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DIARY FOR OCTOBER.

1. Saturday ..... Last day for notice of trial for York & Peel.
2. SUNDAY ..... *19th Sunday after Trinity.*
3. Monday ..... County Court and Surrogate Court Term commences.
8. Saturday ..... County Court and Surrogate Court Term ends.
9. SUNDAY ..... *20th Sunday after Trinity.*
10. Monday ..... York and Peel Fall Assizes.
16. SUNDAY ..... *21st Sunday after Trinity.*
18. Thursday ..... *St. Luke.*
23. SUNDAY ..... *22nd Sunday after Trinity.*
28. Friday ..... *St. Simon and St. Jude.*
30. SUNDAY ..... *23rd Sunday after Trinity.*
31. Monday ..... All Hallow Eve.

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 Ardagh & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

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

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

The Upper Canada Law Journal.

OCTOBER, 1864.

STAMPS ON LAW PROCEEDINGS.

It is a common saying "that the Queen's Government must be carried on," but this cannot be accomplished without money. Various are the means devised for the creation and collection of revenue. Taxation in all its forms is the price which we pay for civil government. No mode of taxation is more familiar to members of the legal profession than that which arises upon legal proceedings. Once upon a time it was trifling in Upper Canada. But with our progress in civilization we have progress in taxation, until now the disbursements incurred to the Crown in the conduct of law proceedings are become most serious items in a bill of costs. Few who pay bills of costs reflect how much of each bill goes to the government. The attorney has the credit (or rather the discredit) of collecting the whole amount, having himself advanced the proportion of the government; and thus is not only a tax gatherer, but a tax gatherer who himself guarantees the collection of taxes.

Up to this time all fees on legal procedure were paid by attorneys and others whose duty it was to pay them to duly accredited officers of the government. But the officers were not all immaculate. Some were required to furnish security, and others spared the necessity of doing so. By means of defaults, secured (if we may be allowed the expression) by bad sureties or no sureties at all, the government from time to time sustained serious losses. In order to cure as far as possible abuses of this kind, the Legislature, during its last session, passed an act intituled "An Act for the collection, by means of stamps, of fees of office, dues and duties payable to the Crown upon law proceedings and registrations."

The act took effect on the first day of the present month of October. Henceforth no money shall be paid to or shall be received by any officer entitled to receive fees due and and payable to the Crown under certain acts therein specified.

WHAT COURTS, OFFICERS AND ACTS AFFECTED.

The acts affected are Con. Stat. U. C. cap. 15, respecting the County Courts; cap. 16, respecting the Surrogate Courts; cap. 19, respecting the Division Courts; cap. 33, respecting the Law Society of Upper Canada; cap 10 sec. 29, respecting fees payable to the Clerks of the Crown and Pleas, Clerk of Process, and their deputies; cap. 12 sec. 11, respecting fees payable to masters, registrars and clerks of the Court of Chancery; cap. 12 sec. 65, respecting fees payable to the Clerk of the Court of Appeal; cap. 35 sec. 26, respecting fees payable to the Courts and the Law Society in respect of certain services performed as to the admission of students and attorneys. Besides it is declared that stamps shall be used in lieu and in payment not only of the law fees and charges due and payable to the Crown under the acts mentioned, but "under or by virtue of this act or any other act or acts whatsoever, either now or hereafter to be in force in Upper Canada, and under or by virtue of any order in council or proclamation made or issued, or hereafter to be made or issued under such acts, or any one or more of them" (s. 2). The only exception is that created in favor of the administration of justice in "unorganized tracts," where it would be inconvenient, if not impossible, regularly to procure the requisite stamps (s. 33).

STAMPS HOW PROCURED.

Stamps are issued by order of the Governor-in-Council, in such form and subject to such other direction as may be thereby and as shall hereafter be from time to time by the like order provided for the purposes of the act (s. 1). The Finance Minister procures the necessary stamps required under the act, and delivers them to the Receiver General from time to time as required. The former officer keeps an account of the numbers, denomination and amount of the stamps, and of the dates at which they were procured and delivered (s. 22). The Receiver General, upon payment to him of the proper amount, delivers such of the stamps as may be from time to time required, and keeps an account of the number, denomination and amount thereof, according as he receives and delivers them (s. 23). It is made the duty of the Receiver General, subject to provisions hereinafter noticed, to allow to any person who takes

at any one time stamps to the amount of five dollars or upwards, discount at the rate of five per cent (s. 24). But the Governor in Council may, if he deem it expedient to do so, make arrangements with any particular person or persons for the sale of stamps to him or them in any particular locality, and for such time as may be thought expedient, at any rate of discount, not exceeding, however, the rate above stated (s. 25). In such case the Receiver General is not to issue any stamps to any other person or persons in the locality specified in the order-in-council (*ib*). If such an arrangement be made with any person or persons for the issue of stamps, such person must at all times keep on hand such a supply of the different kinds of stamps during the time for which the arrangement lasts, as may be reasonably expected to be required of him (s. 26). He must sell the stamps to all persons who may demand the same, upon payment to him of the amount or value of the stamps (*ib*). In case of any violation of duty, the person so appointed is liable to forfeit as a penalty to her Majesty a sum not exceeding $20, and be held further liable for damages sustained by any person through his violation of duty (*ib*). The Governor in Council may from time to time make such regulations as may be thought expedient for an allowance for such stamps, issued under the act, as may have been spoiled or rendered useless, or unfit for the purpose intended, or for which the owner may have no immediate use, or which, through mistake or inadvertence, may have been improperly or unnecessarily used (s. 27). The allowance is to be made either by giving other stamps in lieu thereof, or by repaying the amount or value to the owner or holder thereof, after deducting the discount, if any, allowed in the sale of stamps of the like amount (*ib*). In case it become necessary to distinguish the stamps issued for any special fund or purpose from those applicable to the Consolidated Revenue Fund of the Province, the Governor may, by order in council, direct the distinction to be made and observed, in such manner and from and by such means or differences in the lettering or numbering, or in the color or form or otherwise of the stamp, as he may find or consider it to be necessary or expedient (s. 28).

WHEN AND HOW USED.

Whenever fees were hitherto payable in money, stamps to the like amount, subject to the provisions hereafter noticed, must be given to the officer whose duty it is to receive the fees. It is the duty of the officer in every case in which a stamp is attached or impressed upon any matter or proceeding, or who may receive the matter or proceeding, forthwith upon the issue or receipt thereof, to cancel the same by writing, stamping or impressing in ink on such stamp his name and the date thereof, so as effectually to obliterate and cancel the stamp, and so as not to admit of its being used again (s. 20). All fees now payable, or hereafter at any time to become payable, shall, after they become payable, be at the following rates:

All fees up to 10 cents must be made and paid at 10 cents
All fees from 10 cents to 20 cents do. at 20 cents
All fees from 20 cents to 30 cents do. at 30 cents

And so in like manner all other fees which are not multiples of ten cents must be stated and payable at the multiple of ten cents next above the sum at which they are so stated.

Excepting the charge now made of one penny per folio in the Court of Chancery for examining and authenticating office copies of papers.

In such last mentioned cases the charge is to be for examining and authenticating office copies of papers, when the same do not exceed three folios 5 cents
And for every three folios above the first three *folios an additional* . . . . . *5 cents*
And for any number of folios less than three above any number divisible by three, the charge for such broken number must be . . . . . 5 cents

In all cases of search, examining and authenticating office copies of papers made by the attorney or solicitor, and in all other cases where it has not been customary to use in reference to such search, examination, authentication, matter or thing, any written or printed document or paper, whereon the stamp could be stamped or affixed, the party or his attorney or solicitor requiring such matter or thing to be done, must make application for the same by a short note or memorandum in writing, and a stamp or stamps to the amount of the fees so payable will then be stamped on or affixed to such such note or memorandum (s. 14).

No matter or proceeding which may have been duly stamped for the purpose for which it may have been used, is to be considered as stamped for any other purpose, in case another fee or charge is due or payable thereon, for any other or further use of the same matter or proceeding (s. 16).

Every person who fails or omits to obliterate any stamp, as required by the act, is made subject to a fine not exceeding $20, and in default of payment to imprisonment not exceeding two months (s. 30).

PENALTIES FOR NEGLECT TO USE STAMPS.

No matter or proceeding whatever, upon which any fee is due or payable to the Crown, is to be issued, or received or acted upon by any court, or by any officer entitled to receive the fee, until a stamp or stamps, under the act for the same, corresponding in amount with the amount of the fee so due and payable to the Crown, for, upon, or in respect of such matter or proceeding, and in lieu of such

sum so due and payable to the Crown, shall have been attached to or impressed upon the same (s. 12). Every matter or proceeding whatever, upon which any such fee is due or payable to the Crown, and which is not so duly stamped, is, if not afterwards stamped under the provisions of the act, declared to be absolutely void for all purposes whatsoever (s. 13).

No sheriff or other officer or person is allowed to serve or execute any writ, rule, order or proceeding, or the copy of any writ, rule, order or proceeding, upon which any such fee or charge is due or payable, and which is not duly stamped under the act (s. 15). Every such service and execution, if made contrary to the act, is declared void, and no recompense is allowed therefor (Ib.). The court in which any matter or proceeding is, or is pending, which ought to be and is not duly stamped, must not, nor shall any judge of such court take or allow any such matter or proceeding, although no exception be raised thereto by any of the parties, until such matter or proceeding has been first duly stamped (s. 17). Every person who knowingly issues or knowingly receives, procures or delivers, or who knowingly serves or executes any writ, rule, order, matter or proceeding, upon which any fee is due and payable to the Crown, without the same being first duly stamped under the act for the fee payable thereon, is subject, for the first offence, to a fine not exceeding $10; for the second, $50; for the third and every subsequent offence, $200; and in default of payment of such fines, to an imprisonment not exceeding one month for the first offence, three months for the second offence, and one year for the third and subsequent offences (s. 29).

CRIMINAL OFFENCES.

The copying or imitating any stamp issued under the act is made forgery, and punishable as such. The using again or re-issuing of any stamp which has before been used, or which has been obliterated and cancelled, as for a new and valid stamp, is made a misdemeanor, punishable by a fine not exceeding $50, or by imprisonment not exceeding two months, both at the discretion of the court (s. 32).

RELIEF FROM CERTAIN PENALTIES.

Any party to any matter or proceeding in any court, which ought to be, but is not duly stamped, may apply to the court in which such matter or proceeding is pending, or to any judge having jurisdiction in the case, for leave to have the same duly stamped; and in case the act has not been knowingly and wilfully violated, the application shall, on payment of costs, be granted, for the duly stamping of such matter or proceeding with stamps of such amount beyond the fee due thereon, as may be thought reasonable, not exceeding ten times the amount of the stamps (s. 18). The affixing of such stamp or stamps under any order made for that purpose, is to have the same effect as if the matter or proceeding had been duly stamped in the first instance (s. 19).

RECOVERY AND PAYMENT OF FINES.

All fines imposed by the act are to be paid to the Receiver-General, for the general uses of the Province, and may be recovered before any court having competent jurisdiction to the amount, at the instance of Her Majesty's Attorney or Solicitor General (s. 31). The production of any writ, rule, order, matter or proceeding, unstamped, or stamped for too low and insufficient a sum, or the stamp of which is not properly and sufficiently obliterated and cancelled, or if the proof of any such writ, rule, order, matter or proceeding having been unstamped or not sufficiently stamped at the time when it was issued or received, or served or executed, or of the stamp not having been sufficiently obliterated and cancelled, is made sufficient *prima facie* evidence of such writ, rule, order, matter or proceeding having been knowingly or wilfully so issued or received, or served or executed, without being or having been stamped, or without the stamp having been properly and sufficiently obliterated and cancelled (*ib.*)

Questions no doubt will and must arise upon the interpretation of this act, as upon the English stamp acts. Reference to the English acts will therefore be at all times useful as well as necessary when such questions arise. It is not for us at present to anticipate the questions, even if we were able to do so. They will naturally arise upon the construction of the act, as of every new act, when an attempt is made to work under it. The English stamp acts are numerous. The first institution of the stamp duties was by statute 5 & 6 W. & M. cap. 21; but they have since been in many instances vastly increased beyond their original amount. The principal English stamp act is 55 Geo. III. cap. 184, but there are prior acts of legislation still in force. The subsequent acts are, 5 Geo. IV. cap. 41; 9 Geo. IV. cap. 49; 3 & 4 Wm. IV. cap. 23, sec. 97; 4 & 5 Wm. IV. caps. 57, 60; 5 & 6 Wm. IV. caps. 20, 64; 1 & 2 Vic. cap. 85; 5 & 6 Vic. caps. 79, 82; 6 & 7 Vic. cap. 72; 7 & 8 Vic. cap. 21; 8 & 9 Vic. cap. 76; 9 & 10 Vic. cap. 60; 12 & 13 Vic. caps. 1, 80; 13 & 14 Vic. cap. 97; 15 & 16 Vic. caps. 54, 83, 87; 16 & 17 Vic. caps. 51, 59, 63, 71; 17 & 18 Vic. caps. 78, 83; 19 & 20 Vic. cap. 81; 21 & 22 Vic. cap. 20; 22 & 23 Vic. cap. 36; 23 & 24 Vic. caps. 15, 111; 24 & 25 Vic. caps. 92, 122. The principle of our act as to collection of revenue on law proceedings by means of stamps will be found in 17 & 18 Vic. cap. 78, passed in regard to the High Court of Admiralty.

Stamp duties bid fair to become in Upper Canada a most extensive mode of taxation. In England they have become so. The wedge has been inserted here, and no doubt in course of time, as the public necessities may require it, will be pushed further and further, till the amount of revenue collected by means of stamps will be something of which we have at present little conception. We cannot say that we object to it as a mode of taxation. It is not so much felt as other modes of taxation to which we have been long subject, and is much more convenient and easy of collection. Death and taxes, it is said, are certain. While we cannot avoid the former, it is well to regulate the latter so as to make it as little odious as possible.

JUDGMENTS.

QUEEN'S BENCH.

Present: DRAPER, C. J.; HAGARTY, J.; MORRISON, J.

Monday, September 19, 1864.

Manary v. *Dash.*—Rule discharged.

McPhatter v. *Leslie et al.* — Rule absolute for a nonsuit, on leave reserved.

Beemer v. *Kerr.*—Rule discharged.

Hamilton v. *Gould.*—Rule discharged.

Connors v. *Darling.*—Appeal allowed, and rule absolute to set aside nonsuit in court below.

Somers v. *Livingston.*—Appeal dismissed with costs.

Hamilton v. *Jeffrey.*—Rule absolute for new trial.

McIntosh v. *Tyhurst* —Rule absolute for new trial.

Robinson v. *Reynolds.*—Rule absolute for new trial without costs.

Berryman v. *Port Burwell Harbor Co.*—Rule discharged.

Irvin v. *McBride.*—Rule absolute to enter verdict for defendant pursuant to leave reserved.

In re Sheely and Town of Windsor.—Rule *nisi* refused.

The Queen v. *Rowe.*—Rule absolute for new trial.

In re McDermott.—Rule discharged with costs.

Baird v. *Story.*—Rule absolute for new trial.

Myles v. *Thompson.*—Rule *nisi* to set aside nonsuit discharged.

The Queen v. *Toronto Roads Co.*—Rule absolute to amend the former rule.

The Queen v. *Emily Munro.*—Prisoner remanded.

In re McLay and Hammond.—Rule *nisi* to go, calling upon McLay to show cause why he should not be attached for contempt of court.

Clark v. *Galbraith.*—Rule discharged with costs.

Vindin v. *Wallis.*—Rule discharged.

Spiers v. *Carrique.*—Rule absolute, without costs.

Saturday, September 24, 1864.

Cross v. *Waterhouse.*—Rule to rescind order of Draper, C. J., discharged with costs.

Covert v. *Bennett.*—Appeal allowed. Nonsuit to be entered in court below.

In re Stewart and the School Trustees.—Rule absolute for mandamus.

In re School Trustees of Sandwich. — Rule for mandamus discharged without costs.

Halliday v. *White.*—Rule absolute to enter nonsuit.

In re Wannacott and Meyers —Rule absolute for prohibition.

In re Coleman.—Rule discharged.

Hobbs v. *Scott.*—Rule discharged.

Hamilton v. *G. T. R. Co.*—Rule absolute to enter nonsuit.

Hamilton v. *G.T.R Co.*—Judgment for defendants on demurrer.

The Queen v. *Shaw.*—Rule discharged with costs.

Goodeve v. *Wallace.*—Rule absolute.

COMMON PLEAS.

Present: RICHARDS, C. J.; ADAM WILSON, J.; JOHN WILSON, J.

Monday, September 19, 1864.

Durand and the Corporation of the City of Kingston.—Postea to defendants, with leave to apply to judge in Chambers to amend.

Harper v. *Patterson.*—Judgment for plaintiff on demmurrer, and damages to be assessed at the rate of 6 per cent. interest, and rule *nisi* to enter verdict for plaintiff discharged with costs.

Date v. *Gore District Mutual Insur. Co.*—Judgment for plaintiff on demurrer to the fifth plea.

Date v. *Gore District Mutual Insur. Co.*—Rule absolute for new trial without costs

Roe et al. v. *McNeill et al.*—Rule absolute to enter verdict for plaintiffs.

Robertson v. *Fortune.*—Judgment for sureties on demurrer; leave to amend refused, the offer to amend having been made by the court to the defendants during the argument, and declined.

Geddes v. *The Toronto Street Railway Co.* — Rule absolute for new trial without costs.

May v. *Rutledge.*—Rule that verdict stands for portion of goods, and to be entered for defendant as to rest.

McMahon v. *McFaul.*—Rule absolute to enter nonsuit.

Strachan v. *Jones.*—Rule nisi for new trial discharged.

Henderson v. *McLean.*—Rule nisi for new trial discharged.

Jewitt v. *Haacke.*—Rule nisi discharged.

Stead v. *Tyrrell.*—Rule absolute for new trial on payment of costs.

In the matter of an appeal between Morissey and Hagan.—Appeal allowed, and judgment of court below reversed.

Gordon v. *Robinson.*—Judgment for plaintiff on demurrer to plea, with leave to defendant to apply to a judge in Chambers to amend.

Dickson v. *McMahon.*—Rule absolute to set aside a judgment as fraudulent, with costs.

Soules v. *Donovan.*—Rule absolute to set aside nonsuit, and for a new trial, on payment of costs.

Mingaye v. *Corbett.*—Held that a sale of goods by the sheriff is within the 17th section of the Statute of Frauds. Rule absolute to enter nonsuit.

Patterson v. *Smith.*—Rule absolute to rescind in part a judge's order (JOHN WILSON, J., *dissentiente*).

The Queen v. *Connor.*—Judgment that defendant ought not to have been convicted, and that an entry to that effect be made on the record.

The Queen v. *Switzer.*—Judgment for defendant on demurrer to indictment.

Tuer v. *Harrison.*—Rule discharged.

In re Kemp and Owen.—Rule absolute for a prohibition.

In re Thomas D. Warren.—Rule discharged with costs.

Harnden v. *Bank of Toronto.* — Rule absolute for new trial, without costs.

Saturday, September 24, 1864.

Gibbon v. *The Welland Railway Company.*—Rule absolute for new trial, without costs.

Matthewson v. *Henderson.*—Stands.

Attorney General v. *Perry.*—Stands.

Pearson v. *Kultan.*—Stands.

Nesbitt v. *Rice.*—Rule discharged.

Hobbs v. *Hull.*—Rule absolute for new trial, without costs.

Carroll v. *Boggs.*—Rule absolute for new trial, on payment of costs.

In the matter of the Appeal between Boucher and Shewan.—Appeal allowed without costs, and rule absolute for new trial in court below and nonsuit set aside.

Stewart v. *Rowlands.*—Judgment for defendant on demurrer.

Campbell v. *Baxter.*—Judgment for plaintiff on demurrer to the fourth count, and for defendant on demurrer to replication to eighth plea to the third count.

Burr v. *Bletcher.*—Rule absolute to set aside nonsuit, and new trial without costs.

In re McLean v. *The Great Western Railway Company.*—Rule absolute to quash return to mandamus *nisi*, and peremptory mandamus awarded.

McCann v. *Nesbitt.*—Rule *nisi* refused.

SELECTIONS.

CONTRIBUTORY NEGLIGENCE.

A LAW LAY.

Tuff v. *Warman*, 5 C. B. N. S. 573.

Ingenuous Student, who, with curious eye,
Would trace the tangled threads of thought that lie
Involved in oracles of *Tuff and Warman*,
Hear, on that well-thumb'd text, a homely sermon.

The text, though cumbered much with clause on clause,
Reads fairly plain, till near an end it draws;
But at the end, through devious ways, we come
To rule that gravels pleaders, all and some.
Here Wightman, Justice, tells us, in effect,
Plaintiff stands none the worse of's own neglect,
If but defendant, when default is made,
Its consequences could with care evade.
The canon at first blush leads all too wide,
Unless a triple caution be supplied;
Which to supply, and point you out the way,
To find where wanted, here, in loyal lay,
Contributory Negligence I sing,
The rule of Law, and reason of the thing.

Both are in fault: else, 'tis a simple story,
The negligence were not contributory.
Then, either both have been in fault together,
Or else the one's in fault before the other.
If both together, neither bears the blame;
The wrongs concurrent, and the rights the same:
If fault of one the other's fault precede,
He pays the penalty: unless, indeed,
The other, by some little common sense,
Could shun that first misconduct's consequence.
Say, I lie drunk, a trespasser besides,
On *Marcus'* avenue; and *Marcus* rides,
Or stumbles o'er me: still, first question is,
(Be it, the broken bones are mine or his,)
Could *Marcus*, by an ordinary care,
Have shunned the danger, and so gone elsewhere?
If *yea*, he pays me for my hurt; altho'
I was in act the first to blame: if *no*,
Since but for me he ne'er had been o'erthrown,
I pay him for his hurt and bear my own.

What then, whene'er by night I walk or ride,
Must I a link-boy or a scout provide,
Lest *Davies'* donkey in my path should roll,*
Or *Forrester* have left his building pole†
To trip me up? nay, Law was never heard,
To sanction charge of caution so absurd.
I must not, if I'd not be brought to book,
Run blind-man's muck, and leap before I look;
(Though some that leap'd and never looked, have found
A verdict 'twixt the foot-board and the ground;)‡
But if with eye-sight such as bless'd withal,
I keep my head from contact with the wall
By ordinary care, the law demands
No weightier charge of caution at my hands.
But say I'm blind; or one of tender years,
Insensible to age's prudent fears?
Your case thereby nor better is nor worse,
Your leader answers for you, or your nurse.§

Of these collateral moot-points enough,
Return we now to *Warman* versus *Tuff*.
The judgment's truly neither less nor more
Than, done in doggrel, is set down before;—
One's first in fault; then, could the other one
That fault's effects by common caution shun?
But there you stop: else, caught in Pleaders' Pound,
Each cries *Tu quoque!* in an endless round.
As, say that when, a log, in *Marcus'* way
By want of ordinary care I lay,
Marcus athwart me falling breaks his head,
And brings his suit: if, in defence 'tis said
"You might have shunned me had you used your eyes;"
And *Marcus* then with Wightman, J., replies
"And *you* shunned *me!*" the altercation tends
To circular dispute that never ends. (*a*)
Or, say two runners, each a careless spark,
Have clashed their heads together in the dark;
It lies not in the mouth of one to say
"Sir, you by caution could have kept away,
And so I had not dashed, and lost, my tooth
'Gainst your *Os frontis:*" for the other youth,
With equal justice may in turn reply,
"Nor had *I* dashed 'gainst *yours*, and lost, my eye."
For here the active fault of both concurr'd
And left to neither in the law, a word. (*a*)
Or say two barges insecurely moor'd
Drift in a stream, with neither crew on board:
Borne in an eddy of the wind or tide,
The barques approach, and with a crash collide:
My planks stove in afford as little room
For just complaint, as does *your* broken boom.
For here, the passive fault of both together
Has shut the mouth of each against the other. (*b*)

But two, each so in fault, will yield no more
Predicaments of blame, but only four:*
And Wightman's canon, as above we see,
Holds not, of these, in categories three:
Wherefore his "Plaintiff's non-disabling fault,"

* *Davies* v. *Mann*, 10 M. & W. 546.

† *Butterfield* v. *Forrester*, 11 East, 60.

‡ *Scott* v. *Dublin and Wicklow Ry. Co.*, 11 W. C. L. R. 377.

§ *Lynch* v. *Nurdin*, 4 P. & D. 672. *Waite* v. *N. L. Ry. Co.*, 1 Ell. Bl. & Ell. 719.

* Viz.,—

Negligence in both	Concurrent	Both active. (*a*)
		Both passive. (*b*)
	Non-concurrent	Plaintiff active; defendant passive. (*c*)
		Plaintiff passive; defendant active. (*d*)

Must needs be taken with three grains of salt,
And limited to that one category
Where Plaintiff's fault's the first contributory.
As if, say last, when *Marcus* o'er me rode,
Broad day-light had the present danger show'd,
And I, as Pleintiff, my crushed ribs had mourn'd,
Whereto "*Tu quoque*" *Marcus* had return'd,
Then, in that case, but in that only one,
May I reply as Wightman, J., has done,
"True. 'twas my first default that brought me there,
But you, good *Marcus*, could with common care,
Have shunned me where I lay, and in that state
Of things, 'tis lawful to recriminate." (*d*)

By Wightman's judgment, then, 'twas never meant
That Plaintiff's negligence should not prevent
Plaintiff's success, in any of the three
Firstly above-put cases:—Wherefore ye
Who scan that clause so oft misunderstood,
Read "If Defendant by due caution could
(*When Plaintiff has been first to blame in fact*)
Have shunned the consequence of Plaintiff's act,
The Plaintiff shall not thereby be undone,"—
So shall the Law and Judgment be at one.

—*Law Magazine.* S. F.

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 Post Office."

All other Communications are, as hitherto, to be addressed to "The Editors of the Law Journal, Toronto."

COUNSEL FEES IN DIVISION COURTS—THE "POOR CREDITOR."

It is a self evident fact that there has been of late years, a tendency to ameliorate the condition of those persons who are commonly known as *poor debtors*, and this may result principally from the increased enlightenment of the age, and partly perhaps from a re-action following on the harsh and extreme measures to which insolvent debtors were formerly subject. This is all very well and proper in its way, but unfortunately it is in many instances at the expence of the *poor creditor*. A striking instance of this was the attempt made some short time ago to get rid of what is known as the "91st clause." The attempt was, however, only partially successful, and most fortunately so for the unfortunate creditor. The late act respecting Insolvency, it is to be hoped, will do much to lessen the anomalies which have hitherto been too numerous in our law with respect to debtor and creditor, but which must in every human and therefore imperfect system, always exist to a greater or less extent.

We propose now to discuss another way in which suitors in general, and creditors in particular, are practically placed in a wrong position. It is reasonable that when one person becomes indebted to another, but makes default, that the former should bear any reasonable and necessary expense that may be incurred by the latter for the purpose of clothing him with authority to collect his debt in such manner as the law may provide; and in the same way a defendant against whom a fraudulent or unjust action is brought, should not be obliged to incur any expense in defending such action. It may be said that it is impossible to remedy this, and in practice this is certainly true to a great extent, but we must, as far as possible, assimilate practice to theory.

The only fees recognised under the Division Courts Act, are the fees payable to the court and its officers. Many of the suits entered in these courts, are entered by the suitors themselves or by their clerks; a large number are entered by agents and collectors, who receive a per centage on accounts collected by them for their principals, and some by professional men or their clerks, for their regular clients; and nearly all special actions of a difficult or important nature, but which of course form but a small minority of the whole are entered, and at all events conducted in court by professional men.

A mercantile man with a large business, cannot conveniently attend to the collection of those debts which it is found necessary to collect by process of law; such claims are therefore handed to a solicitor, who is obliged to make his charges, great or small, not against the debtor, but against his client who employs him. In simple matters of collection these charges certainly would not be very much. But as the difficulty of the case increases, so, naturally, will the charges for attending to it. Many of these cases present a mass of confused testimony and conflicting interests, and bring up as knotty points of law and evidence, and require as careful management and legal acuteness in conducting them, as the bulk of the suits brought in County Courts or in the Superior Courts.

Now it will scarcely be denied that, in cases of this sort the suitor who is able to secure the services of able counsel is more than a match, *ceteris paribus*, for an opponent who is unable to obtain such assistance. This is more apparent in jury cases where the decision of questions of fact is withdrawn from the judge, who would necessarily be better qualified both by education and experience, than the jury would be likely to be to sift or to reconcile suspicious or conflicting evidence.

This is not as it ought to be. Both suitors should be on the same footing. Both are entitled to the same advantages, but one perhaps is unable to pay for the services of a lawyer to state his case coherently, or discover and expose the rascality of his opponent, or of an unscrupulous or prevaricating witness. The Statute, however, makes no provision for the collection of any fee to professional men, and so the suitor has practically, in many cases, either to go without that assistance which his more wealthy oppo-

nent can more easily take advantage of, or has to pay money out of his pocket for the recovery of a just debt, or perhaps to defeat some unjust claim which has been made against him.

A partial remedy for this state of things would be the allowance in certain cases of fees to professional men for their services in these courts, according to a fixed but moderate tariff. We should suggest something like the following:—that it should be in the discretion of the judge before whom a cause is tried, according to its intricacy or importance, to allow a fee of say one dollar for drawing a special claim and advising on evidence to be adduced; a Counsel fee of say three dollars, in cases conducted in court by a barrister, or by an attorney or his articled clerk; an increased Counsel fee of say five dollars, in jury cases conducted by a barrister; that such fees should be taxable to and recoverable by the successful suitor against the opposite party. The report of a decision given by an able County Judge, in another column, shews sufficient reason, to say nothing of the numberless other arguments that might be adduced, why these fees should be restricted to professional men.

Some such enactment as that above proposed, or even one more comprehensive, would hurt no one; and would, we believe, be considered a boon by all concerned.

CORRESPONDENCE.

To the Editors of the Upper Canada Law Journal.

Gentlemen,—An answer to the following question would much oblige a subscriber.

Is a division court clerk justified in making a slight charge for making out an account of fees on suits, where for the convenience of the suitor, the clerk has not taken a deposit?

Yours, &c., X. Y.

[Such a charge cannot, we think, be legally made; but inasmuch as a clerk in giving credit for fees runs a risk, and takes a certain amount of personal responsibility and labor upon himself, which he is not legally bound to do, we do not suppose that any suitor would be mean enough to refuse payment of a small fee under such circumstances.—Eds. L. J.]

To the Editors of the Upper Canada Law Journal.

Gentlemen,—An answer to the following would much oblige a subscriber.

Can a division court clerk charge the fee of 20 cents for receiving a transcript. The tariff allows 20 cents for receiving papers from another division *for service?* Is a transcript served? I think not.

Yours, &c., L. S.

[We feel some doubt as to the right to charge such a fee, but are inclined to think it might properly be charged, as although the transcript itself is not served an execution issues upon it, the acting upon which may be considered as in the nature of a service. The fee is one which we should say ought to be allowed.—Eds. L. J.]

To the Editors of the Upper Canada Law Journal.

Gentlemen,—Would you kindly give your opinion on the following case.

A. brings an action against B. on a verbal contract for the delivery of some twenty-five cords of wood, in value less than £10. The wood was never delivered, and nothing was ever paid on account of the contract. The action is brought to recover 50 cents a cord *profits*, which the plaintiff alleged might have been made had the wood been delivered. I objected on the trial that the damages claimed were too remote. The learned judge overruled my objection, and gave judgment for the full amount claimed. I afterwards moved to set aside the judgment, on the ground taken at the trial, and urged in support of the objection that profits in a case like this could not be recovered, as such damages are uncertain, depending, as they must necessarily do, on many contingencies, and could not have been contemplated by either party. The learned judge held that he must be guided by the contract price and market price, and decided accordingly. I may remark that A. might have bought abundance of wood had he thought proper, but there was no evidence that he did so. You will greatly oblige by inserting this and your reply in the next issue of your valuable journal.

Yours respectfully,

A Student-at-Law.

[The general rule of law as to the measure of damages in an action by the vendee against the vendor for not delivering goods when no payment has been made is this—viz., the difference between the contract price and that which goods of a similar description and quality bore at the time when they ought to have been delivered. If, therefore, 50 cents were the difference between the contract price and the market price of the wood per cord at the time when the wood should have been delivered, the ruling of the learned judge was perfectly correct. The reason of the rule is this, because the plaintiff has the money in his possession, and might purchase goods of a like quality the very day after the contract was broken.

We have assumed that there was a time fixed for the delivery of the wood. If there was not, the damages should be computed from the time when the defendant refused to perform his contract.—Eds. L. J.]

To the Editors of the Law Journal.

Sirs,—Every Division Court officer must feel grateful for your publication of Judge Hughes' able and timely exposition of

the recent legislation affecting Division Courts, published in your last number. But, Messrs. Editors, there is one idea contained therein which I confess I do not rightly understand.

In case of service of summons under the new Act, Judge Hughes gives a form of affidavit for the bailiff to make, wherein the bailiff swears that the place of sittings of his court is nearest to the residence of the defendant. Now there are many cases where the bailiff could not make the affidavit, and still the defendant actually lives nearest the court he was summoned to attend. A bailiff would know, of course, how many miles he has to travel to serve; but he in many cases might not know the distance from defendant's place of residence to the place of holding courts in other Divisions, in which cases, of course, the bailiff could not make that part of the affidavit, and then what would be the consequence? I can't see, Messrs. Editors, that either the bailiff or the clerk should be held in any way responsible as to whether the person summoned lives nearest the court to which he is summoned or not, it seems to me a matter altogether between the plaintiff and defendant. The plaintiff hands his claim to the clerk, telling the clerk that the person he is suing lives nearest that Division, and pays the clerk the necessary costs and orders it to be sued. Can the Clerk refuse to take proceedings by handing back the claim? I think not. Well, if the clerk issues the summons and hands it to the bailiff, is he also not compelled to have it properly served, supposing he knows in his own mind that there is another court nearer the place of the defendants. A plaintiff may contend against the officer of the court that he is right in his calculation about the distance, and I don't see why the plaintiff should not have his own way, and if he is wrong let the defendant defend on the grounds of distance. I have a case in point in my next court, the 22nd September; a person left me a note to sue; note dated in an adjoining division and defendant living in the same division, but I should think as nearly as possible the same distance to the place of holding both courts, and told the person so at the time; but he contended that it was a little nearer this Division and insisted upon suing it in my court. I don't really see that I could do any thing else, nor can the bailiff refuse to serve it I think; but he certainly cannot make the affidavit that defendant lives nearer this Division.

Yours, &c.,

CLERK 6TH D. C. CO. NORFOLK.

PORT ROWAN, Sept. 12, 1864.

TO THE EDITORS OF THE LAW JOURNAL.

TORONTO, Sept. 20, 1864.

SIRS,—I see by the conclusion of Judge Hughes' letter, that he thinks a Division Court judge has power to change the venue. I have always understood there was no such power, but may be wrong, and would feel obliged by Judge H. indicating where it is to be found, for the information of myself and others.

Yours, &c.,

A PRACTITIONER.

TO THE EDITORS OF THE LAW JOURNAL.

HAMILTON, Sept. 24, 1864.

GENTLEMEN,—In your last number is a letter from Judge Hughes, on a subject which may be discussed with advantage in your pages. I do not think the letter, in parts, renders the subject anything clearer. The fourth paragraph, for instance, which is somewhat obscurely worded, seems to me to take a wrong view, if I understand the meaning of it. It seems to assert, that to confer jurisdiction, the division in which the proposed defendant lives, must be nearest to the division in which the action is brought; whereas the matter of distance has reference, in the act, only to the place of sittings of the court in which the action is brought. And in the latter part of the same paragraph it seems to be stated that the cause of action must have arisen in the division in which the suit is to be brought; although the act provides that the case may be entered and tried "irrespective of where the cause of action arose," &c. If the words, "or unless the place where the court is *usually held* is nearest to the usual residence of the defendant," is given as an alternative, it does not certainly make more clear the words of the act; and besides, the words underlined are an *interpolation* on the enactment itself. Another question arises on this paragraph, which, if understood in this way, I think Judge Hughes is wrong, *i. e.*: Call the court to be used A, the division in which one of the defendants resides B, in the county of X; and suppose another defendant to reside in the division for the A court; the court A is nearest the defendant residing in B division, but not nearest to the other defendant residing in the home division. Is it Judge Hughes' meaning that the court has no jurisdiction? I do not see how the bailiff can swear to distance in every case, nor can I see how he should be required to do so by general order. In the concluding words in the affidavit there is a slight clerical error, which requires amendment—"travelled —— miles to *do so.*" To do what?

There are several other points in Judge Hughes' letter, upon which difficulties are suggested, yet which seem to me intelligible enough, noticing that the act of last session is *incorporated with the Division Court Act;* but I may be wrong. Of course, he knows best what is suited to his own officers; but to my mind the main parts of the act are not made clearer by his exposition, not to speak of the embarrassing position he puts himself in by an opinion beforehand.

Yours obediently, A. B.

TO THE EDITORS OF THE UPPER CANADA LAW JOURNAL.

TORONTO, Sept. 24, 1864.

GENTLEMEN,—My attorney informs me that he can collect no costs against defendants in Division Court actions, and I find that I am charged with lawyer's costs for attending to a suit against a man who, by his ingenuity and trickery, has succeeded in complicating what ought to have been a simple case.

What do you think about this?

Yours, &c.,

A MERCHANT.

[See Editorial remarks at page 258.—EDS. L. J.]

UPPER CANADA REPORTS.

ERROR AND APPEAL.

(Reported by ALEX. GRANT, ESQ., *Barrister-at-Law, Reporter to the Court.)*

KERR v. AMSDEN.

Registered judgment—Lien—9 Victoria, chapter 34, and 13 & 14 Victoria, chapter 63.

Held per Curiam, affirming the judgment of the court below, that in order to a judgment creditor retaining the lien created by the registration of his judgment it was incumbent on him to lodge a writ against lands with the sheriff within one year after the registration of his judgment; in other words, if such a judgment creditor had neglected to lodge his writ against lands for a year after the entry of his judgment, and an unregistered judgment creditor or a subsequently registered judgment creditor had lodged his writ before him, the sale effected under such execution will be freed and discharged of any lien created by such registered judgment.

[VANKOUGHNET, C., dissenting.]

This was an appeal from a decree of the Court of Chancery in a cause wherein Thomas Cockburn Kerr and John Brown were plaintiffs, and Samuel Amsden and Angus McCollum were defendants, the bill in which set forth that on the 28th of December, 1857, plaintiffs recovered judgment in the Court of Common Pleas against Amsden for £306 11s 3d, which was duly registered in the registry office of Haldimand on the 30th of the same month, at which time Amsden had divers lands, &c., in that county; and the same judgment was re-registered on the 28th December, 1860: that part of the amount had been recovered by virtue of writs issued on the judgment, leaving still due £160 with interest and costs; that defendant McCollum claimed an interest in those lands by virtue of a sale and conveyance by the sheriff of Haldimand, and prayed payment of the amount remaining due, or in default a sale. The answer of the defendants set up that by virtue of writs of *fi. fa.* against the lands of Amsden, the same had been sold and conveyed to McCollum, and that no writ against lands had been sued out on the judgment recovered by the plaintiffs within the period required by law.

The following admissions were made and signed by counsel:—that the plaintiffs did not place writs of *fieri facias* lands in the sheriff's hands until the 28th December, 1859; that before filing bill, and on the twenty-fifth February, 1860, all Amsden's lands were duly sold at sheriff's sale to McCollum; that the execution of the sheriff's deed to McCollum, dated the sixteenth day of April, 1860, and the issuing of the writs mentioned therein; that at date of registration of plaintiffs' judgment Amsden had the land afterwards sold to McCollum; that the writs of *fieri facias* under which lands were sold were upon registered judgments, recovered and registered subsequently to plaintiffs'; that the writ of *fieri facias* lands in suit of *Pratt* v. *Amsden* was placed in the sheriff's hands on the 15th July, 1858; that under such writ Amsden's lands were duly advertised for sale within the year, and were offered for sale on the third day of November, 1859, but not sold for want of bidders; that the *fieri facias* was returned on the seventh day of November following, and a *venditioni exponas* duly issued under which Amsden's lands were sold on the 25th of February, 1860; that the bill was filed on the 18th of May, 1861, placed in the sheriff's hands for service on the 21st of May, 1862, and served on the 23rd of the same month, and that during the whole time between filing and service defendants resided in Dunnville and might have been served.

The cause was set down to be heard upon the pleadings and the foregoing admissions, and was heard before his honour Vice-Chancellor Esten, who, after taking time to consider the case, dismissed the bill with costs.

The plaintiffs being dissatisfied with that judgment, re-heard the cause before the full court, when the decree which had been pronounced was affirmed with costs, his lordship the Chancellor intimaitng that he dissented from the views expressed by the learned Vice-Chancellors, whose judgments were as follows:—

ESTEN, V.C.—The question in this case is whether where a registered judgment creditor has failed to deliver a writ against lands to the proper sheriff within a year from the entry of his judgment, and an unregistered judgment creditor has lodged his writ against lands in the hands of the sheriff before the registered judgment creditor, the sale of the lands under the writ on the unregistered judgment is, or is not subject to the equitable charge created by the registration of the prior registered judgment? I have already expressed an opinion upon this point in a judgment which I delivered alone; but I thought it my duty to re-consider the question, since the argument of this appeal, and I adhere to the opinion which I before expressed. The clause in which the question arises is a very singular one. In the 9th Victoria, chapter 34, it occurs in the form of a proviso in the 13th section of the act: but in the Consolidated Statutes of Upper Canada it forms a separate clause by itself. It seems to be founded on a misapprehension of the law, or rather of the true construction of the act in which it occurs. It seems to indicate that the legislature thought that but for that proviso an unregistered judgment, followed by a writ in the sheriff's hands, would prevail against a registered judgment. But this, I apprehend, was an error in construing the 13th section. The sale under the unregistered judgment would convey only such estate as the debtor had, at the date of lodging the writ upon that judgment in the sheriff's hands; but this estate was subject to the registered judgment, supposing the writ to have been lodged after the registration, and must have gone to the purchaser subject to such registered judgment. And when the registered judgment creditor afterwards proceeded to a sale, under his own judgment, either at law or in equity, he would offer for sale and would convey to the purchaser such estate as the debtor had at the date of the registration of his judgment, and such conveyance would therefore over-reach the conveyance under the writ upon the unregistered judgment. Such would have been the effect of the 13th section without the proviso; but from the terms of the proviso we must suppose that the legislature did not intend that the 13th section should have that effect, but intended that an unregistered judgment with a writ should prevail over a registered judgment, and the provision was introduced in order to limit that result to cases in which the registered judgment creditor had neglected to lodge his writ for a year after the registry of his judgment, and that they intended only that a registered judgment should overreach subsequent sales and conveyances by the debtor, which, in fact, was the real effect of a docketed judgment in England, when docketing was practised. It might have been fairly questioned whether the proviso in the 13th section of 9th Victoria, c. 34, was not repealed by the 13th and 14th Victoria, c. 63, but I should have thought that it was not so repealed.

The effect of repealing it would have been to have given absolute priority to the unregistered judgment with a writ, according to what we must deem to have been the meaning of the legislature in framing the 13th section, or to have preserved the priority of the registered judgment, notwithstanding the neglect to lodge the writ within a year after entry, neither of which results would have accorded with the intention of the legislature. I should have thought, therefore, that the proviso in question was not repealed by the 13th and 14th Victoria, chapter 63, and the matter is placed beyond dispute by the 22nd Victoria, chapter 89, sec. 52, which preserves or retains it in the form of a separate clause. The result is that if a registered judgment creditor should neglect to lodge his writ against lands with the sheriff for a year after the entry of his judgment, and an unregistered judgment creditor should lodge his writ against lands before him, the unregistered judgment will "take effect" against the registered judgment; and the question is, what is the effect of this provision?

The meaning of the legislature, I think, was that a registered judgment should not only bind the lands, as against subsequent purchasers from the debtor, but should have priority over unregistered or subsequently registered judgments, although, with prior writs in the hands of the sheriff, provided the registeris-judgment creditor should issue and lodge his writ within a year from the entry of the judgment. If, however, he should neglect this precaution the unregistered judgment, with a prior writ in the sheriff's hands, should "take effect" against the registered judgment. The intention of this provision must be that where the sheriff should proceed to a sale, the judgment creditor, who had the first writ, should be paid in full, in preference to the registered judgment creditor. This is the only way in which the unregistered judgment could "take effect" against the registered judgment. The whole object, however, of this provision will be

defeated if it should be deemed that the equitable charge created by the registered judgment should, although the legal lien would not, prevail over the unregistered judgment with the prior writ in the sheriff's hands; because, in that case, the sheriff's sale, under such writ, will be subject to the registered judgment; the purchaser will deduct the amount of it from his purchase money, and the unregistered judgment creditor, instead of being paid first, as the legislature intended, will be paid second or not at all.

Thus, supposing the estate to be worth £300, and the registered judgment to be for £200, and the unregistered judgment with the first writ to be also for £200, the purchaser, understanding that he purchases, subject to the registered judgment in equity, will deduct the amount of it from his purchase money, and will offer only £100 for the estate, and the unregistered judgment creditor must be satisfied with it; and the purchaser, in order to preserve his estate, will have to pay the full amount of the registered judgment to the holder of it. In other words, the registered judgment will be paid in full first, and the unregistered judgment, with the first writ, will be paid second, and only in part or not at all, contrary to the intention of the legislature, which must be considered, according to this construction, as saying *uno flatu*, that the unregistered judgment shall be paid first at law, and the registered judgment shall be paid first in equity; which would be an absurd result.

The truth is, that when the legislature passed the 13th and 14th Victoria, chapter 63, they did not intend to alter the 13th section of the ninth Victoria, chapter 34, but only to explain it. They re-enacted and explained it *eodem intuitu* with which they originally passed it in the 9th Victoria, chapter 34; and the second section of the 13th and 14 Victoria, chapter 63, must have been enacted *eodem intuitu*; for the same intention must be attributed to the whole act and to every part of it. Now the intent of the 13th section of the 9th Victoria, chapter 34, must have been that registered judgments should bind lands in the hands of subsequent purchasers from the debtor, but should be postponed to a registered judgment with prior writ, otherwise the proviso which immediately follows would have been insensible.

Before this act the first writ prevailed; the legislature meant that it should still prevail, and such is the true construction of the 13th section without the proviso, which qualified this priority, and limited it to cases in which the registered judgment creditor should neglect to deliver his writ for a year after entry of his judgment. The effect of the entire section was that a registered judgment should bind the lands as against subsequent purchasers from the debtor, and should even prevail over an unregistered judgment with a prior writ, unless the registered judgment creditor should neglect to lodge his writ for a year after entry of his judgment.

Then came the 13th and 14th Victoria, chapter 63, which began by explaining the 9th Victoria, chapter 34, section 13, but as I have already observed, did not mean to alter it. The effect of the first section of the 13th and 14th Victoria, chapter 63, without the proviso being understood, would have been that all registered judgments would have been postponed to unregistered judgments with priors writs *ipso facto*, because such was the meaning and true construction of the 9th Victoria, chapter 34, section 13, without the proviso; and this section was re-enacted in the 13th and 14th Victoria, chapter 63, with the same meaning with which it was originally passed, in the 9th Victoria, chapter 34. The second section of the 13th and 14th Victoria, chapter 63, must have been enacted with the same intent as the first, because the legislature could not pass two clauses in the same act of parliament with a different and inconsistent intent. The first and second sections are to be read as if contained in one section, as in fact they are in the Consolidated Statutes, and the meaning of them, independently of the proviso, is that registered judgments shall bind lands in the hands of subsequent purchasers from the judgment debtor, in the same manner as docketed judgments in England formerly did, and should form an equitable charge on such lands, but shall be postponed to an unregistered judgment with a prior writ, unless (such is the effect of the superadded proviso, expressed in the 9th Victoria, chapter 34, understood in the 13th and 14th Victoria, chapter 63, and re-expressed in the Consolidated Statutes) the registered judgment creditor should deliver his writ to the sheriff within a year from the entry of his judgment, in which case the registered judgment shall prevail over the unregistered judgment, notwithstanding the priority of the writ, both at law and in equity. This construction necessarily flows from the consideration that section thirteen of 9th Victoria, chapter 34, and section one of the 13th and 14th Victoria, chapter 63, mean the same thing, and section two of 13th and 14th Victoria, chapter 63, means the same thing as section one; that these clauses *per se* gave an absolute priority to the unregistered judgment with the prior writ, in accordance with the previous law, but that this *prima facie* operation was qualified by the proviso to the 13th section of 9th Victoria, chapter 34, and the effect of the whole is to give priority to the registered judgment both at law and in equity; provided, and only provided, it is followed by a writ delivered to the sheriff within a year from the time of entry. This construction seems to be a reasonable conclusion from the premises upon which it is founded, and effectuates the intention of the legislature, which would otherwise be entirely defeated. Before the 9th Victoria, chapter 34, the first writ bound the lands, and this had been the case ever since we had a constitution. The legislature were so impressed with the forcible prevalence of the writ, that they assumed it in passing the 13th section of the Victoria, chapter 34, and engrafted the proviso upon that section for the protection of the registered judgment. The 13th section, as illustrated by the proviso, must receive this construction, and must receive the same construction in the 13th and 14th Victoria, chapter 63, section 1, in which it is only explained, and the second section of the act must have been passed with the same intent as the first. I think therefore that a sale under a prior writ upon an unregistered judgment is not subject to a prior registered judgment, upon which a writ has not been lodged within a year from its entry, and that the purchaser at such sale holds discharged from such registered judgment.

SPRAGGE, V.C.—The question seems to divide itself into two points. First, whether the proviso to 9th Victoria, chapter 34, is confined in its operation to judgments registered under that statute, and does not apply to judgments registered under 13th and 14th Victoria; and next, whether, if it applies under the later statute, it applies at law only, or both at law and in equity. The first point has been decided in the affirmative in both the common law courts, and the question remains whether, in equity, the priority obtained by registration is preserved, although the priority is lost at law.

The statute 9th Victoria gave to registration the effect of creating a legal charge, but provided that it should retain its efficacy for a year only; 13th and 14th Victoria continued the same effect to registration, and gives the further effect of creating an equitable charge; the proviso is not repeated in terms, but is held still to apply at law; the legal charge is still lost, unless execution against lands be lodged with the sheriff within the year.

If without lodging the writ the charge in equity is preserved, the sale by the creditor who has obtained priority at law must be subject to the equitable charge, and his priority is merely nominal. The words of the statute are, "shall take effect," and it is the respective judgments, not writs of execution—that are to take effect, and the words are general, not confined to law or equity. If the equitable charge continues without *fi fa.* lodged, then the judgment, having priority at law, does not take effect against the registered judgment, but the registered judgment, does very effectually take effect against it. The legislature was dealing with priorities as between judgment creditors, and prescribed under what circumstances priority should be obtained, should be preserved, and should be lost. It evidently contemplated the registered judgment creditor pursuing his legal remedy, for it inflicts the loss of legal priority, at least, upon its neglect. Suppose, then, the legal remedy preserved, as was the case in the common law cases reported, both having writs in the sheriff's hands, the contest at law has been, which judgment should be first satisfied—which should "take effect" against the other. It does not seem to have occurred either to the litigants or to the court that the priority all the while was really with the registered judgment

creditor. Strictly, of course, the court of law had only to do with the moneys realized by the sale, but the whole contest was futile if the equitable charge remained.

It does seem strange, certainly, that in order to preserve an equitable charge, it should be necessary to lodge a common law writ. If some other act had been prescribed as the condition for keeping alive the priority of the charge, *e g.*, re-registration, there would be no apparent anomaly, but I do not think we are at liberty to say in the face of the words of the act, comprehensive as they are, that the omission to do what the act prescribed cannot have the effect, as to the equitable charge, which is given to it in general terms by the act, merely because it appears to us unnecessary or anomalous.

The question may be shortly put in this way: a writ of *fi. fa.* against lands is placed in the hands of the sheriff; there is a registered judgment against lands in the same county; the judgment with writ lodged (either unregistered, or, as is held at common law, registered after the other judgment) cannot take effect against the prior registered judgment, unless the party having such prior registered judgment had neglected to lodge his *fi. fa.* for a year; but if such neglect has taken place, then the judgment with the writ lodged prevails and "takes effect" against the prior registered judgment. Does it take effect against it in any practical sense, if the equitable charge still retains its precedence over the legal charge? The question upon either construction of the statute has its difficulties; but, upon the whole, I think that the lodging of the writ within the year is made necessary by the statute, to preserve the equitable as well as the legal charge.

The plaintiffs thereupon appealed from the decree, and the order affirming the same, on the following, amongst other grounds:—

That the judgment of the appellants being registered prior to those judgments, under writs of execution issued on which, the lands of Amsden were sold, and prior to the delivery of such writs to the sheriff of the proper county, formed a lien on the said lands prior to such judgments, and the executions issued thereon, and such sale was and should be declared to be subject to such lien; that the judgments, under executions issued on which, the said lands were sold, being judgments registered subsequently to that of the appellants, and it not appearing that such executions were issued within one year after such registration, formed liens on Amsden's lands subsequent to that created by the appellants' registered judgment, and such executions could not give them a priority over it or change the relative priorities of such liens; that the statute 13th and 14th Victoria, chapter 63, gives the registered judgment of the appellants a priority or lien in equity which cannot be affected by the proviso in 9th Victoria, chapter 34, which would seem to require a legal writ of execution against lands, to be issued and placed in the hands of the proper sheriff within one year to maintain such priority—the statute, 9th Victoria, chapter 34, not giving the registered judgment creditor the remedies in equity or creating the equitable lien which the statute 13th and 14th Victoria, chapter 63, does.

The respondents on the other hand c ..nded they were entitled to retain the decree which had been so pronounced on the following amongst other grounds: that the appellants lost the priority created by the registration of their judgment by not issuing execution within one year; that the judgment, under execution, upon which the respondent Amsden's lands were sold, had priority over the appellants' judgment; and ; at the effect of the appellants' neglect to issue execution was to destroy the priority of the appellants in equity as well as at law.

Strong, Q. C., for the appellants, referred to and commented on *Moffatt* v. *March*, 3 Gr. 628; *Neate* v. *Duke of Marlborough*, 3 M. & C. 407; *Godfrey* v. *Tucker*, 3 New. R. 20, *Rolleston* v. *Morton*, 1 Dru. & War. 171; *Whitworth* v. *Gaugain*, 3 Hare, 416; *Russell* v. *McCullough*, 1 K. & J. 313, *Coppin* v. *Gray*, 1 Y. & C. C. C. 205.

Roaf, for the respondents, cited amongst other cases *The Commercial Bank* v. *The Bank of Upper Canada*, 21 U. C. Q. B. 91, as to the principal point involved; and also an anonymous case reported in 1 *Vernon*, 171, as to the delay in proceeding after bill filed.

After taking time to look into the authorities the appeal was dismissed with costs, his lordship Chief Justice DRAPER stating that he felt it unnecessary to make any lengthened note on the case, or to say more than he fully concurred in the judgments given by the learned Vice-Chancellors in the court below; and was therefore of opinion that the appeal should be dismissed with costs.

VANKOUGHNET, C., retained the opinion expressed on the rehearing of the cause. The statute having declared that the registration of the judgment shall have the same effect as if the debtor had executed a writing under his hand creating a charge upon his lands, his lordship was of opinion, that in any sales made by the sheriff under writs of execution issued upon other judgments the lands of the debtor must be sold subject to the lien in equity created by such registration.

Per Curiam.—[*Vankoughnet*, C., dissenting.] Appeal dismissed with costs.

QUEEN'S BENCH.

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

MULHOLLAND v. THE CORPORATION OF THE COUNTY OF GREY.

Delay in taking out rule nisi—Practice.

A rule *nisi* for a new trial having been applied for in Michaelmas Term, was granted after time taken to consider. The clerk's book, however, contained no entry of its having been granted, and the attorney not being aware of it, but having made no enquiry of the court or any of the judges, did not take out the rule until Easter Term following.

Held, that the omission of the clerk did not relieve the attorney of the duty of applying to the court; and as the rule had thus been allowed to lapse, the court refused to re-open it.

(Q. B., E. T., 27 Vic.)

In Michaelmas Term last, *McPherson* applied for a rule to shew cause why a new trial should not be granted, which the court deferred granting until they could consult the notes of the trial and speak to the learned judge (Richards, C.J.) who tried the cause. Afterwards the rule was granted, and during the present Easter Term was set down in the new trial paper.

When called, on the 27th of May, for argument, *Creasor* objected that the rule, though entitled of Michaelmas Term, had not been served until the present term, on the 19th of May. This being admitted on the other side, the court treated the rule as having been allowed to lapse, if it were drawn up during the term of which it was granted; and as irregular if drawn up of the present term, in which it had been taken out.

On the following day *McPherson* applied for a rule to revive or re-open this rule. His affidavit stated he was told by the then clerk of the court, during last Michaelmas Term, that the court had not disposed of the application, and that he was not fully aware that it had been granted until the present term, when he took it out: that the clerk's book contained no entry of its having been granted: that he wrote to his agent during the vacation to enquire, but got no information until he heard that the opposite attorney had stated that the rule had been granted. No application was made for information on the subject to any of the judges until the present term, nor was any enquiry made in court during the whole of Hilary Term. *McPherson* argued that the want of an entry in the clerk's book entitled him to succeed, as until then it could not be properly said that the rule was granted, such entry being the record of the decision of the court; and as that entry was not made until the present term, after enquiry made of the judges, the delay was owing to the omission of the officer of the court, and entitled the plaintiff to relief.

The court refused the application, stating that they considered the omission to make any application to the court during Hilary Term, or any enquiry of any of the judges from the end of Michaelmas to the beginning of this term, to be fatal to the application as a matter of right, for it was the duty of the plaintiff's counsel to have applied to the court for judgment on his motion

some time at least in Hilary Term: that their decision had been given in open court, as their own private memoranda of business transacted shewed, and if any one representing the plaintiff had been present it would have been known to him: that an enquiry might have been made of any of the judges, and the information obtained: that though there was an omission on the part of the clerk to make the proper entry, it did not relieve the plaintiff's attorney from the duty of enquiry, or of instructing counsel to apply for the decision of the court during the following term. They also intimated that they had not granted a rule without hesitation, as it appeared to them the principal objection raised was the smallness of the damages given, and as it was intimated by the plaintiff's counsel during the application that it was a continuing injury—if so, another action would lie for subsequent damages; and that, without a case of the greatest hardship, or that some permanent and valuable right was boun , or irreparable and serious injury was inflicted, which would be remediless, they would not grant an application which might furnish an inconvenient precedent. There was one rule *nisi* applied for during Michaelmas Term which was not disposed of until the first day of the following term, in the case of *Beattie* v. *Robinson*, which was refused.

Rule refused.

REGINA v. PETERMAN.

Conviction—Certiorari—Notice.

Notice of application for a writ of *certiorari* must be given to the convicting magistrate, and the want of such notice is good cause to be shewn against a rule *nisi* to quash the conviction.

(Q. B., E. T., 27 Vic.)

Defendant, having been convicted before Joseph Wood, J. P., under Consol C. ch. 91, secs. 37 and 38, appealed to the Court of Quarter Sessions, where the conviction was affirmed.

Application was then made for a writ of *certiorari*, which was ordered to issue, upon proof of notice given to the complainant and the justices presiding at the Quarter Sessions.

J. A. Boyd, for defendant, in the term following, obtained a rule *nisi*, calling upon the said complainant, and the justices who heard the case in Quarter Sessions to shew cause why the conviction and the order of Quarter Sessions affirming the same, should not be quashed.

On the return of this rule *Doyle*, for the complainant, objected that no notice of application for the *certiorari* had been given to the convicting justice, Mr Wood, and that the rule *nisi* had not been served upon him. He cited in support of this objection Paley on Convictions, 364; *Rex* v. *Rattrelaw*, 5 T. R. 539; *Rex.* v *Justices of Glamorganshire* 5 T. R. 279; Dickenson's Q. S. 941, 960, 961.

Boyd, contra, cited *Rex.* v. *Allan*, 15 East, 345; Gude's Crown Practice, vol. i., p. 21-3; Hulton on Convictions, p. 94, and Consol Stats. C., ch. 99, sec. 117, shewing that in appeals to the Quarter Sessions the convicting magistrate need not be notified.

The court held that, whatever might be the practice in England, it was proper for them in such a case as the present to see that the convicting magistrate was apprised of the proceedings, inasmuch as he was exposed to an action if the conviction should be quashed. The rule *nisi* was therefore discharged, but under the circumstances without costs.

Rule discharged.

COMMON PLEAS.

(*Reported by* E. C. JONES, Esq., *Reporter to the Court.*)

REGINA v. ROW.

Perjury—Conviction for—Magistrates for county—No jurisdiction within the limits of a city situate therein—Con. Stat. U. C., ch. 112.

The prisoner being indicted for perjury in giving evidence, upon a charge of felony against one L. G., it appeared that the felony, if committed at all, was committed in the county of Middlesex. The justices before whom the examination took place entertained the charge and examined the witnesses within the city of London. The defendant's counsel objected at the trial that the justices being justices of the county of Middlesex had no jurisdiction, sitting in London, to examine into an offence committed outside the limits of that city. The learned judge overruled the objection, reserving the case under ch. 112 of Con Stat. of U. C. Upon motion,

Held, that the conviction was illegal, and it was therefore reversed. *Held* also, that Imperial Stat 28 Geo III., ch. 45, sec. 1, is local in its character, and is not in force in this province.

(C. P., E. T., 27 Vic.)

Case reserved under chapter 112 of the Consolidated Statutes for Upper Canada by *Morrison*, J., at the last spring assizes, holden at London, in and for the county of Middlesex, as follows:

At the last assizes holden at the city of London, in and for the county of Middlesex in Upper Canada, Richard Row was tried and convicted before me upon an indictment for perjury under the following circumstances.

In the month of November last an information in writing, and upon oath of the said Richard Row, was laid by him before two justices of the peace for the county of Middlesex, charging one Elliott Grieve with a certain felony alleged to have been committed in the township of Westminster in the said county. The said Elliot Grieve was brought before the said justices and several other justices of the peace of the said county, and examined upon the said charge. The said felony, if committed at all by the said Elliot Grieve, was committed in the said county outside the city of London. The said examination took place within the limits of the city of London aforesaid, and the said Richard Row was then and there, and at said examination, and within the limits of the said city, sworn and examined before the said justices as a witness in support of the said charge, and his deposition was then and there taken in writing by the said justices. The perjury alleged in the said indictment against the said Richard Row, is assigned on a statement made by the said Richard Row in support of the charge against the said Elliot Grieve while under examination as aforesaid before the said justices, and which statement is contained in the writen deposition aforesaid.

At the trial of the said Richard Row, after the evidence for the prosecution was concluded, the defendant's counsel objected that the said justices had no jurisdiction or authority to administer the oath aforesaid to the said Richard Row on such examination, inasmuch as they were then sitting within the limits of the city of London where, as justices of the county of Middlesex, they had no jurisdiction, and for that reason the said Richard Row could not be convicted on the said indictment.

The learned judge overruled the objection, and the jury having convicted the defendant, sentenced him to three months' imprisonment for the said offence, but reserved the question for the consideration of the justices of the Court of Common Pleas for Upper Canada under chapter 112 of the Consolidated Statutes for Upper Canada, whether the legal objection above mentioned, taken by the defendant's counsel, was entitled to prevail, and requested the opinion of the said justices upon the said question.

S Richards, Q C., for the Crown, referred to the Municipal Institutions Act, ch. 54, secs. 361, 362, 365, Con. Stat. Canada, ch. 102, secs. 20, 24, & 25; 28 Geo. III., ch. 49, sec. 4.

R. A. Harrison, contra, referred to Paley on Convictions, 4 ed. p. 16, and 28 Geo. III., ch. 49.; 16 Vic. ch. 179; *Regina* v. *Rawlings*, 8 C. & P. 439; *Regina* v. *Guardians of Holborn Union*, 6 E. & B. 715; *Regina* v. *Justices of East Looe*, 8 Jur. N. S. 1128.

RICHARDS, C. J.—We think the objection taken to the conviction at the trial ought to prevail, and that the justices of the peace of the county of Middlesex acting in the matter therein referred to, had no jurisdiction to administer oaths to or examine witnesses within the city of London, in the proceedings then being had before them, and in which the alleged perjury was committed.

We are also of opinion that the Imperial Statute 28 Geo. III., ch., 39, sec. 4, is local in its character, and is not in force in this province.

We therefore reverse the conviction of the said Richard Row in the said case, and judgment given thereon, and order an entry to be made on the record that in the judgment of the justices of the Court of Common Pleas for Upper Canada the said Richard Row ought not to have been convicted.

Per cur.—Conviction reversed

THE CORPORATION OF WELLINGTON v. WILSON ET AL.

County council—Road lying between two townships—Jurisdiction over—Municipal Institutions Act

The first count of the declaration alleged that the defendants wrongfully cut away, removed and destroyed a bridge *belonging to the plaintiffs*, to wit: the bridge across the Grand River, on the line of road and public highway between the townships of A. and G. in the county of W.

The second count alleged that there was and had been a line of road and public travelled highway between the townships of A. & G. which crosses the Grand River in the county of W., such road being the line of road allowance between the townships aforesaid, and in order that the road might be travelled upon, the plaintiffs in discharge of their duty, caused a bridge to be erected across the said river where such bridge crosses the line of road, &c., and thereby facilitated the use by the ratepayers of the said county and others of the said line of road and highway. Yet the defendants, well knowing the premises, but contriving to injure, &c., the plaintiffs, wrongfully and injuriously injured and cut down, &c., said bridge, and by means thereof it became the duty of the plaintiffs to rebuild the said bridge, and in performance of such duty plaintiffs have expended divers large sums of money, &c., &c.

The first count was demurred to on the grounds that the plaintiffs were not authorised by law to be, and were not the owners of the said road and bridge, and were not entitled by law to maintain any action for the wrongs complained of, but that the remedy should have been by indictment or by action

The second count was demurred to because it was not shown that the road or bridge had been assumed by plaintiffs by by-law, or how the duty to rebuild the bridge arose, or that it was their duty to do so, and that they were not bound to do so.

Two defendants also pleaded that the plaintiffs did not assume the road by by-law. To this the plaintiffs demurred on the grounds that the plea raised an immaterial issue. That it attempted to put in issue matter not stated in the second count; that the defendants being wrong doers the absence of a by law was no defence; that the plaintiffs had a property in and duty respecting the bridge without a by law; that the absence of a by law, if otherwise necessary, could not be taken advantage of by the defendants;

Held, 1st. That by sec. 339 of the Municipal Act, the plaintiffs have exclusive jurisdiction over the bridge in question, and not a mere naked power, and having jurisdiction the common law (irrespective of the statute) would impose upon them the duty of repairing it, they could therefore maintain the action although sec. 336, which vests the soil and freehold of all highways in cities, towns, villages and townships in their respective municipalities, does not mention counties.

2nd. That the allegation in the first count, that the bridge *belonged to the plaintiffs*, was truly stated.

3rd. That the plaintiffs may have become the absolute proprietors of the bridge by purchase from a road company, and there was nothing to shew that they did not claim by such title in the pleadings, and that their title was sufficiently shewn in the pleadings. (C. P., E. T., 27 Vic.)

The first count of declaration stated that the defendants wrongfully and injuriously cut away, removed and destroyed a bridge belonging to the plaintiffs, to wit, the bridge across the Grand River, on the line of the road and public highway between the townships of Amaranth and Garafraxa in the county of Wellington.

The second count stated, that heretofore, and at the time of the grievances hereafter mentioned, there was and from thence hitherto hath been a line of road and public travelled highway between the townships of Amaranth and Garafraxa in the county of Wellington such highway being the town line or line of road allowance between the townships aforesaid, and such line of road crosses the river called the Grand River in the said county, and that the line of road might be travelled upon and used by the ratepayers and others, inhabitants of the said county, and others, the subject of Her Majesty; the plaintiffs, in the performance of their duty in that behalf, caused to be erected and constructed a bridge across the said Grand River, where such bridge crosses the line of road, and so removed the interruption caused by such river to the said road, and thereby facilitated the use by the ratepayers of the said county and others of the said line of road and highway, and the plaintiffs in the erection and construction of the aforesaid bridge thereon, expended and disbursed divers large sums of money belonging to the corporation of the county of Wellington, and collected and derived from the rates and assessments imposed upon the ratepayers and other inhabitants of the said county, and from other lawful sources in that behalf. Yet the defendants well knowing the premises, but contriving and wrongfully intending to injure the plaintiffs, wrongfully and injuriously injured and cut down, removed and carried away the said bridge, and thereby obstructed the said road and highway, and by reason thereof the plaintiffs became liable to rebuild the said bridge, and to expend thereon divers other moneys of the said corporation, and it thereupon also became and was the duty of the plaintiffs to reconstruct and rebuild such bridge; and the plaintiffs in the discharge and performance of such duty, have paid and expended in the rebuilding and reconstructing of such bridge, divers large sums of money, and are liable to expend and pay divers other large sums of money, and by means of the premises the plaintiffs have been otherwise greatly injured.

The fourth plea of the defendants, Wilson and Edsall, to the second count was, that the plaintiffs did not, by any by-law, assume the road or bridge.

The fourth plea of the defendant Currie, to the second count, was precisely the same.

The defendants, Wilson and Edsall, demurred to the declaration, and stated the following grounds of objection to the first count:

That the plaintiffs are not authorised by law to be, and are not owners of the bridge, or of the road, nor are they entitled by law to maintain any action for the wrongs in the first count alleged. That the remedy for the wrongs complained of is by indictment or information, and not by action at the suit of the plaintiffs.

The following were the objections to the second count:

It was not shewn that the road or bridge had been assumed by the plaintiffs by by-law, or how the alleged duty or liability to build or rebuild the bridge arose, or that it was in law their duty so to do, or that they had any legal right so to do or to expend thereon the moneys alleged to have been expended; that the plaintiffs were not by law bound to build or rebuild the bridge; that the road and bridge are not, nor is either of them, vested by law in the plaintiffs, and that the remedy for the wrong complained of is by indictment or information, and not by action at the suit of the plaintiff.

The defendant Currie also demurred to the declaration, and assigned the same grounds of exception to each of the counts.

The plaintiffs demurred to the fourth plea of the defendants, Wilson and Edsall, and stated the following grounds of demurrer to the same:

1st. That the plea raised an immaterial issue.

2nd. That it attempted to put in issue matter not stated in the second count.

3rd. That the defendants being wrongdoers, the absence of a by-law could not be a defence.

4th That the plaintiffs had a property in and a duty with respect to the bridge without a by-law.

5th That the absence of a by-law, if otherwise necessary, could not be taken advantage of by the defendants.

The plaintiffs also demurred to the fourth plea of the defendant Currie, and assigned the same cause of demurrer as to the fourth plea of the other defendants. The parties respectively joined issue on the demurrers.

Crooks, Q. C., for the plaintiffs, contended that they had an interest in the subject of the suit, and were entitled to maintain it. He referred to *Fisher* v. *Vaughan*, 12 U. C. Q B. 55; Consolidated Statutes U. C., ch. 54, secs. 313, 314, 315, 327, 331, 335, 339, 340, 341, 343; *Gibbs* v. *The Trustees of the Liverpool Docks*, 3 H. & N. 164; *Woods* v. *The Municipalities of Wentworth and Hamilton*, 6 U. C. C. P. 601; *McKinnon* v. *Penson*, 8 Exch 319, S. C. in Exch. Cham. 9 Exch. 609; *Brown* v. *Municipal Council of Sarnia*, 11 U. C. Q. B. 87; *McDowell* v. *The Great Western Railroad Company*, 5 U. C. C. P. 130; *Huist* v. *Buffalo and Lake Huron Railroad Company*, 16 U. C. Q B. 299; *Campbell* v. *The Great Western Railroad Company*, 15 U. C. Q B. 498; Woolrych on Ways, 326, 338, 340; *Harrison* v. *Parker*, 6 East, 134.

C. S. Paterson and John Read contra, contended that sec. 336 of the Municipal Act vested the soil of all highways in cities, towns, villages and townships in their respective municipalities, but counties are not mentioned. Unless the plaintiffs can shew a title to the road or bridge they cannot maintain an action for the injury to them, the remedy must be by a public prosecution. *Davis* v. *Petley*, 15 Q. B. 276; 1 Hawk, P. C. 700, c. 82. Same reference in Hawk b. 1, chapters 76-77, fol. edn.

ADAM WILSON, J.—The sections of our Municipal Act must be specially examined to ascertain the express powers which have been conferred upon county corporations.

The first count describes the bridge as belonging to the plaintiffs, and as crossing the Grand River on the line of road and public highway, between townships of Amaranth and Garafraxa, in the county of Wellington.

The second count describes it in nearly the same manner, and adds that the highway between the townships is "the town-line, or line of road allowance between the townships."

The demurrers to the declaration raise the question, whether, under any circumstances, the plaintiffs, as a county corporation, can have a bridge belonging to them "on the line of road and public highway between two townships in the same county," which they have not assumed by by-law? And if they cannot, then whether such a title must, as a proper allegation of pleading, be set forth in the declaration?

By sec. 389 of the Municipal Act, it is provided that the county council shall have exclusive jurisdiction over all roads and bridges lying *within any township* of the county, *and which the council by by-law assumes as a county road or bridge;* and also over all bridges across streams separating two townships in the county. And over "every road or bridge dividing different townships," &c.

From this it would appear to be necessary for the county council to pass a by-law assuming a road or bridge as a county road or bridge, only when the road or bridge is *within any township.* In all cases of roads or bridges dividing different townships in the county, the county council have exclusive jurisdiction, by authority of the statute, without any by-law whatever.

Now, here is a case in which the bridge is alleged to be "on the line of road or public highway *between two townships*, in the county of Wellington," and therefore within the very words of the statute, which confer on the plaintiffs "the exclusive jurisdiction" over it.

This, therefore, being a bridge within the jurisdiction of the county, the county council may, under sec. 331, make or repair the same, or place a toll upon it to defray its expenses or repair, or grant to companies the right to construct it, or grant the tolls upon it to any person or company for building it; see also s. 342.

It may be doubtful whether sec. 337 applies to *county* roads, as the language is, every *such* road; and *such* may perhaps, be confined only to the roads mentioned in sec. 336, which does not specify county roads.

But, apart from sec. 337, which imposes the burden of repairing the roads within the respective municipalities upon the municipalities in which they are situated, the common law duty would apply to all such bodies, to repair the roads which are within their jurisdiction, and for which they can raise the funds required for the purpose.

I have no doubt, therefore, that these plaintiffs could be indicted if *this* bridge were out of repair; but the present question is whether they can, as plaintiffs, maintain this action, and allege the bridge "to belong to them?"

The statute does not by sec. 336, which vests every public road, street, bridge, or other highway, in a city, township, town or village, name a *county* at all—probably an unintentional omission.

The county has clearly the "exclusive jurisdiction," and under this, the county may exercise all the very extensive powers above enumerated under sec. 331. If the county can grant to road or bridge companies permission to commence or proceed with roads or bridges within its jurisdiction, whose road or bridge would it be when it was finished? No doubt it would be the road or bridge of the company, and they might maintain a civil action for any injury done to it. If this be so, as respects a company, why should not the like rule prevail as to the county, if the county do the work, when the county has not merely a naked power over the subject, but has an interest, "the exclusive jurisdiction" as well?

But, while the defendants insist that this bridge cannot belong to the plaintiffs, how can we say as a fact whether it can or cannot?

By the Joint Stock Companies' Act, U. C. c. 49, s. 68, the plaintiffs may have bought this bridge from a joint stock company, in which case the purchasers are *to stand in the place and stead of the company;* and unquestionably, then, the bridge would *belong* to the plaintiffs. When, therefore, the defendants demur to the declaration, and say that under no circumstances can a *county* own a bridge, they are going too far, unless it be necessary that the county should set out its title in the declaration, with far greater particularity than is ever adopted.

But why should this be more necessary for a county than for any other municipality, which might equally purchase a road? It is a general rule of pleading, that title must always be shewn when a claim is made, or a liability is sought to be imposed.

The common count for goods sold and delivered, must shew *title* in the plaintiff to sue, and this is done by alleging that the goods were sold and delivered "by the plaintiff."

Title is shewn to goods and chattels, by stating them to be the goods and chattels "of the plaintiff," or that he was "lawfully possessed of them as of his own property," and so as to real property.

The title here is sufficiently shewn, unless the law be that the plaintiffs cannot under any circumstances be possessed of a bridge. If it be that a bridge may or may not belong to the plaintiffs, the plaintiffs need not anticipate all this in their declaration; as in the case of *Simpson* v. *Ready*, 12 M. & W. 738, where it was held that although the action was given only to a *burgess*, the plaintiff need not allege in his declaration that he was a burgess; it was a matter of evidence only.

The *soil* and *freehold* may be vested in the Crown, but the "exclusive jurisdiction" which the county has in its own roads, and highways and bridges [excluding those which may be acquired by purchase from road companies], with the other very great powers which have been expressly conferred upon such bodies, must confer upon the county something more than the mere naked possession.

As against wrong-doers, mere possession as the private property, is a sufficient title; and we think that this is also applicable to the present case.

In *Harrison* v. *Parker*, 6 East. 154, the plaintiff, who sued the defendant for destroying his bridge and carrying away the materials, had only a licence to build the bridge from the owner of the soil, he had no right in the soil itself; he had no *exclusive* right in the soil, and it was held, he might sue for the carrying away of the materials, but no decision was given on the other point.

The case of *McKennon* v. *Penson* only decides that as a civil action is not maintainable at law against a county in England, for non-repair of a county bridge, because it is not a corporation, and notice could not be done towards the inhabitants, that an action would not lie, under the statute, against the surveyor of the county.

This case, however, shews that in this country, as the county in a corporation, that such an action would lie against it.

The decision in *Dimes* v. *Petley*, 15 Q. B. 283, is an authority in favour of the plaintiffs. There it is laid down on a motion for judgment *non obstante veredicto*, "that if there be a nuisance in a public highway, a private individual cannot of his own authority abate it, unless it does him a special injury; and he can only interfere with it as far as is necessary to exercise his right of passing along the highway; * * * and he cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if avoiding it he might have passed on with reasonable convenience." As this is the law even as to nuisances, how much more should property on a part of a highway be protected, which is not a nuisance, but convenient for and essential to the public travel. I think that the "exclusive jurisdiction" granted to the plaintiffs, of the bridge in question, with the other very great powers which have been conferred upon them by the legislature, sufficient to pass title to a grantee, do vest in them an interest in this bridge, beyond a mere naked power.

That their interest is truly stated to be as alleged, a bridge "belonging to the plaintiffs."

And that as the plaintiffs may become the absolute proprietors of a bridge by purchase from a road company, there is nothing in the pleadings which shews that they do not claim by such a title.

And their is no rule of pleading which requires them to set out their title with greater particularity than they have done.

The Chief Justice and my brother Wilson are not responsible, for all the reasons I have expressed in the opinion I have given, but they agree with me that there should be judgment for plaintiffs, on demurrer.

Per cur.—Judgment for plaintiffs.

REGINA V. SCHRAM ET AL., AND REGINA V. ANDERSON ET AL.

Imp. Stat. 59 Geo III ch. 69—Enticing persons to enlist.

The defendants having been convicted of a misdemeanour under Imp Stat 59 Geo III. ch. 69. for procuring and endeavouring to procure enlistments in this country for the army of the United States, upon motion for a new trial.

Held, that that statute is in force in this province, and the conviction was sustained.

(C. P., E. T., 27 Vic.)

The defendants were indicted at the spring assizes, 1864, held at London, before Morrison, J. The indictment alleged that Henry Schram and Hayden Waters, on the fourteenth day of January, in the year of our Lord one thousand eight hundred and sixty-four, at the city of London, in the county of Middlesex, in the province of Canada, the said province of Canada then and still being a colony belonging to and subject to Her Majesty, did unlawfully and wrongfully, and without the leave and license of Her Majesty for that purpose first, or at any time whatever, had and obtained under the sign manual of Her Majesty or signed by order in council or by proclamation of Her Majesty, hire, retain, engage and procure one John Talbot to enlist and to enter and engage to enlist and to serve, and to be employed in warlike and military operations by land as a soldier in the land service of and for and under and in aid of the United States of America, the said United States of America then and still being a foreign State, contrary to the statute in such case made and provided, and against the peace of our lady the Queen, her Crown and dignity.

The second count was similar, except that it alleged that the defendants procured J. T. to go and embark for the purpose of enlistment.

The third count was for procuring J. T. to enlist.

The defendants having been convicted upon this indictment, a rule was obtained for a new trial this term, which was argued by *Robert A. Harrison* for the defendants, referring to *Whicker* v. *Hume*, 4 Jur. N S. 933.

S. Richards, Q C., for the Crown.

RICHARDS, C. J.—The preamble to cap 69 of 59 Geo. III. in effect recites that the enlistment or engagement of his Majesty's subjects to serve in war in foreign service, without His Majesty's license, may be prejudicial to and tend to endanger the peace and welfare of this kingdom, and that the laws then in force were not sufficiently effectual for preventing the same. [This statute was passed on the 3rd July, 1819.]

By the second section of the statute it was provided—1st. That if any natural born subject of his Majesty, without the license of his Majesty, should take or agree to take or accept any military commission, or should enter into the military service as a commissioned or non-commissioned officer, or should enlist or agree to enlist to serve as a soldier or to be employed, or should serve in any warlike or military operation in the service of or for or in aid of any foreign prince, state or colony, either as an officer or soldier, or in any other military capacity.

2nd. Or if any natural born subject of his Majesty should, without such leave or license, accept or agree to take or accept any commission or appintment as an officer, or should enlist or enter himself, or agree to enlist or enter himself to serve as a sailor or marine, or to be employed or engaged, or should serve in and on board any ship or vessel of war or on board of any vessel used or fitted out or intended to be used for any warlike purpose in the service of or for or under or in aid of any foreign power, prince, state or colony.

3rd. Or if any natural born subject of his Majesty should, without such leave and license, contract or agree to go, or should go to any foreign state, country, colony or province, or to any place beyond the seas with intent or in order to enlist, or to enter himself to serve, or with intent to serve in any warlike or military operation whatever whether by land or by sea in the service of or for or under or in aid of any foreign prince, state or colony, either as an officer or a soldier, or in any other military capacity, or as an officer or sailor or marine in any such ship or vessel as aforesaid, or

4th. "If any person whatever within the United Kingdom of Great Britain and Ireland, or in any part of his Majesty's dominions elsewhere, or in any country, colony, settlement, island or place belonging to or subject to his Majesty, shall hire, retain, engage or procure, or shall attempt or endeavour to hire, retain, engage or procure any person or persons whatever to enlist or to engage to enlist, or to serve or to be employed in any such service or employment as aforesaid as an officer, soldier, sailor or marine, either in land or sea service, for or under or in aid of any foreign state, potentate, colony, province, part of any province or people, * * * or to go or to agree to go or embark from any part of his Majesty's dominions, for the purpose or with intent to be so enlisted, entered, engaged or employed as aforesaid * * * in any or either of such cases, any person so offending shall be deemed guilty of a misdemeanor, and upon being convicted thereof upon any information or indictment, shall be punishable by fine and imprisonment or either of them, at the discretion of the court before which such offender shall be convicted"

Section 4 provided, that all such offences as should be committed within England should be tried in the Court of King's Bench at Westminster, or at the assizes or sessions of Oyer and Terminer, or any quarter sessions of the peace for the county or place where the offence was committed, and all the offences committed in Ireland might be tried in the Court of King's Bench in Dublin, or the assizes or quarter sessions in the county or place where the offence was committed, and all such offences committed in Scotland, might be prosecuted in the Court of Justiciary in Scotland, or any other court competent to try criminal offences committed within the county, shire, &c., within which the offence was committed, and when any such offence was committed out of the United Kingdom, any justice of the peace residing near the place where the offence should be committed, on information on oath might issue his warrant to arrest the offender, and it should be lawful for the justice to commit such person to gaol, to be delivered by due course of law or otherwise, to hold such offender to bail to answer for such offence in the superior court competent to try and having jurisdiction to try criminal offences committed in such port or place, and "all such offences committed at any place out of the said United Kingdom, should and might be prosecuted and tried in any superior court of his Majesty's dominions competent to try and having jurisdiction to try criminal offences committed at the place where such offence should be committed."

Section 9 provided that any offences made punishable by the provisions of that act, committed out of the United Kingdom, might be prosecuted and tried in his Majesty's Court of King's Bench at Westminter, and the venue in such case laid at Westminster in the county of Middlesex.

The point raised on the argument was whether the statute, the principal passages from which applicable to this case I have abstracted, is in force in this country The words of the statute seem broad enough to apply to this country. That part of the second section of the act which I have marked 4th, and have transcribed, not only enacted if any person should commit the offence charged in this indictment in Great Britain and Ireland, or in any part of his Majesty's dominions elsewhere (and as if to put the matter beyond all possible doubt, continues), or in any country, colony, settlement, island or place, belonging to or subject to his Majesty, he should be guilty of a misdemeanor. In 1819, when this act was passed, the province of Canada (then divided into Upper and Lower Canada, but now united) was a colony belonging and subject to his Majesty George the Third.

This portion of the statute seems clearly to create an offence, though the acts forbidden were committed in Canada The words of the latter part of the fourth section of the statute quoted above, seem clearly to give jurisdiction to try the offence to the court before which the defendant was convicted.

The only ground on which we can hold that the statute of 59 Geo. III is not in force in this country is because we have and then had a local parliament, and that enactments of this kind ought to be made by the authority of that parliament, and if not so made, they ought to be held not to be in force here.

By the Imperial Statute 31 Geo. III. cap 31, a separate legislature was established in each section of the province to make laws "for the peace, welfare and good government thereof, such laws not being repugnant to that act" By the Union Act, Imp. Stat. 3 & 4 Vic. cap 35, these provinces were again united and power given to the local legislature to pass laws for the peace, welfare, and good government of the province of Canada, such laws not being repugnant to that act or to such parts of 31 Geo.

III. cap. 31, as were not repealed, or to any act of the Imperial Parliament made or to be made, and not thereby repealed, which did or should by express enactment, or by necessary intendment, extend to the provinces of Upper or Lower Canada, or either of them. The very words of the statute 3 & 4 Vic. cap. 35, seem to imply that the power to legislate on such matters was and is reserved to the Imperial Parliament, though this province may be affected by such legislation.

As long as it is admitted that the home government, by whom the supreme power of the empire is exercised, is the proper channel through which all our relations and intercourse with foreign governments are to be carried on, the power to pass laws to bind the whole nation so far as regards those relations (and as necessarily arising out of them the peace of the empire) must rest with the Imperial Parliament.

Independently of the doctrine that our local legislature can only exercise such powers as are specially conferred upon it under the statutes passed by the Imperial Parliament, there are other points of view in which the question may be considered. Though possessing a domestic legislature we form part of a vast empire having other colonies exercising similar legislative powers to our own. If any one colony by passing laws or refusing to pass laws produced a state of things which created difficulty with a foreign state, the whole nation might be involved in a calamitous war from the imprudence or recklessness of a very unimportant colony. Considered in this light it appears to me that the statute which we are discussing relates to the conduct of citizens of the empire towards foreign states and people, and is on a subject which must be disposed of and legislated upon by the Imperial Parliament as representing the supreme legislative power of the nation, and as to which it is necessary that all the subjects of the Crown should alike be bound. The very preamble of the act states that the proceedings which the statute prohibits may be prejudicial to and endanger the peace and welfare of the kingdom.

I cannot say that I have any doubt that the statute is in force in this country, and creates the offence of which the defendant was convicted before the proper tribunal. It is not contended that the evidence does not justify the conviction. The rule for a new trial will therefore be discharged.

Per Cur.—Rule discharged.

COMMON LAW CHAMBERS.

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

HIGGINS v. BRADY.

Absconding Debtors' Act, Con. Stat. U. C. cap. 25—Sufficiency of affidavit—Applicable only to residents—Who residents.

Held, 1. That an affidavit, under Con. Stat. U. C. cap 25, for a writ of attachment against an absconding debtor, must on the face of it shew that the debtor is or was a *resident* of Upper Canada.

Held, 2. That it is not enough to describe the debtor as "lately doing business" in Upper Canada; nor is it sufficient to describe him as having "departed from Canada." &c.

Held, 3. That an affidavit concluding that "Patrick Brady hath departed from Upper Canada, and hath gone to the United States, with intent to defraud (*omitting* 'me') of my just debts, *or* to avoid being arrested or served with process," so far as the conclusion was concerned, was sufficient—the act as well as the affidavit being in the alternative, and the latter alternative alone being sufficient

Semble, That a debtor whose family resided in the United States, but who for several months was in this province, purchasing horses for the United States army, and contracting debts here for horses so purchased, with the declared intention that he would move permanently into Canada, was sufficiently a resident of Upper Canada to be within the operation of the Absconding Debtors' Act.

(Chambers, March 2, 1864.)

Defendant obtained a summons calling upon plaintiff to shew cause why all proceedings had and taken against him as an absconding debtor should not be set aside, upon the grounds, among others, that the affidavit of plaintiff on which the attachment issued did not shew that defendant was a resident of Upper Canada, and did not shew that defendant had any intention of defrauding the plaintiff, or anybody else, and also upon the ground that defendant was not, in fact, a resident of Upper Canada.

Plaintiff's affidavit, on which the order for the attachment was made, stated "that Patrick Brady, lately doing business in the town of Chatham, in said county, speculator," &c., without shewing on its face that Brady was a resident in Upper Canada;" and concluded "that Patrick Brady hath departed from Upper Canada, and hath gone to the United States, with intent to defraud* of my just debts, or to avoid being arrested or served with process."

Defendant filed a number of affidavits to shew that he was not, in fact, a resident, and plaintiff filed a number in answer. The facts as to residence, so far as material, will be found in the judgment of the learned judge who decided the case.

Carroll shewed cause.

J. A. Boyd supported the summons.

ADAM WILSON, J.—The question as to the residence, in fact, whether it were in Upper Canada or not, appears to have been of that character which may well warrant the plaintiff in treating the defendant as having been a resident of this province. The defendant's family resided in the United States. The defendant himself was in this province, about Chatham, from April last until about the end of the following January, purchasing horses for contractors for the United States army. The defendant represents he was chiefly in the United States, coming here occasionally to purchase. The plaintiff represents just the reverse, that the defendant was here nearly the whole time, and only occasionally in the United States disposing of his horses, and once upon a visit to his family in the United States. It is very clear the defendant contracted his alleged indebtedness here, when carrying on his business of purchasing horses; spent a very great portion of his time for about ten months here; and represented on different occasions his wish or intention to move permanently into Canada. I cannot say that this is not such a residence here as will make him answerable to the like process, as a debtor, to which our people are subject. On the contrary, I think it is, although it is by no means a change of domicile. (*Frear* v. *Ferguson*, 2 U. C. Cham. Rep. 144; *Romberg* v. *Steenboch*, 1 U. C. Prac. Rep. 200; and *Brett* v. *Smith*, 1 U. C. Prac. Rep. 309, 315).

The objection that the plaintiff's affidavit does not state that defendant had an intention to defraud plaintiff or anybody else, is not, I think, sustainable, because both the statute and the affidavit are in the alternative, and if either alternative is fully stated, the affidavit will be sufficient. Besides it does appear here that the deponent believed Brady had departed from Upper Canada to avoid being arrested or served with process, which will warrant the writ of attachment issuing, although the deponent may not have reason to believe the debtor has so gone with any intention of defrauding him.

The objection that the affidavit does not state upon its face that the debtor is or was a resident in Upper Canada is of a more serious character.

The present act, Con. Stat. U. C. cap. 25, reads that "if any person, *resident* in Upper Canada, indebted to any other person, departs from Upper Canada, with intent," &c., he shall be deemed an absconding debtor (s. 1); and that "by affidavit made by any plaintiff, his servant or agent, that any such person so departing is indebted," &c.

These enactments are taken from the original C. L. P. Act 1856 (19 Vic. cap. 43 sec. 43) which is taken in its turn from 2 Wm. IV. cap. 5, and 5 Wm. IV. cap. 5. But they did not require that the debtor should have been a resident. The language was general: "If *any person* being indebted should secretly depart from the province," &c.

Under these earlier acts questions arose whether persons not residents could be treated as absconding debtors, and what facts sufficiently brought a debtor within their operation; and *Ford* v. *Lusher*, 3 U. C. O. S. 428; *Smith* v. *Niagara Harbor Co.*, 6 U. C. O. S. 555; *Taylor* v. *Nichol*, 1 U. C. Q. B. 416, show in what manner the act was occasionally applied by creditors.

It may have been to point out more clearly the class of persons who were to be treated as absconding debtors that this change in the enactment in the law was made, and as it has been very clearly made, it is right it should be strictly followed.

It appears to me that as the present act declares "if any person *resident* in Upper Canada, indebted, &c., shall depart," &c., that it is necessary the creditor should shew in his affidavit that the person against whom he applies for such stringent process, is a person

* "Me" omitted.—EDS. U. C. L. J.

who was or is a resident in Upper Canada, for without this he does not shew that the process ought properly to be issued.

This affidavit describes the debtor as "lately doing business in Chatham," &c.; but all this might be true, and yet the debtor never have been in Canada in his life. So it also declares that the debtor "has *departed* from Canada and gone to the United States," but all this too may be true, and yet the debtor may never have been more than five minutes in Canada.

The act of 1832 required that the creditor should have been an inhabitant of the province. The act of 1835 altered this, and enabled any creditor, whether an inhabitant of the province or not to issue such process. So the act of 1832 was general in its language against all debtors, although its construction was limited to resident debtors only.

Since 1856 the act has been special in its language against resident debtors only, and the affidavit for the attachment must shew that it is such a person who is indebted, and who is so departing, from which it appears that while the class of creditors has been enlarged, the constructive application of the statute to particular debtors has been expressly declared and defined; and, therefore, I think the plaintiff should have shewn in his affidavit that Brady was a person resident in Upper Canada, and that for want of such a statement his proceedings are defective.

I think the sheriff should be directed to abandon the seizure he has made under this writ, so far as this writ is concerned, and that the writ of attachment should be set aside, and all proceedings had upon it, with costs: no action to be brought by the defendant against the plaintiff for anything connected with such proceedings.

Order setting aside proceedings.

Ward v. Vance.

Attaching order—Executors—Attachment of simple contract debt.

An order upon executors to pay a simple contract debt pursuant to an attaching order was refused, on the ground that the executors might be liable on specialty debts of their testator, after satisfaction of which they might have no assets, and before satisfaction of which they ought not to be ordered to pay a simple contract debt. The attaching order was also at the same time discharged.

(Chambers, July 7 1864.)

On 5th May last the judgment creditor obtained from a judge in Chambers, an order that all debts due, owing, or accruing due from the garnishees as executors of the last will and testament of David Thompson, deceased, to the judgment debtor, be attached to answer a judgment recovered against the judgment debtor in the Court of Queen's Bench, on 2nd August, 1862, by the judgment creditor and a summons calling upon the garnishees to shew cause why they should not pay the judgment creditor the debt alleged to be due from them as executors of David Thompson, deceased, to the judgment debtor, or so much thereof as should be sufficient to satisfy the judgment debt.

Robert A. Harrison, showed cause, and filed an affidavit of one of the garnishees, wherein, among other things, it was sworn that there were debts of a higher nature on specialties executed by David Thompson in his lifetime, and still outstanding to an amount exceeding all moneys or assets of the estate realized by the executors and in the hands of the executors or either of them. Mr. Harrison argued that executors could not be held to be "third persons indebted," or within the meaning of Con. Stat. U. C. cap. 22, sec. 288, that the act did not apply to persons indebted in a representative capacity, such as executors, and that under no circumstances should an order be made that might have the effect of disturbing the ordinary course of administration of assets. He referred to Com. Dig. Attachment, A. D.; 1 Rolle's Abr. 105; *Masters* v. *Lewis*, 1 Ld. Rayd. 56; 3 Bac. Abr. 258; *McDowall* v. *Hollister*, 25 L. T. Rep. Ex. 185; *Nonell* v. *Hullett*, 4 B. & Ald. 646; *Burton* v. *Roberts*, 6 H. & N. 93; *Blake* v. *Blake*, 2 Sch. & Lef. 26; *Rutherford* v. *Dawson*, 2 Ball & Beatty, 17; Drake on Foreign Attachment, 811.

Till, contra, argued that any debt for which an action could be maintained, might be attached under the Common Law Procedure Act, and that an order might be made, if necessary, for payment of the debt out of assets *quando*. He referred to *Horsam* v. *Turget*, 1 Vent 111; *Hodges* v. *Cox*, Cro. El. 843; Locke on Attachment, 45, 46.

Draper, C. J.—I refuse the order on the ground that the executors of the deceased debtor of Vance, may be liable on specialty debts of their testator, after satisfaction of which they may have no assets and before satisfaction of which they ought not to be ordered to pay a simple contract debt. In Rolle's abr 551, and Noy 115, it is said a legacy cannot be attached in the hands of an executor because it is uncertain whether after the debts are paid the executor may have assets to discharge it. So there may be an uncertainty in this case, and at least while it exists I think I should not make an order which may affect the course of administration. I discharge the summons.

Mr. Harrison asked to have the attaching order also discharged, referring to *Wintle* v. *Williams*, 3 H & N 288; *Wilson* v. *The Corporation of Huron and Bruce*, 8 U. C. L. J. 135.

Draper, C. J.—I think you are also entitled to have the attaching order vacated.

Order accordingly.

In re Kemp v. Owen.

Prohibition—Issue in Vacation—Power of judge in Chambers.

Held, that a judge in Chambers in Upper Canada, has no power to order the issue of a writ of prohibition, restraining the judge of a Division Court from proceeding with a plaint instituted in a court before him.

(Chambers, July 9, 1864.)

Owen, a defendant, sued in the first Division Court of the County of Lambton, obtained a summons calling upon Kemp, the plaintiff, who sued him there and the judge who presided over the court, to shew cause why a writ of prohibition should not issue out of the Court of Common Pleas, directed to the judge prohibiting the Division Court from further proceeding with the plaint, and from further proceeding on the judgment obtained on the plaint, on the ground that the court had no jurisdiction in the plaint or to hear or determine the same, and on grounds disclosed in affidavits and papers filed.

Robert A. Harrison, shewed caused. He contended that a judge in Chambers had no jurisdiction to make the summons absolute—that in England jurisdiction was given by the Statute 13 & 14 Vic., cap. 61, sec 22—that there was no such statute in force in Upper Canada, and that in the absence of such authority the summons must be discharged (*In re Milne and Sylvester*, 18 U. C. Q. B. 538.)

S. Richards, Q. C., supported the summons, contending that in Upper Canada a judge in Chambers has, in vacation, power to order the issue of a writ of prohibition to an inferior tribunal, and that the power existed in England independently of the Statute 13 & 14 Vic., cap. 61, sec. 22 (2 Chit. Archd. 9 edit. 1627.)

Draper, C. J.—I have considered this application, and cannot say I have any doubt about it. I am clear that a judge of a Court of Common Law, sitting in Chambers, has not the power to order the issue of a prohibition as asked by this summons. See *Home* v. *The Earl of Camden*, 2 H. Bl. 533, *Ireson* v. *Harris*, 7 Ves 257; *Croucher* v. *Collins*, 1 Saund. 136, and notes, Eng. Stat. 1 Wm. IV. cap. 21. I discharge the summons, but, as the point seems to be a new one, without costs.

Summons discharged without costs.

Hammond v. McLay.

Replevin—Right to books, &c., in virtue of an office—Necessary statements in affidavit of applicant.

Any person out of whose possession books, &c., have been taken, whether by force or fraud, or without right, may assert his right and claim them in an action of replevin under our statutes, Con Stat. U C., cap 29, sec. 5, and 23 Vic cap. 45, sec. 1; but when the right to the custody and possession depends on the holding of an office, it should appear that the applicant does hold the office, and therefore is entitled to the books, &c.

(Chambers, July 9, 1864.)

Robert A. Harrison, upon affidavits, made an application under Statute 23 Vic., cap. 45, for the issue of a writ of replevin.

The affidavit of the intending plaintiff stated that he was lawfully entitled to the possession of the following property, viz., books, plans, maps, memorials, parcels of documents, and a port-folio, belonging to him as *Registrar for the County of Bruce*, and set out in detail, the books, &c., claimed. That the value of the property was $500. That as he was informed and believed, McLay wrongfully, and with force, took away the said books, &c., and deposited them in a building in the village of Southampton. That the books, &c., had been in deponent's possession and under his control for about five years last past.

The description given of the books, &c, (except the port-folio) shewed them to be books, papers, maps and documents, such as only the Registrar of the County is lawfully entitled to have possession.

The affidavit of Wm. Duncan Lillie, stated that Hammond has, for about five years last past, acted as Registrar of the County of Bruce; that he had had in his possession, in a room in his dwelling house, the Registry Books, &c. That about 21st June last, and during Hammond's absence from home, deponent went to Hammond's house and found there McLay, with two constables, who took away the registry books; that McLay professed to act under the authority of a writ of mandamus from the Court of Queen's Bench, but refused to give Hammond's wife a copy thereof, or to let her peruse it; that McLay and the constables used personal violence to deponent and to Hammond's wife when they endeavored to prevent the removal of the books.

Mr. Harrison referred to Con. Stat., U. C., cap 29, sec. 4; Stat. 23 Vic. cap. 45, sec. 1; Con. Stat. U. C., cap 89, secs 10, 14, 66, 77, Doe *Miller* v. *Tiffany*, 5 U. C. Q. B. 79; *Regina* v. *Richmond*, 5 Jur., N. S. 521.

DRAPER, C. J.—The registrar of the County, or his duly appointed deputy, is the only person entitled to have possession of the books, &c., in question. I cannot but infer that they are books, &c., belonging to the office of a public official character in which the public have an interest, except in the use of the words "belonging to me as Registrar for the County of Bruce." The applicant shews no right to the possession of books of that character. He shews too much or, as it appears to me too little, to entitle him to the writ, for he shews the books, &c., are such as the registrar of the County would be the lawful custodian of; and he does not shew that he is such registrar. No doubt that generally speaking, any individual, out of whose possession goods, &c., have been taken, whether by force or fraud, or without right, may assert his right and claim to them in an action of replevin under our statutes; but when the right to the custody and possession depends on the holding of an office, it should, I think, be asserted that the applicant does hold the office and therefore is entitled to the books, &c.

If the were a matter of which I had no judicial knowledge, I might have perhaps granted a summons to shew cause why a writ of replevin should not issue. But only last term the Court of Queen's Bench granted, on McLay's application, a writ of *mandamus nisi* to Hammond, to deliver over these same books and papers, and we had then before us an exemplification of Hammond's commission as registrar, dated 13th June, 1859, of a writ of supersedeas of that commission, dated 26th February, 1864, and a commission under the great seal, dated 26th February, 1864, appointing McLay to that office. Now, if it appeared on the return of a summons, as no doubt it would appear, that McLay had this commission, he would have a right to the possession of the books, &c, in question, at least a *primâ facie* right; and it would be, as it appears to me, impossible to allow a man who does not assert he is registrar, to take away the registry books, &c, from another who holds a commission appointing him to that office. It would appear that the Crown has taken the responsibility of superseding its former commission, and issuing a new one. This is not the occasion to raise even a doubt that the law sustains that course; and in view of the inconvenience which would result to the public, if, by an interference on my part, the registry books were in one man's hands, while the other held the commission as registrar, I feel I ought not to grant the order for the writ; and I withhold a summons, because I presume after what I have stated, it would not be desired on the applicant's behalf.

It must be quite understood that I say nothing as to the alleged conduct of McLay, or the grounds on which it is asserted that he professed to have a right to take these books into his possession. I am not at present called upon to enter into the discussion of these matters.

Summons refused.

HAACKE v. ADAMSON.

Action against a magistrate—Costs—Con. Stat. U. C. cap. 126, ss 17, 18 & 19.

Where a plaintiff in an action against a magistrate for acting maliciously and without reasonable or probable cause, being guilty of the offence of which he was convicted, was, under the operation of Con. Stat U. C. cap 126, sec. 17, restricted to the recovery of only three cents damages, he was *held* not to be entitled to recover any costs whatever.

Held also that the 18th and 19th sections of Con. Stat U. C. cap 126, taken together, must be limited "to any such action" not provided for in section 17 of the same act.

Held also, that no one can have costs taxed to him who did not incur costs.

(Chambers, July 9, 1864.)

This was an application for revision of taxation of costs by the Master.

Plaintiff had declared against the defendant, first, in trespass for false imprisonment; second, that defendant, a justice of the peace, convicted plaintiff of selling spirituous liquors by retail without license, and adjudged that plaintiff should pay forty dollars and costs, to be levied by distress, or, in default of distress, that plaintiff should be imprisoned for twenty-one days unless, &c.; that the conviction was removed by certiorari into the Queen's Bench; yet defendant, knowing, &c., maliciously and without reasonable or probable cause, issued a warrant for plaintiff's arrest and imprisonment, and maliciously and without reasonable or probable cause caused plaintiff to be imprisoned for seven days and until discharged pursuant to a habeas corpus.

Defendant pleaded "not guilty," per Con. Stat. U. C. cap. 126 and cap. 54.

On the first count the defendant had a verdict, and on the second the plaintiff had a verdict and three cents damages.*

The Master determined that under Con. Stat. U. C. c. 126, s. 17, the plaintiff was not entitled to any costs, and that the defendant was not entitled to any costs on the verdict on the first count, because he did not appear to have incurred any costs thereunder which he would not have had to incur for his defence under the second count if that count alone had been on the record.

Both plaintiff and defendant were dissatisfied with the Master's decision.

Robert A. Harrison, for plaintiff, referred to Con. Stat. U. C. cap. 126, secs. 17, 18 & 19; *Prelly* v. *Sully*, 26 Beav. 606; *O'Flaherty* v. *McDowell*, 6 H. L. Cases, 142; Marshall on Costs, 360.

Hector Cameron, for defendant, referred to same statutes, and to Gray on Costs, 244, 245.

DRAPER, C. J.—First, the plaintiff insists that though by the 17th section of the Consolidated Statutes, chapter 126, the right to recover costs "in any such action," under the existing facts, is taken away in express words by enacting that under such facts he shall not be entitled to recover *any* costs of suit whatsoever; yet the 18th section enacts that "If the plaintiff *in any such action* recovers, or the defendant allows judgment to pass against him by default, the plaintiff *shall be entitled to costs in the same manner as if this act had not been passed.*"

The 18th section gives the plaintiff costs in cases where the declaration is like the second count in this case. If he recovers a verdict "for any damages," a right to costs as between attorney and client arises; and at the end of this section is a further provision, that in every action against a justice of the peace for anything done in the execution of his office, if the defendant obtain judgment upon verdict or otherwise, he shall be entitled to *full* costs as between attorney and client.

The Consolidated Statutes, chapter 126, section 17, is almost verbatim a transcript of our statute 16 Victoria, chapter 180, section 12, which is copied from the 13th section of the English statute 11 & 12 Victoria, chapter 44. Section 17, transposes some of the words in section 12 of our statute 16 Victoria—why, I do not perceive, but it leaves the meaning and effect the same. Section 18 of the Consolidated Statute is the first sentence of section 13 of the statute 16 Victoria, and section 19 contains the residue of section 13, which section 13 is copied almost word for word from section 14 of the English statute.

Taking the words of section 17 by themselves, the plaintiff "in any such action" is prevented from recovering "*any* costs of suit," in cases pointed out in that section. Taking the words of section 18 by themselves, if the plaintiff "in any such action recovers a verdict," he shall be entitled to costs, in the same manner as if this act had not been passed.

The plaintiff insists that he comes within the precise words of the 18th section, for he has recovered a verdict, though only for three cents; and it has been argued that the Legislature intended that the magistrate should be punished for a wrong done by him,

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* See *Haacke* v. *Adamson*, 14 U. C. C. p. 201.—EDS. L. J.

by being obliged to pay costs, though the plaintiff was, by the terms of section 17, precluded from recovering more than three cents, and though that section deprives the plaintiff of all costs; in other words, it was urged that the costs might be considered as going to the plaintiff's attorney, not to the plaintiff, and to be inflicted as a *quasi* penalty on the magistrate. I dissent from this proposition. On the plaintiff's contention, that part of the 17th section which deprives the plaintiff of costs, where, under that section, he is limited to the recovery of three cents damages, would be wholly inoperative; for if the plaintiff in *any* (read as *every*) such action, who recovers a verdict at all, is entitled to costs, then there can be no case in which a plaintiff who recovers a verdict will be deprived of costs. This dilemma was felt to be insuperable by the plaintiff. It was therefore insisted, that the 18th section must in that respect be deemed as a later expression of the will of the Legislature, and therefore as repealing or annulling the apparently contradictory provision of section 17. I also dissent from this proposition. In *Bonham's* case (8 Rep.), it is said, "The best expositor of all letters patent and acts of parliament, are the letters patent and acts of parliament themselves, by construction and comparing all the parts of them together—*injustum est nisi totâ legé inspectâ aliqua ejus particula proposita judicare vel respondere.*" and in *Lincoln College* case (3 Rep.): "The office of a good expositor of an act of parliament is to make construction on all the parts together, and not of one part only by itself. *Nemo enim aliquam partem recte intelligere possit antequam totam iterum atque iterum perlegevit.*" And again, in 1st Inst. 381, a, "It is the most natural and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the matters." Now, in section 17 there is a plainly defined class of cases, in which the plaintiff, if he recovers a verdict, shall nevertheless have no costs of suit whatever; and being so, the 18th and 19th sections, taken together, must be limited to "any such action," not already expressly provided for by the 17th section, which otherwise, as to the protecting the magistrate against costs, would be a dead letter. On any other principle of construction, the 18th and 19th sections would also be found to clash; for the one gives costs to the plaintiff, "in the same manner as if this act had not been passed," and the other gives the plaintiff costs of suit as between attorney and client, which, if the act had not been passed, he would not have been entitled to.

I think, therefore, the Master was right in refusing to tax costs to the plaintiff.

As to the costs to the defendant, the right to costs on the first count, if there be any costs incurred, is undeniable. The plea of "not guilty" is distributive, and the latter part of section 19 gives the defendant a right to costs, as between attorney and client, if the action is brought for anything done by defendant in the execution of his office. There is nothing before me to enable me to do more than express these general conclusions. No one can pretend to have costs taxed to him who did not incur any costs.

Order accordingly.

PRATT ET AL. v. JONES.

Second application for same cause—When to be entertained—Disposal thereof.

A second application for the same cause, will not in general be entertained in Chambers, unless it be sworn that some new fact has, since the former application, been discovered, and which, if known to the Judge who disposed of the former application, would probably have changed his opinion.

Where the second application was entertained upon the supposition that the new fact was of sufficient importance to alter the aspect of the case; and, after argument, it did not appear to have any such effect, the application was refused with costs.

(Chambers, July 13, 1864.)

Defendant obtained a summons, calling upon plaintiff to show cause why the writ of summons, the service thereof, and the judgment entered and signed in the cause, and all subsequent proceedings, should not be set aside with costs or otherwise as to the presiding Judge in Chambers should seem just, on the ground that the writ of summons was issued and judgment signed contrary to the effect and meaning of an agreement under seal made between the plaintiff on the one hand, and the defendant on the other, as shown by the said affidavits and papers filed, or why the execution issued in the cause, and all further proceedings therein should not be stayed on the payment of costs on the same ground, and on the ground that the defendant paid the mortgage money pursuant to the said agreement and other grounds disclosed in the affidavits and papers filed, or why the said judgment should not be set aside, and the defendant be allowed to defend and plead on the merits on the payment of costs on the same ground as last mentioned.

It appeared that on the 11th November, 1857, plaintiffs gave a mortgage on certain land, to Arthur Rankin, to secure payment of £135 18s. 9d., that on the 16th of same month, plaintiffs sold and conveyed part of the land to defendant, receiving £125 cash, and a mortgage for £137 10s.; that on the same day an agreement under seal was entered into between plaintiffs and defendant to the effect that the mortgage to Rankin, and the agreement, should be lodged in the hands of John O'Connor, and that defendant should pay each payment and interest due on his mortgage to plaintiff; and after Mr. O'Connor deducting out of each payment the amount due to Rankin, on the mortgage to Rankin, Mr. O'Connor should pay the surplus, if any, to the plaintiffs. And it was declared that O'Connor's receipt should be a sufficient discharge to defendant for monies paid on his (defendant's) mortgage; that in April, 1864 defendant was served with writ of summons in this cause, to which he paid no attention, that soon after he received notice from Mr. O'Connor, that he claimed the money due on the mortgage, by virtue of a lien on the mortgage to Rankin; that defendant then made enquiry, and found judgment had been signed against him by default, on the 18th May, 1864; that on the 4th June, 1864, defendant paid the money due for principal and interest on the said mortgages to O'Connor, ($638) who thereupon delivered up the said mortgages to him; that both mortgages were in O'Connor's possession from the time of their execution till he delivered them to defendant, that O'Connor has always held, and still holds the agreement, that in and before and for some time after November, 1857, O'Connor was attorney and solicitor for Rankin, and authorized by Rankin to receive and give receipts for monies on plaintiff's mortgage to him, and on other mortgages, &c.; that in May, 1861, O'Connor ceased to be Rankin's solicitor, that Rankin was indebted to O'Connor for professional services, and for monies paid in his business, in more than $638, in security for which O'Connor had a lien or the mortgage to Rankin, and on the other documents of Rankin, that O'Connor first heard of this cause, and of the judgment signed therein, about three weeks before 7th June, 1864, he being then in Quebec; that on the 29th February, 1864, Rankin assigned the mortgage given by plaintiffs to him, to one Joseph Pratt; that the last instalment thereon was due on the 8th May, 1864; that in March last, notice was given of the assignment to defendant, and he was informed that plaintiffs were in a position to, and would procure a discharge thereof, or of defendant's mortgage to plaintiffs on payment by defendant; that Jones requested plaintiffs' attorney not to put him to costs, assuring him it was his desire to pay the money without litigation, that by a discharge of mortgage dated 21st March, 1864, the mortgage to Rankin had been satisfied, the plaintiffs having paid the money due thereon, and the assignment and discharge duly placed on record in the Registry Office; that on the 9th June, 1864, a summons similar to the above, was issued by Hagarty, J., which that learned judge upon hearing argument, afterwards discharged.

On the 4th July, 1864, Draper, C.J., granted the new summons, above mentioned, under the circumstances mentioned in his judgment.

Robert A. Harrison showed cause, and contended that this was a second application for the same cause as that previously disposed of by Hagarty, J., and ought not therefore to be entertained (*Moosie* v. *Dougall*, 9 U. C. L. J. 238), that if entertained, there were no merits shown, and that no merits could be shown, that payment to a stranger after judgment were not merit., that if O'Connor ever had a lien it was waived by his acceptance of the mortgage as a bailee, that a bailee has no lien (*Chit. Archo.*, 11 edn. 135), that if there were an existing lien, it was only on the mortgage security, that the debtor and creditor had notwithstanding a right to deal with each other independently of, and apart from the matter paper or security (*Haigh* v. *Edwards*, 1 H. & N. 181; *Brunsden* v. *Hillard*, 2 L. & Et. 19, *Brown* v. *Connal*, 2 U. C. Prac. R. 208); that if there were at any time a defence to the action, defendant, by his laches, had lost the right to avail himself of it; and that his summons ought to be discharged with costs.

O'Connor and *Donovan* supported the summons.

Draper, C. J.—I granted the new summons on an additional affidavit. It was pressed on me that there was some new fact newly discovered, not laid before Hagarty, J., and which would probably have changed his opinion. I was somewhat reluctant, and said unless such new fact appeared clearly, and was of sufficient importance to alter the aspect of the case, I should discharge the summons with costs. The defendant took it out after this expression of opinion, filing an affidavit of Mr. O'Connor's, stating his belief that the defendant has a good defence on the merits. That from the affidavit filed on behalf of the plaintiffs on the hearing of the summons by Mr. Justice Hagarty, it was inferred that the mortgage to Rankin had been satisfied by the plaintiffs, and discharged long before the defendant had paid him (O'Connor) money on that mortgage, whereas the discharge was registered on the 10th June last, and he believed the same was executed on that day, but was ante-dated That from a conversation with one of the plaintiffs, he believed they had not actually paid the mortgage, but that the discharge was merely a pretended one, obtained and requested in order to procure an undue advantage over the defendant. The defendant himself makes no new affidavit. He does not deny that he received notice of the assignment of his mortgage in March last, nor that he told plaintiff's attorney that he wished to settle the matter without litigation, and begged he would not put him to costs, nor does he profess to have a meritorious defence I do not see what defence he could plead to this action, founded on his own covenant to pay money to the plaintiffs. He was served with process in this suit in April, and he paid the money due on his covenant to the plaintiffs, after judgment had been signed against him, and paid it to Mr. O'Connor, who was not attorney for the plaintiffs, and who, unless attorney for Rankin, could have no right to receive it. And long before the payment so made, Rankin had assigned the mortgage given him by the plaintiffs to a third party, and the defendant had notice of that assignment. If the defendant is in any difficulty now, it arises from his own acts, done with a knowledge of the facts and f his own position. I see no grounds for relieving him—and on this application, it is only with his position that I am called upon to deal. I discharge the summons with costs.

CHANCERY.

(*Reported by* Alex Grant, Esq, *Barrister-at-Law, Reporter to the Court.*)

Leary v. Rose.

Specific performance—Representations made by infant binding on him—Estoppel—Acquiescence.

D 's father died in 1847, having first made his will purporting to devise all his real estate to his wife in fee, this will was not executed in proper form, and therefore D became entitled to the land as heir at law. Three months before D became of age, he agreed with P for the sale to him of the real estate for valuable consideration. A conveyance to P. was prepared by D., and executed by his mother, the devisee under his father's will, D. being the witness to it. P afterwards sold and conveyed his interest, and D. brought ejectment against the purchaser. On a bill filed to restrain this action, it was shewn that D. had at various times acquiesced in the sale after he became of age. *Held*, that D.'s conduct with reference to the sale to P. was fraudulent, and was to be considered as an assertion that his mother was entitled as devisee in fee although he was then not of age, and that such conduct and his subsequent acquiescence after his attaining majority estopped him from denying the validity of the sale; and he was enjoined from proceeding with the action of ejectment, and ordered to execute a conveyance to the plaintiff, the vendee of P.

The bill in this case was filed by John Leary against David Rose and Elizabeth Rose, praying, under the circumstances therein stated, and which are clearly set forth in the judgment, for an injunction to restrain an action of ejectment brought by David Rose against the plaintiff, and for an order for him to join in conveying to plaintiff the lands in respect of which the action was brought.

Mowat, Q. C., and *Blake* for the plaintiff.

Roaf for the defendants

Smith v *Lowe*, 1 Atk 490; *Franklin* v. *Thornebury* 1 Ver. 133; *Mocatta* v *Murgatroyd* 1 P Wm. 393; *Pearson* v *Morgan*, 2 Br. C C 385; *Thompson* v. *Simpson* 2 J & L 110; *Teynham* v. *Webb*, 2 Ves Sr 198, *Nicholson* v *Cooper*, 4 M. & C. 186; *Dann* v *Spurrier*, 7 Ves. 235; *Govett* v. *Richmond*, 7 Sim 1; *Herrick* v *Attwood*, 2 DeG. & J. 21; *Raw* v. *Pote*, 2 Ver. 239; *Pickard* v. *Sears*, 6 A. & E. 469; *Gregg* v. *Wells*, 10 A. & E. 90; *Freeman* v. *Cooke*, 2 Exch. 654; *Banks* v. *Newton*, 16 L. J. Q. B. 142; *Wing* v. *Harvey*, 28 L. J. Ch. 511; *Arnot* v. *Biscoe*, 1 Grant, 95; *Stone* v. *Godfrey*, Ib. 767, *Davis* v. *Snyder*, Ante vol. i., p. 134; Chambers on Infancy 438; Dart's V. & P., p. 10; Jovenden on Frauds, 502, were, amongst other authorities, referred to and commented on by counsel.

Spragge, V. C.—Alexander Rose, the father of the defendant David Rose and the husband of the female defendant, was seised in fee of a farm in the township of Westminster. He died in February, 1847, having two days before his death, by an instrument purporting to be his will, in terms devised all his real estate to his wife in fee. It seems agreed that this instrument, for some reason not explained, was invalid, and that the real estate descended to David, as the heir-at-law of his father. The will was set up in an action at law brought by David, and was not sustained.

For a time it appears to have been thought by both David and his mother that a life estate only was devised, but it was afterwards discovered that the instrument purported to devise in fee. David however claimed, in conversation among his friends, that he was entitled by title paramount; that the farm had belonged to his uncle, by whom it had been devised to his elder brother, who had died before his father, and that he, and not his father, was entitled.

David came of age on the 9th of July, 1855. In May of that year a bargain was made with Peter Rose, not a son of Alexander, for the conveyance to him of the Westminster farm, for the sum of twelve hundred pounds, the consideration to be paid partly in money and partly in land and chattels. In regard to the land it was agreed that two parcels of land in the township of Warwick, of 100 acres each, to be selected by David, should be purchased and paid for by Peter, one parcel to be conveyed to David, and one to the widow; and that Peter should convey some town lots in London, and remove a mortgage given for part of the purchase money to one McRoberts, from whom he had purchased the same.

It is not made very clearly to appear by whom the treaty for this bargain was conducted, but I think partly by David, and partly by the widow. David spoke of it among his friends as made by him.

On the 13th of May a conveyance was executed to Peter of the Westminster farm. It is made by Elizabeth Rose, as widow, and sole devisee of Alexander Rose; David Rose is the only witness attesting its execution. It was registered on the 2nd of June following, and must have been registered on the oath of David Rose. In January, 1856, Peter Ross conveyed to William Elliott, and on the 9th of April, 1857, the farm having been advertised by Mr. Elliott for sale by auction, was purchased at auction by the plaintiff. David Rose has since brought ejectment against the plaintiff, and this suit is instituted to restrain proceedings at law, and to compel David to execute a conveyance to the plaintiff. The principle invoked is the familar one that a party standing by and allowing another to contract on the faith of that which he can contradict, cannot afterwards dispute the fact upon the faith of which the other contracted; and the case is also made that David was himself a party to the arrangement; and acts of confirmation are alleged and evidence is given in support of them.

The first branch of the case proceeds upon the ground of fraud. David was under age at the time of the execution and registration of the conveyance to Peter Rose; but it is conceded that if an infant is of sufficient discretion to be capable of committing fraud, he will be affected by it; and of this there can be no doubt, as was said in the old case of *Watts* v. *Cresswell* (2 Eq. Ca. Ab. 515), "If an infant is old and cunning enough to contrive and carry on a fraud, his lordship thought in equity he ought to make satisfaction for it" In that case a loan of £300 was solicited and obtained, through an infant twenty years of age, for his father, the father being tenant for life, with remainder to the infant. The infant represented the father to be tenant in fee, and was a witness to the mortgage deed, and also to the payment of the money. Lord Cowper thought that his witnessing the deed would not bind him, because if he was made a party to the deed, and executed it, yet that, though a much stronger case, would not bind him; a position shaken, I think, by subsequent authorities; but his lordship thought that by reason of his representations and his being principally concerned in the fraud, knowing that he was entitled in

remainder, he ought to make satisfaction to the mortgagee; and he decreed accordingly.

It is said that in this case Peter was not imposed upon, for he knew of David's claim. It is true that he knew that David claimed through his brother, and that he claimed to be entitled notwithstanding the will; but it does not follow that he knew or believed that the title was in David as heir, and not in his mother as devisee. He may be taken to have known at all events that by the death of David's elder brother the estate devolved, not upon David, but upon his father; and that David was mistaken in his claim of heirship. The result would then be that David was entitled as heir though through a different channel from that which he supposed, and through which he claimed; and that Peter believed him not to be heir, and believed his mother to be devisee. Both probably believed the will to be valid. David believed that although valid he was entitled in another right; and Peter knew that if valid, David was not entitled at all. I am, however, stating David's belief from what he had himself said as to his title; but I ought perhaps to assume that before the execution of the conveyance he discovered his mistake; and that otherwise he would have joined in the conveyance; for upon a contrary assumption he would be guilty of fraud. In assenting to and assisting at the conveyance to Peter, he must be taken to have intended the conveyance to be valid, which it would not be if the heirship from his brother gave him a title paramount. There is this peculiarity about the case that David did not know any fact that was not also known to Peter. They may or may not have differed in regard to David's title as a matter of law; but whether they did or not, I cannot see that Peter purchased upon the faith of any fact represented or concealed by David. David's representation as to his own title, assuming him to have continued it up to the execution of the conveyance, was calculated not to induce Peter to take it, but to deter him from taking it, unless David joined in it.

This case therefore does not seem to me to fall within the principle to which I have adverted, taking it in the terms in which it is ordinarily enunciated. But a case before Lord St. Leonards, when Chancellor of Ireland, *Thompson* v. *Simpson*, 2 J. & L. 110, seems in principle to apply. Lands were limited to a father for life, with power to appoint among his children, and in default of appointment to his children in fee; the father joined to his son Robert Thompson in a fine and recovery; and they were advised that the consequence of this act was to vest the fee in the father. Afterwards the father sold and conveyed the estate, and the son was not required to join in the conveyance, but assented to the conveyance to the purchaser. The fine and recovery were not effectual to vest the estate in the fatner; but both the father and the son, and doubtless the purchaser also; but both the father and the son, and doubtless the purchaser also, believed that they were: and Lord St. Leonards declared that he would bind whatever interest the son had at the time of the conveyance by his assent to it. I do not see any distinction in principle between that case and the one before me, unless it arise from David not being of age. He was not of legal capacity to contract or assent to a contract. Where a contract is made upon the faith of assumed facts, an infant knowing the contrary, but yet assenting to the existence of the facts, the infant is guilty of a moral wrong, for he ought to disclose them; but he may intend no fraud at the time, and may never commit any actual fraud, for his latent rights may be asserted by the representatives of his estate; yet if they are asserted afterwards they are held bound. Does not the fraud then consist, not in the original standing by when the contract was made, but in the assertion of the right after so standing by? If so, *Thompson* v. *Simpson* would apply. I have no doubt, upon the evidence, that David dis assent to the conveyance to Peter. The acts of assent were much stronger than in many of the cases cited.

But there are other acts by David which I think bind him. Peter did not carry out his part of the agreement; he failed to pay off the mortgage on the town lots, and to pay the purchase money on the Warwick lands, and left the country. David seems then to have revived his claim, or to have given out that he had some claim. A few days before the sale by auction, the plaintiff, with McRoberts, went to look at the farm; they found David in the house, and McRoberts, who knew David, spoke of the intended sale, and told him that the plaintiff thought of purchasing, and said to him that he understood he made some claim, and if so, that he had better come in (I suppose to the sale) and make it. David merely said he supposed it did not make much difference. McRoberts says, on cross-examination, that he did not understand David to abandon any claim he had, and that David did not say anything to lead him to think that he had a claim.

I think this was, under the circumstances, a standing by, by David after he came of age, that ought to preclude him from asserting any claim. There being an intending purchaser under a conveyance to which David was a witness and an assenting party, and being so, had assented to the character in which the conveyance was made, namely, by his mother as entitled as devisee under his father's will; he is asked in effect to disclose his claim, if he has any, to such intending purchaser, and he says nothing to lead the enquirer to suppose that he has any claim. I take this to be a tacit assent to the goodness of the title acquired by Elliott.

There are also acts of acquiescence and confirmation by David after he came of age of the sale to Peter. He gave up possession to Peter, and necessarily as purchaser, for Peter had no other title; he made enquiries of McRoberts whether Peter had removed the mortgage from the town lots, and he availed himself so far as he could, of the benefit of the consideration to be paid by Peter; he selected the land in Warwick avowedly as part of the consideration for the Westminster farm, expressing his preference for it over the Westminster farm, and went upon it, and commenced to clear and cultivate it with some assistance, but slight probably, from Peter

If Peter had completed his part of the agreement, it would be too clear for argument, I think, that he would be entitled to a conveyance from David of the Westminster farm; his failure to do this has probably been the motive with David for questioning now the title which he assisted in making to Peter. It is urged by Mr. Roaf, who argued the case for the defendants with great ingenuity and ability, that if Peter had been the plaintiff, the court would not decree him a conveyance, but upon condition that he should first make good all the engagements he entered into by way of consideration, and to this I agree. It is further contended that the plaintiff stands in no better position than Peter.

The plaintiff does not shew that either he or Elliott stands in the position of purchaser for value, in the sense in which purchase for value will avail a defendant against a plaintiff's equity: but the plaintiff's position is different, not only upon the record, but substantially different. His case is that David's conduct is fraudulent, and it cannot surely be an answer to such a case that the plaintiff does not bring himself within the strict technical rule in relation to purchasers for value. The defendant's position is, that the plaintiff must make good Peter's engagements as a condition of relief. Suppose the plaintiff, upon his purchase at auction, had paid his purchase money in full, it would be most unjust to impose such a condition; or suppose him to have paid afterwards the mortgage given on account of purchase money. Whatever has been innocently done by the plaintiff, induced by the defendant's conduct, the defendant cannot complain of To make the plaintiff pay over again what he has already paid would be visiting the consequences of the defendant's conduct upon the wrong head. Whether David may have any equity in relation to purchase money which may yet remain to be paid, and may be applied to Peter's benefit, is another question. If he has such equity, it must be the subject of another suit, in which David should be plaintiff

The bill places the ground of relief in a great measure upon the footing of specific performance; but the ground upon which I have proceeded is sufficiently made by the bill.

The decree will be for a perpetual injunction restraining proceedings in ejectment, and for a conveyance from David, with costs against him

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Carpenter v. Wood

Practice—Taking accounts before the master—General order XLII., sec 13

The XLII of the General Orders (sec 13) applies to all cases where accounts are directed to be taken before the master.

This was a suit, instituted by the plaintiff against the defendant,

calling upon the defendant for an account of certain trust estates vested in the defendant, and charging him with certain acts of wilful neglect and default. At the hearing of the cause,

Stuart, for the plaintiff, asked that the decree to be drawn up might direct the master to enquire as to wilful neglect and default, the order of court, he submitted, being intended to apply to mortgage cases only.

W. Proudfoot for the defendant.

SPRAGGE, V. C.—The question raised is, whether upon the reference to be directed in respect of the dealings of the defendant with the trust estate the ordinary reference only should be made, or whether the master should be directed to enquire as to wilful neglect and default. Two specific acts of wilful neglect or default are charged in the bill: one, the omission to collect a debt alleged to be due from Messrs. Burton and Sadleir, the other, for not continuing to pay the instalments from time to time falling due upon the Hamilton Industrial Building Society stock; and a good deal of evidence has been given in relation to these, and also in relation to other alleged instances of wilful neglect or default. The old rule laid down by Lord Eldon, that the plaintiff must aver and prove at least one act of wilful neglect or default order to obtain a decree directing an enquiry as to wilful neglect or default, has been lately affirmed and acted upon by Sir W. Page Wood, in *Sleight* v. *Lawson* (3 K. & J. 292), and I am not prepared to say that either of the instances charged in this bill are sustained in evidence in the shape in which they are charged. I say this without meaning to say that there is no evidence of wilful neglect or default in respect of either of these transactions; but it is unnecessary that I should say more, because I think that the question of wilful neglect or default is open to the plaintiff in the master's office without any specific direction that he should enquire as to wilful neglect or default. The 13th section of general order number 42 gives the master that power, in my opinion. After instancing several matters of enquiry which it is ordered shall be within the cognizance of the master, the order proceeds, "and generally in the taking of accounts to enquire and adjudge:" that is in the taking of accounts in the master's office it shall be within the cognizance of the master to enquire and adjudge "as to all matters relating thereto as fully as if the same had been specifically referred." The taking accounts of a trust estate received, or which, but for wilful neglect or default, might have been received, or any wilful neglect or default in the dealing with a trust estate, are not, it is true, among the instances of enquiry enumerated in the order, but certainly the matters of enquiry are not intended to be confined to those enumerated. The general words which I have quoted shew this, and in my opinion are large enough, when an account is directed of the dealing of a trustee with a trust estate, to authorise the master and to make it his duty to enquire as to wilful neglect or default on the part of the trustee. I believe it has been thought by some members of the profession that the section to which I have referred applies only to references in suits between mortgagor and mortgagee. I see no ground for this; unless it be that the instances enumerated are more applicable to such suits than to others, but they are only instances, and there is nothing in the section so as to limit its application. The scope of the section, as expressed in the beginning of it, is as general as it could be made. "In the taking of accounts in the master's office," I think it embraces every kind of account referred to the master. Taking this view of the authority and duty of the master, I think it would be neither necessary nor proper that I should express any opinion in regard to the wilful neglect or default alleged against the defendant in his dealing dealing with the trust estate.

CHANCERY CHAMBERS.

(Reported by ALEX. GRANT, ESQ., *Barrister-at-Law.)*

BANK OF BRITISH NORTH AMERICA v. HEATON.

Receiver—Mortgage—Application of rents of mortgaged premises.

It would seem that a first mortgagee has not, as such, a right to the rents and profits of the mortgaged premises. Where, therefore, a puisne incumbrancer filed a bill and obtained the appointment of a receiver, who had since his appointment collected the rents and profits of the property, and paid the same into court, and a prior incumbrancer, who was not a party to the first suit, filed a bill upon his mortgage, and moved in that cause for an order to apply the rents so paid in by the receiver, to payment of his claim, the court, under the circumstances, refused the application with costs, but gave the plaintiff liberty to renew the same, in such manner and in such suit as he should be advised.

This was an application by *E. B. Wood*, for an order that the rents and profits collected by the receiver apppointed in the suit of *Joseph* v. *Heaton* might be paid out to the plaintiffs, all parties other than Joseph being consenting parties thereto.

A. Crooks, Q. C., contra.

The cases cited are mentioned in the judgment of

SPRAGGE, V. C.—The plaintiffs are first mortgagees of defendant Heaton. In another suit, *Joseph* v. *Heaton*, to which the bank were not parties, a receiver was appointed at the instance of the plaintiff Joseph; that order was made without reserving the rights of the plaintiffs. The receiver, since his appointment, has been in receipt of the rents and profits of the mortgaged premises, and has paid them into court, and the plaintiffs in this suit now as first incumbrancers, ask that they may be paid to them.

I have examined the cases to which I have been referred, *Gresley* v. *Adderley* (1 Swans, 573), and *Thomas* v. *Brigstocke* (4 Russ. 64); and I have also referred to *Bertie* v. *Lord Abingdon* (3 Mer. 560), *Brooks* v. *Greathed* (1 J. & W. 176), *Norway* v. *Rowe* (19 Ves. 144), and *Smith* v. *Earl of Effingham* (2 Beav. 232), and some others. I do not find any instance of the granting of such an order as that now applied for. The principle established by the cases seems to be that what is gotten in by the receiver is for the benefit of those for whom it is provided by the order appointing him, and Lord Eldon says, in *Norway* v. *Rowe*, that the constant habit of the court upon motions for the appointment of a receiver is not to look at mortgagees further than to take care that they are not prejudiced. In some cases the first mortgagee having the legal estate has been prejudiced, because the court having given possession to the receiver will not suffer such mortgagee to exercise his legal right without at least obtaining the leave of the court; the court has sometimes granted such leave, and sometimes put him to be examined, *pro interesse suo:* the case of *Smith* v. *the Earl of Effingham* comes nearer in its circumstances to this than any that I have seen. Some years before the institution of that suit, one Bridges, a subsequent incumbrancer to Smith, filed his bill against the trustees of the debtor and made the incumbrancers parties, omitting, however, to make Smith, who was first incumbrancer, a party: the priorities of the several incumbrancers, omitting the plaintiff, were declared, and a receiver was appointed, who was directed to keep down the incumbrances according to the declared priorities: Smith filed his bill ten years after the bill filed by Bridges against the parties to the former suit and the receiver, alleging ignorance of the proceedings in the former suit; that the parties had notice of his claim, and had fraudulently omitted to make him a party; and he alleged the existence of an outstanding term as an obstacle to the exercise of his legal right: he prayed by his bill to be declared first incumbrancer; for payment of his arrears (he was an annuitant), and that the receiver might pay over the balance in hand, and be enjoined from making any further payments to the defendants. What was asked at the bar was that the receiver might be enjoined from making any further payments until further order. It was objected that the application was irregular, being made in a different suit; and that there was no impediment to Smith's recovering at law: the application went off upon the point of form, Lord Langdale declining to decide the rights of the parties: but he observed that if the appointment of the receiver were the only obstacle, the proper remedy would be for Smith to ask leave, in the suit in which the receiver was appointed, to enforce his legal remedies. It was suggested by counsel that he might have applied in that suit to be examined *pro interesse suo.*

If that course were adopted his right I apprehend would not be larger than if he proceeded at law, viz., the receipt of the rents and profits from that time. If Lord Langdale was right in what he indicated as the proper course (and what he said was quite in accordance with the authorities) the first incumbrancer has no right to rents and profits received anterior to the time of establishing his own rights by some proceeding in reference to such

rents and profits; the same objection applies to the form of this application as was made in *Smith* v. *Lord Effingham*, but I did not understand any objection to be made upon that score. It is suggested on behalf of the plaintiffs that they were in possession of the mortgaged premises when the receiver was appointed, but deferred to his appointment in the belief that he would apply the rents and profits in the payment of incumbrancers according to their priorities. It would be premature to say whether that circumstance, supposing it to be established, ought to make any difference. I think the proper course now is to refuse the application, with liberty to renew it in such form and in such suit as the plaintiffs may be advised.

This application must be refused wtih costs.

Ley v. Brown.

Solicitor's lien—Delivery of papers.

Where a solicitor refused to carry on a suit unless money was advanced, or to deliver up the papers to a new solicitor until his costs in the suit were paid, the court on application by the client ordered a taxation, and directed the papers to be delivered up to the new solicitor upon his undertaking to hold them subject to the lien, if any, of the former solicitor, and to re-deliver them within ten days after he ceased to have occasion for them for the purposes of the suit.

Morphy, for the application.

Turner, contra.

Spragge, V. C.—This is an application by the plaintiff to compel his late solicitor Mr. Turner to deliver up to the present solicitor the papers and documents in his possession, and for taxation of his bill. Mr. Turner was his solicitor only in this suit, and upon receiving instructions he was paid £12 10s., the receipt for which expresses that it was on account of £30 which he was to receive in full of costs in the event of his failing in the suit. The petitioner states that he has since paid to Mr. Turner about £21; that a decree for an account has been obtained, but that Mr. Turner has refused to proceed without the advance of more money; that the plaintiff is unable to advance more money, and believes that Mr. Turner is indebted to him on account of the suit; that Mr. Turner has all the books, papers, and accounts belonging to the suit, and refuses to deliver them up or proceed with the suit, unless supplied with more money; and that the suit cannot be proceeded with without such books, papers, and accounts. The petition is verified by affidavit.

The question is whether the client is entitled under the circumstances to delivery of the books and papers in question for the purpose of the further prosecution of the suit, or only to an inspection and taking of copies and production.

In the older cases the client was held entitled to the lesser remedy only. In *Commerell* v. *Poynton*, 1 Sw. 1 and in *Moir* v. *Mudie*, 1 S. & S. 282, in each of which the solicitor refused to proceed, a delivery of papers was asked, but inspection and production and liberty to take copies only were granted; but in *Colegrave* v. *Manley*, T. & R. 400, where a solicitor assigned his business to another solicitor, retaining, however, such connexion with it as gave him an oversight of it, Lord Eldon held that the solicitor, having dissolved the connexion between himself and his client, was not entitled to hold the papers to answer his lien, and he was ordered to deliver them to the new solicitor appointed by his client, upon the latter giving a receipt for them, and undertaking to hold them, subject to the lien of the former solicitor for what should be found due to him upon taxation of his bill of costs.

This case was followed by *Heslop* v. *Metcalfe*, 3 M. & C. 183, upon appeal from the Vice-Chancellor, before Lord Cottenham, who reviewed the previous cases upon the subject, and agreed with *Colegrave* v. *Manley*, observing, "It is admitted that when the solicitor discharges himself, the client and his new solicitor shall at all events have free access to inspect and copy the papers at the office of the former solicitor. The mere giving of access, however, is, nine times out of ten, of no practical value; for if the papers are to remain, notwithstanding in the custody of the solicitor who has discharged himself, it is obvious that they cannot be made use of in the further progress of the suit;" and he proceeds to point out how this would be so, and adds, that it would be entirely inconsistent with the *dictum* of Lord Eldon, that the suitor must have his business conducted with as much ease and celerity, and as little expense, as if the connexion had not been dissolved. In *Heslop* v. *Metcalfe*, as in this case, the solicitor had refused to proceed unless furnished with more funds. The order made in that case was, that the papers should be delivered to the new solicitor, on the latter giving his undertaking that they should be received without prejudice to any right of lien, and also, that they should be returned undefaced within ten days after the hearing of the cause.

In a later case, *Wilson* v. *Emmett*, 19 Bea. 233, Sir John Romilly followed *Heslop* v. *Metcalfe*.

It seems, therefore, to be now settled that upon a solicitor refusing to proceed, either because he is not furnished with funds or otherwise, he must deliver up the papers in his hands to his client's new solicitor for the purposes of the suit, but for these purposes only. He is not bound as at law, having once commenced to proceed with the suit, but may dissolve the connexion between himself and his client, and still preserve his lien upon his client's paper's in his hands: as was said by Lord Cottenham, in *Heslop* v. *Metcalfe*, "the principle should be, that the solicitor claiming the lien shall have every security, not inconsistent with the progress of the cause;" but inasmuch as any thing less than a delivery of the papers would not enable the client to have his suit conducted with as much ease and celerity, and as little expense as if he had them, a delivery of the papers is ordered.

The proper order in this case will be that all books, papers, and accounts belonging to the client in the possession of his late solicitor, Mr. Turner, be delivered to his present solicitor, Mr. Hodgins, upon the latter giving an undertaking to hold them subject to Mr. Turner's lien for what, if any thing, shall be found due to him upon taxation of his bill of costs, and to return them undefaced to Mr. Turner within ten days after he shall cease to have occasion for them, by obtaining a decree on further directions or otherwise, in case any sum that may be found due to Mr. Turner shall not be in the meantime paid. The usual order to go for taxation of Mr. Turner's bill of costs.

ASSESSMENT CASES.

(In the First Division Court, County of Elgin, before His Honor Judge Hughes

Marr v. The Corporation of the Village of Vienna.

Consolidated Assessment Act—Personal property—Residence.

Where a former resident of Vienna, having taken a house at Ingersoll in another municipality, whither the major part of his household effects had been removed, and his servant and most of his family resided when the assessment was taken, and he remained and slept in his former domicile during the night previous to the taking of the assessment, and was found on the following morning in the act of removing the last of his household effects, and taking his final departure, when the assessor came to assess

Held that his "residence," for the purpose of assessing his income under the 40th section of the Municipal Assessment Act, was at Ingersoll, his permanent residence, and not at Vienna, which had then become his temporary residence.

Held also, that the 16th section, making the yearly taxes to be computed from 1st January to 31st December, does not authorize the assessor to enter persons for personal property on the roll as "taxable persons," who are not permanently resident in the municipality, or have taxable property therein at the time the assessment is taken, under the 19th section. *Re Yarwood*, reported in 7 U. C. L. J., 47, referred to and partially overruled.

(Vienna, 13th July, 1864.)

This was an appeal from the decision of a Court of Revision. The appellant had been for many years a resident of Vienna, owning a farm within the corporation. On the 9th of February, (having previously rented a dwelling-house for himself and family at Ingersoll, permanently to reside in,) he commenced the removal of his household and household goods; other parts of his effects were taken away to Ingersoll on the 11th February, and the appellant and his wife removed with the residue of his effects on the 16th February. Possession of the former domicile at Vienna was given up to a person who had purchased it some months previously, on the 16th February. The safe containing his money, mortgages, notes, &c., was taken to Ingersoll on the 9th February, and all the important effects were removed on the 9th and 11th February. The assessment roll was placed in the hands of the assessor in February, on the evening preceding or on the morning of the day the appellant finally left the place. He assessed him for $1,000 personal property, and swore on the trial he had been instructed by the Reeve of the village to assess the appellant before he left the village; that he went to his house in the morn-

ing and told him he had come to assess him; that appellant told him he had nothing to assess, as none of his personal property was there; that he (the assessor) saw no property to assess, and did not ask him what personal property he had, and as he did not give him the amount, and having no doubt he was worth $1,000 personal property, he assessed him for that sum, as he thought he was no poorer than he was the year previous, and knew him to be a man of large means; that he had inserted his own name, and assessed himself first on the roll, and then Mr. Marr, whose name was second.

The assessor assessed the appellant for $1,000 personal property, and as the owner and occupant of fifty acres of real estate, which he had previously sold and surrendered possession thereof to one Chute.

Chute appealed to the Court of Revision the same day as did this appellant, complaining that his name had been erroneously and wrongfully omitted from the roll as the owner and occupant of the real property; and Marr also appealed that he was wrongfully inserted for the real estate, the assessor knowing that he had sold it, and given up the occupancy of it to Chute. The Court of Revision amended the roll in so far as the real estate was concerned, but refused to disturb the assessment in so far as the assessment of $1,000 of personal property against the appellant, Marr, was concerned, but took no evidence to shew what the appellant's personal property consisted of. The roll when corrected by them did not shew that Marr was assessed as a householder, or as occupant of any land in the village, but as a freeholder, although the estate in respect of which he had been assessed was erased from opposite Marr's name and set opposite the name of Chute in a different part of the assessment roll, so that the appellant, without any land, was assessed for personal property in the village, without being the occupant of any house or land, and appeared as a freeholder. In the way the assessment roll stood corrected, it was not shewn nor was it contended that he had any office or place of business in the village.

Ellis for the appellant.

Mann for the respondent.

The appellant was examined, and swore his accessible personal property, not counting some road stock, which he held as security for a debt, did not exceed in value $1,263, and that he owed just debts to the value of $1,300, which were not secured by mortgage upon his real estate, and not unpaid on account of the purchase-money for real estate.

As to the road stock, it was contended it should have been assessed in the name of one Francisco, whose it was, and who had transferred it in security to the appellant; that the appellant ought not to have been assessed at Vienna, as he had been assessed at Ingersoll; that he had been treated as an absentee by the notice being sent after him to Ingersoll, instead of being served upon him at Vienna whilst he was there, and it was shewn that the residence had changed from Vienna to Ingersoll since the 11th February, by the removal of appellant's family and household effects, although he and his wife and a part of the effects remained in the old domicile until the day the assessor came, which was the day the appellant finally removed. On the other hand it was contended that the assessment related back to to the 1st January, and if the appellant owned personal estate, and resided in the village after 1st January, he was assessable and liable to the rates of Vienna during the now current year. *Re Yarwood* v. *Corporation of St. Thomas*, 7 U. C. L. J, 47, was referred to as authority on this point.

HUGHES, Co. J.—Not speaking of or referring to the road stock, I think the assessment was not properly rated for $1,000 personal property, because the evidence shews that the appellant owed just debts not secured by mortgage upon his real estate, and not unpaid on account of the purchase-money therefor, to the extent of $1,300. He shews his personal property which would be otherwise liable to taxation at $1,263, and his just debts being $1,300, they exceed his personal taxable property by thirty-seven dollars.

As to the shares in the Incorporated Road Company, which is the assessable personal property of each shareholder, and assessable at their value, under the 4th and 35th sections of the Assessment Act, they must, and can only under the 40th section be assessed at the place of residence of the appellant at the time the assessment is taken, because under the 1st subsection of the 19th section the assessor can only enter on his list and assess those persons who are residents of the municipality, and who have taxable property therein; and as this particular kind of taxable property (not being in the municipality) in respect of the right to tax it follows the domicile of the person taxed, and as the appellant's fixed domicile was then at Ingersoll, and his domicile at Vienna had then become only temporary, and because the appellant had no place of business at Vienna, these shares were not properly the subject of taxation at Vienna. I so held on this point, in *Re Hepburn* v. *Johnson*, 7 U. C. L J., 46.

The facts which came out in this case shew me that the decision *in Re Yarwood*, 7 U. C. L. J., 47 was not correct in one particular: had the appellant there been assessed in Yarmouth as well as St. Thomas in respect of the same income, an injustice would at once have presented itself, which I am satisfied would have led me to a decision different to the one I arrived at, because the statute never intended a man to pay taxes twice in the same year in respect of the same property, so that I am now satisfied the 16th section only fixes the municipal fiscal year to commence on the 1st January, and to end on the 31st December in each year (unless a municipal by-law fixes it otherwise), for all purposes for which taxes and rates are to be considered to have been imposed for any current year. The 16th section is intimately connected with, and no doubt is intended to amplify the meaning of the 11th section.

I think that at the time the assessment was taken, the appellant was not a resident of Vienna, but he was then actually removing the remnant of his household from it to another municipality in another county; that his settled, permanent abode was then at Ingersoll, in the county of Oxford, and not at Vienna. The chief part of his household and household effects were there, had been there for some days, and a man can scarcely be held to be a resident of a place where his household and household goods are not. Although an exceptional case (an exceptional case may exist, but very rarely), and a man is said to be a resident of the place where are his home and his family at the present time, and not where it has been for the last few or many years; although he may still sleep for the last time at his last place of residence. With this view I therefore reverse the decision of the Court of Revision on this point.

The assessor here did not give the appellant notice of the assessment until he had removed to Ingersoll; it is true he sent it to him there within the time fixed by law (he might as well have given it to him at once); he in fact treated him as an absentee, and acted as knowing that he lived at Ingersoll, so that when the appellant got the notice he had become liable to assessment and was assessed at Ingersoll. There would, therefore, be an injustice in his paying taxes in both places on his personal property, and I am satisfied that this Act of Parliament is not to be so strictly or unreasonably construed against the appellant as the respondents contend for.

I therefore order that the clerk of the municipal corporation of the village of Vienna be notified by the clerk of this court of this my decision, and that the assessment roll be amended by striking out the assessment of the appellant's personal property for the year 1864, upon the said roll. And as to the costs in this proceeding, I order that the same be borne and paid by the respondents.*

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* In *Regina* v. *Stapleton*, 1 Ell. & Bl., Lord C J. Campbell said the word "residence" in one statute may have a different meaning from what it bears in another statute. Erle, J., said the word "residence" has various meanings, and is used in different statutes in different senses; and Crompton, J., thought that where it was found that a pauper was residing in two parishes at the same time, and he had in fact two dwelling places, one in each parish, the question would always be, which of the two dwelling places is the permanent residence—and that no more definite guide could be given than by the use of the words permanent and temporary. An absence for a mere temporary purpose with an intention to return will be no break in the residence. In *Hilson* v. *Falmouth*, 3 Shepley, 479, it was held that if a person abandon his domicil and go to another with the intention to abide there for an indefinite period, his domicil is in the latter town, from the commencement of his residence; and in *The State* v. *Hunt*, 4 Harrington 558, and *The State* v. *de Cannora*, 1 Texas, 401, if a party leaves a place with the intention to change his residence to take up his abode and make his home elsewhere, he loses his domicil in that place, notwithstanding he may entertain a floating intention to return at some future period. Bayley, J., in *Rex* v. *Inhabitants of North Curry*, 4 B. & C. 959, says—"It is stated in Nolan's Poor Laws, 3 ed. p. 72, that personal property cannot be rated unless the proprietor

DIVISION COURTS.

(In the First Division Court, County of Elgin, before His Honor Judge HUGHES.)

PATON ET AL. Judgment Creditor v. WM RAMSAY, Judgment Debtor, SELINA RAMSAY, Claimant

Probate of will—Invaders of the profession—Feme covert—Trustee claiming property as against the creditors of her husband.

The claimant was widow of one Teal, deceased, who died over twelve years ago, leaving a will, bequeathing his personal estate and devising his real estate to his widow, as executrix in trust for his mother, widow and children. The widow never obtained probate of the will. Two years after the death of the testator she married the judgment debtor, Ramsay, who lived upon and worked the farm and took care of the property, sometimes treating it as his own, and sometimes as the property of the devisees. He kept up the quantity of the stock by replacing all that was sold or died to its original quantity and value, and sold horses, cattle, &c., no account being kept of what became of the chattels of the estate, nor of the outgoings and incomings of the farm. When he married the widow he had real and some personal estate of his own to the value of about $600, which he sold or disposed of for the general benefit of the family as well as of himself. He subsequently became embarrassed, and having made an arrangement with the testator's mother to pay her a stated sum, by way of annuity, was obliged to and did incur a liability with the judgment creditors, who are merchants, and who supplied her with goods in lieu of the annuity, at his request. Not being able to pay the plaintiffs, they sued him in the Division Court, and, recovering judgment and execution, caused the bailiff to seize the goods, chattels, and cattle found upon the farm. The wife of the judgment debtor claimed all the property seized as belonging to her in her capacity of executrix and trustee under the will of Teal. He owned some property in his own right. Nearly all the property of the estate had been sold, or died, or was killed, but had been replaced by Ramsay. No proper evidence was offered to trace it as distinctly belonging to the judgment debtor or to the estate.

Held, 1st That the claimant ought to have obtained and produced probate of the will, not the will itself, in proof of the trust. 2nd That property of the estate might (*if bona fide*) be kept up at its original value. 3rd. That evidence should be given distinctly shewing what property is that of the estate and what that of the judgment debtor; and in the absence of an account being kept and shewn, each article must be traced as having its source in the property of the estate, or as the proceeds of the labor of the judgment debtor. 4th. Invaders of the legal profession remarked upon.

The agent for claimant, produced the will of George Teal, and proved its execution by the evidence of one of the subscribing witnesses. He also proved what property was upon the place at the time of the testator's decease, and that some of the property, or stock, or chattels, which had been bought to replace such of the cattle or chattels as had died or been sold or exchanged away were there to stand for the original value of the stock, &c., on the place, and rested his case upon this evidence, without distinctly tracing each article seized as belonging to, or the increase of the original stock, or purchased out of the proceeds of the farm, independently of the judgment debtor. The agent for the judgment debtor, relied upon the insufficiency of the claimant's evidence in not producing probate of the will, shewing claimant's title; and, even if there were probate, that the chattels, being all in the possession of the judgment debtor, they were all his ostensibly, and without strict proof of the identity of each article traceable to the estate, the claimant had no right to resist the sale of the property.

HUGHES, Co. J., allowed the case to proceed—and after hearing the facts, delivered the following judgment:—I am quite satisfied that the claimant here has no right to prosecute her claim to these chattels, unless she obtains probate of the will of George Teal, deceased, under whose will she claims to be trustee of the property claimed; that the production of the will without probate is insufficient. *Pinney* v. *Pinney*, 8 B. & Cr., 335, is in point. There, in trover for a chattel claimed by the plaintiff, as vendee of an executor, it was held that the production of the will was not evidence of the title of the executor; that the probate must be produced. Lord Tenterden refused to receive the will itself as proof (no probate having been produced), and said that if the plaintiff had proved a clear, undisputed possession, it might have been sufficient, but because it appeared that before and after the sale to the defendant, the plaintiff used the chattels, it was different. The plaintiff had no exclusive possession, and Pinney could have no title as executor unless the will were allowed by the spiritual court, and probate obtained.

In *Vogel, Executor of Vogel*, v *Thompson*, 1 Ex. 60, before the court would grant judgment upon a *scire facias*, they required to be satisfied that probate had been taken out, and the affidavit which did not state that fact to be amended by shewing that the plaintiffs had obtained probate.

Mr Taylor, in his work on Evidence, section 1426, speaking of the probate of the will, says: "The document constitutes the title deed of the executor, without which his character cannot be recognised, and with which it cannot in general be impugned in any court of law or equity" Toller on Ex. 74, 75; *Ryves* v. *Duke of Wellington*, 9 Beav. 579, 599, 601.

Mr Phillips, in his work on Evidence (vol. 2, p 29), says: "The probate is the only legitimate evidence of personal property being vested in an executor, or of the appointment of an executor. On these points it is conclusive against all persons; the original will is not admissible for that purpose" *Coe* v. *Westerman*, 2 Sel. N. P., 12 and 730; *Pinney* v. *Pinney*, 15 E. C. L. R. 230.

In *Beaumont* v. *James* 15 Jur 714, (5 E. L. & Eq. R. 166), V. C. Knight Bruce, in a claim for an administration of an estate under the Court of Chancery in England, refused to allow an order to be drawn up without the production of the probate or letters of administration, the master having ascertained that there was none.

It has become very common in this county for persons, acting under the advice of people unconnected with the legal profession, who presume to give legal advice and propound legal opinions, to assume the right to act under a will without probate. It should, however, be known, and borne in mind, that the law does not require an executor to give security for the due administration of an estate, or for the due execution of a will, but that it does require him to take an oath to do so; and because that is so, he has no right to enter upon his duties as executor without giving notice of it, proving the will, being sworn into office, and obtaining probate.

It is much to be regretted that no means are provided to protect the public, or that the public will not protect themselves against those persons who exist in every community, invading the rights of the legal profession by presuming to act as legal advisers, conveyancers, &c., to and for ignorant people. Their acts and ignorance as such lead to great losses and hardships, and very often to inextricable difficulties, which are ever the fruitful sources of litigation and trouble.

In this case I am happy to say no serious difficulty need occur, because if the claimant here produces the probate at the next sittings, I shall give effect to it in the same way as if it had been produced at the present hearing, for her title would be good by relation, if it be good at all.

It ought also to be generally known that where there are lands belonging to an estate, and no assets of a personal nature, such as goods, chattels, cattle, or debts to collect, the will ought and need only be registered in the county registry office, but where there are goods, &c., and no lands or interest in lands, the will ought to be proved in the Surrogate Court; and there is no necessity, indeed it is a useless expense, to register the will in the county registry office; and where there are both lands and personal assets, such as goods, chattels, cattle, debts to collect, &c., the will ought both to be registered in the county registry office and probate should also be obtained from the Surrogate Court.

With regard to the chief subject of dispute in this case, i. e., the ownership of the goods, chattels, &c., seized., I am at a loss from the evidence already adduced, to distinguish between the chattels of the estate of George Teal, deceased, claimed here under his will, and those which may be assumed to be the property of the judgment debtor, from their being found in his possession, he having bought some of them, and exercising acts of ownership over the whole. It seems too much to suppose that the judgment debtor has been upon the farm left by the testator, and devised to the widow, in trust, working that farm, feeding and taking care of the farming stock, keeping it up, and feeding and taking care of Teal's mother, and bringing up his children, for twelve years, without having accumulated something for his own labour beyond supplying himself and family with the necessaries of life, and acquiring a few sheep (two sheep and four lambs, one heifer,

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reside in the parish. Then the question is, what is the meaning of the word "resides." I take it that that word where there is nothing to shew that it is used in a more extensive sense, denotes the place where an individual eats drinks and sleeps, or where his family or his servants eat, drink and sleep" See also judgment of McKenzie, Co. Judge, in appeal *Re Cartwright* v *Corporation of Kingston*, 6 U. C. L. J., 189 and 193, and judgment of Adam Wilson, J., in *Higgins* v. *Brady*, reported in the present number of U. C. L. J.—EDS. L. J.

a bedstead, &c.), especially when it is proven that he has expended over $600 worth of his own property within that time The difficulty is to say which are his and which belong to the estate of Teal. The case of *Haslington* v. *Gill*. 3 Doug. 415 (26 E. C. L R. 171), shews that when, after marriage, the wife, with the proffts of her trade (carried on independently of her husband), purchased cows with the proceeds of stock under a settlement, that the settlement is good against the creditors of the husband, and that the cows purchased after the marriage were protected by the settlement. *Dean* v. *Brown*, 2 Car. & P. 62 (12 E. C. L R 30) shews that where a *feme covert* was carrying on a trade, and before marriage conveyed her stock-in-trade, furniture, and other articles belonging to her, in and about her premises, to a trustee, for her separate use, and then married, that the property was not subject to execution for the debts of her husband, though some of the articles had been disposed of and others purchased for her use in their stead.

I therefore think I cannot do justice between these parties unless they specifically shew me what particular articles belong to the estate and what not; such as are not traceable as belonging to the estate, *i. e.*, such as cannot be proved to belong to, or to have been purchased or acquired with the moneys or moneys' worth of the estate of Teal, I shall hold to belong to the judgment debtor. I therefore remit the case for further evidence to next sittings.

GENERAL CORRESPONDENCE.

Issue of Process and Transaction of Business out of Office Hours—Regularity thereof.

To the Editors of the Upper Canada Law Journal.

Guelph, September 30th, 1864.

Gentlemen,—Having frequently heard the question asked, "Can a Clerk of the County Court or Deputy Clerk of the Crown transact business before and after the hours mentioned in the rules, and on holidays?" I would deem it a favour if you would make some comment on the subject through the *Law Journal*. Upon inquiry I find that a number of Clerks and Deputy Clerks differ on this point: some say that it is optional with them to transact business out of the hours which the law says their offices shall be open. It is a great convenience to the profession generally to transact business of some kinds out of office hours: for instance, to issue writs of summons, &c.; but still it is found to be a source of great inconvenience if some other kinds are transacted, for the simple reason that you may never know when you should be at the Clerk's office to be in time to protect yourself.

Supposing that you desire to enter an appearance, and you know that the Clerk frequently if not daily transacts business before and after office hours: in order to run as little risk as possible, you would be obliged, perhaps, to be on the move at a very uncomfortable time in the morning, and then perhaps find that the opposite party had been before you and hurried the Clerk to his office and had judgment signed by the time you arrived to enter appearance. And if you suppose the office to open at ten in the morning and not before, you would be a long while behind time. This, of course, is an extreme view of the matter, but it is such as may occur at any time, especially if there is any ill feeling to gratify or advantage to be had. At all events, it shews plainly that there is something wanting to make the practice more definite and reliable. There are arguments on both sides of the question, and as a remedy I suggest that it should be made a rule that judgments of any kind should not be entered nor any business done with the public, at which the opposite party as of right should be present, except between the hours stated in the present rules, and not before or after.

If you could throw any light on the above question, you would, no doubt, be conferring a great favour on all concerned, as well as to your correspondent.

A Law Student.

[The appointment of office hours during which offices connected with the administration of justice must be kept open for the dispatch of business, is held to be a mere regulation for the convenience of suitors, that is, that suitors may know with certainty during what hours they will find the offices open; but it is nowhere held that an officer of the Courts is not competent to act before or after office hours, as he has always been held competent on those holidays when he is not bound at all to attend his office. No doubt it might sometimes lead to unfortunate consequences if judgments could as a rule be entered or process of execution obtained out of the regular office hours; but much is left to the good sense and integrity of the officer himself. The subject will be found discussed in *Rolker et al.* v. *Fuller*, 10 U. C. Q. B., 477, to which we, in conclusion, refer our correspondent.—Eds. L. J.]

Conveyancers—Notaries Public—Commissioners—Attorneys and Solicitors.

To the Editors of the Law Journal.

Gentlemen,—The business of country practitioners is materially cut up by persons who, under the various titles of Notaries Public, Conveyancers, and Commissioners, monopolize the whole of the Conveyancing, and do so under the shadow of the authority, given by the instrument appointing them notaries public. This document seems to give the right to "draw deeds," and one of these notaries publishes the whole as an advertisement of his right to the title of conveyancer, he having no other legal status whatever.

Would you have the goodness (if possible, in your next issue) to say:

1. Whether any person, merely a notary public, conveyancer, or commissioner, has any legal position, and whether the possession of a notary's certificate, implies any legal qualification, derived from proper education, and examination as to fitness?

2. Whether there is any title other than attorney or solicitor, which guarantees the possessor to be properly educated for the business of a conveyancer?

3. Is a notary public, conveyancer, or commissioner, liable at law for any error he may commit in the drawing of deeds, and is not an attorney or solicitor so liable?

4. Do notaries public, conveyancers, and commissioners, pay any certificate duty—and have not attorneys and solicitors to pay a duty to enable them to practice?

By answering these questions, you would much oblige

26th Sept., 1864. An Attorney.

1. A notary is described in the books as a person who takes notes, or makes a short draught of contracts, obligations, or other writings and disbursements. But at the present time in England, a notary is one who publicly attests deeds or writings in one country, to make them authentic in another country; and among merchants, his principal business is to protest bills and notes. By the English Statute 41 Geo. 3, ch. 79, no person is allowed to act as a notary, unless duly admitted, nor admitted unless he have served seven years apprenticeship to a notary. Nothing of the kind is required in Upper Canada. Notaries with us are appointed by the Crown without any previous apprenticeship, and often without any special qualification. The mere fact of appointment as a notary in Upper Canada, certainly does not imply any legal qualification derived from proper education and examination as to fitness.

2. Conveyancing in England is specially followed by a class of the legal profession, who are specially trained to it, and and who devote their lives to it. In Upper Canada it seems to be open to all the world. But we know of no title other than attorney or solicitor, which in any manner guarantees the possessor to be properly educated for the business of conveyancer. The blunders of these conveyancers who are not *members* of the profession, is a fruitful source of litigation in this country.

3. The liability, if any, of a notary public, conveyancer, or commissioner, for blunders, if any, in the drawing of deeds, is not nearly so great as that of the attorney or solicitor. On several occasions, bills avowing for their object the equalization of the liability, have been introduced in the Canadian Legislature, but have not as yet became law. An Act of the kind has lately been passed in Ireland, and will no doubt ere long be passed in Canada.

4. The only fees paid by notaries public and commissioners, are fees for their commissions—the former a few dollars, and the latter a few shillings, while attorneys and solicitors not only pay large fees at the time of their admission, but are subject to annual fees so long they practice, to say nothing of the expensive education requisite to unable them to pass the necessary examinations. Mere conveyancers, (not being attorneys, solicitors, notaries public, or commissioners,) as the law stands, pay no fees.

The law on the subject of conveyancing, both as to the profession and the public in Upper Canada, stands on a most unsatisfactory footing. Legislation of some kind is needed, not merely for the protection of the profession, but of the public. It is supposed that any man who can write can fill up a deed without previous skill or training of any kind. The supposition is often fallacious, and those who from false ideas of economy save a few shillings in the preparation of deeds, as often sow the seeds of litigation which result in the loss of hundreds of pounds, if not of whole estates. We draw our correspondent's attention to the remarks of Judge Hughes on this subject . page 277.—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

C. B. In the matter of ——————, an Attorney.

Attorney, affidavit in support of application against—Taking off file.

Where a rule calling on an attorney to answer the matters of an affidavit is discharged by consent, the court will not allow the affidavits filed in support of the rule to be taken off the file.

Q. B. Curtis v. Lewis.

Venue—counsel.

The proper venue for every action is the county where the cause of action arose, and it is not a sufficient reason for changing it that either party has retained the most eminent counsel on the circuit in which that county lies, unless it is done oppressively.

REVIEWS.

The Relations of the Industry of Canada with the Mother Country and the United States. By Isaac Buchanan. Edited by Henry J. Morgan. Published by John Lovell, St. Nicholas street, Montreal.

There is much in this volume to admire. Mr. Buchanan is a thorough Protectionist, and one who is not afraid to express his thoughts. The good of Canada is his aim; and though *erratic in* many things that he says, he seldom loses sight of his object. He argues that manufactures must be nurtured among us, and cannot be nurtured without protection of some kind. His mission, in the words of a cotemporary, seems to be to show that man is the real wealth of the country, and that the end of legislation ought to be to protect an industrious people, who, to develope its resources, must enlarge its manufactures, and thus be enabled to secure a rotation of crops.

Without doubt, we have advantages for manufactures second to no people on the face of the earth. Without doubt, we send millions out of the country for the purchase of goods that could and ought to be manufactured by ourselves. Without doubt, the consequence is the depletion of capital—the loss of the life-blood of a nation.

In the future we hope to be a nation. Some policy, therefore, which will tend to our growth towards nationality, and secure prosperity to us as a nation, is much to be desired. That policy must be one of self-reliance. We depend too much on strangers for our support—nay, for our very existence as a people. The object of those who deal with us is to make as much money as possible out of us. Our object should be to retain as much money as possible at home. That object cannot be better entertained than by the due encouragement of home manufactures.

We do not mean that agriculture should be neglected. The growth of manufactures in our cities, towns and villages will attract population; and the greater the consumption, the better for the farmer or producing part of the population. Variety in manufactures, no doubt, also will beget variety in crops, and thus tend to bring about that which all who are interested in the farming interest desire—a rotation of crops. Agriculture and manufactures are not enemies, but twin sisters, mutually dependent upon and supporting each other.

We cannot endorse all Mr. Buchanan's views, but find in them much to recommend—much material for thought. His mind is eminently suggestive. In some things he is a theorist; but all men of thought are more or less theorists. He is deeply concerned in the welfare of the Province. By strict attention to business, combined with shrewd business habits, he has made for himself a fortune such as few among us possess. The man who is successful in his own affairs, possesses

a good passport as a guide in the affairs of a nation. Mr. Buchanan's position is such, that his motives as a public man are beyond suspicion. He may err in judgment, but certainly cannot be accused of deceit or treachery. Few public men can be said to be more unselfish than he is, and has proved himself to be in the past. Many may dissent from his views, but none can impugn his motives. We admire his courage, and, for the good of the country, should like to have more, who, like him, are capable of turning their attention to questions of social economy, on the proper solution of which depends our present and future prosperity.

We are pleased to find that Mr. Buchanan's work is edited by Mr. Henry J. Morgan. This gentleman, though young, and, as yet, comparatively speaking, inexperienced, has done much in the cause of Canadian literature. Some, who have neither the ability to imitate nor the ambition to follow him, are given to detract him. But we are glad to say there are few such; and, if it be any consolation to him, we have only to add that no man yet made his mark in the world of literature, without incurring the malice of some who were envious of his fame, without the ability themselves to acquire a portion of it. Mr. Morgan has received letters of recommendation from men of the highest standing, both in the old and new world, from whom a word of praise is more than an antidote for all the malicious drivel of his provincial detractors. Mr. Morgan has been admitted a corresponding member of the New York Historical Society, and is besides an active member of Canadian literary societies. His industry is great, and his ambition fully equal to his industry.

The volume now before us, so far as its mechanical execution is concerned, is a credit to Canada. It is well printed, and elegantly bound. It is only of late years that such a work could be turned out of a Provincial establishment. We hope in the future to receive many like it, as so many earnests of our progress. Provincial literature, like Provincial manufactures, is in its infancy; but the time will come when in the one as well as in the other we shall be able to take our place among the foremost nations of the world. We have now a larger population and more wealth, than had our American cousins when they set up for themselves in the battle of life. We do not, as yet, advocate independence, but hope for steady and solid progress, and trust that we shall be forever spared the horrors of war to which our neighbours have been so long subjected, and with consequences so deplorable to themselves and injurious to the civilized world.

The Chesapeake. *Before Mr. Justice Ritchie, with his Decision Compiled from original documents.* J. & A. McMillan publishers, St. John, New Brunswick.

We have to thank the Law Society of St. John, N. B, for a copy of this pamphlet. It contains the report of a most interesting and instructive case—that of David Collins and others, prisoners arrested under the provisions of the Imperial act 6 & 7 Vic. cap. 76, accused of piracy. The object and nature of the 10th article of the treaty, as to the rendition of criminals between the United States and Canada, with the mode of procedure under it, is fully discussed. The case is of interest, not merely to the people of New Brunswick, but of all the colonies, which we hope some day soon will become one people—one nation, powerful in moral influence, as they are undoubtedly in natural resources.

The Edinburgh Review, for July and October, 1864 (New York: Leonard Scott & Co.), is received. It contains several interesting papers, of which the chief are, Public Schools; Results of the Post Office Reform; The Queen's English and English Horses. The remaining articles are, Mr. Foster's Life of Sir John Eliot; The History of our Lord in Art; Life of Edward Livingstone; De Rosso's Christian and Jewish Inscriptions; Eugénie de Guerin. The Three Pastorals.

The Westminster Review, for same period (same publishers), is also received. It, like the Edinburgh, contains a most instructive paper on Public Schools in England. The remaining papers are, Novels without a Purpose; Liberal French Protestantism; Mr. Lewes' Aristotle; The Tenure of Land; Dr. Newman and Mr. Kingsley; Edmond About on Progress; Thackeray.

The London Quarterly, for same period (same publishers), is also received. It opens with a paper on Words and Places, being a review of a work of that name, being a work of Etymological Illustrations of History, Ethnology and Geography, written by the Rev. Isaac Taylor, M.A. The value of the study to which it relates is amply shown, and the principles on which searches of the kind should be conducted is also in a great degree illustrated. We find in the number a paper on the Public Schools of England, which at the present time are exciting a lively interest among the thinking and writing community. The remaining papers are, Ludwig Uhland; Freethinking, its History and Tendencies; The Circassian Exodus; Lacerdaire; Christian Art; Travelling in England; The House of Commons.

Blackwood for September. New York: Leonard Scott & Co., is also received. This number contains the conclusion of the "Chronicles of Carlingford," which no doubt we shall soon now have published in book form; part VIII. of Cornelius O'Dowd upon Men and Women, and other things in general; part XII. of Tony Butler; The Rev. Charles Kingsley and Dr. Newman; The Alphabeticals and the City of Gold. Blackwood seems to be quite equal to what it was in its palmiest day, and no doubt is read, as it ought to be, by everybody fond of light but good and instructive reading.

Godey's Lady's Book for October is also received. Owing to the enormous increase in the price of paper, and of every article in the printing business in the United States, the proprietor of this well-known and popular magazine announces that he is obliged to increase the club subscription to the Lady's Book to prices which will be announced in the November number. Our only wonder is that the increased price was not long since determined upon for the reasons mentioned. The object of the present timely notice is to prevent making up clubs at the old prices. The Lady's Book cannot receive too much encouragement. It was designed to supply a want in the social circle, and has now become almost a necessity in every family on this continent, where the English language is read and spoken.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

ANDREW GREGORY HILL, of Welland, Esquire, Attorney-at law, to be a Notary Public in Upper Canada.—(Gazetted September 3, 1864.)

HENRY PELLATT, of Toronto, Esquire, to be a Notary Public in Upper Canada.—(Gazetted September 3, 1864.)

ARCHIBALD THOMSON, of Renfrew, Esquire, to be a Notary public in Upper Canada.—(Gazetted September 24, 1864.)

CORONERS.

JAMES LANGSTAFF, Esquire, M.D., Associate Coroner, United Counties of York and Peel.—(Gazetted September 24, 1864.)

TO CORRESPONDENTS.

"X Y," "L S," "A Student at Law," "Clerk 6th D C. Co Norfolk," "A Practitioner," "A. B." and "A Merchant," under Division Court Correspondence, p. 259.

"An Attorney" and "A Law Student," under General Correspondence, p 278.

"D J H" and "A L," many thanks; too late for this Number, will receive attention in the next.