horse and sleigh as a trespasser himself, would they be *in the custody of the law* as to the true owner, *because the constable happened to find them in the hands of a person against whom he had an execution?* If I leave my watch to be repaired, or my horse to be shod, and it be taken on a *fi. fa.* against the watchmaker or blacksmith, shall I not have replevin? If the owner put his goods on board a vessel to be transported, shall he not have this remedy, if they are taken on execution, against the master of the vessel? It seems to me indispensable for the due protection of personal property. In many cases it would be mockery to say to the owner—Bring an action of trespass or trover against the man who has despoiled you. Insolvency would be both a sword and a shield for trespassers. Besides, there are many cases where the possession of chattels is of more value to the owner than the estimated value in money, and the action of detinue is so slow and uncertain, as a specific remedy, that it has become nearly obsolete." "The rule," he proceeds, "I believe is without exception, that wherever trespass will lie the injured party may maintain replevin. Baron Comyns says, 'Replevin lies of all goods and chattels unlawfully taken,' (6 Com. Dig. Replevin A) 'Though,' he says, (Replevin D) 'replevin does not lie for goods taken in execution. This last proposition,' he adds, 'is certainly not true without important qualifications. *It is untrue as to goods taken in execution where the fi. fa. is against A. and the goods are taken from the possession of B*, (being the property of the latter, is plainly intended). "By goods," he proceeds, "*taken in execution*, I understand goods *rightfully taken in obedience to the writ*, but if, through design or mistake, the officer takes goods which are not the property of the defendant in the execution, he is a trespasser, and such goods never were *taken in execution*, in the true sense of the rule laid down by Baron Comyns."

In *Thompson* v. *Button*, 14 Johnson, 84, it is laid down that goods taken in execution by a sheriff out of the possession of the defendant in the execution, being in the custody of the law, cannot be replevied, *but if the officer having an execution against A. undertakes to execute it on goods in the possession of B., the latter may bring replevin for them*. The chief justice in giving judgment says, "As a general principle, it is undoubtedly true that goods taken in execution are in the custody of the law, and it would be repugnant to sound principles to permit them to be taken out of such custody, *when the officer has found them in and taken them out of the possession of the defendant in the execution.*" This judgment is in precise accord with the law of England, as I understand it.

In *Hall* v. *Tuttle*, 2 Wend. 476, the law is laid down in precisely the same language. The court, in giving judgment, adds, "The sheriff levies at his peril, if the property does not belong to the defendant in the execution."

In *Dunham* v. *Wyckoff*, 3 Wend. 279, the case came up on demurrer, which admitted that the property in the goods seized under execution was in the plaintiff in replevin, although when seized they were in the possession of the person against whom the judgment and execution was had. Judgment was given for the plaintiff on the demurrer, as the pleadings admitted the property to be his. A similar point was decided on error in *Acker* v. *Campbell*, 33 Wend. 372.

The principle upon which these cases proceed seems to be in accord with that stated by Chief Baron Gilbert as the principle upon which the

courts in England refused to permit replevin to be brought in respect of goods seized under an execution issued upon a judgment recovered in the superior courts.

Our law of replevin in this country would seem to have its foundation in 4 Wm. IV. cap 7; for the sheriff in this country, having no county court, it is difficult to see how the action could have been brought before that statute. (See *Hutt* v. *Keith*, 1 U.C.Q.B. 478). By that Act, the remedy seems to have been limited to the case of a wrongful distress, probably because of there having been an opinion prevalent that it was only in such case that replevin lay in England. The Act provides that any person complaining of a wrongful distress in a case in which by the law of England replevin might be made, may, on filing a precipe, obtain from the crown office a writ of replevin in a form given by the statute.

This law was amended by 14 & 15 Vic. cap. 64, A.D. 1851, whereby it was enacted "that whenever any goods, chattels, deeds, &c., valuable securities or other personal property or effects have been or shall be wrongfully distrained or otherwise wrongfully taken, or have been or shall be wrongfully detained, the owner, or person or corporation who by law can now maintain an action of trespass or trover for personal property, shall have and may bring an action of replevin for the recovery of such goods, chattels or other personal property aforesaid, and for the recovery of damages sustained by reason of such unlawful caption and detention, or of such unlawful detention, in like manner as actions are now by law brought and maintained by any person complaining of an unlawful distress." The writ was to be obtained only upon an affidavit of the claimant, his servant or agent, that the person claiming is the owner of the property claimed, describing it.

The effect of this Act was to introduce the law as existing in England, namely, to authorize replevin to be brought for any wrongful taking, with this further addition, that it should also lie wherever trover lay.

It happily seldom occurs that a sheriff or his officer, under a writ of execution against B., wantonly and vexatiously, and without any reasonable excuse, takes from A his goods, of which he is in actual visible possession as undisputed owner. Consequently, we do not find that to redress such a wrong, any person required to avail themselves of the privileges of the Act by bringing replevin.

But cases of persons not being in actual possession, but claiming to be the owners, by virtue of some contract with an execution debtor, of goods taken under an execution from the actual visible possession of an execution debtor as apparent owner, are cases which do frequently occur in practice. *In such cases as last mentioned the action of replevin did not lie according to the law of England.* That remedy was only available when goods were taken from and out of the possession of the plaintiff in replevin, who also claimed to be the true owner, and therefore entitled to *retain* the possession and enjoyment of the goods taken. Replevin being the *re* delivery of the goods taken *to the person from whose actual possession they were taken*, upon pledges given by him to prosecute his claim of right to *retain* such possession. Although, according to the law of England, the real owner of goods taken under execution from the actual possession of an execution debtor as apparent owner, could not maintain replevin, nevertheless, upon the construction put upon 14 & 15 Vic. cap. 64, such persons were permitted in this Province to bring *replevin* against the sheriff, and to have his right tried in that form of action. Of such class of actions, *Short* v. *Ruttan* (Sheriff), 12 U. C. Q B. 79, is an example.

The words of the Act authorizing the owner to bring replevin in all cases wherein he could maintain trespass or trover, seemed to authorize him to bring an action of *replevin*, although the goods were never taken out of his actual possession, and although according to the law of England replevin in such a case could not be maintained. Doubts, however, were entertained whether it could have been the intention of the Legislature to place the remedy by replevin upon a footing so different from that upon which *ex vi termini*, and according to the law of England, it stood in England. Accordingly, to remove these doubts, the Act 18 Vic. cap. 118, appears to have been passed. The preamble of that Act recited that, "Whereas doubts have arisen whether by the provisions of a certain Act of the Parliament of this Province, passed in the fourteenth and fifteenth years of Her Majesty's reign, entitled, 'An Act to amend and extend the law relative to the remedy by replevin in Upper Canada,' when any goods and chattels or other personal property and effects in the said Act mentioned have been seized and taken in execution, or by attachment or otherwise, under process from any Court of Record in Upper Canada, *the same can be replevied* and *taken out of the hands and custody of the sheriff or other officer to whom the execution of such process of right belongs;* and whereas it is expedient to remove such doubts,"—and the Act declared that the said Act did not authorize, and shall not be construed to have authorized and permitted, or to authorize and permit, the replevying and taking out of the hands and custody of any sheriff or other officer, as aforesaid, any such goods and chattels which such sheriff or other officer shall have seized and taken, *and shall have in his lawful keeping under and by virtue* of any process whatsoever issued out of Her Majesty's Courts of Record in Upper Canada. Upon the passing of this Act it was held, in accordance with the law as it was always understood in England, that a person out of possession could not maintain replevin in respect of goods seized and taken in execution from and out of the possession of the execution debtor: *Calcutt* v. *Ruttan*, 13 U.C. 146. That decision is what would have been decided if the remedy by replevin had existed in this Province precisely as it existed in England, and the 14 & 15 Vict. cap. 64, had never been passed.

In so far as goods taken in execution were concerned, the object and effect of the Act 18 Vic. seems to have been to place the law in this Province upon the same footing as in like cases it was in England; but the Act went further, and extended to goods seized under an attachment against absconding debtors *the like* protection from the remedy by replevin, and, as it seems to me, *only the like* protection as by the law of England surrounded goods taken in execution. And there appears to be some reason for this, although the writ of attachment is not

preceded by a judgment, as an execution is; because by the Act respecting absconding debtors in force at the time of the passing of 18 Vict. ch. 118, namely, 2 Wm. 4, ch. 5, sec. 4, provision was made, *more effectual than replevin*, and the like provision now exists under Consolidated Statute 22 Vict. c. 25, for superseding the attachment and obtaining restoration of his goods *upon the application of the defendant* in the suit on his giving bail in respect of the action in which the attachment issued: The language of the Act 18 Vict ch 118, namely, "any such goods and chattels which such sheriff or other officer shall have seized and taken, *and shall have in his lawful keeping under and by virtue* of any process, &c., seems to me to accord precisely with the judgment of Platt, J., in *Clark* v. *Skinner*, 20 Johnsons' Report, *supra*, wherein he says: "By goods taken in execution I understand goods *rightfully taken in obedience to the writ*," but if through *design* or mistake the officer "takes from A. goods which are not the property of, nor, I add, in the possession of the defendant in the execution when taken, he is a trespasser, and such goods never were taken in execution in the true sense of the rule laid down by Baron Comyns"—goods of which the defendant is in possession when seized under and by virtue of any process against him authorizing the seizure of his goods and chattels are in the lawful keeping of the officer, *under and by virtue* of the process, because the possession of goods *prima facie* implies property—but if a sheriff or his bailiff, or the bailiff of a division court, (for 23 Vic. ch. 45, sec. 8, places goods seized by him under any process issued out of a division court in precisely the same position, as to the action of replevin, as 18 Vict. ch. 118 did goods seized by a sheriff under process from any court of record,) wantonly and causelessly, and, it may be, maliciously, takes from the actual and undisputed possession of the real owner *his* goods under colour and pretence of an execution or other process which he has for execution upon the goods of another, shall the person upon whom such wanton wrong may be committed, be held to be deprived of a right, recognized by the law of England, of availing himself of the only remedy which in the given case may be competent to secure him any adequate redress?

The second section of Con Stat. U. C. c. 29, is expressed in briefer language than 18 Vict. c. 118, but the substance and effect of both is the same, and both must receive the same construction. Now, certain of the goods of a judgment debtor are by law specially exempted from all liability under any execution issued upon the judgment: as, for example, the bed, bedding and bedsteads in ordinary use by the debtor; the necessary and ordinary wearing apparel of himself and his family; the tools of his trade, to a certain amount. If, then, a sheriff's bailiff, or the bailiff of a division court, although the right of exemption should be claimed, should vexatiously and wantonly seize these exempted articles; or if a sheriff's bailiff, or the bailiff of a division court, without any pretence of right, should vexatiously and wantonly enter the house of A, and strip it of all his household furniture in his actual use, merely because the bailiff has in his hands an execution or other process against the goods of B; or if a sheriff's bailiff, under like circumstances, should seize a raft of timber belonging to A. and in his possession, on its way for delivery to C., under a contract which A. is bound under heavy penalties to fulfil, and should so cause a breach of the contract; or if, under like circumstances, and it may be by fraudulent collusion with B, the execution debtor, or with his creditor, the sheriff should seize a steamship belonging to A and in his possession, freighted with goods and passengers, at the moment of its departure from port on its voyage, and so prevent the voyage altogether—can any of these goods so wrongfully seized be, with any propriety of language, said to be *in the lawful keeping of the sheriff or bailiff, under and by virtue of a process which neither directs nor warrants any such service.* Or shall it be said that a judge, when invoked to permit the party so wronged to seek redress in the only form of action which can give him any relief, shall have no jurisdiction to do so? Similar instances without number, of wanton injury, might be enumerated, where the goods of an utter stranger to the process in the bailiff's hands, and to the person against whom it has issued, may be wrongfully and vexatiously seized by the officer; wherein, if a judge, upon hearing the parties, and being satisfied that the seizure is utterly inexcusable, cannot sanction the issuing of the writ of replevin, the hands of justice must be admitted to be most cruelly tied. I am not aware of any case which has held that justice is so crippled. In this case I am not called upon, however, to rest my decision upon the ground that in answer to the application for the writs there is no denial of what is plainly asserted on oath, namely, that the goods seized were the property of and in the possession of the claimants when seized, and that they were wrongfully seized without any process authorising such seizure; for I am of opinion that the goods now being in the possession of the official assignee are not in the custody of the sheriff or other officer under the process, within the meaning of section 2 of 22 Vic. c 29, even though that section could protect the goods in the hands of the sheriff from being reached by a writ of replevin.

The execution of all process coming out of courts of record to be executed, belongs to the sheriff of the county to whom it is addressed, except when the sheriff is himself a party, when it belongs to the coroner to execute it.

The term, then, "sheriff or other officer," in 18 Vict. cap. 118, and in 22 Vict. cap. 29, sec. 2, as indeed is plainly expressed in 18 Vict., means a sheriff or other like officer, as his deputy, bailiff, or a coroner, "*to whom the execution of such process of right belongs;*" and what is declared not to have been authorised is the replevying the goods which *such* sheriff or other officer shall have seized under or by virtue of the process *out of his hands.* Now, when the sheriff has transferred the goods seized under an attachment in insolvency, in discharge of his duty under the process placed in his hands, to the official assignee in insolvency, they came into his hands and could only be detained therein *as and if they are the property of the insolvent.* In no other event can the official assignee retain the goods. He becomes liable to the true owner, from whom they were wrongfully taken, not by reason of the original wrongful taking, but by reason of

his own wrongful detention of goods not belonging to the insolvent after a demand made for them upon him by the true owner, from whom they had been taken. Such wrongful detention cannot be justified by the assertion that the sheriff, who had wrongfully seized the goods, had given them to the assignee. If the goods were now in the hands of the sheriff, he, to set himself right with the true owner, and to protect himself from an action, might unhesitatingly restore the goods to the owner. When the official assignee, to whom he has delivered them (upon demand being made upon him by the true owner), refuses to restore them, *he* becomes a wrong-doer himself, wholly independently of the sheriff and of the wrong committed by him, and must be responsible for his own acts.

The affidavits and argument upon the appeals leave no doubt on my mind that these are cases in which I have a discretion enabling me to grant writs of replevin, and that I properly exercise that discretion by granting them, which I therefore do without further delay, to enable the official assignee, if so advised, to have my judgment reviewed by the court during the present Term; and as the Act of 1860 enables me to direct that a bond may be taken in less than treble the amount of the property. I think it proper to limit the amount to a sum not exceeding four thousand dollars in each case. The orders of Mr. Dalton will therefore be set aside, and the orders will go for the writs of replevin.

DIVISION COURTS.

In the Third Division Court in the County of Elgin.

OAKES v. MORGAN.

Nonsuit after payment of money into Court—Div. Ct. Rule 130—Impounding money for defendant's costs.

[St. Thomas, Aug. 19, 1872.—*Hughes, Co. J.*]

This was an action to recover an account claimed for work and labour. At the trial the plaintiff proved a special executory contract to serve defendant for a fixed period not performed on his part, but sought to recover as upon a *quantum valebat* for the time he had worked as plaintiff's hired servant. The defendant paid a specific sum into Court, less than plaintiff's claim. The plaintiff was, on his own evidence, nonsuited at the trial because he proved he had failed to perform his contract.

After the sitting, *E. Horton* (who acted as counsel at the trial) applied for an order to set aside the nonsuit, and for a new trial on the following grounds:—

1st. That the payment by the defendant into Court was an admission that defendant was indebted to the plaintiff in at least that sum.

2nd. That the ordering a nonsuit when money had been paid into Court was unjust and unprecedented.

3rd. That the plaintiff was and is entitled under the circumstances to the amount paid into Court, and acknowledged to be due from defendant to him.

W. J. White, attorney for defendant, shewed cause, and cited the several authorities hereinafter referred to, contending that the nonsuit was right, and that the money paid into Court could not be taken out by the plaintiff, as the practice of a court of record permits, because the 130th General Rule of 1869 provides against that practice; that it is in fact to be retained by the clerk until the final result of the cause; that it may be impounded to abide the order of the judge who may order it to be applied in discharge of defendant's costs.

No one appeared to support the application.

HUGHES, Co. J., delivered the following judgment:

The payment into Court was an admission that the defendant owed the plaintiff $8 and no more. The plaintiff proceeded with his claim for, and undertook to prove his right to recover more, in fact the whole of his demand, and would not accept the $8 in full; he, however, proved at the trial he was not entitled to any sum whatever.

After payment of money into Court there may be a nonsuit in a court of record, and that this is sustained by precedent, there is abundance of authorities, if authorities are required. *Gutteridge* v. *Smith* was the leading case on the subject, 2 H. Bl. 374; 2 Esp. 482, n. It was formerly held that after tender, plaintiff could not be nonsuited, but it is now settled that plaintiff may be nonsuited after a plea of tender: *Anderson* v. *Shaw*, 3 Bing. 290. The 69th section of the Division Courts Act applies the principles of practice of the Superior Courts to the Division Courts in cases not otherwise provided for. The 130th Division Court Rule of 1869, makes the practice different with regard to plaintiff's right to take the money out of a Division Court, from that which is the practice in the Courts of Record. The rule provides that it is *not* to be paid out to the plaintiff until the final determination of the suit, unless the judge shall otherwise order; the object of that rule is quite obvious; so that the grounds stated for setting aside the nonsuit herein are untenable. Besides this, I do not see how I could be expected to grant a new trial, when upon the plaintiff's own shewing the merits of the case are entirely against his right to recover any sum whatever; the application ought rather to have been for me to grant an order for the clerk to pay over (after deducting defendant's costs) the balance of the amount paid into Court, to the plaintiff.

The authority shewn by Mr. White, 2 Chit. Arch. Pr. (9 ed.) 1283, lays it down that the Court or a Judge, may, if the plaintiff fails in his action, and the money has not been taken out of Court by him, impound it to answer the defendant's costs.

I shall, therefore, order the application for a new trial to be discharged and the money paid into Court to be impounded to pay the defendant's costs; and after those costs are satisfied the balance to be paid to the plaintiff.