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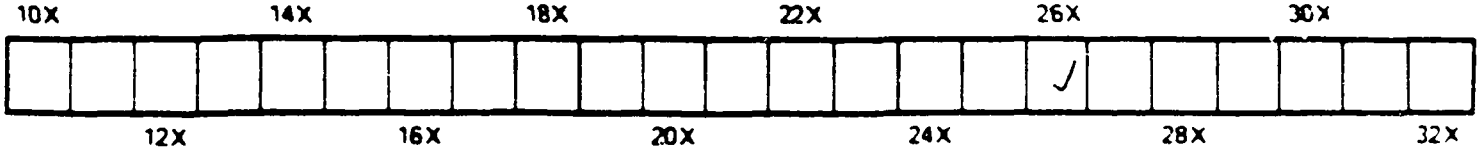

VOL. VII. TORONTO, AUGUST, 1861. No. 8.

THE UPPER CANADA LAW JOURNAL

AND MUNICIPAL AND LOCAL COURTS' GAZETTE.

CONDUCTED BY

W. D. ARDAGH, Barrister-at-Law; ROBT. A. HARRISON, B.C.L., Barrister-at-Law.

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REMITTANCES.

S & H, Kingston, $5; D M, Embro', $20; C. C, Mono Mills, $17 50; W H. L, Drumbo, $4, W. M, Toronto, $5; A H, Wardsville, $4, J B J, Brockville, $4

STANDING RULES.

ON the subject of Private and Local Bills, adopted by the Legislative Council and Legislative Assembly, 3rd Session, 5th Parliament, 20th Victoria, 1857.

1. That all applications for Private and Local Bills for granting to any individual or individuals any exclusive or peculiar rights or privileges whatsoever, or for doing any matter or thing which in its operation would affect the rights or property of other parties, or for making any amendment of a like nature to any former Act,—shall require the following notice to be published, viz:—

In Upper Canada—A notice inserted in the Official Gazette, and in one newspaper published in the County, or Union of Counties, affected, or if there be no paper published therein, then in a newspaper in the next nearest County in which a newspaper is published.

In Lower Canada—A notice inserted in the Official Gazette, in the English and French languages, and in one newspaper in the English and one newspaper in the French language, in the District affected, or in both languages if there be but one paper; or if there be no paper published therein, then (in both languages) in the Official Gazette, and in a paper published in an adjoining District.

Such notices shall be continued in each case for a period of at least two months during the interval of time between the close of the next preceding Session and the presentation of the Petition.

2. That before any Petition praying for leave to bring in a Private Bill for the erection of a Toll Bridge, is presented to this House, the person or persons purposing to petition for such Bill, shall, upon giving the notice prescribed by the preceding Rule, also, at the same time, and in the same manner, give a notice in writing, stating the rates which they intend to ask, the extent of the privilege, the height of the arches, the interval between the abutments or piers for the passage of rafts and vessels, and mentioning also whether they intend to erect a draw-bridge or not, and the dimensions of such draw-bridge.

3. That the Fee payable on the second reading of and Private or Local Bill, shall be paid only in the House in which such Bill originates, but the disbursements for printing such Bill shall be paid in each House.

4. That it shall be the duty of parties seeking the interference of the Legislature in any private or local matter, to file with the Clerk of each House the evidence of their having complied with the Rules and Standing Orders thereof; and that in default of such proof being so furnished as aforesaid, it shall be competent to the Clerk to report in regard to such matter, "that the Rules and Standing Orders have not been complied with."

That the foregoing Rules be published in both languages in the Official Gazette, over the signature of the Clerk of each House, weekly, during each recess of Parliament.

J. F. TAYLOR, Clk. Leg. Council.
10-tf. WM. B. LINDSAY, Clk. Assembly.

OPINIONS OF THE PRESS.

THE UPPER CANADA LAW JOURNAL.—This well conducted publication, we are glad to learn, has proved eminently successful. Its contents must prove of great value to the profession in Canada, and will prove interesting in the United States.—*American Railway Review*, September 29th, 1860.

THE UPPER CANADA LAW JOURNAL.—This useful publication for September is before us. We heartily recommend it as a very useful Journal, not only to members of the legal profession, but also to Magistrates, Bailiffs, &c., and in fact every person who wishes to keep himself posted in law matters. It has been recommended not only by the highest legal authorities in this Province, but also in the United States and England. The present number is replete with useful information.—*Welland Reporter*, September 20th, 1860.

UPPER CANADA LAW JOURNAL.—We have received the April number of this excellent publication, which is a credit to the publishers and the Province. Among a great variety of articles of interest, we especially note two, one on a series on the Constitutional History of Canada, the other upon a decision declaring the right of persons not parties to suit to search the books of the Clerks of Courts for judgments. The question arose out of a request of the Secretary of the Mercantile Protection Association.—*Montreal Gazette, April, 20th.*

THE UPPER CANADA LAW JOURNAL, for May. Messrs. Maclear & Co., King Street, Toronto.—In addition to interesting reports of cases recently tried in the several Law Courts, and a variety of other important matter, this number contains well-written original articles on Municipal Law Reform, responsibilities and duties of School Trustees and Teachers, and a continuation of a Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada.—*Thorold Gazette, May 10th*, 1860.

UPPER CANADA LAW JOURNAL.—The March number of this very useful and interesting Journal has been received. We think that the articles found in its pages are equal in ability to any found in kindred periodicals either in England or America. Messrs. Ardagh & Harrison deserve the greatest credit for the manner in which the editorial work is performed. We hope their enterprise may be as profitable as it is creditable.—*Hastings Chronicle, May, 16th* 1860.

The Upper Canada Law Journal. Maclear & Co., Toronto. This well conducted publication, we are glad to learn, has proved eminently successful. Its contents must prove of great value to the Profession in Canada, and will prove interesting in the United States.—*Legal Intelligencer*, Philadelphia, August 6, 1858.

Upper Canada Law Journal.—We have received the first number of the fifth volume of this highly useful Journal, published by Maclear & Co., of Toronto, and edited by the talented Robert A. Harrison, Esq., B.C.L., author of the Common Law Procedure Act, which has obtained classification along with the celebrated compilers of England and is preferred by the professionals at home to all others.

There is no magistrate, municipal officer, or private gentlemen, whose profession or education wishes the law to be well administered, should be without it. There are knotty points defined with a simplicity that the most ordinary minds can understand, and the literary gentleman will find in its pages, a history of the constitution and laws of Canada, from the assumption of British authority. Subscription, $4 00 a year, and for the amount of labour and erudition bestowed upon it, it is worth double the amount.—*Victoria Herald, Janu.* 19, 1859.

The Law Journal of Upper Canada for January. By Messrs. ARDAGH and HARRISON. Maclear & Co., Toronto, $4 00 a year cash.

This is one of the best and most successful publications of the day in Canada, and its success prompts the editors to greater exertion. For instance they promise during the present volume to devote a larger portion of their attention to Municipal Law, at the same time not neglecting the interests of their general subscribers.—*British Whig, January* 18, 1859.

The Upper Canada Law Journal, for January. Maclear & Co., King Street East, Toronto.

This is the first number of the Fifth Volume: and the publishers announce that the terms on which the paper has been furnished to subscribers, will remain unchanged,—viz., $4 00 per annum, if paid before the issue of the March number, and $5 00 if afterwards. Of the utility of the *Law Journal*, and the ability with which it is conducted, ample testimony has been afforded by the Bar and the Press of this Province, so it is unnecessary for us to say much in the way of urging its claims upon the liberal patronage of the Canadian public.—*Thorold Gazette, January* 27, 1859.

THE UPPER CANADA LAW JOURNAL AND LOCAL COURTS' GAZETTE, is the name of an excellent monthly publication, from the establishment of Maclear & Co., Toronto.—It is conducted by W. D. Ardagh, and R. A. Harrison, B.C.L., Barrister at Law.—Price $4 per annum.—*Oshawa Vindicator*, October 13th, 1858.

LAW JOURNAL, for November has arrived, and we have with pleasure its invaluable contents. In our humble opinion, the publication of this Journal is an inestimable boon to the legal profession. We are not aware of the extent of its circulation in Brantford; it *should be taken*, however by every member of the Bar, in town, as well every Magistrate and Municipal Officer. Nor would politicians find it unprofitable, to pursue its highly instructive pages. This journal is admitted by Trans-Atlantic writers to be the most ably conducted Journal of the profession in America. The Publishers have our sincere thanks for the present number.—*Brant Herald*, Nov 16th, 1858.

The *Law Journal* is beautifully printed on excellent paper, and, indeed, equals in its typographical appearance, the legal record published in the metropolis of the United Kingdom. $4 a year is a very inconsiderable sum for so much valuable information as the *Law Journal* contains.—*Port Hope Atlas*.

UPPER CANADA LAW JOURNAL, Maclear & Co., Toronto, January.—We have so frequently spoken in the highest terms of the merits of the above periodical, that it is scarcely necessary for us to do anything more than acknowledge the receipt of the last number. It is almost as essential to Municipal officers and Magistrates as it is to Lawyers.—*Stratford Examiner, 4th May*, 1859.

THE UPPER CANADA LAW JOURNAL for March. By W. D. Ardagh and Robt. A. Harrison Barristers at Law. Maclear & Co., Toronto. $4 a year cash.—Above we have joined together for a single notice, the most useful periodical that any country can produce, and happy are we to add, that it appears to be well and deservedly patronised. We have so repeatedly alluded to its merits, that the reader will readily excuse any longer make mention.—*Whig, May*, 18th 1859.

THE UPPER CANADA LAW JOURNAL, *and Local Courts Gazette*.

The August number of this sterling publication has been at hand several days. It opens with a well written original paper on "Law, Equity and Justice," which considers the questions so frequently asked by those who have been, as they think, victimized in a legal controversy.—"Is Law not Equity? Is Equity not Law?" Liability of Corporations, and Liability of Steamboat Proprietors, are next in order, and will be found worth a careful perusal. A "Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada," is continued from the July number, it is compiled with care, and should be read by every young Canadian.

The correspondence department is very full this month. There are letters from several Division Court Clerks, asking the opinions of the Editors on points of law with which it is important every clerk should be familiar. There are communications too from Justices of the Peace, asking information upon a great variety of subjects. All questions are answered by the Editors, and a glance at this department must be sufficient to satisfy every Clerk, Justice of the Peace, Bailiff or Constable that in no way can they invest $4 with so much advantage to themselves, as in paying that amount as a year's subscription to the *Law Journal*. The report of the case, "Regina v. Cummings," by Robert A. Harrison, Esq., decided in the Court of Error and Appeal, is very full, and of course will receive the careful attention of the profession. The Reports of Law Courts add greatly to the value of the publication.

THE UPPER CANADA LAW JOURNAL, &c.

We are indebted to the publishers of this interesting law periodical for the numbers till this sale of the present volume, (Vol. 4.) commencing with January last. Its pages have been looked over by us with much interest. It is the only legal periodical published in Upper Canada, and is conducted with great ability. Each number contains elaborate original articles on professional subjects, mainly of importance to the bar of Canada, but also entertaining to that of the United States— communications on mooted points and replies thereto, serial instructions to magistrates and other officers—and numerous decisions of the Division and other Courts of Canada. We welcome it as an excellent exchange.—*The Pittsburgh Legal Journal, Sept. 4th*, 1858.

THE LAW JOURNAL, for February, has been lying on our table for some time. As usual it is full of valuable information. We are glad to find that the circulation of this very ably conducted publication is on the increase—that it is now found in every Barrister's office of note, in the hands of Division Court Clerks, Sheriffs and Bailiffs.—*Hope Guide, March 9th* 1859.

THE UPPER CANADA LAW JOURNAL for July. Maclear & Co., Toronto. $4 a year.—To this useful publication the public are indebted for the only reliable law intelligence. For instance, after all the Toronto newspapers have given a garbled account of the legal proceedings in the case of Moses R. Cummings, out comes the *Law Journal* and speaks the truth, viz. that the Court of Appeal has ordered a new Trial, the prisoner remaining in custody.—*British Whig, July* 6, 1858.

THE UPPER CANADA LAW JOURNAL. Toronto: Maclear & Co.—The July number of this valuable journal has reached us. As it is the only publication of the kind in the Province, it ought to have an extensive circulation, and should be in the hands of all business as well as professional men. The price of subscription is four dollars a year in advance.—*Spectator, July 7*, 1858.

Upper Canada Law Journal.—This highly interesting and useful journal for June has been received. It contains a vast amount of information. The articles on "The work of Legislation," "Law Reforms of the Session," "Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada," are well worthy of a careful perusal. This work should be found in the office of every merchant and trader in the Province, being in our opinion, of quite as much use to the merchant as the lawyer.—*Hamilton Spectator—June* 8, 1858.

U. C. Law Journal, August, 1858. Toronto: Maclear & Co.

This valuable law serial still maintains its high position. We hope its circulation is increasing. Every Magistrate should patronize it. We are happy to learn from the number before us that Mr. Harrison's "Common Law Procedure Acts" is highly spoken of by the English *Jurist*, a legal authority of considerable weight. He says it is "almost as useful to the English as to the Canadian Lawyer, and is not only the most recent, but by far the most complete edition which we (*Jurist*) have seen of these important acts of parliament."—*Cobourg Star, August 11th*, 1858.

UPPER CANADA LAW JOURNAL.—The August number of the *Upper Canada Law Journal and Local Courts Gazette*, has just come to hand. Like its predecessors, it maintains its high standing as a periodical which should be studied by every Upper Canadian Law Student, and carefully read, and referred to by every intelligent Canadian who would become acquainted with the laws of his adopted country, and see how these laws are administered in her courts of Justice.—*Stratford Examiner, August 12th*, 1858.

DIARY FOR AUGUST.

4. SUNDAY ..... 10th *Sunday after Trinity.*
10. Saturday ..... Articles, &c., to be left with Secretary Law Society.
11. SUNDAY ..... 11th *Sunday after Trinity*
14. Wednesday ..... Last day for service of writ County Court.
18. SUNDAY ..... 12th *Sunday after Trinity.*
20. Tuesday ..... Last day for notice for Chancery Examination, Toronto.
21. Wednesday ..... Long vacation ends.
24. Saturday ..... Last day to declare County Court.
25. SUNDAY ..... 13th *Sunday after Trinity.*
26. Monday ..... Trinity Term begins.
30. Friday ..... Paper Day, Q. B
31. Saturday ..... Paper Day, C. P.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

AUGUST, 1861.

THE ACT FOR THE BETTER ASSIGNMENT OF DOWER.

The law of Dower in Upper Canada has always been a subject of much perplexity to the lawyer, and of more or less oppression to the land-owner.

While dower was, in theory, for the support of the widow, in practice it yielded her little or nothing, and, worse still, caused much loss to the owner of the fee.

This being the case, the aim of the doweress was rather to levy a money compensation than to have the *enjoyment* of one-third of a bush-lot, which, owing to the existence of the primeval forest, she could not cultivate, or even one-third of a lot partly cleared, of which, for want of means, she could make no use.

In truth no greater punishment could, in many cases, be inflicted upon the claimant than to admit her claim, and to permit her to take possession of that which apparently she so earnestly prized. But even here there was a difficulty: parties, owing probably to the fact that the claim for one-third of the land was only a pretence, could not agree upon the portion to be assigned, and an action for dower, with its attendant expenses, was the consequence.

Then, suppose the right to dower conceded, was it just to allow the widow to have not only one-third of the lot as left by her deceased husband, but at the same time, in consequence of her own neglect to claim immediate dower, to give her, by way of damages for detention, the benefit of subsequent improvements? Was it fair to carve out of the centre of a farm one-third of it, so as to render the working of the remainder ruinously expensive? Was it right for the law capriciously to impoverish any of her Majesty's subjects without, at least, a corresponding benefit to her who put the law in motion? These, and similar questions without number, were daily asked, but owing to the vexatious state of the law, could not be satisfactorily answered.

The Legislature has at length made an attempt to place the law of dower upon a more satisfactory footing in passing the act 24 Vic. cap. 40, intitled "An Act for the better assignment of Dower in Upper Canada." It is confined to Upper Canada, and does not affect cases where the right to dower has become consummate by the death of the husband before 18th May, 1861: (s. 16).

It is by this act enacted that "In estimating damages for detention of dower nothing shall be allowed for the use of permanent improvements made after the alienation by, or death of, the husband of the claimant" (s. 17); and that "no action for dower shall be brought but within twenty years from the death of the husband of the person claiming dower, nor until one calendar month's notice, in writing, demanding the same, has been given by the claimant to the tenant of the freehold:" (s. 18.) It is also, very properly enacted, that no such action shall be hereafter brought "in case the claimant joined in a deed to convey the land or release dower therein to a purchaser, though the acknowledgment required by law at the time may not have been had, or though any informality may have occurred in respect thereof:" (s. 19.)

The leading features of the act, however, are two: first, to provide facilities for the issue of a writ of assignment of dower; and, secondly, to provide a means whereby the assignment of dower may be, as far as possible, reasonable and just.

Facilities for issue of writ.—Where there exists an outstanding claim for dower in any real estate in Upper Canada, and the owner of the real estate acquiesces therein and is willing to assign dower, but the parties are not agreed as to the admeasurement, it is made lawful for either of the parties to apply to a judge of either of the superior courts of common law, or to the judge of the county court of the county in which the lands lie, out of which dower is demanded, for a writ of assignment of dower: (s. 2.) It must be made to appear to the satisfaction of the judge, by evidence on affidavit, (intitled, it is presumed, in one of the courts) that the parties agree as to the existence of the right of dower. This is the foundation of the summary jurisdiction. When it is established to the satisfaction of the judge he is authorized, without

suit or other proceeding, to order the writ of assignment of dower to issue to the sheriff of the county in which the land lies, out of which the dower is demanded. So, whenever, a widow's right to dower is established in an action for that purpose, she is entitled to sue out from the court in which the action is brought a writ of assignment of dower, under the provisions of the act. The writ must, of course, in this case be sued out upon the judgment, and in any case be directed to the proper sheriff: (s. 1.)

Form of writ.—The Legislature has not given the form of the writ intended, but, on the contrary, declared that the superior courts of common law shall frame a form of writ of assignment of dower, and *fieri facias* for costs, adapted to the provisions of this act and any other act in force in Upper Canada relating to dower:" (s. 15.)

Duty of sheriff upon receipt of the writ.—It is made the duty of the sheriff to whom the writ is directed, to appoint three reputable and disinterested freeholders commissioners, for the purpose of making admeasurement of the dower. The appointment must be by an order which shall specify, 1. The lands of which dower is to be admeasured; and, 2. The time at which the commissioners shall report: (s. 3)

Oath of Commissioners.—Before entering upon their duties the commissioners must take an oath of office. No form of oath is given, but it must be to the effect that "they will faithfully, honestly and impartially discharge the duty and execute the trust reposed in them by the appointment." The oath may be administered by the sheriff who made the appointment, or before some officer authorized to take affidavits: (s. 4.) There is no obligation on the part of any person to accept of the appointment. It may be refused, and even if accepted it would appear may be neglected without any very serious consequences. It is, however, to be presumed that any person who takes the oath "faithfully, honestly and impartially" to discharge the duty will not be guilty of neglect.

Provision in case of death or resignation of Commissioners.—If the persons appointed commissioners, or any or either of them die, resign, neglect or refuse to serve, others may be appointed in their places by the sheriff. Persons so appointed must take the oath before mentioned.

General duty of Commissioners.—The commissioners are required "as speedily as possible" to lay off the one-third of the lands embraced in the order for that appointment, as the dower of the widow. The part so admeasured and laid off must be by the commissioners designated with posts, stones, or other permanent monuments: (s. 5, sub-s. 1).

Rule to be observed as to improvements.—In making the admeasurement, the commissioners are required to take into view any permanent improvement made upon the lands embraced in the order, by any guardian or minor heir, or other owner, since the death of the landlord, or since the time that the lands came to be owned by any person or persons by the alienation of the husband or by title derived through him. If practicable, the commissioners must award the improvement within that part of the dower not allotted to the widow. If not practicable so to award it, they shall make a deduction from the lands allotted to the widow proportionate to the benefit she will derive from such part of the improvements as may be included in the portion assigned to her: (s. 5, sub-s. 2).

Power to award annuity in lieu of Dower.—It is not under all circumstances imperative upon the commissioners to make an actual assignment of dower. If from the improvements upon the land or other peculiar circumstances, the commissioners find that an assignment of dower cannot be so made as to be fair and just to all parties by metes and bounds, they may assess the amount of a yearly sum of money in lieu thereof. In assessing the annuity they must take evidence of all facts and circumstances relating to the lands, and the improvements thereon, making allowances for the improvements in the same way as would have been done had the assignment been made by metes and bounds. The evidence should be taken in writing on oath and be subscribed by the witnesses. It must be returned to the Sheriff: (s. 5, sub-s. 3).

Annuity—its effect, and how recoverable.—The annuity will be a lien upon the entire of the lands, unless the commissioners think it just to confine it to a part, and then only to such part. It will be payable as the commissioners may direct, and recoverable by distress in the same manner as rent. The usual personal remedy against the owners of the land may also be preferred and be had: (s. 5, sub-s. 4).

Employment of a surveyor.—When an admeasurement is necessary, the commissioners may employ a surveyor with necessary assistants to aid them in the admeasurement: (s. 5, sub-s. 6).

Report of Commissioners.—The report or return must be by the commissioners directed to the sheriff, with a full and ample report of their proceedings, with the quantity, courses, and distances of the land admeasured and allotted to the widow, with a description of the posts, stones, and other permanent monuments thereof: (s. 5, sub-s. 5).

Controlling power of Sheriff—Confirmation of Report.—The sheriff is empowered upon the application of the commissioners or of either party, to enlarge the time for making the report. He may also by order compel the report or discharge the commissioners neglecting to make the same, and appoint others in their places. (s. 6). When the report is made, he may at the time for receiving it, or at

such other time to which the hearing shall have been adjourned on good cause shown set aside the report and appoint new commissioners as often as may be necessary. If not set aside, the sheriff is required by order to be endorsed on the writ to confirm the report and admeasurement: (s. 7).

Report when absolute.—The report when made and confirmed is to be filed with the proceedings in the cause thirty days thereafter: (s. 6). The report so made and confirmed at the expiration of thirty days from the date of confirmation, unless appealed from is binding and conclusive upon all parties to the action in which the writ of assignment of dower was issued: (s. 8).

Right of appeal.—Any party interested may appeal from the order of confirmation of the report of the commissioners in the court in which the proceedings have been carried on. The appeal must be made within thirty days after the order of confirmation: (s. 9).

Mode of appeal, bond, &c.—The appeal must be filed with the sheriff who granted the order. It will not, however, be effectual or valid for any purpose, until a bond to the adverse party is executed by the appellant, and filed with the sheriff with security to be approved by him. The approval must be evidenced by an indorsement on the bond. The bond itself must be in the penal sum of $100, and conditioned for the diligent prosecution of the appeal, and of all costs that may be adjudged by the court against the appellant: (s. 10.)

Duty of sheriff when bond approved.—It is made the duty of the sheriff with whom the appeal bond is filed; 1. To transcribe the order, evidence, report, and other proceedings had before him, together with the appeal; 2. To certify the same under his official seal; and, 3. To transmit the same to the proper officer of the court appealed to: (s. 11).

Review of proceedings by the court.—The court to which the appeal is made, is required to proceed at the next ensuing term after the transmission, and not later than the second term after the making of the order appealed from, to review the proceedings upon the application, and to do therein "what shall be just:" (s. 11).

Hearing of appeal.—The hearing shall be brought on by the ordinary practice as in cases of an appeal from the County Court, and the court may by rule direct further returns from any sheriff whenever the same shall be necessary: (s. 14).

Proceedings upon reversal.—In case of the reversal of the order of confirmation, the court is to cause the same to be certified to the sheriff making the order, to the end that new commissioners may be appointed or a new admeasurement be had, as the court may direct: (s. 12). The court itself may, if it see fit, appoint the commissioners: (*Ib*).

Duty of sheriff if no appeal.—If there be no appeal within the time limited for the purpose, it is the duty of the sheriff to deliver possession of the land admeasured to the claimant for her dower, and she may hold the same, subject to the payment of all taxes and charges accruing thereon subsequent to her taking possession: (s. 8).

Costs.—In all cases where a widow's right to dower is established in an action for that purpose, the costs of proceedings for the assignment of dower follow the suit, and are recoverable by writs of *fieri facias* from the goods and chattels or lands of the defendant in the suit: (s. 13). In all other cases, the costs are in the discretion of the court or judge that issues the writ of assignment of dower: (*Ib*). But in both classes of cases all costs in appeal are in the discretion of the court of appeal: (*Ib*). Power is conferred upon the Superior Courts of Common Law to settle the fees to be allowed to the sheriff, commissioners, and all others for services: (s. 15).

Registry of report.—A certified copy of the report may be registered in the registry office for the county where the lands are situate: (s. 6).

ORDERS OF THE COURT OF CHANCERY.

29TH JUNE, 1861.

PRO CONFESSO—SETTING DOWN.

Where a bill has been ordered to be taken *pro confesso*, the cause may thereupon be set down to be heard; but the day for which the same is so set down is to be not less than ten days from the setting down thereof, unless the Court think fit to appoint a special day for the hearing thereof.

MOTION FOR DECREE.

Where a party has given notice of motion for decree, he is to set the cause down to be heard on such motion not less than ten days before the day for which such notice is given, unless he shall have obtained an order allowing a less time for such purpose.

Motions for decrees are to be allowed only in three classes of cases, namely:—

First—Where there is no evidence.

Second—Where the evidence consists only of documents, and such affidavits as are necessary to prove their execution or identity, without the necessity of any cross-examination.

Third—Where infants are concerned, and evidence is necessary only so far as they are concerned for the purpose of proving facts which are not disputed: but this order is not to apply to cases in which, but for this order, the court would grant leave to serve short notice of motion for decree in order to prevent irreparable injury.

DELIVERY OF POSSESSION AFTER FINAL FORECLOSURE.

In any suit for foreclosure or for redemption, the mortgagor or other person entitled to the equity of redemption, being in possession of the premises foreclosed, may be ordered to deliver up

possession of the same upon or after final order for foreclosure, or for the dismissal of the bill, as the case may be.

PARTIES INTERESTED IN THE EQUITY OF REDEMPTION MADE PARTIES IN THE MASTER'S OFFICE.

In any case in which it shall appear conducive to the ends of justice that parties interested in the equity of redemption should be allowed to be made parties in the Master's Office, by reason of the parties so interested being numerous or otherwise, it shall be competent to the Court, at the hearing, or afterwards, to direct that parties so interested, may be made parties in the Master's Office, upon such terms as to the Court shall seem fit; such order to be only made where one or more parties interested in the equity of redemption are already before the court.

DEFENDANT ABSCONDING OR BEING CONCEALED.

In case it appears to the court by sufficient evidence, that any defendant against whom a bill has been filed, has been within the jurisdiction of the Court at some time, not more than two years before the filing of the bill, and that such defendant, after due diligence, cannot be found to be served with an office copy of the bill, and that there is good reason to believe that he has absconded from the jurisdiction, or that he is concealed within the same, the court may make such order as is prescribed by section 7th of the 9th of the General Orders of June, 1853.

APPOINTMENTS AND NOTICES IN THE MASTER'S OFFICE.

Where the Master shall direct that parties not in attendance before him shall be notified to attend before him at some future day, or for different purposes at different future days, it shall not be necessary to issue separate warrants, but the parties shall be notified by one appointment, to be signed by the Master, of the proceedings to be taken, and of the times by him appointed for taking the same.

In cases where parties are notified by appointment from the Master, of proceedings to be taken before him, no warrants shall be issued as to such parties in relation to the same proceedings.

Parties making default upon such appointments, are to be subject to the same consequences as if warrants had been served upon them.

TAXATION OF COSTS.

Where costs are awarded to be paid, it shall be competent to the Master in Ordinary to tax the same, without any express reference to him for that purpose.

PAYMENT OF MORTGAGE MONEY.

Where the Master is directed to appoint mortgage money to be paid at some time and place, he is to appoint the same to be paid into some Bank at its head office, or at some branch or agency office of such Bank, to the joint credit of the party to whom the same is made payable, and of the Registrar of this court; the party to whom the same is made payable, to name the bank into which he desires the same to be paid, and the Master to name the place for such payment.

Where money is paid into some Bank, in pursuance of such appointment aforesaid, it shall be competent to the party paying in the same, to pay the same either to the credit of the party to whom the same is made payable, or to the joint credit of such party and the Registrar. If the same be paid to the sole credit of the party, such party shall be entitled to receive the same without the order of this court.

Where default is made in the payment of money appointed under this order to be paid into any Bank, the certificate of the cashier, where the same is made payable, or of other, the like Bank officer, shall be sufficient evidence of such default. Where the affidavit of the party entitled to receive the same is by the present practice required, the like affidavit shall still be necessary.

CONDUCT OF SALE.

Where, upon a bill for foreclosure, a sale is asked for by a defendant, it shall be competent to the court to require as a condition that the party asking the same, shall conduct the sale at his own expense, dispensing in such case with a deposit, if the court shall think fit.

NOTICES, APPOINTMENTS, &c, HOW TO BE SERVED.

The General Order of this Court, number 43, is altered and varied in the following particulars:

Where the pleadings in any cause have been filed in the office of the Registrar of the Court, at Toronto, or in the office of any Deputy-Registrar, all notices, appointments, warrants, and other documents and written communications in relation to matters transacted in Court or Chambers, or in the office of the Master or Registrar, which do not require personal service upon the party to be affected thereby are to be served upon the Solicitor, when residing in the City of Toronto; and when the Solicitor to be served resides elsewhere than in the City of Toronto, then such notices, appointments warrants, and other documents, and written communications aforesaid, may be served either upon such Solicitor, or upon his Toronto Agent, named in the "Solicitors' and Agents' Book; unless the Court, or a Judge thereof, or a Master, before whom any such proceeding may be had shall give any direction as to the Solicitor upon whom any such notice, appointment, warrant, or other document or written communication shall be served. And if any Solicitor neglect to cause such entry to be made in "the Solicitors' and Agents' Book," as is required by the above general order, the leaving a copy of any such notice, appointment, warrant, or other document, or written communication for the Solicitor neglecting as aforesaid, in the office of the Registrar, is to be deemed sufficient service, unless the Court direct otherwise.

AFFIDAVITS ON APPLICATIONS TO COURT.

Section 3, of General Order, number 40, is hereby abolished, except as to affidavits in support of *ex parte* applications; but this order is not to be taken to warrant the taxation of costs of obtaining office copies of affidavits, for use upon the hearing of any matter, by the party on whose behalf they are filed.

Affidavits except upon *ex parte* applications, must be filed before they can be used; and affidavits in answer must be filed not later than the day before that appointed for the hearing of the motion.

PROCEEDING WHERE STATE OF ACCOUNT CHANGED AFTER DECREE OR REPORT.

In cases where after a decree or decretal order for the sale or foreclosure of mortgage property the state of the account ascertained by decree or decretal order, or by the report of the Master, shall be changed by payment of money, by receipt of rents and profits, by occupation rent, or otherwise, before final order for foreclosure or sale obtained, it shall be competent to the plaintiff or other party to whom the mortgage money is payable, to give notice

to the party by whom the same is payable, that he gives him credit a sum certain to be named in such notice, and that he claims that there remains due to him in respect of such mortgage money for a sum certain, to be also named in such notice; and in case upon the final order for forclosure for sale being applied for, the judge shall think the sums named in such notice proper to be allowed and paid under the circumstances, the order for final foreclosure is to go without further notice, unless the judge shall direct notice to be given, or it shall be competent to the party to whom the mortgage money is payable, to apply to a judge in Chambers for a reference to a master, or for an appointment to fix such sums respectively, and in the latter case either upon notice, or *ex parte*, as the judge may think fit, and the order to be made thereupon is to be served, or service thereof dispensed with, as the judge may direct.

It shall be competent to the party to whom such notice may be given to apply to a judge in Chambers for an appointment to ascertain and fix the amounts proper to be allowed and paid instead of the amounts mentioned in such notice; or for a reference to a master for a like purpose; and in case the judge shall think a reference to a master proper, the same may be made *ex parte*, unless the judge shall otherwise direct.

APPEALS FROM MASTER'S REPORTS.

Section 17 of General Order 42, is altered and varied in the following particular:—

Reports become absolute, without order, confirming the same at the expiration of fourteen days after the filing thereof, unless appealed from. An appeal shall lie to the court upon the motion, at any time from the signing of the report, to the expiration of fourteen days from the filing of the same in respect of the finding of the the master upon any matter presented in his office for his decision, without objections or exceptions being previously taken.

It shall be competent for any party affected by the report to file the same, or a duplicate thereof, and the filing of such duplicate shall have the same effect for the purposes of this order as the filing of the report, by the party taking the same.

J. C. P. Esten, V. C.
J. G. Spragge, V. C.

LAW SOCIETY OF UPPER CANADA.

EASTER TERM, 1860.

ARTICLED CLERKS' EXAMINATION.

BLACKSTONE, VOL. I.

1. Into what two classes does Blackstone divide the relations of persons.

2. What are the three *absolute* rights of individuals?

3. How are parliaments dissolved? Is their any provincial statute on this point?

SMITH'S MERCANTILE LAW.

1. "I promise to pay to A. or order £50 on demand, in goods:" is this a good promissory note? Give your reasons.

2. What is requisite to a valid sale of goods over the value of ten pounds? Does it make any difference whether the goods are in existence at the time of the sale?

3. What is the effect of mentioning no time for payment in a bill or note?

4. What are general and particular liens, and how are they respectively looked upon by the law?

WILLIAMS ON REAL PROPERTY.

1. What are the various kinds of estates, in real property, and how are they transferable?

2. What is a "use?" and, in connexion with this, explain the operation of a conveyance under the Statute of Uses.

3. Explain the nature of a mortgage, and the respective rights of the mortgagor and mortgagee.

4. Define a "reversion," and mention some of its incidents.

STORY'S EQUITY JURISPRUDENCE.

1. Explain the origin of equity jurisprudence, and distinguish between courts of law, and courts of equity, strictly so called.

2. Give the general heads of equitable relief, with examples to illustrate your meaning.

3. Explain "marshalling," and "substitution" or "subrogation."

4 What is the nature of the remedy by "injunction."

STATUTES AND PLEADING OF THE COURTS.

1. What is an avowry and cognizance?

2. What is the effect of a creditor obtaining judgment against his debtor as an absconding debtor, where it afterwards appears to the court that such debtor was not an absconding debtor?

3. What is the course to be pursued when a plaintiff dies during the progress of a suit?

4. In what cases can the court or a judge direct that a plaintiff shall be at liberty to proceed against an absent defendant without his having entered an appearance?

5. What is the penalty incurred by a tenant who is served with a writ of ejectment, and omits to notify the same to his landlord?

6. What are the requisites of a bill and answer respectively?

7. What changes have the general orders introduced as to "parties?"

8. What is the practice in this country and in England respecting as to obtaining "discovery?"

9. How far are persons interested in a suit admissible as witnesses?

EXAMINATION FOR CALLS.

TAYLOR ON EVIDENCE.

1. Of what facts are the entries of a deceased person against his interest, and in the ordinary course of business, respectively evidence, is there any and what difference between them in this respect?

2. Explain the rule that there are no degrees of secondary evidence. Would this rule make a copy of a copy sufficient, in cases where secondary evidence is admissible? Give your reasons.

3. Mention some cases in which evidence is excluded on the grounds of public policy.

4. Mention some cases in which a notice to produce is not necessary for the purpose of letting in secondary evidence.

BYLES ON BILLS.

1. Is a debt due from a third person to A. a good consideration for a note payable *in futuro*, given by B. to A.? Give your reasons.

2. If a bill is accepted in one country, payable in another, is the contract to be construed by the law of the country in which it is accepted, or of that in which it is payable? Give your reasons.

3. Is a plea of tender, by the acceptor after the bill has become due, but before action brought, good? Give your reasons?

SMITH'S MERCANTILE LAW.

1. What is the effect of the endorsement of a bill of lading on the vendor's *legal* right to stop goods in transitu?

2. Are there any, and if so, what cases, in which the concealment of facts within the knowledge of the insured will not vitiate a policy?

3. What is a charter party? and what is the ordinary form of contract of affreightment by a general ship.

ADDISON ON CONTRACTS.

1. What is the effect of the consideration for a contract, and of the contract itself respectively, being partly legal and partly illegal?

2. Upon what does the question, whether goods supplied to an infant are necessaries, depend?

WILLIAM'S ON REAL PROPERTY.

1. Distinguish between a "reversion" and a "remainder."

2 What are estates of "courtesy" and in "dower," and the incidents thereof respectively?

3. What is an "easement," and how may it be conferred or lost?

4. What are the limitations imposed by statute, with respect to the recovery of real estate?

STORY'S EQUITY JURISPRUDENCE.

1. When does a bill in equity lie for "an account?"

2. What is "accident," as one of the heads of eqitable jurisdiction?

3 When will equity relieve against forfeitures?

4. How far will the defective execution of a power be remedied in equity.

STATUTES AND PLEADING OF THE COURTS.

1. In what, if any, cases of ejectment, can mesne profits be recovered at the trial of the action of ejectment?

2. In what cases is the venue in replevin local, and in what transitory?

3. In what manner can a plaintiff suing upon a lost negotiable instrument, prevent such loss being set up as a defence?

4. What is the effect of a party to a suit refusing to admit a document saving just exceptions after having been duly called on by notice to do so? and, what is the effect of omitting to give such notice?

5. Under what circumstances in equity is a "demurrer" proper?

6. What is the effect of a "replication" in equity, and when should it be filed?

7. Classify the different kinds of bills in chancery, and state how far they are effected by the general orders.

8. What is an order for the production of documents, and the effect of it?

SELECTIONS.

THE CASE OF ANDERSON, THE FUGITIVE SLAVE.

Continued from page 173.

As to *Campbell* v. *Hall*, Cowp. 204 (1774), it was an action for money had and received against a customs collector of Grenada—not a *habeas corpus* case, and therefore inapplicable to Anderson's case. The references to Vattel's "Law of Nations," *Grotius de Jure Belli ac Pacis*, and the memorandum in 2 P. Wms. 75, refer to the rights of a conquering prince over a conquered state, immediately upon subjugation, and consequently are irrelevant to the kindly relations which exist between the mother-country and Canada; especially now that the latter has a legislature and judicature of its own. In Watson's case, 9 A. & E. 731 (1839), though the prisoners, the subject of the *habeas corpus*, were brought from Canada, yet they were in Liverpool (England) when the writ was granted, to which place, as part and parcel of England, the Court of Queen's Bench at Westminster had clearly power to issue its writ of *habeas corpus*. Beside, since this case was adjudged, the colony of Canada has had an independent judicature, and special privileges conferred upon it by the Imp. *Stat. 3 & 4 Vic. c. 35; to which reference will be made hereafter.*

We now proceed to demonstrate that the negative of the question stated in the first paragraph of this article is the correct one, and that the issue of the writ of *habeas corpus* by the Court of Queen's Bench at Westminster, was an act quite beyond either its common law or statutory jurisdiction.

As the common law jurisdiction of the Court is inapplicable to a colony which we have not possessed for three generations, no further comment is necessary on this head.

Our observations as to the statutory jurisdiction will be arranged under two principal heads. 1st, As to the topical jurisdiction of the Court of Queen's Bench at Westminster; and 2dly, As to the privileges and territorial ambit of the Canadian courts of civil judicature.

1st.—*As to the topical jurisdiction of the Court of Queen's Bench at Westminster.* That the Court of Queen's Bench at Westminster has a well-defined territorial jurisdiction, which it cannot legally transgress, is clearly shown as well by the appointments and patents of its judges, as by the course of its practice for a long series of years.

The head of the Court of Queen's Bench at Westminster,* is a functionary whose formal title formerly was that of *Justiciarius Angliæ*, and his court being a remnant of the ancient *aula regis*, can still be removed by the queen to any place *in England*, whereever she may, for the time being, happen to be; and for this reason it is that the process of such court may be still made returnable, as formerly it always was, "*Ubicunque fuerimus in Anglia.*"

It may be argued, and with some plausibility, that the official name of the chief-justice, though confined to England, *does not limit the jurisdiction of his court to this island*, because it may well be that though his court must be held in England, yet its writs may lawfully run into the colonies or other dominions of her majesty. But, when the matter

* "The Chief-Justice of the King's Bench is not now that *Justiciarius Angliæ* which was anciently in use; for he had, in effect, all jurisdiction both in civil and criminal matters in the King's Bench, Chancery, Common Pleas, and Exchequer, and often sat in those Courts as their chief judge. But the chief-justice of the King's-Bench has, as one of the judges of such court, that part of the jurisdiction of the *Justiciarius Angliæ* which concerns criminal causes, and the inspection and reformation of the judgments of other courts. It is true he is frequently called Chief-Justice of England, because he presides in that court where the *Justiciarius Angliæ* did most frequently and naturally sit, as the King's deputy in the administration of justice. But it is a misconclusion that therefore he is that *Magnus Justiciarius Angliæ*, the great state officer before the time of Henry III. He is created by writ, and always was; but the *Justiciarius Angliæ* by patent."—2 Hale's "Pleas of the Crown," p 6.

comes to be fairly considered upon authorities and usage, it will be found that the chief-justices of the Court of Queen's Bench in England have so constantly refused (except where specially authorised by statute) to accept jurisdiction over a local action arising, or crime committed, out of England, that the jurisdiction of the court is practically and actually co-extensive with its judges' patents.

The nature and extent of the topical jurisdiction of the Court of Queen's Bench at Westminster may therefore be defined to embrace England, Wales, and Berwick-upon-Tweed, but not Scotland nor Ireland. The Isle of Man, and the Islands of Jersey, Guernsey, Alderney, and Sark are also excluded. Here the ordinary process of the Courts at Westminster has no force, and no action of a local character arising therein can be brought in the courts of this country. The colonies are also excluded, as is shown by the case of *R.* v. *Hooker*, 7 Mod. 193 (7 Geo. II., K. B. cor. Lord Hardwicke C. J., and Page, Probyn and Lee, JJ.), in which a motion for an information for an assault and battery, committed on a person in Newfoundland, was refused on the ground that the offence was local, and that the procedure by information was not distinguishable, so far as related to the court's jurisdiction from an indictment. Further, in *Doulson* v. *Matthews*, 4 T. R., 503, Lord Kenyon and Buller, J. expressly held that trespass would not lie in the superior courts at Westminster for entering a house in Canada. The latter judge saying—"We may try actions here which are in their nature transitory, though arising out of a transaction abroad, but not such as are in their nature local." These authorities are, it is submitted, conclusively against the jurisdiction of the English courts.

We now proceed to notice several acts of parliament which have been from time to time passed, in order to enlarge not only the jurisdiction and process of the superior courts at Westminster, but also the powers of their judges and other officers, which, but for such enabling statutes, could not have been legally exercised; and it appears that it has only been after centuries of struggles, that the Court of Queen's Bench at Westminster has at last established its jurisdiction over the whole of England proper. The first we propose to notice is the Stat. 11 Geo. IV. & 1 Wm. IV., c. 70; which was passed in order to give currency to Westminster writs within the county Palatine of Chester and in Wales, which it does in language that clearly shows that Queen's Bench writs were previously limited to England. Thus, section 13 enacts:—

That from and after the commencement of such Act, his Majesty's writ shall be directed and obeyed, and the jurisdiction of his Majesty's Courts of King's Bench, Common Pleas, and Exchequer, respectively, *and of the several judges and barons thereof*, shall extend and be exercised over and within the County of Chester, and the County of the City of Chester, and the several counties in Wales, in like manner, to the same extent, and to and for all intents and purposes whatsoever, as the jurisdiction of such courts respectively is now exercised *in and over the* COUNTIES OF ENGLAND, *not being counties Palatine*, any statute heretofore passed to the contrary notwithstanding: and that all original writs to be issued into the said several Counties of Chester, City of Chester, and Wales, shall be issued by the cursitors for *London and Middlesex*, and the process and proceedings thereon shall be issued by and transacted with such of the officers of the several Courts of King's Bench and Common Pleas, as shall be named for that purpose by the chief-justices of such courts respectively, each *naming for his own court*.

So, when our relations with our East Indian possessions became considerable, it required the Stat. 13 Geo. III. c. 63, to empower the Court of Queen's Bench at Westminster to issue a *mandamus*, commanding the chief-justice and judges of the Indian Courts to examine witnesses in India, and to render legal the use of such examinations in the superior courts at Westminster, on the trial of misdemeanours or offences committed in India.

Further, the Stat. 1 Wm. IV. c. 22, after reciting that great difficulties and delays were often experienced, and sometimes a failure of justice took place in actions depending in courts of law, by reason of the want of a *competent power and authority* in the said courts to order and enforce the examination of witnesses when the same might be required before the trial of a cause; and after reciting the above-mentioned Stat., 13 Geo. III. c. 63, enacted by sect. 1st, That all and every the powers, authorities, provisions, and matters contained in such recited Act, relating to the examination of witnesses in India, should be, and the same were thereby, extended to all COLONIES, *Islands, Plantations, and places under the dominions of his Majesty in foreign parts*.

The 5th section provided—That every person whose attendance is required, is entitled to the like conduct-money, and payment for expenses and loss of time, as upon attendance upon a trial; and the 6th section enacted—That any sheriff, gaoler, or other officer having the custody of any prisoner, may take such prisoner for examination, under the authority of this Act, by virtue of a writ of *habeas corpus*, to be issued for that purpose; which writ may and can be issued by any court or judge under such circumstances, and in such manner as such court or judge might then by law issue the writ, commonly called the writ of *habeas corpus ad testificandum*.

Notwithstanding the passing of the last-mentioned Act, yet so jealously have the courts at Westminster respected their original jurisdiction, that when, in *Wainwright* v. *Bland*, * a *mandamus* was moved to examine a witness in *Scotland*, the court of King's Bench refused the rule, and held that the witness must be examined by a commission, the court having no authority to issue a *mandamus* to Scotland, not being "foreign parts" within the above statute.

So it required the passing of the Stat. 45 Geo. III. c. 93, in order to provide for the appearance of persons to answer in cases where warrants were not usually issued, and to give evidence in criminal prosecutions in every part of the United Kingdom. The second section of which Act enacted:—

That the service of every writ of subpœna or other process, upon any person in any one of the parts of the United Kingdom, requiring the appearance of such person to answer or give evidence in any criminal prosecution in any other of the parts of the same, shall be as good and effectual in law as if the same had been served in that part of the United Kingdom where the person so served is required to appear; and in case such person so served shall not appear according to the exigence of such writ or process, it shall be lawful for the court out of which the same issued, upon proof made of the service thereof to the satisfaction of the said court, to transmit a certificate of such default under the seal of the same court, or under the hand of one of the judges or justices of the same, *to the Court of King's Bench in England*, in case such service was had in England; or, in case such service was had in Scotland, to the Court of Justiciary in Scotland; or, in case such service was had in Ireland, to the Court of King's Bench in Ireland; and the said last-mentioned courts respectively shall and may thereupon proceed against and punish the person so having made default, in like manner as they might have done if such person had neglected or refused to appear in obedience to a writ of subpœna, or other process issued out of such last-mentioned courts respectively.

And the 4th section provided and enacted—That none of such last-mentioned courts shall in any case proceed against or punish any person for having made default, by not appearing to give evidence in obedience to any writ of subpœna, or other process, for that purpose, unless it shall be made to appear to such court that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, had been tendered to such person at the time when such writ of subpœna or other process was served upon such person.

So the Statute 17 & 18 Vic. c. 34, after reciting that great

* 1 Gale, 103. S. C. 3 Dowl, 653.

inconvenience arose in the administration of justice, from the want of a power in the *superior courts* of law to compel the attendance of witnesses resident in one part of the United Kingdom at a trial in another part, and that the examination of such witnesses by commission was not in all cases a sufficient remedy for such inconvenience, enacted by sect. 1.—

That if any action or suit now, or at any time hereafter, depending in any of Her Majesty's superior courts of Common Law at Westminster or Dublin, or the Court of Session or Exchequer in Scotland, it shall appear to the court in which such action is pending, or, if such court is not sitting, to any judge of any of the said courts respectively, that it is proper to compel the personal attendance at any trial of any witness who may not be within the jurisdiction of the court in which such action is pending, it shall be lawful for such court or judge, if in his or their discretion it shall so seem fit, to order that a writ, called a *Writ of Subpœna ad testificandum*, or of *Subpœna duces tecum*, or Warrant of Citation, shall issue in special form, commanding such witness to attend such trial wherever he shall be within the United Kingdom: and the service of any such writ or process *in any part of the United Kingdom*, shall be as valid and effectual to all intents and purposes, as if the same had been *served within the jurisdiction of the court from which it issues*. By sect. 1, persons are not to be punished for disobedience if sufficient money has not been tendered for expenses.

These statutes it must be admitted, when fairly considered, show that the topical jurisdiction of the Court of Queen's Bench at Westminster is co-extensive with England proper, and not beyond, and that the authority and powers of its judges are limited by such jurisdiction, except where expressly enlarged by statute. But whether a court has or not jurisdiction in any given case, can readily be known by the following simple test, viz.: By ascertaining whether, if the jurisdiction were assumed and denied by the subject, such court could legally enforce its judgment by execution; for it is a legal axiom on this subject, that the power of enjoining its decision is a consequence of jurisdiction, and thus that jurisdiction and execution are convertible terms. This axiom is acknowledged by Lord Campbell in *Ex parte Lees*, El. Bl. & El. p. 834, where he said—"It was not at all explained in what manner our writs of error, *certiorari*, or *habeas corpus* could be enforced in such dependencies," which passage was, as we have seen, quoted with approbation by Chief Justice Cockburn in Anderson's case. This test is also laid down and descanted upon in a learned and accurate treatise, known to the profession as "Mosley on Inferior Courts," in p. 64, of which is the following paragraph:—

So a power of enjoining its decision is a necessary adjunct to a jurisdiction, and therefore it is said by Bracton *—"Oportet etiam quod ille qui judicat, ad hoc quòd rata sint judicia, habeat jurisdictionem ordinariam vel delegatam, et non sufficit quòd jurisdictionem habeat, nisi habeat coertionem, quòd si judicium suum executioni demandare non posset, sic essent judicia delusoria." Also—"Sunt enim causæ spirituales, in quibus judex secularis non habet cognitionem nec executionem, CUM NON HABEAT COERTIONEM."† and so strongly is a jurisdiction dependent upon a power and authority of giving it effect, that if a jurisdiction be created by act of parliament, or letters patent, and no mention made of such powers as are necessary for giving it effect, as a power of issuing process and execution, they will be implied by mere operation of law.

2nd—*As to the privileges and territorial ambit of the Canadian Courts of Civil Judicature.*—The first statute to which attention is directed to the Imperial Statute of 3 & 4 Vic. c. 35, which was passed on the 30th July, 1840, and is entitled,—"An Act to reunite the provinces of Upper and Lower Canada, *and for the government of Canada.*" It recites that it is necessary that provision be made for the good government of the provinces of Upper Canada and Lower Canada in such manner as may secure the *rights and liberties*, and promote the interests, of all classes of her Majesty's subjects within the same; and that it is expedient that the said provinces be reunited, and form one province for *the purposes of executive government and legislation.*

This statute, after declaring the union of the provinces, provides a legislative council and assembly, appoints a governor with very large powers, and by section 44, which establishes Courts of Appeal, Queen's Bench, and Chancery, in and for Upper Canada.‡

After reciting "That, by the laws then in force in Upper Canada the governor, lieutenant ,overnor, or person administering the government thereof, or the chief justice thereof, together with any two or more of the members of the Executive Council thereof, constituted and were a *Court of Appeal* for hearing and determining all appeals from such judgments or sentences as might lawfully be brought before them. And also, that by a legislative act of Upper Canada, stat. 2 Wm. IV. c. 8, entitled 'An Act respecting the time and place of sitting of the Court of King's Bench,' it was amongst other things enacted, that his Majesty's Court of King's Bench in that province should be holden in a place certain, that is, in the city, town, or place which should be, for the time being, the seat of the civil government of such province, or within one mile therefrom. And also reciting, that by a Legislative Act of Upper Canada, passed in 7 Wm. IV. c. 2, entitled 'An Act to establish a Court of Chancery in this province,' it was enacted that there should be constituted and established a Court of Chancery, to be called and known by the name and style of 'The Court of Chancery for the province of Upper Canada,' of which Court the governor, lieutenant-governor, or person administering the government of such province, should be Chancellor; and which court, it was also enacted, should be holden at the seat of government in the said province, or in such other place as should be appointed by proclamation of the governor, lieutenant-governor, or person administering the government thereof."

And it was enacted, that until otherwise provided for§ by an act of the Canadian legislature, all judicial and ministerial authority which before and at the time of the passing of the said Act 3 & 4 Vic. c. 35, was vested in, or might be exercised by the governor, lieutenant governor, or person administering the government of the said province of Upper Canada, or the members, or any number of the members of the executive council of the same province, should be vested in, and might be exercised by the governor, lieutenant-governor, or person administering the government of Canada, and in the members of the like number of the members of the executive council of such province respectively.

And that, until otherwise provided for,‖ by act or acts of the Canadian legislature, the said Court of King's Bench, now called the Court of Queen's Bench of Upper Canada, should, from and after the union, be holden in the city of Toronto or within one mile from the municipal boundary of such city. Provided always, that until otherwise provided by act or acts as aforesaid, the governor of Canada might, by and with the advice and counsel of the Executive Council of such Province, by his proclamation fix and appoint such other place as he might think fit, within that part of the last-mentioned province which then constituted the province of Upper Canada, for the holding of the said Court of Queen's Bench.‖

* Lib. iii. f. 106, 107, par. 4. † Lib. iii. f. 106, 107, par. 5.

‡ As Anderson escaped to Upper Canada, we need not trouble ourselves with the courts of Lower Canada. Other courts are also established by this statute, but for our purpose it is unnecessary to detail them.

§ This section is superseded by the provincial act, 12 Vic. c. 63, and other acts making other provision for the same matters.

‖ See *ante*, p. 44, and *post*, p. 60.

¶ The 47th section of the same Act enacts—"That all the courts of civil and criminal jurisdiction, within the provinces of Upper and Lower Canada, at the time of the union of the said provinces, and all legal commissions powers, and authorities, and all officers, judicial, administrative, or ministerial, within the said provinces respectively, except in so far as the same may be abolished, altered, or varied by, or may be inconsistent with the provisions of this act, or shall be abolished, altered, or varied, by any act or acts of the legislature of the

The second Statute to which attention is directed was passed in the year 1859 (22 Vic. c. 10), and is entituled, "An Act respecting the superior courts of civil and criminal jurisdiction;" and by it her Majesty, by and with the advice and consent of the legislative council and assembly of Canada, enacted as follows—

By Section I., "Her Majesty's Court of Queen's Bench for Upper Canada, and the Court of Common Pleas for Upper Canada, are to continue under the names aforesaid; and all commissions, rules, orders, and regulations granted or made in, by, or respecting such courts, or the judges or officers thereof, existing and in force when such Act took effect, remain in force until altered or rescinded, or otherwise determined."

By Section II., "Such Courts of Queen's Bench, &c., are during the reign of a King, to be called '*His Majesty's Court of King's Bench for Upper Canada*' and during the reign of a Queen, '*Her Majesty's Court of Queen's Bench for Upper Canada.*'"

By Section III., "Such courts are Courts of Record of original and co-ordinate jurisdiction, and respectively possess all such powers and authorities as by the law of England are incident to a superior court of civil and criminal jurisdiction; and have and shall use and exercise all the rights, incidents, and privileges of a court of record, and all other rights incidents, and privileges, as fully, to all intents and purposes as the same were, at the time such Act took effect, used, exercised, and enjoyed by any of Her Majesty's superior courts of common law at Westminster in England, and may and shall hold plea in all, and all manner of actions, causes, and suits, as well criminal as civil, real, personal, and mixed, and proceed in such actions, causes and suits, by such process and course as are provided by law, and as shall tend with justice and despatch to determine the same; and may and shall hear and determine all issues of law, and also hear, and (except in cases otherwise provided for) by and with an inquest of twelve good and lawful men determine, all issues of fact that may be joined in any such action, cause, or suit, and judgment thereon give, and execution thereof award, in as full and ample a manner as, at the time this Act takes effect, can or may be done in Her Majesty's Courts of Queen's Bench and Common Pleas, or in matters which regard the Queen's revenue, (including the condemnation of contraband or smuggled goods), by the Court of Exchequer in England."

By Section IV., "The aforesaid courts are to be held at the *City of Toronto.*"

By Section V., "Such Court of Queen's Bench shall be presided over by the chief justice of Upper Canada and two puisne justices; and such Court of Common Pleas by a Chief Justice and two puisne justices; and such courts respectively may be holden by any one or more of the judges thereof, in the absence of the others; and the chief justice and justices of the said courts respectively has, and may use and exercise all the rights, incidents, and privileges of a judge of a Court of Record, and all other rights, incidents, and privileges, as fully, to all intents and purposes, as the same were, at the time such Act took effect, used, exercised, or enjoyed by any of the judges of any of Her Majesty's Superior Courts of Common Law at Westminster."

As, therefore, Her Majesty's Court of Queen's Bench in Canada has jurisdiction over the same subject-matters as its sister court in England, so the former Court is, as regards Canada, intrusted with the highest jurisdiction; not only over all capital offences, but also all other misdemeanours whatsoever of a public nature, tending either to a breach of the peace, the oppression of the subject, the raising of factions controversy, or debate, or to any matter of misgovernment. So that, whatever crime is manifestly against the public good comes within its cognizance, and this though no person is directly injured. *Neither can any private subject, who has not forfeited his right to the protection of the law, suffer any kind of unlawful violence or gross injustice against his person, liberty, possessions, from any person whomsoever, without a proper remedy from this court;* not only for satisfaction of the private damage, but also for the exemplary punishment of the offender.†

Neither is it necessary, in a prosecution for any such offence in the Canadian Court, to show a precedent of the like crime formerly punished there, agreeing with the present in all its circumstances; for such court, like the Court of Queen's Bench at Westminster, being the *custos morum* of all subjects in Canada, whenever it meets with an offence contrary to the first principles of common justice, and of dangerous consequence to the public if not restrained may and will adopt such a punishment as the heinousness of the offence requires.

The above Acts of Parliament, although they do not in terms exclude the jurisdiction of the Court of Queen's Bench in England, yet, as such court never had any common law jurisdiction over Canada, and as there is no statute conferring upon such court the power of sending its prerogative writs into that colony, the necessity for expressly excluding the jurisdiction of the English courts did not arise. Indeed, had such statutes contained language restraining the jurisdiction of the English courts, the fact might have afforded a plausible ground for asserting that the jurisdiction once existed, although in truth it never has.

More could be stated on this important and interesting subject, was there space for so doing; but sufficient has been alleged to convince any impartial mind, that neither the common law, nor the present topical jurisdiction of the English Court of Queen's Bench at Westminster, ever extended, or now extends to Canada (except as to those matters specially given to it by statute); and that, as there is no statutory power whereby the English court is enabled to grant a *hab. corp. ad. subj.* into that colony, so the writ in Anderson's case should not have been granted.

It has also been demonstrated that, as the lives and liberties of her Majesty's subjects in Canada are protected by her Majesty's courts there, having powers equally extensive, ample, and powerful as those enjoyed by the Court of B. R. in England, so the latter Court has acted improvidently in usurping a jurisdiction which is the privilege of the Canadian courts, and of the Canadian courts alone. Such usurpation may, indeed, in the present instance, be attempted to be palliated by the extreme and urgent circumstances of Anderson's case; but this is undeniable, that a prerogative writ tested in England, and issued by the Court of B. R. here, has been sent for execution on to American soil; that Canadian privileges have been violated; and that a dangerous and alarming precedent has been established, which sooner or later may be made the stepping-stone for further encroachments, and may ultimately lead to a collision between the judicatures of this country and our North American possessions, to end, probably, with a second declaration of American independence.

province of Canada shall continue to subsist within those parts of the province of Canada which now constitute the said two provinces respectively, in the same form and with the same effect as if this act had not been made, and as if the said two provinces had not been reunited as aforesaid."

† 2 Hawkins' "Pleas of the Crown," p. 7.

U. C. REPORTS.

COMMON PLEAS.

(*Reported by* E. C. Jones, Esq., *Barrister-at-Law, Reporter to the Court.*

JOHN GRANT QUI TAM V. MOSES MCFADYEN, ESQ.

Magistrate—Return of conviction—Notice of action against—Con. Stat. U. C., ch. 126.

In an action against a magistrate for the penalty given by the statute (Con Stat. U. C., ch. 124) for having neglected to make an immediate return of the conviction of one J. S

Held, that one month's notice before action under Con. Stat. U. C. ch. 126, secs. 9 and 10, not necessary.

The declaration stated that an information having been laid against one John Leng, and the defendant and W. S., and J. R F, three of Her Majesty's justices of the peace, having adjudicated on the causes of complaint in the said information, afterwards on the 5th July, 1850, at Elma, in the said county of Perth was (*sic*) convicted before the defendant and W. S. and J. F. R, being such three justices of the peace for the said county, for that the said John Leng did, on, &c., (stating an assault and battery of plaintiff,) and adjudged the said John Leng for his said offence to forfeit $8, and to pay plaintiff $10, for his costs in that behalf, and if those sums were not paid, that the said John Leng should be imprisoned for twenty days, unless the said sums and the costs of taking the said John Leng to gaol should be sooner paid, whereupon it became defendant's duty to make an immediate return of the said conviction according to the statute, yet defendant did not nor did the other justices or either of them make an immediate return of the said conviction, whereby an action hath accrued to the plaintiff, who sues as well, &c, to recover $30.

Plea 1 —Not guilty. 2. Not indebted.

The case was tried at Stratford in October, 1860, before *Hagarty J.* It was proved that the defendant, with two other justices of the peace as stated in the declaration, made the conviction therein set forth in July, 1860. The information had been laid on the 14th June, before another magistrate, who summoned the accused, and appointed a meeting at a particular place. On going there at the appointed time, he found defendant and the other two justices. They heard the case altogether, but the summoning justice did not concur in the conviction made. The complainant, the now plaintiff, gave immediate notice of appeal, and at the following quarter sessions the conviction was quashed. On the 10th September, 1860, after the action was commenced, this conviction, dated 5th July, 1860, was delivered by defendant to the clerk of the peace. A return of the conviction was sent to the clerk of the peace on 14th September. The quarter sessions met on the 11th September and adjourned to the 18th, when the appeal was heard, both parties having appealed, and the conviction was quashed.

The defendant's counsel objected that it did not appear the justices were requested to proceed summarily, or that the parties were brought before them. That it was not alleged that the assault was unlawful, either in the information or conviction; that the disposition of the fine was unlawful; that it should have been directed to be levied by distress; that the conviction does not recite the information or the summons issued, or the appearance, or set forth any evidence; that when a conviction is appealed against, the statute does not apply; that no notice of action to defendant was proved, and that the return to the Court of Quarter Sessions was sufficient. Leave to move for a nonsuit on the last the last three objections was reserved.

The learned judge left the case to the jury on the question whether the defendant had made an immediate return. They found for plaintiff. It was further objected that the learned judge told the jury that the fact of notice of appeal having been immediately given should not be considered by them.

In Michaelmas term, *S. Richards, Q.C.*, obtained, a rule nisi for a new trial for misdirection, or to enter a nonsuit on the leave reserved

Crooke shewed cause, citing *Kelly qui tam* v. *Cowan*, 18 Q. B. U. C., 104; *Murphy qui tam* v. *Harvey*, 9 C. P. U. C., 528; *O'Reilly qui tam* v. *Allan*, 11 Q B. U. C., 411. Upon the point of notice he referred to Consol. Stat of Upper Canada, ch. 126, sec. 10. *Wright* v. *Horton*, Holt N. P. C. 458; *Morgan* v. *Palmer*, 2 B. & C. 729.

In the following term *S. Richards*, Q. C., supported his rule. He addressed himself particularly to the objection of want of notice of action, contending that this was a case within the 9th and 10th sections of the the Consol. Stat. U. C., ch. 126. He cited *Davis* v. *Curling*, 8 Q B. 226; *Joule* v. *Taylor*, 7 Exch. 58, and urged that under those cases the court might view the non-return of the conviction as amounting to proof of his acting in the discharge of his office of magistrate, and so might come within the words, "any thing done by him in the execution of his office," in which case he was entitled to notice.

DRAPER, C. J.—I think this case clearly distinguishable from those cited by *Mr. Richards*. It is an action for a penalty, the foundation of which is, that the defendant has disobeyed the plain provisions of the statute requiring him to make a return of the conviction. It is not a wrong to the plaintiff individually, which is the cause of action, and where that wrong might be deemed, even though an act of omission, something done in the execution of the office, but it is a breach of a duty prescribed by law, for which a punishment by way of penalty is inflicted. *Charlesworth* v. *Rudgard*, 1 C. M. & R. 896, appears to me to decide this case, and *Wright* v. *Horton* (Holt N. P. C. 458) is the same in effect.

I think the rule should be discharged.

Per cur.—Rule discharged.

HUGH FRASER AND MATTHEW CROOKS CAMERON v. JOHN GLADSTONE AND ALEXANDER MORRISON.

Assignment—Registry of—Consideration in—How far necessary to shew the consideration in the registered instrument.

Held, that an assignment (registered under the statute) for the money consideration of five shillings, with a separate declaration of trust referred to and forming part of the instrument (not registered) was invalid, and that the conveyance registered must shew the true and full consideration for which it is given. The decision in *Arnold* v *Robertson*, 8 C. P. U. C. 147, affirmed.

Interpleader issue to try whether certain goods taken in execution by the sheriff of York and Peel on a *fieri facias* delivered to the sheriff on 1st March, 1859, in a suit brought by defendants against one John Hutchison, were the property of the plaintiffs as against the defendants.

The trial took place at Toronto in April, 1860, before *Hagarty, J.* John Hutchison in the interpleader order, was the only witness called. He produced and proved an assignment dated 28th December, 1857, made by himself to the plaintiffs, whereby, after reciting that he was indebted to the plaintiffs and to divers other persons that he was unable to pay, and being desirous of having his estate and effects applied for the benefit of his creditors, had agreed to make a general assignment to the plaintiffs upon the trusts contained in a certain other indenture of assignment of the same date, made between the same parties, and the creditors of him, the said John Hutchison, who became parties to the said assignment within two months from its date, and that for the more convenient filing, according to law, of the assignment of the goods, chattels, and household furniture, of the said John Hutchison assigned to the said parties of the second part, for the benefit of creditors upon the trusts contained in the other indenture, he had agreed to execute the bill of sale of his goods, chattels, and household furniture, in and about the dwelling-house and premises occupied by him, in &c., and mentioned in schedule annexed marked A. B. and C. It was witnessed that in consideration of the premises and of the trusts and release in the other indenture, and of 5s., he granted, &c, unto the plaintiffs, the goods, &c., described in the schedules A. B. and C.

Habendum to the plaintiff's upon the trusts contained in the other indenture. This indenture was filed in the office of the clerk of the county court on 27th December, 1857. The witness stated the household furniture still remained at his house; that a great number of his creditors had executed the other assignment; that about £27,000 had been paid to the creditors. All the creditors for sums under £60, and all accommodation paper had been paid, and three dividends to general creditors: that his assets were estimated at £100,000, and his debts at £50,000; that he was allowed to draw a salary of £500 per annum, but had not drawn so much; that he attended to the business and received and paid moneys; that after all the creditors who had signed were paid, he was to receive the balance; that a considerable part of his real estate was mortgaged, and the mortgage creditors were paid with the others.

Various objections were raised on the defence, but it is only necessary to notice one, namely, that this assignment, which is the only one filed according to law, contains no trusts, but it is declared to be upon the trusts set forth in another indenture not filed: that the trusts contained in that other indenture form part of the consideration for this, and therefore that this assignment is void according to the decision in *Arnold* v. *Robertson*, 8 C. P. U. C., 147.

The learned judge expressed his opinion to that effect, and it

was agreed that a verdict should be enter for the defendants, with leave to the plaintiffs to move to enter a verdict for them.

In Easter term last, *M. C. Cameron* obtained a rule *nisi* on the leave reserved.

In Hilary Term, *Eccles, Q. C.*, shewed cause.

M. C. Cameron contra.

DRAPER, C. J.—I have heard nothing to distinguish this case from *Arnold* v. *Robertson* (8 U. C. C. P.) and therefore think it unnecessary to say more than till that decision is overruled, we ought in my opinion to be governed by it.

Per cur.—Rule discharged.

DICKSON, DEFENDANT, (APPELLANT,) V. PINCH, PLAINTIFF, (RESPONDENT.)

Appeal—Witness—Competency of a party to suit when called by opposite party.

Held, that a party to a suit called and examined as a witness at the instance of the opposite party is rendered competent as a general witness, and that his incapacity by reason of interest is thereby wholly removed.
See *Lamb* v. *Ward*, 18 Q. B. U. C. 305, where the contrary is decided.

Appeal from the county court of the united counties of Peterborough and Victoria.

Writ issued August 9th, 1860.

Declaration.—Common counts, for money payable, work done, money received, interest, and account stated.

Pleas 1st. Never indebted. 2nd. Satisfaction and discharge by payment. 3rd. Set-off.

The following were the particulars of the plaintiff's claim as endorsed on the writ.

$86 01c. balance due on a due-bill, dated the 16th day of November, 1857, made by the defendant, and now over due, with interest; also $18 25c. being for the wages of the defendant for work and labour done for the plaintiff between the 1st. of January and 1st. of March, 1860. and also for 38 days' work of the defendant for the plaintiff as engineer, from the 22nd of March, to the 4th of May, 1860, $43 89c.

The plaintiff claims interest on $86 01c. from the —day of November, 1859, on $18 25c , from the 1st day of March, 1860, and on $43 78c., from the 8th day of May, 1860, until judgment.

Particulars of defendant's set-off.

	Rent due, May 1860, ...	£5	0	0
1858.	Paid William Wood, ...	3	10	0
1859.	" B. Reynolds, ...	7	10	0
		£16	0	0

At the trial, Samuel Dickson, the defendant, was called and examined by *Mr. Weller*, on behalf of the plaintiff, and stated that the due-bill produced made by Wood, on his behalf, is correct, also the shanty time.

On cross-examination by Mr. Dennistown, the following question was asked and objected to by Mr. Weller as inadmissible:

"Whether the defendant made any other payment than the payment endorsed on the due-bill?" This question was allowed by the learned judge with leave for the plaintiff to move against the verdict, and if the question should be found improper, and no other evidence offered by the defendant of the payments spoken to by him, the verdict should be amended by adding the amount spoken to and proved by the defendant alone, to the plaintiff's verdict.

To the best of my recollection I paid the plaintiff $30 on the due-bill; I paid Reynolds for him; it was not included in the settlement; I paid him $3, $8, or $10, and $5 at different times on shanty time.

The learned judge directed the jury to find for the plaintiff without reference to amount but to inform the court how much was to be deducted on Mr. Dickson's statement.

The jury found a verdict for the plaintiff for $66, leaving $48 struck off on account of the allowance of Dickson's testimony.

On the first day of term at the sitting in term of the county court of the united counties of Peterborough and Victoria, Mr. Weller, pursuant to leave reserved, moved for a rule *nisi* to which cause was shewn by Mr. Dennistown, and the court gave the following judgment: "The question in this matter is whether the defendant—who was placed in the witness box by the plaintiff in order to prove the making of a due-bill part of the plaintiff's cause of action, and not for the purpose of proving any other fact—could afterwards be made use of in his own behalf by being cross-examined as to whether he (the defendant) had not reduced the amount apparently due on the face of the due-bill by other payments of a subsequent date to those which appeared allowed on the face of the due-bill itself admitted.

"The question allowed, subject to the leave reserved to the plaintiff at the trial, has been fully argued, and, I think, on the authority of *Lamb* v. *Ward* et al., 18 Q. B. U. C. 304, the only case in which, as far as I am aware, the point has been the subject of adjudication, must be found in favour of the plaintiff.

"The ruling of the majority of the court of Queen's Bench, and some of the cases suggested by his lordship the *Chief Justice*, if I construe them correctly, leave no other course open.

"I cannot draw the line between a defendant proving one payment, and proving a general set-off, or his proving his endorsation, and his freedom from liability by reason of time given by the holder to the maker of a promissory note, of which he was the endorser, and the making of a due bill, as in this present instance, and the making payments which do not appear to have been otherwise credited upon it.

"The payments on the time bill would necessarily fall under the same rule.

"I may, and do individually prefer the judgment and reasoning of the dissentient to the judgment of the majority in Ward's case, but as long as it stands unshaken, it, in my opinion, is binding upon this court, and the plaintiff's rule must be made absolute."

This judgment was appealed from on the following grounds:

That the questions asked the defendant on cross-examination were properly admissible, and that the judgment of the judge of the county court of the united counties of Peterborough and Victoria on making the rule absolute to increase the verdict, is erroneous and should be reversed.

The case was argued by *D. B. Read, Q. C.*, for appellant, citing 16 Vic , ch. 19, sec. 1, and referring to Lamb v. Ward.

Eccles, Q. C., contra.

DRAPER, C. J.—We cannot reverse the judgment of the learned judge of the county court, without coming into conflict with the opinion expressed by the Court of Queen's Bench in *Lamb* v. *Ward et al.*, 18 Q. B. U. C. 304.

It is the more usual, as well as the more convenient practice, where a question of law has been decided by a court of co-ordinate jurisdiction, to treat that decision as a binding authority until it shall be reversed by a higher tribunal. This practice, however, is subject to exceptions. In *Henderson* v. *McLean*, 16 U. C. Q. B. 630, the Court of Queen's Bench expressed their regret that they could not concur in some of the opinions expressed by this court in *Henderson* v. *McLean*, 8 U. C. C. P. 42; so in *Reynolds* v. *Harris*, 3 C. B. N. S. at p. 289, Cockburn, C. J., observes "if our decision could be taken to a Court of Error, we should feel bound by that case" (one which he had referred to) "as a precedent," but he adds, "doubting whether the record could be framed so as to raise the point, and seeing that it is one of a class which rarely finds its way into a Court of Error, we think we ought to deal with the case as one in which there is no appeal, and act upon our own judgment." In one respect these words apply exactly to the present case. There is no appeal from our decision. We are sitting as a Court of Appeal to which the appellant, having a right to go to either of the superior courts of common law, has elected to apply for a review of the judgment of the court below.

I am fully alive to the inconveniences that may arise from opposing judgments being rendered in the two courts on this question, the greater, because the point is one that may frequently arise at *nisi prius*. We can only hope that either a decision of the Court of Appeal, or a declaration of the legislature, will speedly remove them. But I do not perceive on what ground we can withhold from this party the expression of the conclusions at which we have arrived.

A very few years back witnesses were held to be incompetent to testify for any of the following causes:—want of understanding—want of religious belief—for infamy to character, or for interest

It was moreover considered a privilege of parties to a suit that they might refuse to give evidence, and a disqualification of, that they were not permitted to swear in their own favour

The first change in these respects made in Upper Canada was by passing the statute, 12 Vic., ch. 70, which following the British statute, 6 & 7 Vic., ch 85, enacted that no person offered as a witness should be excluded by reason of incapacity from crime or interest from giving evidence, but on this rule a proviso was engrafted containing some exceptions, namely, any party to an action, suit, or proceeding individually named in the record, any lessor of the plaintiff or tenant or premises sought to be recovered in ejectment, the landlord or other person in whose right a defendant in replevin made cognizance, any person in whose immediate or individual behalf any action was brought or defended wholly or in *part, or the husband or wife of such parties respectively.*

The 14 & 15 Vic ch. 66, repealed this proviso, making the only exception, that no married woman should be allowed as a competent witness in any civil proceeding for or against her husband Both these acts were repealed by 16th Vic., ch. 17; after the latter of them had been in force a little more than 14 months. During that time it certainly was found that perjury was committed to an alarming extent by parties to suits, who offered themselves as witnesses in their own behalf under its provisions. It was very probable the shock felt by judges and jurors on hearing the opposite parties in a cause, make the most contradictory and irreconcilable statements on oath as witnesses, rather than any increased difficulty experienced in coming to a decision, that made a change in the law very generally desired. Whether after a longer trial of that law, the evil experienced would have materially diminished, and the result have been, as in England, a conviction of the advantage of removing every disqualification to give evidence in civil cases arising from crime or interest, I do not profess to say; we have to deal with the law as contained in that statute, which has been re-enacted in the Consolidated Statutes of Upper Canada, ch. 32, and to which I now refer.

By section three the provisions of the first statute, 12 Vic., are re-enacted that no person offered as a witness shall be excluded from giving evidence by reason of incapacity arising from crime or interest; but (by sec. 4.) every person so offered shall be admitted and compellable to give evidence on oath, &c., thus taking away the privilege of refusing as well as the disqualification to give evidence, arising from interest in the matter under trial, or that he had been previously convicted of a crime or offence. Section five declares that the act shall not render competent or authorise or compel any party to the suit individually named in the record, or any claimant or tenant of premises named in ejectment, or the landlord or other person in whose right any defendant in replevin makes cognizance, or any person in whose immediate or individual behalf any action may be brought or defended, or the husband or wife of any such party to be called as a witness in behalf of such party, "*but such party may in any civil proceeding be called and examined as a witness in any suit or action at the instance of the opposite party;* but this does not extend to the wife of the party to any suit or proceeding named in the record.

It is upon the construction of the few words above quoted that the decision has been given which is now appealed from. The learned judge has held, contrary, as he says, to his own impression, and in deference to the case of *Lamb* v. *Ward*, that the defendant who was called as a witness by the plaintiff, in order to prove his own signature, was not a witness for all purposes, and could not be cross-examined by his own counsel to prove that he had subsequently paid a sum of money in part satisfaction and discharge of the promise to pay contained in the instrument he proved.

In construing an act of parliament it is impossible to deny that our judgments are affected and guided according to the stand point from which we contemplate its provisions. It is one thing to regard this act as based upon the principle that the attainment of truth should not, subject to certain exceptions, be impeded by incapacities created by law, but that the fullest information as to the facts in issue should be laid before those who are to decide upon them, who should exercise their judgment on the credit of the witnesses, and the truth of their testimony. It is another to view it as an innovation upon an old established rule, which rule is still to prevail where not absolutely changed, and is to be the guide for deciding all doubtful points arising on the construction of the new enactment.

I think the former is the true point of view from which to examine this question, and to ascertain the true meaning of the language used by the legislature. The reason of this law I take to be general, to remove obstructions to the enquiry after truth, arising from incapacities created by law. I take the exception, the exclusion of certain persons from being witnesses to be special, and to be considered necessary from apprehension of mischief that might result from allowing parties to institute or defend actions in in reliance on their own oaths to sustain their side of the question And I apprehend that where the general reason of the law is limited by any special exception, such exception shall not prevail over the general reason any further than a strict interpretation of the *language used in creating it will warrant, and a fortiori that the* language of the exception shall not be enlarged by construction to overrule the general reason.

As I read this act I find three things:

1st. An express removal of all incapacity to give evidence arising from crime or from interest.

2nd. An exception to the removal of incapacity.

3rd. An exception to that exception.

I need say nothing on the first point, for nothing can be more explicit than the language of the first section, which is confirmed and amplified by the second.

The exception is contained in section three, and is expressed with equal clearness. It follows almost verbatim a similar provision in Lord Denman's act, 6 and 7 Vic., ch. 85.

The third section also contains the provision which gives rise to the controversy, and which I treat as excepting something from the operation of the former exception. The former selects certain classes of person, out of those who by the first section of the act are made competent witnesses, and declares those classes to be incompetent. The latter under defined circumstances again removes the incompetency. In other words, under sections one and two, *all* persons, including parties to suits, are enabled to give evidence. The first part of section three, excepts parties to suits, among others, from the operation of sections one and two, and then immediately provides that any party to a suit may be called and examined as a witness at the instance of the opposite party. If so called he becomes at once a "person offered as a witness," under the first section, no longer excluded by incapacity from interest, and under the second section he is to be admitted, and is "compellable to give evidence on oath or solemn affirmation." I am unable to put any other construction on the words, "at the instance of the opposite party," than this, that they remove the prevention just created to examining as a witness, a party to the suit, provided the opposite party wills it. The exception that a man shall not be offered as a witness to prove his own case is upheld, but his opponent is empowered to call him. I think the words used amount to this: every plaintiff may call the defendant, and every defendant may call the plaintiff, as a witness in the cause. If the legislature meant to limit such calling to the giving proof in support of the case of the party by whom he is called, but not to give evidence to the same extent that every other witness is required to do, I think they would have been careful to express that intention in words more suitable than "that he may be called and examined *as a witness.*" They have not even said that he may be called and examined *for* or *in behalf* of the opposite party, from which it might be reasonably inferred that the examination was to be limited to those subjects respecting which the party calling him had examined him. He is called as a witness, and so far as the language used goes, there is no distinction made between him and *any other witnesses called and examined in the cause.*

I do not think therefore that the mere words of the statute warrant any other limitation on his testimony than that which would apply to all witnesses. But leaving the question of strict construction, I have not been able to satisfy myself that there exists *aliunde* such an objection to the full examination of a party to the cause who is made a witness at the instance of the opposite party, that the proposed limitation ought if possible to be adopted, in other words, that we ought to assume that this was the intention of the legislature in passing the act.

The objection is twofold as urged for the respondent 1st. That a party is not to be believed when he swears anything on his own behalf, or 2nd, that if a party who desires to examine his opponent as a witness for some particular object, by calling him makes that opponent a general witness in the cause, no one will run that risk, and so the statute will be made a dead letter.

As to the first alternative, it cannot be denied but that there are men unprincipled enough to bring unjust actions and to set up unjust defences; men of whom it might well be feared, that to maintain such suits or defences they would (if legal penalties could be evaded) swear falsely themselves or procure others to do so. Such men are not very likely to tell the truth against themselves on an occasion when, if the truth appeared, their action or defence must fail. This argument extends to the utter exclusion of parties to a suit from being witnesses.

The second alternative seems to me to present a very one-sided view of the question. By calling his opponent as a witness, the party affirms his credibility. Can he limit that affirmance to such matters as may be against the interest of his opponent, and deny his credibility as to all other matters in issue between them? Or can he admit his credibility generally, and admitting his knowledge of the whole truth of the matters at issue between them, insist that he shall only tell part of the truth, namely, that which the party calling him desires, but shall tell no more, because the statute does not make him competent to be called as a witness in his own behalf? I can understand an interested party contending for such an argument to establish that the exceptions in the third section are at variance with the principles advanced in the preamble to the 16 Vic.; but I cannot imagine that such a construction is consistent with these words, "Whereas the enquiry after truth in courts of justice is often obstructed by incapacities created by law, *and it is desirable that full information as to the facts in issue should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony.*"

It is admitted, that, provided the cross examination of a party called as a witness is confined to the subject matter of his interrogation in chief, it is to be subject to no other limitation. The practical value of the limitation claimed will depend in many instances on the astuteness of the witness, who may contrive so to shape his answers as to blend together the facts which he desires to advance in his own behalf, with those which make against him, and to which examination in chief is directed, just as an equity draftsman will so frame an answer, that it will be difficult for the plaintiff to read a passage in support of the bill, without also reading something which sustains the defence. But it seems to me a bad practice for the attainment of truth, to make the admission of the proof of important facts in any degree dependent upon the ingenuity with which answers to interrogatories can be framed, and it is not theoretically, at least, made better by compelling a party to answer just so much as it suits the interests of his opponent to ask, and preventing him from stating independent facts which will shew the whole truth, and yet nothing but the truth.

Upon the whole, I am of opinion that if a party to a suit is called and examined as a witness at the instance of the opposite party, he stands on the same footing as any other witness in the cause as to competency, that his incapacity by reason of interest is not partially, but wholly removed, and his credibility must be left to the jury.

As a consequence, I think this appeal should be allowed, and that the rule allowing the plaintiff to increase the verdict rendered for him at the trial pursuant to leave reserved should be discharged in the court below without costs.

RICHARDS, J.—In this matter this court is the tribunal of the last resort to the parties, and they are bound by our decision without any further right of appeal. We are therefore properly asked to decide this case according to the views held by this court, notwithstanding the Court of Queen's Bench, a court of co-ordinate jurisdiction, may have decided the point raised differently from what we shall.

It was not denied in argument before us, nor am I aware that there is any intention of disputing the proposition, that the rule laid down by Mr. Taylor in his work on evidence is the correct one (vol. 2, p. 1116, sec. 1289,) as applied to an ordinary witness in the cause, viz, "that if a plaintiff call a witness to prove the simplest fact connected with his case, the defendant is at liberty to cross-examine him on every issue, and by putting leading questions to establish, if he can, his entire defence."

In the United States a different rule prevails in many of the states, and there "a party has no right to cross-examine a witness except as to facts and circumstances connected with matters stated in his direct examination, and if he wishes to examine him as to other matters, he must do so by making the witness his own, and calling him as such in the subsequent progress of the cause." If the rule in the American courts prevailed here, we might with more propriety be called upon to decide in favour of the plaintiff, for as he only examined the defendant as to certain matters, the latter could not in his cross-examination give evidence as to other matters on which he was not examined in chief: and if the defendant desired to give evidence in his own favour, he would be called (after his own case had been gone into) as a witness for himself, and being a party to the cause this would seem to be contrary to our statute.

If, then, the rule which prevails in England and Ireland, and which I have always understood to be in force here is to be acted upon, if the defendant was a witness in the cause, he might, on cross-examination, be called upon to state all he knew about the matters in dispute between the parties, as well what was favourable to himself as what was unfavourable.

The whole question revolves itself into this, is a party to a cause when called by his opponent, a competent *witness* in that cause? or is he only then to answer certain questions and be cross-examined as to the matters arising out of such questions?

Without reference to the object of the statute 16 Vic, ch. 19, Con Stat. U. C., ch. 32, or any arguments deducible from the wording of the various sections of that act applicable to the point in dispute to which I shall refer presently, let us see why the defendant can properly be treated differently from any other witness. The oath he takes is the same as that administered to an ordinary witness, and by it he is bound to "depose the whole truth, so that he is not to conceal any part of what he knows whether interrogated particularly to that point or not."—3 Blackstone's Com. 372.

Can he, with propriety, and in view of his oath, refrain from stating the whole truth on the issue joined between the parties merely because such statements may be favourable to himself? In the old form of answers to a bill in Chancery, or to interrogatories under the Common Law Procedure Act, the party swore to the truth of the answers, and his opponent read them as evidence against him or not, as he pleased. But when a witness is called in open court his answers to questions if pertinent to the issues are evidence in the cause whether the party calling him wishes to make them evidence or not.

As the law formerly stood if a defendant consented to give evidence in a cause when called by the opposite party, and the other defendants also consented, he was a good witness. He was not a competent witness if tendered for himself and co-defendants, and he was not compellable to give evidence against himself, but if he consented to be examined, he was then an admissable witness. The moment he was an admissable witness, I do not see how any evidence that he might give, pertinent of course, to the issue, could be excluded from the consideration of the jury. That the evidence he gives is favourable to himself might be urged to the jury as a ground for not placing too much reliance upon it, but I cannot see that it would justify a court in rejecting it.

The change of the law in relation the admissibility of witnesses and parties to suits in England to give testimony, who were formerly excluded on the ground of interest, was no doubt caused by the adoption in a great measure by the legislature, of the views of Mr. Bentham, propounded in his work on the *Rationale of Judicial Evidence*. The whole change proceeds on the broad ground that all persons, parties to the suit or otherwise, who can give information as to the facts on which the court and jury wish to be informed may be sworn and examined; and that all those facts which were formerly considered sufficient to exclude the evidence on the ground of interest were to be taken into consideration by the court and jury in judging of the credibility of the witnesses. In that view the English statutes from time to time were passed,

each subsequent enactment limiting the exceptions by which evidence was excluded, so that now in almost all suits the parties litigant may give evidence in their own favour, and bills have been from time to time brought before parliament to extend the same principle to a certain class of indictable offences, so as to permit the defendants to be sworn in their own defence.

The preamble to our statute of 16 Vic , ch. 19, clearly refers to the obstruction interposed in courts of justice to enquiries after truth by *incapacities* created by law, and states that it was desirable that full information as to the facts in issue should be laid before the persons appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony. The first section of the act provides that no person offered as a witness shall be excluded by incapacity from interest from giving evidence on the trial of any issue joined in any court, or before any judge, jury, &c , but that every person so offered may and shall be admitted and compellable to give evidence on oath notwithstanding that such person may have an interest in the event of the trial of any issue or of the suit in which he is offered as a witness.

This section thus far seems to me in broad comprehensive terms to remove all *incapacity from interest* from any one who might give evidence; that was the ground of exclusion formerly as applicable to a party who offered to be sworn on his own behalf. He was not compellable to give evidence against himself, and the section without the proviso seems to contemplate that he might be compellable to give evidence; with the proviso, this point is beyond a doubt.

The proviso, as I read it, was not intended to give any additional right to any party, but rather to control the broad powers which were previously given in the clause. It in effect declares that the act shall not authorise or permit any party to a suit individually named in the record to be *called as a witness on behalf of such party*, but *such party may* in any civil proceedings *be called* and *examined as a witness* in any suit or action *at the instance* of the opposite party.

I think the latter part of the proviso as referred to above furnishes a strong, if not a conclusive, argument as to the meaning of the legislature. It does not say that a party may call his opponent as a witness for himself; if it had it might be contended (though I doubt if successfully) that the witness could only give evidence for the party who called him, and that he could not give evidence for himself. But framed as it now is, the section merely provides that a party may be *examined as a witness* at the instance of his opponent, there is nothing in it, or in the general principles of law to say that a witness may not be examined on any matter pertinent to the issue after he has been sworn in the cause.

To conclude my view of the statute as applicable to the point under discussion amounts briefly to this. By its provisions all persons, whether parties to a cause or not, may be called as witnesses and give evidence, but a party to the cause cannot be such witness unless called by his opponent.

When a witness is once placed in the box I see no reason why he may not give the jury all the information he has sworn to give touching the matters in question in the suit. The view taken by Mr. Taylor in continuation of the passage already quoted from, seems to me to accord with what I now contend for, he says "When it was requisite that the substantial, though not the nominal party, in the cause should be called his adversary for the sake of formal proof only, it was held that he was thereby made a witness for all purposes, and might be cross-examined to the whole cause.." He refers to *Morgan* v. *Bridges*, 2 Starkie Rep. 314, which bears out the doctrine stated, and to *R.* v. *Murphy*, 1 Arm. Mac. & Og. 206, which last authority I have not yet seen.

I am clearly of opinion that the plaintiff, in the case before us, having called the defendant and he having proved payments to the satisfaction of the jury to the amount of £12, that the rule allow that sum to be added to the verdict found by the jury in the court below ought not to be allowed to stand, and that this appeal should be allowed, and the rule *nisi* in the court below should be discharged.

HAGARTY, J.—I wish to rest my decision of this point on the broadest ground. A party to a suit is not a competent witness in his own behalf, and merely on his own motion. Our law, I presume, considers him disqualified by interest from giving a fair narrative to the jury of matters possibly fully known only to himself, and deems it a lesser evil to rest their decision on testimony that may balance its want of directness by its possibly superior credibility. I stop not to question the wisdom of the law, but accept it as it is. It can have no other logical foundation than want of faith in human nature when truth does not square with interest. Granted his good faith, the man who positively knows the facts of a disputed point, must be the proper medium to reflect them in their clearest light on those who must accept them as the basis of decision.

The law declines to risk the enquiry on the fidelity of the interested litigant. The opponent, however, for reasons satisfactory to himself, presents him to court and jury as worthy of credence for *his* purposes. To my mind the conclusion is irresistible that the opponent once offering him as a faithworthy witness on any point involved in the trial, at once removes all incompetency from supposed inability to sacrifice interest to truth, and that he forthwith becomes not merely a compellable, but also a thoroughly competent witness for every purpose on all the facts then in issue in the cause, however diverse and distinct may be the issues to be disposed of.

I am willing to accept the illustration offered in the court from which I have the misfortune to differ, and to hold that if in the same suit one issue be as to the execution of a bond, and the other as to a charge of slander, and the plaintiff avail himself of his undoubted right to make defendant a compellable witness to disprove the plea of *non est factum*, he thereby removes all objection to his adversary as a competent witness to prove or disprove any fact connected with the other issues as to slander or other disputed matter.

I think a party to a suit is necessarily either a competent or an incompetent witness to all the matters involved in any one trial as a whole, and that his incompetency once removed for any purpose is gone as to all.

No separation of competency as to parts of the matters to be tried is intelligible to my mind, nor can it be, I think, to a jury anxious to have the truth from the surest and most reliable sources. But for the judgment of the majority of the Court of Queen's Bench, which makes me pause long in maturing my opinion, I would entertain no shadow of doubt on this point.

I think we must allow the appeal, as our decision is final.

Per Cur.—Appeal confirmed.

CHAMBERS.

(*Reported by* ROBERT A. HARRISON, Esq., *Barrister-at-Law*)

WHITE ET AL. V. SHIRE.

Rule for costs of the day—From what office to be issued—When defendant entitled to costs of the day.

Held—1. That under sec. 225 of the C. L. P Act, authorising a rule for costs of the day to be drawn up on affidavit without motion made in Court, that the rule should be drawn up in the principal office of Toronto.

2. That Deputy Clerks of the Crown have no power under the 120th Rule of Practice to issue rules for costs of the day.

3. That where a cause is called on for trial, counsel for plaintiff and defendant both being present, counsel for plaintiff states he is not ready, and counsel for defendant states he is ready, and plaintiff not being ready the cause is struck out of the docket, defendant is entitled to his costs of the day.

(July 19, 1861.)

The record in this case was entered for trial at the last assizes for the county of Wentworth, before Mr. Justice Richards.

On the last day of the Assizes, the learned Judge read over the names of the untried cases, in open court, and asked if the parties were ready in any of them.

When this cause was called on, the counsel for plaintiff and defendant were both present. The counsel for plaintiff said he was not ready, but the counsel for defendant said he was ready. Plaintiff not being ready, the cause was struck out of the docket.

Afterwards, on 28th May last, defendant caused a rule for costs of the day to be issued from the office of the Deputy Clerk of the Crown at Hamilton. The rule, which was signed by the Deputy Clerk of the Crown, was in the usual form, directing that "the costs when taxed shall be paid by the plaintiff, if it shall appear to the Master that costs ought to be paid."

Both parties attended the Deputy Clerk of the Crown under this rule, and he, thinking that defendant should have asked for a nonsuit, refused to tax any costs whatever to defendant under the rule.

Defendant then, on 21st June last, issued a rule in the usual form for costs of the day, from the principal office in Toronto. Plaintiff attended the Master, and objected to the Master taxing any costs to the defendant, on the ground that the former rule for the same purpose having been issued and adjudicated upon, the second rule was irregular; which objection the Master overruled. Plaintiff then objected that under the circumstances of the case defendant was not entitled to any costs whatever. The Master ruled that defendant was entitled to the costs of the day, and taxed them under the rule.

Jackson obtained a summons on the defendant to show cause why the rule for costs of the day issued from the principal office in Toronto, and the taxation of costs thereunder, and all proceedings subsequent thereto, should not be set aside; or why all proceedings on the rule should not be stayed till term, on the ground that the rule was irregularly issued after a rule had been issued from the office of the Deputy Clerk of the Crown at Hamilton, for the same reason and purpose and to the same effect as the rule sought to be set aside, and the Deputy Clerk of the Crown decided upon hearing the parties that defendant was not entitled to costs; and on the ground that, under the circumstances of the case, defendant was not entitled to any costs of the day whatever against plaintiffs.

Harrison shewed cause, and contended that the rule sought to be set aside was regularly issued, and that defendant was entitled to the costs of the day. He referred to Consol. Stat. U. C., cap. 22, sec. 225; Rule Pr. 120; Har. C. L. P. A. 646; *Morgan* v. *Fernybough*, 11 Ex. 205; *Scott* v. *Crosthwaite*, 6 U. C. L. J. 151.

Jackson, contra, contended that the second rule was irregular, and that as defendant failed to nonsuit plaintiffs he was not entitled to costs of the day. He also referred to *Morgan* v. *Fernybough*, as reported in 1 L. J. N. S. 374.

BURNS, J.—It appears to me, under the 225th section of the C. L. P. Act, that a rule for costs of the day should be drawn up in the principal office. The rule of court (No. 120) authorizing Deputy Clerks of the Crown to sign rules, were such rules as were side bar rules, &c., before the statute was passed. And before the statute was passed, a rule for costs of the day required to be moved in court. The statute abolished the motion, but leaves the rule to be issued by the Master. The case was properly disposed of by the Master. This summons must be discharged with costs.

Summons discharged with costs.

PRACTICE COURT.

LATTA v. WALLBRIDGE.

Award—Setting aside—Referring back—Grounds—Mistake—Discovery of new evidence.

Held—1. That the Court will not set aside an award on the ground of mistake, unless the mistake be admitted or clear.

2. That an award will only be referred back on the same grounds that would formerly have justified its being set aside.

3. That under the circumstances of this case, the arbitrator was justified in allowing as a set off the judgment of defendant against the plaintiff and another, as against any claim that plaintiff had against defendant.

4. That the Court would not interfere, either to set aside the award or refer it back, on the ground of the discovery of new evidence.

(Sittings after Easter Term, 24 Vic.)

In Easter Term last, *Jellett* obtained a rule calling on the defendant to show cause why the award in this cause, should not be set aside on the following grounds:—

1. That the arbitrator allowed a judgment recovered in the County Court of Hastings, wherein the present defendant was plaintiff, and the present plaintiff and one Gilbert Latta were defendants, to form the subject of the set off in this action.

2. Or why the award should not be referred back to the arbitrator for re-consideration, as to the item of $122 27 mentioned in such award, or the item charging the plaintiff with the balance of the said judgments or both such items, on the grounds that the sum of $122 27 was not a proper charge against the plaintiff, he having retired the note out of the defendant's hands and paid the same to him after he had taken the same up from the Bank, and that the judgment aforesaid was between different parties than those in this action and could not be set off, and then, for that, the balance of judgment was improperly charged against plaintiff: that the said sum of $122 27 and the said judgment represent the same debt, and because the award was contrary to evidence.

3. And because of the discovery of new evidence the note which the defendant retired, with the sum of $122 27 now being in plaintiff's hands, found since the arbitration closed, and on the ground that the arbitrator considers it ought to be referred back.

The arbitrator in a certificate stated that, in his opinion, the matter should be again opened, because he was not sure that the judgment charged in the award made against the plaintiff, was not not based on a debt identical with the defendant's cheque mentioned in the award (viz., $122 27): in other words, his apprehension that the plaintiff was in the award charged twice with the same liability.

Affidavits were filed on behalf of the plaintiff, with a view of shewing that the judgment and the $122 27 did, in fact, represent the indebtedness arising out of the same transaction and ought not both to be allowed. The plaintiff further stated, that he had found a note which was mislaid at the time of holding the arbitration, which would aid materially in establishing the view of the case contended for by him.

Harrison shewed cause during the term, and contended that as to the judgment allowed by way of set off, was recovered in an action under our Prov. Stat., on a promissory note made by the plaintiff and indorsed by his brother, and the plaintiff's counsel admitted and consented before the arbitrator, that it should be allowed as a set-off to the plaintiff's claim for whatever balance was due on the judgment; that although plaintiff did, before the arbitrator finally closed his award, withdraw his consent, yet as the debt was the debt of plaintiff alone and defendant swears he is insolvent, the court would not set aside or refer back the award on that ground. As to referring back the award to the arbitrator on the ground of mistake as to allowing both $122 27 and the balance on the judgment, he submitted that the Court would not refer it back on the ground of mistake, unless it appeared perfectly plain that there was a mistake. As to the discovery of new evidence, he submitted that this is very rarely allowed as a ground for setting aside an award. He argued that the evidence given before the arbitrator and considered by him fully justified the award, and that although the arbitrator on being applied to and told of new evidence, might consider it desirable to re-open the case, that such a practice would be very inconvenient, and that the Courts had always ruled against it He also contended, that this case ought not to be referred back unless the Court is prepared to set aside the award on the grounds suggested by the plaintiff. He referred to *Glen* v. *G. T. R. Co.* 2 U C. Prac. R. 377; *Phillips* v. *Evans*, 12 M. & W. 309; *Fuller* v. *Fenwick*, 3 C. B. 705; *Fawell* v. *Eastern Counties Railway*, 2 Ex. 344; *Ozenden* v. *Cropper*, 10 A. & E. 197; *Legge* v. *Young*, 16 C. B. 626; *Hogg* v. *Burgess*, 2 H. & N 293; *Hodgkinson* v. *Fernie*, 3 C. B., *N. S.* 188; *Bagaelly* v. *Mallalieu*, 4 L. T., *N. S.* 245.

Jellett, in moving the rule absolute, referred to *Paterson* v. *Howison*, 2 U. C Q. B. 139; *Arnold* v. *Bainbridge*, 9 Ex. 153.

RICHARDS, J.—The notes of evidence before the arbitrator, and the affidavits shew clearly that the question was raised and discussed before the arbitrator, as to whether the cheque or payment of $122 27 and the judgment were really for the same indebtedness, and the arbitrator did undoubtedly decide against the plaintiff. Since the award, plaintiff has discovered a note not produced before the arbitrator, which, if he had produced before the arbitrator, would have strengthened the view he pressed on him. On this being brought to the knowledge of the arbitrator, he does not say as the arbitrator did in *Burnard* v. *Wainwright*, 19 L. J. Q. B. 423 (*S. C.*, 1 L. M. & P. 455), that if the discovered documents had been produced, it would have materially affected the decision of the arbitrator; but that he is not sure his decision is right, and for that reason the case ought to be referred back.

The later cases certainly do not seem to favor the view of setting aside or referring back a matter to an arbitrator even when the mistake is clearly shewn, but in this case both parties do not admit a mistake; the plaintiff endeavors to shew that there is a mistake, whilst the defendant positively denies it. The case of

Philipps v. *Evans*, 12 M. & W. 809, seems quite as strong as the one now under decision. There the arbitrator had omitted by mistake to notice the sum of £119 7*s*. 4*d*., acknowledged to have been levied by defendant on plaintiff's goods, and the affidavits stated that on the error being pointed out to the arbitrator, he admitted there appeared to be a mistake, and regretted he could not rectify it, his authority having expired with the publication of the award. He recommended the parties to consent to the matter being again brought before him, but the defendant refused to do so, and the Court refused to set aside the award. In referring to *Hall* v. *Hinds* where the award was set aside (2 M. & S. 847) Rolfe, Baron, said "there it was done because without controversy a mistake had been committed by substracting one sum from the other, instead of adding them both together and awarding for the plaintiff instead of the defendant," and Alderson, Baron, observed, "If we were to enter into the question of merits on affidavits, in nine cases out of ten it would be argued there was some mistake." Baron Parke in giving judgment said, referring to *Hall* v. *Hinds*, "I do not mean to say that the decision of the Court of Common Pleas in that case was not correct, as it was founded on facts which shewed a clear mistake, but I feel extremely unwilling to enlarge that rule, although we may possibly do some injustice in particular cases. I think it better to adhere to the principle of not allowing awards to be set aside for mistakes, and to open a door to enquire into the merits, or we shall have to do so in almost every case."

Most of the cases on the subject of setting aside awards in mistake or improper finding of arbitrator, were referred to for *Hodgkinson* v. *Ferrie et al.*, 3 C. B., *N. S.* 189, and nothing in that case would seem to warrant the extending the rule as to setting aside this award, as contended for by the plaintiff. It is also an authority to shew that awards will only be referred back on the same grounds that would formerly have justified their being set aside.

I am not prepared either to refer back or set aside the award, on the ground that the arbitrator has made a mistake in awarding, as to the $122 27 and as to the judgment, both in favor of the defendant, or on the ground of the discovery of the new evidence.

As to the award being bad because the arbitrator allowed the judgment to be set-off against plaintiff's claim, I am not willing to yield to plaintiff's views on that point for many reasons, amongst others, that it clearly appears that the note on which the judgment was based was the individual note of the present plaintiff, given for an individual debt which he himself had incurred, and on which the other defendant in that suit was only an accommodation indorser. At the arbitration his counsel admitted it was a proper subject for set off in that proceeding, and I am by no means prepared to decide that the judgment under our statutes so far merged the individual liability of defendant on the note as to prevent its being allowed by the arbitrator as a set off under this reference.

If I had fully made up my mind in favor of the plaintiff as to the merger of the individual liability on the judgment, I should still hesitate to set aside this award on that ground, for truly as the arbitrator says, "in equity and good conscience" the amount ought to be set off against any claim plaintiff may have against defendant.

The defendant shews in his affidavits that the case was repeatedly adjourned by the arbitrator at the request of the plaintiff; that he has been obliged to pay thirty dollars for the arbitrator's fees when taking up the award; that if the matter is referred back he will be put to more expense; and that as plaintiff is insolvent, he get nothing from him.

Under these circumstances he contends, that the case ought not to go back to the arbitrator as for the discovery of new evidence: that having taken as much time as he chose in bringing the matter before the arbitrator, if he neglected to search among his papers for the document he has found since, he ought not to be allowed to wait till the arbitrator had dicided against him and then bring the matter up again.

On the whole, I am not prepared to make the rule absolute on any of the grounds taken by the plaintiff.

If defendant, after the matter has been fully considered, is advised that he can enforce the award, and plaintiff considers that from anything that appears on the face of it, he can legally resist the payment of the amount thereby directed to be paid, he will have an opportunity of doing so when defendant attempts to enforce the award against him.

In the meantime, the rule *nisi* will be discharged with costs.

Per Cur.—Rule discharged with costs.

RITCHIE v. WORTHINGTON ET AL., ADMINISTRATORS OF DAVISON.

Held, 1st. That a judgment deliberately taken by the plaintiff against the defendants, as administrators, in September, 1858, will not be opened up on the ground that certain assets have since become available for plaintiff's judgment. 2nd That the plaintiff having his judgment may however reach those assets either in equity or at common law.

(Sittings after E. T., 24 Vic.)

In Hilary Term *Bruce* obtained a rule on behalf of the plaintiff, calling on the defendants to shew cause within the first four days of Easter Term, why the judgment roll in this cause should not be amended, by enabling the plaintiff to pray and take judgment on the assets admitted in the defendants' plea, after satisfaction of the mortgages and judgments therein referred to, in addition to judgments of assets *quando acciderint*, or why the said judgment should not be set aside, and the plaintiff allowed to reply to said pleas, or to take such judgments thereon as he may be advised.

A copy of the pleadings was filed on moving the rule.

The action was commenced in 1858. Several promisory notes are set forth in the declaration, and the plaintiff claims £1,200 damages. The defendants pleaded on the 20th April, 1858, setting up judgments recovered against the intestate in his lifetime, and mortgages made by him outstanding for large amounts, and that they had not sufficient goods or chattels of intestate come into their hands to satisfy the same. On the 20th September, 1858, plaintiff admits defendants' plea, takes judgment *quando*, and replies lands. There was also an affidavit filed by the plaintiffs' attorney. He stated that judgment was entered on the 27th September, 1858; that at the time of pleading, the plea by defendants and of the taking judgment in this suit, the judgment and mortgages in the plea mentioned were outstanding, and being aware that they amounted to a sum sufficient to exhaust any assets then on hand, the plaintiff was advised to take judgment of assets *quando*, and took such judgment instead of taking judgment of the assets then unadministered, after satisfaction of such mortgages and judgments, and of assets *quando*: that the mortgages have been foreclosed without resort to the personal estate of intestate, and the judgments mentioned in the plea have been satisfied from other sources, and in consequence, he was informed and believed a large amount of assets remained in defendants' hands, which, but for the form of the judgment so taken might be made available for the plaintiff's claim in this action, and that a considerable portion of the judgment recovered by the plaintiff remains unpaid.

During Faster Term *Harrison* shewed cause, and contended that the rule ought to be discharged; that there is no ground for the interference of the court, and that the parties cannot now be placed in *statu quo*: that the defendants have paid other debts since the pleadings were filed, and that they desired to plead the retaining of their own debts, which they would be deprived of if this amendment was allowed to be made. He referred to *Cameron* v. *Reynolds*, 5 El. & B. 301; Williams on Executors, 1692; 6 Taunt. 45; *Burroughs* v. *Stevens*; 5 Taunt. 556; 1 Wms. Saund. 336.

Burton in support of the rule.

Harrison for defendants filed the affidavit of defendant, Worthington, in which he stated that plaintiff had issued an execution against the lands of intestate on the judgment, under which 500 acres of land in the township of Harvey, in the United Counties of Peterboro and Victoria were sold in the month of December, 1859, to the agent of plaintiff's attorney, for $500: that since the recovery of plaintiff's judgment the defendants, as administrators, have in good faith paid on account of the judgment set forth in their plea, and on account of taxes due the City of Hamilton in respect to the estate of the intestate, much more than the amount of assets that have hitherto come to their hands to be administered.

That the payments so made were from the proceeds of the sale of intestate's effects and from their own money, and that intestate in his lifetime was indebted to defendant, Worthington, in $300: that all the payments referred to have been made in good faith, and long before the defendants had any notice or knowledge that plaintiff intended to apply to vacate his own judgment in this action; and further, if plaintiff is allowed to relinquish his present judgment, and obtain now the money so paid by said defendants, it would inflict great hardship and injustice on them, and embarrass them in the administration of the assets of the estate.

Anthony Copp, another of the defendants, by his affidavit also filed, stated that he believed all the statements in Mr. Worthington's affidavit were true, and that intestate at the time of his death owed him $400, which is yet unpaid.

RICHARDS, J.—In this case the plaintiff, after having deliberately taken judgment for assets *quando acciderint*, and replying lands, and issuing an execution against and selling the lands of the intestate, now seeks to vary his judgment in such a way as to reach assets that have become available since his judgment was entered, though in the meantime the defendants have changed their position by making payments on account of the estate they were administering. Other parties, creditors of the intestate, may, for anything I know, have had their proceedings in recovering their debts influenced by the course the plaintiff chose deliberately to take in entering his judgment.

The plaintiff has not produced any authority which would justify me in directing the course he desires to have carried out to be taken *Burroughs* v. *Stevens*, in Taunton, would seem to be an authority against him. In *Cameron* v. *Reynolds*, 5 El. & B. 301, the court in setting aside a judgment entered by mistake when the defendant knew of the error, and which would have had the effect of depriving the plaintiff of a considerable portion of a just claim, went a great way to aid the plaintiff; but then what the plaintiff did was done under a clear mistake as to a fact, and the application was made promptly, and clearly no injustice could be done; but there the proceedings were taken deliberately, and at the time it seemed to be the best course for the interest of the plaintiff that judgment should be entered as it was, for thereby he was able to reach certain lands of the intestate, which we are told have been sold for his benefit. Now after a lapse of three and-a-half years, he thinks it would be better for him if he had taken, or could now get a different sort of a judgment. If he is permitted to do this, I do not feel that all parties are placed in the same position they would have been in had plaintiff taken the judgment he now wishes to get. In *Cameron* v. *Reynolds*, Coleridge, J. says, "The court in its discretion, certainly would not set a judgment aside unless the circumstances were such that they could place the parties in the same position in which they would have been but for the mistake:" and in the same case, Lord Campbell, C. J., in giving his judgment, says, "We are asked what are the limits of our jurisdiction, and whether we could do this at any time? I answer that lapse of time becomes after a season a bar as soon as the court in its discretion sees that it has been such as must work prejudice." I think, if for no other ground, the lapse of time here, and what has since been done, must in the language of Lord Campbell, "work prejudice."

As to the plaintiff's position, he has his judgment to recover the amount due him, from assets that may come into the hands of the administrators after the plea pleaded. If the payment of the mortgages or judgments set up in the plea of the defendants, renders whatever was then in their hands *now* assets for the satisfaction of this judgment, the plaintiff can proceed under the judgment to reach them. If they are not in law assets to answer a judgment entered in this way, they must be in equity, and the plaintiff can seek his remedy there. But either in law or in equity, the administrators ought to have an opportunity of shewing if they can, that these assets are not now liable to satisfy the plaintiff's claim, either because they have a right to retain the amount to satisfy their own debts, or because they have paid the amount to discharge liabilities that they were bound to pay before they satisfied this judgment. On the whole I cannot doubt that I ought to discharge this rule.

Rule discharged, with costs.

COUNTY COURT.

(In the County Court of the United Counties of Frontenac Lennox and Addington, Before His Honor JUDGE MACKENZIE.)

PARKER v. HOWELL.

Judgment—Irregularity—Fraud—Right of subsequent Judgment Creditor to attach—Issue—Undue Preference.

Quære, Is the want of the Clerks signature at the foot of an execution an irregularity?

Held, 1.—That however available an objection for irregularity might be if urged at the instance of the defendant in a cause it cannot be pressed by a third party, such as a subsequent execution creditor.

2.—That a subsequent judgment creditor may attach a prior judgment on the ground of Fraud.

3.—That an issue may be directed between the parties to try the question of Fraud.

4.—That merely allowing a judgment to lie signed for want of appearance is not of itself an undue performance.

(Chambers 7th July, 1861.)

Agnew obtained a summons calling upon the plaintiff to show cause why the judgment entered up in this cause together with the *fi. fa.* issued thereon, and all subsequent proceedings should not be set aside on the grounds—

1st. That the judgment was fraudulent, collusive and void; or why an issue should not be ordered to try the *bona fide* of the judgment.

2nd. That no *bona fide* debt was due to plaintiff when action was commenced

3rd. That if any debt was due, it was incurred for the fraudulent purposes of this action.

4th. That at the time of obtaining the judgment, the defendant not being able to pay his debts in full, voluntarily, or by collusion with the plaintiff, allowed the plaintiff to obtain judgment against him (the defendant), with intent to give the plaintiff fraudulent preference over one Thomas Tweed, who had recently obtained a verdict against the defendant for $150, and his other creditors, and for the purpose of preventing Tweed from securing his verdict, and so defeat him in his remedy; and for the purpose of fraudulently covering the goods and chattels against Tweed's execution.

5 That the execution is not signed by the Clerk of the Court at the foot thereof; and on other grounds disclosed in affidavits and papers filed,

It appeared by the affidavits filed that Thomas Tweed obtained a verdict for $150 against the defendant at the last Kingston Assizes, in the month of April last, 1861. That proceedings were instituted in November, 1860, and judgment entered on the verdict of Tweed, on the 30th day of May, 1861, and a *fi. fa* issued thereupon against the goods of the defendant The verdict was rendered in favour of Tweed on the 25th April, 1861. That the defendant was, and is, in the employment of the plaintiff as shopman in the city of Kingston.

Parke showed cause, and filed affidavits on the part of the plaintiff, as well as a statement of account between the plaintiff and defendant, showing a balance of $172 6c. in favour of the plaintiff; and cited *Farr* v. *Ardley*, 1 U. C., Q. B. 337, *Jones* v. *Jones*, 1 D. & R., and *Young* v. *Christie*, 7 U. C. Ch. R, 312.

Agnew contra, cited *Wilson* v. *Wilson* 2 U. C. Pra. R., 374, *Brook* v. *Hodson*, 7 M. & G., 529, *Imray* v. *Magnay*, 11 M. & W. 267, and *Ferguson* . *Bond et. al.*, 10 U. C. C. P., 493.

MACKENZIE, Co. J.—The case of *Wilson* v. *Wilson*, 2 U. C. P. R. 384, is in point. It is in principle like the present case. The result of the present application must be governed by it. Mr. Justice Burns, in his judgment, held that the Commercial Bank, the applicants, could not be allowed to urge a defect or irregularity as a ground to set the proceedings aside, as they were no parties to the judgment; the defendant himself or those claiming as privy under him could only take such advantage.

In the cases of *Farr* v. *Ardley* and *Jones* v *Jones*, cited in the argument, it was held that, however available an objection for irregularity might be, if urged at the instance of the defendant himself, it could not be pressed by a third party, such as a subsequent creditor.

I am not ready to say that the want of the Clerk's signature at the foot of the writ of execution would amount to an irregularity. It is unnecessary, however, to decide the point now, as I am of opinion that Thomas Tweed, the present applicant, cannot be

allowed to press such an objection, being no party to this judgment. The second ground is very important, and deserves careful consideration.

Hanod v. *Benton*, 8 B. & C., 217, *Martin* v. *Martin*, 3 B. & A., 1,934, *Sharpe* v. *Thomas*, Bing 516, establish that a subsequent creditor may attack a judgment obtained on a warrant of attorney on the ground of fraud, upon application to the court, by a motion.

In *Wilson* v. *Wilson*, in delivering judgment made use of the following remarks:—"The recent enactment, allowing the plaintiff to take a final judgment at once, upon filing a writ of summons specially endorsed with an affidavit of personal service, has opened the door to collusion and fraud, quite as wide as may be used with cognovits and warrants of attorney, and I think the non-intervention of the defendant in the obtaining of the judgment, together with the activity of the plaintiff, should be considered by the Court as strong a reason for inferring as where the judgment is obtained by the activity of the defendant in the matter, where it requires no interference of the Court to assist in obtaining the judgment, should, it appears to me, not place others who are interested in questioning whether such conduct is for the purpose of enabling the plaintiff to perpetrate a fraud in a worse position than if the defendant had actively assisted the plaintiff to do it, by giving a confession of judgment or warrant of attorney."

According to the dates giving in the statement of account filed by the plaintiff, the defendant owed him nothing until the 16th April last. There are charges to the amount of $239 and 74 cents after the 1st April, and to the amount of $229 and 89 cents after the 16th April. The charge of 50 dollars paid to Mr. Parke on the 16th of April was on account of costs of defence in the case of *Tweed* v. *Howell*, which was not tried until the 25th, and the charge of $112 and 50 cents, for furniture, made on the same date, 16th April, is not explained. Taking into consideration that a verdict was standing against the defendant at the suit of Tweed at the time the present judgment was entered up, and that entries exceeding the balance claimed by the plaintiff were made on account after the 16th April, 1861. I think there is ground of suspicion against the plaintiff's claim. I do not feel satisfied with the manner in which the account of the plaintiff is made up.

In *Wilson* v. *Wilson*, Mr. Justice Burns stated—"If the parties were subjected to an examination before a jury, the truth would be much better ascertained." I think this matter should be settled by an issue between the parties, as suggested by Lord Tenterden in *Hanod* v. *Benton*, and ordered by Mr. Justice Burns in *Wilson* v. *Wilson*. A jury, then, will decide whether the plaintiff's claim is an honest one, or a contrivance to prevent the effect of the judgment obtained by Tweed against the defendant. The issue should be between Thomas Tweed, as plaintiff, and Edward Henry Parker, defendant; and should be to try whether the judgment obtained by Edward Henry Parker against the defendant Howell was obtained by fraud and collusion between Edward Henry Parker and Thomas B. Howell, in order to defeat the effect of the verdict of Thomas Tweed; or whether the judgment is an honest one, founded upon a valid and *bona fide* consideration, and the present summons to set the judgment aside be enlarged until after the determination of the issue.

In the case of *Young* v. *Christie*, Grants Ch. R. 312, it was held that the allowing of a judgment to be signed for want of an appearance, is not an undue preference of one creditor over another as will render the judgment void under the statute—22 Vic. cap. 96, sec. 18 and 19.

NOTE.—The jurisdiction of a County Judge in vacation or judge in chambers to grant an issue of the kind suggested does not seem to have been questioned but to say the least of it is is very doubtful. The power of a Judge in chambers to order an interpleader issue is expressly conferred by statute.—EDS.

L. C. REPORTS.

SUPERIOR COURT.—MONTREAL.

GRANT v. ÆTNA INSURANCE COMPANY.

Law of Fire Insurance—Jury Trial—Admission of illegal and rejection of legal evidence—Contemporaneous representations by insured to other insurers—Valuation in cases of Loss—Representations or Warranty.

Held.—1st. That letters written by the agent of the defendant, a Fire Insurance Co., to his principal after the loss had accrued, cannot be used in evidence against the Company.

2nd. That contemporaneous representations made by the assured to other insurers of the same subject, may be legally proved by the defendants.

3rd. That the loss under the policy stipulating: "That the loss or damages shall be estimated according to the true and actual cost value of the property at the time the loss shall happen," must be ascertained from proof of the money value of the subject in the existing market.

4th. That the following words written upon the face of the policy, "of the steamer Malakoff now lying in Tate's dock, Montreal, and intended to navigate the St Lawrence and Lakes from Hamilton to Quebec, principally as a freight boat, and to be laid up for the winter at a place to be approved of by the company, who will not be liable for explosions either by steam or gunpowder," is a warranty and not a representation.

5th. That such warranty not having been complied with by the assured, the policy is void, and an action for the loss will be dismissed upon motion, *non obstante veredicto*.

(Judgment rendered the 31st March, 1860.)

BADGLEY, Justice:—Three motions having been submitted in this cause, the first in arrest of judgment, the second for entry of judgment for defendant, *non obstante veredicto*, and the third for a new trial, all predicated upon a verdict found in favour of the plaintiff upon his action against the defendants for the recovery of $4,000 on an open Policy of Insurance effected with the defendants upon portions of the steamer Malakoff. The motions are severally based upon special grounds detailed in them respectively, and will be adverted to particularly in the course of my observations. The contract of insurance between the parties is in the following terms and conditions contained in the defendants policy: The defendants agreed to insure the plaintiff "for $4,000, namely, $2,400 on the hull and cabins, $1,200 on the engines and boilers, and $400 on the tackle and furniture of the steamboat Malakoff, now lying in Tait's dock, Montreal, and intended to navigate the St Lawrence and Lakes *from Hamilton to Quebec, principally as* a freight boat, and to be laid up for the winter in a place approved by this company, who will not be liable for explosions either by steam or gunpowder. The company agree to make good to the insured any loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property as above specified, from the 30th July, of 1858, to the 30th of July, 1859, the said loss or damage to be estimated according to the true and actual cash value of the property at the time the same shall happen." The other stipulations were those generally contained in policies: namely, the exemption of the defendants from liability for loss occasioned by civil commotion, &c.: the avoidance of the policy for want of notice to the defendants and of indorsement on their policy of any other insurance effected by the insured on the same subjects; in case of other insurances, the defendants' liability only for such sum as their insurance should bear to the whole amount insured on the said property; and the acceptance of the policy subject *to the printed conditions annexed thereto*. It is proper to state that two other insurances were also effected by the plaintiff, the first with the Equitable Office for $2,400 on the hull and cabins, and $1,600 on the engines and boilers, together $4,000, of the said steamboat Malakoff, and the other with the Home Office for £1,000, to wit—$2,400 on the hull and cabins, $1,200 on the engines and boilers, and $400 on the tackle and furniture of the said steamboat, making the total insurance £3,000, distributed as follows—£1,800 on the hull and cabins, £1,000 on the engines and boilers, and £200 on the tackle and furniture of the Malakoff. Of these the defendants had ½ of the first, 3-10 of the second, and ½ of the third. The insurance with the Equitable is noted in the defendants' policy, and it is admitted that they had notice of that effected with the Home Office. It only remains to add that all these policies were open policies, without special valuation of the subjects insured by them.

The verdict was found upon special issues; articulations of facts, as follows:—1st. The defendants' execution of the policy; 2nd. The destruction by fire of *nearly all* the subjects insured, except the bottom of the vessel and the remains of the engines and boilers; 3rd. The plaintiff's ownership and his loss of £8,000; 4th. Namely, £1,800 on hulls and cabins, £900 on engines and boilers, and *£300 on furniture and tackle, with estimate of the* remains worth as old iron, £300; 5th. Plaintiff's compliance with terms of the policy; 6th. The fitness and proper condition, or nearly so, of the Malakoff to navigate at the date of the policy, but that she had not navigated; 7th. That she was in running

order at that date; 8th. That there was no greater risk in the Dock than if navigating; 9th. That she was put in order and required no further outlay; 10th. The defendants' knowledge of other insurance effected; 12th. Absence of concealment by plaintiff from defendants of the sameness of the hull of the Malakoff with that of old steamer North America, and the immateriality of that fact; and 13th. The finding for plaintiff of the sum demanded, £1,000, less £100 for ⅛ share of the value of the remains. The 11th finding is peculiar; the special issue inquires: "Did the plaintiff declare or represent to the defendants that the Malakoff would and should navigate, as aforesaid, and be laid up for the winter in a place to be approved by the defendants, and was the said representation material, and was it complied with?" The finding is, "No, he conformed to the conditions of the policy.

The contract and findings have been stated, the motions under discussion will be examined; 1st. that an arrest of judgment is grounded upon the irregularity and inconsistency of the findings generally, and the failure of the jury to answer several of the articulations of fact submitted, and specially the 3rd and 4th, and the consequent impossibility to make up a judgment in plaintiff's favour. In my view of the case the 11th articulation was not matter for the jury at all, being part of the contract itself, and forming part of the policy. The subject matter could not be affected by evidence of fact upon which the jury could legally pass; but, as it was submitted to them, they should have given a sensible and applicable finding; but as it stands the finding is no answer to the special issue. The defendants general objection to the other findings, and particularly to those to the 3rd and 4th special issues, cannot be sustained; and, inasmuch as the 11th as above, should not have been submitted, and the other findings are not apparently objectionable, the motion in arrest of judgment upon the grounds stated will be rejected. The second motion to enter up judgment for the defendants, *non obstante*, and the third for a new trial, will be considered together; and to get rid of a little written superabundance, the grounds which require least remark will be taken up first, and these are among the number set out in the third motion that for a new trial, which object to the rulings of the Judge at the trial, in his alleged admission of illegal and rejection of legal testimony, misdirections in law, and erroneous instructions upon the evidence and points submitted. Now, of these, the 5th and 6th objections are untenable; they refer to the rulings as to the proof of ownership in the plaintiff by the customs certificate and other proof adduced. But these do show both title and possession in him; his interest in the subjects insured is satisfied by the proof adduced, and that proof is uncontradicted. The plaintiff appears, therefore, as the registered owner of the Malakoff under the public document, and as in possession of her at the time the insurance was effected, as well as at time of the accident. 1st. Taylor on Evidence, p. 126, says, that "in an action on a policy of insurance of a ship and her cargo, the plaintiff may rely on the mere fact of possession, without the aid of any documentary proof or title deeds, unless rendered necessary by the adduction of contrary evidence." The 10th objection of concealment and its materiality, is likewise untenable. Whether the hull of the Malakoff was or was not that of the North America was unimportant in an insurance against fire: it might have been otherwise in a purely marine risk, inasmuch as in this latter case the unseaworthiness or incapacity to perform the voyage would have given operation to the implied obligation upon the assured, of not concealing something important, within his own knowledge, and any loss or damage would, therefore, have fallen upon the insured himself. The fact in evidence, however, in this respect is satisfactory, inasmuch as the old hull had been almost altogether renewed at the time of the insurance, when indeed the Malakoff had become a strong serviceable steamer. Moreover, this implied obligation relieves the insured from volunteering such spontaneous information—(*a*) however material it might be under other circumstances, although it is quite true that the insured would have been held to disclose all he knew had the information been particularly demanded of him by the insurers. So far from this being the case the latter waived the enquiry, and forestalled the information about the Malakoff by reference to documents in possession of defendants' agent. The jury found the fact not to be material, and their verdict in this respect will not be disturbed. (*b*)—The 11th objection has been already mentioned, and the very general and unimportant grounds contained in the 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th and 21st objections need not be dwelt upon, nor prevent an immediate reference to the really important objections contained in the 1st, 2nd, 3rd, 4th, 7th, 8th, 9th, 13th & 14th grounds. The four first of these have reference to the admission of illegal and the rejection of legal evidence: Nos. 1 and 2 refer to the former, Nos. 3 and 4 to the latter. As to the admission of illegal evidence: it appears that Mr. Wood, the defendants' agent, who had taken the risk, was examined by the plaintiff as his witness, and with the purpose of negativing the warranty contained in the policy pleaded by the defendants, the witness was compelled to produce to the jury certain private letters and reports to his foreign principals from himself as their agent, but written after the loss had occurred. This evidence is not legal, and the requisition to produce it is not warranted by law. The general principle cited, *arguendo*, by plaintiff's counsel, from Paley, on Agency, 322, and 1st Taylor, sec. 539 and page 755, is undoubtedly correct "that no agents, however confidentially employed, are privileged from disclosing the secrets of their principal, except Counsel and attorneys." But the limitation of the general principle is also stated by them who echo the unanimous opinions of text writers and of judicial decisions, that the generality of the rule does not apply to such circumstances as the present From the leading case of *Fairlie* v. *Hastings*, decided by Sir William Grant, Master of the Rolls—Paley, 269—to be found in 10 Ves., Jr., p. 123, to the present time no difference of opinion exists. He lays it down as a general proposition of law, that what one man says not upon oath cannot be evidence against another man. The exception must arise out of some peculiarity of situation coupled with the declaration. An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement, and in many cases by his acts. What the agent has said may be what constitutes the agreement of his principal, or the representations or statements made may be the foundation of or the inducement to the agreement. Therefore, if writing be not necessary by law, evidence must be admitted to prove that the agent did make that statement or representation. So with regard to acts done, the words with which those are accompanied frequently tend to determine their quality. The party, therefore, to be bound by the act must be affected by the words. But except in one or other of those ways, he observes, I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot be proof of it, though it may have some relation to the business in which the person making that assertion was employed as agent. The admission of the agent cannot be assimilated to that of the principal. A party is bound by his own admission and is not permitted to controvert it. But it is impossible to say that a man is precluded from questioning or contradicting any thing any person has asserted as to him, as to his contract or his agreement, merely because that person has been his agent. If any fact rest in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertions. Lord Kenyon carried this so far "in 1 Esp. Cas. 375, *Maesters* v. *Abram* as to refuse to permit a letter by an agent to be read to prove an agreement by the principal holding that the agent himself must be examined If the agreement were contained in the letter, I should have thought it sufficient to have proved that letter written by the agent; but if the letter were offered as proof of the contents of a pre-existing agreement, it was properly rejected,"—see Taylor sec. 539—The letter in this cited case was, in fact, subsequent to the contract. In the cases in 4 Taunt. 511 and 565 of *Langhorn* v. *Allnott*, and *Kahl* v. *Janson*, the Court of Common Pleas decided that the letters of an agent abroad to his principal, containing a narrative of the transactions in which he has been employed, were not admissable in evidence against the principal as the mere representation of the agent, because they were not part of the *res gestæ*, but merely an account of them. See also *Reyner* v. *Pearson* Ibid. 662—where the general rule is this, when it is found that

(*a*) 1st. Arnould, Nos. 567-8.

(*b*) 1st. Arnould, No. 570.

one is the agent of another, whatever the agent does, or says, or writes at the making of the contract as agent, is admissable in evidence against the principal, but what this agent says or writes afterwards is not admissable. So also 4 Rawl., 294 per Rogers, J.: *Hough* v. *Doyle*—so this same principle will be found in *Betham* v *Benson*, Neil Gow's R. 45. Ch. J Dallas there says it is not true that when an agency is established, the declarations of the agent are admitted in evidence merely because they are his declarations; they are only evidence when they form part of the contract entered into by the agent on behalf of his principal, and in that single case they become admissable, these declarations, at a different time, have been decided not to be evidence; numerous English and American authorities may be cited in addition; a few will suffice:—1, B and C., 473; 8, Bing, 471; 19, Pick, 220: 7, Cranch, 336; 2, Hill, 464; 3 Hill, 362; and lastly, Taylor on Evidence. Considering these authorities as the true exponents of the law on this point, it follows that the evidence in question was not legal and should not have been submitted to the jury; it was not contemporaneous with the contract, not *dum fervet opus*. It may also be remarked that, as that evidence was intended to disprove the existence of a warranty written in the policy, its admission controverted another established rule of evidence, which prohibits the admissibility of parol or extrinsic evidence to contradict, vary or control written contracts. Nos. 3 and 4 refer to the rejection of evidence offered. The defendants proposed to show, by the witnesses Tait and Lunn, that the insurance effected by the plaintiff with the first insurer, the Equitable Company, was accompanied by false and fraudulent misrepresentations at the time of making the insurance with that Company, as to the condition and circumstances of the Malakoff, and as to the stipulation of her navigating. The judge *in limine* stopped the question and prevented any answer from being given As the ruling is reported, without stating the legal ground taken for it, the authority from 3 Kent Com. p. 284, cited by plaintiff's counsel, *arguendo*, upon the motion may probably be the support for it, and is as follows:—"This rule has not been favourably received by latter judges, and it is strictly confined to representations made to the first underwriter, and not to intermediate ones. Nor does it extend to a subsequent underwriter on a different policy, though on the same vessel and against the same risks." See, also, 2 Johns, 157. The facts in the evidence in relation to this ruling are as follows: Wood, the witness above spoken of, was the agent of the Ætna, the defendants, and of the Home Office, and was applied to by Tate, the plaintiff's agent, to ascertain the rate of insurance. Tate intimated to Wood his desire to effect insurance upon the Malakoff for £3,000, to be distributed among three different offices for £1,000 each. Having effected insurance on the 30th of July with the Equitable, he, on the following day, the 31st, applied to Wood to complete his original purpose; stated his previous insurance with the Equitable, and obtained from Wood insurance with the defendants for another £1,000, as above, and with the Home Office for the third £1,000. The original purpose and intention intimated to Wood, was in this way perfected, and the insurance with the Equitable was noted in the defendants' policy. In England these insurances would, of course, have been effected with the underwriters by the usual slip process, showing the signature of the Equitable as first insurer, and those of the defendants and the Home Office as second and third insurers, and there, any false or fraudulent representation made to the Equitable would avail to the defendants in resisting the claim against them. In *Barber* v. *Fletcher*, Dougl. 305, Lord Mansfield said, "it had been determined in divers cases that a representation to the first underwriter extends to all others." (1) So also Phillips commenting upon this rule, at No. 554, says:—"The principle on which this rule rests is, that in offering to a party a policy subscribed by another, the insured implies a proposal that the party to whom it is offered shall enter into the same contract which that other has entered into whose name is already upon it, unless such a presumption is rebutted by what passes between the parties to the subsequent signature; and the contract will not be the same if there are certain conditions between the parties to the prior subscription which do not form a part of the contract between those to the subsequent one. The rule is usually stated, generally, that a representation to the first underwriter is such to the others, and the meaning evidently is, that the subsequent subscribers may avail themselves of the rule in defence against a claim on the policy, and this is the result of the jurisprudence on this matter." The exigencies and necessities of trade in the extensive and busy marts of England, and the number and variety of insurance transactions that must be effected within short periods of time, have established the system of slip certificates, by which each subscriber in effect becomes an individual insurer, though on the same policy, and the usages of trade, then come in and give effect to the separation; hence it becomes nesessary to recognize the influence of "such a rule, which is grounded upon the reasonable presumption that the subsequent underwriters subscribe the policy from the confidence reposed by them in the skill and judgment of him whose name *they see stand first in the policy, and from their belief that he had* duly ascertained and weighed all the circumstances material to the risk." (i) It is true there are limitations to the rule, as "that it is strictly confined to those matters of intelligence relating to the subject insured, with regard to which it is reasonable to suppose that the first underwriter would require information, and without which it may be presumed he would not have subscribed to the policy." The rule is also confined to the first underwriter, and to underwriters on the same policy. It has not been extended, nor is the presumption on which it rests made applicable, to underwriters on a second policy on the same interests and risks, *unless*, (2) perhaps, it could be clearly shown that the second policy was fraudulently obtained by the exhibition of the first. (3) This latter remark shows that the rule is not altogether absolute against the admission of evidence to sustain fair dealing between the parties, and rests authoritatively upon the broad legal principle that fraud annuls contracts. (4) The rule, with its restrictions and limitations by English decisions, is adopted as unquestionable, and Mr. Duer, with his usual perspicuity and learning, observes:—"In the United States, although from the disuse, almost total, of private underwriters, the application of the rule is now of rare occurrence, its validity has been often recognized; and, however strongly we may be disposed to question the sufficiency of the reasons on which it was introduced, it stands on too firm a basis of precedent and authority to be now shaken. I confess my own adherence to the rule, on the *ground of reason as well as of authority*. I regard the presumption on which it is founded as reasonable, sound and practical. It springs from an acute knowledge of men, and of the usual mode in which business is conducted, and as will appear hereafter, it is the very presumption on which other decisions, of which the propriety and wisdom have never been doubted, are solely placed, and can alone be vindicated." Now, this is made to rest upon presumptions only: how can such presumptions be reasonably refused their operation in this case, under our legal system? The aggregate insurance, whereof that of the defendants was a part, was in effect one insurance, as originally contemplated and designed by the plaintiff; the influence of the insurance effected with the Equitable Company, as the first insurer, must have been felt by the defendants, and the benefit of the plaintiff's false and fraudulent misrepresentations to that first insurer, may not in reason be refused to the defendants under the circumstances of the case. It may be that the first policy may have been exhibited to the defendants, or other facts adduced, showing that or other implications against the plaintiff; at all events false representation and fraud have been pleaded to this action, and the preventing of the introduction, *in limine*, of testimony tending to support these allegations and the rejection of the questions proposed to the witnesses, Tate and Lunn, appear to have been at least premature and not consonant with law, the more so as our legal system is more enlarged than that from which we derive our commercial law of evidence, because it partakes more of the equity than the common law principles in practice in England. A casual remark upon the 9th objection, that all material representations had been made by the

(1) See also other cases—*Pearson* v. *Watson*, Cowp. 785 —*Stackpool* v *Simon*, Park. 932:—Marsh. 772; *Perse* v. *Parkinson*. 4 Taunt, 440 and 849.—*Forrester* v. *Pigou*, 1 M. and S. 9:—3 East. 572,—2 Campb.—544.

(1) Arnould. p. 531:—10 Pick, 402;—1 Peters, S. C. 186.
(2) 1 Arnoud p. 537
(3) Duer, 68-9 —*Tibbald* v. *Hall*, 2 Dow, p. c. 262.
(4) 2 Duer, p. 673.

plaintiff to the insurer will suffice. It is quite true that all such matters are within the sole province of the jury and not for the judge to express his judicial opinions upon them, and thereb, in effect to substitute his opinion for their findings. It is undeniable that the judge cannot pass either upon the existence or extent of misrepresentations put in issue as matters of fact. The same *observations apply to the 11th* objection as to the fact of the plaintiff's concealment in relation to the hull of the Malakoff. It is not, however, meant to be asserted that judges are precluded from the expression of their own opinions to juries upon facts submitted; but even then the latter are independent of such opinions, and themselves weigh the effect and importance of the evidence adduced. In a recent case in England (1) it was held that strong comments by the judge to the jury on the facts of the case was no ground for a new trial; and Pollock, C.B., said—"I know of no rule of morality which tells a judge that he is not to make observations on the evidence in a cause. He may tell the jury it is strong or weak, if really it is so. I can go farther and say, it is a dereliction of duty if he does not." (2)—As to concealment and its legal bearing upon the insurance, it may be observed that where there is entire good faith, non-disclosures are not to be deemed material simply because their communication might have excited suspicion in the insurer. Where there was no intention to deceive, but the non-disclosure was withheld solely from the conviction of its unimportance, it should appear clearly, in order to avoid the policy, that the facts would have been deemed material by every prudent underwriter as really embracing the risk and justifying an increase of premium. The insured should not be required at the peril of his contract to anticipate all the suspicions that might arise in the mind of the insurer, by disclosing facts which he reasonably believes could have no effect in varying the risks he desired to cover. It is true that an erroneous belief will not protect him; but the error, wholly unmixed with fraud, that is to deprive him of an indemnity, ought to be conclusively established. The 13th and 14th objections refer to the ruling in the first instance, by which the decision of the jury upon the value of the subjects was to be based, on; "*their intrinsic value to be made out from the evidence of Merritt and the engineers; and, in the second instance, that their value was to be the fair value at the time of the loss, unaffected by local circumstances or by other accidental causes of depreciation.*" The defendants' evidence of the market price and sale of other steamboats similar or nearly so to the Malakoff, and at or about the time of the accident, as the policy criterion of the value of Malakoff was rejected by the judge, who said that he could not accept the defendants' view of the law, who wished to estimate the value by bringing a steamboat into the market and selling her suddenly for cash. Now these rulings are not in conformity with the contract or with law. The stipulation in the policy, the binding contract between the parties, is, *that the loss or damage shall be estimated according to the true and actual cash value of the property at the time the loss shall happen.* What, then, is that cash value, and by what other fair mode of ascertainment can it be found than by its cash price in the market? Old Hudibras expounds the rule perfectly, "The value of a thing is what it will bring." It cannot be by taking the intrinsic cost of the subject, there can be no intrinsic value of such a thing, nor by separating the subject from the circumstances of time and place, which alone can give it a current value. If the destruction of the subject render it not available for appreciation by actual sale, its cash value may be found by ascertaining the price obtained in cash for like or nearly like subjects at the time. The abstraction of time and place from the estimation would make it impossible to know the cash or even the fair value of any thing, and specially of the subjects in this case at the given time of the contract, as ruled in this case. The money value in the existing market is the only rule and guide to carry out the stipulation of the contract, and this rule is moreover supported by authority. 2. Phillips, No. 1176, says: Insurance being a contract of indemnity, the underwriters are not liable to pay any loss except such as the assured has actually sustained; whether the loss be total or partial, its amount cannot be ascertained without determining the value of the subject. In No. 1245 the author says—The value of a building or of any article in a fire policy is what it could be sold for, since its value must be proved; and it does not appear what other value than this could be satisfactorily shewn. He remarks that the obvious presumption is that the rule is the same in a fire policy as in a marine insurance, namely, that the value of the subject at the beginning of the risk is *referred to where the policy by its provisions* or the description of the subject does not require a different construction. The authorities from Hammond and Ellis, cited to the jury, rest upon the general rule of the value at the beginning of the risk, but do not apply to this and similar cases in which the policy contracts expressly for an exception; the effect of the ruling would absolutely set aside the policy stipulation of the true and actual cash value at the time of the loss, and substitute for it, either that of intrinsic value or the mere fair value at the time of the loss, independent of all circumstances regulating or applying to it. Angell on Fire Insurance, secs. 264-5, says, "that loss or damage to goods is to be estimated according to the true and actual value of the property at the time the loss happens," and cites a judgment in Louisiana, by which a fair sale at auction, after notice to the insurers, may be considered by the jury in estimating the damages and ascertaining the indemnity. 1. Bell's Com. on the Law of Scotland, p. 643, says the loss is estimated of the distructible parts on the whole value of the house as it would have sold in the market, &c., and so, also, the French authorities are equally precise. (1) "Mais que doit-on entendre par la juste valeur des choses? Ce n'est ni la valeur de convenance, ni celle d'affection, ni même le prix d'achat, c'est la valeur venale, c'est-à-dire, le prix qu'on en pourrait retirer si on les mettait en vente. *Valere res dicitur quantum vendi potest.* Dans la règle le juste prix est auquel les choses de pareilles nature et qualite sont vendues dans les mêmes lieux, dans le mêmes temps, dans les mêmes circonstances et a toutes sortes de personnes sans avoir egard à la valeur extraordinaire, c'est-à-dire au prix qu'on peut obtenir en certain cas, et sous certain rapports. Le contrat d'assurance n'etant pas une mesure conservatoire des objets assures mais seulement un contrat d'indemnité, etc. En un mot l'assureur garantit l'assuré contre la perte réelle qui resulte de l'incendie mais cette perte payee son obligation est étiente." (2) The writers cited hold that the contract would be one against public policy and morality if the contrary doctrine were maintained. This policy, then, having expressly stipulated for the kind and time of valuation, any other judicial instruction to the jury upon the matter is not warranted, and hence the ruling and instruction as above are illegal. There only remain the questions of representation and warranty. The written words of the policy in connection with these points are as follows: after stating the particular amounts upon particular parts "*of the Steamer Malakoff, now lying in Tate's Dock, Montreal, and intended to navigate the St. Lawrence and Lakes from Hamilton to Quebec, principally as a freight-boat, and to be laid up for the winter in a place approved of by this Company, who will not be liable for explosions, either by steam or gunpowder.*" This statement must necessarily be subjected to legal construction to determine its nature, whether of representation or warranty. Then, as to its being a representation, the language is plain, simple, and explicit, adverting to navigation during the season, the course of that navigation, the principal manner of conducting it, and because of the date of the policy, providing for laying up the steamer during the intermediate winter period between the open summer periods. It is impossible for such language to require constructive explanation. But if it be a representation, testimony is admissable with reference to it, but to what purpose here, where it is in writing and in plain and clear phraseology? Angell, p. 194, condensing other authorities, remarks, "A representation in the technical sense in which that term bears to the law of insurance, and, as distinguished from warranty has been well defined, a verbal or written statement made by the assured to the underwriter before the subscription to the policy, as to the existence of some fact or state of facts, tending to induce the underwriter more readily to assume the risks, by diminishing the estimate he would otherwise have formed of it." He elsewhere observes, "it is of

(1) 40 Eng. Rep., p. 358. (2) Dusr, 396.

(1) See Bouquousquié.

(2) See. also, Grun and Johot, p. 25: Persil, p. 90. Nos. 71, 72: Emerigon, Meredith's Translation, cap. 9, sec. 1: and Gouget and Merger vo. *Assurance Maritime*, p. 364.

some matter extrinsic to the contract, and generally, if not always, relates to the present state and condition of the subject insured. The term in insurance, it has been considered, as in the nature of a collateral contract either by writing, not inserted in the policy, or by parol, and is a communication of facts and circumstances relative to the insurance made to the underwriters with the view to enable them to estimate the risk and calculate the premiums to be paid." "It is asserted that it is said to be material when it communicates any fact or circumstance which may be reasonably supposed to influence the judgment of the insurer in undertaking the risk or calculating the premium, and whatever may be the form of the expression used by the insured or his agent in making a representation of it, have the effect of imposing upon or misleading the underwriter, it will be material and fatal to the contract. There is a material difference between a representation and a warranty; the former being a part of the preliminary proceedings which propose the contract, and only a matter of collateral information on the subject of the insurance, and makes no part of the policy; the warranty is a part of the written contract, as it has been completed, and must appear on the face of it. The former may be substantially correct, but renders the contract void on the ground of fraud; the latter must be strictly and literally complied with, and non-compliance with it is an express breach. Fraud is an element which vitiates every contract, and a want of truth in a representation is fatal or not to the insurance, as it happens to be material or immaterial to the risk undertaken; but when a thing is warranted to be of a particular character or description, it must be exactly such as it is represented to be, otherwise the policy is void and there is no contract. This may be considered, as a first principle in the law of insurance." These representations have been classed as positive representations and as statements of belief, expectation or opinion; the latter not representations of what is stated to be intended or expected or believed as a matter of fact to be made good by the assured, and will not affect the contract, though the fact proved otherwise, if the statement is made honestly and not fraudulently with intent to deceive the underwriter and draw him into a contract which he might decline. On the other hand, positive representations are affirmative and promissory although the distinction is one more of form than substance, as in fact most positive representations, even when in terms affirmative are, in effect, promissory, and whenever it is a positive statement of the actual or evident existence of some first material of the risk, it is only distinguishable in form from a warranty by not being on the face of it. At the trial the statement in the policy was assumed as a representation, and as such parol evidence was admitted in relation to it. That evidence clearly proved that Tate, the agent, did represent the Malakoff to be in Tate's Dock temporarily for repairs, and that when completed she would navigate between Hamilton and Quebec, principally as a freight boat, affirming the written statement on the policy. In spite of written and parol testimony the jury find that plaintiff made no such declaration or representation; the finding is manifestly contrary clear evidence adduced by parol and is singularly contradictory of the written evidence of the statement afforded by the contract, thereby in opposition to a rule not of law alone, but of common sense, that what is contained in the policy or other instrument, or written upon it, purporting to belong to it, at the time of signing, is part of the contract and is adopted by the signature. Both parol and written evidence concur with the result of the common sense and legal construction of the statement; representations must be construed by the same principles by which all other contracts in writing are expounded, in which the intention of the parties is always to be sought for in the instrument. In this statement the plaintiff's intention to navigate the Malakoff so soon as the repairs should be completed was understood by both parties, whilst it is equally manifest that no intention existed on plaintiff's part that she should be kept in the dock during the entire insurance year; and the jury, moreover, find her at the date of the policy to be in running order. Whether this intention of navigation could be considered as influencing the insurer's estimate of the character and degree of the risk to be insured against is not doubtful, in as much as Mr Wood swears positively that he would not have taken the risk at all had the intention existed to keep her in the dock. The finding of the jury upon this special point and its materiality is either negative or nonsense, to which no legal meaning can attach. Under all these circumstances of the judicial rulings and instructions, above adverted to, and the irregular and incorrect findings of the jury, the motion for a new trial has been sustained, and a new trial would unhesitatingly be ordered, did not the remaining motion, that for entering up judgment for the defendants, *non obstante veredicto*, urge its importance upon the Court, because the final determination and judgment of the Court mainly depends upon the subject matter of this motion. Although the same point is contained in the motion for a new trial, it appeared advisable to consider it in connection with the motion *non obstante*, as being its more legitimate position, free from minor technicalities or argumentation. The grounds taken in this motion are the special warranty and condition written in the policy, that the Malakoff should navigate, &c, and the plaintiff's non-compliance and breach with them, the Malakoff having, in fact never left the Dock from the time of effecting the insurance in question. The judicial ruling and instruction declared the statement to be merely permissive. Bearing in mind the express written statement in the policy, it must be observed that the person who sought and obtained the insurance was himself the proprietor in possession of the Malakoff at the time of the insurance, and must himself have known what was to be done with the boat during the season of navigation; that being in dock for repairs, she was there to fit her for the only purpose for which she was originally built, that of navigating; that having possession of the Malakoff, he was not only open to an offer, but actually bargained for the hiring of her for navigation purposes without reference to the defendants. Moreover, why was the intention to navigate so particularly stated, specifying the line of voyage and business travel that she was to follow; the manner of the business to be done principally as a freight boat; the stipulation that after her navigating done, she should be laid up in some place to be approved by the defendants; finally, that defendants should not be liable for explosions by steam, her usual mode of propulsion, or by gunpowder, which might possibly form part of her freight. Permission to navigate does not seem to form any ingredient of these stipulations; on the contrary, taking the contract in the fair and obvious import of words and equivalent to an express statement of all the inferences naturally and necessarily arising from it, a positive promissory representation, and, in fact, a warranty, becomes plainly manifest, which it is proved had not been complied with, and the contract has, therefore, been rendered inoperative. It must be remembered that the statement is not a mere verbal representation extrinsic and collateral to the contract, a mere verbal explanation previous to the contract; but, on the contrary, that it is written into and forms part of the contract itself, and that as a Court of law will only construe not reform a policy, the construction adverted to above in the discussion of the question of representation gives to the written statement the significant character of a warranty. Now Phillips on Insurance, No. 541, says: "it is law that promissory representations of material facts made and referred to in the policy usually have the effect of express warranties and come under that head." Arnould, p. 490, says: "that the same statement indeed, whilst when made verbally or in writing *distinct from the policy* by the broker to the insurer is construed as a positive representation and would if written in the face of the policy in almost all cases amount to warranty, the insertion in the policy causing it to be so construed;" and Ellis p. 39, says: "it is the practice of most offices to insert the statement or representations made at the time of effecting the insurance on the body of the policy. By this means they become a warranty and prevent questions from arising on the subject of the materiality or immaterality of the statements." In this case the statement being written on the policy, it is for the Court to decide upon its legal bearing as a warranty and condition, and upon the general effect of its nonfulfillment upon the rights and remedies of the party in fault. The provinces of court and jury are plainly distinct, here the Court decides upon the sense and construction of the common words and phrases of the language where no peculiar meaning is proved. Arnould, p. 142, says: "a warranty in a policy of insurance in whatever form created is a condition or contingency, and unless performed there is no contract. It is styled a condition precedent which means that it is perfectly immaterial for what

purpose the warranty is introduced, and that no contract exists unless the warranty be literally complied with." Any direct or even incidental allegation of a fact relating to a risk has been held to constitute a warranty. "It is simply sufficient and ought to be sufficient," observed Lord St. Leonards, "to avoid the policy, that only one thing warranted is not true." In this case the stipulation undertakes for the performance of a future act,—the navigating of the "Malakoff"—and is therefore classed among promissory warranties. The contract depends on the event taking place literally, and Phillips, at p. 762, says: "it is held that the intention of the parties in a warranty, except as to the meaning of the words used, is not to be inquired into. The assured has chosen to rest his claims against the insurers on a condition inserted in the contract, and whether the fact or engagement which is the subject of the warranty be material to the risk or not, still he must bring himself strictly within that condition. The rigid construction put upon warranties, in this particular, has perhaps arisen in part from the maxims of the Common Law, that conditions are to be severally construed in regard to the party imposing them upon himself." And Ellis, p. 29, concludes the matter thus—"A breach of warranty will avoid the contract. The doctrine of warranties has been a more frequent subject of discussion in cases of marine policies; but, so far as is applicable to the subject, that doctrine is of equal authority in cases of life and fire insurance. A warranty is a stipulation or agreement on the part of the insured in the nature of a condition precedent, and as applicable to fire policies, is usually of an affirmative nature, as that the property insured is of the nature described in the policy. A warranty being in the nature of a condition precedent, it is quite immaterial for what purpose or with what view it is made; but, being once inserted in the policy, it becomes a binding contract on the insured; and, unless he can show that it has been strictly fulfilled, he can derive no benefit from the policy. The meaning of a warranty is to preclude all questions whether it has been substantially complied with or not; if it be affirmative it must be literally true; if promissory it must be strictly performed. The breach of warranty, therefore, consists either in the falsehood of an affirmative, or the non-performance of an executory stipulation. In either case the policy is void, and whether the thing warranted be material or not, whether the breach of it proceeded from fraud, negligence, misinformations, mistakes of an agent, or any other cause, the consequence is the same. With respect to the compliance with warranties, there is no latitude nor equity. The only question is whether the thing warranted has taken place or not, or be true or not; if not, the insurer is not answerable for any loss, even though it did not happen in consequence of the breach of the warranty." Considering the statement in the policy to be a warranty, the Court is constrained to go beyond according the motion for a new trial in this cause, and to adjudge finally upon the motion *non obstante*, and order the judgment to be entered upon the record for the defendants, notwithstanding the verdict in favour of the plaintiff, with costs against the plaintiff.

Mackay and *Austin*, for plaintiff.

Rose and *Ritchie*, for defendants.

UNITED STATES LAW REPORTS.

OYER AND TERMINER, PHILADELPHIA.

COMMONWEALTH v. ROBT. THOMPSON.

Murder—Rule for a New Trial.

Although the alienage of a juror is a good cause of challenge, the Court will not set aside the verdict of the jury in a criminal case on that ground, where the trial has been allowed to proceed without any objection having been made to the juror's disqualification, even when there is evidence, from the affidavits of the juror and the prisoner, that the fact of alienage was not disclosed by the one, nor known to the other, before the trial

Separation of the jurors after they have been sworn in a capital cause, will authorize the Court to set aside their verdict, but the separation must be clear and substantive, and it cannot be established by the testimony of any member of the jury.

After-discovered evidence, to be of no avail in an application for a new trial, must be material in its object, and not merely cumulative, corroborative or collateral—it must go to the merits of the case, and not to any technical ground of defence—and it must be such as ought, naturally, to produce a different result upon another investigation of the merits of the cause.

Judge ALLISON read the opinion of the Court, as follows:

The defendant stands convicted, by the verdict of the jury by whom he was tried, of murder in the first degree; or having, with wilfulness, premidation and malice, taken the life of John Capie.

A rule for a new trial having been entered, we are asked to make it absolute, and the reasons upon which the application is based are, mainly, the alienage of one of the jurors by whom the defendant was convicted, a separation of the jury after having been sworn, and before the rendition of their verdict, and after-discovered evidence.

We will consider these several reasons upon which this rule has, in a great measure, been rested, in the order in which they have been presented and urged upon the consideration of the Court. It may not be out of place to remark that, owing to the gravity of the questions upon which we are required to pass, we have given to them long and anxious consideration, desirous only, in deciding the points which have been presented for our determination by the learned and able counsel for the defendant, that the law in its integrity may be maintained, and that no possible injustice be done to the prisoner at the bar.

The first suggestion is, that one of the jurors was an unnaturalized foreigner, and for that reason disqualified to try the question of the guilt or innocence of the defendant, of which fact the defendant by affidavit supports the assertion he was ignorant, when he accepted Aaron Israel as a juror at the trial of the cause.

The qualifications, and the mode of selecting jurors, are specified in the Act of the 28th of April, 1858, wherein it is provided that there shall be furnished to the Board appointed to select and draw jurors to serve in the several Courts of the City of Philadelphia, certified lists of all the taxable inhabitants of the City, from which a sufficient number of sober, healthy and discreet citizens must be selected to constitute the several panels of jurors required for the ensuing year. There is, therefore, nothing in this Act of Assembly which conflicts with the principle that every man is entitled to be tried by his peers; that a citizen may demand, when charged with the commission of an offence against the laws, a jury of his equals, citizens like himself, to say whether the charge be true or false; for it will be seen that from the lists of taxable inhabitants, citizens are to be selected to serve as jurors. But upon the lists furnished to the Board, there is nothing to indicate who are taxable inhabitants being aliens, and who are citizens, and whether native-born or naturalized; that mistakes therefore will be made is extremely probable, and that some who are not citizens may be selected to serve as jurors is to be expected; so also, many may be chosen who possess not the qualifications of being sober, healthy or discreet. But what of all this? Does error or mistake like this vitiate the panel of jurors? This much has not been asserted; the position, however, has been broadly assumed, that if one who is not a citizen be sworn upon a jury and join in a verdict, the verdict is bad and that no judgment can be entered thereon. Alienage is a good cause of challenge; it is so at common law. Blackstone, vol. 3, page 302. But this much conceded, the question yet remains, whether after a juror has been sworn, without objection to his want of citizenship, and after a verdict, such verdict *must* be set aside.

Courts are required to exercise great caution in the allowance of technical or purely legal reasons for setting aside verdicts, after trial fully and fairly had; and where, upon the review of the whole case, the conclusion is that in sustaining the verdict substantial justice is done, and that the verdict is such a one as ought to have been rendered, in view of all the facts proven upon the trial of the cause. So also ought it to be acted upon as a rule, having its exception, it is true, but still a rule, which in its general recognition, should require that challenges for cause should not be inquired into after verdict for a different principle adopted and carried into practical effect, would be to occupy the attention of Courts in setting aside verdicts after the time and expense incurred in a trial, instead of settling the question of a juror's competency when called to the book to be sworn; for it is a principle well recognized as being against the policy of the law, to allow an objection to be taken at a later period of the proceedings, that could have been taken before the trial. If it were otherwise, parties would be encouraged to take their chance of a verdict in

their favor, without having first exercised due diligence in the investigation of the qualification of the panel of jurors; for they could rest upon the assurance that an after assignment of what would have been good ground of challenge before trial, would stand as a valid objection to the verdict, which would be required to be set aside, because no judgment could be entered thereon. Thus would the greatest uncertainty be introduced into the trial by jury, and much that is now considered of inestimable value, in the settlement of controversies between man and man, or between the law and its alleged violator, be swept away, for the trial by jury would thus be well nigh overturned.

In support of the reason now under consideration, we have the deposition of Aaron Israel to the effect that he is not a citizen of the United States, nor of the State of Pennsylvania; that he was born in London, England; that he has never been naturalized, and that when summoned to attend as a juror, he supposed he was bound to do so under a penalty, and that he first mentioned the fact of his alienage after the trial. If the facts which go to the question of disqualification had been inquired into when the juror was called to be sworn, and a challenge for cause had been based thereon, the challenge would unquestionably have been sustained; for it is by the oath of a juror in most instances, before he is sworn in the cause, that the question of qualification is determined. But when we are asked to set aside a verdict upon this ground, the Commonwealth are entitled to take issue with the defendant, upon the fact of alienage of the juror, and they are entitled to show, if it can be shown, that this statement thus sworn to is not true. Now, how can this be done? If the affidavit of the juror is sufficient to throw upon the Commonwealth the burden of disproving its statements, it is equivalent to saying that in many instances the question of granting or refusing a new trial, must be settled by the affidavit alone; for it might be impossible for the Commonwealth to learn any fact relating to the birth-place of an affiant, and without such knowledge to prove a negative, could not in the nature of things be done. And although in *Guyhawskin* v. *the People*, 1 Scammon, 476, it was held that the affidavit of a prisoner upon a motion for a new trial is *prima facie* evidence of the truth of the statements it contains, yet we cannot say that we are *prepared to recognize the principle which would require us to take* as proved, every fact sworn to by a defendant, or by a juror, after verdict, in support of a rule for a new trial, and to consider ourselves bound by such sworn statements, unless disproved by countervailing testimony. This would be a dangerous power to place in the hands of a juror, or of a defendant, having the strongest possible motive to actuate him in making the necessary affidavit.

This rule is further supported by the oath of the defendant, to the effect that he was ignorant of the alienage of the juror at the trial of the cause; and this it is argued, entitles the defendant to have the present rule made absolute. But from this conclusion we feel bound to dissent; for the doctrine, which to us seems most consonant with reason, and which is not without authority to support it, is, that facts of which a knowledge is only obtained after trial, shall not be allowed to overthrow a verdict, where the objection ought to have been taken at the trial; and where it is of such a nature as ordinarily to require the party to be ready at that time to prove it. As we have already stated, this fact could have been proved when the juror was called to the book—that alienage is a good ground for challenge is admitted by every one; and that the defendant could by proper inquiry, made of the juror himself or of any one who knew the fact, have been prepared with *his objection before the juror was sworn, is plainly evident, and* therefore, upon principle, we must hold, that this is not a sufficient reason for setting aside the verdict in this case.

In *Collingsworth* v. *Duane*, J. W. Wallace's Reports, 147, this question is very fully considered, and numerous cases bearing upon it examined, the ruling of the case is that alienage is a cause of challenge, but is not, *per se*, sufficient to set aside a verdict, and this, whether the party complaining new the fact or not. It is not asserted anywhere that we know of, nor do we desire to be understood as holding that in every case, what would be sufficient cause for challenge, must be taken advantage of in that way; for there may be many causes of challenge, which cannot be known to the party entitled to make them; causes which are secret in their nature, and against which no one can be supposed to be upon his guard; but as to the usual disqualification of the jurors, such as the formation or expression of an opinion, citizenship, relation to, or connection with any party interested, and every objection to a juror's qualification, of a general nature, and such as usually suggest themselves, and are capable of being ascertained by ordinary inquiry, are disallowed as valid grounds for setting aside a verdict, for the reason, that they were unknown at the trial; what a defendant can do by ordinary care to protect himself when charged with the commission of a crime, the law holds him to the obligation of doing, or of seeing that it is done, and if he fail in this, he shall not have the chance of a trial resulting in his favor, and in case of failure, be allowed the benefit of objections that ought to have been made before verdict.

Several cases were cited upon the argument, in which a contrary doctrine seems to have been recognized In *Shoemaker* v *The State*, 5th Wisconsin, 324, and in *Guyhawskin* v. *The People*, 1 Scammon, 476, it was held that an unnaturalized alien is not a competent juror, and the objection was allowed after verdict; but the contrary we believe it to be the correct doctrine upon the question under consideration, and to which we feel ourselves bound to adhere.

The right of every citizen to be tried by his peers, we have already referred to as beyond question, but that it is anything more than a right, which may be insisted on or waived by the defendant, we feel compelled to deny; for the Act which says that citizens shall be selected to serve as jurors, requires that they shall be possessed of certain requisites. It is not every citizen, therefore, who is qualified to perform jury duty; and the same rule which is sought to be established in this case would require us to set aside a verdict if it could be shown that any one who sat upon the jury was neither discreet, nor healthy, nor of sober habit. Either, or all of these reasons, would be a good and valid ground of challenge, because each is made by the Act a requisite qualification in a juror, but would it not go far towards bringing the law into contempt, if on its being shown after trial, that one of the jurors was given to habits of intemperance, or that he was not in all respects healthy, or that he was not esteemed to be a discreet person, we should for these reasons declare the verdict vitiated, without *requiring proof that it was in some way* tainted, or its credit impaired, for the causes assigned; this would be giving importance to the shadow greater than to the thing itself; and this too, in view of the fact, that the law places in the hands of the defendant, before trial, the names, residences and and occupations of the jurors, so that he may be advised when he comes to trial, whether they be sober, healthy and discreet citizens, or otherwise.

If we accept the doctrine contended for, that one incompetent juror vitiated a verdict, consistency would require us to hold to the converse of this rule—that if there was a verdict of acquittal, such verdict should go for nothing, because the trial would be by eleven only, and not by the required number of jurors, and a defendant thus situated could again be placed upon trial for his life.

The reason next in order, is the separation of the jury. As a general rule, a verdict will not be set aside on account of the misconduct or irregularity of a jury, unless it be such as might affect their impartiality, or disqualify them for the proper exercise of their functions. Wharton, in his Criminal Law, 895, says, "While on the one hand the present practice in England, and in a portion of the American Courts, is to sustain the verdict when the separation has been inadvertent, and no abuse has resulted from it; on *the other hand, it has been considered in several instances, that* the mere separation is in itself *prima facie* reason for a new trial."

In *Peiffer* v. *Commonwealth*, 3 Harris, 468, which was a trial for murder, the jury after being impanneled and sworn, were by agreement between the prisoner's counsel and the counsel for the Commonwealth, the Court also assenting, allowed to separate and go to their respective homes; the judgment of conviction was reversed on this account. This case settles the law in Pennsylvania, that where there is a clear case of separation of a jury, after being sworn, in a capital case, the verdict is vitiated, and no judgment can be entered thereon. Does the evidence taken in support of this reason, show such a separation as will require us to set the verdict in this case aside? The depositions prove, that upon one occasion, after the jury was impanneled, the janitor of the Law

Buildings, where they were confined during the recess of the Court, saw one of the jurors in this case, on the vestibule of the ground floor of the building; none of his colleagues were near him, nor were any of the officers having the jury in charge; the juror was at the time, engaged in conversation with a lady; the only thing said in the hearing of the witness was, the question, "How do you do?" The juror was seen to remain in that situation for several minutes. The deposition of Richard Gorman, one of the jurors, has also been submitted, to show that eleven of the jurors left deponent in the third story of the building, with the two officers having the jury in charge; and that they ascended to the fourth story, but whether any other person was there he does not know. This deposition, if taken into consideration, does not show any actual separation, for the officers having the jury in charge gave them the range of the upper stories of the building, keeping guard so as to prevent any person going where the jury were. But the testimony of Gorman cannot be received, to impeach the verdict in which he joined, or to show misconduct on the part of his fellow jurors. The question must, therefore, be disposed of upon the deposition of Gilllingham alone.

Admitting that a separation of the jury would be a good ground for making absolute this rule, we must inquire whether there was a clear and actual violation of the rule of law settled in Peiffer's case. The District Attorney, to explain this alleged separation, called the juror Hergesheimer, and his wife, and their testimony was, that the wife had gone up to where she knew the husband was confined, to ascertain how he was, and to furnish him with a change of clothing; the testimony of the officers failed to shed any light upon the point thus raised for our determination.

In Virginia the decisions do not seem to have been uniform in regard to casual or constructive separation of jurors. The case of the *Commonwealth* v. *McCall*, 1 Va. cases, 271, seems to stand arrayed against *Sprouse* v. *The Commonwealth*, 2 Va. 375; *McCarter* v. *Commonwealth*, 11 Leigh. 633, and *Kennedy* v. *Commonwealth*, 2 Va. 510.

In New York the rule seems to be, that to vitiate a verdict, reasonable suspicion of abuse must exist; and that before a verdict will be set aside for this cause, the Court must be satisfied that the party complaining has sustained some injury from it.

In New Hampshire, Connecticut, North Carolina, and in Indiana, the same rule has been adopted.

In Mississippi, it seems that a verdict will be set aside after separation, unless it affirmatively appear there was nothing communicated to the jury on the subject of the trial; *McCann* v. *State*, 6 Sm. & Mus. 465.

The testimony of both Hergesheimer and his wife was, that no conversation passed between them upon the subject of the trial, and consequently no injury could have resulted to the defendant from this violation of his duty as a juror. It has been held that the testimony of the parties in fault shall not be received to explain what actually took place whilst one or more of the jurors may have been separated from their fellows; this is a strict rule, recognized nowhere that we have knowledge of, but in one case in Virginia; a rule that we do not feel disposed to follow, because the only light that can in most cases be shed upon a case of this kind, must be obtained from the only parties who have knowledge on the subject. Looking then to the testimony of the juror implicated, the inference to be drawn from the deposition of Gillingham, and that of Hergesheimer is, that whilst it is true, that the officers having the jury in charge were guilty of a gross neglect of duty in exposing the cause then upon trial to this risk, yet inasmuch as we are satisfied that no injury has been sustained by the defendant, and no actual separation of the jury, as in Peiffer's case, occurred, we do not see our way clear to recognize in this a sufficient reason for setting the verdict aside. If we hold that in every case a momentary absence of one juror from his fellows, however harmless in its results, however well intentioned, however pressing the necessity, will of itself work the destruction of a verdict, although satisfied that it is not in any degree affected by what may have occurred during the momentary absence from the custody of the officer, it will be most difficult to sustain any verdict in a capital case, where there may be a design to vitiate it in this way; for with our insufficient accommodations—the juries compelled to occupy a building used for many other purposes—the distance they are compelled to pass in going thereto and in returning to the Court room, and this space often traversed in the night time, there would be but few verdicts that might be so vitiated as to render them of no value, after the expenditure of much time and trouble, and expense, in obtaining them. These considerations require us to lend, not too ready an ear to suggestions, which, whilst in individual cases they might have the effect of saving life, would in the end, and in their general effect, destroy the value of the jury trial, by allowing the guilty, even those who with deliberation and malice, imbue their hands in the blood of their fellow-men, to go free from the punishment which their crimes merit, and which is required for the defence and safety of society.

The remaining ground upon which this application rests, is that of after-discovered evidence.

Evidence of this character to avail in an application for a new trial, must be such as could not be secured at the former trial, by reasonable diligence on the part of the defendant. It must be material in its object, and not merely cumulative nor corroborative or collateral; it must go to the merits, and not rest on merely technical defence: and it must be such as ought to produce, on another trial, an opposite result on the merits.

This new testimony fulfils the first requirement of the law; it is after-discovered, and could not have been ascertained before the trial; for the witnesses themselves say, they did not make the facts of which they speak known until after the verdict was rendered.

The testimony of Chas. Gillingham is, that on the night on which Capie was shot, after twelve o'clock, he was in Shippen street, and that he saw Robert Thomson and Byerly, (a witness examined on the trial for the defendant,) in Shippen street, more than half way to Eleventh street, on his way from twelfth street, going east; that he heard two shots fired, and they were the first two; and that the defendant could not have been at Twelfth street by that time. This evidence is wholly cumulative; it corroborates Byerly and other witnesses examined for the defence; it states no fact not testified to on the trial, and therefore, under the law, it cannot avail to make the rule absolute.

James C. Devir's testimony is, that upon the night upon which John Capie came to his death, he was standing upon the north-east corner of Twelfth and Shippen streets, and that he saw a man with a light coat on standing on the west crossing of Twelfth street, and fire the first two shots that were fired that evening, and that that man was not the defendant: about the same time or immediately afterwards, there were one or two shots fired from the north side of Shippen street. Thomas Thomson corroborated this statement to the extent of hearing the two shots fired, and directly afterwards seeing a man with a white coat on, running away, and several officers in pursuit of him.

Is this testimony such as ought to produce on another trial, a different result on the merits? We regret to be compelled to say that we do not think it ought, and the conviction remains, after an anxious and most attentive examination of the facts presented upon the trial, in connection with the statements sworn to by the witnesses in support of the pending rule, that upon the testimony now before us, the verdict ought to stand; and that the after-discovered evidence does not, in our judgment, in any way shake or cause us to doubt the correctness of the verdict, which upon the conclusive testimony of the Commonwealth, was rendered against the defendant. The answer to the case of the Commonwealth was an attempt to prove an alibi, covering not more than a minute or two of time; this failed, either because the witnesses called to support it were not credited by the jury, or because they were believed to be mistaken in the facts sworn to by them. And now the testimony of Devir is proposed to be added to testimony offered on the trial, on behalf of the defendant, and we are required to say whether with the evidence thus offered the verdict ought to be changed; with the most sincere desire to give to the defendant the full benefit of every intendment or presumption of law or fact in his favor, we are reluctantly forced to the conclusion that when this evidence is placed by the side of that of the witnesses for the Commonwealth, who were within a few feet of the man who fired the pistol and the man who was shot, this testimony ought not to secure for the defendant a verdict of acquittal.

We conclude what we have to say upon this subject, by quoting from the remarks of Judge Rodgers, in the *Commonwealth* v. *Flan-*

nigan, 7 W. & S. 423. He says: Granting new trials, does not depend upon the whim or caprice of the Judge, but upon well established and fundamental principles of law. In the trial of issues of fact, the Court judges of the competency, the jury of the effect, of the testimony. But after the verdict, when a motion for a new trial is considered, the Court must judge not only of the competency but of the effect of evidence. If with the newly discovered evidence before them, the jury ought not to come to the same conclusion, a new trial may be granted; otherwise they are bound to refuse the application. The question therefore is, (supposing all the testimony new and old before another jury,) not whether they might, but whether they ought, to give a different verdict." Our judgment on this point we have already stated.

We are therefore compelled to discharge the pending rule, with the general remark, that in the objections taken to the empannelling of the jury, and what was then done, as set forth in the first four reasons, nor in the sixth, seventh or eighth reasons, relating to the admissions of evidence, and the removal of defendant from the Court room—the latter being unsupported by evidence—nor in the ninth, tenth, eleventh, twelfth and thirteenth specifications, when the answer of the Court to the defendant's points are fully and correctly stated, nor in the sixteenth point, that the verdict was received after the expiration of the term for which the jury had been summoned, do we find any sufficient reason for setting aside the verdict and granting a new trial.

In discharging this rule, founded upon the various and important questions which have been argued in support of it, and anxious as we have been to arrive at a correct conclusion, we yet feel it to be a relief to know that if we have committed any error, it is open to examination and review, before the Supreme Court, and it may not be out of place to say, that for our future guidance, and for the purpose of settling the law upon these points, an opportunity ought to be afforded for their re-examination by the highest tribunal in the State.

GENERAL CORRESPONDENCE.

NEW CHANCERY ORDERS.

Chancery practice—Payment of Money—Motion for decree—Filing Reports.

TO THE EDITORS OF THE LAW JOURNAL.

Hamilton, July 17, 1861.

GENTLEMEN,—The Chancery Orders of the 29th June last, direct that mortgage money shall be paid into a bank, instead of to the party entitled to it, according to the present practice. Their Honors the Vice-Chancellors have no doubt seen good reason for the alteration, but to those unacquainted with such reason, the alteration appears to be uncalled for, and will probably work some inconvenience, if not expense and delay. Suppose, for example, the banks refuse to receive such payments (and there is nothing to compel them to do so), what then? The money cannot be paid at all, for in the face of the order no one will be authorized to receive it. If the diminution of costs is the object, that object will probably be defeated; because it is not to be supposed that the banks, if they consent to receive the money, will do so without charging a commission, which in many instances will exceed the costs of the present proceedings. If the money is not paid, will they be at the trouble of certifying the non-payment? I am inclined to think not; for why should they mix themselves up in proceedings in which they have no interest? In case they decline to grant such a certificate, what is then to be the course of proceeding? It seems to me that in all cases in which the banks refuse to receive money or to grant a certificate of non-payment, an application to the Court for further directions will be absolutely necessary, by which an increase of costs and further delay would be incurred.

The first paragraph of the order on this subject directs that the money shall be paid to the joint credit of the party to whom the same is made payable, and of the Registrar. The second paragraph gives the party paying the money the option of paying it either to the credit of the party to whom the same is made payable, or to the joint credit of such party and the Registrar. The first part of the order on this point is imperative; the second part is totally at variance with it. Which direction is to be followed? If the payment is made to the sole credit of the party entitled, then the Master's directions will not be complied with. If paid to the joint account, how is payment of it to be obtained by the party entitled? Will not an application to the Court be necessary?

Motion for Decree.—Will not *three weeks' notice* still be required?

Filing Reports.—Where are they to be filed?—at Toronto or with the Deputy Registrar, with whom the other proceedings in the suit have been filed?

Your opinion, and any explanation you may be able to give on this subject, will oblige

Your obedient servant,

A SOLICITOR.

[We think that the order as to the payment of mortgage money, will be found to be of great practical advantage to the profession. It will assuredly lessen expense, and relieve plaintiffs residing out of the jurisdiction, of the trouble and annoyance of granting powers of attorney, which are often imperfectly executed, and which tend rather to embarrass and delay the suit than otherwise. We anticipate no such difficulty as that the banks will refuse to receive the money, or to give the certificate of non-payment—1st. Because nearly every solicitor keeps a banking account, and has, we presume, sufficient influence with his bank to make the arrangement authorized by the order. 2nd. But should his bank refuse, other banks, either in his town or at their head office, will accept the duty. And, 3rd. It would be an exception to find a bank that would refuse even a temporary deposit. As to banking commission, the practice is to receive deposits without commission, except when the deposit is to be paid out at another office. If any bank should refuse a certificate, a subpœna and an examination before a master or examiner would give the necessary evidence, and obviate the necessity of any application to a judge in chambers to appoint a new day for payment (not to Court for further directions).

Although the Master's report may direct the money to be paid to the joint credit of the plaintiff and Registrar, yet the order goes on to say that notwithstanding such direction, "it shall be competent to the party paying in the same to pay the same to the credit of the party to whom the same is made payable, or to the joint credit of such party and the Registrar;" thus allowing an option which, if exercised in favor of the party only, allows such party to withdraw the funds without an order of court; but if exercised in favor of the party

and Registrar, requires an application in Chambers to obtain the money.

The new orders do not vary the old practice requiring three weeks' notice of motion to be given, or three weeks to elapse from the date of the order *pro confesso*, before a decree can be obtained; but simply require that all such causes shall be entered with the Registrar ten days before the day of hearing. Cases under order xvii. of the 3rd June, 1853, are excepted.

All Master's reports must be filed at Toronto, the same as heretofore: we presume for the same reason that affidavits are to be filed with the Registrar there in cases where the Court or a judge in Chambers is applied to for decrees or orders founded upon the evidence contained in them.

We think these new orders will be found productive of much good, and only regret that the reforming hands of the Vice-Chancellors were not more bold and active in regenerating the fossilized practice of Chancery.—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

Q. B. REG. v. WHITE. *June* 12.

Coroner—Power to take a second inquisition.

A coroner cannot take a second inquisition upon the same body, the first inquisition being valid, and subsisting.

C. P. PHILEY v. HAYLE. *June* 13.

Attorney's signed bill—Agreement for lump sum for attorney's labour as an Attorney.

An agreement by a client with his attorney, that the latter is to receive a lump sum for labour done as an attorney in the event of success, and costs out of pocket only on failure, is void; and a bill delivered claiming the lump sum in one item, under such an agreement, is not a sufficient bill to deliver a month before action.

Ex. WATSON v. BEAVEN. *June* 8.

Award—Reference under Common Law Procedure Act—Enlargement of time after expiration of time limited by Act.

The Court has power, by virtue of the Common Law Procedure Act, to enlarge the time for making an award where a cause has been referred by a judge's order under the 4th section of that Act, notwithstanding more than three months has elapsed, since the arbitrator was appointed; and has made a void award after the expiration of such three months.

Ex. CHINERY v. VIALL. *Feb.* 25.

Damage—Sale—Re-sale by Vendor—Trover.

Where sheep were sold, but not delivered, and before the price had been paid, the credit not having expired, were re-sold by the vendor to a third person.

Held, that trover would lie, but that the measure of damage ought not to be the price of the sheep, but the damage actually suffered.

Ex. CROSS v. DURELL. *March* 7.

Costs—Taxation—Allowances for witnesses—Expenses not paid—False affidavit of increase—Review of Taxation.

An attorney told his client before action that costs of witnesses must be paid previous to taxation, and gave him a list containing the names of his witnesses and the amount of their expenses. The client afterwards gave him receipts of the different witnesses for such sums. The attorney in the affidavit of increase swore that he had caused the witnesses to be paid. The master allowed the expenses upon taxation. It was afterwards discovered that the witnesses had not been paid until after taxation. The court directed the master to review the taxation, and to disallow all such expenses as had not been actually paid at the time of the previous taxation.

Ex. JONES v. DAVIS. *April* 23.

Merger—Estate by courtsey.

A lease for years in the husband does not merge in his estate by courtsey initiate on the birth of a child.

Ex. C. RUSSELL v. THORNTON. *June* 19.

Shipping—Insurance—Time policy—Withholding material information—Waiver—New contract.

A time policy was affected between A. & B. to ensure from January 21, 1857, to January 20, 1858. The defendant B. subscribed it on January 19, 1857. Plaintiff A. had effected the insurance through C & Co., his brokers. On January 15 A. had received notice that the ship had been on shore on January 2, 1857, and was forced to go into port for repairs. A communicated this fact to C. & Co., his brokers, who did not communicate it to B; B. afterwards heard of it, and wrote to A as follows:—"Understanding that the ship has been on shore, I do not consider that my risk commences until the vessel has been surveyed and repaired." The ship was repaired by April 2, and was afterwards lost

Held, affirming the judgment of the Court of Queen's Bench—1st That the non-communication of the fact of the ship having been on shore being material to the risk, and thus avoiding the policy, the letter of defendant B. did not act as a waiver of this non-communication, B. being ignorant of such non-communication at the time. 2nd That even supposing the terms of the above letter to be sufficiently explicit for such a purpose, there was no new contract between the parties for want of acceptance of its terms by the plaintiff A.

CHANCERY.

M.R. LEWIS v. PENNINGTON. *May* 7.

Discovery—Solicitor and Client—Privileged Communication—Exceptions to answer—Pleading.

Where a client has made a confidential communication to his solicitor, the latter is not protected from giving discovery if, before or after the confidential communication, he has acquired the same knowledge from another source. The fact of the confidential communication from the client does not merge the other sources of information.

Everything which is pleaded must be taken most strongly against the person pleading.

V.C S. GRIFFITHS v. COWPER. *June* 12.

Practice—Substituted service—Decree directing payment of money—Defendant abroad on Her Majesty's service

The court will order substituted service of a decree, which directs payment of money by a defendant, who is stationed abroad on Her Majesty's service, without evidence of any attempt to serve him personally

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V.C.S. BORTON v. DUNBAR. *May* 31.

Will—Construction—"Remainder of my money and effects"—"Suitable present for my Godson."—Reversionary Interest.

A testator, while returning to England on sick leave, made his will, by which, after bequeathing two legacies of £10 each, and directing that his portmanteaus, &c., should be sent to his father, proceeded thus: "I beg that the remainder of my money and effects be expended in purchasing a suitable present for my God-

son, H. F. D." At the testator's death, which took place the day after the date of his will, he was entitled to reversionary interests in two considerable sums of stock.

Held, that the stock to which he was so entitled did not pass under his will to his godson.

V.C.S. CHAPMAN v. LAMPORT. *May* 25.

Married Women—Fund settled by Court.

The Court will not disturb a fund which has, by its order, been settled on a married woman to her separate use without power of anticipation.

M. R. JONES v. ASHTON. *June* 8.

Will—Legacies and Annuities—Charge on Real Estate—Exoneration of Personal Estate—Charity—Gift of Money secured on Tolls—Statute of Mortmain.

Although the rule is that a testator, who must be taken to know that his personal estate is the primary fund for payment of his legacies and annuities, must use clear and distinct words to exonerate it from such payment, it is not necessary that he should say in precise words, that he exonerates it, if an intention to exonerate can be gathered from the will.

A gift to a charity, of money secured on the tolls, payable under an act for improving the haven of Hedon, is void under the Statute of Mortmain.

M. R. JEFFREYS v. CONNOR. *June* 5.

Will—Construction—"Die without having a child"—"Die without a child"—Effect given to each expression—Gift over.

A testator by his will gave certain property to his son and daughter, and directed that if his son should *die without having any child or children*, the whole of the property left to him should go to his (the testator's) daughter and niece equally. And he provided that if his son and daughter should *die without any child or children*, then the whole property should go to his (the testator's) niece.

Held, on the principle of giving to each clause its own effect, that the words in the first clause, "die without having any child or children," meant "die without having had any child or children;" so that the testator's son having had several children who were dead, the gift over to the niece did not take effect; and that the words in the second clause "die without any child or children," meant "die without leaving any child or children living at their deaths," so that the gift over to the niece would take effect if the testator's son should die without leaving a child living at his death.

V. C. K. *May* 6, 7, 22, 23, 24, *June* 12.

PARKINSON v. HANBURY.

Mortgage—Redemption—Power of Sale—Notice—Trustee.

P. Mortgages certain leaseholds to C. with power of sale, and in such power is contained the condition of three months' notice in writing, with indemnity to a purchaser upon the vendor's receipt, and with respect to seeing that the notice is given, and the expediency of the sale. P. afterwards conveys the same, to H. & Co. upon trust to sell, and to secure a sum advanced, and gives a written authority to H., & Co., to receive the rents and to make payments. P. dies, and having no representative, C. sells under his power, to H. & Co., but the three months' notice is not given. Administration is then taken out to P's. estate, and H., & Co. render an account to the administratrix, who, fourteen years after, files two bills, one against C. for redemption, and gets a decree for redemption, but not prosecuting it is foreclosed; the other against H. & Co., to set aside the sale as at an undervalue and invalid, by reason of the relative position of the parties, and being without the prescribed notice.

Held, that the ground of undervalue was not made out; that it was a grave question, whether a sale by persons in such a position, and under such circumstances, was valid; but that the three months' notice not having been given, inasmuch as both parties knew that it could not be given, the indemnity clause did not protect the purchasers who were mortgagees and not owners, and that the plaintiff was entitled to redemption.

L. C. PERRY v. HALL. *May* 25, 26.

Power of Attorney—Power to Mortgage—Payment to Agent—Solicitor for opposite Parties—Constructive Notice.

A. gave to B. a power of attorney to receive A.'s rents and official salary, &c., and to act generally in his affairs as fully as he himself could.

Held, that this power, taken together with certain correspondence, authorised a mortgage of policies.

B., an agent under a general power of attorney, had in his possession certain moneys of C., and also two policies belonging to A. his principal. B., *representing that he acted by the direction of* A., borrowed a portion of those moneys, and assigned one of the policies as security, but never paid any portion of the money to A.

Held, that as between A. and C., there was a good payment to A.

V. C. K. TELFORD v. RUSKIN. *June* 12.

Practice—Exceptions—Schedule to answer—Commission Agents—Privilege.

A defendant is required to set forth an account of assets, liabilities, at and up to a particular period, in an ordinary trade, and he sets it out in a book, and claims a right to refer to that, and that he is not bound to append it to his answer by way of schedule, claiming likewise privilege, in that setting forth the names of customers was disclosing private matters which were privileged. An exception to this answer, on the ground that the account was not appended to the answer by way of schedule, allowed.

V. C. K. DACRE v. PATRICKSON. *June* 15.

Will—Construction—Executors taking beneficially.

A testator who is illegitimate, and dies without issue, gives all his personalty to three persons, their executors and administrators, upon trust to lay out £1000 in building and endowing a church, with certain devisees of his real estate, and appoints them executors. Two of the executors disclaim, and the third files a bill, raising the question whether the charitable gift was void, and if so, whether the plaintiff took the personalty for his own benefit.

Held, that he did not, but that the crown was entitled to it.

L. C. RANKIN v. LAY. *May* 26, 28.

Specific Performance—Agreement for a Lease—Breaches of Covenant.

Where there had been an agreement for a lease of a farm, and in a suit for its specific performance, there was a conflict of evidence whether certain husbandry covenants had been broken by the plaintiff (the proposed lessee) specific performance was granted, the lease being ante-dated so as to enable the lessor to have his remedy at law.

This court will not decide a question of fact as to the breach or forfeiture where there is any such conflict of evidence as to leave the matter in reasonable doubt.

V. C. W. LEWIS v. ALLAN. *June* 22.

Practice—Parties—Administration.

In a suit against the surviving trustee and the representatives of the deceased trustee by a residuary legatee for administration of the estate. *Held*, that the assignees of the surviving trustee who had misapplied the funds and become bankrupt since bill filed, were necessary parties.

TO CORRESPONDENTS.

"A SOLICITOR"—Under "General Correspondence."