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DIARY FOR NOVEMBER.

1 Saturday .. Articles, &c., to be left with Secretary Law Society
4 SUNDAY .. *22nd Sunday after Trinity*
5 Monday .. Recorder's Court begins
6 Tuesday .. Chan. Ex. Term Goderich and Cornwall, commences.
10 Saturday .. Last day for notice of Hearing, Chancery.
11 SUNDAY .. *23rd Sunday after Trinity*
14 Wednesday .. Last day for service of Writ in County Court.
18 SUNDAY .. *24th Sunday after Trinity*
19 Monday .... MICHAELMAS Term begins. Chancery Hearing Term begins
23 Friday ..... Paper Day, Q. B.
24 Saturday .. Paper Day, C. P. Last day for decision County Court.
25 SUNDAY .. *25th Sunday after Trinity*
26 Monday .. .. Paper Day, Q. B.
27 Tuesday .. Paper Day, C. P.
28 Wednesday .. Paper Day, Q. B.
29 Thursday .. 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 & Archaph, 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.

NOVEMBER, 1860.

NOTICE TO SUBSCRIBERS.

As some Subscribers do not yet understand our new method of addressing the "Law Journal," we take this opportunity of giving an explanation.

The object of the system is to inform each individual Subscriber of the amount due by him to us to the end of the CURRENT *year of publication.*

This object is effected by printing on the wrapper of each number— 1. *The name of the Subscriber* 2. *The amount in arrear.* 3. *The current year to the end of which the computation is made*

Thus "*John Smith* $5 '60." *This signifies that, at the end of the year* 1860, *John Smith will be indebted to us in the sum of* $5, *for the current volume.*

So "*Henry Tompkins* $25 '60" *By this is signified that, at the end of the year* 1860, *Henry Tompkins will be indebted to us in the sum of* $25, *for* 5 *volumes of the "Law Journal."*

Many persons take $5 '60 *to mean* 5 *dollars and* 60 *cents. This is a mistake. The* "60" *has reference to the year, and not to the amount represented as due*

COUNTY COURTS—JURISDICTION IN EJECTMENT.

The act of last session chapter 43, conferring jurisdiction on the County Courts in actions of ejectment opens a new and extensive branch of business to the country practitioners

Injuries may be so small as not to bear litigation in the Superior Courts, and persons usually submit to sacrifices of some kind to avoid it, or are tempted to take the matter into their own hands and carve out a relief which the law does not sanction—just such a class of cases will be covered by the recent enactment, and landlords will be able to obtain speedy and cheap redress at, so to speak, their own doors.

Every measure furthering a remedy of this kind, while it benefits the public, is a gain to the local practitioner by opening a new source of business.

Imagine the owner of a small house worth, say two dollars per month, bringing an action of ejectment in the Court of Queen's Bench or Common Pleas against a tenant in default or overholding—why the thing would be absurd, and any respectable practitioner would if consulted say to the landlord, "far better for you to give ten or twenty dollars to get possession of your property, than bring an action and probably have to pay your own costs amounting to more than that sum," or some doubtful *expedient* might be suggested as "*worth risking*" under the circumstances.

While the act will enable the County Courts to take cognizance of the most trifling cases, the jurisdiction is yet more extensive than might on a cursory consideration be supposed.

We purpose examining some of the leading features in the law, and take the liberty of remarking that it is a reform which has been long and warmly advocated by the Editors of this Journal, and like other subjects to which we from time to time directed public attention, has been adopted and carried into law by the Legislature.

The law owes its paternity to the Hon. Mr. Patton. It is a carefully drawn act and has the great merit of being free from a mass of words.* The consolidation of the statute law of Upper Canada would not have been a full practical benefit unless it afforded a model likely to be followed in the construction of acts of Parliament; and we notice with pleasure that several acts of last session, including the one before us, are evidently framed after the model of the consolidation

The act deals only with the action of ejectment, and its object is to enlarge the jurisdiction of the County Courts so as to embrace it. It is to be read with "the County Courts Act"—as if its provisions had been incorporated therewith—both are to form as it were one act. Thus section one of the act before us would come in conveniently and might be read as sub-section five of sec. 17 of the County Courts Act, sections 3, 4, 6 and 7 of this act following in their order—section 339 of the Common Law Procedure Act being slightly altered so as to bring in the matter of sec. 5.

The action of ejectment is a mixed action to recover possession of land together with damages and costs. It is *real* in respect to the land—*personal* in respect to the damages and costs. But there is no general jurisdiction in ejectment; it is only in certain cases and subject to certain circumstances that it lies in the County Courts Being purely statutable all the requisites of the statute which

* Mr. Patton has certainly improved his style in this particular since his act respecting attorneys, which was *not* a model of brevity.

creates the jurisdiction must be observed. We give the clause:—

Sec. 1. The several County Courts in Upper Canada shall have jurisdiction and hold plea in actions of ejectment for the recovery of corporeal hereditaments (where the yearly value of the premises, or the rent payable in respect thereof, does not exceed two hundred dollars) in the following cases, namely:—

1. Where the term and interest of the tenant of any such corporeal hereditaments shall have expired, or been determined by the landlord or the tenant by a legal notice to quit.

2. Where the rent of any such corporeal hereditament shall be sixty days in arrear, and the landlord shall have right by law to re-enter for non-payment thereof.

"For the recovery of *corporeal hereditaments.*"

If a thing is capable of being inherited it is an heriditament—it is no less an heriditament because the party has a leasehold interest in it. *Baddeley* v. *Denton*, 4 Exch 508. Hereditament is a general term for every description of property. *Harris* v. *Davison*, 15 Sim. 134 Whatever may be inherited is an hereditament, be it corporeal or incorporeal, real, personal, or mixed. Co. Litt, 6 A. "*Corporeal* hereditament" as used in this clause, we take it, will include anything on which entry can be made or of which the Sheriff can give possession, but not anything on which entry cannot be made or of which the Sheriff cannot deliver possession under a writ of execution. Ejectment would not lie at Common Law for incorporeal hereditaments as for advowsons, common in gross, or other things which pass only by grant. The action of ejectment is maintainable in the County Courts, we assume for all kinds of corporeal hereditaments.

A general limit to the action is found in the words, "where the yearly value of the premises, or the rent payable in respect thereof, does not exceed two hundred dollars."

It will be observed that it is *either* the yearly *value or* "the *rent*," the words are in the alternative, and if either do not exceed the limit—two hundred dollars—ejectment for the premises, it is presumed, will lie in the County Courts. Several cases on this point have been decided in England, under the enactment 9 & 10 Vic, ch 95, sec. 122, which is in terms nearly identical with ours. It gives jurisdiction for the recovery of tenements "where the value of the premises, or the rent payable in respect to such tenancy, did not exceed the sum of £50 by the year, and upon which no fine shall have been paid," &c.

The first case in point on this enactment is, *Fearon* v. *Norvall*, 1 Co. Court Cases 171. It was an application to the Bail Court for an order for a prohibition upon the following facts. A judgment had been pronounced in favor of the landlord, directing possession of the premises to be given. Several months after the judgment the landlord, treating it as a nullity, commenced another action and again recovered judgment, and the prohibition was moved for on—first, the ground of the prior judgment existing unreversed, and secondly, that as the value of the premises (though not the rent) exceeded £50 there was no jurisdiction. In respect to this last point Patteson, J., expressed himself upon the argument as follows: "There is no pretence for saying that where the rent does not exceed £50 per annum, and there is no fine—it is not within the section even though the value may be a thousand pounds. I am quite clear upon this point." Reserving the other point in giving judgment, after taking time to consider, his lordship said: "I disposed of the second objection upon the argument being clearly of opinion that if the rent did not exceed £50 it was immaterial how great might be the value of the premises

Crowley v. *Vitty*, 1 Co. Court cases, 528. In this case there was an agreement in writing to take certain premises at £1 per week. Subsequently the rent was reduced by a verbal arrangement to a sum under £50 per year, but the yearly *value* was shown to be over £50 so that there was clearly no jurisdiction unless the rent was under £50. The Court held that the verbal arrangement did not discharge the written agreement and that the original demise stood. Baron Alderson, in the course of argument in the case referred to the point of which we are speaking, thus: "What do you say to a case of this sort—suppose a man takes a piece of land, pays £25 a-year ground rent, and builds a house on it worth £500 a-year—do you mean to say the owner of the land could in such a case go to the County Court under this section to turn out his tenant?"

The suggestion thrown out by Alderson, B., that to give jurisdiction, neither the rent nor the yearly value must exceed £50 was laid hold of but held to be unsound in *Earl of Harrington* v. *Ramsay*, which is the leading case on the point. This case was first determined in the Court of Common Pleas, on motion for rule for prohibition, 2 Co. Court cases, 154 At the trial before the County Court Judge it appeared that the rent of the premises in question was £41 per annum, but that their value exceeded £50 per annum, and it was thereupon contended that the judge had no power to proceed if either the annual rent or the value exceeded £50. The learned judge of the County Court however ruled adversely and judgment was given for the plaintiff against which the defendant appealed.

Upon the argument Bramwell for the prohibition, referred to the language used by Alderson, B, in *Crowley* v. *Vitty*. The learned judge is reported to have said, with reference to the rent forming the criterion: "That cannot be so always. Suppose a man take a piece of land and pays £25 a-year ground rent, and he builds a house on it worth £800 a year, could the owner of the land go to the County Court under

this section?" Pollock, B., in delivering judgment said, "We proposed to have the case of *Lord Harrington* v. *Ramsay* re-argued, but on consideration we think we cannot read "or" for "and." We have since looked at the act, and the clear grammatical construction is strictly in accordance with what we have decided, but we are satisfied that if the attention of the Legislature had been called to the point, the clause would have been differently framed so as to exclude the jurisdiction of the County Court in such a case. But we, sitting here as we do to construe the acts of the Legislature as we find them, cannot change "or" into "and," or turn an affirmative negative into a negative affirmative, so as to make the law what the Legislature may have meant, but did not express."

Whatever the value of the argument raised, that the jurisdiction was of such a nature that it never could have been intended to confer it upon the small debt courts where the matter is determined by the judge in the summary way provided for in the act—it would not apply to our enactment which confers upon the County Courts a jurisdiction in ejectment with like powers and procedure as in the Superior Courts, and giving the right to appeal.

The case of *Earl of Harrington* v. *Ramsay*, was again moved in the Court of Queen's Bench, (2 C Court cases 136) and another rule obtained on the same grounds as in the Court of Exchequer. The court took time to consider, and Campbell, C. J., after stating that Erle, J., who was absent, had seen the judgment of him (Lord Campbell) and concurred in it, proceeded as follows, "I am of opinion that the Court of Exchequer has put a right construction on the 9 & 10 Vic, ch. 95, sec 122. The object of that section was to give to landlords a summary remedy against tenants holding over "when the value of the premises or the rent payable in respect of the tenancy does not exceed £50 by the year Where the annual value did exceed £50, but the annual rent fell short of that sum; and the defendant contends that the County Court has no jurisdiction. It is said that these are alternative conditions, and that if either the rent or the value exceeds £50 by the year, the County Court has no jurisdiction It must be confessed that there is some carelessness in the wording of this clause, leaving it apparently open to the objection now relied on; but there is nothing so absolute in the language as to justify the court in straining it against what appears to be its general intention I think the effect of the section is as if the Legislature had expressly enacted that on either condition existing the court should have jurisdiction It would be a serious inconvenience if the tenant could contend that the premises were worth more than their real value when the rent was fixed and ascertained The Legislature I think, did not intend that, but only that value should be considered when no rent had been fixed The case of *Crowley* v. *Vitty*, is not an authority against this view, and *Re Pearon* v. *Norcall*, which is opposed to that case is more directly in point. I therefore think that the County Court Judge has jurisdiction in this case, and that this rule should be discharged."

In view of these cases on an analogous enactment it seems safe to conclude that if the rent reserved, whether on a building lease or otherwise, and whatever the length of the term, does not exceed £50 per annum, the County Courts can claim jurisdiction, whatever may be the actual yearly value of the premises

(To be continued)

EVIDENCE IN CRIMINAL CASES.

In the mother country, at the present time, there is a strong inclination to amend the law of Evidence in criminal matters, so as in the first place to allow husband and wife to give evidence for or against each other, and in the second place to allow a person accused of crime to give evidence on his own behalf.

The apparent necessity for one, if not both of these amendments, has been forcibly suggested by the extraordinary circumstances attending the trial and conviction of the Rev. Mr Hatch, and the subsequent trial and conviction of his accusers on the charge of perjury.

Judging from the result of this singular case, it is reasonable to suppose, if either the accused himself or his wife had been allowed to give evidence when the accused was on his trial, that there would have been no necessity for the legal farce of two convictions entirely opposed to each other, followed by two sentences of which the one was wholly inconsistent with the other.

In the subsequent proceedings for perjury against the witnesses on the first prosecution, the accused was allowed to do indirectly, that which the law would not allow directly, viz., to give evidence on his own behalf; and this, it is argued, has as well a tendency to bring the administration of the law into contempt, as to impoverish and perhaps ruin innocent persons, when charged with crimes, the very name of which would cause innocence to recoil with abhorrence

This is the line of argument adopted by the writer of an article headed "Law of Evidence in matters Criminal," first published in the *Scottish Law Journal*, and republished by us in this number of the *Upper Canada Law Journal*. We must say that, as applied to the particular case we have mentioned, there is much cogency in the argument; but at the same time, we must not lose sight of the fact that laws are not made for particular cases, but for all cases; and the true criterion is, to determine whether the balance of mischief, as the law now stands, outweighs

its long-settled advantages in a public point of view. That there are such advantages, we presume the most sanguine law-reformer will not deny. So far as husband and wife are concerned, in a social point of view, it is an advantage that no cause of family dissension should be produced by the giving of evidence, either for or against each other, in matters civil or criminal; and so far as persons accused of crime are concerned, it is an advantage that public morality should not suffer by the sight of men endeavoring to save their lives or their reputations by the commission of deliberate perjury. If a false oath would prevent the conviction of a murderer or a highway robber, we venture to affirm that few such would find their way to the gallows or the penetentiary. It may be replied, that the statement of the accused, if untrue, would be exposed, and its want of truth made manifest by cross-examination or surrounding testimony from other sources. This is possible; but what we hesitate to endorse is, temptation to perjury, in cases where the inducement would be so strong as to be almost irresistible. We think that the man who would take the life of his fellow-man—destroy the chastity of his neighbour's wife or daughter—set fire to his neighbour's buildings—rob his neighbour's house—steal his neighbour's property, would not hesitate, in the hope of escape, to add perjury to his other crimes, and so swell the calendar of crime.

While making these remarks, we have no desire to do more than to present the arguments both for and against the proposed amendments, as they present themselves to our mind. We are quite open to conviction; and if wrong in any view that we have ventured to express, we shall be only too happy to be set right. We are no sticklers for things as they are—if improvement can be shown to us to be both expedient and practicable. But we cannot help thinking that amendments of the nature proposed should be approached with much caution, and that more than one case like that of Mr Hatch should be adduced as a motive for amendments of a character so general, so sweeping, and so comprehensive

HORSE RAILROADS.

Sometimes we have the pleasure of reading, in cotemporary law periodicals of the United States, judgments of great learning, characterized by great reason, and couched in clear and appropriate language.

On no occasion do we remember to have read a judgment more deserving the above description than that of Chief Justice Shaw (reported elsewhere), in the case of *The Commonwealth* v. *Ira Temple*, and for which we are indebted to our valued cotemporary the *Monthly Law Reporter*, of Boston.

The ability with which the very able Judge whose name we have mentioned, applied the principles of the common law to the case then before him, is deserving of sincere admiration. The judgment will be of great weight wherever known, and wherever the law of England prevails. It is of value, not merely because of its bearing on the rights of proprietors of horse railways, but because of its clear enunciation of the principles which regulate the use of public highways, as between different individuals, whose interests, from selfish or other such motives, may clash.

We learn by our exchanges that Chief Justice Shaw, after having served his State for more than thirty years as its highest judicial officer, has retired with the well-wishes of all who knew him either by reputation or had the good fortune to make his personal acquaintance. The occasion of his retirement was one of mingled pain and pleasure; pain, that the State was about to lose the services of so bright an ornament, and pleasure, that after so useful and enviable a career, the distinguished citizen was able to retire into that privacy which was most congenial to his tastes, his habits, and his years.

Massachusetts is one of the few states of the Union that has not yielded to the seductive yet blighting influences of an elective judiciary. Long may she remain firm to the great principles of a thoroughly independent judiciary—independent, not only of those in authority, but of the fickle populace, who generally, in a mass, are as incapable of pronouncing on the qualifications of a Judge, as of giving disinterested and discerning support to a pure-minded candidate for any high station in the commonwealth.

ELECTIVE JUDICIARY

Judge Edmunds, of New York, has written a letter declining the nomination that has been tendered him for the position of Recorder for New York We take this opportunity of making a few extracts from the letter as a most telling commentary upon elective judiciary:—

"I am aware how much good I could do in the office, but it would take time to place the court in the condition which I should aim to give it, and I am persuaded that that time would not be afforded me. My tenure of office would be only three years. While on the bench I should, of course, be withdrawn from political action, and could not resort to the usual means to secure my continuance in it; while on the other hand, ambitious aspirants for the position would be restrained by no such consideration, and would easily oust me long before I could give any permanency to the character I should aim to give to my court.

"It is owing to this cause, doubtless, that since our adoption of the practice of judicial election, not a single justice of the Supreme Court has been re-elected in this city; out of fourteen justices of the Superior Court only four have been re-elected, and a recorder—never.

"I could expect no exemption in my case from this seemingly inevitable fate of the judiciary in this city, and I must

calculate on being removed long before attaining the end, the prospect of which alone could induce me to take the office.

"Besides, the shortness of the term would continually subject me to the imputation of shaping my decisions in reference to a re-election. I experienced this at the close of my judicial career, and I had abundant cause to know that I was thereby shorn of my independence, and my usefulness was impaired. I felt this so keenly, that I then resolved never to undergo it again.

"I have already been made aware of the anxiety there is in many to have me take the place, and in coming to a determination on the subject, I have endeavoured to avoid all selfish considerations. I have, therefore, dwelt but little, even in my own mind, on the pecuniary sacrifice it would be to me, or on the disturbance that would ensue to a business that I have been fortunate enough to build up around me, and which supplies me with all I want, yet leaves me in full freedom to act on all occasions according to my conceptions of what is best; and have been governed by considerations which I owe it to the convention frankly to mention, even at the hazard of being misunderstood.

"When I spoke of the good I could do as a motive for accepting the place, I had in my mind the cases, so frequent in our criminal courts, of innocence unjustly accused and often struck down because unfriended and unprotected; and I could easily imagine the gratification that would flow from being able to guard it in its hour of peril. But until I saw there was a possibility of being inducted into the office, I did not far enough see the whole ground, and to become aware that in much the greater number of instances it would be my duty to condemn, rather than relieve. It would be painful to me thus to sit in judgment on my fellow-men, and to condemn when I would far rather pity and forgive, and endeavour to reform.

"When I now recall my past judicial carreer, where the administration of criminal justice was of rare, and not, as it would be here, of constant occurrence, I find that the most vivid feeling I have is the painful recollection of the many cases in which I was called upon to condemn and punish the erring."

PRIVILEGES OF MEMBERS OF PARLIAMENT.

We publish in this number the report of *Henderson* v. *Dickson*—a decision which was pronounced in the Court of Queen's Bench during last term, and is of much general importance. In it the Court held that a member of the Legislative Council is not privileged from the obligation of any ordinary judgment debtor to attend and be examined as to his property; and that if he refuse to do so, and be committed by an order in the common form for a given period within the discretion of the Court or a Judge, he cannot afterwards succeed in an application to be discharged on the ground that he is a member of Parliament.

LAW OF EVIDENCE IN MATTERS CRIMINAL.

(From the "Scottish Law Journal.")

In no department of public affairs has the ameliorating influence of advancing civilisation been, of late, more conspicuous than in what is generally described as the Law of Evidence—more strictly speaking, the rules affecting admissibility of witnesses in judicial investigations. Confining our observations to Scotland; the time is not far distant when, to modern eyes, the grounds of exclusion were such, and so various, that it seems almost incomprehensible how judicial business could be conducted at all. A very brief retrospect will suffice to explain our meaning.

First of all, we had the exclusion of witnesses on account of supposed "want of integrity," which was ascertained by a "conviction," under the verdict of a jury, of such crimes as forgery, coining, theft, and robbery. Formerly, an objection arising from such a conviction was "indelible," or removable only by royal pardon or statute—no length of time or amount of punishment could efface the stain. This objection was modified, some thirty years ago, and has recently been entirely removed. It proceeded upon the fallacy that evidence-bearing was some sort of franchise or privilege, on the part of the witness, in place of being, what it truly is, a duty or obligation in which third parties have a *jus quæsitum*, which ought not to be defeated by any misconduct on the part of the individual who happens to be the depository of the necessary knowledge. The credit to be given to such evidence is another matter altogether. Then, in very ancient times, *women* were altogether rejected in civil causes. As text writers say—"Our Courts of "Law proceeded to relax the harshness of more ancient de- "cisions, first allowing them to be received as necessary wit- "nesses, in cases of a domestic nature, or where other evidence "could not, from the nature of the case, be obtained;" and, in process of time, females have come to be competent witnesses, in all causes, both civil and criminal. But, the old prejudice still lingers so far as to render it, at least, very doubtful whether a woman, no matter what may be her character, education, or social position, can be an instrumentary witness, to the execution of any deed, however trifling, even where no other witness can be found. So much for the gentler sex. With regard to the lords of the creation, it was at one time held, that a man who happened to be "extremely poor"—which was defined as not being worth £10 Scots—could not be received as a witness at all. Servants of the parties to a cause were also excluded, on account of the supposed influence exercised over them by their masters; and so with yearly tenants, as regarded their landlords. Magistrates of burghs, burghesses, rate-payers in a parish, as regarded any question affecting the community—in short, all having any *interest*, however small, were in like manner deemed unworthy of credit. Pupils—that is boys under 14, and girls under 12 years of age—were declared unfit to give evidence in civil causes, "as not being supposed to have sufficient understanding accurately to apprehend and remember facts;" whereas, every one accustomed to judicial proceedings, now recognises, as a notorious fact, that youths, from 10 to 14, are the most truthful, perspicuous, and satisfactory of all witnesses, as to what they may have seen and heard. Then, there came the category of "relations," including father, mother, brother, sister, son, and daughter, either by consanguinity or affinity: uncle, aunt, nephew, and niece, by consanguinity—it being pointed out as worthy of special congratulation, that "the exclusion does not extend to uncle or nephew, aunt or niece *by affinity*." (See *Tait's Law of Evidence*; Voce Disqualification of witnesses from relationship.)

As if all this were not enough, we had another general element of exclusion described as "agency and partial counsel." Under this flexible phrase, advocates and agents engaged in a cause, clerks who might have heard, or written, or read, part of the pleadings; any person who had introduced a client to an agent, or chanced to be present at a consultation, or been kind enough to tender a litigant some friendly advice; any one who might have heard another precognosced, or been stupid enough to remain in court during part of a trial—all these were excluded. And finally, we had the "ultroneous" witness the man who was simple enough to save expense to the parties, by appearing for examination, without being compelled by a summons; and the witness who might have been spoken to after citation.

With all these disqualifications, deliberately recognised and acted upon, the wonder is that the wheels of justice were not entirely stopped. What lawyer, who has practised for, say, 20 years past, can fail to remember with a lively sense of the ridiculous, the stereotyped "examinations in *initialibus*"—the depositions taken to "*lie in retentis*"—the constantly recurring judgments upon technical questions, more nice and delicate even than those involved in the merits of a cause—the admission of witnesses, "*cum nota*," as it was termed—and, occasionally the absolute forfeiture of just rights arising out of this state of the "Law of Evidence?" To the younger members of the profession such things must be merely matter of tradition. But we assure them we have actually known an initial examination, with the view of disqualifying a witness extend over many hours, and cover scores of pages of *foolscap*—most appropriate name for paper devoted to such a service? We have, during a jury trial, and when it became desirable to make some inquiry of a witness in attendance, been formally warned by counsel to take the precaution of getting the messenger to withdraw the citation already given, and cite the witness anew, after the conversation! And we have known a jury trial suddenly brought to a close, and an important claim absolutely lost, in consequence of the circumstance transpiring that an incautious or inexperienced clerk had allowed the pursuer's witnesses to be present while he was taking their respective precognitions.

Such was the condition of the law of evidence not many years ago. Great changes have recently taken place; so much so that, as regard civil causes, the revolution is almost complete.

First, there was an Act of Parliament, (3 & 4 Vic., cap. 59) declaring that the presence of a witness during any part of a trial should not form a ground of disqualification, where it did not appear that this had occurred from any improper motive. Next came the Statute 15 Vic., cap. 27, by which, among other things, it was enacted—"That no person adduced "as a witness in Scotland, before any Court, shall be excluded "from giving evidence by reason of having been convicted of, "or having suffered punishment for *crime*, or by reason of "*agency* or of *partial counsel*, or by reason of having appeared "*without citation*, or by reason of having been *precognosced* subsequently to the date of *citation*." This was, however, qualified by the proviso that, "any person who shall, at the "time when he is so adduced, be *acting as agent* in the action "in which he was so adduced," should not be admissible. The same statute declared that a person who was merely a *nominal* party in a cause, without any "substantial interest," in the result, should be competent as a witness. Then followed the Statute 16 Vic., cap. 24, repealing the exclusion of an acting agent, and enacting that "it shall be competent to adduce, and examine as a witness, in any action or proceeding "in Scotland, any *party* to such action, or the *husband* or *wife* "of any party, whether he or she shall be individually named "on the record or not." This enactment, on the principle of the greater including the lesser, necessarily swept away all objections on account of relationship, or otherwise. If the hostile parties themselves were to give evidence, there was an end to all remaining objections—unless, in so far as any such were specially saved by the statute.

This course of legislation was avowedly rested upon the ground, that the true principle applicable to all testimony is, not to exclude altogether parties who may be liable to objection but to deal with such objection as affecting their credibility. In short, the public mind had gradually been brought to entertain the important proposition—that the object of all judicial investigation is, by every available means, to *arrive at the truth*. The corollary followed, that it was absurd to shut out attainable light for the sake of mere technicality To our couched eyes, the premises and conclusion seem equally self-evident: but, in matters like this, mankind are slow to learn, and we must not wonder at the reluctance with which such changes as we have pointed out are admitted.

Bold and comprehensive, however, as was the step last taken, it halted even with regard to *civil* causes. Under the old law, with all its narrow limitations and technicalities, our fathers had found that there were circumstances in which these must of necessity be relaxed; and consequently, in spite of the general rule absolutely excluding all interested witnesses, and especially parties themselves, there was a class of cases in which a pursuer was admitted to give evidence. We refer to cases of filiation, where, after certain grounds of presumption were established, the mother of a bastard child was admitted to prove the paternity. This exception to the general rule of law was obviously suggested by the *necessarily occult nature* of the inquiry. At, present both pursuer and defender are allowed to give evidence, in the first instance in all such cases. But, singularly enough, while the Legislature, at the suggestion of the Scottish law authorities, was relaxing the rules of evidence with such boldness otherwise, there was introduced into the statute this remarkable qualification, "That nothing "herein contained shall apply to any action, suit or proceeding, "in Scotland, in consequence of adultery, or for dissolving any "marriage, or for breach of promise of marriage, or any action "of declarator of marriage, putting to silence, legitimacy, or "bastardy, or in any action of adherence or separation." Our fathers considered the occult nature of an inquiry to be a good reason for relaxing the common law rule; we are so inconsistent as to make the very same element a ground for tightening the ordinary rule. With regard to this department of law, we must undoubtedly follow our English neighbours, at an early day. But, meantime, the *actual* anomaly shows the slow progress of correct views in such matters.

Our article is headed "The Law of Evidence in Matters "riminal," and it is really to this we wish to call present attention. Our readers will, however, easily see how the general review we have thus taken bears upon our special subject, when we direct attention to the important proviso contained in the last mentioned statute, regarding criminal causes. The statute appears to throw the door wide open in the first instance; but goes on to provide that "nothing herein contained "shall render any person, or the *husband* or *wife* of any person, "who, in any criminal proceeding, is charged with the commission of any indictable offence, or any offence punishable "on summary conviction, *competent* to give evidence for himself or herself, his wife, or her husband." The law of England is, we believe, alike in this respect. Now, dealing with this statute as it stands, we might put the question, If a party, or the wife or husband of a party, may safely and properly be trusted to give evidence in a civil suit, involving in its issue—affluence or beggary, the loss of character and reputation, or justification from some foul slander, is there any reason why they should not be allowed to open their mouths with regard to an alleged "offence," the punishment for which may be of a comparatively trivial nature—a pecuniary penalty, perhaps, of a few pounds? But, while we put this question bearing upon the minor offences covered by the statute, we go farther, and boldly put the general question, Is, there any maintainable reason why the principle applied in *civil*, should not be applied in criminal, investigations—and those even of the gravest character? We have again and again put this question to ourselves, and after the most deliberate consideration, we must answer in the negative. If, when engaged in a civil cause, involving the most serious consequences, the true principle be, to find out the truth by every available means, and therefore to admit any person as a witness who can give evidence, reserving to judge of the credibility of that evidence according to the whole circumstances, we can see no reason why the same thing should not be done in a criminal inquiry. Indeed, if there be any room for a distinction, this must be in favour of criminal causes. Because, in the first place, with

regard to contracts, and other grounds for pecuniary claims, there is generally room for preconcerted proof, whereas anything of the kind must be absent in matters criminal; and, in the second place, because all crimes must, from the nature of things, be more or less occult.

Laying aside for a moment, the evidence of an accused party himself, it may, and often does happen, that a husband or wife is the person possessed of the most direct and important knowledge as to the subject of inquiry. In such circumstances, why should the husband or wife be excluded from giving evidence? All that can be said is, that he or she must be necessarily biassed in favour of the accused. No doubt this is true, and would weigh with judge and jury in dealing with the evidence given. But, the Legislature, supported by public opinion, having solemnly declared that bias, or interest, should not absolutely exclude a witness, in one set of causes; it lies with those who would make a distinction to show a foundation, in principle, for such a distinction. That the present state of the law produces monstrous results has recently been demonstrated by a remarkable case in England.

The Rev. Mr. Hatch was a married man, of previously irreproachable character. He wished to eke out his income by taking some young people into his family, for board and tuition. Two girls named Plummer became inmates of the house, and almost immediately after they united in accusing Mr. Hatch of criminal conduct towards them. In the evidence of the girls it was alleged that the prisoner's indecent conduct occurred, more or less, in the presence of his wife. Here, then, was one means of testing the truth of the whole story. But, according to rule, Mrs. Hatch could not be allowed to give evidence; and so her husband was found guilty, and subjected to a severe and ignominious sentence. Husband and wife were ruined for life. But the law of England permitted a counter charge of perjury to be made against the Misses Plummer. In the trial that followed, Mr. Hatch and his wife were competent witnesses, and upon their evidence the elder of the two girls was found guilty. Mr. Hatch has, of course, been pardoned, notwithstanding the verdict of the jury finding him guilty, but who will restore him and his wife to their station in society—who can cure the wounds under which they have already suffered?

We are not sure that any remedy would have been available in Scotland. But, taking this case as it stands, no one can fail to see that Mr. Hatch was ultimately acquitted of the crime charged against him *by means of his wife's evidence, and his own.* And, such being the case, was it not monstrous that that evidence could not be made available at the original trial? Notwithstanding the pardon by the Crown, there at present stands upon the records of the Court two verdicts of a jury, one finding Mr. Hatch guilty, the other finding him not guilty. In the same way there stands on the records of the Court two sentences, one awarding severe punishment for a crime, resting on the evidence of his accusers, and the other inflicting punishment upon one of these accusers, on account of that very evidence. Such are the consequences that always result from any serious departure from sound principle.

After the case of Plummer and Hatch, the law excluding the evidence of a wife and husband cannot possibly stand. But we contend that the change must go farther. Even accused parties themselves must be allowed to give evidence, if so disposed. Why should it be otherwise? One man is *accused* of a crime. Another who has been *convicted* of a more serious crime, it may be, is allowed to give evidence against him; but he is not allowed to open his mouth as a witness on oath, although the law and common sense combine in saying he must be considered innocent until found guilty. Is not this an anomaly? It may be that the question is one, substantially, between the accused and the witness, as in the case of Mr. Hatch, and in many cases of assault. If the law or the administrators of the law, have so far given the one an advantage over the other, as to make him the accuser and witness, why should this shut the mouth of the accused? Why must their technical positions be reversed, by some *hocus pocus*, as in the case of Hatch, before a full investigation can be made. Apropos of this, we may remind our readers of the case of Francis Paterson, which lately caused so much interest in Glasgow. Paterson, a gentleman of hitherto unimpeached reputation, was accused of an indecent assault upon a married woman. At the trial, his accuser, and some accomplices, gave evidence upon which he ran the imminent risk of being convicted, and thereby ruined. He of course was not admissible as a witness; but providentially, some third parties were found to give evidence that led to an acquittal. The tables being turned, Mr. Paterson, gave evidence, in the Court of Justiciary, upon which, chiefly his accusers were convicted of the crimes of conspiracy and perjury, the punishment for which they are now undergoing. Would it not have been most desirable that Mr. Paterson should have been deliberately examined, and given his version of the occurrences, under the original trial?

This leads us to conclude with a remark or two upon the relative system of "Judicial Declarations" taken from persons accused of crimes, in Scotland.

Such declarations must be taken for one or other of two purposes. They are intended, either for the purpose of enabling the public prosecutor to form some opinion as to the probable guilt of the accused, and to trace other necessary evidence; or, for the purpose of being used as proof at the trial. In so far as the former purpose is concerned, we confidently affirm that such declarations should remain in the private repositories of the Lord Advocate or Fiscal; and, as regards the second purpose, we with equal confidence maintain that they are a relic of barbarism which should be at once swept into oblivion. The fundamental principle of our trial by Jury is, that the evidence upon which a verdict is to proceed must be exhibited in open court, subject to the tests of publicity and cross-examination. But how does a "prisoner's declaration" come within such a principle? In place of being made publicly, it is extracted from him in the privacy of the Fiscal's office. Instead of being the result of examination, in any proper sense, the prisoner has not the benefit of the presence, or advice of a local agent, much less of counsel.

That declaration, or so much of it as the Fiscal chooses to write down, being once subscribed by the magistrate, and by the prisoner, if he can write, is produced and read by the Clerk of Court, without the slightest opportunity of explanation or elucidation. It may be a distorted or partial edition of the truth, requiring such explanation to make it tell in favour of the prisoner's innocence. It may be a mere tissue of falsehood, calculated to create doubts and difficulties. In either case, an open examination, with reference to the other elements of the trial, would probably clear away all mystery. But no; it is read, and whether it goes, improperly, to prejudice an innocent man, or to mystify a jury, nothing more can be said. Now, we venture to say this is inconsistent with the principles of our jurisprudence. If a man is to be judged by his own evidence, that evidence should be given fully, openly, and with reference to the whole proof upon which he is sought to be inculpated, and not obtained privately, inquisitorially, and partially.

At first sight, some may think that, to allow a person accused to give evidence on his own behalf, would afford him an undue advantage. But we feel quite confident it would not be so. No guilty person will ever succeed, under the test of open cross-examination, in concealing the real facts of a case. The opportunity can only be available to the innocent.

It may also be argued that such a state of the law would open the door to the commission of perjury. And no doubt cases of this kind would occur, as they do in civil causes, where the parties themselves give evidence. But, the object being to reconcile fair-play towards accused persons, with the attain

ment of truth, we put it to our professional brethren, whether the amended law, as regards civil trials, has not, upon the whole, largely tended to the discovery of the real state of facts; and, if this be so, we see no reason to doubt that the same result would follow in criminal causes. The innocent might show their innocence. The guilty would avoid examination altogether; or, they would give evidence to their own condemnation.

To us this appears to be a subject worthy of the serious consideration of the profession. We cannot flatter ourselves that, in these brief remarks, we have done it justice, but trust that what we have said may lead to some fuller and more conclusive discussion.

INSANITY IN CRIMINAL PROCEEDINGS.

(From the "Jurist.")

The unsatisfactory state of the practice respecting the subject of insanity in criminal proceedings is again forced upon our attention by the recent trial of William Godfrey Youngman for murder, and also by a statute passed in the session of Parliament which has just expired, the 23 & 24 Vic., c. 75.

Youngman was indicted for the murder of his mother; and there were three other indictments against him, for having at the same time murdered his two infant brothers, and a young woman to whom he was engaged to be married. Having been convicted and executed on the first of these indictments, the others were not tried. The defence set up by the accused was, that on the occasion in question his mother had, unprovoked, attacked and killed the three other persons, and then attacked himself, with the view of killing him also; whereupon he killed her in his own defence—a story improbable in itself, and inconsistent with the facts in evidence. In support of this defence, a medical witness deposed, on cross-examination, that a person might labour under insanity so as to be excused from responsibility, although his reasoning powers were not in the least affected. This is reproducing a question respecting which a contest has long been going on between the law of the land and a portion of the medical profession. From the earliest time the law of this country—and we believe that of every other also—has held that insanity consists in the presence of *delusion* in the mind, which prevents the unhappy object of it seeing and understanding things as they really are; and if, under the influence of such delusion, he does an act which in a man of sound mind would be criminal, he stands excused from responsibility, on grounds alike of humanity and policy. But since the great development of the valuable science of medical jurisprudence in modern times, many medical jurists, and some very eminent persons who have devoted themselves to the study of mental disease and the treatment of the insane, profess to have discovered that there is a species of insanity where no delusion of any kind exists, but the moral character of the patient is revolutionised, and he is hurried to the commission of crimes, of the guilt of which he is perfectly aware, by what they call "irresistible impulse." To this form some of them have given the name of "moral insanity," and some have even subdivided it into species—as the mania to commit homicide, arson, theft, &c. The law has, however, always sternly refused to acknowledge the existence of this species of insanity; although there is every reason to believe, that in certain cases, owing to the weakness of judges and jurymen, defences founded on it have been allowed to prevail to the defeat of justice. For our own part we have no belief in its existence; but at least we may safely venture to affirm that it is *not proved*; and it is needless to observe, that the onus of proving the existence of so singular a phenomenon lies on those who assert it.

This is not, as is often hastily assumed, a peculiarly medical question—it is a metaphysical or psychological one, on which legislators and tribunals are as well, if not better, capable of judging than physicians. Is man a responsible agent at all? This is clearly a metaphysical question; and so must be the branch of it. Is man a responsible agent so long as he retains his reason? Add to which, the common sense of men in every age has indorsed the judgment of their laws, that so long as reason is on her throne responsibility exists. If, indeed, the whole medical profession had in all times held a contrary opinion, it would be a matter deserving of grave attention, although even this could hardly be allowed to outweigh the established opinion and practice of the human race. But the theory of which we are speaking is not held by medical men in general—it is a theory started in modern times, and confined to a particular school. We should strongly advise every person anxious of studying the subject to read attentively the cases on which the dogma is founded; most of them will be found collected in Beck. Med. Juris. 436, 477, 7th ed., and Tayl. Med. Juris. 791 et seq.; see also p. 787, 3rd ed.; and we venture to say they fall far short of establishing it. In many of them the aberration of reason is plain enough; and in the rest, although there is ample evidence of preternatural impulse to crime, we find no ground for the hypothesis of irresistible impulse. Indeed, the whole doctrine seems based on the fallacy of confounding *preternatural* (we do not say *supernatural*) with *irresistable* impulse. A man may feel a sudden preternatural impulse to crime, but it is his bounden duty to resist that impulse; and when this kind of defence was once urged to a certain learned judge, he sarcastically said, "Laws were made to compel men to resist these irresistible impulses." If a man feels, what many persons have been known to feel, an impulse to throw himself down when standing on the brink of a precipice, it is his duty to conquer that feeling if possible; and if not, to take the remedy which common sense dictates—not to go near precipices: and if a man feels an impulse to commit a crime, it is his duty to conquer that feeling; and if he cannot, or thinks he cannot, then to avoid all occasions which might lead him into the temptation.

When we recollect how often the defence of insanity is resorted to with success—sometimes when it is well founded, but very frequently when it is not—it becomes of importance to consider the legal consequences of such a defence. Until the 39 & 40 Geo. III., c. 94, the prisoner was acquited simpliciter, and let loose upon society to repeat, if so inclined, the mischief he had already done. By that statute, when a person is acquited on the ground of insanity, the Court is directed to detain him until the pleasure of the Sovereign is known; and, according to the practice, he was placed in some lunatic asylum, where such lunatics are kept apart from others. But by the statute just passed, 23 & 24 Vict., c. 75, the Crown is empowered to appoint asylums for criminal lunatics, and the Secretary of State may direct criminal lunatics to be confined in them, (sects. 1 and 2); he may also (sect. 4) appoint any *persons*, not less than three in number, to be a council of supervision for any asylum under that act, and also appoint a resident medical superintendent, &c. The 7th section contains the following proviso:—"Provided always, that any order for removal or discharge, which may now be made by the Secretary of State on the certificate of two physicians or surgeons, may be made on the certificate of the resident medical superintendent of the asylum and any two of the council of supervision." The 9th section then enacts, "that it shall be lawful for the Secretary of State, by his warrant, to permit any person confined in the asylum to be absent from such asylum upon trial for such period as he may think fit, or to permit any such person to be absent from such asylum upon such conditions in all respects as to the Secretary of State shall seem fit; and in case any person so permitted to be absent upon trial for any period do not return at the expiration of such period, or in case any of the conditions on which any person is so permited to be absent be broken, the person not returning at such expiration, or absent after any such conditions have been broken,

as the case may be, may be retaken as herein provided, as in the case of an escape." Whether the large discretion left to the Executive by this statute, and the facilities which it affords for getting rid of confinement in the asylums which it has created, are consistent with the safety of society against the acts of real or pretended lunatics, especially if moral insanity is to be recognised as a defence to a criminal charge, is a question on which our readers may judge for themselves, but which time alone can effectually determine.

DIVISION COURTS.

TO CORRESPONDENTS.

All communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie P. O."

All other communications are as hitherto to be "To the Editors of the Law Journal, Toronto."

CORRESPONDENCE.

To the Editors of the Law Journal.

GENTLEMEN,—I desire to inform our readers of the extent of my experience in the law of Replevin in the Division Courts. Having had one suit, I give you the result. The plaintiff placed two affidavits in my hands (marked No. 1 and No. 2), which I enclose. These had been prepared by a legal adviser, and, on the strength of the 6th clause of number one and the 2nd section of the act, I issued a writ of replevin. I did this, as from the distance to the place of residence of the Judge, and having only a tri-weekly mail, a delay of nearly a week would occur in waiting his order. However, I sent him both affidavits by first mail, and informed him what I had done. Meantime, the plaintiff seemed to relent, and withdrew his action, so that I have nothing further to report in the case. Subsequently, the Judge sent me the draft of a bond, which I enclose, marked No. 3, for publication, if you should deem it desirable.

Your Correspondent, in the September number, seems to think the occurrences of the Clerks being required to issue writs of replevin without a Judge's order will be very rare, but I incline to the opinion that these cases will be more frequent than the opposite. In withdrawing suit the plaintiff demanded the affidavits, but I declined giving them up in the meantime, being of opinion that as a suit had been entered and a writ issued, the affidavits properly belonged to the Court. Is this view correct?

Yours,

Oct. 22, 1860. A CLERK.

[Papers, after being filed by the Clerk, should not be given up or allowed out of his possession without an order of the Judge.—EDS. L. J.]

No. 1.

COUNTY OF ——, } In the —— Division Court, County of
To Wit. } ——.

I, J. S —— of the Township of —— in the County of ——, farmer, make oath and say:

(1) That I am the lawful owner of a certain heifer, now in the possession of one H —— K ——, of the Township of ——, farmer and shoemaker.

(2) That the said heifer was wrongfully taken out of my possession about six weeks ago.

(3) That the said heifer is of the value of ten dollars, or thereabouts.

(4) That the said heifer is coming two years of age, is red on the sides, white on the back and belly, mixed grey about the head, mixed white and red up each side of the hip, white hind legs from the hocks downwards, and of a common breed.

(5) That I am advised and believe that I am entitled to an order for a writ of replevin to replevy the said heifer to me.

(6) That I believe there is good reason to apprehend that unless the said writ of replevin is issued without waiting for an order, the delay will materially prejudice my just rights in respect of the said heifer.

(Signed) J. L——.

Sworn, &c.

No. 2.

In the Division Court of the County of ——.

COUNTY OF ——, } I, J. S ——, of the Township of ——,
To Wit. } in the County of ——, farmer, make oath and say:

(1) That I am the lawful owner of a certain heifer, which appeared to have strayed away or been taken from my possession about six weeks ago.

(2) That on making search for the said heifer, I found that she had been unlawfully taken out of my possession by one H —— K ——, farmer and shoemaker, of the said township of ——, within two calendar months from the date hereof.

(3) That the said heifer is wrongfully detained in his possession by the said H —— K ——, who positively refuses to return her to me.

(4) That the said heifer is of the value of ten dollars, or thereabouts.

(5) That the said heifer is coming two years of age, &c. &c.

(Signed) J. S.

Sworn

No. 3.

Know all men by these Presents, that we, A. B., of &c., W. B., of &c., and J. S., of &c., are jointly and severally held and bound to W. P., of, &c., Bailiff of the —— Division Court, in the County of ——, in the sum of ——— of lawful money, to be paid to the said Bailiff, or his certain Attorney, Executors, Administrators or Assigns, for which payment to be well and truly made we bind ourselves, and each and every of us in the whole one and each, and every of our heirs, executors and administrators, firmly by these presents, sealed with our seals. Dated this —— day of —— A. D. 186—.

The Condition of this Obligation is such, that if the above bounden A. B. do prosecute his suit with effect, and without delay against C. D. for the taking and unjustly detaining (or unjustly detaining, as the case may be) of his cattle, goods and chattels, to wit: (here set forth the property distrained, taken or detained) and do make a return of the said property, if a return thereof shall be adjudged, and also do pay such damages as the said C. D. shall sustain by the issuing of the writ of replevin, if the said A. B. fails to recover judgment in the suit; and further, do observe, keep and perform, all rules and orders made by the Court in the suit; then this obligation shall be void, or else remain in full force and effect.

Signed, sealed and delivered,	A. B.	[L.S.]
in presence of	W. G.	[L.S.]
(1 or 2 Witnesses).	J. S.	[L.S.]

To the Editors of the Law Journal.

Dunnville, Sept 17th, 1860.

GENTLEMEN,—I wish to ascertain your opinion on the following questions:—

1st. Has not the Clerk authority to sell perishable articles seized on an attachment, whether requested by plaintiff or not? See last part of 213th section of Division Court Act authorizing this officer to sell at his discretion.

2nd. If the Clerk cannot sell unless requested by the plaintiff, is it compulsory upon him to take a bond before doing so, or may he not sell without this bond at his discretion?

3rd. If Clerk is bound to have plaintiffs request, or to take bond before selling, is it obligatory upon him to provide horse, cattle, &c., under seizure, with provender at his own expense,

so long as the same remain in his possession under the warrant? If so, this is an outlay which in many cases the Clerk would probably never have repaid him.

4th. Would it not be well that the 214 section of the present Division Court Act, ch. 19, be amended to the effect that the Clerk *should not* be obliged to "*receive*" *the perishable* property, &c., unless bonds were first given either to the Bailiff *on seizure*, or to the Clerk afterwards?

JOHN ARMOUR,
Clerk of Division Court.

[1st. This is rather a doubtful point, but we incline to think that the request of the plaintiff is necessary. The portion of the section which says that the Clerk may sell at his discretion, taken in connexion with what has gone before, would seem to mean that the Clerk may use his discretion in selling or not, but the correct reading of the section is, we think, that the Clerk may, "*at his discretion*," sell the articles on a shorter notice than eight days—that is if the articles are perishable and will not admit of being kept until the expiration of the usual notice of eight days, they may be sold on such shorter notice as the Clerk in his discretion may consider advisable to be given. The length of time to be, of course, regulated by the exigency of each particular case.

2nd. The statute expressly provides that the Bailiff need not seize, or the Clerk take charge of the property for which a writ of attachment has issued, unless a satisfactory bond is given by the attaching creditor. If either of these officers neglect to obtain this bond or to see that it is given, we apprehend it will be at his own risk. The bailiff who seizes should, in the first instance, where the goods are perishable, demand and obtain a bond from the plaintiff, but if he neglects to do so, the Clerk might, we think, certainly refuse to receive them until this proper precaution is adopted for the safety of both.

3rd. The Clerk is allowed "all necessary disbursements" for keeping the property, which, of course, he would deduct from the proceeds of the sale, if the plaintiff succeeded in in making good his claim, or be secured him by plaintiff's bond if he failed.

4th. We agree with our correspondent so far as in thinking that it would be well to have the question settled beyond a doubt by legislative enactment.—EDS. L. J.]

(*See letter of* "B.," *under* "*General Correspondence*," *placed there by mistake.*)

U. C. REPORTS.

QUEEN'S BENCH.

TRINITY TERM, 1860.

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

HENDERSON v. DICKSON

Consolidated Statutes U. C., cap. 24, sec. 41—Examination of judgment debtor—Member of Legislative Council—Privilege

Held, that a member of the Legislative Council of this Province, is not privileged from attending to be examined as to his property, &c., and that in the event of non attendance where he is, under the act committed for a period of time, he is not entitled to be discharged from custody.

Contra where the order for committal besides directing imprisonment for a specified term orders that defendant upon payment of the judgment debt within the period specified for committal shall be released from custody.

Mr. Harman obtained in this term a rule on the plaintiff's attorney to shew cause why an order granted in Chambers by Mr Justice Richards, ordering the defendant to be committed to the close custody of the sheriff of the County of Lincoln, for one week, for not submitting to be examined pursuant to the Judge's order and appointment, made in this cause and served on the defendant, and that such sheriff do arrest and detain the defendant for such period, be rescinded on the ground of the defendant's privilege as a member of the Legislative Council.

On 9th May, 1860, a Judge's order was made in this action, depending in this Court for the examination of the defendant before the Judge of the County Court of the County of Lincoln, upon which an appointment was made by the Judge of the County Court to attend before him on the 25th May, in Niagara.

The defendant being duly notified of this order and appointment declined attending, stating that he was advised by counsel that he need not do so.

The defendant on shewing cause against the rule *nisi*, put in Letters Patent dated 8th February, 1855, summoning him to the Legislative Council of Canada, and an affidavit of the defendant was filed in answer to the rule, in which it was stated that he has been a member of the Legislative Council since 8th February, 1855, on which day he was appointed by patent.

That he has always since acted and still acts as a member of the Legislative Council, that the Provincial Parliament was prorogued on 19th May, 1860.

That he did not intend to treat the order of this Court with contempt, *and informed the Judge of the County Court that he* declined attending on the ground that he was a member of the Legislative Council, and that he acted as he was advised by his counsel.

Mr. Burns showed cause.

ROBINSON, C. J.—After the many instances in which the Courts in this country have recognised the right of members of the Provincial Parliament to claim privilege from arrest for debt, most of which were referred to in *The Queen* v. *Gamble and Boulton*, 9 *U. C. Q. B. 545*, we *shall* assume *the right to exist. There were* indeed some earlier instances of a judicial recognition of the privilege; these are cited in the report of that case.

But admitting the privilege and that the defendant in this cause was entitled to it as a member of the Legislative Council, which was at the time in actual session, it only follows that if the defendant had been arrested and committed to custody in violation of that privilege, he could apply for a writ of *habeas corpus* and obtain his discharge. The order granted for his examination was an ordinary step in the practice of the Court according to the Common Law Procedure Act and was properly made, for the Judge may have had no judicial knowledge of the fact of the defendant being a member of the Legislative Council and if he had, it would have been no reason against the making the order for examination since he could not know that it would be complied with, in which case no question about privilege would arise. But the order to attend and be examined not having been complied with, a Judge's order has been made on the fact being shewn, that the defendant be committed to close custody for a week for not having submitted to the order.

And we are asked to rescind that order as having been illegally made in disregard of the defendant's privilege. The order for commitment made in such cases under the 41st section of ch. 24 of the Consolidated Statutes of Upper Canada, is such an order as has been determined in England to be in effect a qualified limited execution against the debtor, rather than a commitment for contempt of Court in not obeying the order. In Dakin's case 16 C. B. 77, that point was settled by the Court of Common Pleas in England *after full discussion*.

It was then held in consequence that in a case like the present, where a defendant was imprisoned for a certain time by order of a judge of the County Court for disobeying an order of that Court to attend and be examined as a judgment debtor—he was entitled to his discharge being a person privileged from arrest for debt, and the Court therefore discharged him upon a writ *habeas corpus*, as they would have done if he had been in custody on a *Ca. Sa.* in the same suit. We have therefore only to consider whether there is ground for any difference between the laws which regulate imprisonment for debt in England, and our laws which should lead to a different conclusion—and that depends, I think on the question whether if the defendant being committed under the order was to pay the debt and costs in full within the week, he would be entitled to his discharge. If he would, then upon the principles which governed the Court in Dakin's case, this order should be considered as nothing more than a writ of execution, a process for coercion of the defendant to pay the debt and not a commitment by way of punishment for a contempt of the court which made *the order, that is of this court.*

And the question would then be whether the Court should abstain from interfering till the party has been arrested, and then

order his discharge, or whether they should rescind the order, on the ground that it was illegal to direct a defendant to be imprisoned in execution for debt (regarding the order in that light on the authority of *Dakin's* case) who was entitled to privilege from such arrest.

In general, I think the course has been not to move against the *Ca. Sa.* when privilege is claimed, but to apply for discharge of the party from custody, limiting the application to that as if the *Ca. Sa.* were not irregular, but only the arrest under it. In the case for instance of *Winter* v. *Dibdin*, 13 M. & W. 25, that was the course—but in *Cassidy* v. *Stewart*, (a member of the House of Commons) 9 Dowl. P. C. 366, the Court after discussing upon the particular point which I am now considering set aside the *Ca. Sa.* "There was no doubt (they said) that the arrest of a member of Parliament during the period of privilege is illegal, and that the question is whether if the arrest is illegal it is lawful for the plaintiff in a suit to sue out process directing the sheriff to take the person of a member of Parliament in execution."

It appeared to them (they said) that the thing ordered to be done being illegal, the order to do the act must itself also be illegal, and that the defendant should not be put in the situation of having an order issued against him, which if the sheriff executes, must put him to the trouble and expense of obtaining redress against that which is an illegal fact.

I feel that our way is clear in disposing of this application when we have determined the point whether in these courts as in England a defendant committed under such an order as is now moved against, would be entitled to his discharge from custody on satisfying the execution at any time, although the period had not expired for which the order directed him to be imprisoned, and whether we have any enactment which secures to the debtor his discharge upon payment of debt and costs, as is provided by the Imperial Act 9 & 10 Vic. ch. 95 section 110. I can find none applicable to the Superior Courts, though in regard to the Division Court there is such a provision, as will be found by reading in succession the 165th and 169th sections of the Division Courts Act, ch. 19 of Consolidated Statutes of Upper Canada.

Then the question is whether in the absence of any similar provision in respect to defendants committed in the Superior Courts for refusing to attend to be examined in obedience to an order, a defendant *who* shall be committed on account of so refusing can be treated as being in execution within the authority of the English decisions which have been cited. I apprehend he cannot be so considered.

If in this case the order for commitment had happened to be so framed (as it sometimes is) by sanction of the Judge who grants it, as to entitle the party to be discharged at once upon the payment of debt and costs in full, then I should be at liberty to take a different view, but in this case the order for commitment contains no such direction, but simply orders that the defendant shall be committed to close custody for a week for not submitting to be examined pursuant to the judge's order and appointment, &c., and that the sheriff shall arrest and keep and detain the defendant for such period aforesaid.

Then taking our statute ch. 24, sec. 41, (Con. Statutes, U. C.) and this order that has been made under it, I do not feel warranted in holding that the defendant if committed under that order could be regarded as being committed in execution, or as being *quasi* in execution, for if he should pay the debt and cost in full immediately on his commitment for a week under the order, I cannot say that he would be entitled to be discharged before the week had expired; and on the other hand if he should have paid no part of the debt when the time had expired, he would nevertheless be entitled to be discharged, so far as that order was concerned.

I have come reluctantly to the conclusion that under such circumstances this order can be looked upon as nothing else but a commitment for contempt of the order and that the defendant could be legally committed and detained under it for the period mentioned in it, notwithstanding the privilege against being committed in execution which I take to be a different matter.

I think therefore that this rule must be discharged with costs.

COMMON PLEAS

Reported by E. C. Jones, Esq., *Barrister-at-Law.*

Bradbury v. Wasley.

Bankrupt—Sale of lands under a commission from a Lower Canada Court—Ejectment.

Where a bankrupt whose property had been sold under a commission of the court in Montreal, commenced proceedings in ejectment to recover possession of the same land without having first taken steps to supersede the commission and duly prosecuted the same,

Held, that he was barred by the statutes 7 Vic., ch. 10, and 9 Vic., ch. 30.

This was an action of ejectment brought by the plaintiff against the defendant to recover possession of lot No. 23, in the 3rd concession of the township of Scott, in the county of Ontario, to the possession whereof the plaintiff claimed to be entitled, and by the consent of the parties and by the order of McLean, J., according to the Common Law Procedure Act, 1856, the following case was stated for the opinion of the court:

It was admitted for the purposes of the action that William Bradbury, the plaintiff, was, on the 30th May, 1848, seized in fee of the land in question in this cause. That on the 31st of May, 1848, a commission in bankruptcy issued out of the court of bankruptcy in and for the district of Montreal, against the said William Bradbury. That under such commission a final order and decree were issued under which lands in Upper Canada, and amongst others, the lands in question, were sold, and that the defendant was a purchaser at such sale, and now holds the said land in question under and by virtue of a deed from the assignees under the said commission.

The plaintiff contended that the court of bankruptcy in Lower Canada had no jurisdiction over the lands in Upper Canada, and could not sell them nor give title to them.

The defendant contended that sales of land in Upper Canada under a decree of bankruptcy issued out of a court in Lower Canada was valid, and that therefore his title to the land in question was good.

McMichael for the plaintiff, cited 7 Vic., ch. 10, secs. 7, 25, 30, 31.

Eccles, Q. C., contra, referred to 4, 24, 32, 85, 34, 51, 72 and 73 secs. of 7 Vic., ch. 10.

Hagarty, J.—The first section of the Bankruptcy Act, 7 Vic. ch. 10, declares it expedient to provide, by a general law of the province, for the discovering and securing of the estates and effects of bankrupts for the benefit of their creditors, and for the administration and distribution thereof, &c. Section two declares it to be an act of bankruptcy for any trader to make within this province any fraudulent grant or conveyance of his lands, &c. Provision is made for the issuing of commissions of bankruptcy by the judge or commissioner for the district in which the bankrupt resides; and sec. 30 directs the judge or commissioner to execute the instrument declaring the appointment of assignees, which instrument is to be received in all courts of this province in evidence. Section 31 enacts that such instrument shall vest in the assignees all the property of the bankrupt, both real and personal, which he could in any way have lawfully sold, assigned, or conveyed, or which might have been taken in execution against him at the date of the commission, &c., with power to the assignees to redeem all mortgages, &c., upon any goods or estate of the bankrupt, or to sell the same subject to such mortgage, &c. The bankrupt is directed to make and execute all deeds and writings, &c., as the assignees shall at any time reasonably require, and which may be necessary for enabling them to demand, recover, and receive all his estate and effects *which lie in or out of this province*, and the assignees shall have the like remedy to recover all the said estate, debts, and effects in their own name, as the bankrupt might have had if no commission had issued. Section thirty-three declares that whenever the assignees shall deem it expedient to sell any real estate of the bankrupt, the judge or commissioner shall name a day and direct certain advertisements. Section thirty-four declares that every deed or conveyance executed by the assignees according to the usual form of law, shall have the like effect as to incumbrances, &c., as if the sale had been made by a sheriff under a writ against lands issuing out of any court of common law in the

province. Section fifty-seven directs that the several judges and commissioners au h rised to issue commissions and to act in the prosecution thereof shall be auxiliary to each other for proof of debts or for examination of witnesses on oath. Section fifty-eight declares that nothing in the act contained shall prevent a commissioner from having jurisdiction beyond his district over a partner of a bankrupt firm resident beyond the district, as far as relates to the interest or share of such partner in such firm, if he be included in the commission. And lastly, section eighty-five directs the act to be construed in the most beneficial manner for promoting the ends thereby intended. This act is amended by 9 Vic , ch 30, but section twenty-five declares that no title "to any real or personal estate sold or to be sold, under any commission or under any order in bankruptcy shall be impeached by the bankrupt or any person claiming under him in respect of any defect in the suing out of the commission, or in any of the proceedings under the same; and no such title after this act shall come into operation shall be so impeached for any other cause unless the bankrupt, &c , shall have commenced proceedings to supersede the said commission, and duly prosecuted the same within twelve calendar months from the issuing thereof." 12 Vic., ch. 18, continues this act for certain purposes.

The only question submitted to us is, whether the bankrupt the present plaintiff, can recover in ejectment land sold by his assignes to the defendant under final order and decree of the court of bankruptcy for the district of Montreal; the plaintiff contending that the Lower Canada court has no jurisdiction over and could not sell lands in Upper Canada. The case does not allege any proceeding taken by the bankrupt to supersede the commission. Independently of this or any question raised by the twenty-fifth section of 9 Vic., ch. 30, in this grave point, I am of opinion that the plaintiff cannot recover, and that in the case stated the vendee of the assignees can hold against him, and that the Montreal court of bankruptcy had authority to sell lands in any part of the province of Canada.

To affirm the proposition asserted by the plaintiff would, in my judgment, be wholly opposed to the wording and subversive of the object of the statute, which professes to be of general application to the province, which provides local machinery to work the law according to the place of residence of the bankrupt, but which expressly provides for the seizure, realization and distribution of all his estate, and vests the same expressly in his assignees immediately on the execution of their appointment as such.

I may add that if it were necessary to decide the case on the question of the bankrupt being concluded from questioning any proceedings under the commission, unless by proceedings to supersede taken within a given time, my inclination would be strongly against the right to recover in this case on the facts laid before us.

Judgment for defendant.

BACON v. LANGTON.

Replevin—Action on sheriff's bond—In whose name suit may be brought

Held, that the assignee of a sheriff a replevin bond may maintain an action thereon in his own name

Declaration on a replevin bond for certain goods and chattels, to wit, an engine, boiler and one carriage for the same, and one smoke-pipe attached to said boiler, the defendant Thomas Langton, claiming possession of the said goods and chattels, made his plaint to Frederick William Jarvis, Esquire, sheriff of the United Counties of York and Peel, of the taking and unjustly detaining of the said goods and chattels of the said Thomas Langton by the said John Bacon, and then prayed the said sheriff that the said goods and chattels might be forthwith replevied by the said sheriff and delivered to the said Thomas Langton, and thereupon the said Frederick William Jarvis, so being sheriff of the said united counties according to the statute in such case made and provided, did take from the said Thomas Langton and from the said defendants Mark Hutchinson and Jeremiah Carty, as two responsible sureties, a bond in treble the value of the said goods and chattels, (the value of the said goods and chattels having been on that occasion first ascertained by the affidavit on behalf of the claimant duly sworn and filed according to the statute in such case made and provided,) and the said defendants, on the 9th of April, 1851, by their certain writing obligatory sealed with their respective seals, the date whereof is the day and year last aforesaid, did jointly and severally acknowledge themselves to be held and firmly bound unto the said sheriff in the sum of one hundred and fifty pounds of lawful money of Canada, to be paid to the said sheriff or his certain attorney, executors, administrators or assigns, with a condition thereunder written that if the said Thomas Langton should prosecute his suit with effect and without delay against the said John Bacon for the taking and unjustly detaining his goods and chattels and personal property, to wit, goods and chattels hereinbefore mentioned, and should make a return thereof, if a return should be adjudged, that then the said obligation should be void and of non-effect, otherwise to remain in full force and effect, and after alleging a breach set out an assignment to the plaintiff.

The defendants demurred, assigning as matter of law to be argued on the said demurrer, that the said action being brought on a bond given under the provision of the statute 14 & 15 Vic , ch. 64, was not maintainable in the name of the plaintiff, and the plaintiff has no right of action thereon, as the said bond was merely a chose in action not assignable so as to give to the assignee a right of action in his own name. And it appears from the said declaration that the plaintiff in this action did not avow or make cognizance in the replevin suit, and could not therefore acquire a right to sue in his own name.

M. C. Cameron supported the demurrer, citing *Phillips* v *Price*, 3 M & S. 183; *Dean* v. *Freeman*, 5 T. R. 195; 14 & 15 Vic., ch. 54.

Anderson contra, cited *Short* v. *Hubbard*, 2 Bing 349.

DRAPER, C. J —The case of *Dean* v. *Freeman*, (5 T. R 195,) as commented on in *Phillips* v. *Price*, in 3 M & S. 183, shews that it is not necessary for the assignee of the sheriff who sues on a replevin bond to show that he is either avowant or cognizor, but at the same time it may be conceded that both those cases were decided upon a replevy of goods distrained upon. The Upper Canada statute 4 W. IV , ch. 7, was intended, I apprehend, to apply to similar cases, and it is conceded that a bond taken under that act would be assignable, but the defendant contends that the bond taken under the act 14 & 15 Vic. ch. 64, cannot be assigned, because the statute does not in express terms say so. Except by implication the sheriff cannot take a bond under this latter act. The legislature assume, that in extending the remedy of replevin to other cases than those of distress, the essential parts of the remedy continue, of which the giving a bond by the party claiming to replevy was certainly one, as a protection to the party out of whose hands property of more or less value was to be taken. Therefore, in the fourth section it is said, the condition of the bond to be taken by the sheriff "and *prescribed* by the act" 4 W. IV. ch. 7, may be altered so as to correspond with the writ to be issued under the new act, and the bond shall be taken for treble the value sworn to of the property replevied. This, I think, clearly shews that it was considered the enactment of the 4 W. IV., as to making a bond with condition was recognised as continuing and applicable to replevin under the new act; and I can see no reason for holding that the legislature did not equally mean that the right to have an assignment of the bond should equally extend to a bond conditioned according to the last as well as the first act, the authority for requiring a bond at all being in either case referable to the first act only Besides, it may be said that the 8th section of the Consolidated Statutes of Upper Canada, ch. 1, enacts that these statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as *declaratory of the law* as contained in the previously existing acts, and the 8th section of 29 of these Consolidated Statutes enacts that the bond in every action of replevin shall be assignable. I see nothing to indicate that this is a new law, in effect different from those which preceded. I regard it as a legislative interpretation to which I entirely subscribe. I should have arrived at the same conclusion without its aid; with it there is no room for doubt or hesitation.

Judgment for plaintiff.

THE BANK OF MONTREAL v. ARMOUR.

Bill of exchange—Payment of drawer after action—How for satisfaction as to acceptor

Held, that the payment of a bill by the drawer after action brought does not operate as a consequent set law as a satisfaction and discharge in an action by the indorsee against the acceptor

Declaration —For that certain persons by, under, and using the name, style and firm of Strong and Matheson, on the 19th of February, 1859, by their bill of exchange now over due, directed to the defendant, required the defendant to pay to the order of the said Strong and Matheson the sum of $400 three months after the date thereof; and the defendant accepted the same, and the said Strong and Matheson endorsed the same to one W. M. Matheson, who endorsed the same to the plaintiffs, but the defendant did not pay the same or any part thereof, and the plaintiffs claim $600.

For a defence arising after this action was commenced the defendant says the said Strong and Matheson, after this action was commenced, satisfied and discharged the plaintiffs' claim by payment.

To which plaintiffs demurred, assigning as grounds of demurrer, that the satisfaction therein set forth was not averred to have been made at the request or for or on behalf of the defendant, or for or in respect of his liability on said bill. That no legal privity is shewn in said plea between the said Strong and Matheson and the defendant, therefore the satisfaction did not enure to the benefit of the defendant. That the satisfaction was made by the parties who were under a personal liability upon a bill declared on. That the plea imports that the satisfaction made by them referred and was limited to their own personal liability, and it is not stated in said plea to have extended beyond, and that the satisfaction to the endorsee of a bill made by a drawer or endorser does not, as a legal consequence, enure as a satisfaction of the bill quoad the acceptor.

Crombie for the demurrer, cited *Goodwin* v. *Creamer*, 18 Q. B. 757; *Jones* v. *Broadhurst*, 9 Com. B. 173; *Ex parte Taylor*, 3 Jur. N. S. 753; *Randall* v. *Moon*, 21 L. C. C. P. 226.

J. H. Cameron, Q. C., contra.

DRAPER, C. J.—The cases cited for plaintiff were *Jones* v. *Broadhurst*, 9 C. B. 173, and *Randall* v. *Moon*, 12 C. B. 261. Both these cases were decided before the English Common Law Procedure Act of 1852, and the rules of pleading founded thereupon. The case of *Williams* v. *James* (15 Q. B. 498), and *Goodwin* v. *Creamer* (18 Q. B. 757), which also bear on the question, were likewise decided before that act came into force.

The broad ground on which the first of these decisions rests is, that there is no principle upon which, as a consequence in law, the satisfaction of a bill as between the endorsee and the drawer should operate as a satisfaction and discharge in an action by the endorsee against the acceptor. In that case the defence arose before the commencement of the action.

In *Randall* v. *Moon* the acceptor pleaded payment by the drawer after the commencement of the action, and that the plaintiff was not suing as a trustee for the drawer. The plaintiff replied traversing the allegation that the payment was in satisfaction of the causes of action in the declaration mentioned

On the trial it appeared that the defendant accepted for the drawer's accommodation; that actions had been brought against both drawer and acceptor; that the drawer had obtained a judge's order to stay proceedings in the action against him, and had paid the plaintiff the full amount of the bill, &c. The plaintiff had a verdict for the full amount, and the court refused a rule of *nisi* to enter a verdict for the defendant, or to reduce the damages, holding as to the first point, that payment by the drawer (the holder having no notice that defendant accepted for his accommodation) was not to be considered a payment by the acceptor, because a right of action for damages had rested at the time of payment.

In *Williams* v. *James*, payment before action by the drawer was pleaded by the acceptor in full satisfaction, &c., and was traversed by the replication. Payment by the drawer was proved, but it also appeared that subsequently to such payment the defendant had written letters to the plaintiff *promising* payment. Lord Campbell, in giving judgment said, "*Prima facie* a payment by the drawer is for the benefit of the acceptor, but the drawer has his remedy against the acceptor, and may take the bill from the endorsee and sue upon it in his own name, or may employ endorsee to do so." The judgment of the court was, however, for plaintiff, on the ground that the defendant's letters shewed an understanding that the bill was not extinguished, but the drawer's remedy was preserved.

In *Goodwin* v. *Creamer* the acceptor pleaded that after action brought the last indorser paid the plaintiff the full amount of the bill and interest in full satisfaction, &c., of all moneys payable in respect thereof. During the argument *Lord Campbell* again said that *prima facie* the party who has received the money in satisfaction of the bill cannot afterwards sue the acceptor. The court, however, held the plea bad on the ground that damages might be recoverable beyond the amount of the bill, and that a holder had a right to continue his action against the acceptor until the costs were paid.

In *Ex parte* Taylor *in re.* Houghton, 3 Jur. N. S. 753-4, Sir *J. L. Knight Bruce*, L. J., questioned the accuracy of the position that at law the holder of a bill of exchange could recover the full amount from the acceptor, notwithstanding previous payments by the drawer or other parties, but this was merely throwing out a doubt. *Turner*, L. J., abstained from expressing any opinion on the rule at law, and it was decided against the holders right to prove for the whole against the estate of the bank upt acceptor. Leave was offered to carry the case to the House of Lords, but I have not found any further trace of it.

The 117 sec. of our Common Law Proceedure Act, 1856, and the rules of pleading framed under the authority of that statute, both copied from the English act and rules, appear to me to do away with any technical ground, such as the right to costs, on which any of the preceding cases may have been partially rested. I do not perceive that our statute 1 W. IV., ch. 5, relative to costs of several actions against the different parties to a bill or note, can aid in disposing of this demurrer. We are called upon as appears to me to decide whether, in an action by the endorsee against the acceptor of a bill not appearing to have been accepted for the accommodation of the drawer, a plea that the drawer has paid the bill, is good in bar.

Upon the best consideration I have been able to give, I think it is not, without its further being shewn that such payment was made on the acceptor's account, and that he adopted it at the time of payment or subsequently.

In *Jones* v. *Broadhurst*, the court left undecided the question whether an unauthorised payment by and acceptance in satisfaction from a stranger is a good plea in bar. But in *Simpson* v. *Eggington* (10 Exch. 845) the court considered that the law was fully established by the cases of *Belshaw* v. *Bush* (11 C. B. 191) and *James* v. *Isaacs* (12 C. B. 791). The former deciding that a payment by a stranger considered to be for the defendant, and on his account, and subsequently ratified by him is a good payment, and the latter, that a plea of satisfaction from a stranger without the authority prior or subsequent of the defendant was bad.

In the present case the payment by the drawer to the holder was no satisfaction as between the acceptor and the drawer, who, though obliged to pay the holder, had his remedy over against the acceptor. The bill is not extinguished. The money paid to the holder by the drawer still leaves the acceptor liable on the bill, while the acceptor, by paying it to the holder and taking it up, extinguishes all right and claim upon it. If the drawer has already paid the holder, the money to be recovered in this action will be money had and received to his (the drawer's) use, and he can have no future recourse against the acceptor. While, if the plaintiffs confessed this plea, they would be entitled to recover their costs to the time of pleading it from the defendant, and might either sue again on behalf of the drawer, or by handing the bill to him, enable him to recover the amount of it from defendant.

Judgment for the plaintiff on demurrer.

CHAMBERS.

(*Reported by* CHRISTOPHER ROBINSON, ESQ., *Barrister-at-Law*)

HENDERSON v. MOODIE.

False return—Declaration—Striking out count—Variance between copies filed and served

Where plaintiff in a declaration for a false return inserted three counts, the second alleging as a breach of duty on the part of defendant neglect to levy, &c., and the third alleging as a breach that although defendant did levy he falsely returned no goods, the third count was upon the application of defendant struck out as being substantially the same as the second—the real grievance being the false return no matter which way stated.

Semble when the evidence is given in such a case an amendment would be allowed without difficulty in accordance with the facts found.

Held also on an application to set aside a declaration on the ground of variance between the copy served and copy filed that a mere verbal error by the omission of words which leave the sense and substance unaltered, is not a ground for setting aside the declaration or copy served.

Semble however that "being in a hurry" is no excuse for a variance between the copy of pleading filed and that served.

(31 March, 1860.)

This was an action brought by the plaintiff against the defendant as sheriff of the county of Hastings, for a false return.

The declaration contained three counts.

First count.—For that the plaintiff heretofore, to wit, on, &c., in the Court of Queen's Bench, at Toronto, by the consideration and judgment of the same Court, recovered against one Michael Manion a certain debt of forty five pounds fifteen shillings and six pence, and also ten pounds eight shillings and eleven pence costs, which in and by the same court were adjudged to the plaintiff, and with his assent, for his damages, which he had sustained as well by the occasion of the detaining of the said debt as for his costs and charges by him about his suit in that behalf expended, whereof the said Michael Manion was convicted, as by the record and proceedings thereof still remaining in the same court of our said Lady the Queen at Toronto aforesaid, will more fully appear. And that the said judgment being in full force, and the debt and costs remaining unpaid and unsatisfied, the plaintiff, on, &c., for the obtaining of satisfaction thereof, sued and prosecuted out of the said court aforesaid a certain writ of our Lady the Queen called a *fieri facias*, directed to the sheriff of the county of Hastings, by which said writ the said sheriff was commanded that of the goods and chattels of the said Michael Manion in the said sheriff's bailiwick he should cause to be levied the damages aforesaid, and that he should have that money before the said justices of the said court at Toronto immediately after the execution thereof, to render to the plaintiff for his damages and costs aforesaid; and that the said sheriff should have then there that writ; which said writ afterwards, and before the delivery thereof to the said sheriff as hereafter mentioned, to wit, on, &c., was duly endorsed with a direction for the said sheriff to levy the sum of forty-five pounds fifteen shillings and six pence debt, and ten pounds eight shillings and eleven pence costs, with interest on the same from the 19th day of November, 1858, ten shillings for certificate of judgment, seventeen shillings and six pence for *fi fa.*, besides sheriff's fees, poundages, and incidental expenses; and which said writ endorsed, afterwards, and before the execution thereof, to wit, on, &c., was delivered to the now defendant, who then, and from thence until, and at, and after the execution of the said writ, was sheriff of the said county of Hastings, to be executed in due form of law; and although there then and afterwards, and whilst the said last-mentioned writ remained in full force, were divers goods and chattels of the said Michael Manion within the bailiwick of the now defendant as such sheriff as aforesaid, whereof he could and might and ought to have levied the monies so endorsed and directed to be levied as last aforesaid, whereof the defendant all the time aforesaid had notice, yet the now defendant, so being sheriff of the said county of Hastings, not regarding the duty of his office as such sheriff, but contriving and wrongfully and unjustly intending to injure, prejudice and aggrieve the now plaintiff in this behalf, and to deprive him of the monies so endorsed on the said last mentioned writ, and directed to be levied as last aforesaid, and of the means of obtaining the same, did not nor would, within a reasonable time for that purpose which hath long since elapsed, levy the money last aforesaid, or any part thereof, but wholly neglected and refused so to do, and therein made default; and afterwards, to wit, on, &c., falsely and deceitfully returned to the said court of our said Lady the Queen, that the said debtor Michael Manion had not any goods or chattels in his bailiwick, whereof he could cause to be levied the damages and costs aforesaid, or any part thereof, as by the *said last mentioned writ and the* return thereof remaining of record in the said court fully appears; by means of which said premises, &c.

Second count.—And that the judgment in the first count mentioned being in full force, and the said damages and costs in that count mentioned remaining unpaid and unsatisfied, the plaintiff afterwards, to wit, on, &c., pursuant to the statute in such cases made and provided, applied for and obtained, and an order was made, upon and by virtue of said judgment in the first count mentioned, by the Hon. W. H. Draper, C.B., Chief Justice of the Court of Common Pleas, at Toronto, dated, &c., whereby the said Justice ordered that all debts due and owing from one Paul Larkins, the garnishee in said order named, to one Michael Manion, the judgment debtor therein named as being the person in the first count mentioned, should be attached, to answer a judgment recovered against the above named judgment debtor, on, &c., by the now plaintiff, the judgment creditor in the Court of Queen's Bench, and being the same judgment described in the first count mentioned; and the said Justice did thereby further order that the then named Paul Larkins, the garnishee therein named, his attorney or agent, should attend before the said Justice, at the time and place therein mentioned, to show cause why he should not pay to the now plaintiff, the judgment creditor, the debt due from him to the judgment debtor, or so much thereof as might be sufficient to satisfy the said judgment debt due the now plaintiff the said judgment debtor. And that the said order so made as aforesaid, was duly served upon the said Paul Larkins, garnishee therein named; and that the said Paul Larkins, garnishee as aforesaid, did not appear upon the said summons and order at the time and place mentioned therein, and in pursuance thereof; and that afterwards, to wit, on, &c., upon proof of the service of the said summons and order, an order was duly made by the then presiding Judge in Chambers, at Toronto, for an execution to issue to levy the amount due from said Paul Larkins, garnishee as aforesaid, to the said Michael Manion, judgment debtor as aforesaid, towards satisfaction of the said judgment debt. And that afterwards, to wit, on, &c., the now plaintiff sued and prosecuted out of the said court, upon and by virtue of said order, a certain writ of *fieri facias* against the said garnishee therein named, Paul Larkins aforesaid, directed to the sheriff of the county of Hastings; by which said writ our said Lady the Queen commanded the said sheriff that of the goods and chattels of the said Paul Larkins, garnishee as aforesaid, in the sheriff's bailiwick, he should cause to be levied fifty-six pounds four shillings and five pence, being part of the amount of the debt due from the said Paul Larkins to Michael Manion attached in the hands of the said Paul Larkins by an order of the Hon. W. H. Draper aforesaid, dated, &c., pursuant to the statute in such case made and provided, to satisfy fifty-six pounds four shillings and five pence, which Geo. E. Henderson the now plaintiff lately in the Court of Queen's Bench recovered against the said Michael Manion, whereof the said Michael Manion was convicted, as appears of record; and that the said sheriff should have that sum before the said court immediately after the execution thereof, to be rendered to the now plaintiff for his damages aforesaid; and that the said sheriff should have then there that writ; which said writ afterwards, and before the delivery thereof to the said sheriff, to wit, on, &c., was duly endorsed with a direction to the said sheriff to levy of the goods and chattels of the said Paul Larkins, the garnishee therein named, the sum of fifty-six pounds four shillings and five pence debt and costs, fifteen shillings for *fi fa*, with interest from the 5th day of October, 1859, besides sheriff's fees; and which said writ, so endorsed, afterwards, and before the execution thereof, to wit, on, &c., was delivered to the now defendant, who then and from thence until, and at, and after the execution of the said writ, was sheriff of the said county of Hastings, to be executed in due form of law; and although then and afterwards, and whilst the said last mentioned writ remained in full force, there were divers goods and chattels of the said Paul Larkins within the bailiwick of the now

defendant as such sheriff as aforesaid, whereof he could and might and ought to have levied the monies so endorsed and directed to be levied as last aforesaid, whereof the defendant during all the time aforesaid had notice, yet the now defendant, so being sheriff of the said county of Hastings, not regarding the duty of his office as such sheriff, but contriving and wrongfully and unjustly intending to injure, prejudice and aggrieve the now plaintiff in this behalf, and to deprive him of the monies so endorsed on the said last mentioned writ, and directed to be levied as last aforesaid, and of the means of obtaining the same, did not nor would within a reasonable time for that purpose which hath long since elapsed, levy the amount last aforesaid, or any part thereof, but wholly neglected and refused so to do, and therein failed and made default; and afterwards, to wit, on, &c, falsely and deceitfully returned to the said court that the said Paul Larkins had not any goods or chattels in his bailiwick, whereof he could cause to be levied the damages and costs aforesaid, or any part thereof, as by the said last mentioned writ and the return thereof remaining of record in the said court fully appears; by means of which said premises, the plaintiff hath been and is greatly injured, &c.

The third count was the same as the second count, with the exception of the breach. Instead of assigning as a breach that the defendant neglected to levy, &c., it alleged that the defendant did seize and levy, &c, and yet returned that the said Paul Larkins had not any goods and chattels, &c, in the usual form.

H. B Morphy, for defendant, obtained a summons on plaintiff to show cause why the declaration, the copy and service, or the copy and service, should not be set aside for irregularity, with costs, on the ground that the declaration served was not a true copy of the declaration filed; and also why the second or last count of the declaration filed should not be struck out, the two counts being substantially the same. The variances between the declaration filed and the declaration served were merely clerical.

English showed cause. He filed an affidavit of plaintiff on which it was sworn that before the time was out for entering appearance in the cause, and after writ was served he was informed by one Morgan Jellitt the brother of R. P. Jellitt, and managing clerk in his office, that his brother the said R. P. Jellitt was going to defend the cause as defendant's attorney, and asked him if they had entered an appearance, to which he replied no, that they did not intend entering an appearance until the time was out, and that they would have until Saturday morning to enter the appearance and would not do so before then.

That from this information he relied on an appearance being filed by R. P. Jellitt as defendants attorney, at the latest on Saturday morning in Toronto, and which was the last day for the service of declaration for the Belleville Assizes, which service was required to be made before three o'clock that day, that said Jellitt did not enter an appearance for the defendant on Saturday aforesaid as it was supposed he would, and which deponent only ascertained about noon of that day, by sending to the Deputy Clerks office, to search if an appearance had been entered, and which he was induced to do by being informed on that day short time before that the said R. P. Jellitt intended to throw him over the assizes if possible, with the cause. That in consequence of the appearance not being entered, a personal service upon the defendant was necessary, and that he had consequently to send one of his clerks to look up the defendant, or in failure of not finding him to serve at the house, and therefore had not time to compare the copy served, with the one filed before the hour of three would arrive. That the copy served was served by one of his clerks, only a few minutes before three, at the house of the defendant, who resides nearly a mile from deponent's office, a much greater distance off than defendant's attorney's office. That if the defendant's attorney had entered the appearance on Saturday morning, service might have been effected upon him at his office, before three o'clock, of that day, with a compared copy of the declaration filed. That the principal differences between the copies served and filed, is an omission of some words in the one filed. That since the filing and service of the declaration, an appearance was entered by R P. Jellitt, defendants attorney on the twenty-seventh instant, a true copy of which was filed, and a notice of such appearance having been entered, was served at his office. That the first count in the declaration is a distinct and separate cause of action, for a false return to the writ *fi fa.* against Michael Manion, the judgment debtor in the declaration mentioned.

Draper, C. J.—*I think* the last count of this declaration should be struck out. Whether the fact be that there were goods and the sheriff neglected to levy—or that he actually levied and made the money—the return of *nulla bona* is the substantial grievance. And in whichever form the count is framed, when the evidence is given an amendment would be allowed without difficulty in accordance with the facts proved.

The third count being struck out, I see no sufficient ground for setting aside the declaration for variance between the copy filed and that served. A mere verbal error by the omission of that which leaves the sense and substance unaltered, would not I think constitute a ground for setting aside the declaration or the copy served. At the same time I should not hesitate to hold parties to great care and attention in examining their papers before filing or serving—and do not think *being in a hurry* affords any excuse—even though a trial might be lost.

CHANCERY.

(Reported by Thomas Hodgins, Esq., Barrister at Law.)

Bank of British North America v. Moore.

Right to redeem by mesne incumbrancer—Injunction—Judgment creditors—Assignee.

A judgment creditor offers to redeem a prior judgment creditor, whose *ven ex* was in the Sheriff's hands, and made an assignment of the judgment, but the prior judgment creditor (who was also holder of a mortgage subsequent to the second judgment creditor) refused to receive the money otherwise than in satisfaction of the judgment, and refused to assign, whereupon the second judgment creditor filed his bill to redeem and for an injunction to restrain the sale. On the motion for the injunction, it was *Held* that he was entitled to redeem and to an assignment of the judgment, and an injunction was accordingly granted (5th July, 1860.)

This was a bill by a subsequent judgment creditor to redeem the prior incumbrancer, the assignee of a judgment, whose *ven ex.* was in the Sheriff's hands. It was proved by the Sheriff's affidavit that if the property was forced to a sale it would not sell for any thing like its value. The other facts appear in the judgment of the Court.

Wood for plaintiff, *G. R. Van Norman* for defendant Robinson.

The following cases were then cited by the plaintiff:—

Ramsbottom v. *Wallis*, 5 L. J., N. S, 92; *Dunstan* v. *Patterson*, 2 Phil. 341; *James* v. *Boon*, 3 Swans, 234, *Rhodes* v. *Buckland*, 16 Beav, 212; *Smith* v *Green*, 1 Coll 555; *McMaster* v. *Phipps*, 5 Gr. 253; *Moffat* v *Marsh*, 3 Gr. 623; Fisher on Mortgages, 619; *Thurkell* v. *Patterson*, 17 Q B, U. C.

Spragge, V C.—The plaintiffs file their bill as registered judgment creditors of the defendant Moore, to redeem prior judgment creditors, the Ketchums, of whose judgment the defendant Robinson is assignee, and to foreclose Moore. The lands of Moore, in the county of Oxford, affected by both judgments, are about to be sold, upon the judgment of the Ketchums against Moore, upon a writ of *ven. ex.* The sale is advertised for the twelfth of the present month.

The plaintiffs have offered to pay the prior judgment debt, upon receiving an assignment of the judgment; but this has been refused by the assignee Robinson, who declines to receive the money otherwise than in satisfaction of the judgment. He is assignee of (besides the judgment) a mortgage of Moore's, which is subsequent to the plaintiffs' judgment. I understood it to be stated in argument that Robinson was assignee of a judgment against Moore subsequent to the plaintiffs, and that he hoped and expected that if the sheriff's sale proceeded, enough would be realized to satisfy the Ketchum judgment, the plaintiffs' judgment, and the subsequent judgment, or part of it, of which he is assignee; and I supposed that writs against lands in all these three suits were in the hands of the sheriff;—and I could understand Robinson being unwilling to be first to redeem the plaintiffs in respect of his subsequent judgment, when he was expecting to obtain payment through the sale by the sheriff; and I am not prepared to say that he would be making an inequitable use of his position as first judgment creditor in refusing to be redeemed and to assign under

the circumstances, because by assenting he would forego a fair advantage of his position. The affidavits filed on his behalf state only that he is assignee of a subsequent mortgage, upon which it is not stated that any proceedings at law or equity had been taken.

To put out of view for a moment the subsequent mortgage, Robinson objects that he was not bound, upon payment of the Ketchums' judgment, to assign it; and in support of his objection the rule is cited, that a mortgagee is bound only to convey the mortgage premises, not to assign the mortgage debt. This is established, as between mortgagee and mortgagor, in *Dunstan* v *Patterson* (2 Pinll. 345), and *Smith* v. *Green* (1 Coll 562); and the rule may also apply as between prior and subsequent mortgagees, but the ordinary form of decree, upon a judgment creditor being redeemed by a subsequent incumbrancer, is, that he assign the judgment to the party redeeming him: and the succeeding directions show that the right to receive the mortgage or judgment debt paid, passes to the subsequent incumbrancer, who pays it.

Then, is the registered judgment creditor justified in refusing to receive payment of the judgment debt and to assign the judgment? *Smith* v *Green* was the case of a first mortgagee, to whom notice was given by a second mortgagee of his intention to pay off the mortgage at the usual period, six months. Before the expiration of the time, the first mortgagee filed his bill to foreclose; and the second mortgagee, just before the expiry of the six months, tendered to the first mortgagee his mortgage money, with costs incurred up to that date. This was refused, and the foreclosure suit proceeded with. Sir J. L. Knight Bruce intimated as his opinion, that a prior mortgagee ought, without suit, to receive his mortgage money from one entitled to redeem him. His language is: "To say that a first mortgagee ought not, without a judicial proceeding, to accept payment from a second mortgagee, and thereupon to convey to him the mortgaged estate, with or without the concurrence of the mortgagor, when the second mortgagee does not desire the mortgagor's concurrence, is too much." And he deprived the first mortgagee of his costs, incurred after tender of his mortgage money.

If a first mortgagee ought, without suit, to receive his mortgage money, and convey the mortgaged estate to a second mortgagee, redeeming him, so a prior judgment creditor ought, without suit to redeem him, to receive his judgment debt, when offered by a subsequent incumbrancer, and to assign to him his judgment. Vice-Chancellor Knight Bruce thought the taking of proceedings to recover his mortgage debt inequitable after such tender; and it cannot be doubted that if the first mortgagee could have taken, and were taking, proceedings that would put the mortgaged estate beyond the reach of the subsequent incumbrancer to redeem it, he would have restrained such proceedings, as was done by Sir John Romelly in *Rhodes* v. *Buckland* (13 Beav. 212).

A refusal by a judgment creditor, pressing a sale of his debtor's lands to satisfy his debt, to receive payment and assign his judgment to a subsequent judgment creditor, would appear simply unreasonable and vexatious. As soon as he registered his judgment, and another creditor registered a judgment after him, the right of the latter was to redeem the former—a right clearly enforceable in equity; and an offer to redeem refused, would, I have no doubt, be at the peril of costs, and the court would see that the right to redeem was preserved to the incumbrancer making the offer. A refusal by a judgment creditor to be redeemed would indeed be almost unaccountable, unless redemption would in some way operate to his prejudice. It remains to consider whether the reason offered on behalf of Robinson for his refusal in this case is a sufficient one. The rights of the parties are clear, according to their priorities: the Bank to redeem Robinson in respect of Ketchums' judgment, and Robinson, if he desires it, to redeem the Bank as subsequent incumbrancer under the subsequent mortgage assigned to him. Then, does this interfere unfairly with any legal right of Robinson? The land cannot be sold by the sheriff to satisfy this subsequent mortgage; but if the Bank pay off the Ketchum judgment, not getting an assignment of the debt, a prior incumbrance will be removed at the expense of the Bank, and the subsequent mortgage will be relieved of so much of prior incumbrance. This would be an undoubted advantage; but is it a just one? If Robinson desires to use his legal process to force the Bank into such a payment, I think such use of it would be inequitable. I see nothing in the circumstance of Robinson being assignee of a subsequent mortgage, to alter his position from what it would be if he were only first incumbrancer sought to be redeemed by a second incumbrancer. I may possibly be under a misapprehension as to some of the facts, for the counsel for Robinson did not seem to expect that the argument could be proceeded with when it was. I have intimated what view I should probably take of the matter, if Robinson held a judgment subsequent to the plaintiff's, which might be satisfied at the Sheriff's sale: but finding upon the affidavits a subsequent mortgage stated, with, so far as appears, no proceedings taken to enforce it. I have taken such to be the facts, and my judgment proceeds upon such being the position of the parties. The order will be, that upon payment to Robinson, if he will receive it, and assign the Ketchum judgment, of the amount of that judgment and subsequent costs, or if not, then, upon payment into court of the same amount, an injunction should go to restrain the sale of Moore's lands in the county in which the plaintiff's judgment is registered, in satisfaction of the Ketchum judgment.

PATERSON v. HOLLAND.

Reported by A GRANT Esq., *Barrister-at-Law.*

Practice—Re-hearing—Adding parties in Master's office.

Defendants presented their petition for a second re-hearing on the ground that certain persons, necessary parties, were not before the court but as two opportunities of making the objection had been disregarded and the interests of the parties complaining of the omission would be properly protected by making them parties in the master's office, the petition was refused.

The proper practice is to bring all necessary parties before the court, at the hearing, and not to add them in the master's office.

A Crooks, for some of the defendants in this suit, moved upon petition for an order to re hear this cause a second time, on the ground that one Kneeshaw, or his representatives, had not been made parties to the suit.

Hector and *Blake*, for the other defendants.

McDonald and *Strong*, for plaintiffs, *contra.*

ESTEN, V. C.—This is a petition for a second re-hearing. The ground stated in it is that certain persons, necessary parties, were not before the court at the original hearing. These persons, however, with the exception of Kneeshaw, or his representatives, were then out of the jurisdiction, and therefore their absence was not properly matter of objection, and the court made such a decree as it could properly make in the absence of those parties. Is then the fact of Kneeshaw, or his representatives, who were within the jurisdiction, not having been before the court at the original hearing, a sufficient reason for allowing a second re-hearing, and undoing all that has been effected under the decree, when two opportunities of making this objection have been disregarded, and all the ends of justice can be secured as regards the parties in the master's office? I think not; but at the same time I think that all necessary parties should be brought before the court at the hearing, and I am opposed to the introduction of any practice of adding such parties for the first time in the master's office, merely to remedy defects arising from the carelessness and negligence of the plaintiffs in the suit.

SUPERIOR COURTS.

MONTREAL DISTRICT.

(From the "Lower Canada Jurist.")

ROLLAND v. BRISTOW.

City Councillor—Montreal—Disqualifications.

Held—Under 12 Vic., cap 129, ss 8 & 41, 10, That a party elected to be councillor in the corporation of the City of Montreal not being possessed to his own use and benefit of real and personal estate within the City of Montreal after payment of his just debts, of the value of £500 cy., is not qualified to be so elected.

2nd That a party elected to be such a councillor and becoming insolvent during his occupancy of said office, is by such insolvency disqualified to hold such office.

20th February, 1860.

The petitioner in this matter by his petition or *requête libellée*, set out his qualification as a voter of the St. Lawrence ward in

Montreal, and that by the statute 14 & 15 Vic., cap. 128, ss. 8 & 41, it is enacted that no one shall be elected a councillor of the City, unless a resident householder within it for a year before his election, and unless he has real and personal property within the city, after payment of his debts, of the value of £500 currency; that he should continue to have such pecuniary qualification during his term of his office, and should continue to be a resident householder, and that he should become disqualified if he became insolvent or bankrupt.

That defendant was, on the 28th July, 1859, elected councillor for the City of Montreal for a term of three years; that he was not at the time of his election or afterwards qualified, not having been a resident householder in Montreal for a year before the election, nor possessed of the property qualification; that since his election he had become insolvent and ceased to hold his office; that he illegally assumed to exercise the office of councillor and the court was authorised to issue a writ requiring him to answer the petition and to shew cause by what authority he assumed to exercise the office.

With the petition was filed a copy of a judgment of the Circuit Court, rendered 15th September, 1859, against the defendant for £11 7s. 2d., together with copies of writ of execution in the same case with a return by bailiff of *nulla bona* against the defendant, the report purporting also to be signed by him, also affidavits by petitioner and another setting out their belief that the defendant had not the necessary property qualification, had become insolvent, was not at the time of the making of the affidavit a householder, but was living in a boarding-house.

The defendant pleaded an *exception à la forme*, which was dismissed. Afterwards defendant pleaded to the merits alleging his qualification, that he was not insolvent and denying the allegations of the petition. The case being inscribed for evidence and hearing, the petitioner examined the City Clerk and another witness who produced the voters, and assessment lists of the City of Montreal, extracts from which are filed, showing that the petitioner's name was on those lists as proprietor of houses in Bleury Street; the defendant's name occurred in the list of 1859 as a tenant and not as proprietor of real estate, that in the voters' list for 1860 the defendant's name did not appear either as tenant or proprietor.

SMITH, J., in giving judgment, held that the proof was sufficient to sustain the pretensions of the petitioner, in the absence of any proof on the part of the defendant, who was bound to show that he had the right to exercise the office he assumed to hold, the proceeding being in the nature of a *quo warranto*. The judgment was recorded in the following terms.

"Considering that the said petitioner and informant hath fully established by legal evidence the material allegations of the said *requête libellée*, and namely, that at the time of the election of the said William Bristow to be a councillor for the St. Lawrence Ward for the City of Montreal, to wit, at the election held in the city for the election of a councillor for the said St Lawrence Ward on the twenty-eighth day of February last past, to wit, February, 1859, the said informant as petitioner was a duly qualified elector and voter qualified to vote at the election of a councillor for the said St Lawrence Ward in the City of Montreal, and that he, the said William Bristow, was not duly qualified to be elected as such councillor, the said William Bristow not being possessed to his own use and benefit of real and personal estate within the City of Montreal, after payment or deduction of his just debts, of the value of five hundred pounds currency, and that he hath continued to be so disqualified down to the filing of the information or *requête libellée* of the said informant or petitioner, and thereby by reason thereof, the said William Bristow was unqualified by law to be elected as such councillor.

"And further considering that it hath been established by legal evidence by the said informant or petitioner, that since the said election and during the occupancy of said office of councillor by the said William Bristow, the said William Bristow hath become insolvent, and hath thereby become disqualified by law to hold the said office, and by reason thereof hath ceased to hold the said office of councillor as aforesaid, the Court doth maintain the said petition, information, or *requête libellée*, and doth declare the said election of the said William Bristow to be and to have been illegal, null and void, and doth further declare that by reason of the subsequent insolvency of the said William Bristow, the said William Bristow hath by law ceased to hold the office of councillor as aforesaid, and by reason thereof, doth declare the occupation of the said office as councillor as aforesaid, for the St. Lawrence Ward to be an intrusion into and a usurpation of the said office, and the Court doth accordingly oust the said William Bristow from his office of councillor for the St Lawrence Ward in the City of Montreal, and doth exclude the said William Bristow from the exercise of the functions of the said office as aforesaid

"And the Court doth condemn the said William Bristow to pay the costs of the said information or *requête libellée*."

QUEEN'S BENCH, APPEAL SIDE.

DISTRICT OF QUEBEC

(From the "Lower Canada Reports")

MONTIZAMBERT, *Appellant*, AND TALBOT DIT GERVAIS, *Respondent*

Held —1. That a registrar is responsible for damage or loss caused by his neglect to enregister a mortgage, or by a certificate given by him wherein an omission occurs, from the effect of which a purchaser *de bonne foi* is troubled in his possession

2. That the action in such case must be one *en garantie*, the registrar being the *garant* of the party to whom he has directly caused damage

[19th day of June, 1860.]

This was an appeal from a judgment rendered in the Superior Court, at Quebec, on the 1st. day of April, 1859, whereby the appellant, who is the registrar of the County of Quebec, was condemned to pay to the respondent the sum £57 19s. 9d., for damages sustained by the latter, arising out of the alleged neglect of the appellant to register a mortgage upon a certain property which the respondent had purchased.

The facts of the case are as follow:—In February, 1843, one Paquet purchased a certain property in St. John street, in the city of Quebec. In July, 1845, a judgment was rendered against him in the Court of Queen's Bench for the sum of £25 10s. cy., with interest and costs, and this judgment was registered in August of the same year by Dérouselle, who had obtained it by assignment. The deed of acquisition of the property above mentioned was not registered, until November, 1845; and, in October, 1846, Tessier, notary, having applied to the appellant for a certificate of all mortgages registered against the name Jean Paquet, received a certificate in which reference was made to a number of mortgages, but omitting all mention of the judgment in favour of Dérouselle, which had been registered in August, 1845. In November, 1846, Prudent Talbot dit Gervais, the present respondent, acting on the faith of the certificate granted by the appellant in his capacity of registrar, purchased from Jean Paquet the property in question. In September, 1853, an hypothecary action was instituted by Derouselle against the respondent, founded upon the mortgage created by the judgment rendered in his favour against Paquet; and in February, 1855, a *quittance portant subrogation* was granted by Derouselle to the respondent, for the sum of £47 0s. 3d., being the amount of principal, interest and costs in his action against the latter. Upon these grounds the respondent instituted his action against the appellant and obtained the judgment from which the present appeal was brought

Holt and *Irvine*, for appellant, maintained that the certificate granted by him to the respondent was not such an one as the registrar is required to give by the 49th clause of the Registry Ordinance; and that not being in the course of his official duty, he could not be held liable for any damages occurring through an accidental error or omission in such a certificate. Admitting, however, that the registrar was actually bound to give such a certificate, it would be the duty of any person bringing an action for damages, against the registrar, based upon such certificate, to shew that the amount claimed had been paid out by him, and not by reason of any neglect or omission of his own; but because of negligence on the part of the registrar. It was but fair that the party bringing such a suit, should be made to prove the amount of his loss in an accurate manner. In the present action there was no proof of

this kind. For instance, it did not appear that Derouselle's action was ever entered in Court, or that any proceedings were had after the service of the writ and declaration. Neither did it appear that Paquet had ever been sued by the respondent as his *garant*; nor that any notice had ever been given to him by the respondent, although it did not appear that he was insolvent. And again, the respondent should not have paid Derouselle without a judgment having been rendered or even a suit pending against him. He should, moreover, have taken all possible steps to enforce payment from Paquet. With regard to the amount claimed, there was, in the first place, no evidence in the hypothecary action of the amount of costs claimed by the respondent having been ever taxed, neither was there any evidence of the amount paid by the respondent for legal advice. One item of £2 was also paid as having been charged to the respondent by a notary, for drawing up a petition to His Excellency the Governor General For this demand the appellant certainly could not be liable. The counsel for the appellant concluded by denying the liability of the registrar in the action; stating that there was not sufficient evidence of the respondent's loss; or that even admitting the sufficiency of the evidence the appellant had been condemned by the Court below to pay double the amount for which he was responsible.

Fournier and *Gleason*, for respondent, stated that it was an admitted principle of justice that he who by his neglect or his error, caused damage, should be held liable for it. If the responsibil ty of the registrar had no valid existence, it would be much better to close all registry offices; it would, at least, remove a trap from the path of lenders and purchasers in good faith.* With regard to the pretentions set up by the appellant that a notorial *acte authentique* is no legal evidence against a third person not a party to such act, it was a doctrine contradicted by all the authors who had written on the subject † With regard to another allegation of the appellant it might be stated that the insolvency of the vendor, Paquet, was both proved and admitted in the case; and, as to the amount claimed by the respondent, it was proved by the *quittance* given by Derouselle as well as by the appellant's admission of facts.

SIR L H. LAFONTAINE, BART., C. J —After a careful examination of the facts of the case, it will be observed that it involves a question of great importance, affecting, as it does, the responsibility of registrars in their capacity of *conservateurs* of mortgages. The main question is, whether the party aggrieved has a right to maintain an action against the registrar for the amount of damage alleged to have been sustained. This right is clearly established by the 8th sec, of the Ordinance 4th Vic , cap. 30; and it cannot be denied that the registrar is responsible for the damages caused by his negligence, whether the loss arises out of his neglect to enregister a title, or by reason of an insufficient certificate given by him. The *conservateur* should be held personally responsible for negligence of his public functions. It is true that the action does not exist on, or arise from, a special contract or a personal cause; but it originates in the fundamental principles of law itself, and proceeds from the damage caused by the neglect of the party complained of to perform his public duties as an official of the law.

With regard to the amount claimed by the respondent, the payment of principal and costs is not attempted to be denied—nay, it is admitted by the appellant; and this admission, of course, proves his liability for the amount demanded.

I, therefore, come to the conclusion that the judgment of the Court below, in the present action, should be confirmed.

DUVAL, J.—This is a question of which the main issue is the responsibility of the registrar.

On this question, the old and acknowledged principle of our law is well expressed in the following words: "*Tout fait quelconque de l'homme que cause à autrui du dommage, oblige celui par la faute duquel il est arrivé à le réparer.*"

This responsibility comprises as well acts of omission as acts of commission No public officer can be allowed to plead his own negligence or that of his subordinate to protect himself against such an action as the present Nor can such public officer be listened to when he pleads ignorance or error of judgment on his part Bertrand de Grenille well expressed the intention of the legislature when he said: "*la loi n peut balancer entre celui qui se trompe et celui qui souffre*" It is needless to refer more particularly to the writers on the subject: Troplong, Toullier, Domat, and others will be found to establish the rule beyond doubt Indeed, the principle is recognised by all the Judges of this Court.

The objection now made is to the sufficiency of the evidence adduced by the plaintiff. It is said that the notarial acknowledgment of payment signed by Derouselle, the creditor, is not evidence against third parties. I understand the rule of law on this subject very differently. The deed proves itself,—*probat rem ipsam*, —against the whole world: *le Contrat de Vente*, says Pothier, Tr. des Obligations no. 738, *prouve contre un tiers qu'il y a eu effectivement une Vente* (8 Toullier, nos. 148, 149) Were this not so, how could an action *en déclaration d'hypothèque* be maintained against a third party. Parol evidence would be clearly inadmisible. *Faits et articles* would be useless, as the defendant would answer, I was no party to the contract and knew nothing about it. How then could the original debt be proved? This rule of our law: that the deed proves itself against the whole world, is daily recognised and acted upon in all our Courts.

In thus stating my opinion on the law, I will say that there are certain items in the plaintiff's claim that cannot be allowed. The charges of the notary and some of the alleged law expenses are not proved.

As to the want of notice of action to the defendant, a public officer, an objection made in the present suit, it is clearly without foundation. The protest filed contains such notice in the most explicit terms.

MONDELET, J., after a *résumé* of the facts said:—The action in the Court below is founded merely upon a *quittance* given by Derouselle to the respondent; and for this reason, apart from all others, I think the judgment given in favor of the latter should be reversed. The *quittance* is no proof of a judgment against the respondent in so far as the registrar, a third party, is concerned; it establishes the fact only of the payment of a certain sum to Derouselle. Nothing is better established than that the notarial fact is proof only of the fact which has occurred in the presence of the notary. Apart from this *quittance* there is no legal proof of the action said to have been instituted by Derouselle against the respondent; no proof that the suit was ever returned into Court, and nothing whatsoever to shew that a judgment has ever been obtained. Even supposing that the judgment of the Court below should be confirmed by the Court here, there are several items in the respondent's claim which would have to be struck out, such as —interest, costs, amount paid to Mr. Delagrave, advocate, and to Mr. Glackmeyer, notary public, for the drawing up of a petition.

Next arises the question of the responsibility of the registrar. This is a generally admitted principle, but I do not see, in this case, what connecting link there is between him and the respondent. I can easily understand how the latter who had a business transaction with Paquet may have a recourse against him, by reason and in consequence of the damages suffered by him by reason of his being troubled in the possession of the property sold to him by Paquet. But with regard to the appellant who never gave a certificate to the respondent, who certainly never asked him for one, I cannot see what reponsibility he can be said to have incurred towards the respondent. These observations appear to be founded on the principles expressed by Troplong, *Priv. et Hyp.*, t. 4, no 1001.

I am of opinion, therefore, that the judgment of the Court below, in this case, be reversed.

BADGLEY, J —I fully concur in the opinions expressed by the Chief Justice, and Mr. Justice Duval, with regard to the incontestible responsiblity of the registrar for damages which he has caused. The public functionary, in undertaking the duties of an office, becomes directly responsible to those who employ him in that capacity for losses caused by his omission, his negligence, or his incapacity,—in proof of which I need only refer to the registry

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* 1 Domat, *Lois Civiles*, p 100, liv 2, tit 8, sec 4, art 1 — 4th Vict , cap. 30, secs 8, 20, and 49

† 1 Pigeau p 226.—Nouveau Denisart vbo *Acte Authentique*, p 159.—Pothier, *Traite des obligations*, p 369, part 4 cap 1, sec 4, no 738, who says —"L'acte "*prouve contre un tiers rem ipsam* c'est-à-dire que la convention qu'il renferme "est intervenue"

ordinance. In looking over the facts in evidence, it will be observed that the action instituted by Derouselle was served in February, 1855; that the registrar had notice of it in the shape of a protest, and that the action against the appellant was founded upon a *quittance* granted by Derouselle in the month of February, 1845. With respect to the *quittance*, of which so much has been said, it is a general principle that the *acte authentique* is proof of itself. The exception, as laid down by the authorities, is, of course, that the *acte authentique* can only *faire foi* against a third party when it relates to facts of which the notary is personally cognizant, and not to those which are founded on a mere *ouï-dire*. The principle of law, clearly defined, is, that the registrar is responsible in a direct manner, for the amount of the judgment—capital and costs. But it would be utterly preposterous to condemn the registrar in the amount of accumulated interest and costs, on sums other than the original amount of alleged loss and damage.

For the reasons which I have briefly laid down, I concur in the judgment of the Court, and consequently in the reversal of the judgment of the Court below against the appellant.

AYLWIN, J.—The liability of the registrar is clearly established and defined in the most unmistakable terms by our own law. As has been truly and forcibly said it arises from the liability of the public servant to every one of Her Majesty's subjects. There is not—there cannot be—any doubt or any question on this point, which must, in all common sense, be conceded at once. In my mind, however, the question at issue before the Court is whether the respondent has availed himself of his undoubted right of recourse against the appellant in a legal way, and whether he has followed it up in a proper manner in this case? Let us examine the facts on record for an answer:

When the respondent is sued by Derouselle he simply protests against the registrar, and then pays the amount claimed by the latter, upon a *reconnaissance simple*. He does not call the registrar before the Court as his *garant*, although the registrar actually was his *garant* in relation to the property in question. Why did he not proceed in this matter as he should have done? I cannot understand why the respondent thought fit to content himself with a simple protest served upon the registrar when he was troubled in his possession. The action of the respondent should have been one *en garantie* and the appellant should have been called into Court as the *garant formel* of the former. Had the respondent adopted this course he would have placed the appellant in a position to resist the action of Derouselle if he thought fit, or of adopting any other course he might deemed proper.

I am of opinion that the judgment of the Court below should be reversed: for, although admitting to the fullest extent the liability of the appellant in his public capacity, I nevertheless feel that the respondent should be taught to proceed in a proper manner for the recovery of what was undoubtedly an undeniable right.

Judgment of the Court below reversed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

(*From the "Monthly Law Reporter."*)

COMMONWEALTH v. IRA TEMPLE.

The legislature, exercising the sovereign power of the State, either by general law or special enactment, have control of all public easements and accommodations for the general benefit.

The right of every one to use the highway is equal, but each is bound to a reasonable exercise of his absolute right.

Where a driver of a wagon made use of the track of a horse-railroad for the wheels of his wagon, and upon the approach of the car behind him, refused to move off the track when requested by the conductor of the car, although he had room and opportunity so to do,

Held, that he was liable to indictment therefor.

Held also, that if the driver wilfully intended to follow his own convenience, in violation of the equal rights of others, it would be sufficient proof of a malicious motive on his part.

This was an indictment founded on the fifth section of the three hundred and second chapter of the acts of 1856, entitled "An act to incorporate the Malden and Melrose Railroad Company," which provided as follows:

"If any person shall wilfully and maliciously obstruct said corporation in the use of said road or tracks, or the passing of the cars or carriages of said corporation thereon, such person, and all who shall be aiding or abetting therein, shall be punished by a fine not exceeding five hundred dollars, or may be imprisoned in the common jail for a period not exceeding three months."

At the trial in the Court of Common Pleas, it appeared from the evidence on the part of the Commonwealth that the defendant was driving his heavily loaded wagon from Charlestown to Boston in a public street, with one wheel in the track of the Middlesex Railroad, when one of the cars of the Malden and Melrose Railroad came up behind him. The defendant's team was moving at the usual rate for teams of that class, but at a less rate of speed than the horse-cars were in the habit of moving. There was room outside the track for either vehicle to pass the other. When the cars came up the conductor asked the defendant if he would please to remove his team from the track. The defendant said not, but continued it at the same rate of speed several hundred feet, and then turned off. It also appeared from the same testimony, that it was usual for those in charge of vehicles, like that of defendant, to drive them with one wheel in the track, and that they could be drawn much more easily in that place than in any other part of the street. There was no evidence that the defendant got upon the track in the first instance with the intention of obstructing the cars, or that he changed his rate of speed on the approach of the cars, or that he used the street, or did any act in any other than the usual manner. There was no other evidence than this bearing upon the question of malice. As bearing upon the question of intention, the defendant offered to show that it is not the custom for those in charge of vehicles to turn out when a car comes up behind them, until it suits their convenience. The evidence was objected to and ruled out.

The defendant contended that malice must be shown, and that it could not be inferred from the mere fact that the defendant used a part of the street the most convenient to him in the ordinary way, knowing that the cars would be obstructed by such use.

The defendant also prayed for the following instructions:

1. If the jury find that the defendant was using the highway in the ordinary way, they must find for the defendant, without reference to the motive of his act.

2. In the absence of regulations on the subject, the corporation has no right to drive its cars at any particular rate of speed, and the mere slackening of the speed of the car by the defendant, if it was moving at the ordinary and proper rate of speed, was no obstruction within the meaning of the statute.

3. There is not sufficient evidence to warrant the jury to find a verdict of guilty.

4. The right of the horse railroad company to use the highways is subject to the right of the public to use such highways as they had previously done.

5. If the jury find that the defendant went upon the track in the ordinary use of the street, without intending to obstruct the car, and continued on the track after the car came up behind him for his own convenience, and because that was the best part of the street to drive on, the defendant is not guilty.

6. In order to establish the crime of obstructing the cars, some act must be shown beside the use of the street in the ordinary way.

7. The act incorporating the railway company created no new crime: it merely attached a new penalty.

8. In the absence of regulations as to the rate of speed, and the mode of use of the track, they have no right to a given rate of speed.

The presiding Judge (BISHOP, J.) declined to give any of the instructions, as prayed for, but did instruct the jury that although the public might drive the vehicles over the tracks of the railroad when the cars were not approaching, the corporation had a prior right to the track; and if the jury should find that the defendant was on the track and hindered the progress of the car, and was requested to remove from it, and could reasonably have removed, he was bound so to do; and his remaining there, knowing that the car would be thereby obstructed, intending thereby to obstruct it, in the use of their track, was a wilfull and and malicious obstructing within the meaning of the statute, and that it was not material whether the defendant stopped his vehicle, or whether it continued to move on the track at the ordinary rate of such vehicles; that no other proof of malice was necessary than that the defendant

knowingly and intentionally obstructed the car, although he may have made only the ordinary use of the street.

To all of these rulings and instructions, and refusals to instruct, the defendant alleged exceptions, and took the case up to the Supreme Judicial Court, where it was argued last October by *P. W. Chandler* and *George O. Shattuck*, for the defendant, and by *Attorney-General Phillips* for the Commonwealth. The decision of the court was given by

SHAW, C J.—Since horse-railroads are becoming frequent in and about Boston, and are likely to become common in other parts of the Commonwealth, it is very important that the rights and duties of all persons in the community, having any relations with them, should be distinctly known and understood, in order to accomplish all the benefits, and, as far as practicable, avoid the inconvenience, arising from their use. This is important to proprietors and grantees of the franchise, who expend their capital in providing public accommodation, on the faith of enjoying with reasonable certainty the compensation in tolls and fares which the law assures to them: to all mayors, aldermen, selectmen, commissioners or surveyors especially appointed by law for the care and superintendence of streets and highways; to all persons for whose accommodation in the carriage of their persons and property these ways are specially designed; and to all persons having occasion to use the ways through or across which these horse-railroad cars may have occasion to pass. These railroads being of recent origin, few cases have arisen to require judicial consideration, and no series of adjudicated cases can be resorted to as precedents to solve the various new questions to which they may give rise.

But it is the great merit of the common law, that it is founded upon a comparatively few, broad, general principles of justice, fitness, and expediency, the correctness of which is generally acknowleged, and which at first are few and simple; but which, carried out in their practical details, and adapted to extremely complicated cases of fact, give rise to many, and often perplexing questions; yet these original principles remain fixed, and are generally comprehensive enough to adapt themselves to new institutions and conditions of society, new modes of commerce, new usages and practices, as the progress of society in the advancement of civilization may require.

In the first place, all public easements, all accommodations intended for the common and general benefit, whatever may be their nature and character, are under the control and regulation of the legislature, exercising the sovereign power of the State, either by general law or special enactment. It may be done by a charter, or special act of incorporation, in case of a bridge over broad navigable waters; or where the necessity for its exercise is of frequent recurrence, it may be by the delegation of power to special tribunals, or municipal governments, by general laws.

Again, when the entire public, each according to his own exigencies, has the right to the use of the highway, in the absence of any special regulation by law, the right of each is equal; but as two or more cannot occupy the same place at the same time with their persons, their horses, carriages and teams, or other things necessary to their use, each is bound to a reasonable exercise of his absolute right in subordination to a like reasonable use of all others; and not to incumber it over a larger space, or for a longer time, to the damage of any other, than is reasonably necessary to the beneficial enjoyment of his own right. If an adjacent proprietor has occasion to stop at his own gate with a carriage or team, if he has occasion to deliver wood, coal, or other necessaries; or if he is a trader, to deliver or receive merchandise, he must place his team or carriage, for the time being, in such manner as to obstruct the way for the use of others as little as is reasonably practicable, and remove the obstruction within reasonable time to be determined by all the circumstances of the case.

So in the actual case of the highway. Each may use it to his own best advantage, but with a just regard to the like right of others. Persons in light carriages, for the conveyance of persons only, have occasion, and of course a right, when not expressly limited by law, to travel at a high rate of speed, so that they do not endanger others. But all foot passengers, including aged persons, women, and children, have an equal right to cross the streets, and all drivers of teams and carriages are bound to respect their rights, and regulate their speed and movements in such a manner as not to violate the rights of such passengers. So in regard to drivers of fast and slow carriages, each must respect the rights of the other. Take a single illustration: if a heavily loaded ox-team be passing along a street wide enough for only one carriage, say fourteen feet, and other fast carriages follow, these last must, for the time being, be restrained to their speed, because this necessity results from these circumstances,—the narrowness of the way, and the ordinary slowness of the ox-team ahead. If parties thus travelling in the same direction should come to a portion of the way wide enough for carriages to pass each other, say twenty feet wide, it is obvious that if the driver of the heavy team would turn to either side, it would give the fast team room to pass, whereas, if he should keep the middle, the five or six feet on either side would not permit any carriage to pass. Now, supposing no impediment should intervene, and no circumstance should render it dangerous for the driver of the slow team to bear off, in our opinion it would be his duty to do so, although it might suit his convenience better to keep in the middle; and his refusal thus to bear off would be an abuse of his own equal and common right, for which, if injurious to another, an action would lie; and, if it was a public highway, the party would subject himself to a public prosecution.

In some few cases, the regulation of the use of the highway is important enough to require a rule of positive law, requiring each traveller, when meeting, to turn to the right of the centre;—in some States, to the left. But the circumstances, under which travellers may be placed in relation to each other are so various, that it would be impracticable to prescribe any positive rule approaching nearer to certainty than the rule of the common law, that each shall reasonably use his own right in subordination to the like reasonable use of all others.

With these views of the law regulating the use of public ways, we will examine the present case, as it appears on the exceptions.

We understand that a horse-railroad and cars are a modern invention, designed for the carriage of passengers, and though not moving with the speed of steam-cars, yet with the average speed of coaches, omnibuses, and all carriages designed for the conveyance of persons.

The accommodation of travellers, of all who have occasion to use them, at certain rates of fare, is the leading object and public benefit, for which these special modes of using the highway are granted, and not the profit of the proprietors. The profit to the proprietors is a mere mode of compensating them for their outlay of capital in providing and keeping up this public easement.

A franchise for the railroad, which the defendant was accused of obstructing, had been duly granted to the proprietors, which grant included the right to lay down tracks on a public highway, and also to use and maintain horse-cars thereon for the carriage of passengers.

Every grant, by an obvious and familiar rule of law, carries with it all incidental rights and powers, necessary to the full use and beneficial enjoyment of the grant; and when such grant has for its object the procurement of an easement for the public, the incidental powers must be so construed as most effectually to secure to the public the full enjoyment of such easement

It appears that the proprietors of the horse-railroad having received a franchise, had laid down a railway track, and had procured horse-cars, with suitable conductors, and were in the actual use of the track. The defendant, with a heavily loaded team,—it does not appear whether an ox team or a horse team,—was on the public street driving from Charlestown to Boston, with one of his wheels on the railroad track, when the cars came up behind him. The defendant's team was moving at the usual rate for teams of that class, but at a less rate of speed than the cars were in the habit of moving. There was room outside the track for either vehicle to pass the other. When the cars came up, the conductor asked the defendant if he would remove his team from the track; he did not, but continued upon it, at the same rate of speed, several hundred feet, and then turned off.

Several things are here to be observed. The cars could only pass on one precise line. The wagon could deviate to the right or to the left, within the limits of the travelled part of the road. The public by the grant of the franchise had granted the right to move on that precise line, and had given to all passengers the right to be carried on that line at the usual rate of speed at which pas-

sengers are carried by horses, subject only to occasional necessary impediments. The cars cannot so move and the passengers cannot be so carried, whilst the wagon moves on the track. No impediment is shown to prevent the wagon from turning out The wagon, therefore, is, for the time being, an unnecessary obstruction of the public travel, and therefore unlawful.

It is stated among the above-mentioned circumstances in the bill of exceptions, as if the two vehicles were upon an equality in this respect, that there was room on either side for either vehicle to turn out. But this is mere illusion; the wagon could turn out, the cars could not; *ad impossibilia lex non cogit.*

It is said above that it is usual for those in charge of heavy and slow teams to drive them with one wheel on the track, and that they could be driven much more easily in that place that in any other part of the street. This is no justification. Whilst the track was not required for the cars, perhaps the teamster had a right so to use it. But, when required for the cars, which could pass in no other mode, he had no legal right to consult his own convenience, to the great inconvenience, the actual injury of the equal rights of another.

It is no excuse that the defendant did not get upon the track in the first instance with the intention of obstructing the passage of the cars, or that he did not slacken his rate of speed on their approach; it is a nuisance, if, for his own benefit, he violates the rights of others; and if this consists in the violation of a public right, indictment is the appropriate remedy for its vindication and redress. Nor is express malice, a disposition or desire to cause damage to another, as in case of malicious mischief, necessary to the completion of the offence It is a nuisance if one wilfully seeks and pursues his own private advantage, regardless of the rights of others, and in plain violation of them; it is a wrong done. And as every man must be presumed to intend all necessary, natural and ordinary consequences of his own acts, it is a wilful and intended wrong; it is malice,—a thing done *malo animo*,—in the sense of the law and no other malice need be proved, to show the act to be a nuisance.

If it be said that the obstruction in this case was very slight, that the cars were delayed but a very short time,—the answer is, that this is very true, and the injury may be trifling in itself, but vindicated and justified as it is in the argument, on the ground of right, it tests a principle of very great importance. If the driver of a heavily loaded truck or wagon may, for his personal convenience, use one rail of the track, wilfully, for a few hundred feet, others may use the other rail for the like purpose, and for any distance which suits their convenience. Cars, which at the ordinary speed of horses in carriages, would pass a given space in one hour, may be three or four in accomplishing it. Passengers whose business requires them to be at the place of destination at a fixed time, and who expect and have a right to expect that it will be reached in that time, may find their business greatly deranged

Men who, relying on the establishment of horse-cars for their daily passage, have fixed their domicil at one place and their ordinary place of business in another, may find their plans of life thus defeated. Indeed, without pursuing the effect of the right contended for into all its consequences, the establishment of such a principle might essentially impair the value of real estate in many situations

We will now consider some of the points specially raised by the bill of exceptions.

1 The defendant contended that malice must be shown, and that it could not be inferred from the mere fact that the defendant used a part of the street, the most convenient to him in the ordinary way, knowing that the car would be obstructed by such use.

If the term malice is here used in the sense of ill-will, a desire to injure another, as an actuating motive, the opinion of the Court is, that malice need not be shown, but that if a wilful intent to follow his own convenience in violation of the equal rights of others exists, it is sufficient, and no other malicious motive need be proved.

2. The defendant contended, that in the absence of regulations on the subject, the corporation has no right to drive its cars at any particular rate of speed, and the mere slacking of the speed of the car by the defendant, if he was moving at the ordinary and proper rate of speed, was no obstruction within the meaning of the statute.

This position we think is untenable. We think the corporation had a right, and, in reference to passengers, were bound to move at the rate of speed usual for vehicles for the carriage of passengers, drawn by horses, provided this right could be enjoyed without preventing the loaded team from moving at its usual and proper speed; and both could be done by the team ahead turning off the track, which the car in the rear could not do. It was therefore the duty of the team, in the reasonable use of the public right, to do it. What was the usual and proper rate of speed of the one was not that of the other.

3. The evidence was properly left to the jury.

4. It was contended, that the right of the horse-railroad company to use the highways is subject to the right of the public to use such highways as they have previously done.

This position we think manifestly unsound. The legislature having granted a new and peculiar use of the highways, the right of the public to use them as they had done is thereby qualified, and must be adapted to such new use

Suppose the legislature should authorize a canal to cross a highway, with a draw, to be raised while boats are passing; the public cannot use the highway, as they have previously done, at all times, but must use it in subordination to the new right granted.

So here the law having authorized a horse-railroad which cannot deviate from one line, other vehicles must conform their use of the way to such new and authorized use, although it prevents them, to some extent, from using it as they had previously done.

The 5th, 6th, 7th and 8th prayers for instructions, we think, were rightly rejected, for reasons which are already sufficiently stated.

The instructions actually given were, in our opinion, correct in law, carefully guarded, and precisely adapted to the circumstances of the case, and therefore the exceptions must be overruled, and judgment entered on the verdict.

GENERAL CORRESPONDENCE.

Goods exempt from seizure—Distress for rent.

To the Editors of the Law Journal.

Gentlemen,—Under the head of "Division Courts" in your last issue, I notice that in considering the subject of landlord's claims for rent in arrear as made under the Division Courts Act, with a special reference to the question, how far, if at all, the goods of a debtor, *exempt by statute*, are liable to seizure by the bailiff on receipt of the required notice of claim by the landlord for rent in arrear, to satisfy the same.

The opinion expressed by the writer of that article is not in accordance with the decision in the cases of *Beard* v. *Knight*, 27 L. J. (N. S.) Q. B. 359, (S. C.) 4 Jurist, (N. S.) 782, and *Wilcoxon et al appellants* v. *Surly respondent*, *Re Findgar* v. *Taylor*, 29 L. J. (N. S.) Ex. 154.

As this is likely to become a question of consequence to Division Court officers and the public, I desire to draw your attention to it, so that a proper and uniform understanding of the subject may be had.

Yours truly, B.

[As our correspondent says the question he raises is likely to become of consequence to Division Court officers and we willingly insert his communication. It always has been our desire that parties competent to do so should submit any remarks that occurred to them upon matters appearing in this journal. Our only desire is to inform, and if wrong, we shall be only too happy to be set right at any time.

In the present instance we continue to think that the position which our correspondent questions is correct, but our readers must judge for themselves.

We have looked at the case of *Beard et al* v. *Knight*, Reid claimant, referred to by our correspondent,—the other case we have not seen.

The first mentioned case does not touch the point at all. It shows that the property of a third party was seized by the bailiff, and the question raised for the opinion of the court was whether the claimant was not entitled and ought not to have paid him the produce of the sale of the goods seized and sold under the execution as they were found and determined by the judge of the court below to have been the property of the claimant and not of the defendant. To put it in other words, simply a question whether a bailiff can satisfy the landlord's claim for rent due from the execution debtor by selling the goods of a third person which may be in the house of such debtor.

Upon the argument Lord Campbell, C. J., said: "The enactment that the overplus is to be returned to the debtor shows clearly that the goods to be sold were intended to be his, and not those of a third person. It would require very strong language to show that goods belonging to A. are to be sold for the debt of C.; there is hardship enough as the law stands at present, and I should not be inclined to extend it any further. We must regard the rights of the owners of goods, but you seek to destroy their rights. These goods could not be taken in execution."

Our correspondent cannot surely have read the report of the case.—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

EX. WHITWORTH & ANOTHER v. HUMPHRIES & OTHERS. *Jan.* 14.

Ejectment—Common Law Procedure Act 1852, *s.* 172.

To be let in to defend in an action of ejectment under the above section a man must be *in possession* by himself or by his tenant.

Held, that a remainderman has not the *possession required* by the section.

C. C. R. REG. v. RACHEL WARDROPER. *Jan.* 28.

Husband and wife indicted for receiving—Coercion and control of husband.

Where a husband and wife are indicted for receiving, it is proper that the jury should be asked whether the wife received the goods either from or in the presence of her husband, and where this question was not put, and both husband and wife were convicted, this court quashed the conviction of the wife.

P. P. YEATMAN v. DEMPSEY. *Jan.* 19.

Contract implied—Agreement to appear at a trial without subpœna—Cause of action—Damages.

The plaintiff with the view (known to the defendant) to obtain a divorce from his wife on the ground of her having been insane at the time of the marriage, employed the defendant, a medical man, to observe her and also to inquire into her past history and procure evidence of her insanity at the time of the marriage, and to make it available in the suit, and the defendant was to be paid for what he did. The defendant did not appear at the trial and his evidence being necessary, the plaintiff was in consequence obliged to withdraw the record.

Held, that this was evidence of an undertaking to appear and give evidence at the trial without a subpœna, and also evidence of substantial damage to the plaintiff.

EX. JONES v. HOWELL. *Nov* 24.

Notice of action—Arrest—Malicious injury to property—Arrest on Sunday—Statute 7 & 8 *Geo IV., c.* 30, *s* 28

The defendant by the direction of his tenant arrested on a Sunday, two men, one of whom had just before wilfully broken one of his windows and locked them up for two hours in a room of the house. The man who had committed the damage afterwards brought an action for false imprisonment.

Held, that the defendant was entitled to notice of action under 7 & 8 Geo IV, c. 30, s. 41.

Quære, whether the arrest was justifiable, under 7 & 8 Geo. IV, c. 30, s. 28.

The plaintiff in this case was running away from the place the offence was committed when pointed out to the defendant by his tenant. At the trial the learned judge directed a non-suit reserving leave for the plaintiff to move to enter a verdict for £5. The ground was whether the plaintiff was "found committing" the offence within the statute.

C. C. R. REG. v. CHARLOTTE EVANS. *Nov.* 19.

False pretences—Obtaining change for the note of a bank which has stopped payment—Evidence.

Upon indictment for obtaining money by false pretences in change for a bank note, it was proved that the note was one of a private bank, which had paid a dividend of 2*s.* 4*d* in the pound, and no longer existed; and that a neighboring bank would not change it.

Held, that the above was not evidence from which it could be inferred that the note was of no value whatever.

EX. ABRAHAM v. REYNOLDS. *Jan.* 12.

Negligence—Master and servant—Common work.

A. contracts to cart wool from B's warehouse. Whilst the carting is going on, A's servant who is managing the cart is injured by the negligence of B's servant.

Held, that A's servant though engaged in common work with B's servant, cannot be considered a servant of B., and may recover in an action against B, for the injury.

POLLOCK, C B.—If several persons undertake an operation together, the fact of their object being common will not exclude one from right of action for an injury arising from negligence of another, as in case of a vessel coming into dock and mariners dragging at one end of the rope and dock-labourers at the other, either party would have a right of action for an injury arising from negligence of the other.

C. C. R. REG. v. CHARLES HUNTLEY. *Jan.* 21.

Pleading—Immaterial averment—Count for receiving, containing words of reference to count for stealing.

In an indictment containing two counts, the first alleged that the prisoner stole certain goods and the second that he received "the goods aforesaid," "so as aforesaid feloniously stolen," after objection that he could not be found to have received goods stolen by himself; the case went to the jury and he was acquitted upon the first count and convicted upon the second.

Held, that the words "so as aforesaid feloniously stolen" were immaterial and that the conviction was good.

EX. CUMMING v. SHAND P.O., &c. *Jan.* 13

Banker—Credit—Unrealised security—Dishonoring cheque.

By the course of dealing between a banker and his customer the banker gave his customer credit to the value of goods con-

signed to the customer, the bills of lading relating to which were deposited with the banker.

Held, that an action for dishonoring a cheque drawn in respect of such credit was maintainable against the banker, notwithstanding a fall in the market value of the goods, the bills of lading were an insufficient security for the amount to which the customer had been credited.

POLLOCK, C B.—If by the course of dealing whether between a banker and customer or any two individuals, the practice is for one to give the other credit to an ascertained amount in respect of valuable security deposited with him, that is a state of facts from which it may very reasonably be inferred that the understanding of the parties was that it should not be put an end to without notice.

EX. ASTLEY AND ANOTHER v. JOHNSON. *Jan.* 23.

Bill of exchange—Failure of consideration—Consideration payable at a future day and before maturity.

A. drew a bill abroad upon his correspondent in England, at ninety days' sight, payable to the order of B. The bill was drawn and handed to B. on the terms that he should pay for the bill at the end of the month.

Held, that it was a good answer to an action on the bill against the acceptor at the suit of B, that B. had not paid the money or any part of it for the bill; and that the bill was accepted after the month and in ignorance of the non-payment of the consideration.

MARTIN, B., thought the principle of a *condition precedent* to the payment of the money applicable in this case.

Q.B. *Jan.* 23, 24.

NICHOLSON AND OTHERS v. RICKETTS AND OTHERS.

Partnership—Purchase and sale of bills of exchange.

An arrangement was made between the defendants, merchants in London, and V. & Co, merchants in Buenos Ayres, that V. & Co. should draw upon the defendants and sell these drafts, and when an opportunity offered purchase others to be remitted to the plaintiffs for the purpose of covering their acceptances. The profits on these transactions were expected to arise from the difference in the rates of exchange, and it was agreed that they, or the losses, if any, should be divided equally between the two firms. Bills were accordingly drawn by V. & Co. upon the defendants and sold to the plaintiffs, who were informed of the authority given by the defendants to V. & Co to draw the bills. These bills were signed by V & Co. in their own names.

Held, in an action against the defendants as drawers of the bills, that though there was a partnership between V. & Co. and the defendants they were not liable, V. & Co having no authority to bind them by their signature in their own names.

Held also, that the defendants were not liable for the amount of the bills in an action for money had and received as upon a failure of consideration.

Held also, that the defendants were not liable for not accepting the bills, as they had not under the above circumstances contracted to do so.

C P.

THE PENARTH HARBOUR, DOCK, AND RAILWAY COMPANY v. THE CARDIFF WATERWORKS COMPANY.

Inspection of document—Profert and Oyer, abolition of—Common Law Procedure Act 1852, (15 & 16 *Vic., c.* 76) *ss.* 55, 56.

Where a party to an action, in his pleading, relies on a deed in his possession, the Court may, by virtue of its jurisdiction at Common Law, make a rule absolute for inspection of the deed by the opposite party.

Per WILLES, J., that section 56 of the Common Law Procedure Act 1852, seems incidentally to give a statutory right to apply to the Court for inspection.

Section 56 says: "A party pleading in answer to any pleading in which any document is mentioned or referred to, shall be at liberty to set out the whole or such part thereof as may be material, and the matter so set out shall be deemed and taken to be part of the pleading in which it is set out."

Held, that giving a right to set out the document, seems incidentally to give a right to apply to the Court for inspection.

CHANCERY.

M. R. SABIN v. HEAP. *Nov.* 17, 18.

Time—Executor—Charge for payment of debts—Liability to see to the application of purchase money.

When there is an express charge in a will for the payment of debts the lapse of twenty-eight years from the testator's death will not be a sufficient period to re-but the presumption that the debts have not been paid, although the *cestuis que trusts* have been in receipt of the rents and profits of the estate.

Semble, that at the expiration of twenty eight years trustees can make out a good title under an express power of sale created by the charge for the payment of debts.

M. R. LOCH v. VENABLES. *Dec.* 16.

Will—Personal estate—Shares—Bonus.

Testatrix being possessed of twelve shares in the Carron Company, specifically bequeathed them to her niece for her life, and after her decease to her great nephew for his life, and in case he should marry to his wife for her life, the remainder to their child or children, but in case her great nephew should not marry then to certain charities, and she bequeathed the residue of her personal estate for the same ends, intents and purposes as the Carron Company's stock A bonus on the shares was declared by the company prior to, but which became payable after her death.

On bill filed by the trustees of her will,

Held, that the bonus must not be treated as part of the proceeds of the shares, but as part of the personal estate.

V. C. K. DAWSON v. SOLOMON. *Nov.* 25, *Dec.* 6, 22.

Specific performance—Insurance—Vendor and purchaser.

S. contracts in writing to purchase a leasehold house of D. and his co-trustees for sale. The house is held under D. college, and there is a power of re-entry and avoidance of the lease on non-performance of any covenant. The insurance of the house being about to expire, D. renews it so as just to extend beyond the day appointed for completion. The purchase is not completed on that day and the insurance expires. On a subsequent day when the parties met to complete, the fact of the policy having dropped is discovered, but the purchaser's solicitor offers to complete is a waiver of the forfeiture is obtained. This, the plaintiff's solicitor declines, although afterwards a waiver is obtained The purchaser refuses to complete and on bill filed by D. to enforce specific performance against S., bill dismissed without costs.

Semble, if the fact of an insurance being about to expire after the day appointed for completion and acceptance of title is known to a purchaser and on being applied to for the means of renewing it he refuses to afford them, the Court would enforce performance against him.

The omission of a vendor to inform a purchaser of the day on which a policy of insurance on the premises will expire, followed by a forfeiture of the lease is not sufficient to put an end to the contract.

The relation of trustee and *cestui que trust* is created in its full extent from the day appointed for a completion of a purchase supposing it is not then completed.

M. R. PASCOE v. SWAN. *Nov.* 10.

Partition—Account—Infancy—Tenant in common—Occupation—Rent.

B., one of two tenants in common (A. & B.) died leaving C. an infant her heir at law. C on attaining his majority instituted the present suit for partition and account. The Court decreed that A. should be treated as having entered on C's estate, and having been in actual possession during the whole of C's minority and charged A. with an occupation rent.

REVIEWS.

A TREATISE ON THE AMERICAN LAW OF REAL PROPERTY.—By Emory Washburn, LL.D., Professor of Law in Harwood University. Boston: Little, Brown & Co.

We have read the volume before us which is complete in itself, and furnished with a full and well constructed index. This carefully prepared work will be found a valuable contribution to the Canadian lawyer.

The section on waste we mention, illustrating its peculiar advantage to us.

The condition of things in the United States and Canada is very much alike, and many acts that in England would be waste, are held, and properly so, not to be so in the United States. This branch of the law of real property is very fully illustrated by reference to American cases.

The section "letting lands upon shares" (page 364), may also be referred to as showing the peculiar value of the work to our profession. The English reports and text books, contribute little to our enlightenment on this subject, the practice of "letting on shares" not prevailing in Great Britian.

On the most important statutory provision relating to lands, a compendium of the law of the several States, is given in notes, which will enable the Canadian reader to understand the apparant discrepancies in the decisions of the different Sates, and be useful also for reference.

Our opinion before expressed, that the value of American text books would be greatly increased by reference to the cases decided in Upper Canada, we reiterate in respect to the work before us, and take the liberty of saying that our reports would have furnished Mr. Washburn *more aid in the preparation of his work, than the reports of any three States in the Union.*

We can strongly recommend this work. It is the best American text book we have seen on the law of real property, and we are satisfied that any Canadian lawyer who reads even a single section will desire to have it by him to consult whenever called upon to advise in respect to the important branch of the law which it covers.

ORDERS OF THE COURT OF CHANCERY FOR UPPER CANADA, WITH NOTES, by T. Wardlaw Taylor, Esq., M.A., Barrister-at-Law. Toronto: H. Rowsell, King-street. 1860.

The Editor of this small volume states that the edition is not published by authority, but will be found to contain all the orders by which the practice of the Court is regulated.

It is a shame that something is not done by our Court of Chancery towards consolidating its orders. Long since, we had been given to understand that the Court here intended to do so, and have been in daily expectation that the work would be done. The orders of June 1853 have long been out of print, and the orders of succeeding years were not, until the publication of the volume before us, to be had in separate form.

Mr. Taylor, it will be seen, has attempted to do what the Court should long since have done. His edition is not published "by authority," but yet contains "*all* the orders by which the practice of the Court is regulated." He has not, of course, consolidated the orders; *that* is for the Court to do. What, however, he could do towards supplying a great want to the profession, he has done, and done very well. He has taken the trouble to append to the orders decisions on points of practice arising under them, and also many decisions on those sections of the English Chancery amendment acts which have been adopted into the orders of 1853. With this part of Mr. Taylor's performance we have no fault to find, except that his notes, instead of being foot-notes, or otherwise distinct from the text, are mingled with the text in a manner which is not free from confusion.

In his search for decisions under the orders, he has evidently been industrious, but yet we cannot say that he has noted *all* the decisions. Under order No. ix. subsec. 15, we should find a note of *Goodeve* v. *Manners*, 4 Grant, 101. Under order xiii., *Counter* v. *The Commercial Bank*, 4 Grant, 230; *Shaw* v. *Laddell*, *Ib.* 352; *Prentiss* v. *Brennan*, *Ib.* 147. Under order xvii., *Davidson* v. *McKillop*. 4 Grant, 146; *Clarke* v. *Hall*, 7 Grant, 339. Under order xxxii. subsec. 2, *Hill* v. *Forsyth*, 7 Grant, 461. Under same order, subsec. 4, *Clarke* v. *Best*, 8 Grant, 7. Under order xxxvi. subsec. 12, *Crooks* v. *Crooks*, 4 Grant, 376. Under order xl. subsec. 6, *Re Ausbrook*, 4 Grant, 109. Under order xlii. subsec. 15, *Paterson* v. *Holland*, 7 Grant, 563. Under order xlvi. subsec. 6, *Saul* v. *Cooper*, 4 Grant, 61.

The volume should have been accompanied with an Index of cases to which reference is made in the body of the work. Had it been, we could have tested its value with more accuracy. It is possible that some of the cases to which we have referred as being omitted, are inserted in places other than where we should expect to find them.

We must, however, do Mr. Taylor the credit of having produced a work that will be of very great service to that portion of the profession who are engaged in Chancery practice. Every man who supplies, at moderate cost, a want of which any portion of the profession stands in need, is a benefactor.

The book is well printed, and printed on good paper. It is done in Mr. Rowsell's usual well-known style. Price, $1 50 paper, $2 half calf, $2 50 half calf interleaved with writing paper.

BLACKWOOD, for October, received. Contents:—Seeing is Believing; The Papal Government; Tickler II. among the Thieves; The Reputed Traces of Primeval Man; The Romance of Ajostini; The Fresco Paintings of Italy; Proverbs; The Meeting; Progress; Strength; Norman Sinclair.

GODEY'S LADY'S BOOK, for November, received. Contents, as usual, varied and interesting. It is embellished with some engravings of exceeding beauty.

APPOINTMENTS TO OFFICE, &c.

JUDGES.

The Hon JOHN PRINCE, of Osgoode Hall, Esquire, Barrister-at-Law, Q.C. to be Judge of the Provisional Judicial District of Algoma.—(Gazetted Oct 6, 1860)

NOTARIES PUBLIC.

JAMES FOX SMITH, of Newtonville, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted Oct 6, 1860)

CHARLES ADDISON HARTT, of Clinton, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted Oct. 6, 1860)

ORLANDO JOHN MACKAY, of Toronto, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted Oct. 6, 1860.)

DAVID BLAIN, of Toronto, Esquire, Barrister-at Law, to be a Notary Public in Upper Canada.—(Gazetted Oct. 6, 1860)

MACNEIL CLARKE, of Prescott, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted Oct. 6, 1860)

JOHN HORNER GREENWOOD, of Whitby, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted Oct. 13, 1860)

SHERIFFS

HENRY J THORP, Esquire, to be Sheriff of the County of Prince Edward.—(Gazetted Oct. 27, 1860)

CLERKS OF COUNTY COURTS.

JOHN MACBETH, of London, Esquire, to be Clerk of the County Court of the County of Middlesex.—(Gazetted Oct 27, 1860)

SEPTIMUS PRINCE, Esquire, to be Clerk of the District Court of the Provisional District of Algoma.—(Gazetted Oct. 27, 1860)

TO CORRESPONDENTS.

A CLERK, JOHN ARMOUR—Under "Division Courts," p 249

B.—Under "General Correspondence," p. 261.

E. S WHIPPLE—Too late for this number.