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DIARY FOR FEBRUARY.

5. SUNDAY ...... *Septuagesima Sunday.*
6. Monday......... HILARY Term beg. Last d. for not. of Ex. Sandwich & Whitby
7. Tuesday......... Chancery Ex. Term, Toronto, commences.
10. Friday .... Paper Day, Q. B.
11. Saturday....... Paper Day, C. P.
12. SUNDAY ...... *Sexagesima Sunday.*
13. Monday......... Paper Day, Q. B. Last d. for not. of Ex. Chatham & Cobourg
14. Tuesday .... Paper Day, C. P.
15. Wednesday.... Paper Day, Q. B. Last day for serv. of Writ in Co. Court Y. & P.
16. Thursday...... Paper Day, C. P.
18. Saturday....... HILARY Term ends.
19. SUNDAY....... *Quinquagesima Sunday.*
20. Monday......... Last day for notice of Ex Chancery for London & Belleville.
21. Tuesday .... Shrove Tuesday. Chan. Ex. Term, Sandwich & Whitby com.
22. Wednesday.... *Ash Wednesday.*
25. Saturday. ...... Last day for declaring in County Court.
26. SUNDAY...... *1st Sunday in Lent.*
27. Monday ... . Last day for Chancery notice of Ex. London and Belleville.
28. Tuesday .... Chancery Ex. term, Chatham and Cobourg, commences.

IMPORTANT BUSINESS NOTICE.

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

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

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

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

FEBRUARY, 1860.

OUR CALENDAR.

It having been decided in *Cuthbert* v. *Street*, 6 U. C. Law Journal, p. 20, that in computing the eight days required for Notice of Trial, the commission day of the assizes is to be excluded, we so altered our calendar as to meet the effect of the decision.

Though necessary, in consequence of this alteration, to shift back one day the several days named for pleading, serving process, and other proceedings in a cause, by some oversight, the compiler of the calender neglected to do so.

The oversight was not known to us, until the issue of the calendar with our last number, and now that it is in our power to draw attention to the fact, we not only do so, but issue a new and amended calendar with this number.

We are most anxious to make the yearly calendar as correct as possible, and in order to attain this object, spare neither trouble nor expense.

We shall take it as a favour, if any person discover a material error in the calendar now issued, and will inform us of the same, with a view to correction.

REGISTRARS—DUTIES AND LIABILITIES.

The registration of title to lands is become a subject of much importance in Upper Canada.

Much depends upon the proper discharge of duty by the several Registrars of the Counties, Ridings and Cities, and much dissatisfaction is felt at the carelessness of some and the rapacity of others.

It is a fact, that in some Counties the Registrars, in regard to fees, know of no law but their own selfishness, and in others are as disobliging as their ignorance of the law regulating the performance of their duties is lamentable.

The greater number of the Registrars of Upper Canada are, as we have reason to believe, free from these terms of reproach. They discharge the duties appertaining to their offices to the satisfaction of the public and in strict accordance with the requirements of the law. As a rule, those who know most about the duties of their office are the most obliging. All are public servants, and it is the duty of each public servant to be courteous in his dealings with the public.

We proceed in this number of the *Law Journal* to make some remarks on the duties and liabilities of Registrars of titles to land.

It is the duty of every Registrar, or his deputy, to attend at his office every day in the year (excepting Sunday, Christmas Day, New Year's Day, Good Friday, Easter Monday, and the Queen's Birthday,) from the hour of 10 in the forenoon until 3 in the afternoon.

Upon payment of his proper fees, of which we shall say more hereafter, it is his duty to register such Deeds, Conveyances, Powers of Attorney, Wills, Devises, Judgments, Decrees of Foreclosure, Bills in Chancery, Certificates of Satisfaction, Discharges of Decrees or Orders of Chancery and Rules or Orders of Court directing the payment of money other than costs, and other instruments such as mentioned in the Consolidated Statute of Upper Canada, chapter 89.

It is also his duty, when required to make searches concerning all Memorials registered, and concerning all Deeds, Wills or Judgments, Decrees or Orders recorded, and give certificates thereof under his hand if required by any person.

The books, indexes, and other documents in the office of the Registrar are all in his keeping, not merely for the convenience of parties but for the safety of the community, who are interested in their being preserved unaltered and unmutilated. He is not obliged to place his books and indexes in the hands of any person desiring to make a search, but may in his discretion do so.

Whenever, however, a person conducting himself respectfully desires to make a search into the state of any particular title or into the registration of judgments, &c., the Registrar ought, as a general rule, to allow the person interested in the search to run his eye over the index in order to give greater assurance that no entry respecting the land or the party in question shall escape attention, but this of course would only be when the Registrar sees the object to be the single one of making the search more satisfactorily.

Such a proceeding would not only to a certain extent relieve the Registrar from responsibility, but be a great satisfaction to the party interested in the enquiry.

On these points the case of Webster and the Registrar of Brant, reported in this number, is an authority. It is the judgment of a Court of competent jurisdiction, and at present the law of the land.

There is nothing in the Registry Act requiring a Registrar to keep an index of lands in any particular form. The index is kept for the purpose of facilitating searches It is for the Registrar's own convenience and not a record of his office.

The Registrar is, however, expressly required to enter in a separate book to be kept for the purpose, the certificates of all judgments, decrees or orders brought to him for registration, and to prepare an alphabetical index thereto (Consol. Stat. s. 71).

It is the duty of the Treasurer of the County to provide a fit and proper Register book for each Township, reputed Township, City and Town, the limits whereof are defined by law. Whenever any Registrar requires a new Registry book it is the duty of the Treasurer, on his application, to furnish him therewith, and books so furnished are to be paid for by the Treasurer out of County funds. The Registrar has no authority without reference to the County Council himself to order Register books so as to make the County liable for them (*Read* v. *The Council of the County of Kent*, 13 U. C., Q. B., 572).

If the Treasurer refuse or neglect to furnish Register books within thirty days after the application of the Registrar therefor, the Registrar may provide the same and recover the cost thereof from the Municipality of the County (Consol. Stat. U. C., p. 897, s. 69).

Next as to the Registrar's fees. The legal principle is, that every charge imposed by law on the subject in the shape of a tax or fee must be by clear and express words (*Keele* v. *Ridout*, 5 U. C., Q. B., 240).

We cannot too deeply impress this principle upon the minds of Registrars. Some of them think that they may create fees according to fancy, and because some persons submit to the exactions, believe nobody will question the right.

It is to our own knowledge the habit of some Registrars to make charges for many matters of detail for which there is no statutory or other legal authority.

The following are the only charges which a Registrar is entitled by law to make :—

1. For drawing affidavit of execution of instrument if done by the Registrar or his Deputy... ....$0 50
2. For recording every Deed, Conveyance, &c., *including* all necessary entries and certificates............ 1 25

   In case such entries and certificates exceed 800 words then at the rate of 13½ cts. for every additional one hundred words.

3. For registering a Sheriff's Deed..........................$0 75
4. " " Certificate of Payment................. 0 50
5. " " Satisfaction thereof...................... 0 50
6. " " any Certificate of a Suit or Proceeding in Equity.......... .... 0 50
7. For registering any Certificate of Decree.............. 1 00
8. For entering Certificate of Payment of Mortgage money, *including* all entries and Certificates thereof 0 50
9. Drawing Affidavit of the execution thereof when done by the Registrar or his Deputy.................. 0 50
10. For searching Records relating to any parcel or lot of land not exceeding four references................. 0 25
11. For every additional four distinct references, and so in proportion to every number of searches made... 0 25
12. In no case a general search into the title of any particular lot, piece or parcel of land to exceed..... 2 00
13. For every extract furnished, *including* Certificate.... 0 25
14. Where the extract exceeds 100 words for every additional 100 words.. 0 15
15. For furnishing statements required under the 72nd section of the Registry Act, per folio of 100 words 0 10

A Registrar is not in any way bound to give extracts or certificates of such portions of a lot as are not asked for, nor can he compel a person to pay for such. He may make search to see whether the Crown had granted the whole of a lot or granted it in halves or other lesser proportions, but as soon as he discovers that it was granted in halves or other lesser proportions his search and his extracts should be confined to that part which is asked for, and his extracts for which he would have a right to charge should be confined to that part.

If a Registrar finds that it enables him to make searches more easily to insert all the conveyances affecting a particular lot in one part of a page he may do so, though the Crown may have granted it in half lots or other lesser proportions, yet that will not enable him to charge for searches and abstracts for the whole when not wanted.

When after grant from the Crown a person sub-divides a lot himself and does not furnish the Registrar with a plan, the Registrar has no other mode than to put all conveyances affecting the lot in the one index, and in this case it is apprehended would be entitled to each search made, though on portions of the lot other than that about which the enquiry is made.

On these points we refer to *Hope* v. *Ferguson*, 17 U. C., Q. B., 219.

Much contrariety of practice exists as to the right of a Registrar to charge 25 cents "for every *extract* furnished *including certificate*, and where that same exceeds 100 words 15 cents for every additional 100 words contained in such extract and certificate."

A Registrar is required to furnish a certificate of title to a particular lot with judgments. To do this he looks at a number of memorials, and considers *each* memorial as a separate and distinct extract and certificate, and charges for it as such. This he has no right to do. He is not asked for an extract of each memorial, or a certificate as to each memorial, but for *an* extract of all memorials on the land, and a certificate thereof. Should a particular memorial be required to be extracted and certified separately, then there would be the charge of 25 cents for the first 100 words, and 15 cents for each subsequent 100 words. But a mere memorandum of the name of each granter and grantee, the date, &c., the date of registry, and description of instrument, whether bargain and sale or mortgage, is not such an extract as entitles a Registrar to charge 25 cents.

Such is the decision of the Court in *Hope* v. *Ferguson*, 17 U. C. Q. B., 219, but still we are informed some Registrars adhere to the erroneous but more profitable mode of calculation.

We are not sure but such a practice is an "undue practice," within the meaning of S. 77 of the Registry Act, for which a Registrar may be prosecuted criminally, and incur a forfeiture of his office. We do not venture a decided opinion on the point, but would recommend complaints to the government with a view to redress.

It was held under the old Registry Act, 9 Vic., cap. 34, that a Registrar must record the memorial of a deed, &c., in every Township in which there are lands situate that are embraced in the deed; but that he need not enter in the book of any township lands other than those lying in that Township. (*Smith et. al* v. *Ridout*, 5 U. C. Q. B., 617.) It is only necessary, in such case, to furnish one memorial, which memorial is to be copied in each township book, in the same manner, and to the same extent only, as if a separate memorial had been furnished in relation to the lands situate within each such township. (Consol. Act, S. 33.)

It is not yet decided whether for the purpose of charging fees, the Registrar is entitled to each entry in each separate book, as a separate memorial—that is $1,25 if under 800 words—or is obliged to register continuously in the several books, charging $1,25 for the first 800 words, and 13½ cents for each additional 100 words in the books. The question is now before the Queen's Bench, but not yet determined.

Every Registrar is required to keep a book in which he is to enter all the fees and emoluments received by him by virtue of his office, showing separately the sums received for registering memorials, certificates, and other documents, and for searches, and to make a return of such fees and emoluments in detail, annually, to the Legislature. (Consol. Stat., S. 76.)

Most Registrars keep the book of emoluments, but so far as we can learn *keep* the returns also. This is because of a defect in the Act. No penalty is imposed for non-compliance, and so the law is wilfully disobeyed. The information is such that the Legislature should receive annually, with a view to funding the fees and payment by salary, if thought desirable, for the public interest. We hope some Member of Parliament will turn his attention to this matter, and see that the section of the statute requiring a return is either repealed or obeyed. Laws lose much of their force if enacted only to be disobeyed.

DELIVERY OF JUDGMENTS.

QUEEN'S BENCH.

Monday .... 5th March, 10 o'clock, a.m.
Saturday .... 10th March, 2 o'clock, a.m.

COMMON PLEAS.

Monday .... 5th March, 2 o'clock, a.m.
Saturday .... 10th March, 10 o'clock, a.m.

SPRING CIRCUITS, 1860.

EASTERN CIRCUIT.

THE HON. CHIEF JUSTICE DRAPER.

Perth..............	Wednesday,...........	11th April.
Brockville........	Tuesday,...............	17th April.
Cornwall..........	Monday,................	23rd April.
Ottawa............	Tuesday,...............	1st May.
L'Original........	Tuesday,...............	8th May.

MIDLAND CIRCUIT.

THE HON. SIR J. B. ROBINSON, BART., CHIEF JUSTICE.

Whitby...........	Thursday,.............	15th March.
Peterboro'........	Tuesday,...............	20th March.
Cobourg	Monday,................	26th March.
Belleville.........	Tuesday,...............	10th April.
Picton.............	Wednesday,...........	25th April.
Kingston..........	Wednesday,...........	2nd May.

HOME CIRCUIT.

THE HON. MR. JUSTICE BURNS.

Hamilton..........	Monday,................	19th March.
Niagara...........	Monday,................	9th April.
Welland...........	Monday,................	23rd April.
Milton....	Monday,................	30th April.
Barrie..............	Monday,................	7th May.
Owen's Sound....	Tuesday,...............	15th May.

OXFORD CIRCUIT.

The Hon. Mr. Justice McLean.

Guelph	Monday, ...	26th March.
Berlin	Monday, ...	2nd April.
Stratford	Tuesday, ...	10th April.
Woodstock.........	Monday, ...	16th April.
Brantford.........	Monday, ...	23rd April.
Simcoe............	Tuesday, ...	1st May.
Cayuga	Tuesday, ...	8th May.

WESTERN CIRCUIT.

The Hon. Mr. Justice Richards.

Sarnia	Wednesday, ...	14th March.
Goderich..........	Tuesday, ...	20th March.
London...	Monday, ...	26th March.
St. Thomas........	Tuesday, ...	10th April.
Chatham..	Monday, ...	16th April.
Sandwich.........	Monday, ...	23rd April.

TORONTO.

The Hon. Mr. Justice Hagarty.

Monday, 9th April.

LECTURES

ON THE JURISDICTION AND PRACTICE OF THE HIGH COURT OF ADMIRALTY OF ENGLAND.

It is doubtless known to some of our readers, that up to a very recent period the High Court of Admiralty in England was an exclusive Court, possessing the privilege of appointing its own Practitioners (Proctors), but under a recent English statute, has been "thrown open" to the legal profession in England.

We have extracted from the *Law Times* of December 10th, 1859, the subjoined notice of two lectures which were about to be given to the members of the Incorporated Law Society, by John Morris, Esq., of old Jewry London, Solicitor, a member of the firm of Ashurst, Son & Morris.

Two Lectures on the Jurisdiction and Practice of the High Court of Admiralty of England will be delivered in the hall of the society on Wednesday, Dec. 14, and Wednesday, Dec. 21, at eight o'clock in the evening precisely, by John Morris, Esq., a member of the society.

The History of the Jurisdiction:—The Ancient Jurisdiction. The Restraining Statutes of Richard II. The Conflict with the Common Law Courts. The Statutes of Victoria; and Rules of Court made there-under.

Distinction between the *Instance* Court and the *Prize* Court.

The present jurisdiction of the Instance Court in causes of—1. Wages. 2. Possession. 3. Mortgages. 4. Bottomry. 5. Necessaries. 6. Salvage and Towage. 7. Damage.

The practice of the Instance Court:—Suits *in rem; in pœnam; in personam.*

Changes introduced by recent Statutes and Rules of Court.

The Prize Court:—Its jurisdiction and practice.

General remarks,—On the duties of Proctors (which under the recent statute apply equally to Solicitors.) On the special characteristics of the Jurisdiction and Procedure. Suggestions thereon, and especially as to any extension of the jurisdiction—also as to a course of study in Admiralty Law.

The members of the society and the subscribers to the other courses of Lectures are invited to attend these additional Lectures.

R. Maugham,
Secretary.

The Editor remarks as follows in the same number on the proposed lectures.

We wish to direct the special attention of our readers to a programme, which has been published to the Incorporated Law Society, of two Lectures which are to be delivered in the Hall of the Society, on Wednesday the 14th and the 21st inst., at 8 p. m., by Mr. Morris, of the firm of Ashurst, Son and Morris. There are many, now in the full tide of professional business, who will remember how much they owe of their success to their practice at the Law Students' Debating Society, when Mr. Morris was—as we believe he was for many years—its Secretary, and one of its most active members. They who recollect him in this character will need, we are convinced no other stimulus to interest them, and aid him in an undertaking which is perfectly new. The subject of the lecture is the Jurisdiction and Practice of the High Court of Admiralty; and now that this once close court has been thrown open lately to the Profession, it was unnecessary to show how opportune and useful will be a popular exposition of its practice by an experienced and able man, such as Mr. Morris is.

But it is in another point of view that these lectures are, perhaps, most interesting. It is the first appearance of a solicitor as a law lecturer at the Law Institution. Now that so much has been done to fuse the two great divisions of the Profession, and to identify their practitioners in education and professional knowledge, it is apparent that nothing like presumption can be charged against a gentleman who comes forward in his character of solicitor as an expounder of the law. In truth, the large and varied knowledge of law which is absolutely essential to every competent solicitor in these days—composed, as it necessarily is, in almost equal proportions of an intimate acquaintance with principles as well as with practice—will be thought reasonably, at least by some, to fit such a one more thoroughly for the office of a lecturer than even the more special, but less general, learning of the barrister. It may be that the latter dives more deeply into principles and details; but it is certain that he does not work upon so extensive and matter-of-fact a surface of daily useful practice. We will only add, that we think Mr. Morris deserves much credit for having started so useful an initiative. We wish him heartily success; we trust that all who can will encourage him; and that many others will follow his example.

In pursuance of the announcement, the lectures were delivered on the 14th and 21st December, and a full report was given in the *Jurist* of the 31st December.

Though there is not any Admiralty Court in Upper Canada, we deem these lectures of sufficient importance to give place to them from time to time in the *Law Journal.* They evince much research and much learning, and being the first of a solicitor before the Law Institution, we hail them as an earnest of what may yet be done by that branch of the profession in England.

The Act of last session, enabling barristers and attorneys to practise in the Admiralty Court, has given to the subject of the lectures I am about to deliver an interest and importance to the profession generally which it has not hitherto possessed.

I trust that my present effort to stimulate that interest, and give it a practical direction, may not be without use.

It is necessary that we should, at the commencement, have a clear perception of the subject on which we are about to enter. It is not the maritime law of England in general, nor even the particular portions or branches of it which govern the proceedings of the Court of Admiralty, but it is the jurisdiction and practice of that Court. I do not propose to treat

of the law administered by the Court further than may be necessary to define the limits of its jurisdiction. I would here merely remark that the law by which the proceedings of the Court are governed is founded on the maritime laws of ancient Europe, modified and controlled by Acts of Parliament and common usage.*

I shall, in the first place, glance at the origin and history of the jurisdiction, without which it would be impossible to show you clearly its present limits, and the principles on which they have been fixed; why it is that the Court takes cognisance of suits for wages, bottomry, salvage, &c., and not of causes of charter-parties, marine insurance, necessaries supplied to a ship not foreign, &c.

The origin of the Court is involved in the same obscurity which rests on the early history of the Courts of Common Law. Some writers, and amongst them Blackstone, have assigned the origin of the Amiralty Court to the reign of Edward III.; but subsequent investigations have shown that it existed at a much earlier date. One old writer† concludes that "decision of marine cases was not put out of the king's house, and committed to the charge of the admiral, until the time of King Edward III." From this I infer that this Court, like the Courts of Westminster, was originally attached to the king's household.

In the reign of Richard II., grandson of Edward III., two statutes were passed relating to the Admiralty jurisdiction, which have been generally termed the "restraining statutes." They were founded on frequent petitions of the Commons against the admiral, the substance of which was, "that the admiral and his officers held pleas of contract arising in the bodies of counties, of trespasses, debts, quarrels, wears, kiddles, breaking open of houses, carrying away goods, illegal imprisonment, excessive fees, and extortion."‡

The first of these statutes was the 13 Rich. II., c. 5. It enacted that "the admirals and their deputies shall not meddle, henceforth, of anything done *within the realm*, but only of a thing done upon the sea, according as it hath been duly used in the time of the noble King Edward III., grandfather of our Lord the King that now is."

The next was the statute 15 Rich. II., c. 3. It enacted "that of all manner of contracts, pleas, and quereles, and of all other things done or arising within *the bodies of counties*, as well by land as by water, and also of wreck of the sea, the Admiral's Court shall have no manner of cognisance, power, nor jurisdiction," but that the same should be remedied at common law.

One question which arose on the construction of the first of these statutes, was as to what was the jurisdiction of the Admiralty, as "*duly used*" in the reign of Edward III.; which has given rise to a great deal of learned discussion. Mr. Justice Story, in his able judgment in *De Lovio* v. *Boit*, (2 Gallison's Reports, 398,) which has been well termed a "learned and elaborate essay on the Admiralty jurisdiction, and one of the most elementry views on the subject extant," after reviewing the ancient authorities, comes to the conclusion, "that before and in the reign of Edward III. the Admiralty exercised jurisdiction—1. Over matters of prize and its incidents. 2. Over torts and offences in ports within the ebb and flow of the tide, on the British seas and on the high seas. 3. Over contracts and other matters regulated and provided for by the laws of Olerom and other special ordinances. And 4, (as the commission of Robert de Herle shows) over maritime causes in general."

This, it must be admitted, is a favourable view of the ancient jurisdiction; yet Mr. Justice Story challenges the production of "any authority previous to the 13 Rich. II., which properly considered, impeaches the jurisdiction of the Admiralty as here asserted." It is true that Lord Coke, in his view of the Admiralty jurisdiction, in his 4th Institute has made citations from ancient cases, which seem to impugn or weaken the conclusions so drawn; but then, as Mr. Justice Story remarks, "It is well known with what zeal, ability, and diligence, Lord Coke endeavored to break down the Court of Chancery, as well as the Admiralty. It would have been fortunate for the maritime world, if his labours in the latter case had been as unsuccessful as in the former. There are many persons who are dismayed at the danger and difficulty of encountering any opinion supported by the authority of Lord Coke. To quiet the apprehension of such persons, it may not be unfit to declare, in the language of Mr. Justice Buller, that with 'respect to what is said relative to the Admiralty jurisdiction in 4 Inst. 135, that part of Lord Coke's work has been always received with great caution, and frequently contradicted. He seems to have entertained not only a jealousy of, but an enmity against, that jurisdiction.'"

The Courts of Common Law adopted and followed Lord Coke's views. They put the narrowest construction upon the language of the restraining statutes. In the reigns of James I. and Charles I., attempts were made to put an end to the unseemly conflict between the two jurisdictions; but after the restoration it was renewed with more vigour than ever. Prohibitions to the Admiralty Court were issued by the Common Law Courts almost as of course; and if they had consistently followed out their construction of the restraining statutes to its logical consequences, the Admiralty Court would have been shorn of all its important jurisdiction. What, in substance, the Common Law Courts contended for, and so far as they could, held, was as follows:—

1. That the jurisdiction of the Admiralty is confined to contracts and things made and done upon the sea, and to be executed upon the sea; whereas all important maritime contracts are necessarily, from the nature of the case, entered into on land.

2. That the Admiralty Court has no jurisdiction over maritime contracts made within the bodies of counties or beyond sea, although of a maritime nature.

3. *Nor* of contracts made upon the sea, if to be executed upon land, or not of a maritime nature, or under seal, or containing any unusual stipulations.

4. *Nor* over torts, offences or injuries done in ports, or within the bodies of counties, notwithstanding the places be within the ebb and flow of the tide.

On the other hand, the Admiralty Court asserted its jurisdiction over all maratime contracts, contending that the subject matter, and not locality, was the true test; and as to torts, &c., it claimed cognisance over all those committed on the high seas, and so far as the tide ebbs and flows.

The Admiralty Court always asserted jurisdiction over things done beyond sea; for such cases it was peculiarly well suited, being, even as to its ordinary jurisdiction, a sort of international court; whereas our Common Law Courts, in their early history, according to the narrow views then prevailing held that they could take cognisance only of things done within the realm. At length they got over the difficulty, as they had done in other cases, by the aid of a fiction—viz., by supposing the things to have been done at Cheapside and such like places, and holding that such averments were not traversable.

In the language of Mr. Justice Story, in the case from which I have already cited:—"The Courts of Common Law, by a silent and steady march, have gradually extended the limits of their own authority, until they have usurped or acquired concurrent jurisdiction over all causes, except of prize, within the cognisance of the Admiralty. And even as to matters of prize, its exclusive authority was not finally admitted and confirmed till the great cause of *Lindo* v. *Rodney* (2 Doug. 613). almost within our own times. It is curious, indeed, to observe the progress of the pretensions of the Courts of Common Law

* Browne's Civil & Ad. Law, p. 34; Pritchard's Adm. Digest, Introduction, p. vii.
† Lambard. ‡ Wynne's Life of Jenkins, p. 78

in amplifying their jurisdiction. At first they disclaimed all cognisance of things done without the bodies of the counties of the realm, and even over collateral matters done out of the realm, which came incidentally in question upon issues regularly before the Courts. They afterwards held cognisance of contracts originating within the realm, to be executed abroad; of contracts made abroad to be executed within the realm, and finally, after much hesitation and doubt, by the use of a fiction, often absurd and never traversable, over all personal causes arising on the high seas or in foreign realms, without any regard to the place of their transaction or consummation."

Sir Leoline Jenkins, the distinguished Admiralty judge in the reign of Charles II., in his celebrated argument before the House of Lords on the Admiralty jurisdiction, pointed out the inconvenience to the public arising from the evasion of the Admiralty jurisdiction in his time—1. As to foreign contracts, or those made abroad. 2. As to mariners' wages, freight and charter parties. 3. As to building and victualling of ships, and as to material men, who furnish materials or supply work for the ship. 4. As to disputes between part owners.

Lord Tenterden, in his work on shipping adverts to the "flame of jealousy" formerly prevailing in Westminster-hall against all the courts at Doctors' Commons. These jealousies, however, have now long since subsided The successive judges of the Admiralty Court (especially Lord Stowell), so far from evincing any desire improperly to assume jurisdiction which it has not, state it as an invariable maxim that the Court is, *ex mero motu*, bound to reject what does not belong to its jurisdiction; though, in cases free from doubt, it is also bound to exercise, and not abdicate, that jurisdiction with which it has been invested, and which it ought usefully and beneficially to employ on behalf of its suitors.

In the case of the *Apollo* (1 Hagg. R. 312), Lord Stowell said that a great portion of the powers enumerated in the Commission of the judge of the Court, are inoperative, and that the active jurisdiction of the Court stands in need of continued exercise and usage.

At the commencement of the present reign, the jurisdiction of the Court (except in prize cases) had been circumscribed within very narrow limits. In many cases great inconvenience and injury resulted from the inability of the Court to administer complete justice in cases properly before it, and from its want of jurisdiction in other cases where it would alone afford a proper remedy. Much, however, has been done to remove these defects by the statutes which I am about to notice.

The most important of them is the 3 & 4 Vic., ch. 65, entitled, "An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England." As to the improvements in the practice, the provisions of the statute will come under review at a subsequent period: but as to the jurisdiction, I may here observe that it is extended by the statute in several important particulars—viz., over claims of *mortgagees*, whenever a vessel shall be arrested or the proceeds brought into the registry—on questions of *title*, as to which it was previously held that the Court had no jurisdiction—in cases of *salvage, damage, and towage*, or for *necessaries supplied to any foreign vessel*, "whether such ship or vessel may have been in the body of a county or upon the high seas at the time when the services were rendered, or damage received, or necessaries furnished, in respect of which such claim is made;" whereas previously the Court had no jurisdiction in any case of salvage, damage, or towage, happening within the body of a county, nor had it jurisdiction to entertain any claim for necessaries, even to a foreign vessel; it being held that there was no distinction whether the necessaries were supplied to a British or a foreign vessel. This extension of jurisdiction as to necessaries supplied to foreign vessels was most expedient and has been found to be of great advantage. Without the power of arresting the ship which can only be done by the Admiralty process, there is, practically, no means of enforcing claims against foreign vessels.

Other statutes of this reign, and the rules of Court made thereunder will be more appropriately noticed in the observations which I shall afterwards make on the *present* jurisdiction and practice of the Court.

Here, perhaps, I might remark, that criminal offences at sea constituted formerly an important breach of the jurisdiction; but by recent statutes (the last of whith is the 7 & 8 Vic. ch. 2.) that jurisdiction is now vested in the Central Criminal Court, and in the justices of assize.

It will be convenient here to notice the distinction between the ordinary or civil jurisdiction of the Court called the "Instance Court," and the prize jurisdiction, called the "Prize Court." The two jurisdictions are quite distinct, although exercised by the same judge. They are somewhat analogous to the plea and revenue side of the Court of Exchequer. The Instance Court takes cognisance of certain maritime contracts and injuries, concurrently with our other Courts; the Prize Court has jurisdiction over prizes taken in time of war, and this jurisdiction it exercises free from the controlling power of the Common Law Courts, questions of prize being exclusively cognisable in this court.

The jurisdiction, both of the Instance and Prize Court, but especially the latter, is (to use the language of a recent writer)* "exercised according to the rules and practice of the Roman Civil Law, which from its universality, and as forming the foundation of the system of jurisprudence established in most of the great nations of Europe, is best adapted to the proceedings of a Court administering the law of nations."

Thus, being founded upon the same model, there is an affinity between the maritime tribunals of Europe and America, which is most fitting and useful in dealing with subjects which have no special locality.

I propose now to consider the present jurisdiction and practice both of the Instance and Prize Courts. With reference to the Instance Court, I shall particularly endeavour to point out, in those cases in which it has concurrent jurisdiction with the common law or equity courts, the special advantages if any, of proceeding in this court.

The present jurisdiction of the Instance Court comes first in order before us.

It would make my observations on this subject more intelligible, if you had some previous acquaintance with the procedure of the Court; but it may answer my present purpose if I remark that the one distinguishing feature of the Admiralty procedure is the power to arrest the ship, as the first step in the suit; the suit is, therefore, a suit *in rem*—the ship, as it were, "being brought into court" and adjudicated on. This remedy *in rem* against the ship is founded on the practice of the civil law, which gives an *actio in rem* to recover or obtain the thing itself, the actual specific possession of it; whereas, with us, things personal are looked upon by the law as of a nature so transitory and perishable, that it is for the most impossible either to ascertain their identity, or to deliver them in their original condition; and, therefore, the law contents itself with restoring, not the thing itself, but a pecuniary equivalent in damages (3 Black Com. 146).

I propose to consider the present jurisdiction of the Instance Court under the following heads—viz., causes of

1. Wages.
2. Possession and Restraint.
3. Mortgages.
4. Bottomry.
5. Necessaries.
6. Salvage and Towage.
7. Damage.

(*To be continued.*)

* Pritchard Ad. Dig. Introd., p. 7.

INDEX TO VOLUME 5.

In reply to numerous inquiries, we take this mode of stating that the Index to Volume 5 is nearly completed, and will be issued with the March number of this Journal.

LAW SOCIETY, U. C.

HILARY TERM, 1859.

ARTICLED CLERKS' EXAMINATION.

SMITHS' MERCANTILE LAW.

1. What is the effect upon a creditor's remedy of taking a bill or note for a debt?
2. How may a general lien arise; what is the extent of an attorney's lien, and upon what does it attach?
3. Is there any, and if so, what case in which an endorsement can be for part of the sum secured by a bill or note?
4. *Messrs. W. & Co.*

   I will engage to pay you by half-past four to-day, fifty-six pounds, or bill that amount on H, J. W.

   Is this a good guarantee? Give your reasons.
5. What parties to a promissory note stand respectively in the position of the drawer and acceptor of a bill of exchange?
6. What is barratry, and against whom can it be committed?

WILLIAMS ON PERSONAL PROPERTY.

1. What exceptions are there to the maxim: *actio, personalis moritur cum personâ?*
2. In what order must the claims against a deceased person be satisfied out of his personal estate, by his executors or administrators?
3. Will a surety be discharged by the creditor neglecting to sue the principal; give your reasons?
4. Mention some chattels which descend to the heir.
5. Upon what principle does the husband's liability for debts contracted by his wife, previous to marriage, depend; and to what extent does he remain liable for such debts after her decease?

BLACKSTONES' COMMENTARIES.

1. Upon what is a master's right of action, for beating his servant, founded?
2. Of what parts may every law be said to consist?
3. What is the distinction between *mala in se*, and *mala prohibita?*
4. What is the meaning of the maxim: "The king never dies?"

STORY'S EQUITY JURISPRUDENCE.

1. Is a voluntary conveyance of lands void as against a subsequent purchaser for valuable consideration who has notice of the prior voluntary deed? Upon what statute does the law on this subject depend?
2. In what cases will a registered deed be postponed in equity to a prior unregistered deed?
3. What are the rights of a surety who pays off the debt, as to collateral securities in the hands of the creditor?
4. Does the creditor discharge a surety by giving time to the principal debtor, with a reservation of all his rights against the surety, but without having any communication with the surety?
5. What course should a partner take upon the goods of the partnership being seized under a *fi. fa.* against the other partner for the separate debt of the latter?
6. Will a bill in any, and what cases, lie for the specific performance of an agreement for the sale of the chattels?

WILLIAMS ON REAL PROPERTY.

1. What is an estate by the courtesy of England, and what is essential to constitute a title to it?
2. Are the conveyances of infants void, or voidable only?
3. How may a tenant in tail, in possession, convert his estate into a fee simple?

STATUTE LAW AND PRACTICE.

1. Is a widow in any cases, and if so what, entitled to dower out of an equitable estate?
2. In what cases is a sheriff entitled to an interpleader, is he bound to make any, and what enquiry into the nature of the claim set up?
3. Has there been any statutory alteration with regard to costs where judgment is arrested?
4. Can inferior jurisdiction cases be tried in the Counties of of York and Peel?
5. What is the course under the Common Law Procedure Act for compelling a plaintiff to proceed to trial.
6. What is the distinction between an avowry and a cognizance?
7. By what statute was a Court of Chancery erected in Upper Canada? Does the Act referred to contain any, and what special provision as to the redemption of mortgages?
8. Does the Court of Chancery in a suit for foreclosure give any, and what personal remedy against the mortgagor?
9. If a bill to redeem is dismissed at the hearing, what is the effect of the decree?

EXAMINATION FOR CALL TO THE BAR.

SMITH'S MERCANTILE LAW.

1. To what extent is an auctioneer the agent of the vender and purchaser respectively?
2. What is freight, and under what circumstances is it payable?
3. What is the common law liability of a common carrier?
4. In what cases is the insured entitled to a return of the premium?
5. Is a warranty made after a sale binding? Give your reasons.

BYLES ON BILLS.

1. To what extent is an agreement to renew a note or bill written a separate piece of paper binding between the original and subsequent parties respectively?
2. Upon what grounds, and to what extent, does a promise by an indorser to pay a note or bill after it becomes due, dispense with proof of notice of dishonour?
3. Is it necessary to present a bill or note payable at sight or on demand, or either of them, for the purpose of charging the maker or acceptor?
4. If a bill or note be re-indorsed to a previous indorser, has he any remedy against the intermediate parties? Give your reasons.
5. Where a note or bill is given to a single woman who afterwards marries, who should indorse, and who should sue upon it during coverture?

BLACKSTONE'S COMMENTARIES.

1. What is the meaning of a menial servant?
2. What are the duties of a coroner?
3. What is the difference between a denizen and an alien?
4. What are the two divisions of municipal law?

STORY'S EQUITY JURISPRUDENCE.

1. What is the nature of the equitable right of a married woman usually termed her "equity to a settlement?" Out of what property will a settlement be enforced? Will such a settlement be enforced against the husband's assignee for a valuable consideration?
2. What forfeitures for breaches of covenants in leases will courts of equity relieve against?
3. Upon the death of one of several co-partners, do his real or personal representatives become entitled to his share of the real estate belonging to the co-partnership? Give reasons for your answer.
4. Is a general assignment to a trustee in trust for the creditors of the settler, and to which no creditor is a party revocable? What will render such an instrument irrevocable?

5. What is requisite beyond the transfer itself, to perfect an equitable assignment of a chose in action as against subsequent assignees? Does this doctrine apply to the assignment of equitable interests in real estate?

6. Will the Court of Chancery in any, and what cases, interfere at the instance of a private individual to restrain a public nuisance?

7. Mention some of the cases in which a bill in equity is demurrable unless the plaintiff's affidavit is annexed to the bill.

8. Will a bond, void upon its face for illegality, be decreed in equity to be delivered up to be cancelled? Give a reason for your answer.

9. When a debt for which a surety is bound, is due, and the principal debtor refuses to pay, has the surety any, and what remedy in equity to which he may have recourse without first paying the debt himself.

10. In whose favor will a court of equity aid the defective execution of a power?

WILLIAMS ON REAL PROPERTY.

1. What covenants for title should an ordinary vendor give? What covenants should mortgagor enter into? What covenants is a purchaser entitled to from a trustree for sale?

2. What is the appropriate form of conveyance on a purchase by one joint tenant from another?

3. When a power is required to be executed by writing under hand and seal, attested by two witnesses, what should be the form of the attestation?

4. If the donee of a power having also an estate in the lands subject to the power, convey away his estate, can he afterwards execute an appointment in pursuance of the power, which will defeat the conveyance?

5. Under a devise to husband and wife, and their heirs, what will the wife surviving the husband take?

ADDISON ON CONTRACTS.

1. Can a covenant not to sue be pleaded as a discharge of the cause of action; if not, what is its effect? Is there any exception to the rule that a right of action once suspended is gone forever?

2. Where goods are obtained under a colour of a purchase with fraudulent intention of never paying for them, what remedies are open to the vendor?

3. Can a contract sufficient to satisfy the Statute of Frauds, be collected from several distinct documents, and can the connexion between them be shewn by parol evidence?

4. In what cases will the principal be liable for the negligence of his agent?

5. Mention some cases in which a master will, and some in which he will not, be liable for goods purchased on his credit by a servant.

TAYLOR ON EVIDENCE.

1. What papers is an attorney justified in refusing to produce under a *subpœnâ duces tecum?* If he refuses, and is not compelled by the judge to produce the papers asked for, can the party requiring them give secondary evidence of their contents; if not, what further steps must he take before he can do so?

2. State some cases in which a notice to produce is not necessary for the purpose of making secondary evidence admissable.

3. Is a witness who refuses to answer a question on the ground that it may criminate him bound to show how his answer would have that effect? Give your reasons.

4. When a written receipt has been given is oral evidence of payment admissible, and why?

5. To what extent is it permitted to give evidence impeaching the character of a witness, and what is the proper form of question for this purpose?

6. In what cases, and of what facts, is a dying declaration admissible evidence?

7. Is it necessary to object at all, and if so, to what extent, to inadmissible evidence tendered at Nisi Prius, in order to be allowed to make the reception of each evidence a ground for a new trial?

PRACTICE AND STATUTES.

1. Is there in Upper Canada any and what statutory enactment as to purchasers seeing to the application of purchase money?

2. What statutory powers has the Court of Chancery in Upper Canada over the real estate of infants and lunatics?

3. From what time does the Statute of Limitations run against a *cestui que* trust asking relief in equity against a sale of real estate by an express trustee in breach of trust?

4. Can the Statute of Frauds be taken advantage of in equity in demurrer to the bill? Can the Statute of Limitations be so taken advantage of?

5. Is the mis-joinder of co-plaintiffs an objection for which a bill will be dismissed at the hearing?

6. From what office can writs of summons in local and transitory actions respectively be issued?

7. Can an equitable defence be set up at common law in an action of ejectment, or in a case stated for the opinion of the court, without pleadings? Give your reasons.

8. What is the effect of the marriage of a woman plaintiff or defendant during the progress of the suit?

9. When a verdict is taken subject to arbitration, what is the method of enforcing the award?

10. Within what time must a rule enlarged from a previous term be mentioned to the court to prevent its lapsing?

11. In what cases can the court make a compulsory reference to arbitration, and at what period of a suit?

EXAMINATION FOR CALL WITH HONORS.

JUSTINIAN'S INSTITUTES.

1. To what persons were curators appointed; and by whom was the appointment of a curator made?

2. What were "Servitudes?" Mention some of the principal real servitudes. How were they created?

3. Give a definition of the right of "Usufruct" in the Civil Law. How was an "Usufruct" created? How determined, and what things could have been made the subject of this right?

4. What was the enactment of the Falcidian Law?

5. On what ground could a "*donatio inter vivos*" after it had been completed, have been revoked by the donor.

6. Where several "*fide jussores*," or sureties, were bound each for the whole debt, could the creditor enforce payment of the whole from any one? If one of several "*fide jussores*" so bound for the whole debt, voluntarily paid the whole, could he enforce contribution from his co-sureties? Give reasons for your answers.

7. What was "*novation?*"

8. Was a contract of sale, by which it was agreed that the price should be fixed by a third person, good in the Civil Law; and what was the consequence if the person to whom the question of price was referred, refused or became unable to fix it?

9. Could a mandatory or agent, after having accepted the office, renounce the performance of the duty delegated to him?

COOTE ON MORTGAGES.

1. From what dates does the Statute of Limitations run against a mortgagee out of possession?

2. Will the Court of Chancery in any, and what case, in taking an account against a mortgagee in possession, take it with annual rests?

3. Blackacre and Whiteacre are by separate deeds, at different dates, and for distinct debts, mortgaged to A., subsequently the same mortgagor mortgages Blackacre alone to B.; can B. redeem the mortgage on Blackacre without also redeeming that on Whiteacre?

4. What is the remedy given to an equitable mortgagee, who not being able to maintain ejectment, is desirous of applying the rents and profits in reduction of his debt?

DARTS' VENDORS AND PURCHASERS.

1. After the conveyance has been executed, can a purchaser, upon discovering a defect of title, in any case, obtain relief either

at law or in equity otherwise than by action upon the covenants for title.

2. Will the Court of Chancery in any, and what cases, set aside a sale of lands for inadequacy of price only?

3. Does it follow that because a court of equity refuses specifically to perform a contract, that it will rescind it?

4. What is the effect of a registered judgment as a charge? What interest in real estate does it bind?

5. What must be shewn as to a title to induce a court of equity to compel an unwilling purchaser to take it?

JARMAN ON WILLS.

1 Give a definition of the rule against perpetuities.

2. Under a devise of lands to A. and his children, A. having no children either at the date of the will, or of the testator's death, what estate does A. take?

3. What is the rule by which to determine whether or not a devise to a person in trust for another, gives the legal estate to the person named as trustee?

4. In what cases is parol evidence admissible to show the intention of a testator? Give instances.

5. In what cases are cross-remainders implied in a will? Give examples. Is there any difference between the construction of wills and deeds as to the implication of cross-remainders?

6. Explain the doctrine of constructive conversion?

WATKINS ON CONVEYANCING.

1. In whom does the legal estate vest if on a conveyance by bargain and sale, a use is limited to a person other than the bargainee? Give the reason for your answer.

2. What is a power simply collateral? What a power in gross? Give instances of each.

3. Of what property is a deed of "Grant" the appropriate form of conveyance at common law?

STORY ON PARTNERSHIP.

I. Give a definition of partnership, and illustrate the rule that partnership is a *voluntary* contract.

2. Where the same person is a partner in two different firms, can one of such firms sue the other? Will this rule affect the rights of the holder of a note or bill made by one of such firms to the other, and endorsed over? Give your reasons.

3 In what cases will a person be liable as a partner to third persons, when he is not an actual partner?

4 Has one partner in the business of an attorney the power to bind the firm by bill or note? Give your reasons.

5. Is the absence of an express stipulation between the parties conclusive on the question, whether a partnership is at will or for a definite period?

6. State some of the distinctions between the rights of a partner and a part owner of a chattel.

7. Where there are running accounts between a firm and a customer, how will the ordinary rule of law, with regard to appropriation of payments by such customer, affect the liability of a retiring partner?

RUSSELL ON CRIMES.

1. What is the distinction between a principal in the second degree and an accessory; in what cases there be no accessories?

2. Is a married woman liable for crimes which she commits in the presence of her husband, and why? Does not the rule apply to all crimes? If not, state the exceptions.

3. Give a definition of larceny. Is *lucri causâ* a necessary ingredient; at what time must the *animus furandi* exist to constitute the conversion of goods found a larceny.

4. What is the presumption of law as to the age at which a person is responsible for crime?

5. Mention some cases in which homicide is justifiable, and some in which it only amounts to manslaughter.

6. Define the crime of burglary. What is considered night for this purpose; does this depend on common law or statute?

7. If a prisoner is acquitted on the ground of insanity, how should the verdict be returned, and what is the effect of such finding; is the question of insanity ever raised before plea?

8. If a servant is entrusted with property by his master and converts it, is this larceny or embezzlement? Give your reasons.

STORY'S CONFLICT OF LAWS.

1. Give the definition of the term "Domicil," and state some of the principal rules to be applied in determining the question of "Domicil."

2. By what law is the validity of a will of personalty to be determined, where the property bequeathed is situate in one country, the domicil of the testator being in a different country, whilst the will is made in the third?

3. Can an action be maintained in Upper Canada on a contract void under the Statute of Frauds, but made in a foreign country, by the law which it is valid? Give reasons for your answers.

4. What is essential to make a foreign judgment an estoppel by the law of England? Give a short outline of the law of estoppel by foreign judgment.

5. Supposing a debt, not transferrable by the law of Upper Canada, contracted in a foreign country, and there assigned over by the creditor to a third person, who by the law of the foreign country could maintain an action as such assignee in his own name, who would be the proper person to sue in Upper Canada for the recovery of the debt?

6. Would a child born before marriage in Scotland, whose parents afterwards married, be considered legitimate in England? Give your reasons, and state how far the laws of England is governed in cases of legitimacy by the law of the country where the birth takes place.

7. Are there any, if so, what exceptions to the rule, that a marriage is valid in England when valid according to the laws of the country where is was celebrated?

JURIDICAL SOCIETY.

(From the *Solicitors' Journal and Reporter.*)

The Lord Chancellor, on last Monday evening, as President of the Juridical Society, presided at its usual bi-monthly meeting, when Mr. Lewis, Q.C., read a paper upon the law regulating the prosecution of Blasphemous Libels; after which a discussion of more than ordinary interest took place. There was a very large attendance of members, including several judges and Queen's Counsel.

Mr. Lewis, in his paper, after referring to the delicacy of the inquiry, apologised for introducing it to the society, on the ground that the law in reference to it had been assailed by able men in violent terms as incompatible with that freedom of opinion which ought to prevail in a free country. Having given examples of the kind of speaking which the law held to be blasphemous, he remarked that such blasphemy was indictable, under both the common and the statute law, the malice of the person uttering it being assumed as an essential ingredient of the offence. Formerly, nonconformity and heresy were indictable by statute, but that law had been repealed, and that being the case he was ready to maintain that there was not anything prejudicial to free opinion in the state exercising its power to protect the Christian religion from ribald and scurrilous attacks.

The learned reader then proceeded as follows:—

We have now ascertained the mode in which the law of England deals with the three leading classes of occurrences, in which blasphemy may present itself. That law we find in each case to have the purely practical aim of protecting what, *rightly or wrongly*, in regard to religion, it deems the essential interests of society at large, or of individuals specially in need of, and entitled to claim its protection.

"*Rightly or wrongly*," I say; for the question has been started, whether this interference is right or justifiable? Whether society or the law has any function to examine what is irreligious, or to make irreligion a crime? It is said to be

each man's right *et sentire quæ velit, et quæ sentiat dicere;* and that the law oversteps its rightful limits when it annexes a punishment to profane speech. A claim is put forward, which I will state in the precise words of one who has made himself most conspicuous in denouncing this portion of our laws. Mr. Buckle, the well-known author of what at first appeared to be a promising treatise on "Civilisation in England," put forward this proposition:—"It should be clearly understood that every man has an absolute and irrefragable right to treat any doctrine as he thinks proper; either to argue against it, *or to ridicule it.* If his arguments are wrong, he can be refuted; if his ridicule is foolish, he can be *out-ridiculed.*" "Every species of attack is legitimate." Again: "Any punishment inflicted for the use of language which does not tend to break the *public peace,* and which is neither seditious in reference to the *State,* nor libellous in reference to *individuals.*" is "simply a wanton cruelty." And once more, he puts the proposition in the form of a question, thus:—"Is it proper that law, or public opinion, should discourage an individual from publishing sentiments which are hostile to the prevailing notions, and are considered by the rest of society to be false and mischievous?" In other words, our objectors say, *Deorum injuriæ, diis curæ!*

Here, then, is the problem which it is my object to submit for your consideration. Here is the issue which remains to be decided by the educated mind of the country, and which it especially befits us, as jurists, to aid in the determination of! The protest against the existing law is made not by Mr. Buckle only, but also by a writer of even higher repute and consideration—Mr. John Stuart Mill, whom, in fact, as respects this question, Mr. Buckle only *followed* in order of time; but whom he has far *outstripped*—if I ought not rather to say, *contrasted* with himself—in the intemperance of the remarks which he has published on the subject, and the unjustifiable mode in which, in his eagerness to heap abuse upon the law, personal character has been traduced by him.

It is wholly impossible, in a discussion of this subject, to omit noticing the particular case which has given this question more immediate prominence among the public disputations of the day. It is invested with special interest to us, *as lawyers,* because it is the first occasion in the long period which has elapsed since society assumed its present settled and refined condition, that the administration of justice, by one of the first class of judicial functionaries, has been openly alleged, by persons of education, to have been designedly perverted to the purposes of oppression. It is also invested with interest for every one who is concerned for the character and honour of our highest *literature;* in that we find, how even a cultivated intellect may surrender itself to prejudices, under the influence of which it may be guilty of the breach of every imaginable literary propriety, and of even the commonest decencies of social intercourse.

[The learned reader here detailed the particulars of Pooley's case, and the attack of Mr. Buckle on Sir John Coleridge, in reference to it; animadverting, in strong terms, on the spirit manifested by Mr. Buckle in that attack, and the mode in which he had conducted that controversy.]

Has then the law a right to restrain offensive attacks on religion.

"*No!*" says the lover of liberty; "OR," he says, "IF you interdict the use of such weapons, interdict them equally *on both sides.* Restrain the employment of vindictive, sarcasm contumely, and other intemperate means against irreligious opinions, if you forbid their use in opposition to the prevailing that is, the Christian opinion." This ground is taken by Mr. Mill and others. Mr. Mill says, "If it were necessary to choose, there would be much more need to discourage offensive attacks on *infidelity* than on *religion.* It is, however, obvious that law and authority have no business with restraining *either.*" So, it is asked by an anonymous writer, as to "those who would punish blasphemy because it is offensive to believers, will they similarly punish believers for language offensive to those of other creeds, with equal virulence and wilfulness?"

Now it would be mere disingenousness, a mere evasion were I to profess myself satisfied with the *alternative* offered of an equality of treatment to be extended to the defamers of *Christianity,* and the *supposed* defamers of *unbelief.* I shall not shelter myself under any such compromise! Part of my argument, indeed, will be, that there is nothing in unbelief to defame! It is plausible, but utterly false (as I shall hope to show), to assume that there is room, or material, here for any *bargain.* The man who rejects religion has nothing to offer which can entitle him to put the Christian *under terms.* There is no subject matter for an *exchange!* The offence (supposing the fact of an offence to be established), is *all on one side.* How can any one *defame infidelity,* which, in its very nature, abjures all claim to veneration, and which says, "Let us eat and drink for to-morrow we die!" Its own description of itself confesses that there is *no sacrednsss* in it to *desecrate.* It may be arguable theoretically whether Christianity is or is not true, and the unbeliever is not sought to be precluded from denying its truth; but if I establish, as I hope to do, that Christianity may, for certain limited purposes, be treated by the State as it would be were it certainly known to be true, then we must take *its own description of itself,* and, according to that description, it offers sanctions with which *disbelief* has nothing to compare,—against which it has nothing to *set-off*; sanctions which are of such a nature that an attack upon them *may* be indecent—may be *profane*; sanctions, moreover, which being profaned, there is no longer *even equality* (as I shall show), for Christian opinion (that equality which the unbeliever himself insists on), but a gross *inequality,* to the unfair hindrance and disparagement of those opinions.

The arguments which establish, as I conceive, the right to visit blasphemy with legal penalties, are of *two* kinds. *One* class of arguments is derived from the essential nature of Christian doctrines, and the intrinsic difference between their sanctions and those of infidelity (if the latter can be said to claim any sanctions). In other words, from the very nature and character of Christian opinions, they occupy, in regard to protection from the State, a preferable position to disbelief. The *other* line of argument is either historical, or bases itself on existing facts.*

Before submitting to you the arguments that have occured to me, there are certain *admissions* which may be most readily and unhesitatingly made, and which will assist in clearing the ground of the controversy.

Thus, I need hardly say, I admit that a human being is not accountable to *others* for his religious belief. I admit that, as between man and man, or between man and society, each individual for himself is entitled to "absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological." I admit that this complete liberty belongs to all, whether Christians or not. I admit that the "only part of the conduct of any one, for which he is amenable to society, is that which concerns *others.*"

The right which the law asserts, therefore, is not a right to *persecute* any opinion. Beyond even this, it is not a right to *inforce* any opinion. It is not a right to *prohibit* any opinion. It is not even a right to prohibit the *publication* of any opinion *as an opinion,* provided there be decorum and respect. It should, therefore, be clearly understood that it is altogether inappropriate to adduce in the present argument such examples as that of the Mussulman not permitting pork to be eaten, or the Hindoo beef; Spain prohibiting Protestant worship or a married clergy; the Persians forbidding temples; the Puritans

* I need hardly say that in using the term "Infidel" or "Infidelity," I adopt the term merely as a convenient form of expression, without the slightest intention of inflaming prejudices or affixing any stigma.

denying wordly amusements; or the Socialists disallowing the appropriation of more than a ratable or sufficient portion of wealth.

The line of argument which I first venture to submit, is derived, as I before said, from the very *nature* and character of Christian opinions. The essence of the Christian's faith—as we all know—is God, a future state, a revelation, sin, redemption, and a final judgment Now, I admit that, in so far as we claim a right to punish the ridicule of Christian tenets, on the ground of their divine character, we deny Mr. Mill's theory of the perfect equality of opinion in the just view of liberty, and assert or insist on the soundness, or the right to assume the soundness, of our own as against those of the infidel, though we claim no right to *persecute* or be *intolerant*. If the law cannot take cognizance of the fact that Christian opinions have, or claim, Divine sanction, it cannot, on the mere ground of their alleged orthodoxy, deem the irreverent aspersion of those opinions a crime; or supposing that the law could so treat it, then, upon the hypothesis I have mentioned, it must equally punish any contumely of the opinions of the infidel.

This, then, is the position of the argument:—There is no attempt to proscribe freedom of opinion, as such; and for the purpose of the enjoyment of that freedom, it is agreed to be assumed, that the opinions commonly deemed orthodox *may* prove *wrong*, and those of the unbeliever sound. But, when the greater license of derision and reproach is claimed, those who refuse to concede it, rely, though not exclusively, on the assumption that there is something in the protected creed which the State is at liberty to take notice of, as entitling it to that protection, and that in this respect the creed of the infidel cannot be treated as on a level with it. Undoubtedly, then, I am concerned to show that the sanctions of Christianity are matters which the State, *i. e.* the nation at large, may, for some purposes of police, inform itself of, without unduly infringing on what all allow to be the just liberty of opinion, and, therefore, of infidelity.

I shall desire to consider this question in a manner and on grounds strictly logical, without calling in aid matters of *feeling* and *sentiment* which, however legitimate, and even necessary in a *Christian* view, *opponents* could not be expected to share in.

Now one thing, at all events, it may be expected the objector to our laws against blasphemy will concede:—The questions involved in religion *may* be of eternal moment. *His own* proposition is, that we can never be sure of our opinion being a sound opinion, or another's a false one. He says, that we cannot call any proposition certain, because we are not the judges of certainty. He says that creeds fluctuate, and that we find an improvement in the character of successive creeds. Now, this being his own view of opinions generally, he will admit that the Christian *may* be right, when he declares that religion is of eternal moment, and that Christianity furnishes the means of knowing what are the obligations, what the perils, and what the rewards of religion.

It is therefore, a fact, which no license of opinion can dissemble, that a most serious, indeed, an awful choice, is presented when the rival opinions are Christianity on the one hand, and infidelity on the other. To say that this is a case merely of *opinion against opinion* is deceptive. Granted, for the purpose of argument, that *either* may be true yet there is this difference—the one *offers* nothing, *entails* nothing, involves no risk of *losing* anything: it is a simple *negation*, and presents a mere *blank*:—the other *warns*, *promises*, and holds out *consequences* of *never-ending* importance to every one to whom the choice is tendered.

Now, does it not flow from this, that the treatment which the mass of opinion ought to receive, must be such as is suitable to the more complicated, as well as to the simplest, of the two sets of opinions—in other words, ought to be measured by the conditions of that opinion which involves *responsibility*,—which professes to involve loss, deprivation, perdition; and not merely of that which claims to produce no sanctions, and entail no consequences.

The two sets of opinions, in other words, exist under altogether different conditions. There is an atmosphere in which the one set of opinions could not *live* even as *opinions*, which, nevertheless, would be quite compatible with the vitality of the other set of opinions. *Reverence* is essential to the one, but it is altogether *indifferent* to the other. What, then, does the very liberty of opinion itself require, on which the objector prides himself? It requires that these several rival opinions should be allowed to exist under conditions suitable to each. It is not equality, not liberty, to deny to the more complicated opinion any other range of existence or of action than that which suffices for the balder one.

This being so, the State rightly enough, is called upon to take notice of each of these rival sentiments, and to allow them due play. It learns, therefore, the nature of each opinion, and the sanctions which it claims for itself. It is called upon to take care not to interfere unnecessarily with the propagation or action of either set of opinions. It agrees to do this. It sees the tremendous seriousness in particular of the Christian opinion, according to its own description of itself. It at once acknowledges that, seeing what Christian opinions are, both the ordinary liberty of opinion, and the very nature of those opinions in themselves, require that they should enjoy a reverent medium of communication with the public. It acknowledges that *irreverence* conflicts with what is of their very essence and is fatal to their free action as opinions.

But the State has a more special duty even than this. The great bulk of the community are in a condition which entitles them to *protection* on the part of the State. The great mass are composed of the *young*, the *ignorant*, and the *poor*. Towards these classes, the position of the State is this:—It is bound to take care that those opinions, between which they are to choose, shall come to them, or have the means of reaching them, in their true character, without any illicit interference or poisonous adulteration. Especially must this be so with regard to that particular set of opinions which are alleged to carry in their train eternal consequences of good or evil. Shall these be prevented from finding access to the poor, the ignorant, and the young, in their true garb, and with the freedom and purity which their own nature requires?

Now, how is it consistent with the fair and free action of religious opinions upon those who are unprotected, and not of sufficient intellectual or social strength to cast off all illicit influences, to allow those religious opinions to be publicly ridiculed and held up to scorn? Where is the liberty of opinion? where the fairness? where the equality? if unbridled irreverence stalks abroad to bias and prejudice and intimidate the weak and the unweary. Irreverence and contempt, be it observed, involve not merely an improper prejudice against Christian opinions, but poison the very atmosphere of those opinions. The spirit of ridicule is itself destructive of the very conditions under which alone religious opinions can live merely *as opinions*. Christianity and irreverence are absolutely incompatible. And yet, irreverence cannot pretend to be an *opinion*. It cannot shelter itself under a claim to be treated, itself, as an independent *opinion*.

Perhaps to this it may be answered, that persons need not be affected by the ridicule or the scoffing *unless they like*, and that there is no harm in leaving them to feel and do as they *like* in this respect. But to this again I answer, that the common mass of the people are not those who know and understand all that can be said *on both sides*. It cannot be expected that they *should* do so. The common mass are the weak and the unprotected, and no state of the world can be anticipated, in which people generally shall be able to erect a *barrier for themselves* against irreverent influences, by first critically ex-

amining all that has been written and said *for* and *against* the Christian faith.

I contend, then, that since Christianity *may* be true (which is all that I ask the infidel to allow); that since, it true, its behests are of everlasting moment to every one; that since, irreverence and ridicule are conditions inconsistent with the very nature of Christian opinions, and incompatible with their just action *as opinions*, it is the right and the duty of the State, not by *infringing* upon liberty of opinion, but on the contrary, in *pursuance* of it, and for securing it, to punish the licentious scoffer, and declare blasphemy a crime.

Let me, in conclusion of this view of the question, remind you of the touching language of Lord Erskine in *Williams'* case. Speaking of the blasphemous publication, "Paine's Age of Reason," he says,—"It strikes at the best, and sometimes, alas! the only refuge and consolation amidst the troubles and afflictions of the world. The poor and humble, whom it affects to pity, may be stabbed to the heart by it. They have more occasion for firm hopes beyond the grave than the rich and prosperous, who have other comforts to render life delightful. I can conceive a distressed, but virtuous man surrounded by his children looking up to him for bread, when he has none to give them; sinking under the last day's labour, and unequal to the next; yet still (supported by confidence in the hour when all tears shall be wiped from the eyes of affliction) bearing the burden laid upon him by a mysterious Providence which he adores, and anticipating with exultation, the revealed promises of his Creator, when he shall be greater than the greatest, and happier than the happiest of mankind. What a change in such a mind might be wrought by such a merciless publication!"

Another consideration which more properly belongs to this line of argument, than to the succeeding one, though perhaps in strictness to neither, arises from the particular circumstance that the great majority of people in this country profess the *Christian* religion. As individuals, they being Christians, cannot but acknowledge the duty of holding in veneration God and the Bible. Now, the question which I would ask is, whether they are released from this obligation because they have aggregated themselves into a state—because they are a corporation, and not units? It is, of course, conceded, that all the members of the corporation are not Christians by profession; and those I need hardly say, who are not such, we do not address in this argument. Further still, I admit that, if it were a question of *prohibiting* or *enforcing* opinions, then against those rejecting them we could make no use of the fact that the majority are Christians. But, persecution and intolerance, which are no weapons of Christianity, being out of the case, what answer is there to the suggestion that the same duty rests upon the aggregate of Christians which is acknowledged to bind them individually? How can their association in the same community with unbelievers exonerate them from performing the duty which rests upon themselves as Christians, and the performance of which, by the hypothesis, involves no breach of the just liberty of the dissentients. How can the mass who accept the Divine injunction, "at the name of Jesus every knee shall bow," allow a public and (what they must admit to be) a profane desecration of that name to go unrebuked, and that too under the tacit sanction of their own laws, merely because there are some *allied* with them in the State who *disavow* the Christian injunction, but whose liberty of opinion is not infringed by enforcing it?

Let me now proceed to those considerations which are of a mixed character, and represent *worldly* rather than *religious* interests; *secular* rather than *religious* considerations. Is the State entitled to repress blasphemy upon the basis of a foregone conclusion, that atheism or infidelity is publicly pernicious, apart from any consideration of the precise nature of Christianity?

I shall here assume (what no doubt has been denied) that some opinions may be treated as necessary to civilization; and that as regards the State, so long as there is no persecution, the usefulness or expediency of particular opinions, and not their truth merely, may be taken into consideration. It cannot be necessary when a given emergency presents itself, and the State must, in that emergency, act one way or the other, that the State should know, with infallible certainty, that its opinions on the abstract question are right. But then it is said, when we claim to look at expediency or usefulness, that even the usefulness of an opinion is itself matter of opinion! What then? Is the State to *stand still, and do nothing*, in all matters that can be deemed *matters of opinion*, because the truth or usefulness of the opinion may be debated? It would be idle to treat such a contention as entitled to any serious attention, were it not that such a notion seems to be countenanced by recent writers of great ability.

Now, what I am contending for is, that the state may adopt and act upon the opinion that Atheism is publicly and nationally pernicious—that when Atheism assumes the form of blasphemy it may be punished—and that, so to treat it, involves no violation of true liberty of opinion. The answer is, that the nation, *i.e.*, the majority, cannot, without assuming infallibility, be *sure* that Atheism is *not right*. Supposing this to be granted, is it meant that, until the certainty is obtained, all practical interests affected by the question are to be left to take care of themselves? Is history, is experience, is example, to be disregarded, so far as it warns us against infidelity? Is *Government to fall to pieces—the fabric of society to totter—so* far as they have been reared and built up of Christian materials, because as yet there is no one and no Government that can oracularly assume infallibility?

Now, this dilemma is expressly stated by Mr. Mill in his book on Liberty, and it is worth while to notice how explicitly he puts it. I claim the full benefit of the objection as he himself supposes it.

After arguing that all opinions are equally liable to the risk of error, he supposes som: .e to object thus:—

"There is no greater assumption of infallibility in forbidding the propagation of error than in any other thing which is done by public authority, on its own judgment and responsibility. Judgment is given to men that they may use it. Because it may be used erroneously, are men to be told that they ought not to use it at all? To prohibit what they think pernicious is not claiming exemption from error, but fulfilling the duty incumbent on them, although fallible, of acting on their conscientious conviction. If we were never to act on our opinions because those opinions may be wrong, we should leave all our interests uncared for, and all our duties unperformed. An objection which applies to all conduct can be no valid objection to any conduct in particular. It is the duty of Governments, and of individuals to form the truest opinions they can; to form them carefully, and never impose them upon others unless they are quite sure of being right. But when they are sure (such reasoners may say) it is not conscientiousness but cowardice to shrink from acting on their opinions, and allow doctrines which they honestly think dangerous to the welfare of mankind, either in this life or in another, to be scattered abroad without restraint. Because other people, in less enlightened times, have persecuted opinions now believed to be true, let us take care, it may be said, not to make the same mistake; but governments and nations have made mistakes in other things, which are not denied to be fit subjects for the exercise of authority: they have laid on bad taxes; made unjust wars. Ought we therefore, to lay on no taxes, and under whatever provocation, make no wars? Men and governments must act to the best of their ability. There is no such thing as absolute certainty, but there is assurance *sufficient for the purposes of human life*. We may, and must, assume our opinion to be true for the guidance of our own conduct; and it

is assuming no more when we forbid bad men to pervert society by the propagation of opinions which we regard as false and pernicious."

One would have hoped the difficulty, being thus candidly noticed, would have received a full and satisfactory solution. For myself, however, I must declare that, having carefully examined the book several times, with the anxious desire to learn what is the explanation of the difficulty which Mr. Mill would give, I have been quite unable to find any answer whatever to the objection, either in form or substance, in any part of the book.

Let me, then, shortly state the general grounds on which the law, as I conceive, may claim to punish those who revile religion, apart from any consideration of the special character of our religion, and even though those grounds form but matters of opinion :—

1. The whole existing fabric of the constitution and Government in this country is identified with religion ; and to hold up religion to scorn is to attempt undermining the foundations of the constitution and the Government. The monarch, on his accession swears to maintain the Christian religion ; and, as it has been well said, "the whole judicial fabric, from the King's sovereign authority to the lowest office of magistracy, has no other foundation than the oath that has been taken. The whole is built, both in form and substance, upon the same oath of every one of its ministers to do justice as God shall help them hereafter. What God? and what hereafter?"

2. The standard of morality in this country is the Christian standard. The Bible is the highest sanction of our morals, and Christ the great Teacher of them. True, this is not so in the estimation of unbelievers ; but the question nevertheless still presents itself, what has hitherto been the basis of those rules of right and wrong which, as a civilised people, we have heretofore recognised in our social and political intercourse? It may be that, as matter of fact, with the national Christian example before them, infidels, in ordinary life, conduct themselves morally as Christians are accustomed to do. But does this necessarily show that the standard morality would be preserved to us if there were merely an atheistical basis? This point has been so forcibly put by one of the controversialists, whom Mr. Buckle's attack has brought forward, that I shall only run the risk of enfeebling the argument by giving it in any other words than his own :—

"But it by no means follows that, because they or any other individuals are not often directly affected by the standing sanctions of morality and religion, those sanctions can be safely dispensed with ; or that, because in them Atheism is, in the existing state of society generally, consistent with morality, and even with a sort of philanthrophy, it is not essentially immoral and destructive of all that is valuable in life. The truth is, the good qualities which, in a certain state of society, are consistent with *Atheism*, owe not only their force, but their very existence to *religion*. After a nation has lived for many centuries under the influence of Christian modes of feeling, the standard of morality in ordinary men, who are almost entirely the creatures of habit, is so high, that they fancy that it exists in virtue of eternal *self-evident* principles, which would be acknowledged by all mankind as soon as they were understood, and not in virtue of a long course of external influences, which, in the lapse of centuries, have moulded not only the modes of thought and feeling, but the very language and principles of thought of the nations, which have been exposed to them. It is idle for any man in the present day to try to separate himself from Christianity, and to say,—"Though I am not a Christian, I think so and so." In fact, he is a Christian in many respects, and he cannot cease to be one, however much he may wish it. He might just as well try to cease to be an Englishman." And again :—"If atheistic habits of mind were ever to become so general as to model thought and language, and to cease to be remarkable from their peculiarity, what sort of society should we have? Would people in general continue to be amiable, self-denying, and philanthrophic, or would they not act on the principle of eating and drinking, for to-morrow we die?"

3. Viewing the position of religion historically, whether as regards our own country or others, is not the State warranted in protecting religion from insult? Has not civilisation here grown and prospered hand in hand with the Christian religion? nay, rather under the shelter of it? Not relying, however, on affirmative experience alone, let us advert to the fatal example which negatively history likewise furnishes. If we wish to learn the fate of a country of scientific morals, but without religion, let us turn to China! It has been well said, that in all the world there is no more terrible or instructive example of the practical results of looking upon men as mere passing shadows, who have no superior and no hereafter.

4. Is it not clear, that as matter of public *decency*, blasphemy is rightly declared criminal? Do not the feelings of the mass of the people constitute a definite class of *interests* which may give the State jurisdiction when open blasphemy offends those feelings? The bulk of the nation consists of professed Christians. Their feelings as such, when no persecution of unbelievers is involved, constitute *rights*, which the infidel may be held bound to respect, without at all infringing upon his reasonable liberty. The conduct of the man who asperses religion affects a definite interest of all those to whom the religion is dear ; and it cannot be shown to be justifiable as a fair exercise of his own religious liberty. Conceive the disgrace, the confusion, and the chaos, if every street furnished its carricature of the persons and events that make up the Christian history and creed!

Lastly. There is no injustice in punishing the blasphemer in respect of his offence being one of words merely, and involving no physical violence and no external inteference with the property or actions of others. Is there not a whole class of offences which, time out of mind, so to say, have been punishable by our English law, that, nevertheless, comprise no breach of the peace, and no physical or overt interference with others? In what sense is blasphemy a mere matter of opinion,—mere conduct affecting a man's self only,—which is not equally true of such offences as the following?—Publishing obscene prints? using obscene language ; speaking in contempt of the sovereign ; gaming, perjury, and Sabbath-breaking, or some instances of it?

I am, indeed, aware that our laws against some even of these offences have incurred the censure of recent writers on liberty. But I am well content if the law against blasphemy stands no more in need of defence than these other laws that I have mentioned.

We have now been occupied in considering the mode in which, in a free country, indecent or unfair attacks on Christianity may be dealt with by the law. Let us hope that, painful and repulsive as the investigation, in some respects, must have been, it may have served to remind some of us of the eloquent declaration of Lord Erskine in his speech on the prosecution of Williams for blasphemy. Speaking of Christianity, he says,—"It is at this moment, the great consolation of a life, which, as a shadow, passes away ; and, without it, I should consider my long course of health and prosperity (too long perhaps, and too uninterrupted to be good for any man), only as the dust which the wind scatters, and rather as a snare than a blessing!"

The Lord Chancellor observed that while he agreed with a great deal he did not agree with everything which had fallen from the learned reader. There could be no doubt that it was a very grave offence to speak scornfully or in terms of ridicule or insult of the Christian religion and he hoped it would ever continue to be one punishable by the law of England ; but the views of Mr. Lewis went further for he would direct the powers of the State to the prosecution, not only of Paine, but also against men like Gibbon and Hume ; but, as had been the

case with himself at the time he held the office of Attorney-General, the law officers of the Crown had to consider not only the character of the offence, but also whether it was prudent to prosecute it.

Mr. J. G. Phillimore, Q.C., characterised the arguments of Mr. Lewis as being those most frequently used in the cause of error, for, pushed to their legitimate conclusion, they would justify the revocation of the Edict of Nantes. The doctrine "parens patriæ," as acted upon by the Court of Chancery, was a gross usurpation; and with regard to the Shelley case, although he would not select him as the tutor of his children, the very last person he would select to fill that office was Lord Eldon himself. He thought Christianity ought to spurn being defended by weapons which were taken from the armory of error.

The Hon. Baron Bramwell complained that Mr. Lewis had made use of negative terms, such as infidelity and heresy, which were correlative of something positive, which he had omitted to define. What he considered truth and orthodoxy would in Constantinople be held as blasphemy, which the state was under an obligation to repress and punish. For his own part he would, as a general principle, severely punish any one who would indulge in indecent or ribald attacks upon the religion of any sect, no matter how few might be its members.

Mr. T. Chambers, the Common Serjeant, observed, that Mr. Lewis's views were misunderstood, and, instead of being at variance with those expressed by the learned Baron, were identical with them.

The Attorney-General, in moving the adjournment of the discussion, said that Mr. Lewis did not intend to give his paper a general application, but confined it to the law of England. With regard to matters of religion, the duties of the State were of a completely negative character, as it could neither teach religion nor enforce morality. With regard to the Toleration Act, it was inapplicable in practice, and as such had fallen into desuetude, for it related only to those who had been educated in the Christian religion, a limitation which rendered it a nullity in practice. With regard to the interference of the Court of Chancery in the case of Shelley's children, there was a great deal of misunderstanding. It was not because their father was an unbeliever in Christianity, but because he violated and refused to acknowledge the ordinary usages of morality.

The motion having been agreed to, the thanks of the society were, on the motion of Baron Bramwell, seconded by Vice-Chancellor Stuart, voted to the Lord-Chancellor, for his kindness in attending, and the proceedings terminated.

DIVISION COURTS.

CORRESPONDENCE.

NORFOLK Co., February 16th, 1860.

To the Editors of the Law Journal.

I find that the several Division Court Clerks in this County, differ with me on what I construe to be very plain. And I thought, perhaps your opinion might set them or me right.

I maintain, according to the wording and intention of the Act, that it does not require the plaintiff, in suing, to furnish his account in duplicate, although it is customary to do so, and the custom is established upon the impression that the law requires it. I really cannot see how there can be two opinions on the subject. The 35th section of the Division Court Act says, "The plaintiff or defendant, respectively, shall furnish the Clerk with the particulars of the plaintiff's claim, or demand. And the clerk shall annex the plaintiff's particulars to the summons, and *he shall furnish copies thereof.*" Then again, what is meant by the 74th section, which says, "The plaintiff shall enter with the Clerk, a copy, and if *necessary*, *copies* of his account, claim, or demand?" Now I cannot imagine any case wherein it would be *necessary* to furnish copies; except it means where two or more persons are joined in one action. Furthermore, in the tariff of fees for Clerks, they are allowed ten, fifteen, and twenty cents, in proportion to the amount, for furnishing particulars of demand or set-off. There is nothing, so far, that goes to show that in any case, claims or set-offs are to be furnished in duplicate.

Yours &c.,

A DIVISION COURT CLERK.

[We quite coincide in the opinion above expressed by our valued correspondent. It is the duty of the *Clerk* to furnish a plurality of copies when required.—EDS. L. J.]

KINGSTON, January 30th, 1860.

To the Editors of the Law Journal.

GENTLEMEN,—I send a statement of proceedings had in the First Division Court, in the United Counties of Frontenac, Lennox, and Addington, under the authority of the "91st clause," during 12 months ending 6th October, 1859.

You will perceive that the amount collected, is nearly 25 per cent. of the total amount claimed; that the amount of suits "settled by parties" or "withdrawn," is about 39 per cent. of the total amount claimed; and that the amount of suits "remaining unpaid," is about 36 per cent. of the total amount claimed. From this it may be interred, that between 50 and 60 per cent. of the amount sought to be recovered, has been rendered available to the plaintiffs. There is little doubt that 75 per cent. of the amount of suits marked, "Settled between the parties, &c.," has been paid or secured in some other way.

I have ascertained from the Jailer, that the number of persons committed to Jail under the 91st clause, from the several Division Courts of the United Counties of Frontenac, Lennox, and Addington, during the year 1859, was 13. Number of days in Jail, 155; average for each prisoner, about 12 days.

From these facts and figures, it will be manifest that the law, as it stands, is a beneficial one, and mercifully administered in these Counties. Were it not for the existence of such a law, not a cent of the money above mentioned, would I believe, have ever been paid. I also believe that a considerable portion of the proceeds of Division Court suits, now paid without recourse being had to the "91st clause," would be withheld, were it not that the parties know that there is a sure method of enforcing payment.

I am also of opinion, in common with every person with whom I have had an opportunity of conversing on the subject, that if the "91st clause" be rescinded, the efficiency of the Division Courts will be much impaired, and that any benefits which may accrue to individuals in consequence of their being exempted from the payment of their just debts, will be more than counterbalanced by the injury which will, in such cases, be inflicted on the public.

Respectfully yours,

A. BURROWES,

Clerk of 1st D. C., F. L. & A.

Memoranda of proceedings had in the First Division Court, Frontenac, Lennox, and Addington, under authority of 91st clause Division Court Act of Upper Canada, from 6th October, 1858, to 6th October, 1859—1 year.

	No.	$ c.
1. Number of Judgment Summonses issued.....	144	...
2. Amount sought to be recovered..............	...	5,110 07
3. Number of Orders of Commitment made.....	64	...
4. Number of Warrants of Commitment issued.	57	...
5. Number of persons committed...............	7	...
6. Number of days in Jail........................	96	...
7. Average for each prisoner, days, about......	14	...
8. Amount of money paid to Clerk..............	...	1,225 24

9. Collective amount of Judgment suits in which proceedings were "stayed by plaintiffs," or which were "settled between the parties," or in which no further action was taken in consequence of want of orders from plaintiffs..........	... 1,997 67
10. Amount of Judgment suits in which the money remains unpaid..........	... 1,887 16

[One grain of testimony such as the above, is worth more than all the political clap-trap of a session. The evidence in support of the 91st clause, is not only satisfactory, but almost universal. The measure itself is a wise one, and if properly administered, a beneficial one. It is a *libel* upon the County Judges of Upper Canada, to say that it is not so administered. Facts are "stubborn chiels." In support of the 91st cluse, it is unnecessary to do more than refer to the facts monthly disclosed in the *Law Journal*, by the publication of letters, such as the above, from intelligent Division Court Clerks.—Eds. L. J.]

TO CORRESPONDENTS.

We have carefully perused the long statement of grievance furnished to us by Mr. Marcus Gunn.

It does not seem to us, that he suffered injustice in the case determined against him. We, however, know nothing of the facts, beyond what his statement affords. He appears to have given the note of Parks to I. & S. Gordon, in satisfaction of so much of their demand against him as amounted thereto. This, however, is most positively denied by affidavit. Owing to the conflict about facts, it may be that no decision other than that given, could be rendered.

If not given in satisfaction, the note should, instead of being retained by I. and S. Gordon for more than a year, have been returned by them to Mr. Marcus Gunn, in order that he might have endeavored to make something out of the maker, while in good circumstances.

As a rule, the assignee of a chose in action, cannot sue in his own name. Some County Judges, however, we believe have created many exceptions to this rule, and probably the County Judge who tried this case, saw fit to make it an exception to the general rule.

The statement, besides being too long, is not of sufficient general interest for publication in the *Law Journal*. It will be returned upon application to the Editors within one month, otherwise destroyed.

U. C. REPORTS.

QUEEN'S BENCH.

Reported by Christopher Robinson, Esq., *Barrister-at-Law.*

IN THE MATTER OF WEBSTER AND THE REGISTRAR OF THE COUNTY OF BRANT.

Registrar—Right to inspection of his Books.

A registrar is not obliged to place his books and indexes in the hands of any person desiring to make a search, but may do so in his discretion, and on his own responsibility.

In this case one W. desired to ascertain the judgments recorded against Y., and the registrar gave him the numbers of certain judgments, which he said were all that related to Y., and offered to show him the corresponding certificates, but refused to allow him to inspect the index or the registry book of judgments.

Held, that he was justified in such a refusal.

[E. T. 22 Vic.]

E. B. Woods obtained a rule upon the defendant, upon the application of George Thomas Webster, to shew cause why a mandamus should not issue, commanding him to allow the said Webster, or any other person, upon request and tender of the legal fees, to have inspection of the separate books and alphabetical index in the registry office of the county of Brant, in which are entered all certificates of judgments registered in the said county against one Yardington, or *against any other person or persons against whom* it may be desired to search for judgments in the said office; and to have inspection, and take copies, if required, of all such certificates of judgment found entered or referred to in the said separate book or alphabetical index, and generally to have inspection of all the public books and records in the said registry office in which are any certificates, memorials, or entries affecting the lands of the said Henry Yardington, or any other person or persons in the said county, at all proper hours of the day, and upon tender of the lawful fees thereof; or that such order should be made as the justice of the case requires; and why the said registrar should not pay the costs of the application.

This rule was granted upon affidavit made by the said Webster, in which he swore that he had occasion, on, &c., as clerk to an attorney, to search in the registry office of the county of Brant for judgments entered there against Henry Yardington, or his lands, &c.: that he informed Mr. Shenstone, the registrar, of his object, and requested to be allowed to examine the separate book, and alphabetical index referred to in the statute 13 & 14 Vic., ch. 63, sec. 9, and also to be allowed to see and examine the original certificates of judgments brought to him for registration for three years next preceding the 29th April, for the purpose of ascertaining which of them, if any, operated as a charge upon or affected the lands of the said Yardington in that county: that he offered to pay the registrar the proper fees, in connexion with the said search, and offered him a sum more than sufficient: that the registrar refused to allow him to search, or inspect, or examine the alphabetical index and separate book, or to search, or inspect, or examine the certificates of judgments, or any of them, further than that, having referred to a book for certain numbers, he gave to the deponent a paper on which certain numbers were written, and brought to him a number of certificates of judgments registered in the office against Yardington, and that he might examine the certificates corresponding with the numbers; but that he would not allow the deponent, in a search against Yardington, to examine or look at any other certificates than those he had marked on the paper, or under any circumstances to examine or look at the said separate book and alphabetical index: that he, Webster, declined to make the search on those terms.

He swore that he had several times before been refused by the registrar the permission which he desired on this occasion, on the ground that the deponent had only the right to see such certificates of judgments as in the opinion of the registrar related to the person or his lands respecting whom he might at that time be searching.

M. C. Cameron shewed cause.

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

We do not think it necessary or that it would be proper for us to grant a mandamus upon this application. The applicant was not able to refer us to any judicial decision or other authority shewing it to be the duty of the registrar to comply with what he desires to enforce, and certainly there is nothing in the statutes creating or regulating the office of registrar that either makes it the duty of the registrar to do what has been insisted upon in this instance, or that would exonerate him from blame in complying with such a claim, if in any case an injurious use should be made of the permission granted.

The books, indexes, and other documents in the office of the registrar, are all in his keeping, not merely for the convenience of parties, but for the safety of the community, who are interested in their being preserved unaltered and unmutilated.

We cannot act upon the presumption that the registrar is so careless or incompetent that his search into his index and books, and his certificate showing the result of his search, cannot be relied on, and that it is on that account necessary that all persons should be allowed by law to demand to have all or any of the books or documents placed in their own hands, that they may search and and make extracts or copies for themselves. It was candidly acknowledged, as regarded Mr. Shenstone, the registrar who is the object of this application, that he is an upright, pains-taking officer, and one who fulfils his duties zealously, and if any thing with more than ordinary care, though he may occasionally in a multitude of searches have passed over a name in an index; but were the fact

otherwise, we could take no peculiar course with regard to him individually, which we could not be required as a matter of right to adopt with respect to all others.

We have no doubt that whenever any person conducting himself respectfully desires to make a search into the state of any particular title, or into the registration of judgments, in order to see whether any certain individual has one or more judgments registered against him, the registrar would, from courtsey, and as a general rule, willingly all the person interested in the search to run his eye over the index with him, in order to give greater assurance that no entry respecting the party in question shall escape attention, but that would be only when the registrar sees the object to be the single one of making the specific search more satisfactorily.

We can easily suppose there might be cases where it would neither be safe as regards the public, who have the utmost interest in the careful preservation of the books and documents in the registry offices, nor fair towards the registrar himself, that he should be compelled to throw his indexes and books and certificates before any one who might choose to come in and ask for them; and at all events, if the legislature would really approve of such a method of dealing with these important public books and documents, they must, so far as our opinion is concerned, give us plain evidence by some statute that that is what they do intend and desire. In the acts which they have passed we see no evidence of such an intention, but the contrary. In the first registry act, 35 Geo. III, ch. 5. sec. 8, the provision is, that every such registrar or his deputy "*shall make searches*," &c., not that he shall place his books, &c., in the hands of whoever calls for them, and let them search for themselves

So the 9th clause gives to the registrar a fee for "every search in the office," which we take to mean searches made by himself respecting some certain person or parcel of land about whom or or which he is requested to make a search, and perhaps to finish a certificate. The existing registry act 9 Vic., ch. 34, secs. 15 & 16, is to the same effect.

The 16 Vic., ch. 187, sec. 8, shews what fees the registrar is entitled to, and for what services, and we need hardly say that while fees are allowed to him, with a proper limitation as to amount, for all searches, there is no fee assigned to him for standing by and watching his books and papers while others are searching.

If the present applicant can demand as a right to go into the office, and have the registrar's books and documents placed before him, every one else must have the same right, and how the public business could be conducted with convenience and despatch, and the safety of the documents secured under such a system, it is not easy to understand.

It was candidly avowed in the argument that the real object of this application is to save fees for searches. If by that is meant that a person, while ostensibly searching for judgments registered against one person, should have it in his power to make use of the opportunity for making either a general search, or a general search through any particular letter, and so avoid paying the established fee for one or more other searches which it is his real object to make, though he said nothing about them, then it appears to us that it is not unreasonable that such a pretension should be resisted.

At the same time we must say that we do not assume that any registrar would object to give to any person conducting himself properly a fair opportunity to inspect any particular entry or document which is referred to in the index, and has been searched for at his request, or an opportunity to satisfy himself that the registrar has not accidently missed some entry in passing through the the index. This, however, may be fairly entrusted to the registrar himself, and we must say we have never before heard of a complaint that persons desiring to have a search made in a registry office met with any obstruction. One would suppose that in the course of sixty years this matter would have adjusted itself, so that the course pursued under the act, and constantly submitted to, would be generally understood. If we were to grant a mandamus in the terms moved, meaning it to be used for the purpose for which it was stated in the argument to be desired, we could not profess to found the command upon anything laid down in the statutes as being the duty of the registrar; and if it should happen that a leaf or more of an index, or the index itself, should isappear, or any document be altered or mutilated, it would be little *satisfaction to the public that the registrar should be enabled to* say that these documents had been freely and unavoidably put into the hands of any and every body by the order of this court, though that would certainly go far towards relieving the officer from all blame. The registrar may put his index or other books into the hands of others to make a search, instead of searching himself, but he does that in his discretion, and upon his responsibility. If he were commanded to do it freely whenever asked, he must be taken to have no discretion in the matter, and would be relieved from responsibility, and unable to answer for the security of his books and papers.

Rule discharged, with costs

Regina v. McCormick.

Waste lands—Effect of possession as against the Crown—Nullum Tempus Act, 9 Geo. III ch. 16—Point au Pele Island.

The *Nullus Tempus* Act, 9 Geo. 3, ch. 16, is in force in this province, but it does not apply to the unsurveyed waste lands of the Crown.

Point au Pele Island, in Lake Erie, and forming by law part of the township of Mersea, had been occupied by defendants and those under whom they claimed, without interruption, since 1789. It was not shewn that the possession held had been other than that of tresspassers, nor that the Crown had ever taken charge of or received any rents from the Island, nor that it had been surveyed, or the title of the Indians extinguished, and it had never been assessed or returned as assessable.

Held, that the Crown was not barred by such possession.

This was an information filed by the Attorney General for Upper Canada to recover from the defendants possession of the lands known as Point au Pele Island, in the township of Mersea, in the county of Essex, which is an Island in lake Erie, near the said township.

The defendants pleaded not guilty, and issue was joined thereon: and by consent of the parties the following case was stated for the opinion of the court:

In the year 1789, Alexander McKee was in the actual possession and occupation of the land in question, and so remained until his death, some years afterwards, when he left a will devising it to his son Thomas McKee, who shortly afterwards died intestate, leaving Alexander McKee his eldest son and heir at law. On the first of September, 1823, this Alexander McKee by deed conveyed to William McCormick the land in question, and all his interest therein.

William McCormick went into possession and so remained until his death. He left a will devising the land by certain described parcels to and among his children, most of whom were then residing on the portions so devised, which had been previously allotted to them by the testator. The children were as follows. Alexander, John, David, William, Thomas, Lucinda, Elizabeth, Charles, Mary, Sarah, Peregrine, and Arthur. All were then living: Alexander, John, and Charles have since died. All the children continued to occupy their portions, and those living and the representatives of those deceased still do so, except that Alexander and David have by deed conveyed their portions to purchasers.

No grant from the Crown has ever issued, nor has any interruption or intermission in the possession or occupation of the premises by Alexander McKee and those claiming under him taken place since the year 1789. Neither has the same been assessed nor returnable as assessable.

The question for the opinion of the court is, whether the Crown can recover the land, or whether the possession for upwards of sixty years does not bar the Crown's right.

If the court should be of opinion that the Crown should recover, then judgment should be entered for the plaintiff, with the costs of suit. If the court should be of opinion that the Crown is barred, then judgment shall be entered for defendant.

R. A. Harrison, for the Crown. *Prince*, contra.

Co. Lit. *b.* 277 *a*; *Doe West* v. *Howard*, 5 U.C. O.S. 462; *Elvis* v. *Archbishop of York*, *Hobart* 322. *Doe Fitzgerald* v. *Finn*, 1 U. C. Q.B. 70; 21 Jac. 1, ch. 14; 4 Wm. IV. ch. 1, secs. 16, 17; 9 Geo. III., ch. 16; Bac Ab. "Prerogative" E. 5 p.; 14 Geo. III., ch. 83, were referred to on the argument.

ROBINSON, C. J.—This case brings up an important question, and one which, cannot I think, be quite satisfactorily disposed of without our knowing whether the Crown had ever in any manner exercised any act of ownership over Point au Pelo Island, and whether it had been acquired by purchase from the aboriginal Indian tribe to which it had belonged.

Our statute of limitations in regard to real property, 4 Wm. IV. ch. 1, does not bind the Crown, nor has any legislative provision that I am aware of been made in Upper Canada, or in Canada since the union, placing any limitation upon the Crown in respect to the time within which its title to real property must, under any circumstances, be asserted.

At common law we have the maxim, *nullum tempus occurrit regi*, which would leave the Crown at liberty to pursue its remedy, by action or information, at any distance of time.

The British statute, 2 James I. ch. 2, never could have affected such a question as here, from the nature of the provisions contained in it, for it could only be applied to actions in respect to estates to which the King had title within sixty years before the passing of that act.

We have only to consider the *Nullum tempus* Act, 9 Geo. III ch. 16, which was passed because the operation of the statute of James the First was spent.

That act, I have no doubt, must be held in force here, under our general adoption of the law of England in all matters relative to property and civil rights, by our statute 32 Geo. III., ch. 1, although the King is not named in the last mentioned statute.

Then what should be the effect of the statute 9 Geo. III., ch. 16, under the circumstances of this case?

According to the statenent of facts placed before us, there has been an actual and uninterrupted posssssion of the whole of the premises in question by the defendants, and those under whom they claim title, from the year 1789 to the present time. There is therefore no reason for considering the question as applying only to any part or parts of the island, and not to the whole, for the admission is of an actual and continued occupation since 1789 of the whole island. It is not stated whether such occupation was held with the knowledge or in any manner by the sanction of the Crown, or whether it was held adversely under a claim of right, or adversely by persons who acted in the first instance as tresspassers, and not claiming title.

Under the statute 9 Geo. III., ch. 16, occupants do not from the mere lapse of time acquire a title, as they might under our statute 4 Wm. IV., ch. 1, by occupying lands owned by individuals for more than twenty years, without payment of rent or written acknowledgment of title. The effect of the statute 9 Geo. III. is simply that the Crown is barred; and that will only be the case where the possession appears to have been adverse, and by a party claiming title, and not entering as a mere trespasser.

Can it be said that this is shewn to have been the fact in regard to this island? The statement is, that Alexander McKee, the first occupant, who held possession in 1789, devised the island to his son Thomas McKee, whose heir inherited it, or claimed to do so, and conveyed it by deed to William McCormick in 1823. It is not stated whether the devise or the deed professed to give an estate in fee, but that I think may be fairly inferred; and it is expressly admitted that there has been no intermission in the occupation of the premises.

Supposing that the British statute 9 Geo. III., ch. 16, is in force here by reason of our adoption of the English law, as I think I may say it has always been assumed to be, though there seems to have arisen no case in which a court has been called upon to apply it, some proof, I think, should be given in any such case that the possession has been adverse to the Crown, and not permissive, and has not been a mere continued possession taken in the first instance by a mere intruder not asserting title. (See *Doe dem. William IV.* v *Roberts*, 13 M & W. 520.) I cannot say that I see in the case stated anything that would warrant us, standing in the place of a jury, in coming to that conclusion.

In the next place, I think that to enable us to apply the statute 9 Geo. III., ch 16, the case should be one in which the Crown might in the nature of things have had it in its power to set up in its favor one or other of the exceptions contained in the statute; namely, that within the sixty years His Majesty or his successors had, "by force or virtue of his right or title to the land, been answered the rents, issues, or profits of the land," or that the land "had within that time been duly in charge of His Majesty, or some of his predecessors, or shall have have stood *insuper* of record within the space of sixty years." It is only, I think, in regard to lands of which that might be predicated that this statute can have been intended to apply.

Now if in 1789, or at any time more than sixty years ago, this had been part of the lands of the Crown from which rents and profits had been received for the Crown, or might in the ordinary course of things been received, amd yet it had been shewn that for sixty years no rents and profits had been in fact received, nor the land in any way put in charge to or for the Crown, the meaning of which is explained in some of the provisions of the act, then the Crown might fairly have been deemed to have abandoned its right in favour of the person who had been left so long unmolested in the possession, though even the nature and origin of that possession would require, I think, to be made to appear more distinctly than it does in the case before us.

But for all that appears this island had not for sixty years been part of the organized territory of the province, in which the title of the original Indian inhabitants had been extinguished, or if the Indian title had been extinguished, the land may never have been surveyed and laid out by the Crown with a view to granting it, but may have been suffered to lie like other waste lands from which the Crown had neither derived either rents or profits, and which can never be supposed to have been under the actual supervision and charge of its officers. As to all waste lands so situated I apprehend the entry of any stranger, and his continued possession for sixty years, would not, under the statute, bar the Crown, and certainly not unless it were shewn that the Crown knew of such occupation sixty years ago, and that it was taken adversly to the Crown, and with the intention of setting up a title against the Crown. That, in my opinion, would be the case in regard to any trespasser, or succession of trespassers, who might for sixty years past have been occupying lands in the remote parts of Upper Canada, north of our lakes; and it would make no difference if there had been a succession of trespassers who had pretended to convey the land from one to another; and if so, we cannot on any principle draw a distinction between lands so situated and lands similarly circumstanced lying nearer to the settled portions of the province.

This land, it is stated in the case, has never been assessed, from which it is reasonable to infer that it is not land which has yet been made liable to assessment. For anything that appears, this may have been regarded and treated by the Crown as Indian land, in which the right of the natives had not been extinguished, though it is by law a part of the township of Mersea as the case states and in that case, or even if it formed part of the waste lands of the Crown, to which no tribe of Indians could pretend any claim, but which had never been organized by the Crown, and surveyed and laid out with a view to its being occupied, I do not think the *Nullum Tempus* Act of 9 Geo. III. could be properly held to apply to it. We could draw no distinction founded upon the proximity to settlement or comparative remoteness, but, so far as the application of legal principles is concerned, must look as we should upon any other waste land of the Crown which had never by any particular act been reduced into possession of the Crown, as lands from which rents or profits might be derived. To hold otherwise would be inconsistent, I think, with the various statutes which have from time to time been passed for the protection of the waste lands of the Crown, and of what are called Indian lands, from trespassers, The Indians could not have adopted any legal proceedings for dispossessing trespassers, either as holding in a corporate capacity or otherwise; and it would seem unreasonable, on the other hand, that the time should be considered as running so as to bar either the Crown or the Indians, while the Crown could not be held to be acquiescing in any interruption of rents or profits, which it had never at any time been receiving, or in a position to receive.

I do not doubt, when I consider the position of this island on the southern frontier of Canada, that it must have been known to the government in fact that McKee and McComick and his family had held the long possession which is admitted. If the govern-

ment acquiesced in it from a knowledge that the Indians had all along intended the land to be theirs, and for that or any other reason have forborne for sixty years to assert a claim, either on account of the Indians or for the Crown, that may be felt perhaps by the government to give a strong claim to the present occupants to be confirmed in their title, or at least to be left unmolested as they have hitherto been; but that is a consideration to be disposed of by the government, and it is evident, I think, from what is before us, that the defendants are not likely to be unjustly or harshly dealt with. As a court of justice we must be careful not to distort legal principles on account of their operation in particular cases, for what we hold to be law in the present case we should be bound to apply in others, unless there should be a difference in the facts such as should warrant a different decision.

My opinion is that the Crown, upon what is stated in this case, is entitled to a verdict.

BURNS, J.—The question to be decided in this case, is whether the 9 Geo. III., ch. 16, is to be applied to the unsurveyed public lands of this province or not, and I believe it is now for the first time brought up.

The act 14 Geo. III., ch., 82, passed five years after the *Nullum Tempus* Act, making more effectual provision for the government of the province of Quebec, expressly provides that in all matters of controversy, relative to property and civil rights, resort shall be had to the laws of Canada as the rule for the decision of the same; but when the province of Quebec was separated into Upper and Lower Canada, the legislature of Upper Canada, on the 15th of October, 1792, enacted, in consequence of that provision being manifestly and avowedly for the accommodation of his Majesty's Canadian subjects, that in future, in all matters of controversy relative to property and civil rights, resort should be had to the laws of England, as the rule for the decision of the same.

It appears from the case submitted to us that the first occupation of the island in question by those under whom the defendant claims, took place in 1789, three years before the Canadian Legislature altered the rule of decision.

Looking at the two statutes of Upper Canada with respect to the public lands, 2 Vic., ch. 15, and 12 Vic., ch. 9, and others also, I do not think the legislature contemplated the act of 9 Geo. III., ch., 16, applicable in Upper Canada to lands for which there had been no grant, lease, ticket, either of location or purchase, or letter of license of occupation. In the provisions in these acts no time is contemplated when the Crown would be barred from taking the summary remedy provided in the two specially mentioned. We should not however be pressed with that consideration, if we saw clearly that in the case of the unsurveyed and ungranted lands of the Crown, the *Nullum Tempus* Act must be held to apply, for we should take the legislature was only making provision for cases in which the Crown had not lost title.

I have no doubt we must consider the act called *Nullum Tempus* Act, as part and parcel of the law of this province so far as affecting lands, the revenues, issues or profits of which the Crown has taken or received, or where the lands can be said to have been duly in charge at some period, so that the act would apply; but with regard to the public waste lands vested in the Crown, I take it they must be looked upon as at common law without being bound by that statute. When I consider the 36th and 37th sections of the Imperial act, 31 Geo. III. ch. 31, with respect to the allotment of lands of the Crown, for the support and maintenance of a protestant clergy, and also the 43rd, 44th, and 45th sections of the same act, with respect to the mode of granting lands, and by what title they should be held, I cannot do otherwise than conclude than that the Imperial Legislature supposed the lands of the Crown at that day in Canada were not subject to be considered in the same light with the lands of the Crown in England. Again, when the Union Act, 3 & 4 Vic., ch. 35, was passed, we find that all the territorial revenue at the disposal of the Crown was surrendered to the government of this province upon certain conditions. The act 7 Wm. IV., ch. 118, to provide for the disposal of the public lands, and the act 2 Vic., ch. 14, passed before the union, and the act since that time, the 4 & 5 Vic., ch. 100, 12 Vic., ch. 31, and 16 Vic., ch. 159, all shew, I think, the distinction between lands which may be supposed to be lands of the Crown proper, and public lands which belong to the government of the country, by which I mean the unsurveyed waste lands of the Crown, and which do not come within the meaning of lands duly in charge, or where rents, revenues, issues or profits may have been taken. In this case it is admitted this island has never been assessed, nor been returned as assessable, and it therefore cannot be considered otherwise than as lands from which neither rents, issues, revenues or profits have been derived. It is not stated in the case whether it has ever been in charge of the Crown or not, but if it ever had been that should be made to appear, and so long as that is not proved or admitted we must assume that it never has been. In order to bar the Crown from the common law right belonging to it the case should be brought within the statute.

I think the Crown is entitled to judgment upon this special case.

MCLEAN, J., concurred.

Judgment for the Crown.

COMMON PLEAS.

Reported by E. C. JONES, Esq., Barrister-at-Law.

EDWARD HARVEY POTTER v. JAMES CARROLL, SHERIFF OF THE COUNTY OF OXFORD.

Sheriff—False Return—Cognovit—Absconding Debtor—Executions—Attachments—Priority.

In an action against a Sheriff, in the first count of the declaration alleging a false return, and in the second neglect to levy, the Sheriff, among other pleas, pleaded that at the time of the delivery of the plaintiff's execution to him, the plaintiff's judgment had been satisfied, and that there was nothing due from the judgment debtor to the plaintiff thereon.

Held, though with much doubt, to be a good defence.

One P., without the issue of process, on 18th April, 1857, gave a confession of judgment to plaintiff. On 7th May, 1858, an execution was placed in the Sheriff's hands against the goods and chattels of P., at the suit of C. Under this execution, the Sheriff seized P's. goods and chattels. Shortly afterwards he absconded, and on the 7th and 10th August, 1858, attachments were placed in the Sheriff's hands against his goods and chattels, as being the property of an absconding debtor. On 16th August, 1858, plaintiff delivered to the Sheriff an execution issued on his cognovit, upon which judgment had been entered before P. absconded.

Held, that while C's. execution remained in the Sheriff's hands, it prevented the application of the attachments on the goods, and consequently suspended their operation, but that the moment plaintiff's execution was received by the Sheriff, it bound the goods in the Sheriff's possession, subject to the satisfaction of the prior execution of C., under which he held them.

(M. Term, 1859.)

The first count of the declaration was for a false return of *nulla bona* to a writ of *fi. fa.* issued by the plaintiff against the goods of one Pickle, though the defendant, as sheriff, had actually levied on goods to the amount endorsed on the writ.

The second count complained, that though there were goods of Pickle on which the defendant ought to have levied, yet he neglected to do so, and falsely returned *nulla bona* to the *fi. fa.*

The defendant pleaded; 1st, not guilty; 2nd, to the first count, that he did not levy; 3rd, to the second count, that there were not any goods of Pickle whereof he might have levied; 4th, to the declaration generally—leave and license; 5th, to the first count, that at the time of the delivery of the writ to the defendant, the judgment had been satisfied, and that there was nothing due by Pickle to the plaintiff thereon; 6th, to the second count, that at the time of the issuing of the writ and the delivery thereof to the defendant, the judgment had been satisfied, and that there was nothing due by Pickle to the plaintiff thereon.

The plaintiff took issue on all these pleas—and demurred to the fifth and sixth, the objections resolving themselves into this, that it is not competent for a sheriff to set up such a defence to an action for false return.

DRAPER, C. J. The only cases relied upon to support the pleas were *Imray* v. *Magnay*, 11 M. & W. 267, and *Christopherson* v. *Burton*, 3 Exch. 160. These cases show that the sheriff may set up as against an execution creditor, that his judgment and execution are fraudulent as against another creditor, whose execution is at the same time in the sheriff's hands, and that if he has had notice of the fraud he must do so, or he will render himself liable to the *bona fide* execution creditor should he return his writ *nulla bona*, and satisfy the fraudulent execution.

In *Remmett* v. *Lawrence*, 15 Q. B. 1004, some doubt is thrown upon the case of *Imray* v. *Magnay*, but the Court of Exchequer, in *Shattock* v. *Carden*, 6 Ex. 725, recognize and act upon the same

principle. These cases are not applicable to the present question and do not give any color to the present defence.

The question in them was one of fraud on the part of one execution creditor and the execution debtor, to delay, hinder, and defeat another *bona fide* creditor, contrary to the statutes of Elizabeth. Here it is simply a question, whether the sheriff shall, in excuse of a breach ot his duty to execute a writ, be allowed to raise the question, whether as between the plaintiff and defendant in the original action anything remains due.

I can find no case in which this question is directly raised, but we have been referred to the case of *Wylie* v. *Birch*, 4 Q. B. 566, as establishing, that in an action for a false return to a *fi. fa.* pleas which, admitting the defendant's breach of duty, shew that the plaintiff has sustained no damage by the action, are good answers to the action. If that be a general principle, applicable to all similar cases where the pleas shew that there was no damage, then I do not see how this case can be distinguished, for, at the time of the delivery of the writ to the sheriff, the judgment was satisfied, and nothing was due to the plaintiff by the execution debtor. It is difficult to see what damage the alleged false return would cause.

The issues, in fact, were tried at the last assizes at Brantford, before Burns, J. The plaintiff put in an exemplification of a judgment against Charles Pickle, entered 18th April, 1857, for £4003 14s. 9d., upon a cognovit given without the previous issue of process. A copy of a writ of *fi. fa.* (admitted) issued by the plaintiff thereon on the 16th August, 1858, against the goods and chattels of Pickle, directed to the defendant, received by the defendant on the day it was issued, endorsed to levy £2750 with interest from date, £8 14s. 9d. costs, 15s. for this and concurrent writ and sheriff's fees (note—the costs appear by the roll to have been taxed at £3 14s. 9d. ;) and endorsed is a return of levy of goods to the value of £25 remaining on hand for want of buyers, and no goods *ultra*.

Then a paper was put in by consent, coming from defendant's office, bearing date on 8th Oct., 1859, which shewed that on the 7th May, 1858, the defendant received an execution against the goods of Pickle, in favour of one Carden for £606 8s. 8d,. which, before the 9th of Sept., 1858, defendant had returned goods to the value of £100 on hand, whereupon, as appeared later in the case, Carden issued a *ven. ex* and *fi. fa.* for the residue received by defendant, 10th Sept., 1858, and returned *feci.*; and up to the 4th August, 1858, three other executions, amounting together to £116, under which writs actual possession of Pickle's goods was taken by the defendant on the 6th August, 1858. After such possession taken the defendant received two writs of attachment against the estate of Pickle, as an absconding debtor, one on the 7th August, 1858, at the suit of the Commercial Bank for £125, the other on the 10th August, 1858, at the suit of one Moore for £888 14s. 4d., and next on 16th August, 1858, he received the plaintiff's execution; afterwards, and between that day and the 7th of February, 1859, he received nineteen writs of attachment for various sums, amounting in the whole to £5896 4s. 8d.

By the sale of Pickle's goods the sheriff realized in gross £2240 18s. 2d. The expenses of insurance, &c , £215 16s. 2d.. The amount of the executions prior to the plaintiff's was stated on the learned judges notes to have been £690, leaving a balance of £1331 17s., which the plaintiff claimed as applicable on his writ.

The defendant gave evidence for the purpose of shewing that plaintiff's judgment was satisfied; which the plaintiff met by strong rebutting evidence. It is necessary to refer to it, as the jury found for the plaintiff on the fifth and sixth issues. There was also evidence to shew that Pickle was considered in insolvent circumstances in the spring of 1858. There was nothing to give rise to a suspicion that the plaintiff was not a *bona fide* creditor of Pickle's. The learned judge, by consent of the parties, directed a general verdict for plaintiff, and £1331 17s. damages, with leave for the defendant to move .. enter a verdict for him on the 1st, 2nd and 3rd issues, if the court should be of opinion that the writs of attachment were entitled, under the circumstances, to priority.

In Michaelmas Term *Beard* obtained a rule *nisi* accordingly, referring to *Daniel* v. *Fitzall*, 17 U. C. Q. B. 369. *Gamble* v. *Jarvis*, U. S. O. S. 272.

Wood showed cause referring to the C. L. P. Act, s. 55; Consol. Stat. ch. 25, s. 21, 22: *Bank B. N. A.* v. *Jarvis*, 1 U.C. Q. B. 182; *Caird* v. *Fitzall*, 2 U. C. Prac. R. 262.

Beard, in support of the rule, referred to the C. L. P. Act, 1856, s. 49 Consol. Stat. c. 25, s. 14.

Draper, C. J.—There are some features in this case which distinguish it from any which as yet, so far as I am aware, has been decided in respect to the conflicting rights of creditors who have got judgment or judgment and execution against an absconding debtor, before his absconding; and creditors who have commenced suits against such debtor by writ of attachment.

1. The plaintiff's judgment, which was on *cognovit*, signed without any process having been first issued, was entered up long before Pickle absconded, and while he was apparently in good credit.

2. When the first of the attacking creditors put his writ into the defendant's hands against the property, credit, and effects of Pickle, his goods had been seized, and were in the sheriff's hands upon several writs of *fi. fa.*

3. The plaintiff's *fi. fa.* was received by the defendant while Pickle's goods were thus in his hands; and, so far as appears, before any proceedings were taken, if, indeed, any could be taken under the two writs of attachment which defendant received, before he received the plaintiff's *fi. fa.*

The sections of the statutes which it appears necessary to consider, are the following, which I cite from the Consolidated statutes: chap 25, s. 14—all the property, credit, and effects, including all rights and shares in any association or corporation, of an absconding debtor may be attached in the same manner as they might be seized in execution; and the sheriff to whom any writ of attachment is directed, shall forthwith take into his charge or keeping all such property and effects, according to the exigency of the writ, and shall be allowed all necessary disbursments for keeping the same; and he shall immediately call to his assistance two substantial freeholders of his county, and with their aid he shall make a just and true inventory of all the personal property, credits, and effects, evidence of title or debt, books of account, vouchers, and papers that he has attached; and shall return such inventory signed by himself and the freeholders, together with the writ of attachment. 19 Vic., c. 43 s. 69.

Sec. 19.—The sheriff having made an inventory and appraisement on the first writ of attachment against any absconding debtor, shall not be required to make a new inventory and appraisement on a subsequent writ of attachment coming into his hands; 19 Vic., c. 43, s. 54.

Sec. 21.—Any person who has commenced a suit in any Court of Record of Upper Canada—the process wherein was served or executed before the serving out of a writ of attachment against the same defendant as an absconding debtor—may, nothwithstanding the suing out of the writ of attachment, proceed to judgment and execution in his suit in the usual manner; and if he obtains execution before the plaintiff in any such writ of attachment, he shall have the full advantage of his priority of execution, in the same manner as if the property and effects of such absconding debtor still remained in his own hands and possession; but if the court or a judge so orders, subject to the prior satisfaction of all costs of suing out and executing the attachment; 19 Vic, c. 43 s. 55.

Sec 22.—In case it appears to the court in which such prior action has been brought, or to a judge thereof, that such judgment is fraudulent, or that such action has been brought in collusion with the absconding debtor, or for the fraudulent purpose of defeating the just claims of his other creditors, such court or judge may, on the application of the plaintiff on any writ of attachment, set aside judgment and any execution issued thereon, or stay proceedings thereon; 19 Vic. c. 43, s. 55.

Sec. 25 enacts that if the real and personal property, credits and effects of any absconding debtor, attached &c. prove insufficient to satisfy the executions obtained in the suit, the debtors of the absconding debtors may be sued to recover such debts; 19 Vic. c. 43. s. 53.

Sec. 29.—When several persons sue out writs of attachment against an absconding debtor, the proceeds of the property and

effects attached and in the sheriff's hands shall be ratably distributed among such of the plaintiffs in such writ, as obtain judgments and sue out execution upon the same in proportion to the amount actually due upon such judgments; and the court or a judge may delay the distribution, in order to give reasonable time for the obtaining of judgment against such absconding debtor; 19 Vic. c. 43, s. 57.

Ch. 22, s. 236—Final judgment upon a *cognovit actionem*, or warrant of attorney to confess judgment, given or executed before the suing out of any process, may, at the option of the plaintiff, be entered in any office of the Superior Courts; 19 Vic., c. 43, s. 10.

The legislature has not in terms provided for this case. By sec. 21, when the suit is commenced before the debtor absconds, it may be carried on to judgment and execution, and the execution may be satisfied by levying on goods seized under the writs of attachment, if it comes to the sheriff's hands before any execution from any attaching creditor. That section as well as others, and some of the cases, treated goods seized under writs of attachment, as in *custodia legis*.

In *Gamble* v. *Jarvis*, Robinson, C. J., expresses that opinion, and in that event the goods attached could not be taken in execution, unless for the exception introduced in favour of a creditor commencing his suit by process served out, and perhaps also served out before the debtor absconded. It is, however, unnecessary to decide, whether if the facts were simply that the sheriff had first received the two attachments in favour of the Commercial Bank, or of Moore, and had seized under them, and then the plaintiff's execution had come to his hands, the execution ought to be satisfied out of the goods seized on the attachment. My impression is that it ought not; that we could not so extend the construction of the 21st sec.; and that if not, the goods, being in *custodia legis*, could not be taken in execution.

At the same time, I think that the mere receipt of a writ of attachment by the sheriff does not bind the absconding debtor's goods. Treating such writ as primarily, at all events (no more than process to enforce appearance) it cannot, in my opinion, be held to operate as a lien upon the defendant's goods, any more than a writ of distringas to enforce appearance could from the time of its receipt. This point was well discussed by my lamented and very learned predecessor, in *Kingsmill* v. *Warrener*, in appeal, 13 Q. B. U. C. 51.

In the present case, the two writs of attachment in question could neither bind the goods by their delivery to the sheriff, nor could he attach the goods by them at any time before their sale, because at the time of the receipt, and until the sale, these goods were bound by the executions previously in his hands, and they continued so bound until the plaintiff's *fi. fa.* was delivered to him. Then, according to the decision of *Jones* v. *Atherton*, 7 Taunt., 56, putting, for the moment, the writs of attachment out of the question, the goods were bound by the plaintiff's *fi. fa.* being already in the sheriff's possession under the former writs, subject to these writs, from the date of the delivery of the plaintiff's writ to the sheriff.

Then the only question is, whether the fact that before the receipt of the plaintiff's execution, the two writs of attachment were placed in the sheriff's hands, makes any difference.

Upon the best consideration I can give the question, I think it does not. While the first execution remained in force, they prevented the application of the attachments on the goods, and consequently suspended their operation. But such was not the case in reference to the plaintiff's *fi. fa.*, which might, and, as I think, did operate the moment it was received, to bind the goods in the sheriff's possession, subject to the satisfaction of the executions under which he held them.

On this ground, therefore, I think the defendant should have judgment, though I express this opinion with much doubt of its soundness.

Richards, J., dissentiente.

Hagarty, J., concurred.

CHAMBERS.

The Queen on the Relation of John Bland v. Joseph Figg.

Municipal Election—Disqualification—Contractor—Proceedings.

A dispute arose between a township treasurer and the council of the township as to the duty of the treasurer, who was paid by salary in lieu of perquisites of office, to fund certain per centages for seven years, during which he held office. He paid the per centages for two years under protest, and refusing to pay more was dismissed, and afterwards became a candidate for the office of councillor, to which office he was elected, and subsequently became Reeve Having, while in office, given a bond to the corporation, as treasurer of the township, conditional for the due performance of the duties of his office.

It was Held, 1.: That the dispute was a matter of contract in the legal sense of the term, viz, the remuneration for services performed, the retention by one party of money claimed by the other, the due performance of the office of treasurer by the defendant, &c.—2.: That although the defendant did not hold the office of treasurer at the time of the election, there then being a dispute in good faith between him and the council of the township, arising out of matters connected with his administration of the duties of that office, he was disqualified as a person having an interest in a contract with the corporation.

Where the affidavit of the relator, though not intitled in any Court, followed and referred to the statement of the relator, which was properly intitled, held sufficient, an objection that the recognizance was not intitled in any Court, was disallowed upon similar grounds. *And semble*, such mere formal objections cannot be urged by defendant after appearance. His proper course in order to raise them would be to move.

The defendant, Figg, had been since May, 1852, to October, 1859, treasurer of the of township Toronto Gore. The office is held during pleasure, and no by-law or formal annual re-appointment was made.

On May 24, 1852, a resolution of the council was passed, giving defendant £12 10s. as his salary as clerk and treasurer, and all perquisites arising from said office to be funded for the benefit of the township.

In February, 1854, a resolution was passed, directing an addition of £5 to be made to defendant's salary. In November, 1854 a further addition of £2 10s. was granted in addition to al others, amounting in the whole to £20 for the then year.

In February, 1856, it was resolved that £5 be granted to him in addition to the salary he already received, making in total, £25 for the year 1856.

By the statutes in force to the end of 1858, the township treasurer was entitled to take to his own use 2½ per cent. on all county rates received and paid over by him. (13 & 14 Vic. ch. 64, schedule A. No. 32.)

The defendant retained this per centage in addition to his salary, and no difficulty occurred till May, 1859.

Contradictory affidavits were filed on the one side, insisting that it was well understood that the salary was in lieu of the per centage, which, as a perquisite of office, was to be accounted for to the township, and on defendant's part that it was understood differently.

In June last, as appeared in affidavit of one Brougham, filed by defendant, the accounts were directed by the council to be examined with respect to these per centages, and they were found to amount to £36, from and including 1852 to the end of 1858, but he says that for the years 1852 and 1853 the per centages amounted to £9 4s. 2d., which sum was paid by defendant last December under protest, leaving £27 odd of per centage, if such are claimable.

The defendant in his own affidavit stated that he paid the per centage of 1852 and 1853 under protest, and in the margin of the copy of resolutions, annexed to his affidavit, are these words: "The amount of the per centage for 1852 and 1853 have been returned by me to the township treasurer under protest, reserving to myself the right of recovering the same, subject to the decision of a competent court of law."

He swore that he duly paid over all monies received, except the per centage on county rates, from 1854 to December 1858, and that he considered he had a right to retain these latter at all events, as a fresh contract was created between the council and himself with respect to his salary, as appeared by the resolutions of that year, annexed to his affidavit.

From the affidavit of Brougham it appeared that the latter person and one Taylor, investigated the accounts, and reported in November last, (after defendant's dismissal) that defendant owed £50 8s. 6d., which sum included the per centage of 1852 and

1853, and this report Brougham swore was in December presented to the council, finally audited and adopted.

A receipt was produced and signed by Slightholme, the treasurer succeeding the defendant, dated December 2nd, 1859, acknowledging the receipt of this sum from defendant, "being the full amount of the balance in his hands due to the township of Gore of Toronto, and paid over by him."

After giving this receipt, the council paid to defendant £15, as the portion of his salary due to him for 1859 up to the date of his dismissal.

On defendant's part it was also said that the council were quite satisfied, as if a final settlement had been made and agreed to give up defendant's bond, which he had given as treasurer.

On the relator's part it was proved that a dispute began in May last, between defendant and the council. That defendant persisted in refusing to refund the per centages, and at length, in consequence thereof, was dismissed in October last, and Slightholme appointed.

The latter swore that the receipt given by him was drawn up by defendant, that he was then well aware of the existing dispute as to the per centages, that in giving the receipt he had no intention to cover the disputed monies but only the amount actually paid, nor was he authorized so to do, that he was Reeve in 1852, when defendant's salary was fixed, and it was expressly understood to be in lieu of all perquisites and per centages. This was strongly denied on the other side.

The township clerk (Heugill) in his affidavit, set forth the audit and report of Brougham and Taylor made to the council, Nov. 25th, 1859, shewing the balance of £50 8s. 6d, and certifying that this was *exclusive of the disputed per centages of former years*, and, also, that the treasurer charged himself with the per centage of 1852 and 1853 under protest, and reserving his legal rights.

A resolution of the council was also annexed to his affidavit of 30th Dec , 1859, directing legal proceedings to be taken against defendant, and his sureties to recover all monies or per centages, withheld by him, due to the municipality, and that a further item of ten shillings is, according to the township books, claimed by defendant as a per centage on money paid over in 1859 to the Receiver General.

It was objected to the resolution of 30th December, 1859, that it was illegal because the council met in a different tavern from the tavern in which the next preceding meeting was held, and as no by-law or resolution to that effect was passed, that the proceedings were void.

Contradictory affidavits were filed as to the willingness or unwillingness of the late council to consider the defendant's responsibility to them at an end.

Harrison, for the relator, contended, 1. That the defendant, by virtue of the resolution of 1852, under which he accepted office, was bound to fund the disputed per centages for the benefit of the township. 2. That the resolutions for 1854 and subsequent years made no alteration as regards his obligation to do so, but only as regards the amount of salary to be paid him yearly in lieu of perquisites of office. 3. That whether the defendant is or is not bound to fund the per centages, there being in truth, at the time of his election, a *bona fide* dispute existing between him and the corporation as to the per centages he was disqualified. 4. That the corporation having his bond, and alleging that there was a breach of it, he came within the principles of the law which disqualifies persons having an interest in a contract with the corporation. 5. That the council having as late as December authorized legal proceedings to be taken against him on his bond, the continued existence of the dispute was manifest. 6. That it was immaterial where the council met where that resolution was passed, as the statute is only directary and not imperative. Mr. Harrison cited *Askin* v. *The London District Council*, 1, U. C., Q. B. 292.

McMichael and Blevins, for defendant, objected that the affidavit of the relator, verifying the statement not being intitled in any Court, could not be read. The same objection was made to the recognizance and to other affidavits filed on behalf of the relator. On the merits it was contended for defendant, 1: That he was not at any time liable to refund the per centages. 2: That if at any time liable to do so, the council had subsequently caused his accounts to be examined, and a balance found against him, which he paid and for which he held a receipt in full. 3: That he was not in debt to the municipality, and could at any moment bring an action for his bond, which they wrongfully withheld. 4: That the fact of their withholding his bond, when there was nothing due by him, did not make him a contractor or otherwise disqualify him. 5. That the resolution passed in December was illegal as it was not passed by the council convened at the last place where the council met, and at the time of the last adjournment there was no resolution to meet at a different place. *Pringle* v. *McDonald*, 10 U. C., Q. B. 254, was cited for defendant.

Harrison, in reply, submitted as to the technical objections. 1: That defendant after appearance was too late to raise them. 2: That if not too late they were not such as would have any effect, because the affidavit of the relator, verifying the statement, immediately followed the statement, which was intitled in the Court, and in fact part of it, and as to the recognizance, that it having been allowed by the judge who issued the fiat for the writ, no objection as to form could afterwards be raised against it.

HAGARTY, J.—After the appearance of the defendant to a *quo warranto* summons to try the validity of his election as a township councillor for the Toronto Gore, it is objected that the affidavit of the relator, at foot of his statement, is not headed in any Court.

The statement is headed in the Queen's Bench, and the affidavit immediately follows it and refers to it. No form is given in the Rules of Court, and I do not consider that objection fatal, nor that any difficulty would be experienced on that account in supporting an indictment for perjury, which must necessarily set out and rely on the statement, of which the affidavit may be said to be a part (see remarks of the Court in *Doe Park et al.* v. *Henderson*, 7 U. C. Q. B. 188).

A similar objection is taken to the affidavit of caption of the recognizance, which I dispose of by the remarks already made.

A like objection is urged to a long affidavit of Bland, the relator, which I may dispose of by remarking that this case does not require it, and it may be dispensed with.

The form of the *fiat* of Draper, C. J., is also objected to, but, I think, without foundation.

I have great doubts whether such mere formal objections can be urged after appearance. The better course would seem to be to move to set aside the writ for irregularity. The remarks of C. J. Draper, in *Reg. ex rel. Sutton* v. *Jackson*, 2 U. C. Chamber Report, 26, encourage this view. Substantial defects, such as want of interest in the relator, &c., stand on a wholly different footing. The rule of court 16, as to irregularities and defects, is also worthy of note.

I do not feel it necessary to pursue the enquiry into the disputed facts of this case. All that is necessary to enable me to form my opinion may be gathered from the affidavits of the defendant and Brougham.

I do not feel called upon to pronounce any positive opinion as to the liability of defendant to refund the disputed per centages to the council, nor of the latter to return the amount for 1852 and 1853, paid by defendant under protest. I understand that the municipal law, as now settled, provides no appeal from any decision in this election.

If it were necessary for me to decide on the rights of the parties, a very unsatisfactory result might be arrived at. I might determine that no claim existed against either party at the suit of the other. A court of law might take an opposite view. The law does not, I think, tend towards such a result.

If I feel called on to declare that the defendant comes within the clause in the act disqualifying any person from being a member who has a contract with the council. I do not consider myself as pronouncing judgment in favor of either of the disputants. I am to see that there is a claim in good faith subsisting, a matter of "contract" really to be settled between the parties. If it appeared to be a matter too clear for doubt, or that it was raised in bad faith, I, of course, would not hesitate to adjudge it.

I assume the legislature designed to prevent a person taking his seat in a deliberative body, whose first act might be to decide

whether that body should or should not proceed to enforce a claim considered to exist against that person, or whethar it should refund or pay to that person a sum of money which he has paid just before his election under protest, and reserving his legal rights to recover it back.

The facts here are very simple: At the last meeting of the old council (it matters little, I think, in which of the two taverns it was pleased to assemble) it was resolved to take legal measures to recover back all the unpaid per centages from the defendant, who had been their treasurer for years, until dismissed three months before the election on disputes connected with this and other matters. The defendant, in the same month of December last, had paid a part of these per centages to the council, stating that he did so under protest, and (in his own words) "reserving to myself the right of recovering the same, subject to a competent Court of Law."

And further, to shew the state of this matter, he swears, in answer to an affidavit charging him with admitting liability and promising to pay, "the only effect of such conversation, and that "intended by it, was, that if by law and by a resolution of the "said council I was obliged to pay over the said per centage, I should not deny that I ever admitted any legal obligation in me to pay over, &c. &c. &c."

As a member of the new council he will be called upon, as one of the five, to decide whether an action is to be prosecuted against himself on the one hand, and whether the council shall or shall not refund to him the sum paid under protest on the other.

I do not pay much attention to the charge on one side or denial on the other, that defendant's motive, in becoming a member of the council, was to influence the decision of this very matter in his favor.

The defendant puts himself in this dilemma. He insists that the council have no claim whatever upon him as to these per centages, but he pays a portion of them under protest, insisting on his right to recover back.

The term used by the legislature: "having an interest in any contract by or on behalf of the corporation," is, although peculiar, wide enough, in my judgment, in the letter, and certainly in the spirit, to embrace such a case as the present. Under his bond as treasurer, or as treasurer without bond, he, of course, was a contractor with the council, and although he no longer holds the office, these disputes arise from matters connected with his administration of that office.

The whole dispute here is on a matter of contract, in the legal sense of the term—the remuneration for services, the retention by one party of money claimed by the other, the due performance of the office of treasurer by the defendant, &c., &c. It may be that the respective claims are quite apart from the bond given by the defendant.

I repeat that I do not form my conclusion from any strong view of the ultimate legal issue of this dispute. It is sufficient for me to see that there is a real money dispute in a matter of contract in which the parties appear to be at issue. I do not see how the defendant can legally sit in a council of five to determine how this dispute is to be decided. It may cease to be a dispute at any time by the joint action of the parties, but at the date of the election, as far as I can judge, it had a real existence.

The amount in dispute is not large, but the principle involved is one of high importance to the honest administration of our Municipal system, which has been justly termed the school in which our fellow subjects in all parts of the world are trained to the due understanding, practice, and appreciation, of the Representative Institutions of a broader range, and of a permanent authority.

I am of opinion that a writ should issue declaring that the defendant was disqualified, that there be a new election for the office, and that defendant do pay the relator's costs, as I do not think, under the circumstances, that he ought to have been a candidate.

No case is, I think, made out for seating the relator.

Order for a writ for a New Election with costs.

MONTHLY REPERTORY.

CHANCERY.

V. C. S. TOWNSEND v. TOWNSEND. *May* 10.

Employment of trust monies in trade—Liability of trustees under a will—Entries in accounts—Articles of partnership—Account—Compound interest.

A representation which admits of being made good by the maker of it will be binding upon him. Therefore, an entry in an account by trustees under a will crediting a legatee with the amount of her legacy is binding on them when it is made knowingly, and there is nothing to show that it is done in error. If trustees under a will use for the purpose of their own trade, trusts moneys which according to the will ought to have been otherwise invested, in a decree against them directing an account, compound interest will be charged.

In a case where, according to the deed of partnership, a date had been fixed for payment of the share of a deceased partner, an account was directed against the surviving partners, who were also executors and trustees of the deceased partner and had improperly retained in the partnership the share of the deceased partner, and accounts in accordance with the deed of partnership were directed up to the date fixed by the partnership deed.

V. C. K. FALCKE v. GRAY ET AL. *May* 2.

Specific performance—Chattels—Inadequacy—Auction—Jurisdiction.

A Court of Equity will decree specific performance of a contract to purchase a chattel which is of a peculiar and unique kind.

Where a purchaser of a chattel which is of a unique kind, with the worth of which he is well acquainted, stands by and permits it to be set down at one fifth of its real value, knowing the ignorance of the vendor and valuer, and after contract signed by the vendor, files a bill for specific performance of such contract, the Court will not decree specific performance.

Although in the case of a contract to purchase a peculiar chattel this Court will under peculiar circumstances, of fraudulent advantage taken by the purchaser, refuse specific performance, it will not set aside the contract on a bill filed with that object by the vendor.

Where a party sells by auction the Court will not relieve on the ground of inadequacy of price.

V. C. K.

IN RE THE H. C. AND G. LIFE ASSURANCE COMPANY, EX PARTE DR. WOOLASTON.

Misrepresentation—Forfeiture.

Misrepresentations made by a director or secretary of a joint stock company, with reference to expected profits or the appointment to a particular office whereby a party is induced to take shares are not representations of the company.

Where by the deed of settlement of a joint stock company it is provided that upon non-payment of calls on a certain notice and after a certain time, the directors may declare shares forfeited, such shares are not forfeited by mere non-compliance with the notice, but there must be a declaration of the directors to that effect.

V. C. K. ROGERS v. ROGERS. *June* 8.

Special case—Construction—Contingency.

A testator gives all his real and personal estate and effects to his three daughters, H, J and S, share and share alike, and in case either of them dying, to be equally divided between the children of the deceased, if any; but in case there shall be no children to claim their mother's share, then that share to be divided equally between his two surviving daughters, their executors, administrators and assigns, absolutely for ever.

Held, that the daughters took a fee simple as tenants in common.

M. R. JACQUET v. JACQUET. *June* 15.

Will—Trust for payment of debts—Practice—Adjourned summons.

Testator directed that his executors should dispose of C estate, and that their receipts should be a discharge to the purchaser, the monies arising from the sale thereof, to be applied to the liquidation of his debts and the overplus to fall into his residue.

Held, that a trust for payment of debts was thereby created.

M. R. *June* 7.

BROMLEY v. SMITH, SMITH v. BROMLEY, BOUSTED v. BROMLEY.

Expectant heir—Setting aside transactions—Costs.

The rule that the burden of proving the fairness of a dealing with an expectant heir lies on the person so dealing, held applicable to a case where the dealing was not a sale, but a charge, where the heir was of mature age, and fully understood the nature of the transaction, and had himself been guilty of misrepresentations in the matter, which, however, did not appear to have been relied on. Limits of the rule that a bill charging fraud which is not proved, must be dismissed with costs, discussed.

Decree made in favor of the heir without costs, and so much of the bill as charged conspiracy dismissed with costs.

V. C. W. CAMPBELL v. BEAUFOY. *May* 30.

Domicil—Will—Executor—Plea.

To a bill by a legatee against the executor who has proved the will in England it is a valid plea that the testator was domiciled in a foreign country, and that by the laws of that country the dispositions contained in the will are void; the grant of probate being conclusive as to the validity of the instrument, *qua* will, but not as to the validity of its contents.

V. C. W. DUIGNAN v. WALKER. *June*, 16.

Agreement—Carrying on business within certain distance—Mode of measuring

Under an agreement not to carry on business within seven miles of a certain place, the distance must be measured in a straight line upon a horizontal plane, and not by the nearest practicable mode of access.

V. C. W SCOTT v. MILLER. *May*, 30.

Witness,—Privilege.

A defendant claiming to be privileged from giving the discovery required by the answer, must swear positively to his belief that his answer would or might tend to subject him to penalties.

Upon exceptions to answer the Court had held, that the defendant (a solicitor) could not protect himself from answering in respect of an agreement sought to be enforced by the bill, on the ground that he would be thereby subjecting himself to penalties under 6 and 7 Vic., c. 73, the agreement as stated in the bill being perfectly innocent.

In his further answer, the defendant "submitted" that he was not bound to give the discovery sought, because it "would or might show or tend to show," that, under 6 & 7 Vic., c. 73, he was liable to be struck off the roll.

Held, that this further answer was insufficient, the defendant not having pledged his belief that his answer in respect of the agreement, which had been held to be innocent, would criminate him.

COMMON LAW.

Q. B. POOLE v. KNOTT. *May* 31.

Public company—Liability of executor of deceased shareholder.

Where the Act of Parliament which constituted a public company, provided that the shareholders should continue liable for the debts of the company, as they would have been if the Company had not been incorporated; and that, if execution could not be obtained against the property and effects of the Company, there execution might be issued against the person, property and effects of any shareholder, or any former shareholder who was such at the time of the obligation being incurred or being still in existence.

Held, that this did not admit of execution being issued against the executor of a shareholder who had died before the judgment and had been recovered against the company, but who was a shareholder when the obligation was created, and continued to be so, up to the time of his death.

Q. B. MILLER v. MYNN AND OTHERS. *June* 2.

Common Law Procedure Act 1854, *sec.* 61—*Attachment of debts.*

If a judgment be recovered against three, the debts owing and accruing to two of the judgment debtors, out of the three may be attached to answer the judgment debt; the proceeding under sec. 61 of 17 & 18 vic. c. 125, being analogeous to execution by *fieri facias.*

EX. C. ROBERTS v. BRETT. *May*, 16.

Covenant—Condition precedent—Assignment of breaches—Construction.

Plaintiff covenanted among other things "forthwith" to procure a vessel and stow a cable on board at a certain wharf, and to have her ready for sea before the 15th July, and defendant covenanted to provide the cable, and to pay plaintiff £5,000 by instalments of £1,000 seven days after the arrival of the vessel at the wharf, and the other instalments at other times with other covenants, and it was mutually agreed that each party should within ten days of the execution of the agreement, give and execute to the other a bond with two sureties in the sum of £5,000 for the due performance of the covenants on his part.

In an action on this agreement the breach assigned being the non-providing of the cable by the defendant, &c.

Held, affirming the judgment of the Common Pleas that the giving of the bond was a condition precedent to plaintiff's right to sue upon the contract.

A breach was thus expressed, after stating that plaintiff was ready and willing to stow the cable above mentioned, but before the time arrived for so doing according to the terms of the said contract the defendant refused to perform the said contract, on his part and dispensed with the said vessel being brought alongside the said wharf. The plaintiff then averred general performance of all conditions precedent, after which he said "yet the defendant did not nor would stow," &c.

Held, that in a declaration so worded the real breach followed the word "yet," and that the words preceding did not set up as a breach, the dispensation by the defendant of plaintiff's performance of condition precedent, but was only intended as inductive to the real breach following the word "yet."

EX. HICKIE v. RODACONADIS. *May* 11.

Ship—Total loss—Benefit of freight earned by forwarding cargo in other ship.

The under writers of a policy on a ship for a certain voyage are not entitled to any deduction in respect of freight earned by forwarding the cargo in another ship after a total loss of the ship insured, in course of the voyage.

EX. BETTS v. BURCH. *May* 11.

Damages—Penalty or liquidated damages—Sum stipulated to be paid on breach of agreement—Agreement to purchase furniture at a valuation.

By an agreement for the purchase of furniture and stock in trade according to a valuation, it was provided that the goods should be valued and possession given on or before the 18th October 1858, and in the event of either of the parties not complying with every particular set forth in the agreement he should forfeit and pay the sum of £50 and all expenses attending the same.

Held, that the £50 was in the nature of a penalty and was not recoverable as liquidated damages upon breach of the agreement

M. R. REMNANT v. HOOD. *June* 28.

Settlement—Construction—Vesting.

By a settlement a sum of £2,000 was charged pursuant to a power in a will on real estate, for the portions of younger children —to be raised and levied within three calendar months after the decease of the settlor (the tenant for life under the settlement) and to be paid, and payable in manner following, viz:—If only one younger child, for the portion of that one; and of two or more to be divided equally.

Held, that a younger child who attained twenty-one, and died in her father's lifetime, was entitled to a share.

REVIEW.

ESSAI SUR LES LETTRES DE CHANGE ET LES BILLETS PROMISSOIRES. Par Désiré Girourd. Montreal: Imprimé et publié par John Lovell, Rue St. Nicolas, 1860.

This treatise on the Law of Bills of Exchange and Promissory Notes evinces much industry, and is both well arranged and well written. It reviews the law of France, England and the United States, on the very important subject upon which it treats, and carefully points out the difference between the law of Lower Canada and of these countries. Reference is also made to many decisions of the courts both in Upper and Lower Canada, and to our Statute Law as to Bills and Notes. The work is creditable both to editor and to publisher, and if translated might receive some patronage from the profession in Upper Canada.

BLACKWOOD. American Edition. Leonard, Scott & Co., New York.

We have to acknowledge the receipt from the publishers of the January number. In it there is the commencement of a remarkable poem headed St. Stephens. In this poem it is intended to give succinct sketches of our principal Parliamentary orators, commencing with the origin of Parliamentary oratory (in the civil wars), and closing with the late Sir Robert Peel. An article in the same number, intitled The Public Service, shews how much of late has been said and how little done with regard to administrative reform. The number is as usual not only a readable but interesting one.

THE ECLECTIC MAGAZINE. New York: W. H. Bidwell, No. 5 Beekman Street.

The letter-press of the February number is rich and instructive. There are selections in it from no less than twelve leading periodicals. The number opens with two beautiful portraits,—that of Queen Victoria and the great Duke, now gathered to his fathers. We can, with regard to the *Eclectic*, endorse the statement of its proprietor, that "It is not partisan, not political, not sectional, but a large gathering of cream and honey from all the fields and flowers of the English periodicals."

THE WESTMINSTER. American Edition. New York: Leonard, Scott & Co.

The number for the quarter ending January last, just received, contains some very able articles, of which that on "Government Contracts" is one, appears in this number. Favouritism, jobbery, red tapeism, negligence, corruption, and all the incidents of a government contract, are held up to public abhorrence, but only to be followed by the first person who has the good luck in a worldly point of view to become a pet government contractor. The article on Christian Revivals abound with many facts of interest, and so does that on the Realities of Paris. An article on social organism is very learned and instructive. The number is a good one.

THE LAW OF FAIRS AND MARKETS. By Frederic Stewart MacGachen, Esq., of the Inner Temple, Barrister at Law. London: James Cornish, 297 High Holborn. Price, One Shilling sterling.

Within sixteen pages we have here condensed the law as to fairs and markets. The author as divided his work into three parts:—

1. The Rights and Duties of owners at Fairs.
2. The Tolls to be taken.
3. The General Regulations as to Fairs, &c., including the law of market overt, and of the restitution of stolen goods.

The book is the only one on the subject of which it treats, and is written in the form of a dialogue, condensed in plain and popular language.

Not less than 150 cases, early and modern, are noticed in this unique and useful publication. It is evidently a model law book, as cheap as it is useful.

THE LAW MAGAZINE AND LAW REVIEW. London: Butterworths, 7 Fleet Street.

The number of this welcome quarterly for February is received. It opens with a well written article on the Temple Church, an edifice which the writer hereof had the good fortune to visit. Though quite aware of its antiquity, and fully alive to its beauty, we were ignorant till now that in the course of a few years not less than £80,000 sterling were spent in its repairs. The Church is small but really a gem. No lawyer thinks of visiting London without seeing the Temple Church, hearing its famous choral service, and seeing the "lions" who frequent it. On the Sunday that we attended divine service there we sat face to face to that veteran law reformer and world renowned statesman, Lord Brougham, and felt amazed that an intellect so mighty was encased in a body so commonplace. There he sat, or rather tried to sit, but uneasy he twitched from side to side, as his head did from shoulder to shoulder, in an apparent state of mental excitemen. This, however, was the manner of the man and not the excitement of the mind. None more cool, more collected, than this great lawyer, jurist, statesman and orator.

Other papers in the number before us, such as that on Blasphemy,—Brawling,—Justice and Justices,—The Jurisdiction and Practice of the Admiralty Courts,—Criminal Law of France—Corporation Magistrates, will equally interest, amuse and instruct the reader.

APPOINTMENTS TO OFFICE, &c.

CORONERS.

JOHN R. KANE and GEORGE MURRAY, Esquires, Associate Coroners, County of Essex.—(Gazetted 19th January, 1860.)

JAMES WRIGHT, Esquire, M.D., Associate Coroner, United Counties of Northumberland and Durham.—(Gazetted 19th January, 1860.)

WHEELER P. CORNWALL, Esquire, Associate Coroner, County of Essex.—(Gazetted 28th January, 1860.)

CLERK OF THE PEACE.

DAVID PATTEE, Esquire, to be Clerk of the Peace in and for the United Counties of Prescott and Russell, in the room and stead of D. McDONALD, Esq., deceased.—(Gazetted 19th January, 1860.)

NOTARIES PUBLIC.

THOMAS CHISHOLM LIVINGSTON, of Chatham, Esquire, to be Notary Public in Upper Canada.—(Gazetted 19th January, 1860.)

DARNLEY F STEVENS, of the City of Toronto, Esquire, Attorney-at-Law, to be Notary Public in Upper Canada.—(Gazetted 28th January, 1860.)

TO CORRESPONDENTS.

A DIVISION COURT CLERK, A DIVISION COURT CLERK, and A. BURROWES.—Under "Division Courts."

VERITAS.—The greater the truth the greater the libel. Cannot insert your communication.