The Local Courts'

AND

MUNICIPAL GAZETTE.

OCTOBER, 1869.

DEATH OF THE CHANCELLOR.

It is with feelings of deep regret that we record the death of Philip Michael Matthew Scott Van Koughnet, Chancellor of Ontario, at the early age of 47. He died rather suddenly on Sunday, the 7th November. We shall hereafter give further particulars of his career.

DIVISION COURT RULES.

The rules prepared by the Board of County Judges, with which our readers are more or less familiar, have proved a great assistance in working the different acts now regulating the Division Court law of Ontario. It is quite possible that in some minor matters it may hereafter be found advisable to make some slight additions to or alterations in them, complete and full though they are, being one hundred and sixty-six in number.

The only addition which has so far been found necessary, is made by a supplementary rule, promulgated by the Board on 23rd September last, respecting the Fee Fund Accounts and the cancellation of stamps by clerks, a copy of which will be found below.

The Rule is declaratory, and only provides a more effective means of carrying out all over Ontario that which has all along been the practice in several counties. It is understood that the subject was specially suggested for consideration to the Board by the Attorney-General, whose sharp eyes (we must do the Hon. John Sandfield Macdonald the justice to say) are quick to discover where any leakage in respect to the public revenue is going on, or is likely to occur.

We should say that if there be any fraudulent practice now in respect to the use and cancellation of necessary stamps in proceedings in the Division Courts, the judge cannot be held free of blame, for his hands are, by the Rule, adequately strengthened for an effective audit, and, with proper care and attention on his part fraud or mistake is all but impossible.

We understand that Mr. O'Brien has prepared for publication, in such a shape that it can readily be bound up with his Division Court book and his recently published edition of the Amending Act, a reprint of the late rules, with marginal references, together with an index covering all the matter contained in the Amending Act and the new rules.

Owing to the necessity of speed in the publication, several errors have crept into the rules as published by the Queen's Printers; nor were any marginal notes given to them such as are to be found to the old rules. These deficiencies it is intended to supply. The whole of the Division Court law and practice, up to the present time, will thus be again brought within the covers of one book, and be of easy reference to all.

The rule we have referred to is as follows:

"*Supplementary Rule respecting the Fee Fund Accounts and the cancellation of Stamps by Clerks of Division Courts.*

"We, the undersigned, 'the Board of County Judges,' acting under and in pursuance of the powers vested in us by law, as recited and set forth in the General Rules for regulating the practice of the Division Courts in Ontario, dated the first day of July, 1869, have framed the following supplementary general Rule and Order, to be in force until otherwise ordered, and we do hereby certify the same to the Honorable the Chief Justice of Upper Canada accordingly:—

"Rule 167.—The system of paying Court fees by the use of stamps having superseded the necessity for Clerks of Division Courts keeping an account of such fees in a book as prescribed by the 36th Section of the Act, but not the necessity of submitting the proceedings on which Court fees are due to the Judge, or of his examining the proceedings of the Court, and comparing them with the stamps used and cancelled; in order, therefore, to facilitate the examination by the Judge to ascertain that proper stamps have been affixed for all fees payable to the fee fund in respect to proceedings in the said Courts, and in order to detect errors and omissions, and to prevent frauds, it is hereby ordered:—

"(*a*) That the 'Judge's list' at every sittings of the Court shall include therein all the causes (in the order in which the suits are entered) that have been commenced by ordinary or special summons, or otherwise, since the last sittings of the Court, and also all adjourned cases remaining undisposed of, and shall distinguish in such list the causes in which a defendant, or one or more defendants, have not been served; those withdrawn, paid, settled, confessed; those in which judgments have been entered by the clerk, and those which remain to be disposed of by the Judge.

"(b) The Clerk shall at every sittings of the Court produce to the Judge, all the process and papers in every cause necessary to be entered on 'the Judge's list," so as to enable the Judge, upon inspection, to ascertain that the Court fees have been all duly paid by proper stamps, and that such stamps have been legally cancelled; and otherwise to enable the Judge to carry out and effectuate the spirit and intention of the said 36th Section of the Act, and of the Act respecting stamps on law proceedings (27 & 28 Vic. cap. 5) in connection therewith.

"(c) As soon as the trial or hearing in each case is concluded, the Clerk shall affix to the back of the summons the proper stamps for hearing and order, and shall then, or at the close of the Court, submit such stamps, duly cancelled, to the Judge for his inspection.

"(d) Any Clerk wilfully neglecting any of the provisions of the Act respecting the collection of the Court fees by stamps, or his duty under this rule, shall be subjected to the loss of his office.

"(e) In construing this Rule, the second general rule shall apply as if incorporated herewith.

"Dated 23rd September, 1869."

ELECTIVE JUDICIARY.

The State of New York was, we believe, the first to open the judicial office to the choice of the people by annual election. It is now proposed by a new constitution, which is shortly to be submitted to the direct vote of the people, to provide for the establishment of a Court of Appeal, to consist of seven judges holding their office for fourteen years. This would be a great improvement, but it is further proposed, after 1873, to vest the appointments of these judges in the Governor of the State, to be held during good behaviour. The better class of the profession and order-loving citizens are anxiously looking forward to a return to the old English system, by which alone, as is remarked in a leading American law periodical, "the bench can permanently retain its independence or its respectability." The evils resulting from the present system and the corruptions of the judiciary of New York were some time ago exposed in the most scorching way by the *American Law Review*, in language which seemed to despair of any improvement. When, however, a nation, boastful and bigoted though it be, begins to acknowledge that it has made mistakes, there is still, it may be hoped, a chance of improvement.

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

INJUNCTION.—1. The breaking up of the streets of a town for the purpose of laying gas-pipes without lawful authority, will be enjoined in equity. (*Sheffield Gas Consumers' Co*, 3 DeG. M. & G. 304, not followed.)—*Attorney-General* v. *Cambridge Consumers' Gas Co.*, Law Rep. 6 Eq. 282.

2. The breaking up of the streets of a town without lawful authority, for the purpose of laying pipes by an unincorporated gas company, is not such a nuisance as will be enjoined in equity on an information at the relation of a rival gas company (reversing the decree of MALINS, V.C.)—*Attorney-General* v. *Cambridge Consumers' Gas Co.*, Law Rep. 4 Ch. 71.

3. Where a plaintiff has proved his right to an injunction against a nuisance, it is not for the court to inquire how the defendant can best remove it. The plaintiff is entitled to an injunction at once unless the removal of the nuisance is physically impossible. But when the difficulty of removing the injury is great, the court will suspend the operation of the injunction for a time, with liberty to the defendant to apply for an extension of time.—*Attorney-General* v. *Colney Hatch Lunatic Asylum*, Law Rep. 4 Ch. 146.

MURDER — EVIDENCE — CREDIBILITY OF WITNESSES, &c.—On a trial for murder, the Crown having made out a *prima facie* case by circumstantial evidence, the prisoner's daughter, a girl of 14, was called on his behalf, and swore that she herself had killed the deceased without the prisoner's knowledge, and under circumstances detailed, which would probably reduce her guilt to manslaughter.

Held, that the learned judge was not bound to tell the jury that they must believe this witness in the absence of testimony to show her unworthy of credit, but that he was right in leaving the credibility of her story to them; and if from her manner he derived the impression that she was under some undue influence, it was not improper to call their attention to it in his charge.

As to certain threats alleged to have been uttered by the prisoner—*Held*, that they were clearly admissible, and if undue prominence was given to them in the charge, the attention of the learned judge should have been called to it by the prisoner's counsel.

Remarks as to alleged misdirection, in not directing that the jury must be satisfied not only that the circumstances were consistent with the prisoner's guilt, but that some one circumstance was inconsistent with his innocence.

The prisoner's witness having stated that death was caused by two blows from a stick of certain dimensions—*Held*, that a medical witness previously examined for the Crown was properly allowed to be recalled to state that, in his opinion, the injuries found on the body could not have been so occasioned.

Remarks as to evidence of confessions, and an objection that the whole statement was not given.

And as to the effect in criminal cases of a belief by the jury that false evidence has been fabricated for the prisoner, or false answers to questions.—*Regina* v. *Jones*, 28 U. C. Q. B. 416.

Insolvent Act of 1864—Sec. 8, sub-sec. 4—Fraudulent Transfer.—Knox being indebted to one Kyle, and Kyle to the defendant, it was arranged that defendant should take Knox as his debtor, defendant crediting Kyle with the amount which Knox owed to Kyle, and Kyle discharging Knox; and Knox accordingly gave defendant his note for the amount. This took place within thirty days before Kyle made an assignment in insolvency, and his assignee brought trover for the note, contending that the transaction was avoided by sec. 8, sub-sec. 4 of the Insolvent Act of 1864; but

Held, that he could not recover, for the note never was the insolvent's property, and so never passed to the assignee; and even if it was a transfer or payment by Kyle within the act, and so avoided, this would not entitle the plaintiff to the note.—*McGregor* v. *Hume*, 28 U.C. Q.B. 380.

Registrar—Tenure of Office—9 Vic. ch. 34, 29 Vic. ch. 24.—Plaintiff in 1859 was appointed registrar, under 9 Vic. ch. 34, which authorized the Governor in general terms to appoint, saying nothing as to tenure, but providing for removal in certain events, to be proved in a specified manner. His commission expressed the appointment to be during pleasure, and in 1864 he was removed and defendant appointed, the admitted cause of such removal being plaintiff's alleged misconduct as returning officer at an election.

The Court of Queen's Bench held that the plaintiff could be removed only for the reasons and in the manner pointed out by the statute: that the words "during pleasure" in his commission could not deprieve him of his statutory rights; and that the 29 Vic. ch. 24, by which every registrar then in office was continued therein, would not confirm defendant's appointment if illegal.

Held, reversing such judgment, *Draper*, C. J., and *Morrison*, J., dissenting—1. That the office being one to which at common law the appointment might be during pleasure, and the statute not providing expressly for the tenure, the plaintiff's appointment during pleasure and his removal were valid. 2. That if the office was one of freehold, then the grant of it during pleasure was void, and the plaintiff was never appointed.

Adam Wilson, J., concurred with the court below in holding under 9 Vic. ch. 34, that the plaintiff's appointment was valid and his removal ineffectual; but held, that by 29 Vic. ch. 24, the defendant, then filling the office *de facto*, was confirmed in his appointment.—*Hammond* v. *McLay*, 28 U. C. Q. B. 463.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

Promissory note payable in L. C.—Limitation of action—12 Vic. ch. 22 sec. 31.—A., residing in Upper Canada, made a note there payable to B., also a resident of Upper Canada, at the Bank of British North America in Montreal, and B. endorsed it to the plaintiffs, who carried on business in Montreal. Neither A. nor B. had ever resided in Lower Canada.

12. Vic. ch. 22, sec. 31, enacts that all notes payable in Lower Canada shall be held and taken to be absolutely paid and discharged, unless sued upon within five years after they become due.

Held,—reversing the decision of the Queen's Bench, founded upon *Hervey* v. *Jacques*, 20 U. C. Q. B. 366,—that the plaintiff in this case, suing here after the lapse of five years, was not barred, *Adam Wilson*, J., dissenting.

Draper, *C. J.*, held that the statute, being applicable to Lower Canada only, did not change the limitation of actions on contracts made in Upper Canada by persons resident there; and that this note being payable in Montreal, without any limitation of not otherwise or elsewhere, was payable generally, and so not within the statute.

The rest of the court proceeded upon the latter ground only.—*Darling et al.* v. *Hitchcock*, 28 U. C. Q. B. 439.

Executor and Adminstrator.—1. A will contained these words: "I leave the sum of one sovereign each to the executor and witness of my will for their trouble, to see that every thing is justly divided," but did not name any executor. Beneath the signature of the testator, and opposite the names of the attesting witnesses,

were the words, "executors and witnesses." *Held*, that there was no appointment of executors.—*Goods of Woods*, Law Rep. 1 P. & D. 556.

2. A. having deposited certain title deeds with a bank as security for advances, by will empowered his executors to charge his real estates in aid of his personal estate. His widow and sole executrix was allowed to draw out other moneys as executrix on deposit of other title deeds of A.'s estate. The moneys were drawn out from time to time in small sums, and applied by the widow for her own expenses, as well as for A.'s debts. *Held*, that in absence of proof of notice to the bank of A.'s breach of trust, the bank was entitled to prove against the estate for their advances to the widow.—*Farhall* v. *Farhall*, Law Rep. 7 Eq. 286.

CHATTEL MORTGAGE—SECURITY AGAINST INDORSEMENTS—AFFIDAVIT—DESCRIPTION—A chattel mortgage under C. S. U. C. ch. 45, sec. 5, may be given as security against past or concurrent, but not against future endorsements or liabilities. If it did not apply to past liabilities, then a mortgage to secure against them would not be avoided by the act for want of compliance with its provisions.

A recital, that the plaintiff had endorsed three notes, made by J., giving the dates, sums, and the time of payment, for the accommodation of J., and that J. had agreed to enter into the mortgage to indemnify and save harmless the mortgagee of and from payment of said notes, and from all liability or damage in respect thereof: *Held*, clearly sufficient.

An affidavit that the mortgage was made to secure the mortgagee against the payment of "such liability *of*" instead of *for* "the mortgagor" by reason of the notes: *Held*, sufficient.

The goods were described as all the goods in the house of the mortgagor, "in bed room No. 1, one bureau," &c., describing the articles in each room, and adding "all the hereinbefore described goods and chattels being in the dwelling house of the party of the first part, situate on Queen Street in the town of Brampton; also one bay mare, one covered buggy," &c., "being on the premises of the party of the first part on Queen Street; also the following goods and articles, being in the store of the party of the first part, on the corner of Queen and Main Streets, in the said town of Brampton, that is to say, 85 gallons of vinegar," giving a long list, "and also the following goods, being of the stock-in-trade of the party of the first part, taken in the month of April last, that is to say, 16 pieces of tweed," &c.: *Held*, that all the goods were sufficiently described, for the last parcel of goods might be taken as described to be in the store.—*Mathers* v. *Lynch*, 28 U. C. Q. B. 354.

WILL—COMPOS MENTIS—A will was executed by the testator on his death bed; he was *compos mentis* at the time, but was so extremely weak in body and mind that his directions were given at intervals, and there was considerable difficulty in understanding them. No fraud, however, was pretended, and the court was satisfied that the will was in accordance with the testator's wishes, and contained all that was understood of them, though probably not all the testator desired to express; and was understood by the testator at the time of executing it.

Held, that the will was valid.—*Martin* v. *Martin*, 15 U. C. Chan. R. 586.

CRIM. CON.—SEPARATION BY PLAINTIFF'S MISCONDUCT—HOW FAR A DEFENCE—To an action for criminal conversation the defendant pleaded,—1. That the plaintiff had been guilty of adultery with one L., by whom he had a child now living with him, and had continually treated his wife with intolerable cruelty, and had frequently used severe personal violence towards her, and finally put her away from him by force, and threatened to put her to death if ever she returned to him, so that she was in danger of her life, and did live apart from him permanently. 2. That the plaintiff's wife had, while so living apart from him, obtained an order for protection under the Statute, after due notice to the plaintiff of her application therefor, which order was duly registered and is in full force.

Held, on demurrer (*A. Wilson*, J. dissenting), that the pleas showed a good defence.—*Patterson* v. *McGregor*, 28 U. C. Q. B. 280.

FRAUDULENT CONVEYANCE—SECRET TRUST—PUBLIC POLICY.—The plaintiff had executed a conveyance of land without consideration for the purpose of avoiding an execution which it was supposed would be issued against his grantor, upon the secret trust or understanding that when called upon the grantee would re-convey. The court under these circumstances refused to enforce a re-conveyance and a bill filed for that purpose was dismissed with costs.—*Emes* v. *Barber*, 15 U. C. Chan. R. 679.

REGISTRY LAW—POSSESSION—In 1831, A. devised his farm to his widow in fee, and left her in possession. The will was never registered: and shortly after the testator's death his eldest son and heir went into possession with his mother, and so continued until his mother's death in 1854; the son managing the farm, and bein

reputed owner during this period. After his mother's death he was in sole possession; and in 1862, he executed a mortgage on the property to a person who had no notice of the will or of the widow's title.

Held, that the widow's heirs could not claim the property against the mortgage. (*A. Wilson*, J. dissenting)—*Stephen* v. *Simpson*, 16 U. C. C. R. 594.

INDICTMENT.—1. It is not error that the caption of an indictment states that the grand jurors were sworn and affirmed without alleging who were sworn and who were affirmed.—*Mulcahy* v. *The Queen*, Law Rep. 3 H. L. 306.

The 11 Vic. c. 12, declares if felony "to compass, imagine, invent, devise, and intend to deprive and depose our Lady the Queen." In an indictment under this statute it is sufficient to allege as overt acts that the defendants conspired, combined, confederated, and agreed to commit the offence; and the allegation in one count of several different overt acts of felony is not objectionable.—*Ib*.

ACCOMMODATION INDORSERS—CONTRIBUTION.—Where two persons indorse a note for the accommodation of the maker, and the second indorser knows when he indorses that the first indorser is, like himself, an accommodation indorser, he must share equally the loss occasioned by the maker's default.—*Cockburn* v. *Johnston*, 19 U. C. C. R. 577.

R. W. Co.—LOSS OF LUGGAGE.—The plaintiff was a passenger on defendants' railway from Paris to Seaforth, with two trunks, for which he had checks. At Seaforth the trunks were put on platform, and he assisted defendants' servant to carry them into the baggage room, and went up in an omnibus to the hotel; this was about 3 p.m. In the evening, about 8, he sent his checks for the trunks, but one of them had disappeared, and the evidence went to show that it had been stolen: *Held*, that the defendents were not responsible: that their duty as common carrier, ended when the trunk had been placed on the platform, and the plaintiff had had a reasonable time to remove it, as he clearly had here. A nonsuit was therefore ordered.—*Penton* v. *Grand Trunk Railway Co.*, 28 U. C. Q. B., 367.

GUARANTY.—A. drew bills on B., who accepted them, and C. gave B. a guaranty that funds should be supplied to take them up. S. discounted the bills, being informed by A. of the guaranty; but S. never notified B. or C. *Held*, that S. had no equity to claim as a creditor against C. on the guaranty.—*In re Barned's Banking Co.*, Law Rep. 3 Ch. 753.

ONTARIO REPORTS.

QUEEN'S BENCH.

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

PATTERSON v. THE CORPORATION OF THE TOWN OF PETERBOROUGH.

Town corporation—Obstruction of water-course—Liability.

The declaration charged that the defendants, the municipal corporation of a town, on the 1st March, 1868, and on divers other days, penned back the water of a stream in the town, on which the plaintiff had a tannery, so that it flooded his land, &c. The obstruction complained of was a bridge along a street in the town, where there had been a bridge for about 30 years. One D., who owned land on the stream below the bridge, had a wheel in the stream, and parties above him cut away and sent down the ice in the spring, which formed a jam at D.'s, and filled the stream from thence up to and under the bridge. The weight of evidence tended to shew that but for this obstruction at D.'s, the plaintiff would not have been injured. It was left to the jury to say whether the injury complained of was caused by the bridge, or by the ice jam at D.'s, irrespective of the bridge, and they found for the plaintiff.

Held a misdirection: that they should have been told, if the damage was caused by persons sending ice down, which lodged against the bridge, and not by the ordinary action of the ice, defendants were not liable.

And *Semble*, that upon the declaration and evidence the plaintiff could not recover, for it was defendants' duty to build the bridge there, and no negligence was charged.

[28 U. C. Q. B., 505.]

Declaration—First count, that the plaintiff on the 1st March, 1868, and thence hitherto, was possessed of a tannery and land adjoining the stream or water-course in the town of Peterborough, known as the creek, and was entitled to have the waters of such water-course flow away from the tannery and land; and the defendants on the 1st of March and divers days thereafter, penned back the water of the stream or water-course, and obstructed the same, so that it could not flow by and away from the said tannery and land, whereby the water of the stream overflowed and flooded the said tannery and land, and remained thereon for a long time, and spoiled the tan vats, hides and liquors therein, and the stock, machinery and materials of the plaintiff therein, and the land and tannery thereon were much injured and damaged, and the plaintiff was deprived of the use thereof, and incurred expense in removing the water from the same and repairing the same, and the same were thereby much injured and diminished in value, and the plaintiff was by means of the premises much injured in his said trade or business and otherwise.

The second count was in effect the same as the first, except that it averred that the plaintiff was in possession of land adjoining the water-course, and had the right to have the waters flow away from the same, and that defendant penned back the water of the creek on his lands, causing damages, &c., as in the other count, but omitting the tannery. The plaintiff claimed $500 damages, and an injunction against the continuance of the injury, and against the commission of injury of a like kind to the same property.

Defendants pleaded,

1. Not guilty.

2. That the plaintiff was not possessed of the tannery and land as alleged,

3. That the plaintiff was not entitled to have the stream or water-course flow by and away from the said tannery and land as alleged.

These three pleas were to the first count of the declaration, and similar pleas were pleaded to the second count.

The plaintiff joined issue on all the pleas.

The cause was taken down to trial at the Fall Assizes of 1868, at Peterborough, before Hagarty, J.

There was evidence offered on the part of the plaintiff, to shew that in the month of March, 1868, ice had lodged against a bridge constructed by defendants along a street in the town of Peterborough, over a stream that passed through premises occupied by the plaintiff: that the lodging of the ice there in the spring of the year formed an ice dam, or jam, as it is called, and this penned back the water on the plaintiff's premises, flooded his tan vats, and injured him to the extent of about $418, as shewn by his evidence.

A witness for the plaintiff said, in relation to the water being penned back, there was not the slightest doubt but that this was caused by the bridge: that the defendants took up the floor of the bridge and broke up the ice, and the damage ceased at once. This witness did not think obstructions by one Doherty, lower down the stream, backed the water to the injury of the tannery.

For the defence it was shewn that a bridge had been erected across the stream at the place complained of for more than thirty years: that one Doherty owned premises further down the stream than the bridge: that the corner of one of his buildings was erected in the stream, and that he had a wheel also that was in the stream: that parties having mills on the stream above the plaintiff's premises, in the spring of the year, when the water rose, cut away the ice and sent it down the stream: that it lodged at Doherty's, and formed a jam, and the stream filled with ice up to the defendants' bridge, and then the ice which came down from above lodged about the bridge: that as soon as the jam was cleared below, from Doherty's up to the ice at the bridge, all passed away: that the floor of the bridge was taken up to aid in removing the ice dam or jam, and after that was done all passed away: that had it not been for the obstruction at Doherty's, there would have been no injury: that defendants' bridge did not cause the jam at all, and if it had not been there the jam at Doherty's would have caused the injury. One of the defendants' witnesses said he considered if the bridge was removed, the artificial work in the stream below it would have caused the damage. He also thought the bridge would cause this obstruction, even if the artificial work below was not there.

At the end of the case, defendants' counsel objected that defendants were not liable on the evidence: that the bridge was erected in the ordinary course of their duty, and that the obstruction in the flow of the stream was caused by sending the blocks of ice down the stream by parties above, and not by the ordinary action of the ice.

The learned judge stated that the case turned on the plea of not guilty: there was damage done, and he left it to the jury to say by whom, by the defendants' bridge, or by the ice jam at Doherty's, irrespective of the bridge.

On this direction the jury found for the plaintiff, damages $100. The plaintiff's counsel took the same objections to the charge of the learned judge that he took at the close of the case.

In Michaelmas Term, *C. S. Patterson* obtained a rule *nisi* to set aside the verdict, as being contrary to law and evidence and the weight of evidence, in this, that it was shewn that the obstruction which injured the plaintiff was not caused by the defendants' bridge, but by a stoppage of the stream at a place lower down the stream than the bridge; and because it was not shewn that the bridge caused any obstruction, or that it was calculated to cause any obstruction in the natural flow of the stream; and because the obstruction was shewn to have been caused by ice which did not come down in the natural flow of the stream, or by reason of the natural thaw, but was sent down the stream by persons who broke it up from the mill-ponds; and because it was not shewn that the defendants had constructed their bridge in a negligent or improper manner, or had done any act beyond what they were required by law to do; and for misdirection of the learned Chief Justice, in ruling that the declaration would be supported by evidence of an obstruction caused by the lodgment against the bridge of bodies of ice sent down the stream, notwithstanding that the bridge would not obstruct the stream in its natural flow.

The rule was enlarged until this term, when *J. H. Cameron*, Q. C., shewed cause. The simple question on not guilty was, whether the defendants, by the construction of the bridge, penned back the water on the plaintiff's premises, so as to cause him damage. That damage was done by penning back the water is not denied. There is evidence that it was caused by the bridge, and the jury, who had a view of the place, were competent to judge whether the plaintiff's contention, that the injury was caused by the defendants' bridge, was correct or not. If they thought it had arisen from other causes, they would have found for defendant.

The action is not brought for negligently constructing the bridge, but simply for penning back the water on the plaintiff If the water was thrown back by the bridge, and the defendants wished to justify the erection of the bridge as in discharge of their duty, they should have so pleaded; but the general issue merely denies the fact of the flooding, and there was evidence to go to the jury that it was caused by the bridge. *Harrold* v. *The Corporation of Simcoe*, 18 U. C. Q. B. 9.

C. S. Patterson, contra. The weight of evidence is clearly with the defendants. They were by law bound to build the bridge; they were guilty of no negligence in what they did, and cannot properly be held responsible for the injury sustained by the plaintiff. Besides, the learned judge should have told the jury that the act of the parties above caused the jam by sending down the ice improperly, and that they should find for the defendants on not guilty. At all events he should have told them that defendants would not be liable if their bridge would not have obstructed the ice in its usual and natural condition, and if the jam was caused by the ice above being sent down in too large quan-

tities, though the bridge might have obstructed that, they should have found for defendants. *Croft* v. *Town Council of Peterborough*, 5 C. P. 141; *Sutton* v. *Clarke*, 6 Taunt. 29; *Municipality of Thurlow* v. *Bogart*, 15 C. P. 9; *Corporation of Wellington* v. *Wilson*, 16 C. P. 124; *Fitzsimons* v. *Inglis*, 5 Taunt. 534; *The King* v. *Tindall*, 6 A. & E 143; *The Queen* v. *Russell*, 3 E. & B. 942; *The Queen* v. *Betts*, 16 Q B. 1022; *Blyth* v. *The Birmingham Water Works Co.*, 2 Jur. N. S. 333; S. C. 11 Ex. 781.

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

It will be very difficult to come to the conclusion that this action can be maintained against the defendants in the present form of the declaration, and on the evidence given. There is no doubt that the defendants had the right and were bound to maintain a bridge on the street in question, and that their only liability to the plaintiff must arise from doing that which they are at liberty and bound to do in an unskilful manner. The plaintiff does not sue the defendants for any breach of duty, but simply charges them, not with doing some act that occasions him injury, but on the first of March and divers days and times afterwards, with penning back the water of the stream and obstructing the same, whereby it overflowed the plaintiff's land. The defendants did not do this on the first of March, and divers, &c., but, on the contrary, more than twenty years ago built a bridge, and in 1850 built the present one; and that is all they did towards penning back the water.

We do not understand from the evidence that there was any ground of complaint when the bridge was built, or any perceptible penning back of the water, or any injury done to any one until within a few years past. It seems to us the allegations in the plaintiff's declaration are no more sustained by the evidence than they would be if trespass were brought against a person for throwing a log on the highway whereby plaintiff was injured, when the evidence shewed the log had been cast on the highway a month before the plaintiff was injured; and the very illustration given in *Chitty* on Pleading, shewing the distinction between trespass and case, 7th ed. Vol. I. p 142, applies to the case before us. He says: "If a person place a spout on his own building, in consequence of which water afterwards runs therefrom into my land, the damage is consequential, because the flowing of the water, which was the immediate injury, was not the wrong-doer's immediate act, but only the consequence thereof." Here it is even doubtful if the penning back of the water is in consequence of defendants' act at all.

The case of *Fitzsimons* v. *Inglis* (5 Taunt. 534), is an express authority in favor of the defendants' contention. There the plaintiff declared that the defendant wrongfully placed and continued a heap of earth whereby refuse matter was prevented from flowing away from his house down a ditch at the back thereof. The evidence was that the heap was not originally placed so as to obstruct the water, but that in process of time earth from the heap was trodden and fell into the ditch. *Held*, that it was a fatal variance.

In *Griffiths* v. *Marson* (6 Price 1), where the third count of the declaration was for wrongfully diverting and turning divers large quantities of the water of the stream out of the usual course, the plaintiff proved that the defendant's son had let down the rear of the dam, whereby the plaintiff's meadow was flooded and damaged by checking the course of the stream. The plaintiff was nonsuited. The court held that in actions of this nature it was necessary that the count relied on should be so framed as to meet the particulars of the fact more distinctly, and with greater certainty.

In *Chitty* on Pleading, vol. ii., 7th ed., p. 601, in a note, it is said, "It seems that a declaration for obstructing a water-course without shewing how, is bad on demurrer, but not after verdict: Ld. *Ray* 452. *Sed quære.* The injurious act should be described according to the fact, and a count for diverting and turning, &c., is not supported by proof of penning back and checking a stream" Reference is made to 6 Price 1, and 5 Taunt. 534.

In *Woolrych* on Waters, at p. 317, the learned author states, "The particular mode of obstruction cannot be too carefully described." He then refers to the cases in 5 Taunt. and 6 Price, and also states that *Shears* v. *Wood*, cor. Wood Baron, at Guildford, 7 Moore, 345, though later in point of time, seems hardly reconcilable with the prior cases.

The case in Moore is abstracted in Mr. *Woolrych's* work The action was for diverting water from the plaintiff's mills. The obstruction charged in the declaration was putting a dam across the stream, and cutting above and higher in the stream, so that large quantities of the plaintiff's water were thereby diverted, and the *accustomed* flow of the water was stopped. There was a general count for turning the water out of its usual course. The evidence was, that the defendant put down the dam in question about a mile above the plaintiff's mills, and this had prevented the water from being regularly supplied, but that the water was not thereby diverted, because it returned to its regular course long before it reached the plaintiff's mills, and there was no waste of water. It was proved that the plaintiff had sustained injury by reason of the interruption of his regular supply. It was objected that the mischief had been misdescribed in the declaration, for the complaint should have been that the water had been irregularly or insufficiently supplied, or that it did not reach the plaintiff's mills at the proper and the usual time. The jury having found for the plaintiff, it was moved to enter a nonsuit, but Mr. Justice Burroughs said, that it was in fact stated in the declaration that the water did not run to the plaintiff's mill as they were accustomed to have it, and that this was a mere technical objection, which ought not to be allowed after verdict. The rest of the court concurred, and the nonsuit was refused.

Notwithstanding the decision arrived at in the case just referred to, we do not see our way clear in holding that the plaintiff can recover under the declaration and evidence in this case.

There is no doubt that the mere erection of the bridge has not penned and does not pen the water back on the plaintiff's land, and the weight of evidence, as we understand it, certainly is that the obstruction which makes the water flow back is caused by the large quantity of ice sent down the stream from above, which lodging below, and, as the plaintiff contends, at the defendants'

bridge, pens the water back. It is not pretended that the penning back of the water results immediately from the act of the defendants, and what the defendants are really liable for, if liable at all, is building a bridge whereby the water, at certain seasons, was penned back from ice being sent down and lodging against it.

If the defendants, in building their bridge or after it was built, placed materials in the stream so as to pen back the water on the plaintiff's land, then the averment in the declaration, that the defendants had penned back the water of the water-course and obstructed the same, might have been sustained. If in the usual and natural process of the ice passing out of the stream in the spring, it lodged against the bridge and penned back the water, it might be argued with more force that the defendants had done it directly, as seems to be the effect of the averment in the declaration; but when the difficulty is caused by other parties doing that which immediately causes the injury, and all that can be charged against the defendants is the want of care or skill in constructing the bridge, it seems to us that in this mode of declaring the plaintiff cannot succeed.

On a declaration framed so as to bring the real wrong, if any, committed by the defendants in issue, they would be able to raise the question properly and without difficulty, whether, in discharging the duty cast upon them by the act of parliament, they had by their servants used reasonable skill and diligence in constructing the bridge, in relation to ice or other obstructions likely to come down the stream.

We think leaving the question to the jury, simply whether the damage was done by the defendants' bridge or by the ice jam at Doherty's, irrespective of the bridge, was not putting it before the jury in the way the defendants had a right to have it put, and that they should have been told if the damage was caused by persons sending blocks of ice down the stream which lodged against the bridge, and not from the ordinary action of the ice, and that the lodging of the ice caused the penning back of the water, they should find for the defendants.

We understand the defendants' counsel so desired the learned Chief Justice to charge the jury, and that he declined doing so.

We are all of opinion there should be a new trial, without costs.

Rule absolute.

LOWER CANADA REPORT.

In re Wm. B. Bowie, Insolvent, v. Patrick Rooney.

Held:—That a creditor is not debarred from his right to examine the insolvent under oath, before a judge, by the mere fact that a composition deed (purporting to be duly executed) has been deposited with the prothonotary and that notice has been given by the insolvent of his intention to seek its confirmation.

[13 L. C. J., 191.]

This was an application, by Patrick Rooney, an admitted creditor, to examine the insolvent under oath, as to his estate and effects.

The application had been granted upon petition, without notice to the insolvent, and on the day fixed for his examination he appeared, assisted by counsel, and refused to be sworn, on the ground that he was no longer an insolvent, in consequence of the execution, by the necessary number of his creditors, of a deed of composition and discharge, which had been fyled in the office of the prothonotary, and the confirmation of which was in course of being applied for from the Court.

Abbott, Q C., for the insolvent, contended, that the effect of the execution of the deed was to free and discharge the insolvent from all his liabilities, and that he was consequently no longer an insolvent, and was therefore not amenable to the jurisdiction of the Court. That all the insolvent could be called upon, under the circumstances, to do, was to prove the due execution of the deed of composition by a competent number of his creditors, and that the insolvent was quite prepared and now offered to go into proof of that fact.

Bethune, Q.C., for Rooney, argued, that the deed was only conditional in its terms, and could not operate as an absolute discharge until the accomplishment of the conditions stipulated in the deed. That whether the deed really did confer a present absolute discharge or not, the creditor, nevertheless, had a right to examine the insolvent, under the provisions of the 2nd subsection of sec. 10 of the Insolvent Act of 1864. And that the provision of the 3rd subsection, to the effect, that the insolvent could be examined, even at any stage of his application for a confirmation of his discharge, clearly proved that that the party was still an insolvent within the meaning of the Act, and therefore liable to examination like any other insolvent.

Per Curiam;—On the 14th of October, 1868, the insolvent made a voluntary assignment under the Insolvent Acts. On the 21st of the same month he obtained a discharge from the requisite number (it is said) of his creditors; he is, in September, to apply for a confirmation of it. Notice of his intention to apply has been given, in the Canada Gazette.

Rooney, a creditor, wants to examine him now, before me, and it is objected that I have no power to examine him as proposed. "Termination of liability to be examined is, when discharge has been obtained, as here," says the insolvent's counsel.

I hold the contrary, and our Insolvent Act warrants me. I have no doubt of my having jurisdiction; it is clearly enough given and is necessary for the attainment of justice, and the proper working of our insolvency system.

[Here the Judge read from the Act of 1864, and from *Rex* v. *Perrot*, p. 1123, 2 Burrow's R.; also from "Anonymous" P. 449 of 14 Vesey, junior.]

Surely an insolvent, even after such a discharge as shown in this case, cannot be allowed to say, "though I may be reproached with having suppressed amounts of my assets; though some of the majority whose discharge I am invoking may be fictitious; though my assignee, or a creditor, may wish to know where a person debtor to my estate is to be found; though my knowledge may be wanted in the investigation by my assignee, or by a creditor, of a disputable debt;—I cannot be asked questions." Yet this is what the insolvent's argument might lead to.

Discharges may be set aside, for fraud, for

consent to them having been purchased, &c., (13 subsection of sec. 9, Act of 1864,) but this law might be rendered nugatory under the system of the insolvent here.

I order the examination to proceed, and if the insolvent persist in refusing to be sworn I must deal with him as with any ordinary witness, in such case.

Insolvent ordered to answer.

ENGLISH REPORTS.

QUEEN'S BENCH.

JOHNSON v. SCAFTE.

Bankruptcy—Express or implied contract—Debt proveable—24 & 25 Vic, c. 134, s. 153.

The goods of the plaintiff, who was sub-tenant to the defendant of a certain room, were distrained for rent owing by the defendant to his landlord. The plaintiff paid the landlord in order to release his goods, and, after the payment the defendant became bankrupt and obtained an order of discharge. The plaintiff not having proved his claim under the bankruptcy, nor taken any steps under section 153 of the Bankruptcy Act, 1861, sued the defendant for the damages which he had sustained by distress.

Held, that the claim of the plaintiff was not one proveable under the bankruptcy, and that therefore the order of discharge was no bar to the action.

[Q. B., 17 W. R. 1098.]

Appeal from the ruling of a county court judge.

This action was tried by a jury before the judge of the Liverpool County Court, on the 5th of November, 1868, when a verdict was returned for the plaintiff, with £25 damages. The following are the particulars of demand:—

"This action is brought to recover compensation for injury and loss sustained by the plaintiff in consequences of the defendant's wrongfully allowing certain rent payable by him as the tenant of a warehouse, No. 4, Argyle street, Liverpool, to be in arrear and unpaid, whereby the goods of the plaintiff, who occupied one of the rooms of the warehouse as tenant to the defendant, were lawfully distrained by the defendant's landlord for such arrears of rent, and the plaintiff was compelled to pay such landlord certain moneys in order to obtain the release of his said goods, and was put to great inconvenience, and was injured in his credit. The plaintiff claims £50."

The defendant occupied as tenant to one Mr. Pemberton (the owner), a warehouse, No. 4, Argyle street, Liverpool, at a certain yearly rent. Whilst the defendant was such tenant the plaintiff became his sub-tenant of one of the rooms, into the occupation of which room the plaintiff entered, and placed therein cotton, his property, of considerable value. In the month of February, 1868, whilst the defendant's tenancy and the plaintiff's sub-tenancy continued, the defendant's rent being then in arrear to the amount of £30, his landlord lawfully distrained the goods in the warehouse, including those of the plaintiff. To obtain the release of his goods the plaintiff was required by the defendant's landlord to pay, and did in fact pay to him, the sum of £15, and upon that payment being made his goods were restored to him. After the distress and payment by the plaintiff of this sum of £15 the defendant became bankrupt on his own petition in the Liverpool Bankruptcy Court, and in due course obtained his order of discharge. The plaintiff has not proved, or claimed to prove, under the bankruptcy in respect of the subject-matter of this action, nor have any steps been taken under the 153rd section of the Bankruptcy Act, 1861, to obtain an order of the Court of Bankruptcy directing an assessment of the damages which the plaintiff sustained by reason of the entry by bailiffs employed by the defendant's landlord upon the room in the warehouse occupied by the plaintiff, and the seizure of the goods therein, nor were such damages assessed until the jury assessed them on the trial of this action.

After the defendant had obtained his order of discharge in bankruptcy the plaintiff commenced this action, in which he claimed as part of his special damage the £15 before referred to.

At the trial, in addition to the defence raised by the defendant on the merits, it was contended on his behalf, that the plaintiff's right of action for damages was barred by the order of discharge. The learned judge ruled that it was not.

The question for the opinion of the Court is, whether such ruling is correct in point of law.

R. G. Williams, for the appellant:—The question is, whether the order of discharge is a bar to this action within the meaning of sections 151 and 161, of the 24 & 25 Vic. c. 134. If the action is one of contract the order is a bar. There is an implied contract by the defendant to indemnify his under tenant against distress for rent. The claim therefore is proveable under the 153rd section. The word "creditor" in the 192nd section has been held to include a person claiming unliquidated damages: *Woods* v. *De Mattos*, 14 W. R. 226, L. R. 1 Ex. 91; *Re Penton*, 14 W. 321, L. R. 1 Ch. 158. See the judgments of the Lord Chancellor and Turner, L. J. in *Re parte Wilmot*, 15 W. R. 969, L. R. 2 Ch. App. 795; *Hancock* v. *Caffyn*, 8 Bing. 358; Bullen's Precedents of Pleading, 179, 180; and *Crampton* v. *Walker*, 9 W. R. 98.

Wheeler, for the respondent—The words of the 153rd section are "contract or promise." The contract, therefore, must be an express contract. See *Tatton* v. *Great Western Railway Company*, 29 L. J. Q. B. 184, and Griffiths and Holmes on Bankruptcy, 588, 589. *Burnett* v. *Lynch*, 5 B. & C. 589; *Robertson* v. *Goss*, 15 W. R. 965, 36 L. J. Ex. 252; *Hogarth* v. *Taylor*, L. R. 2 Ex. 105; *Sharland* v. *Spence*, 15 W. R. 767, were also referred to.

R. G. Williams, in reply, referred to *Sanders* v. *Best*, 13 W. R. 160, 17 C. B. N. S. 732.

LUSH, J.—I cannot help saying that we were indebted to the learned counsel on both sides for the arguments that they presented to us. The question at one time presented great difficulty, and if we had to decide it upon some of the grounds raised in argument we should have some difficulty in doing so. But I am of opinion that we are right in deciding it on this ground, that the liability was not one contemplated by the 153rd section of the Bankruptcy Act, 1861. That section enacts that "If a bankrupt shall at the time of judication be liable by reason of any contract or promise to a demand in the nature of damages which has not been, and cannot be, otherwise liquidated or ascertained, it shall be lawful for the Court, acting in prosecution of such bankruptcy, to direct such dam-

ages to be assessed by a jury either before itself or in a court of law, and to give all necessary directions for such purpose; and the amount of damages when assessed shall be proveable as if a debt due at the time of the bankruptcy, etc." I have no doubt that what it was intended to refer to were cases of express contracts, which raise a demand in the nature of a debt technically so called, and which, not having been assessed at the date of the bankruptcy, was not proveable. Express contracts are, I think, what the section points at, and its primary reference is, I think, to contracts of a mercantile character. Is the present, then, a claim of that description? It clearly is not. It arises out of a distress levied on the goods of the plaintiff by the landlord of the defendant, for rent which the defendant owed and ought to have paid. Now, there was no contract on the part of the defendant to keep down the rent; and the liability which he incurred is one which arises out of the relation in which the parties stood to each other, from which relation the law supposes an implied contract. It is a liability on account of which the defendant might be sued either in the shape of an action of assumpsit or one of tort the non-payment of rent being treated either as a breach of contract or a breach of duty, the duty, no doubt, springing out of the relation between the parties, and; therefore, out of what the law says is an implied contract. But though we call it a contract for the sake of convenience, it is not, I think, such a one as is contemplated, by the 153rd section of the Bankruptcy Act. I think, therefore, that the present case does not come within the 153rd section, which contemplates only express contracts, and on that ground, I think the judgment of the county court judge was right.

HAYES, J.—I quite agree with the judgment of my learned brother. The 153rd section of the Bankruptcy Act, 1861, was passed with reference to mercantile contracts made by the bankrupt, an illustration of which is given in the case of *Green* v *Bicknell*, 8 Ad. & El. 701, cited by Mr. Chitty in his book on Contracts, where an agreement was made for the sale of oil, which should arrive by a certain ship, and when the oil was tendered to the party who contracted to purchase it, he refused to take it; on his afterwards becoming bankrupt, the measure of the claim against him was the difference between the contract and market prices at the time when he should have fulfilled his contract. But though the market price was known to the parties in that case, it was nevertheless held that the claim was founded in damages, and could not be proved under the bankruptcy. That was a grievance which is now remedied. The present action is quite of a different description.

The contract is one which arises from the relation of landlord and tenant subsisting between the parties, and the cause of action against the defendant is well stated in the particulars of the county court plaint, which says that the action was brought "to recover compensation for the injury and loss sustained by the plaintiff in consequence of the defendant wrongfully allowing certain rent payable by him . . . to be in arrear and unpaid, whereby the plaintiff's goods were distrained." The law allows the person who is compelled to pay under such circumstances, in order to redeem his goods, to say to the other party, "I have paid your debt and you must recoup me." Generally the money must be paid at the request of the other party in order to be so recoverable, and there was no request here. That furnishes an indication of the nature of the present action, which is not one of contract, but is not unlike the case of an action against a common carrier for not carrying safely, which has been held not to be an action of contract within the meaning of the County Courts Act, but one of tort. I am of opinion then, that the present action is to be regarded as one of tort, although, if it had been framed in contract, it would, perhaps be difficult to say that it could not be regarded in that light also.

Judgment for the respondent.

JONES v. RHIND.

RHIND v. JONES.

Mortgage—Priority—Statute of Limitations.

S., in 1841, executed a legal mortgage of leasehold property to J. to secure £300 and interest. In 1865 he purported to execute another legal mortgage of the same property to R. to secure £121 16s. and interest. R. had no notice of the first mortgage, and the lease of the property was given up to him.

Held that R.'s mortgage was entitled to priority, inasmuch as no explanation was given of the fact of S. being in possession of the lease.

S. paid no interest on his mortgage from the date of its execution, but kept down the interest on a sum of £300 which J. was liable to pay under a bond he had entered into for the benefit of S. The Court presumed the payment of interest on the bond was made under an arrangement for that purpose, and that J.'s debt was not barred by the Statute of Limitations.

[17 W. R. 1091.]

On the 4th of December, 1841, Thomas Smith, who was then in possession of and entitled to a blacksmith's shop in the parish of St. Luke, Chelsea, under a lease for a term of thirty-four years from Lady-day, 1841, demised the same to Benjamin Jones by way of mortgage for securing a sum of £300 and interest, which Jones was liable to pay under a bond he had entered into the benefit of Smith.

A memorial of this mortgage was registered in the Middlesex registry shortly after its execution.

It did not appear whether the lease of the property was given up to Jones on the execution of the mortgage, or whether he ever had it in his possession.

No interest was paid by Smith in respect of the mortgage-debt, but he kept down the interest on the bond to the 16th September, 1867, when he executed a creditor's deed under the Bankruptcy Act, 1861. He also, from time to time paid sums amounting in the whole to £130 in reduction of the principal sum secured by the bond

In the year 1865, Smith, being still in possession of the property, executed another mortgage of it (also by demise) to William Rhind, Herbert Sutton Smith, and Joseph Long Porter, as trustees of the West London Permanent Mutual Benefit Building Society, for securing to them the payment of a sum of £121 16s. On the execution of this mortgage the lease of the property, which was then in possession of Smith, was handed over to the trustees. It was admitted that at the time of this mortgage they were entirely ignorant of the prior mortgage; in fact, the plaintiffs in the first suit, themselves the ex-

ecutors of Jones, who died in the year 1853, were not aware of its existence until the year 1867, when the deed was discovered in a safe which had belonged to Jones.

Under these circumstances the above suits, one by the executors of Jones and the other by the mortgagees under the deed of 1865, were instituted for determining the priorities of, and realising the respective securities.

Alfred Elborough, the trustee of Smith's creditor's deed, was made a party to both suits, and was required to put in an answer in the second suit, although he expressed his willingness to disclaim.

Eddis, Q. C., and *C. Willis*, for the executors of Jones.

Schomberg, Q. C., and *Hemings*, for the trustees of the building society, cited, *Jones* v. *Smith*, 1 Ph. 244; *Perry-Herrick* v. *Attwood*, 6 W. R. 204, 25 Beav. 216, 2 DeG. & J. 21; *Waldron* v. *Sloper*, 1 Dr. 193; *Rice* v. *Rice*, 2 Dr. 73. We found Smith in the actual possession of the property and of the deeds. What could we do to discover the existence of a prior mortgage? We claim the benefit of the Statute of Limitations; *Coope* v. *Cresswell*, 15 W. R. 242 L. R. 2 Ch. 112. It was not incumbent upon us to search the Middlesex registry. The absence of deeds *primâ facie* shows evidence of negligence on the part of the person who ought to hold them: *Perrin* v. *Barbey*, 4 W. N. 160.

Eddis, Q. C.—The burden of proof lies on the other side to show that we have been guilty of negligence in not obtaining and keeping possession of the deeds: *Colyer* v. *Finch*, 5 H. of L. 905; *Bowen* v. *Evans*, 1 Jo. & Lat. 178; *Allen* v. *Knight*, 5 Hare, 272; *Carter* v. *Carter*, 3 K. & J. 617. [His Honour offered to direct an inquiry as to the circumstances under which the lease got into the hands of Smith, but the offer was declined.]

James, V. C.—I am of opinion, Mr. Schomberg, that you are entitled to your decree. It is admitted on both sides that at the time of the second mortgage the lease had by some means found its way into the hands of the mortgagor. Jones, the first mortgagee, is dead, and can therefore give no account of it, but the mortgagor is alive, and has been produced as a witness on the part of the representatives of the deceased mortgagee, and has not been asked to give an account of this occurrence. What we have, then, is that after the deeds got into the possession of the mortgagor, the property which was also in his possession was made the subject of an apparently legal mortgage. Now I am of opinion that, in the absence of any reason why the deed was not given up to the mortgagor, but was allowed to remain so many years in his possession, the Court must presume that the deed was given back for the purpose of representing to the world that he was absolutely entitled to the property. Hence the case is governed by the principle of *Perry-Herrick* v. *Attwood*. The burden of proof lay on the first mortgagee to explain the strong act of giving up the deed, and no explanation is forthcoming. The plaintiffs in the second suit are therefore entitled to a declaration that their mortgage is entitled to priority.

As to the question, whether the Statute of Limitations applied, his Honour was of opinion that the payment by Smith to the legal creditor of Jones was, in fact, payment to Jones, and that he must assume the payment to have been made as part of an arrangement for that purpose; but he wished it to be understood that he decided the case on the broad ground that by reason of the unexplained delivery back of the deed, the plaintiff was entitled to priority. The plaintiffs in the second suit were allowed to add the costs to their debt; but as the trustee who had offered to disclaim had been improperly interrogated, his costs, from the time of his offer to disclaim, were to be paid by them personally.

Ross v. Tatham.

Breach of covenant—Administration suit—Liability of executors.

Executors applied in an administration suit to have a sum set aside to indemnify them against a breach of covenant in a lease, committed by the testator, the lessee.

The lessor had taken no action on the covenant, and had not come in under the administration decree.

Held, that the executors were exonerated by the administration decree from liability, and that their application must be refused. [V. C. M., 17 W. R. 960.]

This was a petition by residuary legatees for payment out of court of the residue.

The testator in the cause was lessee of certain property under a lease for ninety-nine years from Christmas, 1860. In the lease was contained a covenant to build within twelve months from the date of the lease a factory of certain specified dimensions, at a cost of not less than £1,800.

The testator died in 1864, without having erected the factory; a bill for the administration of his estate was filed, and a decree for administration made.

No action had been taken by the lessor in respect of the breach of covenant, nor had he come in under the decree.

Owen, in support of the petition.

Wickens, for the executors, contended that a sum of money sufficient to indemnify them against any liability in respect of the breach of covenant should be retained in court for that purpose. Lord St. Leonards' Act, 22 & 23 Vic., c. 35 does not relieve executors from liability in such a case as this. The covenants referred to in section 27 are only ordinary and usual covenants, and do not apply to an extraordinary covenant which to the knowledge of the executors has been broken: Morgan, p. 280. If the executors had been dealing with the estate out of court it would have been their duty to have set aside a fund to answer this liability. The Court will now direct them to do the same.

Osborne Morgan, *Q. C.*, *amicus curiæ*. cited *Thomas* v. *Griffith*, 9 W. R. 293, 2 DeG. F. & J. 555.

Owen, in reply, referred to *Bennett* v. *Lytton*, 2 J. & H. 155. *Williams* v. *Headland*, 12 W. R. 367, 4 Giff. 495.

Romer, for the widow entitled to a life interest

Nalder, for the plaintiff in the cause, supported the petition.

Malins, V. C., after mentioning the facts, decided that the lessor was a creditor of the testator for unliquidated damages in respect of the breach of covenant, and as such, ought to have

brought in his claim under the administration suit. As he had not done so, he had lost his remedy against the executors, and must follow the assets. A contrary decision would give rise to the greatest inconvenience, and in this case the argument went to the extent of asking the Court to retain the money till the determination of the lease. His Honour could not accede to the application of the executors, who were, in his opinion, exonerated from liability; and, resting on the authority of *Bennett* v. *Lytton* and *Williams* v. *Headland*, made the order as prayed.

Black v. Jobling.

Wills Act (1 Vict. c. 20, s. 26)—Will and Codicil not found at death—Presumed to be revoked—Probate granted of subsequent Codicil.

A. died having made a will and codicil, neither of which on his death was found. But a second codicil duly executed was found. It recited that the testator had already bequeathed to his grandchildren everything upon or relating to a certain farm. The question was whether that second codicil could be admitted to probate, or whether it fell with the will.

Held, that as this codicil had not been revoked by any of the modes indicated by the Wills Act (1 Vict. c. 20, s. 26) as the only means by which a codicil can now be revoked, it was entitled to probate.

[17 W. R. 1108].

The testator, Ebenezer Black, late of Grindon, in the County of Northumberland, died on 8th of May, 1868.

He made a will in February, 1865, and added a codicil in October, 1866. The codicil gave an annuity of £100 instead of a bequest of fifty shares in the West Hartlepool Dock and Railway Company which he had given in the will to his daughter Ann Jobling, and directed his trustees to dispose of his interest in his farm in Tenham-hill, together with the farming stock, &c., and to hold the proceeds arising therefrom in trust for the five children of his daughter Ann Jobling. Subsequently, by a deed of gift dated May 27, 1867, he "gave and devised" the same farm of Tenham-hill to his daughter and her children.

On the 19th of October in the same year he executed another codicil as follows:—

"I Ebenezer Black farmer Grindon in the parish of Norham in the County of Northumberland having already bequeathed to my five grandchildren issue of my daughter Ann Jobling to wit Mary Thomas Jane William and Ann Jobling the lease stock and profits with everything upon or relating to the farm of Tenham-hill they paying all rents taxes and whatever charges may come against the said farm of Tenham-hill in addition to which I now bequeath to each of the above-named children of my daughter Ann the sum of £300 sterling money when they attain the age of twenty-one years out of my capital to be paid to them individually by my executors."

This was duly attested.

The will of 1865 and the codicil of 1866 were in the testator's possession, but at his death they could not be found The defendant, as a legatee named therein, propounded the paper of 19th October, 1867, and the plaintiffs pleaded that it was not executed according to the statute 1 Vic. c. 26; that if well executed, it was executed as a second codicil to his last will and codicil; and that he destroyed them with an intention to revoke them and also the said alleged codicil.

The case was heard before Lord Penzance on May 29.

Dr. Deane, Q. C., and *Pritchard*, appeared for the plaintiff; and *A. Staveley Hill*, Q. C. and *Tristram, Dr.*, for the defendant.

J. H. Mitchell proved that the testator called at his house to ask him to draw a codicil to his will; that he did so, and that it was duly attested; and that the testator said that his capital was increasing, and that he had £1,100 he wished to leave to his daughter's family, and that he had already given them a farm and the stock upon it.

June 29.—Lord Penzance, after reciting the facts of the case, said:—The general proposition relied on against the codicil was that a codicil stood or fell with the will; that, no doubt, was a general proposition which was obtained in the Prerogative Court. I took the trouble to ascertain what under the old law were the exceptions, although the result of the case does not appear to me to be very satisfactory.

The earliest case is that of *Barrow* v. *Barrow*, 2 Lee. 335. There a testator made a will and a codicil, the whole effect of the codicil being to give the residue of his property to his wife. He afterwards burned the will, saying it was useless. The Court there held that it was clear that the codicil was not destroyed by the burning the will, but was a substantive instrument. The codicil gave the residue, and no one could say what that was, without having read the will, which disposed of the other portion of the property, but the Court, nevertheless, so held.

The next is the case of *Medlycott* v. *Assheton*, 2 Add. 231, which was decided in 1824. There the will was made in April, 1820, and in December, 1820, the testatrix wrote a codicil giving £100 each to the two trustees named in her will, and dividing some trinkets among her friends. In 1824 she looked over the papers in her writing-desk, several of which she burned, and a few days afterwards wrote to her attorney desiring him to destroy her will. The Court held that it was altogether a question of intention, and that the legal presumption that the codicil fell with the will might be rebutted by showing that the testatrix intended the codicil to operate notwithstanding the revocation of the will, and as the circumstances were not sufficient to establish such an intention, the codicil was held invalid.

The next was the case of *Tagart* v. *Hooper*, 1 Curt. 289, decided in 1836. The paper was found in the writing-desk of the deceased, and it commenced thus: "This is a codicil to my last will and to be taken as a part thereof." The Court, in pronouncing for the paper, said that in all cases where the codicil had been considered void by the destruction of the will there were circumstances which showed that the codicil was dependent on the will.

In the other cases it was laid down that the codicil was revoked where the will was revoked; but in this case it was held that where the codicil was so revoked there were circumstances which showed it to be dependent on the will.

These are all the cases on the point before the passing of the statute, and certainly the result is not satisfactory.

The consideration of these cases leaves upon the mind no very definite idea of what is meant by "dependent on the will." In one sense, any

codicil that makes any disposition of property at all, must be considered to be dependent on the will which disposes of the rest, for the codicil conveys only a part of the testator's intention regarding his property, and the motives inducing that particular part of his intention cannot with any certainty be dissevered from the motives which induced the disposition of the rest.

It is difficult, if not impossible, to predicate of a particular bequest in a codicil that the testator would have made it if he had disposed of his other property in any different manner than that expressed by his will. It may be that the independence of the will spoken of must be something of a more limited character. And the meaning of the cases may be that a codicil is independent of the will unless it is of such a character that the giving validity and effect to it without the will to which it was intended to be attached would produce some manifest absurdity. I am not sure that even this rule is capable of being easily applied to all the cases that might arise, and I have serious doubts whether such a rule is to be gathered from the cases with sufficient distinctness to justify the Court in adopting it. But all these cases occurred before the Wills Act. Now the section of that Act is most distinct and positive in its terms. "No will or codicil," &c. And I should have had no hesitation in holding that the intention of that section was to do away with all implied revocations and relieve the subject from the doubt and indistinctness in which the cases had involved it. But there have been two cases decided since the Act. The first of these, *In the Goods of Halliwell*, 4 Notes of Cases, 400. The codicil was dated September 5th, 1845, and commenced thus:—"This is a codicil to the will of me R. H. and which I desire to be added to my will," and it related solely to account between himself and his partners, containing no bequest or appointment. The testator died on the 7th of September, 1846, and he expressly declared shortly before the making of the codicil that he had made a will and that it was then in existence. In that case, the Court said that, supposing it all to have been destroyed, the codicil would, upon the general principle, fall with it, but held that there was an exception in favour of the paper, inasmuch as it seemed to have been made for a particular purpose, and admitted to proof. Then comes the case of *Clogstown* v. *Walcott*, 5 Notes of Cases, 623, in which the will was made in 1840, the codicil in 1842. In April, 1846, he destroyed it all, and in so doing so expressed anxiety about the codicils observing this better. It would not affect the codicils with it. In that case for the first time the Wills Act was cited, and the way the learned judge referred to it was as follows:—"Under the old law the effect of destroying a will was by presumption to defeat the operation of the codicil to that will, but by the present law there must be an intention to destroy. Here, however, the deceased did not mean to destroy the codicils, but on the contrary he expected at the time and declared afterwards that the parties mentioned in the codicils would have the benefit of the legacies he had given them. I am of opinion that the Court is bound to pronounce for the solidity of the two codicils, and I decree probate of them to the brother who is executor according to the tenor on the first codicil." Since this last was established a case occurred, *Grimwood* v. *Cozens*, 2 Sw. & T. s. 64, which was heard in 1860, and in that case Sir C. Cresswell said, "I think it has been established by the cases cited at the bar that previous to the passing of 1 Vict. c. 26, a codicil was *primâ facie* dependent on the will, and that the destruction of the latter was an implied revocation of the former, and moreover that Sir H. J. Fust was of opinion that no alteration of this principle was made by the passing of the statute. The question there is entirely one of the intention of the deceased. When a will and codicil have been in existence and the will is afterwards revoked it must be shown by the party applying for probate of the codicil alone that it was intended by the deceased that it should operate separately from the will, otherwise it will be presumed that, as the will is destroyed, the codicil also is revoked." In that case the learned judge seems to have taken it for granted that there was no alteration in the principle, and to have decided the case as if it was under the old law.

Now in reviewing these decisions I cannot perceive that the effect of the statute has been fully considered by the Court. Sir C. Cresswell seems to have thought that it had been decided that the statute made no difference, and passed it by as being so. And Sir H. J. Fust discussed the point without any meaning whatever, merely approving that the statute had made it necessary that there should be an affirmative intention to revoke; but the statute says nothing of the kind, and unless it makes an actual revocation necessary it does not interfere with the existing law at all. In this unsatisfactory state of things I think I shall do best in such a case as the present by adhering to the statute, and by holding that as this codicil has never been revoked in any of the modes indicated by the statute as the only modes by which a codicil is to be revoked, it remains in full force and effect and is entitled to probate.

CORRESPONDENCE.

Master and Servants Act—Jurisdiction of Magistrates.

To the Editors of the Local Courts' Gazette.

Gentlemen,—The authority vested in a Justice of the Peace under the Master and Servant Act (Con. Stat. U. C. cap. 75, sec. 12), appears to be very differently interpreted, and therefore, you will, no doubt, confer a favour upon Magistrates in general by giving your valued and esteemed interpretation of the same.

"1. Any one or more Justices of the Peace may summon a master or employer to appear before him or them *at a reasonable time*, to be stated in the summons," &c.

Now what is understood by *a reasonable time?*

The writer of this letter has seen such a summons issued on a certain day, requiring the appearance of the master on that same day

at 3 p.m., and another summons which required appearance on the next following day on which the summons was issued; and when objection was made to the exceedingly short notice, he was answered that from morning, 9 o'clock (the time summons was served), till afternoon, 3 o'clock, was a reasonable time.

"2. And upon *due proof* of the cause of complaint the Justice or Justices may discharge such labourer or servant from the service or employment of such master, and may direct the payment to him of any wages found to be due, not exceeding the sum of forty dollars."

Pray, what is meant by *due proof?*

In a certain suit of that nature, the complaint was for non-payment of wages. The wages amounted to a large sum, but by numerous payments had been reduced to a trifle below $40. The complainant appeared with an attorney, the defendant did not appear personally but by his attorney. The Justice of the Peace allowed the complainant to swear to the contract, the amount of wages, the amount of monies received on account thereof, and balance due; and ruled that this was sufficient evidence of the claims sought to be recovered, though the complainant's evidence was objected to by the defendant's attorney, who expressed his views to the effect that the rules observed in the Division Courts and Superior Courts should also guide Justices of the Peace, who should therefore require further and other evidence in claims over eight dollars, than that of the complainant or plaintiff, though the act above cited is silent on that subject.

"3. And may direct the payment to him (the servant or labourer), of any wages found to be due, not exceeding the snm of *forty dollars.*"

May a Justice of the Peace adjudicate upon any unsettled account for wages whatever the amount may be, provided the *balance obtained does not exceed forty dollars?*

Some cases have been brought before a single Justice of the Peace, when the account of wages charged was for a long period, amounting to a large sum, but by a great number of credits had been received to less than $40.

If this is the meaning of the above cited Act, a Justice of the Peace has greater jurisdiction in matters of contract, than a Division Court Judge, or even the County Court; for the wages may amount to $1000, and if only the payments received amount to $960, the Justice of the Peace will be authorized to adjudicate upon the case.

Had the Act (29 Vic. cap. 33) which amends the Master and Servant Act, also embraced a definition on the above questions, it would, no doubt, have tended to a more uniform mode of procedure. Respectfully yours,

OTTO KLOTZ.

Preston, 6th Nov. 1869.

[We are glad to hear again from our old friend, Mr. Klotz. We cannot in this issue do more than merely publish his letter. Perhaps some of our correspondents would like to discuss the points raised, if so we will find room for them.—EDS. L. C. G.]

Division Courts—Duty of Clerks as to affixing Stamps.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

SIRS, —I find that some Division Court Clerks do not put on the stamps for hearing and order, in entering judgment on specially endorsed summonses. As an old and steady supporter of your Journal, I hope to obtain ynor opinion as to what is the proper practice.

Yours, A. B.

[There can be no question that the stamps for hearing and order should in all cases be put on and cancelled when the judgment is entered by the Clerk. The judgment entered without such stamps would not be good, and the clerk would be liable for penalties under the Act. The Board of County Judges in illustrating the way in which a bill of costs should be made out, took as an example a case "upon special summons *to judgment entered*," and under "Fee Fund" the hearing and order are shown. (See Form 14.)

By the new rule the judgment entered must be exhibited to the judge to enable him to see that the proper stamps are put on; and any clerk failing in his duty herein would certainly come to grief at the hands of the judge, even if he escaped the penalties under the Act.—EDS. L. C. G.]

REVIEWS.

THE REAL PROPERTY STATUTES OF ONTARIO, WITH REMARKS AND CASES. By Alexander Leith, of Toronto, Barrister-at-Law: Henry Rowsell, King Street, Toronto, 1869.—Vol. I.

If any professional man in good practice in Ontario were asked what new books he would like to see within his easy reach, he would probably say a collection of the Real Pro-

perty Statutes with notes and cases (if possible from the pen of such a reliable authority as Mr. Leith), a consolidated digest of the Upper Canada reports, bringing the cases down to the present time, and a new edition of Harrison's Common Law Procedure Act.

In all these, we are likely soon to be gratified. Mr. Leith's first volume has been published; the digest is well on its way to completion, and three parts of the Common Law Procedure Act have been printed.

If we remember correctly, Lord Bacon says, in some of his writings, that every man is a debtor to his profession, and if debtors, we should try to pay our debts, not certainly all by writing books—that would be as improbable as it would be appalling—but in such ways as tastes and circumstances may direct. That Mr. Leith has gone far towards paying *his* debt, we have all reason to testify.

It is eminently proper that those who are specially learned in any particular branch of the laws, should give the public the benefit of their research, labour, or talent. This is particularly the case where, as in this country, from local differences in legislation, the many admirable text books of the old country fail to guide us. We should, therefore, always welcome, and, as far as in us lies, encourage all that appertains to Canadian legal literature. Let it not be imagined that, as a matter of money, law books in Canada "pay;" copying at three cents a folio would earn more money, nor does it even "pay" in the way that writers in England make capital out of their works; all the more credit then, say we, to those who have sufficient courage and patience to devote their spare time and energies to an attempt, however feeble it may be, to add to the general stock of knowledge, or to save the time and labour of their fellow workers. But we are beginning to wander from the subject in hand.

Mr. Leith commences this his first volume with the recent act to amend the law of property and trusts in Upper Canada. To the various sections are appended notes, explanatory of the defects sought to be remedied, a critical examination of the result, and as to whether the desired objects have been attained, and the present state of the law as affected by the provisions of the act.

The statutes relating to the transfer of real property next engage his attention, and the short and simple, but comprehensive explanations of the various clauses will be of great use to students, whilst many of the observations on Con. Stat., U. C., cap. 90, and the statutes which in the natural order of things follow it, the acts respecting short forms of conveyances, and short forms of leases, expose many mistakes which conveyancers have fallen into, and give valuable hints for future guidance. Our readers have already had the benefit of Mr. Leith's observations on the statutes respecting short forms of conveyances, as also the chapter in a subsequent part of the work on memorials as evidence.

The statutes governing the descent of freehold estates of inheritance come next, and are introduced by some observations on the common law rules of descent, thus enabling the reader better to appreciate the changes that have been made.

We have next the statutes respecting dower and the rights and conveyances of married women. As the learned author remarks in the preface:—

"The chapter on descent, and part of the chapter on dower are taken, with many alterations, from the work of the author on the commentaries of Blackstone adapted to the law of Upper Canada; a course justified by the alterations made, and the probability that that work will shortly be out of print."

There are some very valuable notes to the sections of the different acts which refer to the power of married women to acquire and dispose of their separate property, a subject always of much difficulty, and not by any means made clearer by the recent attempt to give married women greater rights and privileges.

Next comes a short chapter on wills, and then the numerous statutes to make sale of and give title to real estates under writs of execution.

The next chapter is devoted to mortgages. In speaking of the late Act of 32 Vic., cap. 9, intended to "give certainty to the right of married women jointly with their husbands, to execute certificates of discharge of mortgage," he points out some of the difficulties which he thinks a statute, extended as an enabling statute are likely to lead to, thus:—

"Since the statute consolidated by Con. Stat. ch. 73, there can be but few cases wherein, when a married woman is entitled to mortgage moneys, she is not so entitled to her separate use under that statute. As far as the author is aware, it has not been usual in practice, on obtaining from

a married woman a certificate of discharge of mortgage, to require compliance with Con. Stat. ch. 85: and neither where the woman is entitled to the moneys to her separate use, nor even in the few and exceptional cases wherein she is not, would such compliance appear to have been requisite. Under Con. Stat. ch. 73, she is to 'have, hold and enjoy,' free from the control and disposition of her husband as fully as if unmarried. She would be competent to receive, and give a receipt, as a *feme sole*, for her moneys, and the form of discharge given by the Registry Act is but a receipt in writing, though the Act gives it when registered, and not till then, the effect of a reconveyance. The receipt then works a reconveyance by operation of law, by force of the Registry Act; in itself it does not profess to convey. If the view of the author be correct, then the Act has considerably encroached on the rights given to a married woman by Con. Stat. ch. 73, and practically placed the obtaining of her mortgage moneys under the control of her husband."

We commend to the notice of solicitors engaged in the investment of money the remarks on fire insurance in connection with mortgages, also those with reference to powers of sale in mortgages. The statutory power can scarcely be said to be as perfect as it might be. It is a great pity that a provision which has been found of so much practical benefit, should be open even to the criticisms to which it is here subjected. Powers of sale are more and more used every day, and whether or not the form in the act respecting short forms of mortgages is defective (and it certainly is so in some respects), we cannot now well do without some provision of the kind. Probably the legislature may at an early day remedy the defects for the future, and possibly, where it can be done without injustice, confirm proceedings *bona fide* had under it heretofore.

The last chapter treats of memorials as evidence, already spoken of, and with which many are already familiar, through the pages of this *Journal*. It is a masterly article; the author's treatment of the subject having more than once been referred to from the Bench in the most complimentary manner.

The volume concludes with an appendix, giving in full the important cases of *Finlayson* v. *Mills*, 11 Grant 218, on the law of merger, and *Moore* v. *Bank of British North America*, 15 Grant, 308, as to constructive notice under the Registry Act, &c., also the letter of H. Bellenden Ker, Esq., addressed to the Lord Chancellor in 1845, on the Imperial Act of 7 and 8 Vic., cap. 75, "for simplifying the transfer of property," a valuable adjunct in thoroughly appreciating our statute as to the transfer of real property, which, by the way, was mainly taken from the Imperial Stat., 8 and 9 Vic., cap. 106, framed by Mr. Ker.

Such is a short and necessarily imperfect sketch of Mr. Leith's first volume. What we here have only gives us a taste for more. The reputation of Mr. Leith as a real property lawyer is so well established, that the mere fact of his having written the book before us with his usual care and caution, is, one would imagine, sufficient to command a large and ready sale. But further than this, as we are all interested (selfishly, it must be admitted,) in the success of this volume now in print, we sincerely hope that he will receive sufficient encouragement to induce him to continue his labours, by completing the important work he has undertaken. *We* have now endeavoured, poorly though it may be, to do *our* share, let others do theirs, and not allow the talent we have in our midst, whether it be that of the author of this volume, or that of any other deserving author, lie dormant from want of this material assistance and encouragement, which, though they expect and ask it not, is theirs of right, and necessary to its full development.

THE ALBION, 39, Park Row, New York.

We gladly welcome week by week this "journal of literature, art, politics, finance and news." It seems to have taken a new lease of life, coming out with all the vigor of its palmiest days, and that is saying a good deal.

Judging from the following notice to subscribers, which appeared in it some short time since, we presume there is some fear on the part of those "Will-o'-the-wisp" personages of entrusting their precious mites to the tender mercies of post office authorities, thus:—"Subscribers in the United States and the Dominion are informed that they may remit money with perfect safety, and at the risk of this office, by registered letter, thus saving the trouble and expense of other methods of remittance." We commend this notice to our readers also, and can assure them that so far as we are concerned they need have no delicacy in making use of the post office in the same way for our benefit and at our risk.