DIARY FOR AUGUST.

1. SUN. *10th Sunday after Trinity. Lammas.*
8. SUN. *11th Sunday after Trinity.*
14. Sat... Last day for County Clerks to certify County rates to Municipalities in Counties.
15. SUN. *12th Sunday after Trinity.*
18. Wed. Last day for setting down and giving notice for re-hearing.
21. Sat... Long Vacation ends.
22. SUN. *13th Sunday after Trinity.*
24. Tue.. *St. Bartholomew.*
26. Thur. Re-hearing Term in Chancery begins.
29. SUN. *14th Sunday after Trinity.*
30. Wed. County of York Term begins.

THE

Canada Law Journal.

AUGUST, 1869.

THE PRESS IMPRESSED.

Much is said in praise of the liberty of the Press, and much good has resulted from the freedom which in modern times the Press has enjoyed. But it is not to be forgotten that the liberty of the Press is no more than the liberty of the moral agent who controls it. That which a man has no right to do in a state of society as an individual, he has no right to do because in some way connected with the Press. The Press is subject to the law which binds society together, and whenever it transgresses the law with impunity, the liberty to do right becomes a license to do wrong.

We have been led to make these observations owing to the habit of some newspaper writers in Canada to discuss proceedings pending for decision in courts of justice—a habit which, if our judges were not beyond suspicion, would be most destructive in its influence, and which, even under existing circumstances, ought to be generally discouraged. When a case has been argued and is awaiting judgment, no suitor or other person has any right to approach the judicial mind in order to influence its conclusion. That which is wrong in the suitor is wrong in the newspaper editor. And yet it is not unusual in Canada to find newspapers conducted with considerable ability, abusing parties to legal proceedings, or their witnesses, and attempting to hector the judges towards a particular conclusion. Such conduct is very reprehensible, and in England would not be permitted for a day. While in general proud of our Press, we cannot help stating that conduct such as we have indicated is a foul blot on its otherwise fair escutcheon.

One newspaper of considerable ability in Toronto, of late deemed it necessary to provide its readers with an article on the case of Dr. Allen, on his application to rescind the order for the delivery of his children to the mother, which article was published between the day of the argument and the day for the delivery of judgment. It freely espoused one side of the case that was argued, and roughly commented upon anything that appeared in the case opposed to the views of the writer. No notice was taken of this indecorum, and the writer emboldened by the success of his former effort, deemed it necessary to produce another article in the same case between the day of the argument of the application for process of contempt against the Doctor and the day of the delivery of judgment. The latter article in referring to the affidavit made by a son of the Doctor used this language, "The thing is so monstrous that it is, for the ends of justice, to be hoped there may be no hesitation in at once meting him out his proper reward." While so dealing with one of the witnesses before the judge, it is not to be wondered that language equally unwarranted was used in reference to the conduct of the Doctor himself, which was described as "an attempt to trifle with and defy the majesty of the court." Again: "one can hardly conceive a more gross attempt, or one more apparently ridiculous, to trifle with the court, &c." Considering that the conduct of the Doctor, whether a contempt or not, was the subject of investigation, "one can hardly conceive a more gross attempt, or one more apparently ridiculous, to trifle with the court," than this same newspaper article. It is with pain that we direct attention to it. The writer of it little knew that while endeavouring to prejudice the judge and the public against the Doctor, who was accused of contempt of court, that he, the writer, was guilty of a most gross contempt, and one for which, without doubt or question, he ought to be severely punished. Nothing can be more pernicious than to prejudice the minds of the public against persons concerned as parties in causes before the causes are finally determined. There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed

with safety both to themselves and to their characters; and that judges, whether weak or strong, may be allowed equally to discharge their duties without the fear of offending popular writers or popular newspaper publishers.

Such was, in effect, the language of the the celebrated Lord Chancellor Hardwicke, nearly a century since (see 1 Salk., 469), and such is in effect, the language of many eminent judges of more recent times. The present Lord Chancellor, when Vice-Chancellor Wood adjudged the publisher of the *Pall Mall Gazette* guilty of a gross contempt of court, for thus commenting upon affidavits filed in a suit, "many of these are important enough if the deponents can endure cross-examination in the witness box; many are obviously false, absurd and worthless:" *Tichborne* v. *Tichborne*, 17 L. T. N. S. 5. Still later, Vice-Chancellor Malins was equally mindful of the duty which he owed to himself, to the bench, and to the public, by subjecting the proprietor of a local newspaper to costs for animadverting upon the parties to a winding up petition then before the court, and intimated that if process of contempt were asked he would most certainly have granted it: *Re The Cheltenham and Swansea Railway Carriage and Waggon Company, limited*, 20 L. T. N. S. 169. In doing so he said, "whenever it happens that a newspaper, whether on its own motion or at the instigation of others, publishes proceedings in a cause, it does prejudice the cause of justice." Motions of this kind are of late very frequent in England. Vice-Chancellor Malins, in the last reported case of the kind, *Robson* v. *Dodds*, 20 L. T. N. S. 941, said that three or four had occurred before him in a recent period. This learned judge, while alive to the great benefits of a free Press, is no less alive to the necessity of a pure administration of justice. He, in the case to which we have last referred, made an order for the committal of a newspaper publisher who had published an article which was calculated to create a prejudice against one of the parties to a pending suit, and to cast opprobrium upon his solicitor. It is true that he spoke of motions of the kind as of a very embarrassing character, but his firmness in disposing of them is deserving of all praise. No one better appreciates the mission of the Press than this learned judge, but no one less shrinks from the discharge of his duty when it becomes his duty to censure the Press. He is reported in the last mentioned case to have used this manly language, "on the one hand, it is of the highest importance to the public that the Press should be as much as possible unrestricted, a freedom which gives life and vigour to newspaper articles; and it is equally clear that no such comments should be permitted as are calculated to impede the course of justice." Vice-Chancellor James still more recently held a Court near Guildford at which the printer and publisher of a local paper, called the *Poole Pilot*, was called upon to show cause why he should not be committed for contempt of Court for having published an article vindicating in strong terms the claims of a party to a suit pending in Court as to the Tichborne title and estates. Dr. Tristam appeared for the newspaper publisher, and put in an affidavit expressing the deep regret of the publisher for having published the article. The learned counsel by way of excusing his client, said that the strong remarks against the present claimant, which had appeared in other newspapers, had led his client to believe that he had a right to comment on the case. The Vice-Chancellor said, that the press "has no right to comment upon or interfere with a pending suit," that a gross contempt of court had been committed, and at first he was strongly inclined to send the newspaper publisher to prison, but as the latter had expressed his regret he, the learned Vice-Chancellor, would order him to pay the costs of the application. The Vice-Chancellor further intimated, that "in all future cases the full punitive power vested in the Court would be exercised" (*The Law Times*, August 21, 1869, p. 316).

It is to be hoped that we have sufficiently directed attention to the abuse of which we complain, in order to prevent a repetition of it. Most of our newspaper writers are not only men of ability but men of good sense. With such men it is not necessary to do more than point out a legal transgression, in order to remove it. They fearlessly point out what they conceive to be wrong in the conduct of others, and must not complain if others ask them to take "the beam out of their own eye." The misconduct of which we complain is not, we are sure, wilful. It is rather the result of ignorance of the rules of law that govern the conduct of newspaper

writers in relation to pending proceedings in courts of justice. But good sense and good taste alike point it out as an abuse, and while the many discern the abuse, we trust the few who have hitherto acted as if blind to it, will in future discern it, and act accordingly. If not, the courts must be invoked to maintain the majesty of the law. Public opinion is deeply interested in the pure administration of justice, and will abundantly sustain any effort necessary in the direction we have indicated; and the public, in the interest of the laws of decency and propriety, may be compelled ere long to ask if in Canada we have judges of such an independent spirit and unswerving purpose as Lord Hardwicke, Lord Hatherly, or the present Vice-Chancellors, Malins or James.

SELECTIONS.

REAL PROPERTY LAW REFORM—THE RULE IN SHELLEY'S CASE.

The present generation can scarcely realise the fact that there was once a time when the opinion of a Lord Chief Justice upon an abstruse question of conveyancing law would be the talk of the town for weeks. Law reform is now so much the order of the day that abolitions, remodellings, and simplifications have long ceased to surprise anyone. Since the days when an opinion of Lord Mansfield set all the lawyers by the ears in two factions of Shelleyites and anti-Shelleyites, besides drawing down on the great judge the fierce denunciations of Junius, who accused him of wanting to overthrow the laws of England, there has happened a grand turn of the tide. The reforms made are so many indications of the direction in which the current runs. A very few generations of lawyers have passed away since the tendency was all for form and technicality, and "valuable forensic inventions;"—whether in consequence of the accumulations of the previous cycle having become unbearable, or from ever recurrent reaction and oscillation, it is now all for clearing up and cutting down. This is apparent both in legislative reforms and in the tone of judicial decisions, and the tendency shows to the greatest advantage in the latter.

We are going to concern ourselves just now with the particular section of law just alluded to. "The rule in *Shelley's case*;"—"that when the ancestor, by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or tail, the word 'heirs' is a word of limitation of the estate of the ancestor," who takes the whole fee—is one of the first bits of law which most law students learn; it is eminently adapted to be learnt by rote without being comprehended. It is, as Mr. Joshua Williams points out, obviously of far more ancient date than the case, *temp.* Elizabeth, with which it is identified. We do not propose to discuss its origin in this place, beyond pointing out that it is a very natural sequence from the incapacity of alienating which attached to the freeholder of old times. When the tenant could neither sell nor devise, a gift to A. for life with remainder to his heirs would, in practical effect, amount to the same as a gift to A. in fee, or rather, a gift to A. in fee would confer no greater freedom on A.; and it was not strange that the former limitation should be always represented by its shorter equivalent.

As the power of alienation arose, the expressions ceased to be synonymous, but in the meantime the synonyme had become a fixed legal doctrine. It is perhaps the principal evidence of the inconvenience of this technical rule or doctrine (for great lawyers have differed as to which of the two it should be styled) that a large volume may be written upon it without exhausting the subject, and what is worse, without leaving its effect clearly ascertained. Now the rule itself is as much a rule of law as the rule of the descent of real estate *ab intestato:* given an estate of freehold to the ancestor, and it is a rule of law that the same gift cannot make his "heirs" *purchasers* of the reversion in fee. Where they take by descent, that is tantamount to the ancestor taking the fee at once, and the power of alienation attached to an estate in fee thus enables the ancestor to fustrate the testator's intention. Whether or not a particular gift comes within the rule is a question of construction.

Baron Surrebutter, in his stroll round the limbo of departed lawyers and litigants, is made to say—"My attention was arrested by a miserable looking ghost, surrounded by books and papers, which, with a bewildered countenance, he was vainly endeavouring to read through. Upon inquiry I found that this was the shade of the celebrated Shelley, who, for some misdeeds committed upon earth, had been sentenced to read and understand all the decisions and books relating to the celebrated rule laid down in his own case." "The mind sinks," said Lord Eldon, "beneath the multitude of cases" (*Jesson* v. *Wright*, 2 Bligh, 1).

Shortly, we may take the result to be as follows:—

Where the words "heirs" or "heirs of the body" are used, the ancestor takes the fee, even though the testator has added words of distribution (*e g.*, "share and share alike") or an ulterior limitation to the heirs of the second generation, or other expressions inconsistent with the notion of the ancestor's taking more than a life interest. The words "issue" (and in some cases even "children") have the like effect, but not quite so strongly, it

having been held by the Court of Queen's Bench in a late case of *Bradley* v. *Cartwright*, L. R. 2 C. P. 511, that words of distribution may by implication control the words "issue" so as to limit the ancestor's estate to a life interest.* And whatever be the words employed, even if the phrase be "heirs," a downright explanation by the testator that he meant sons or daughters will prevent the Rule from operating. If the testator has not been his own conveyancer, but has created an executory trust to settle lands on limitations sounding like that in the Rule, the Courts, in directing the settlement, incline to give effect to any indication of an intention that the first taker should not take more than a life interest.

The Rule itself has very often been stigmatised as a pitfall for testators, frustrating their intentions by giving the absolute disposal to persons intended only to enjoy for life, and thus enabling such persons to deprive the ultimate beneficiaries of their share in the testator's bounty. The testator may have meant that A. should only enjoy for his life, and that the reversion should be a provision for his children or some one else. If, however, the gift comes within the Rule in *Shelley's case*, A gets the fee simple or becomes tenant in tail, as the case may be, and can at once sell every atom, and so destroy all the hopes of all who were to come after him. We have lately received a pamphlet written by Mr. W. Wiley, one of the Registrars of the Principal Registry of the Irish Probate Court, in which a very earnest appeal is made for the Legislature to abolish the rule. In the words of Cockburn, C. J., in *Jordan* v. *Adams* (9 C. B. N. S. 497), Mr. Wiley urges that "it despotically fixes on the testator a purpose which he never entertains, and enforces a construction by which it is as clear as the sun at noonday that his intention is violated."

He then classifies as follows the instances in which the Rule defeats intention by converting the life interest which the testator meant to give, into an estate tail:—

"1. Cases where after a life estate given to the parent or ancestor, followed by a devise to the 'heirs of the body,' words of limitation are added to the words 'heirs of the body,' which would be totally unnecessary if it was intended that the parent or ancestor should get an estate tail.

2. Cases where after the words 'heirs of the body' words of distribution are added, totally inconsistent with the devolution of an estate tail.

3. Cases where, after an estate for life is given to the parent, there is a devise to his 'issue,' and words of limitation are added, which would be wholly unnecessary if an estate tail was intended.

4. Cases where words of distribution are added to the word 'issue,' totally inconsistent with the devolution of an estate tail.

5. Cases where the words 'child,' 'son,' and 'daughter' have been held to be words of limitation conferring an estate tail."

We agree with Mr. Wiley that the Rule in *Shelley's case* is a grievance; but he has rather overstated its amount. The rule is not necessarily bad because it defeats the intention of testators. No rules oftener defeat testator's intentions than the rule against perpetuity and the law which permits a tenant in tail to bar the entail and sell the land. Probably a majority of testators would like, if they could do so, to tie up their property longer than the law allows them: some of them try to do so, and fail, at the expense of intestacy; but it would not be well on that account to abolish or even remodel the rule against perpetuity. Undoubtedly the Rule in *Shelley's case* must frequently disappoint the intention when the will has been drawn by the testator himself or some other layman. Precisely the same again may be said of the rule against perpetuity, and that objection amounts to this, that as long as there are rules of law they will bruise those who do not know them oftener than those who do. When our real property law is simplified, as we hope to see it one day simplified, to the utmost possible degree, there will still remain some things which to inexperts will be technicalities. And for this simple reason, that the ownership of land must ever be a matter of title rather than of possession. It may sound illiberal, but we do not think "unlearned testators" who draw their own wills are entitled to very much pity. It is common, whenever a doubt arises about the effect of a will, to place it to the account of the "glorious uncertainty of the law." In many cases the doubt arises simply from the testator's want of forethought, or his imperfect style of putting his wishes on paper. Events—births, deaths, or what not—may occur which never occurred to the testator at all. Or he may use words with a certain meaning in his own mind, without reflecting that the next person who saw them might read them in a totally different sense.* In the first case he really has expressed no intention respecting the devolution in the events which have taken place; in the second, it is hard to say what is meant; but in either case the Court endeavours, if possible, to get at his mind. And however the law may be simplified, an expert acting on instructions will always make a better will than a testator could do for himself, just as an architect will design him a better house.

After all is said, there remains this,—the Rule is technical, there is no longer any reason

* The Wills Act, by restricting the meaning of the words "die without issue," though leaving them to the old law where they follow an estate tail, somewhat narrowed the operation of the Rule.

* We remember a devise to A. (a relation of testator's), and after him to "the heirs female," in which it was utterly impossible to determine whether the testator meant A.'s heirs or his own.

for it, and it has therefore become a purely arbitrary rule; it disappoints intentions, it leads to litigation, and has no counteracting advantage,—and Mr. Wiley is quite right in saying that it should be abolished. As to the mode in which the abolition should be effected, we differ from him again. He enumerates seven rules by which he desires that the property should be preserved for the descendants, allowing the ancestor to take a life estate only. Six of these are derived from the five instances above-mentioned; the seventh is designed to assist the practical working of the alteration, by providing that where distributive interests are given "the tenant for life should have the power of selling the fee under proper restriction, the money to be produced, deducting the value of his life interest, to be settled on the trusts of the will." A better plan would be simply in a short Act to abolish the Rule in *Shelley's case* at once, either by name or description. The testator's indications of intention would then have free scope for operation, without the confusion and difficulty of interpretation which would inevitably arise from substituting six or seven benevolent rules for one harsh one. But if even if this were done there would be this evil, that the authorities would be thrown into a far more troublesome state than at present. There would be hundreds of decided cases of which it would be almost impossible to say whether they had any effect left them or not.

We are firmly convinced in our own mind that the time has now arrived when a careful hand should remodel our whole real property law by abolishing all that has become purely arbitrary. In effect this would probably be to remove almost every trace of feudalism. Such a change *will* be made, and we should prefer to see it made once for all, rather than piecemeal.—*Solicitors' Journal.*

CONTEMPT OF COURT.

This is a subject to which attention must have been drawn by several cases which have been lately reported. Whether the occurrence of conduct which the Court deems contemptuous has been more frequent, or the reporters have been more diligent in reporting such cases as have occurred, we know not.

It will be conceived that every court of justice possesses an inherent right, which it is in duty bound to exercise, of punishing those who contemn its dignity; and it is quite clear that if the right did not exist, the course of justice would be seriously interfered with. This being so, the question follows, what are the acts which courts of justice, and especially the court of Chancery, are wont to consider as contemptuous?

The sort of contempt which consists in using violence or abusive language to a person serving the process or orders of the Court, or using scandalous or contemptuous words against the Court or the process thereof, Cons. Ord. xlii. 2, needs no more than a passing notice. When we read that in *Williams* v. *Johns*, 12 Feb., 1773, the defendant, on being served with the *subpœna*, compelled the person who served it to eat the parchment and wax of the process, and then beat and kicked him, and left him for dead, with orders to his servants to throw the body into the river, one is not surprised to find that the defendant was sent to the Fleet for contempt, under the above-mentioned order.

But we pass on to the commoner forms of contempt at the present day, which consist in words rather than in deeds. Of these, according to Lord Hardwicke, there are three sorts, The first consists in scandalising the court itself; the second in libelling parties who are concerned in proceedings before the court; and the third in prejudicing mankind against persons concerned in proceedings before the Court, whether parties or not, at any time before the proceedings are finally disposed of.

With reference to the first sort of contempt, it is clear that anything that scandalises the Court itself, whether in the nature of personal insult, or of reflection upon the course of procedure, or the administration of justice, must be a contempt of the grossest character, *Lechmere Charlton's case*, 2 My. & Cr. 316, where the contempt was in writing a threatening letter to the master to influence his judgment in the matter of the Ludlow charities, and *Martin's case*, 2 R. & M. 674 n, where the contempt was in writing a letter to the Lord Chancellor enclosing money, are the first instances which occur to us. But cases like these are not common.

The second and third sorts may be taken together, and stated to consist in publishing written or printed matter concerning pending proceedings, either with the intention of vilifying the parties concerned, or of prejudicing mankind against them. It is obvious that many cases of this character are cases of libel dealt with in a particular way because they amount to a contempt of court; while, on the other hand, there are many cases where something has been done, and the Court is moved to commit the party doing it for contempt, instead of to restrain him by injunction from doing so again.

The reason of this is that the Court is bound to assert its dignity and protect parties before it no less than itself, in order to secure the due administration of justice. "Nothing is more incumbent upon courts of justice," Lord Hardwicke said, in *Roach* v. *Garvan*, "than to preserve these proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned, whether parties or not, in causes, before the cause is finally heard."

The case which led to these remarks of Lord Hardwicke is better known as the *St. James's Chronicle case* (2 Atk. 470). It was a motion in the cause of *Roach* v. *Garvan* to commit the printers of that journal and the *Champion*,

another journal. Their offence consisted in publishing a narrative of the facts involved in the cause before the cause was finally heard, in the course of which they took upon themselves to abuse some of the parties, and call persons who had given evidence by the opprobrious epithet of "affidavit men."

In *Ex parte Jones* (13 Ves. 237) Lork Erskine committed, for contempt of court, the committee of a lunatic, and the committee's wife who had published a pamphlet, with an address by way of dedication to the Lord High Chancellor, reflecting on the conduct of the petitioners, who were persons interested in the lunatic's affairs. This, be it observed, was under the jurisdiction in lunacy.

In *Colman* v. *West Hartlepool Railway Company* (8 W. R. 734), a party was restrained from publishing a garbled account of certain proceedings before the Court which was calculated to damage the case of his opponents. We refer to this case, which was not one of contempt, because it illustrates what we were saying, that it is pretty much at the option of the offended party to move to restrain the publication or to move to commit for having published.

In *Mrs. Farley's case* (2 Ves. Sen. 20), sometimes cited as *Cann* v. *Cann* (2 Dick. 3 Ha. 333n.), the contempt consisted in publishing advertisements in *Felix Farley's Bristol Journal*, relating to the answer of Sir Robert Cann in the cause.

In the *Tichborne case* (15 W. R. 1072), the printer of the *Pall Mall Gazette* was held to have committed a technical contempt by an article commenting on the affidavits filed on behalf of the plaintiff in a cause which had not come before the Court. And in *Felkin* v. *Herbert* (12 W. R. 241), it was held by Vice-Chancellor Kindersley that the publication of an article in a newspaper holding up to ignominy witnesses who have made affidavits, and reflecting on the parties to the suit, is a gross contempt, even though the time for evidence, as regards the party on whose behalf the affidavits are made, has closed. And the case of *Daw* v. *Eley* (17 W. R. 245), must not be omitted, where the Master of the Rolls held that the solicitor to a defendant in the suit was liable to be committed for contempt in having sent anonymous letters to a newspaper stating as facts the matters relied on by his client, which were in fact the points which would have to be tried as issues in the cause. So, too, in *Matthews* v. *Smith* (3 Ha. 331), it was held to be a contempt to publish advertisements with reference to the subject-matter of the suit, calculated to prejudice the rights or misrepresent the relative positions or character of any of the parties to the cause, or witnesses in it.

In *Robson* v. *Dodds* (1) (17 W. R. 782), Vice-Chancellor Malins held that the printer of a local newspaper was guilty of contempt in having published comments on the conduct of a gentleman who had been solicitor of a building society, pending the hearing of a suit instituted by him against the society. And attacks on witnesses were held to be a contempt in *Littler* v. *Thomson* (2 Beav. 130).

We may infer that would be equally a contempt of court to publish comments on the conduct of parties engaged in the conduct of a cause with a view to prejudice the success of the cause, or misrepresent its objects.

It appears then, that it is equally a contempt of court whether the person on whom the attack is made be a party to the suit or not. Witnesses, equally with parties, are entitled to the protection of the Court, if not more so. Every party to a suit has some inducement to sustain the incidental annoyances of litigation; but the mere witness, who in nine cases out of ten thinks it a great hardship to get into the witness box, or attend before the examiner, would be still less likely to come forward and give evidence if his motives, his character, and his truthfulness could be made a jest of with impunity. Hence it is that the liberty of the press, in the few cases where it has run into licence in this respect, has uniformly been restrained. No doubt the question of intention has something to do with the assessment of the penalty; but where a contempt of this nature has been committed it is no justification that it was not intended to commit a contempt (*Felkin* v. *Herbert*, *ubi sup.*).

So much for comments on and notices and advertisements concerning pending proceedings. There is yet another form of contempt of court arising out of the publication of the pleadings themselves, or any portion of them, pending the final hearing of the cause. It is equally certain that this may constitute a contempt, even where there are no comments on the portion of the pleadings or documents so published. There are two reasons why this should be so; first, because such a publication invites the world to pass judgment on a case where the Court has not expressed its own opinion; and secondly, because *ex parte* statements have a tendency to bias the mind of the judge and jury. It may be idle, as was argued in *Felkin* v. *Herbert*, to suppose a publication would affect the decision of the Court, even were it read by the judge himself; but the question is one of tendency, and not of fact. A Captain Perry, it was said by Lord Hardwicke in *Roach* v. *Garvan*, printed his brief before the cause came on, thus prejudicing the world beforehand, and we cannot but presume that it was held to be a contempt. In *Re Cheltenham and Swansea Waggon Company*, 17 W. R. 463, the contempt consisted in publishing in the columns of a newspaper, but without comment, a petition to wind up a company that had been filed, but not answered, containing charges of fraud, &c. It was argued that the contents of a petition were public matter, as it was necessarily advertised, and copies were supplied under certain restrictions; but it was held that it differed not in this respect from a

bill, the publication of which would clearly be a contempt.

Much, however, depends on the intention, which is necessarily inferred from the facts of the case. In *Baker* v. *Hart*, 2 Atk. 488, the parties interested in an order for a receiver had published it with a statement of the facts upon which the order was obtained, and circulated copies of it among the tenants of the estate. This they did under the master's advice, and it was held not to be a contempt, though the Court disapproved of what had been done. *Brook* v. *Evans*, 8 W. R. 688, may be referred to on this point.

The subject is a well-worn one, yet it is singular how often a risk of contempt is incurred, most commonly at the present day by journalists in the exercise of what are called their public duties. With every desire to see the press retain its present position and continue to exercise its functions as well as it does at the present day, it must be admitted that the interests of justice require some reticence as to the proceedings before the Courts, and that the parties to these proceedings, and the witnesses and persons engaged in the conduct of these proceedings, should be protected from comment or remark, either of an *ex parte* character, or of an adverse or depreciatory tendency. The safest way to avoid the risk is to omit indulging the public with such comments or remarks altogether until the verdict is given or the decree made.

The order to commit will rarely be executed, as an apology will, in most cases be made. *Felkin* v. *Herbert*, however, shows that it is not enough to come to the Court and say, "If I have technically committed a contempt, I apologise," but the apology must be unqualified. Hence, when the order that the party do stand committed is made, the practice is to direct that such order be not enforced for a limited period, in order to give room for a proper apology to be offered.—*Solicitor's Journal.*

CAPITAL PUNISHMENT.

The advocates of capital punishment abolition sustained on Wednesday last their customary defeat, and as long as these reformers aim at abolishing capital punishment *in toto* it may be anticipated, and must certainly be desired, that their measure will always meet a similar fate. Last year the defeat took place on a motion made by Mr. Gilpin (the introducer of this year's measure), during the passage of the Capital Punishment within Prisons Bill. On that occasion, Mr. John Stuart Mill argued very forcibly against the abolition, founding his argument on the deterrent effect of capital punishment upon the criminal classes.

The arguments adduced last week did not comprise any addition to those which have been adduced on previous occasions. A large portion of the argument employed usually consists in the recapitulation of particular instances of hardship, real or assumed; here, of course, the instances selected vary from year to year; but, with this exception, there is no novelty.

The position of the abolitionists consists partly in a sort of assumed rule of progress. Capital punishment, they say, has been abolished from time to time for the minor offences, and the result has justified the abolition; hanging for murder now remains the sole remnant of a bygone system; in obedience to the irresistible march of improvement it is time that this too were swept away. If it were an established law that alterations must always proceed in the same direction, that there is no resting place at which reformers can say, "hold, enough," politicians and political economists of the obstructive and antediluvian school would have a very heavy weight thrown in their favor. We should fear to redress even the grossest abuses from dread of committing ourselves to a ceaseless progress which might end by landing us at an extreme ten times more grievous than its opposite. That we abolished hanging for sheep stealing, and, as we believe, with good effect, is no reason why we should do away with hanging for murder. The position starts with a *petitio principii*, that it is expedient to abolish—which is precisely what has never yet been shown.

The question is purely one of expediency, but before discussing what is the real gist of it, the question of deterrent effect, we may notice an argument generally urged, and which was urged last week by Mr. Gilpin, that capital punishment is irrevocable. If you condemn a man to imprisonment for life, and it is afterwards proved that he was innocent, you can release him; but you cannot restore him to life if you have had him executed, This is a drawback, a disadvantage attendant on the infliction of death as a punishment. But it is far from being so weighty as the abolitionists seem to fancy. In the first place, it is a drawback which, in a greater or less degree, according to the severity of the punishment, coupled with the sensitiveness of the recipient, applies to all penalties. In no case can you do more than remit the infliction to come; you cannot recall the past. If you have sentenced the convict to ten years' penal servitude, you can remit the nine years to come, but you cannot recall the one year which he has endured, any more than you can compensate him for the shame and the pain of the exposure, the trial, and the unjust conviction. We have never heard it advanced as an argument against flogging garotters, that if a conviction for garotting proves unjust, you cannot unflog the innocent convict. The number of innocent convicts for capital offence is so infinitesimally small that there can be no ground for altering the system on their account.

There is also urged another argument proceeding somewhat in the opposite direction to this. It is said that in consequence of death

being the penalty for murder as now defined by the law, many criminals escape altogether, because the juries will not inflict death for certain offences: *exempli gratiâ*, infanticide. The case of infanticide is a peculiar one. It is perhaps scarcely desirable to make any distinction which would amount to enacting that the life of a child is not as valuable as that of an adult. At the same time infanticide proper, that is, the murder of a child at the birth, is certainly considered not so heinous an offence as the murder of an older person, as is shewn by the readiness of juries to acquit in such cases. The rule of law that murder can only be committed of a child completely born and severed from his mother has prevented vast numbers of convictions which otherwise must have taken place, but where mortal injury is inflicted on a child in this position the guilt is really quite as great as if the child had been completely born and the violence inflicted immediately afterwards. It would in our opinion be a great improvement of the law to enact that upon any charge of infanticide—that is, of murder by a mother of her child at the time of its birth—it should not be necessary to prove that the child was completely born at the time of the infliction of the injury, but that in all such cases the offence should not be capital, but punishable only with penal servitude. If that change were made, convictions would take place of the serious charge in cases where at present their is only a conviction for concealing the birth, an offence of a totally different character.

It is also said that there is much uncertainty in the infliction, in consequence of the Home Secretary's intervention. The jurisdiction of the Home Secretary as to remitting sentences is of course, unsatisfactory, but it is difficult to see how it can be done away with altogether. There must always be in some quarter a discretion as to the exercise of the prerogative of mercy. But the cases in which the Home Secretary is appealed to may be divided into two classes, those in which he is called upon to pass judgment upon the facts proved at the trial, and those where new facts are brought forward. As to the latter there clearly ought to be a means of ordering a new trial. We have protested several times against allowing a universal right of appeal in criminal cases, but it would be much more desirable that the subsequent investigation, which must take place in certain cases, should be a judicial rather than a private one. The former class of cases are more difficult to deal with. We are inclined to think it would be an improvement to refer the question of the remission to a certain number of the judges, say five or six, of whom the judge who tried the case should be one. By this plan there would be more uniformity than at present.

The present defects in the system of capital punishment call for amendment, but are not an argument for abolition.

It is also said, and with apparent seriousness, "But capital punishment cannot operate as a deterrent, for see how many murders are committed." This argument might be advanced against the infliction of any punishment whatever. But another question occurs at once: Is there any likelihood that if we abolished hanging there would be fewer murders? It was stated in last year's debate that in the experience of Tuscany and Switzerland the abolition was followed by a marked increase of crime. It requires no unusual penetration to see that, if hanging for murder were abolished, lesser crimes would be consummated by murder far oftener than at present. Where a ruffian has committed a brutal rape or robbery, which, on conviction, will entail on him penal servitude for life or some long term nearly equivalent,—abolish capital punishment for murder, and how often is it likely that the criminal will shrink, if his escape may be thereby facilitated, from adding murder to the first crime? Nay, in many cases it will be his direct interest to do so, simply by way of destroying the evidence of the victim of his previous atrocity. If he silences that evidence he may evade justice altogether, but even if, after adding that second crime to the first deed, he still falls into the hands of justice, he is no worse off than before, because justice has no further penalty to inflict. His back is against the wall; he has all to gain and nothing to lose. We repeat that this consideration alone imperatively requires that death should be inflicted as the penalty for murder. Further than this, we believe that the fear of the capital infliction does operate with very deterrent effect, and especially so upon the "habitual criminal" class. As we have before observed, the saying "while there is life there is hope," applies to criminals, as well as to other people. Appropriating Mr. Scourfield's quotation of last Wednesday—"By all means let reverence for human life be observed,' '*que messieurs les assassins commencent.*'"—*Solicitors' Journal.*

The Irish case of Keays against Lane was a cause on petition against trustees for a breach of trust. The trustees of a fund settled on a husband for life or until insolvency, and then to his wife for life for her separate use, at the solicitation of her husband, and with the concurrence of the wife, committed a breach of trust by lending part of the trust funds to the husband, who afterwards became an insolvent. In a suit against the trustees, charging them with a breach of trust, the husband and wife being parties to the suit, the Lord Chancellor holds, that the Court could make a declaration that the husband should recoup the trustees the amount which they were liable to make good to the trust funds, and that a cross bill by the trustees was not necessary. That the husband not being in insolvent circumstances at the time of the loan, his wife's separate estate in the trust fund was then reversionary, and, therefore, as it could not then be bound by her, it was not available to recoup the trustees.

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

(*Reported by* Henry O'Brien, Esq., *Barrister-at-Law.*)

The Queen v. Mason.

Bail—Power of Judge in Chambers to rescind order for, when bail fictitious—New sureties.

Where a prisoner charged with felony had been admitted to bail upon an order of a judge in Chambers, and an application was subsequently made to rescind such order, and to re-commit the prisoner to gaol, on the ground that he had not been committed for trial at the time such order was granted, and also upon the ground that the bail put in was fictitious,

Held, that a judge in Chambers had power to make the order asked for; but the order in this case was conditional upon the failure of the prisoner to find new sureties within a specified time.

[Chambers, 16th August, 1869.]

On the 27th July, *McKenzie*, Q.C., on the part of the private prosecutor Nichol, and with the assent of the Attorney-General obtained a summons, calling on the accused Mason to shew cause why the order made by Mr. Justice Morrison, on the 22nd of May, ordering Mason to be admitted to bail for his appearance to answer a charge of stabbing Robt. Nichol with intent, &c., should not be rescinded, and set aside and vacated on the ground that Mason was not committed for trial by any justice of the peace, at the time the said order was applied for and granted, and that there was no warrant against Mason for the offence, and that no notice of intention of such application was given to the prosecutor or his counsel, and that the County Attorney had no right to consent to the said order, and that the order was improperly obtained, and why the recognizance of bail and the warrant of deliverance under such order should not be set aside and Mason should not be committed for trial, and why he should not furnish the place of residence of John Patterson and Robert Peck, the alleged sureties, and the description of the freehold mentioned in the recognizance of bail, and why such order should not be made, and such direction given as might be lawful and just in the premises or grounds disclosed in affidavits and papers filed.

The affidavits and papers filed upon which this application is based shew in effect: that Mason, on the 8th May last, was charged upon an information laid by a police officer, and arrested for a felonious assault upon one Nichol, by stabbing him with a knife which penetrated his lungs; that the case was heard before the police magistrate of this city, and witnesses examined for and against the prosecution; that on the 19th May, the police magistrate stated that he had decided upon committing Mason for trial, refusing to take bail, and intimating that Mason would have to apply to a judge; that Nichol, through his counsel, Mr. McKenzie, assuming that Mason would be committed, notified the late Mr. Bethune, Q.C, acting agent for the Attorney-General; that he desired to oppose the admission of Mason to bail, and requested to be informed of any application for that purpose; that an application, of which no notice was given to the private prosecution, was made before the Honorable Mr. Justice Morrison, sitting in chambers, on the 22nd May, to bail Mason; that an order was granted, admitting Mason to bail, himself in $600 and two sureties of $400 each, for his appearance at the next assizes; that the same having come to the knowledge of Nichol, and Mason being at large, an application was made to the police magistrate, to see the order and to inspect the recognizance of bail; that the first was refused, and the counsel of Nichol was referred to the office of the clerk of the peace, where the police magistrate said it was filed; that the same could not be found there; eventually it was brought and shewn to Nichol's counsel; that by the copy of the recognizance filed, it appears to have been taken on the 29th May before the police magistrate, the two sureties being John Patterson and Robert Peck, who are both described as of the township of York, Yeomen, and endorsed on which is a memorandum signed by the police magistrate, that both of the sureties deposed on oath, that they were freeholders in the township of York, and worth $400 each over and above their liabilities; that these sureties are not known and cannot be found; that the assessment rolls of the township of York and village of Yorkville were carefully searched, and no such persons were found entered therein, the same being certified under the hands of the township clerks; and the prosecutor Nichol swears, that he made enquiry, and caused diligent enquiry to be made in the township of York and in the village of Yorkville and elsewhere in the county of York, and that he could get no intelligence or information whatever about the said John Patterson or Robert Peck; that he has reason to believe, and doth verily believe that the names John Patterson and Robert Peck are fictitious names, or if such persons exist, they are obscure and unknown persons without standing or substance and of no worth whatever; he also states that he was informed, and believes, that Mason stated since his liberation, that persons of the names of Sheely and McFarlane were his bail. It appears that Mason was in custody from the 30th of April until the 29th May, under a warrant of remand, dated 30th April, signed by the police magistrate, a copy of which is filed (the original being produced to me by the officers from the gaol), upon which warrant there are indorsements of further remands to the 14th May, 19th May, 20th, 21st, then to the 26th May, 27th, to the 29th, then to the 2nd June, and to the 3rd June. That no warrant of commitment was ever placed in the hands of the keeper of the gaol against Mason, but that he was detained in custody at the time of the application before me for bail, upon such remanding warrant, and until he was liberated under a warrant of deliverance signed by the police magistrate on the 29th of May; and Nichol swears that he was informed by the officers at the gaol, that the warrant of deliverance was brought to the gaol by some person while Mason was there in custody, and that no person was at the gaol to take the recognizance of bail before the delivery of the warrant of deliverance. A copy of the depositions, &c., taken upon the charge by the police magistrate was also filed. By it, it appears that the information was laid against Mason on the 29th April; that on the 8th May, witnesses

were examined and the case remanded until the 14th May; then there appears an entry dated 19th May, that Mason was committed for trial to the next court; then follow other depositions of witnesses apparently for the defence, and sworn on the 18th May.

The only affidavit filed on shewing cause is that of Mr. Nudel, clerk of the police court, in which he states that Mason was committed for trial on the 19th May; that a warrant of commitment was signed and sealed, but not delivered to the gaoler, as there was a counter charge made by Mason against Nichol, in which Mason was a necessary witness; that on the 11th June, Nichol was convicted of an assault on Mason, on Mason's testimony, and that the warrant of commitment against Mason was on that day, to the best of the clerk's recollection, given to a police officer, and that he never saw it since; that during last week (since this application) he procured a duplicate warrant of commitment to be executed by the police magistrate, and placed it in the hands of the gaoler. No affidavit is filed by Mason with respect to the putting in bail, or as to the existence of the sureties, nor any statement made by the police magistrate. On the return of the summons the County Attorney appeared and made a satisfactory statement as far as he was concerned, and the case was argued at length by *R. A. Harrison*, Q.C., for Mason, and *McKenzie*, Q.C., for the private prosecutor, and on behalf of the Attorney-General.

Morrison, J.—On the application to bail, Dr. McMichael appeared for the accused, and the late Mr. Bethune on behalf of the Crown. The County Attorney was also in Court. The question of bailing was discussed in the absence of the depositions and the warrant of commitment (they being sent for). I asked the County Attorney if the case was a bailable one. He stated the circumstances, and that in his opinion it was. It was then agreed by the counsel that the order to bail should go, and after some discussion the bail was fixed at two sureties in $400, and the accused in $600. The depositions and papers were then produced, but as the application was disposed of, I did not look at them. The exact terms in which the order was drawn up I do not recollect. In such orders I generally direct that the bail shall be persons to the satisfaction of the County Attornies, those gentlemen being responsible officers under the Crown. In this case the order may have been drawn up conditioned that the bail should be to the satisfaction of the Police Magistrate. As the order or a copy is not produced, I cannot say what the terms were, or whether they were complied with, the prosecutor swearing that he is not able to produce it, the original being in the possession of the Police Magistrate, who refused to give to his counsel a copy of it.

I may here briefly state, that so far as the County Attorney is concerned, that he accurately stated what took place on the application to bail, and I see nothing to warrant any reflection on his conduct on that occasion, or in reference to any proceeding since the order was made.

When I granted the order to bail I necessarily assumed that Mason was in custody upon a warrant of commitment for trial, and if it had been suggested that he was only in custody on a remanding warrant from 21st May to the 26th May, I certainly would not have entertained the application. It is, however, contended and sworn to by Mr. Nudel, that Mason was committed for trial on the 19th May, but that the warrant of commitment was not given to the gaoler. It may have been the case, but it is certainly quite inconsistent with the remanding warrant and the indorsements thereon. I may state that I noticed on the original remanding warrant a memorandum that the prisoner was committed for trial under date of 19th May, which memorandum is struck out with the pen, and then follow the further remands after that date to the 3rd June. The recognizance of bail appears to have been acknowledged on the 29th May, the warrant of deliverance being dated the same day. No sensible explanation is given to account for these inconsistencies and irregularities except that which is stated in Nudel's affidavit; but it seems very inconsistent after a prisoner has been committed for trial on the 19th May on a charge of felony to remand him on the same charge from time to time until the 3rd June; and although he was bailed and released from gaol on a warrant of deliverance on the 29th May, that a warrant of commitment against the same prisoner for the same charge should afterwards issue on the 11th June, and be placed in the hands of a police officer, and that all these proceedings should take place under the directions of the same magistrate: and it further appears that since this application a duplicate warrant of commitment has been signed and sent to the keeper of the gaol. These matters, in conjunction with the alleged fictitiousness of the bail, in the absence of any satisfactory explanation, gave occasion on the argument for severe comment, and I regretted much that the Police Magistrate did not think it necessary in justice to his official position to account for these irregularities and repel the imputations involved. On the other hand, Mason the accused in the face of an intimation from the prosecutor's counsel, that if the bail were produced, or if it was shewn by affidavit that the sureties were the persons they were represented to be, that this application would be abandoned, refuses through his counsel to file any affidavit. Under such circumstances, and as the case stands, I can only arrive at the conclusion that the bail are as alleged and sworn to, fictitious or worthless. I am asked by this summons to set aside my own order. I am clearly of opinion that I might do so, as the order was based on the assumed fact that the accused was then in custody on a final warrant of commitment, and which it now turns out was not the case, and the order was inadvertently and improperly granted, and for that reason alone I would be justified in rescinding it; but after reading the depositions, and assuming that the accused was in fact committed for trial as stated by Nudel, the case in my judgment was a bailable one, and the amount of bail fixed sufficient; and if I were now satisfied that the sureties were *bona fide* and not as charged, I would dismiss the application; but when it is alleged that this order, which I ought not to have granted, has been improperly used

as an authority and cover to liberate the accused, I should be wanting in my duty if I did not direct such steps to be taken as would in some measure remedy the mischief and insure justice being done in the premises. Blackstone in his commentaries, Vol. 4, p. 296, in treating of commitment and bail says: "Bail is a delivery or bailment of a person to his sureties upon their joining together with himself in sufficient security for his appearance, he being supposed to continue in their friendly custody instead of going to gaol," and "he that is bailed is in supposition of law still in custody, and the parties that take him to bail are in law his keepers, and may re-seise him to bring him in at any time:" 2 Hawkins, P. C. 124. Such being the law, assuming that the bail in the present case are as alleged fictitious, then in reality Mason would be at large: in such a case there must be some remedy. It was denied on the argument that I had any authority to prevent so scandalous an evasion of the law, and that for my doing so no precedent could be found. The absence of precedent can only be accounted for, from no case of the kind having arisen, but if it were so, I would not hesitate to make a precedent, but I am not without authority, for it is laid down in 2 Hawkins, 88, and referred to in 2 Hale, P. C. 125, and in Bacon's Abridgment Title Bail (F.), "That if a person be bailed by insufficient sureties he may be required either by him who took the bail or by any other who hath power to bail him, to find better sureties, and on his refusal may be committed; for insufficient sureties are as none."

If that is law, and on principle and common sense it is, then in this case where it is sworn that the bail are fictitious and utterly worthless, —a conclusion which is borne out by the refusal of the accused to state who they are, or where they are to be found, or that they have any existence,—I shall require the accused Mason to find other sureties, and in case of his neglecting or refusing to do so, to order him to be recommitted for the offence with which he stands charged. An order will therefore go, that Mason do within four days put in good and sufficient bail before myself in Osgoode Hall, viz, himself in $600, and two sureties in $400 each, otherwise he shall be recommitted to the custody of the keeper of the common gaol of the City of Toronto.

Order accordingly.

Cushman et al v. Reid.

Law Reform Act of 1869—Order to try in C. C.—Right of County Judge to try Superior Court cause without a jury.

When an action on a promissory note made in U. S. sued on as if made in this Province, payable in Canadian currency, was brought down for trial from Superior Court to County Court, without a Judge's order.

Held, that such case was improperly brought down, and that it was one in which an order was necessary.

Held also, that under sec. 18, of the Law Reform Act, judges of County Courts can try case brought down from Superior Courts without the intervention of a jury.

This is an action brought on a promissory note made at Chicago, and dated the 1st March, 1867, whereby the defendants jointly and severally with the other persons who are not sued, promised to pay the plaintiffs, or order, nine hundred dollars, twelve months after date, with interest at ten per cent. This note is declared upon as if made in this Province, and payable in Canadian currency, but by an admission signed by the attorneys of both parties, it is admitted that the amount thereof was payable in United States. Treasury notes or funds (commonly termed greenbacks), and that whatever, if anything, the plaintiff may be entitled to recover the the amount thereof, shall be such sum in Canadian or British currency, as will be equivalent to principal and interest in said notes or funds, allowing credit for the amount endorsed as paid on said instrument. This case was taken down to trial at the sittings of the County Court of the County of Hastings, held at Belleville, on the eight day of June, under the provisions of the Law Reform Act, of 1868, and without a judge's order, under section 4, of 25 Vic., ch. 42, and the issues were tried before the judge of the said County Court, under the 1st sub-section of section 18, of the Law Reform Act, who assessed the damages at seven hundred and fifty three dollars, and fifty three cents, without the intervention of a jury.

J. B Read obtained a summons calling on the plaintiff to show cause why all further proceedings in this cause on the verdict rendered therein at the recent sittings of the County Court of the County of Hastings against the defendant and the entry of judgment therein, should not be stayed, and the said verdict set aside, on the grounds of irregularity and impropriety in this, the said cause was tried before the judge of the said County Court, without the order of a judge of either of the Superior Courts of Common Pleas or Queen's Bench, that the said cause should be tried in said County Court; and on the further ground, that there was no jury process awarded to try the issues, and that the said cause was not one which could be carried down for trial at said court, without a judge's order therefor, or if carried down for trial without an order; that such trial was irregular in trying the same before the County Court judge without the intervention of a jury.

Galt, J.—As respects the first objection, I am of opinion, that the case was not one where the amount was liquidated or ascertained by the signature of the defendant, under the provisions of the Law Reform Act of 1868. It is true that the declaration is on a promissory note, and that by the particulars attached to the record, the plaintiff states his claim to be as follows: note $900, interest at 10 per cent, from 1st March, 1867, $204 75; but from the terms of the admission above mentioned, it is manifest that the amount stated in the note is only the basis on which the damages in this case were to be assessed and did not show any liquidated or ascertained, amount and the sum due in the present case, as appears from one of the papers filed, was arrived at by calculating $900 U. S. currency at gold quotation of 141. This case, therefore, was one which should have been taken down by a judge's order, under the 28 Vic. ch. 42, especially as the declaration in this case did not shew the true nature of the claim.

As respects the second objection, namely, that the case was tried by a judge without the inter-

vention of a jury, I am of opinion, that had the case been properly brought before the County Court, such an objection could not be sustained. This is a very important question, and, as this is, I believe, the first occasion on which the construction of the Law Reform Act, as regards this point, has been brought up, I have thought it expedient to state my reasons. The first sub-section of the 17th section of the Law Reform Act enacts, that all issues of facts and assessments of damages in the Superior Courts of Common Law relating to debt, covenant and contract, when the amount is liquidated or ascertained by the signature of the defendant, may be tried and assessed in the County Court of the county where the venue is laid, if the plaintiff desire it, unless a judge of such Superior Court shall otherwise order. The second sub-section is, "All issues of fact and assessments of damages in actions in any County Court, may be tried and assessed at the election of the plaintiff at any sittings of Assize and Nisi Prius for the county in which the venue is laid, without any order for that purpose. The other sub-section of section 17, has no bearing on the present question. Section 18 is as follows: in amendment of the second section of ch. 31, of the Consolidated Statutes of Upper Canada, entitled "an Act respecting Jurors and Juries," which said second section enacts, that issues of fact shall be tried by a jury, unless otherwise provided, it is enacted, 1st, that all issues of fact in any civil action when brought in either of the Superior Courts of Common Law, or in any of the County Courts of Ontario, and every assessment or enquiry of damages in every such action may, and in the absence of such notice as in the next sub-section mentioned, shall be heard, tried and assessed by a judge of the said courts without the intervention of a jury, provided that if any one or more of the parties requires such issue to be tried or damages to be assessed or enquired of by a jury, he shall give notice to the court in which such action is pending, and to the opposite party that he requires a jury. It was contended on behalf of the defendant in the present case, that the foregoing provisions of the first sub-section, apply only to cases in which the judge presiding at the trial is a judge of the court in which the action is brought, or at any-rate that no County Court judge could decide any issue of fact in a case brought in one of the Superior Courts without a jury.

I cannot agree in this view, because it would have the effect of narrowing to a very considerable extent what was obviously the intention of the Legislature, namely, to avoid the intervention of a jury in all cases where the parties did not necessarily require it. If this construction were adopted, this state of things would arise, namely, that all issues from the County Courts brought for trial at any sittings of Assize and Nisi Prius, must be tried by a jury, and that the presiding judge at Nisi Prius could try such issues only without the intervention of a jury, as were raised in actions brought in his own court. This construction is so much opposed to what was evidently the intention of the Legislature, that in the absence of express words to that effect, I do not feel myself warranted in giving effect to it.

My judgment is, that as this case is one in which a judge's order was necessary, that all proceedings be stayed on the verdict until the fifth day of Michaelmas Term next.

Order accordingly.

Fitzsimmons v. McIntyre.

Prohibition—Right of County Judge to strike out of record, Counts, the pleas to which oust his jurisdiction—Partial Prohibition.

A County Court Judge at the trial of a case, made an order, upon the application of Plaintiff's counsel, striking out a count of the declaration and all pleadings relating thereto, because the pleadings thereunder ousted his jurisdiction.

Held, that he had the power so to do.

Held also, That if prohibition had been applied for before trial, it would only have been granted as to that count. That different causes of action included in same declaration may be severed and tried separately.

[Chambers, June 18th, 1869.]

The Record in this case contained three counts; 1st, for breach of covenant; 2nd, for assault; 3rd, trespass *quare domum fregit*. To the third count defendant pleaded "that the dwelling house was not the plaintiff's, as alleged." The record was entered at the last sittings of the County Court at Pembroke, and a summons for a prohibition was granted before, but not served till after trial. At the trial, defendant's counsel objected to the jurisdiction, as the title to land was brought into question by the plea to the third count, whereupon the plaintiff's counsel applied to the judge for an order striking out the third count and all pleadings relating thereto—which was granted, and the judge proceeded to try, and tried the remaining issues. A verdict was given for plaintiff. The summons for a prohibition having been served, was now argued before Mr. Justice Gwynne.

Harrison, Q.C., shewed cause, and contended that the three counts in the declaration contained separate and distinct causes of action, and the judge at trial had power to sever them. The judge having struck out the third count and pleadings relating thereto, there was nothing on the record to take away his jurisdiction. That the judge had power to make such an order, but that if he had not done so, but had allowed the record to remain as it was, he couid have tried the issues on the first two counts, and in that case the prohibition might have gone as to the third count; see *Walsh* v. *Ionides*, 1 E. & B. 383, and *Kerkin* v. *Kerkin*, 3 E. & B. 399.

Osler, in support of summons, contended that, as soon as the plea bringing the title to land into question was pleaded, the judge's jurisdiction ceased, and he had no power to do anything whatever in the case thereafter.

Gwynne, J.—The defendant obtained a summons calling upon the plaintiff to shew cause why a writ of prohibition should not issue to prohibit the judge of the County Court of the County of Renfrew from further proceeding with a cause in the County Court at the suit of *John A. Fitzsimmons* v. *James McIntyre*. Upon argument of the summons it appeared that the declaration in the cause contained three counts; 1st, for breach of covenant; 2nd, for assault; and 3rd, trespass *quare domum fregit*, and asportavit of chattels. Issues, in fact, were joined in respect of the causes of action in the 1st and

2nd counts. To the third count the defendant pleaded that the dwelling house was not the plaintiff's, as alleged. To this plea there was a demurrer. Now these counts contain several and distinct causes of action, and I think it clear, upon the principle and authority of *Walsh* v. *Ionides*, 1 E. & B. 383, and *Kerkin* v. *Kerkin* 3 E. & B. 398, that the prohibition, if granted, should be restricted to the cause of action contained in the third count. Causes of action of this nature, though capable of being joined in one action under the provisions of the Common Law Procedure Act, are still so far distinct, that a judge may, if he thinks fit, order one or more of the causes of action contained in several counts to be tried separately from those in another or others; and I can see no reason, therefore, why a prohibition may not, nor, indeed, why it should not, be restricted to that count, which alone is in excess of the jurisdiction, leaving the others to be disposed of by the County Court, as the proper court wherein they should be tried. It further appeared that, what in fact has been done, is, that at the trial which came on before the summons was served, the judge, by an order made on the record, has expunged the third count and all the pleadings in respect thereof from the record, and thereupon, the trial of the issues joined on the other counts proceeded, and a verdict has been rendered on them alone. This, as it appears to me, is just what the exigency of the case required the judge to do, and the defendant has therefore obtained all the relief that he was entitled to, or that he should have received by a writ of prohibition. It is therefore unnecessary that the writ should issue, and the summons must be discharged.

Summons discharged.

ENGLISH REPORTS.

LAURIE v. SCHOLEFIELD.

Continuing guarantee—Practice—Pleading—Rule 14, H. T. 1853.

R. & Co., manufacturers, opened a banking account with L., who placed £1,000 to R. & Co.'s account, on A. & B., executing the following guarantee:—"In consideration of L., agreeing to advance and advancing to R. & Co. any sums of money they may require during the next eighteen months, not exceeding in the whole the sum of £1,000, we hereby jointly and severally guarantee the payment of any such sum that may be owing to L. at the expiration of the said period of eighteen months, and undertake to pay the same on demand in the event of R. & Co. making default in the payment of the same. Signed, A. & B." R. & Co. paid into L.'s bank to their account more than £1,000 during the eighteen months, but they overdrew their account several times during the same period. At the end of the time R. & Co. made default in payment of the £1,000, and had overdrawn their account £24, whereupon L. sued A. on the guarantee. After the action brought, B. paid L. £500, his share of the liability. L. obtained a verdict against A. for £1,000.

Held, first, that this was a continuing guarantee, and that in placing a construction on it, the position of the parties as well as the words of the contract were to be considered, so that it was not to be avoided by L. allowing R. to overdraw his account to an amount together with the sum of £1,000 exceeding £1,000.

Secondly, that rule 14 H. T. 1853, applied to actions on guarantees, and that therefore the payment of the £500 by B., could not be given in evidence in reduction of debt, but ought to have been pleaded in bar.

[17 W. R., 931.]

Action by the public officer of the Union Bank of England.

The declaration stated that in consideration that the bank would agree to advance and advance to the firm of Russell & Co., sums of money that they might require during the then following eighteen months, not exceeding in the whole the sum of £1,000, the defendant promised and guaranteed to the bank the payment of any such sum that might be owing from the firm of Russell & Co., to the bank at the expiration of the said eighteen months, and undertook to pay the same on demand in the event of the said firm of Russell & Co., making default in the payment of the same; and the bank performed the said consideration for the said promise and guarantee, and advanced to the said firm divers moneys, amounting to £1,000, which they required during the eighteen months, and at the expiration of the said eighteen months, there was owing from the said firm to the bank, £1,000, for and in respect of the said advances, and all conditions were fulfilled, &c., yet the said firm have not, nor has the defendant, paid the said £1,000, and the same remains due and unpaid. And the plaintiff claims £1,100.

Pleas.—first, *non assumpsit;* secondly, that there was not owing from Russell & Co. £1,000, or any part thereof; thirdly, that before action the defendant, by one Black, satisfied and discharged the claim by payment; fourthly, that before action Russell & Co. discharged the said claim by payment; fifthly, that the said promise and guarantee was made by the defendant and accepted by the co-partnership solely as a surety for Russell & Co., and that in violation of the said condition in the said guarantee, and without the defendant's consent, the bank made advances to Russell & Co. during the eighteen months greatly exceeding in the whole the sum of £1,000, and thereby the defendant was discharged and released from liabilty on the guarantee. At the trial before Mellor, J., at the last Spring Assizes at Kingston, the following facts appeared:—

In February, 1867, Russell & Co. desired to open a banking account with the plaintiff's bank, and they were at the same time desirous of obtaining an advance of £1,000 from the bank. The advance, according to the rules of the bank, could only be made upon satisfactory security being given for its repayment. Russell, a partner in Russell & Co., opened an account on the 2nd of February in the usual way, and paid money into the bank to the credit of the firm. At the time the account was opened, it was arranged that the bank should make the advance of £1,000 on having the same secured by the joint and several guarantee of Black & Scholefield.

On the 4th of February the plaintiff gave to Russell & Co., the following guarantee, and on the 8th of February, Russell & Co. brought it back duly signed.

The following is a copy of the guarantee:—

"In consideration of the Union Bank agreeing to advance and advancing to the firm of Russell & Co. any sum or sums of money they may require during the next eighteen months, not exceeding in the whole the sum of £1,000, we hereby jointly and severally guarantee the pay-

ment of any such sum that may be owing to the said bank at the expiration of the said period of eighteen months, and undertake to pay the same on demand in the event of the said firm of Russell & Co. making default in the payment of the same —Dated the 4th February, 1867.

Black & Scholefield."

Russell & Co. then requested the bank to place the sum of £1,000 to their credit, who acted on the guarantee and request, and placed £1,000 to their debt in the loan ledger of the bank, which is a book in which it is the usage of the bank to keep all such accounts. The £1,000 was on the same day carried to the credit of Russell & Co. in the customers' ledger of the bank in which the drawing or current accounts of the customers are kept. Payments made into the bank by the customer from time to time to the credit of the drawing account are entered in that account and are kept distinct from the loan account. They are not paid by the customer or received by the bank as repayments on account of the loan, nor are they so applied, but the customer is allowed to draw against them. In this way the drawing account of Russell & Co. was continued down to December, 1867. During that period they generally had a small balance to their credit. But on the 31st December, 1867, there was a debtor's balance against them of £24. The account remained dormant down to the middle of 1868. The drawing account was then further debited with £12 for interest on loan. The eighteen months expired in August, 1868. During that period Russell & Co. had paid into the bank over £1,000. The whole amount of £1,000 was due to the bank at the commencement of the action, with interest from June, 1868, but since action brought £500 has been paid by Black on account of the debts.

A verdict having been found for the plaintiff for £1,000 and interest, a rule was obtained in Easter Term by Honyman, Q. C., leave being reserved to the defendant to set aside the verdict, and enter a nonsuit or verdict for the defendant, on the grounds that the bank had been repaid the £1,000 by Russell & Co., and that the defendant was not liable by reason of Russell & Co., having been allowed to draw for greater sums than £1,000, and that the fourth and fifth pleas were proved; or to reduce the damages by £500, on the ground that the defendant is entitled in assessment of damages to the benefit of the money paid by Black.

Garth, Q. C., and *R. Clarke*, now showed cause.—If the parties intended to restrict the amount of the loan as well as the liability of the surety, and that the bond should be forfeited if advances beyond the £1,000 were made, they ought to have done this with a clearness and precision not to be mistaken. In *Parker* v. *Wise*, 6 M & S. 239, a bond was given by a surety to secure the repayment of moneys advanced which recited that the obligees were bankers and the principals manufacturers, that the latter banked with the obligees, and that they had overdrawn their account, and in order to enable them to carry on their business, they had applied to the obligees to allow them to overdraw at any time such further sum as they should require, so that those further sums together with the amount overdrawn, should not exceed at any one time £5,000, and the condition was that the principal or surety should pay the sum then owing and such further sums as the obligees should thereafter advance to principals, not exceeding in the whole £5,000. The bankers having advanced more than £5,000 it was contended that they had thereby vacated the obligation, but the court held that the language of the contract did not amount to a prohibition of further advances, but to a qualification only of liabilty of the surety. They also cited on this point *Henniker* v. *Wigg*, 4 Q B., 792; *Williams* v. *Rawlinson*, 3 Bing. 72; Addison on Contracts. 2nd ed. 578; *The North British Insurance Company* v. *Lloyd*, 10 Ex 523. The verdict for the full amount can be sustained, although Black has paid £500 since the writ was issued, although we cannot issue execution for the full amount. The defendant ought to have pleaded the payment of the £500 since the action commenced by Black. which he has failed to do: *Beaumont* v. *Greathead*, 2 C. B. 494. The rule 14 H. T. 1853 expressly states that payment shall not be given in evidence in reduction of damages. Here there is no debt, but the amount is recoverable only as damages; damages cannot be pleaded. The defendant therefore had a right to give the payment in evidence in mitigation of damages.

Honyman, Q C., and *Philbrick*, in support of the rule.—Russell & Co. drew from the bank during the eighteen months £1,055. The sum that was to be drawn was not to exceed £1,000. In fact, the bank had advanced the sum of £1,000 two or three times over, as at various times Russell & Co. paid moneys into the bank and then drew it again. This is not the ordinary form of guarantee. It is made a condition of the advance that it is not to exceed £1,000. The defendant might have been satisfied that Russell & Co. were in a position that if they lent them £1,000 they could repay that amount, but if Russell & Co. were to go into large speculations that would materially increase the risk of the surety. If the guarantee is not read in this way the bank could advance any amount, and if it was not repaid within the time the defendant would be liable. The guarantee means that at no time is Russell & Co. to be in the bank debt more than £1,000. In *Parker* v. *Wise*, the consideration is unlimited. If the £1,000 which was advanced had been repaid the next day, the guarantee would have been exhausted, and the defendant would not have been liable for any fresh advance. Rule 14 H. T. 1853 only applies to the *indebitatus* counts, where you must plead payment. Here you cannot plead payment, as it is not a plea to part of the cause of action. The plaintiff's claim when he sues on the *indebitatus* counts is divisible; here it is not. The object of the rule was where you could plead payment, and did not, you could not use it in reduction of damages. The plaintiff in this action recovers damages and not a liquidated debt, and damages cannot be pleaded to. It was not intended to introduce a new plea by this rule He cited *Speck* v. *Phillips*, 5 M. & W. 279; *Adams* v. *Palk*, 3 Q. B. 2.

Byles, J.—As this guarantee is a written document, we cannot consider in construing it any conversation that took place at the time it

was made, but we are able to look at the position of the parties. Russell & Co. opened a banking account with the plaintiff, and the plaintiff, at Russell & Co.'s request, agreed to lend them £1,000 on their finding sufficient security for that sum. The defendant and Black having signed this guarantee, the money was placed to Russell & Co.'s account. On looking at the position of the parties, and at the words of this document, we have come to the conclusion that this is a continuing guarantee. It has been argued that this sum has been repaid, and that as the bank has advanced more than £1,000 during the eighteen months, the defendant is not liable, for he says that the document is to be read that Russell & Co. must not advance any sums not exceeding in the whole, the sum of £1,000. The plaintiff says that the words "not exceeding in the whole the sum of £1,000" are to be read with the latter part of the guarantee. The more natural construction is to read these words with the preceding part of the guarantee. However, as we can read it with the latter part with the same propriety, it will carry out the intention of the parties in protecting the parties who advanced the money, and who were guaranteed the repayment of it by the defendant. As to the payment of the £500, whether it ought to have been allowed to have been given in evidence in reduction of damages, or pleaded at bar. All the enactments preceding rule 14, apply to actions *ex contractu*. All those that follow apply to actions of tort, or actions in the nature of tort. The plaintiff in form is right; he was entitled to enter his verdict for £1,000, the defendant ought to have pleaded the payment by his co-surety of the £500. The plaintiff would have been entitled to have retained his verdict, if we had not power to deal with the pleadings; as we have the power, we shall amend the pleadings, but that must be done on payment of costs of this rule by the defendant.

Montague Smith, J.—I am of the same opinion. The defendant placed his name to this guarantee as a security for the advances the bank might make Russell & Co. during the eighteen months, and the sureties meant to make themselves liable up to the amount of £1,000 for any sum that might be advanced and owing to the bank at the expiration of that period. The guarantee says to what extent the defendant will be liable, and does not prohibit the bank from making other advances to Russell & Co., not on the security of their guarantee. There is nothing to limit them from so doing. Lord Ellenborough, in *Parker* v. *Wise*, states his view of a similar contract, and his construction of a similar guarantee, that the plaintiff, if he chooses to advance more than the sum mentioned in the bond, is not precluded from recovering the sum secured by the guarantee.

Now the second point, whether payment in this action can be pleaded, must be decided, as it affects the costs of the rule. This was an action on a bond against one of two sureties for £1,000, during the action and before trial £500, half of the debt on the bond, was paid by the other surety, and a verdict was given for £1,000 against the defendant, the question we have to decide is whether this payment by the co-surety could be given in evidence at the trial in reduction of damages, so that the plaintiff should have entered this verdict for £531 instead of £1 031, or if this payment should have been pleaded in bar to the action. It seems to me that it ought to have been pleaded in bar. The rule 14 H. T. 1853 is express—"Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar." I think that this rule applies to all cases where a sum of money is paid in payment of part of a claim. If the £500 was paid in this action, it is properly payment within the words of the rule, and it reduces the debt that amount. I agree, however, that we ought to insist that the plaintiff now reduces his verdict to £531, but as the plaintiff is technically right, the defendant must pay the costs of the rule.

Brett, J.—The case of *Parker* v. *Wise* and the remarks made in the paragraph on the 'limitation of the liability of the surety" in Addison on Contracts apply to this case. The plaintiff is right; this bond must be construed with reference to the usage in business transactions of this kind. I agree with the construction that the Court has put on this contract, and also on their decision as to costs. The rule must be discharged, the plaintiffs consenting to reduce the damages to £500.

Cooper v. Gordon.

Dissenters—Ministers—Dismissal of—Majority of Congregation—Rights of.

In the absence of special usage, rules, or agreement, a Dissenting minister, appointed by his congregation, is not entitled to hold office for life or good behaviour against the will of the majority of such congregation.

[17 W. R. 908.]

The object of this suit was to obtain a declaration that the defendant, the Reverend Samuel Clarke Gordon, a Dissenting minister, had, by a resolution which had been passed by a majority of his congregation, being duly dismissed from his office, and to restrain him from continuing to act as the minister of such congregation.

Previously to the year 1707, a congregation of Protestant Dissenters, known by the name of Independents or Congregationalists, were in the practice of assembling for religious worship in a building called the Presbyterian Meeting House, in Broad-street, Reading. In the year 1707 this building became vested in certain members of the congregation, twenty in number, in trust for such congregation "during such time as the assembling of Protestant Dissenters for religious worship should be permitted at the said meeting-house."

About the year 1808, three messuages and other premises adjoining the meeting-house were purchased, the meeting-house was pulled down, and a new meeting-house and vestry-room erected on the site of the old meeting-house and part of the newly-acquired premises, the remainder of which, with the exception of a house and garden, were used for the meeting-house, yard, and burial ground, and as a passage to the vestry-room. All these premises were vested in trustees upon the following trusts, as to the meeting-house, vestry-room, yard, burial-ground, and garden—"Upon trust for the use and benefit of

the said society or congregation of Protestant Dissenters from the Church of England then belonging thereto, commonly called Independents, and which should from time to time resort to and frequent the said meeting-house and premises, and become members of the said society for the exercise of divine worship therein, and peaceably and quietly to permit and suffer them, and every one of them, to exercise their religion therein, and freely to enter and bury their dead therein, or in some part or parts thereof, under and subject to such orders, rules, regulations, and restrictions as had been and were or should be made and observed in the said society or other religious institutions of the like nature." And as to the house, which was the residue of the premises, "upon trust to permit and suffer the minister or pastor, for the time being, of the said society or congregation of Protestant Dissenters, called Independents, who did or should from time to time meet in the said meeting-house for the exercise of divine worship as aforesaid, to have the use and occupation of the same, or otherwise to receive and pay the rents and profits thereof to such minister or pastor, as the same should become due and payable, for so long a time as such minister or pastor should from time to time be and continue minister or pastor of the said society or congregation, and officiate as such, and no longer, to and for his and their own use and benefit."

The plaintiffs and the defendant Christie were, at the date of the filing of the bill, the sole trustees, and recognized as such by the congregation.

In the year 1865, the congregation considered it desirable that the Reverend William Legg, who had for more than twenty years officiated as their sole pastor, should have some assistance in his duties, and that another minister should be appointed to assist, and act with him. In the following year, Thomas Barcham, one of the plaintiffs, who was then acting deacon of the chapel, on behalf of the congregation, and in accordance with a resolution which had been passed by them, invited the defendant, Mr. Gordon, who was a candidate for the co-pastorate, to become co-pastor with Mr. Legg. Mr. Gordon shortly afterwards accepted such invitation, and entered upon his duties. No arrangement was made with Mr. Gordon as to the duration of his co-pastorate.

About a year after the appointment, a portion of the congregation became dissatisfied with Mr. Gordon, and two deacons who were then in office requested him to resign, assigning for their request the eight following reasons:—

1st. That his sermons were too argumentative, containing trains of reasoning which the people could not carry away with them.

2nd. The sermons were above the level of the great mass of the people, not being snfficiently simple.

3rd. They were too Arminian in doctrine.

4th. They set up too high a standard of Christian life, not taking sufficient account of the influences of trials, &c.

5th. There was a deficiency of unction, Gospel power, and Christian experience.

6th. The motives from which Christians were exhorted to act were not those of Christian love, but of dry, rigid duty.

7th. The work of the Spirit was not sufficiently dwelt upon.

8th. In some of the sermons there was nothing said to unconverted sinners.

A want of harmony between Mr. Gordon and Mr. Legg, led to great unpleasantness, and steps were taken to ascertain the feeling of the congregation on the subject of the dismissal of Mr. Gordon from his office. Accordingly, on the 8th September, 1868, a meeting of the congregation was duly convened, with full notice to Mr. Gordon.

The congregation consisted of 212 persons, a majority of whom, consisting of 116, were present at the meeting. A resolution was passed dismissing Mr. Gordon from his office; the resolution was carried by 115 votes, all the persons present voting in favour of it, with the exception of one, who remained neutral. Notice of the resolution, and notice not to continue to officiate as co-pastor of the congregation, were served upon Mr. Gordon, but he disregarded them, and continued to officiate as before. He also appointed the defendant Pike to receive the pew-rents arising from the chapel, and Pike accepted such appointment, and it was alleged that he had received certain of such rents accordingly.

Mr. Gordon and his supporters, who had protested against the regularity of the meeting, and had not attended it, held meetings of their own, at which resolutions were passed in Mr. Gordon's favour. It was alleged that the conduct of Mr. Gordon, by calling irregular meetings of his partisans among the congregation, and professing them to be of equal authority with the church meetings, and by holding communion service for his own friends at a different hour to established usage, promoted dissension in the congregation, and that his conduct before referred to was very injurious to and brought much scandal upon the church and congregation, and had then already diminished the revenues arising from the pew-rents.

It was admitted that Independents universally hold as fundamental principles that each congregation of persons in church-fellowship, assembling at a particular chapel with their pastor, constituted a church complete in itself, independently of all other congregations of persons professing the same belief and that mere seat-holders, who were not in communion with the church, were not considered to be in church fellowship, or entitled to vote as members of such congregation; and that (in the absence of any special usage, rules, or agreement to the contrary) the power of electing their minister resided entirely with such first-mentioned congregation. The bill alleged that it was the well established usage among Independents, that each congregation might at any time at their discretion dismiss their pastor from his office, and that in the absence of any special circumstances the will of the congregation was ascertained and such power exercised by a vote of the majority of the members. It was admitted that in the present instance no special rules or usage had at any time been adopted by the congregation, but Mr. Gordon contended it was a fundamental principle

among Independents that (in the absence of special usage, rules, or agreement) all appointments as pastor to such a congregation were for life, so long as the pastor should abstain from preaching unorthodox doctrines, and should not be guilty of immorality or other similar gross misconduct, and that, excepting in those cases, there did not exist in any person or body a power to dismiss such pastor.

The defendant Christie, who was one of the trustees, declined to concur with the plaintiffs in the institution of the suit, upon the ground that he considered such suit uncalled for.

The bill prayed for a declaration that Mr. Gordon had been duly dismissed from his office of co-pastor, and that he might be restrained from preaching or officiating in the chapel referred to; and that both he and the defendant Pike might be restrained from collecting or receiving the pew-rents; and for an account.

Hardy, Q.C., and *Higgins*, for the plaintiffs, contended that in the absence of any special rules, the case must be governed by the invariable practice of the body, which was that a majority of the congregation had a right to dismiss their minister. Without such a power, a congregation might be saddled for an indefinite time with a minister who was unacceptable to them.

Greene, Q.C., and *Yate Lee*, appeared for the defendants Gordon and Pike, and on behalf of the former contended, that in the absence of any rules or agreement with Mr. Gordon on the subject, he was entitled upon his acceptance of the office to hold it for life, excepting he were guilty of immorality or heterodoxy, neither of which, however, had been imputed to him. It was also contended that he was *cestui que trust* under the settlement, and had a life interest in the endowment. They cited Lewin on Trusts, 402, s. 17; *Doe d. Jones* v. *Jones*, 10 B. & C. 718; *Doe d. Nicholl and Others* v. *McKaeg*, 10 B. & C. 721; *Attorney-General* v. *Pearson*, 3 Mer. 354, 357, 402; *Foley* v. *Wontner*, 2 J. & W. 246; *Daugars* v. *Rivaz*, 8 W. R. 225; 28 Beav. 233; *Attorney-General* v. *Drummond*, 1 Dr & War. 353.

Whitbread appeared for the defendant Christie, and submitting that he ought not to have been made a defendant, asked for his costs.

Greene, Q.C., for the defendant Pike, urged that he ought not be made a party to the suit; that he was only agent of the defendant Gordon, and that he was entitled to his costs. He cited *Pove* v. *Everard*, 1 Russ. & M. 231; Calvert's Parties to Suits, 301.

Hardy, Q.C., in reply, urged that at law the defendant Gordon was a mere tenant-at-will to the trustees, and was removable by a majority either of such trustees or of the congregation. He cited *Perry* v. *Shipway*, 1 Gif. 1; *Attorney-General* v. *Aked*, 7 Sim. 321; *Doe d. Earl Thanet* v. *Gartham*, 1 Bing. 357; *Rex.* v. *Gaskin*, 8 T. R. 209; *Porter* v. *Clarke*, 2 Sim. 520; *Davis* v. *Jenkins*, 3 Ves. & B. 151.

At the conclusion of the arguments his Honour said that he would not deliver judgment until next term. He strongly exhorted the parties to come to some arrangement in the interval.

May 28—Stuart, V.C., said:—On a careful re consideration of the evidence and the arguments in this case, I find no just grounds for the claim of the defendant, the Rev. William Gordon, to continue to perform the duties and enjoy the emoluments of minister against the will of the trustees and the majority of the congregation. There is nothing in any of the written instruments to countenance the notion, that the choice of a minister by the trustees of a congregation is an irrevocable choice, or that he is to continue officiating for life, or during his good behaviour. Indeed, considering the nature of the duties, the purpose of the choice, and the constitution of the congregation, they are inconsistent with any such irrevocable appointment. If a minister has a right to continue in that situation against the will of the majority of the congregation and of the trustees, and to enjoy the emoluments for his life, the number and proportion of the majority could make no difference, and, instead of being the minister of the congregation, he might be the minister of a minority of ten or of one. Such a position would certainly not be that of the minister or pastor of the congregation described in the declaration of trust of 1808.

As to the argument that this congregation is not a society existing by voluntary subscription, but is endowed with property held upon certain trusts, and that the minister is a *cestui que trust* under the deed, it in no degree supports Mr. Gordon's claim to continue minister during his life or good behaviour. By the deed he is a *cestui que trust* only "so long as he shall continue minister or pastor of the society or congregation, and officiate as such, and no longer." The endowment is for the benefit of the congregation and that they may be benefited by the services of a proper minister. The declaration of trust as to the rents and profits which the minister is to receive, creates a trust for the benefit of the congregation and a remuneration for those services by which they are to be benefited. There is no trust or purpose for the personal benefit of the minister, except to reward the services he performs for the congregation. In his answer, Mr. Gordon says, that in the absence of any special usage or rules the will of every such congregation is in all cases ascertained and their powers exercised by the votes of the majority; and he adds this qualification—that the minority are bound by the majority on all points, only so long as such majority act consistenly with the fundamental doctrines and principles held by the whole body. Such a qualification is futile, because as soon as the fundamental doctrines are contravened by the majority they cease to be the fundamental doctrines of the whole body, and unless the minority submit, there is no longer a united body held together by fundamental doctrines and principles. No doubt, the trustees and the congregation by the unanimous vote which appointed Mr. Gordon to be minister might have, at the same time contracted that he should enjoy all the emoluments for his lifetime. It may, however, well be doubted whether such a contract would be valid or binding on the property, or justified by the terms of the trust deed, or the purposes for which the trust is created. That reasonable degree of harmony which is secured by the submission or complete separation of the minority, seems essential to the endurance

of an association founded for the sacred purposes which united this congregation.

In the case of *Perry* v. *Shipway* 7 W. R. 406, I notice the authorities which establish these two main points—first, that the minister of a Dissenting congregation at law, is merely the tenant-at-will of the trustees; secondly, that in such bodies the decision of the majority of the trustees binds the minority. Indeed, unless the law were so settled, nothing could follow but confusion and defeat of the very purposes for which these congregations are formed. The submission of the minority is the principle upon which civil society is founded. It is a principle essential for that reasonable harmony which is necessary for the coherence of all societies, great or small, civil or religious. In the case of the *Attorney-General* v. *Aked*, it was decided that the minister of a body of Dissenters has no equity to hold his office against the legal right of the majority to dismiss him. The judgment leaves open the question whether in case of a capricious or improper dismissal the court might interfere. That is not very important, because of the improbability that anything done by the majority of the congregation, concurring with the majority of the trustees, would be capricious or improper. This court would be very slow to interfere, and more probably would not interfere at all, with the discretion of the majority. In the present case there is nothing capricious in the decision of the majority of the trustees and of the congregation. It is in vain to try to confound Mr. Gordon's position as to permanence of tenure with that of a public officer, of the rector of a parish, or a parish clerk. The permanence of their tenure is established by the law of the land for public purpose, and for the public benefit. The minister of a Dissenting congregation has a position which the law respects, and will protect as that of one chosen by a voluntary association of private persons, associated for sacred purposes, and entitled to choose a minister suitable to their own particular opinions, whose services are to be rewarded out of their own private funds. He is engaged upon a contract which is merely a private contract, and is to be construed with the same regard to the rights of each of the contracting parties as any other private contract. His position as to tenure under the trustees is clearly defined by the law. There is nothing to show that in equity he can have any position higher than he has at law, nor is there any equity to control that power in the majority of the trustees which is established at law. The power of the majority of the congregation seems to me to rest on the same principle. When the minority refuses to submit, peace is maintained by their seceding and forming themselves, if they can, into another harmonious congregation. This seems more suitable to the purpose for which such religious bodies are formed. It is better than that a contentious and recusant minority should continue members of a congregation which would thereby be disturbed by feelings and passions which should not prevail among persons meeting together for public worship.

It is scarcely necesary to notice the argument that the tenure of his ministry for life must be implied from the terms of the invitation and acceptance mentioning no shorter period. Nothing that involves an absurdity can by mere implication be made part of a contract. If it is to be implied that he was made minister for his lifetime, even the unanimous vote of the congregation would not displace him; and, if he could not be displaced, there would be the absurdity of his being the officiating minister of a congregation unanimously recusant of his services.

There must be a decree declaring that the defendant, Mr. Samuel Clarke Gordon, is not entitled to officiate or preach in the chapel in the pleadings mentioned against the will of the majority of the society or congregation in the pleadings mentioned, and an order for an injunction against him and the defendant Pike, according to the third paragraph of the prayer of the bill.

It is unnecessary to direct any account; indeed, it has not been pressed for.

The plaintiffs are entitled to the costs of the suit against the defendant, Mr. Gordon, and also against the defendant Pike, notwithstanding the allegations in the answer of the latter, and the argument that he was merely the agent of Mr. Gordon. The evidence proves his interference as to pew rents, and he was properly made a defendant. The defendant Christie, having refused to join as a plaintiff, must bear his own costs.

Sutcliffe v. Howard.

Will—Joint tenancy or tenancy in common.

A gift to several persons "during their respective lives, and, subject thereto, in trust for their respective children."

Held, that it created a joint tenancy for life, and that the children took their parents' shares *per stirpes* as tenants in common.

[V. C. M., 17 W. R. 819.]

The testator in this cause devised real estate to trustees in trust to apply the rents and profits for the benefit of his brothers, James and Samuel Howard, and his sister, Lucy North, during their respective lives in such manner as the trustees should think fit; and, subject thereto, in trust for the respective children of his said brothers and sister as tenants in common. The testator died in July, 1848. James Howard died in October, 1848, leaving several children. Lucy North died in 1867, also leaving children. Samuel Howard was still living, and had several children.

The bill was filed by the trustees of the will to obtain the decision of the Court as to whether James and Samuel Howard and Lucy North took as joint tenants during their joint lives and the life of the survivors and survivor of them, or whether upon the death of each of them one-third of the rents and profits was given over to his or her children.

Dunning, for the plaintiffs, the trustees.

Glasse, Q. C., and *Humphrey*, for Samuel Howard, the surviving brother, contended that the gift to the brothers and sister during their respective lives was a gift in joint tenancy. After the death of Samuel Howard the children of all three would take *per capita*. It was a gift to three persons during the lives and life of all the three. The word "respective" meant "as each belongs to each." All the authorities inclined towards a joint tenancy. They cited *Woodstock* v. *Shillito*, 6 Sim 416; *Armstrong* v. *Eldridge*, 3 B. C. C. 215; *Cranswick* v. *Pearson*, 31 Beav.

624; *Wood* v. *Draycott*, 2 N. R. 55; *Macdermott* v. *Wallace*, 5 Beav. 142; *Bryan* v. *Twigg*, 16 W. R. 298, L. R. 3 Ch. 183; *Pearce* v. *Edmeades*, 3 Y. & C. 246; *Doe* v. *Abey*, 1 M. & S. 432; *Abrey* v. *Newman*, 1 W. R. 156, 16 Beav. 431; *Congreve* v. *Palmer*, 1 W. R. 156, 16 Beav. 435; *Alt* v. *Gregory*, 4 W. R. 436; 8 De G. M. & G. 221.

Nalder, for the children of James Howard and Lucy North, was not called upon.

Malins, V C., said that on this will there were two questions—one was whether the brothers and sister took as joint tenants, so that the survivor was entitled to the rents, and the other was whether the children took *per stirpes* or *per capita*. The Court found out the intention of a testator from what he had expressed in the will. No doubt what the testator here intended was that each of the brothers and the sister should take an equal share, and that their children should take their shares after their death. Had he said enough to give effect to such an intention? The word "respective" was here a very important word. During their respective lives each took a life interest in one-third, and after their deaths their shares went over. The authorities were not in a satisfactory position. It was absurd to suppose the testator meant to prefer a surviving uncle or aunt to the children. The gift was to the parents for life, and at their respective deaths, and subject thereto, to their respective children. The children took the share of their deceased parents *per stirpes*. His conclusion was that the brothers and sister took each a life interest in one-third. His or her children succeeded immediately on his or her death. It necessarily followed that the children took *per stirpes*. The children of the deceased brother and sister took their one-third.

Peek v. Peek.

Settlement—Charitable trust—Perpetuity.

Certain property was conveyed by deed to trustees upon trust to permit any person or persons who should be eligible as in the deed mentioned, in the discretion of the trustees, being a lineal descendant or lineal descendants of the settlor, with his or their families, to occupy the house and part of the property for three calendar months only in each year, and if there should be no such lineal descendant to be approved by the trustees, then upon the trusts thereinafter declared concerning the residue; and upon further trust to let the remaining part of the property, except the mansion house, to any person or persons being such descendant or descendants as aforesaid for any term not exceeding seven years: and upon further trust out of the rents and profits to allow the trustees the costs of managing and maintaining the property and certain other outgoings, and to apply the residue for the support or benefit of any poor or aged persons being such descendants as aforesaid as the trustees should think fit; and as to so much of the residue as should not be so applied to apply the same towards the maintenance or relief of any sick or aged poor person living within six miles of the dwelling-house, and to apply so much as should not be so appropriated towards the support and extension of religious instruction or religious or general education or any other benevolent objects, subject to the restrictions therein mentioned.

Held, that the whole of the trusts were invalid, and that the heir-at-law was entitled to the property.

[V. C. M., 17 W. R. 1059.]

Richard Peek by a deed dated 10th November, 1825, conveyed a mansion house and hereditaments to trustees and their heirs upon trust that they should from time to time permit any person or persons being the lineal descendant or descendants of John Peek, deceased, to occupy the said messuage or dwelling-house with the appurtenances, comprising twenty acres or thereabouts, free from rent or taxes, so that each such person with his or her family should occupy the said hereditaments for three calendar months only in each year. And upon the further trust to let the remaining part of the said hereditaments to any person or persons being a lineal descendant of the said John Peek for any term not exceeding seven years at a fair average rent from which at the time of payment a deduction of 20 per cent. should be allowed to the tenant, and upon further trust out of the rents to maintain and keep in good repair the said capital dwelling-house, with the appurtenances and grounds, and to apply the residue for the benefit or advantage of any poor or aged person or persons being lineal descendants of the said John Peek, and as to so much of the residue as should not be so applied upon trust to apply the same in or towards the maintenance or relief of any sick or aged poor person living within six miles of the said capital dwelling-house, and so far as the same should not be so appropriated, upon trust to apply the rents and profits towards the support and extension of religious instruction or religious or general education, or any other benevolent objects, being wholly disconnected with the patronage or control of the state, and within the county of Devon, but giving preference to objects within the six miles aforesaid.

The plaintiff and the other trustees of the settlement except the defendant James Peek were ignorant of the existence of the settlement until Richard Peek's death, which happened on the 7th of March, 1867. James Peek had executed the settlement at the request of his brother, Richard Peek.

Shortly after the said Richard Peek's death the plaintiff and the defendants other than the Attorney-General executed the settlement at the request of James Peek, with the intention of accepting the trusts.

The plaintiff, who was heir-at-law of the said Richard Peek, filed this bill to set aside the settlement.

Pearson, Q. C., for the plaintiff.

Cotton, Q. C., and *Freeling*, for the defendants, the trustees, admitted that they could not carry out the trusts as to keeping up the mansion-house, but they considered that the deed contained a good general trust for charitable purposes: *Liley* v. *Hey*, 1 Hare, 580; *Attorney General* v. *Catherine Hall*, Jac. 381; *Fisk* v. *Attorney General*, 15 W. R. 1200, L. R. 4 Eq. 521.

Wickens, for the Attorney General, contended that it was a good gift for charitable purposes, the same as similar gifts to almshouses, though it was not made in regular form. There was no objection to almshouses being maintained for ever. The gift was good at law as a charitable gift, except as to the rents of the mansion-house: *Christ's Hospital* v. *Granger*, 1 M. & G. 460; *Bernal* v. *Bernal*, 3 My. & Cr. 559; *Martin* v. *Margham*, 14 Sim. 230; *Attorney General* v. *Greenhill*, 12 W. R. 188, 33 Beav. 193.

Pearson, Q. C., in reply. *Forster* v. *Attorney General*, 10 Ves. 335; *Chapman* v. *Brown*, 6 Ves. 404.

Malins, V.C., said it was clear that the trusts regarding the dwelling-house and the adjacent land were void. The deed was an attempt to create a perpetuity for the benefit of the descendants of John Peek, and if the trusts were permitted to take effect the property might be inalienable for generations so come. He was also of opinion that the trusts were so vague and incapable of being carried into effect that they were also void on that ground. But it was contended on the part of the trustees that the residue of the estate was devoted to charity, and that although the particular purposes of the settlement might fail, the general devotion to charity would prevail. It was, however, impossible to ascertain what amount would be required for the purposes to which the rents of the estate were primarily devoted, and he was therefore of opinion that upon the authorities cited he was bound to hold that the charitable trusts declared by the deed failed. The result would be that the whole of the trusts declared by this deed with respect to this property were invalid, and there would be a declaration accordingly, and that the heir-at-law was entitled.

Pugh and Another v. Drew and Others.

Deed—Construction—Intention—Equitable estate—Words of inheritance—Limitation of freeholds by reference to limitation of leaseholds.

If the intention of a deed be clear to pass an equitable estate in fee simple, it is not necessary that the proper words of inheritance should be used for the purpose.

By deed of settlement, on the 7th of March, 1818, certain leaseholds were settled, as to a third share thereof, in trust, in the events which happened, for A. and B., absolutely in equal shares. In 1819, certain freeholds were settled "upon such and the same trusts, and for such and the same ends, intents, and purposes, and subject to such and the same powers, provisoes, and declarations as in the said Indenture of the 7th day of March, 1818, are expressed, declared, and contained of and concerning the premises therein mentioned and described, or as near thereto as the difference of the respective estates of the said A. M., M. J., and A. J." (the trustees) "and their respective heirs, executors, and administrators, therein respectively would admit, to the intent that the rents, issues, and profits of the said hereditaments and premises might be had, received, and taken, and the said hereditaments and premises held, sold, conveyed and assigned, and the produce thereof paid and applied unto such person or persons, and in such manner, and at such time and times, in every respect as in the said indenture of the 7th day of March, 1818, is expressed and declared of and concerning the premises therein particularly mentioned and described."

Held, that the want of proper words of inheritance was not fatal, but that A. and B. took equitable estates in fee simple, and not for life only, in one-third share of the freeholds.

[V. C. J., 17 W. R. 888.]

By certain deeds executed in the years 1808 and 1811 respectively, William Bowdler Pugh assigned certain leaseholds, of which he was possessed, in the parish of St. George the Martyr, Southwark, to Andrew Mann, Margaret Jackson, and Ann Jackson, their executors, administrators, and assigns.

By indenture of lease dated the 8th of December, 1817, certain ground on the south side of the New Vauxhall-road, Westminster, was demised by one Henry Rowles to Andrew Mann, Margaret Jackson, and Ann Jackson, for a term of years therein mentioned.

By indenture of settlement dated the 7th of March, 1818, and made between Andrew Mann, Margaret Jackson, and Ann Jackson of the first part, William Bowdler Pugh of the second part, and Janet Russ Pugh of the third part, it was declared and agreed by all the persons, parties thereto that Andrew Mann, Margaret Jackson, and Ann Jackson should stand possessed of the leasehold premises in Southwark and Westminster above mentioned upon trust, after payment of the rents and performance of the covenants contained in the respective leases, to stand possessed of the surplus rents and profits in trust—

(1) For Janet Russ Pugh, for her sole and separate use during her life; and, after her decease,

(2) To pay and apply the same for the maintenance and education of William Russ Pugh, Jane Russ Pugh, and Margaret Russ Pugh (afterwards Margaret Russ Browne), the three children of Janet Russ Pugh, until they should respectively attain the age of twenty-one years or marry; and, subject thereto,

(3) In trust, as to one-third, for William Russ Pugh (if solvent), during his life, and after his death, for his children who, being sons, should attain twenty-one or die under that age leaving lawful issue, or, being daughters, should attain twenty-one or marry; and in trust, as to the other two-thirds, for Jane Russ Pugh and Margaret Russ Pugh, during their respective lives, for their sole and separate use respectively, without power of anticipation, and with the like respective remainders to their children, as in the case of William Russ Pugh.

(4) "And if it should happen that any one or more of them, the said William Russ Pugh, Jane Russ Pugh, and Margaret Russ Pugh, should have no child, who, being a son, should live to attain the age of twenty one years, or should die under that age leaving lawful issue, or, being a daughter, should live to attain the age of twenty-one years or to be married, then (subject to the trusts aforesaid) they, the said Andrew Mann, Margaret Jackson, and the survivors or survivor of them, and the executors and administrators of such survivor, should stand possessed of the share or shares of the said William Russ Pugh, Jane Russ Pugh, and Margaret Russ Pugh, who should fail to have any such child as aforesaid, in trust for such of them, the said William Russ Pugh, Jane Russ Pugh, and Margaret Russ Pugh, as should be living at the end and failure of the trusts aforesaid of the same share or shares, and in equal proportions, share and share alike, if more than one should be living.

(5) "And if any one or either of them, the said William Russ Pugh, Jane Russ Pugh, and Margaret Russ Pugh, should be then dead, having left lawful issue, him, her, or them surviving then, upon trust that the issue then living of him, her, or them so dying should have, take and be entitled to the share which their, his, or her parent would have been entitled unto if then living;" and, subject thereto,

(6) In trust for William Bowdler Pugh, if then living, for his own absolute use and benefit; but if William Bowdler Pugh should be dead, then

(7) In trust for Andrew Mann, for his own absolute use and benefit.

The indenture contained the usual powers of appointing new trustees.

By indenture of lease and release of the 15th and 16th days of January, 1819, William Bowd-

ler Pugh conveyed two freehold messuages in Lambeth-hill, in the city of London, unto and to the use of Andrew Mann, Margaret Jackson and Ann Jackson, their heirs and assigns for ever.

By indenture of the 25th of January, 1819, made between Andrew Mann, Margaret Jackson and Ann Jackson of the first part, William Bowdler Pugh of the second part, and Janet Russ Pugh of the third part, it was declared and agreed by all the persons parties thereto that Andrew Mann, Margaret Jackson and Ann Jackson, their heirs and assigns, should stand possessed (*inter alia*) of the premises assured by the indentures of the 15th and 16th days of January, 1819, "upon such and the same trusts, and for such and the same ends, intents, and purposes, and subject to such and the same powers, provisoes, and declarations as in the said indenture of the 7th day of March, 1818, are expressed, declared and contained of and concerning the pemises therein mentioned and described, or as near thereto as the difference of the respective estates of the said Andrew Mann, Margaret Jackson, and Ann Jackson, and their respective heirs, executors, and administrators therein respectively would admit, to the intent that the rents, issues, and profits of the said hereditaments and premises might be had, received and taken, and the said hereditaments and premises held, sold, conveyed, and assigned, and the produce thereof paid and applied unto such person and persons, and in such manner and at such time and times in every respect as in the said indenture of the 7th day of March, 1818, is expressed and declared of and concerning the premises therein particularly mentioned and described.

Janet Russ Pugh died in April, 1822.

William Russ Pugh attained his majority in October, 1827, Jane Russ Pugh in May, 1822, and Margaret Russ Pugh in February, 1831.

Margaret Russ Pugh, in July, 1834, married the defendant, Edward Browne.

Jane Russ Pugh died in August, 1862, intestate and unmarried.

William Bowdler Pugh died on the 13th of March, 1841, having devised all his freehold and leasehold estates to the defendant John Pugh, his only son and heir-at-law.

The freehold hereditaments subject to the trusts of the indenture of the 25th of January, 1819, were taken by the Metropolitan Board of Works, and the purchase-money, amounting to £2,100, paid into court. This sum was in May, 1867, invested in the purchase of £2,222 4s. 6d. Bank £3 per Cent. Annuities.

The bill was filed in October, 1867, by William Russ Pugh and Margaret Russ Browne, against (1) the then trustees of the indentures of 1818 and 1819, (2) Edward Browne and his children and (3) John Pugh, the devisee and heir-at-law of the settlor, William Bowdler Pugh.

The plaintiffs contended that, on the decase of Jane Russ Pugh unmarried, one equal third part of the freehold and leasehold hereditaments, subject to the settlements above mentioned, passed to them absolutely as tenants in common, and that one-sixth of the sum of £2,222 4s. 6d. £3 per Cent Consolidated Bank Annuities ought to be transferred to each of the plaintiffs.

The defendant John Pugh, the devisee and heir-at-law of the settlor, contended that, owing to the want of words of inheritance in the indenture of the 25th of January, 1819, the persons entitled thereunder took life interests only in the freeholds; and that, subject thereto, there was a resulting trust in favour of himself.

Fry for the plaintiffs.

Tooke for the trustees.

J. Simmonds for Edward Browne and his children.

C. T. Simpson, for John Pugh, the devisee and heir-at-law of the settlor, referred to Sheppard's Touchstone, 522; *Holliday* v. *Overton*, 15 Beav. 480; *Lucas* v. *Bandreth*, 28 Beav. 274; *Tatham* v. *Vernon*, 9 W. R. 822, 29 Beav. 604. [James, V. C.—Is there any authority for the position, that if there be a deed settling leaseholds in trust for A. B., his executors, administrators, and assigns, and freeholds upon the same trusts, or as near thereto as the circumstance of the case will admit, this is to be construed as giving A. B. an estate for life only in the freeholds?] The nearest estate to an absolute interest in leaseholds is an estate for life in freeholds. The fact of its being a trust estate would not affect the construction. No declaration of trust can convey a fee without proper words of limitation.

Fry, in reply, referred to the maxim, "Benignæ sunt faciendæ interpretationes cartarum propter simplicitatem laicorum ut res magis valeat quam pereat;" Co. Litt. 36a; *Roe* v. *Tranmarr*, Willes' Reports, 684; Broom's Legal Maxims, ed. 1864, p. 521; and to the dictum of Lord Hobart—"I do exceedingly commend the judges that are curious and almost subtil, *astuti* (which is the word used in the Proverbs of Solomon in a good sense, when it is to a good end), to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury, which by rigid rules might be wrought out of the act;" *Earl of Clanrickard's case*, Hobart, 277; *Crossing* v. *Scudmore*, 1 Vent. 141; *Roe* v. *Tranmarr*, Willes, 684.

James, V.C., in giving judgment for the plaintiffs, observed:—Some cases were cited to the effect that a conveyance to A. and his heirs in trust for B. only gives B. a life estate. But Mr. Simpson was obliged to go further, and to maintain that the want of words of inheritance is absolutely fatal under all circumstances. There is no doctrine of this Court which compels me to maintain such nonsense.

Judgment for the plaintiffs.

UNITED STATES REPORTS.

SUPREME COURT.

Estate of John Crean, deceased.

(Legal Gazette.)

1. A testator devised real estate in trust for his son for life, remainder to his issue, and in default of issue, then for the use of his (testator's) right heirs forever; the son died unmarried and without issue.

Held, That this was a remainder contingent upon the event of the estate to the son's issue never taking effect, i. e. the death of the son without issue surviving.

2. That a devise to heirs of a testator will be construed as referring to those who are such at the time of the testator's decease, unless a different intent is plainly mani-

fested by the will and the testator's use of the word *then* as introductory to the limitation, does not sufficiently indicate such different intent.

3. The remainder vested in the son's death without issue surviving, in the heirs of the testator who were living at his (testator's) death.

4. The result would be the same if the estate given to the heirs be regarded as a vested remainder subject to be divested by the death of the son leaving issue surviving. Etter's Estate, 11 Harris, 381, and Reihle's Appeal, 4 P. F. Smith, 97, commented on.

No. 15, July term, 1868. Appeal of Mrs. John L. Buzby, from the decree of the Orphans' Court.

Opinion by Williams, J., delivered July 6, 1869.

John Crean, the elder, devised the real estate, the proceeds of which are in controversy, to Isaac Heylin, his heirs and assigns, in trust, for the use of his son, William, for life; and after his decease, in trust for his children then living, and the lawful issue of such of them as should then be deceased, their respective heirs and assigns forever, in equal parts and shares; such issue to take and receive such part and share only as his, her, or their deceased parents would have had and taken, if then living; and for want of such children, or lawful issue, then in trust for the use of his right heirs forever. The testator's son, William, died unmarried, and without issue, and the question is, who are the persons entitled to the remainder as the right heirs of the testator? Are they the persons who were his heirs at his death, or are they the persons who were his heirs at the death of his son William? It is conceded that under the first limitation, William took only an estate for life. *Powell* v. *Board of Domestic Missions*, 13 Wr. 46. And that the remainder in fee limited to his children living at his decease, and the lawful issue of his children then deceased, was contingent or executory. But whether the remainder limited to the heirs of the testator on the death of William without children, or issue of deceased children then living, is to be regarded as vested or contingent, has been greatly discussed because of its important, if not decisive, bearing upon the question, whether the heirs at the death of the testator, or the heirs at the death of William, are entitled to the remainder. Perhaps the limitation to the heirs might be regarded as a vested remainder under the decision of this Court in Etter's Estate, 11 Harris, 381; and its rulings in *Kelso* v. *Dickey*, 7 W. & S. 279; *Hopkins* v. Jones, 2 Barr, 69; *Mining* v. *Batdorff*, 5 Ibid, 503; Chew's Appeal, 1 Wr. 23; *Ross* v. *Drake*, Ibid 373; *Young* v. *Stoner*, Ibid. 105. The The rule is well settled that a remainder is to be regarded as vested, rather than contingent if such a construction is possible. If it did not vest absolutely in the heirs at the death of the testator, why may it not be regarded as having vested *quodam modo* subject to be divested by the death of William leaving children living? The contingency upon which the heirs were to take the remainder, was not a contingency annexed to their capacity to take, but an event independent of them, and not affecting their capacity to take and transmit their right to the remainder.

Their right to the remainder was only prevented from being an absolute interest by the possibility of a child of William coming into *esse* and surviving him.

The limitation here is substantially the same as in Etter's Appeal, which was declared to be a vested remainder.

Lowrie, J., says: "The estate to Henry in terms was a life estate. If it was only a life estate, then the estate of his unborn children was a contingent remainder, and that of the other devisees (the testator's surviving heirs) a vested one, subject to be defeated by the death of Henry leaving issue." If then the estate devised to the testator's right heirs was a vested remainder, the heirs at his death took the estate, and as William, the devisee for life, was one of the testator's heirs, it would follow that his devisees became entitled to his share on the termination of his life estate. But there are authorities, and among them some decisions of our own, which show that the remainder in this case is to be regarded as contingent, rather than as vested, and the weight of the authorities seems to be in favour of this doctrine. If the prior fee be contingent, a remainder may be created, to vest in the event of the first estate never taking effect, though it would not be good as a remainder, if it was to *succeed*, instead of being collateral to the contingent fee. Thus, a limitation to A. for life, remainder to his issue in fee, and in default of such issue remainder to B, the remainder to B is good as being *collateral* to the contingent fee in the issue. It is not a fee mounted upon a fee, but it is a contingent remainder with a double aspect, or on a double contingency. 4 Kent's Com. 200; *Luddington* v. *Kine*, 1 Ld. Raym. 203; Fearn on Rem. 373. The same doctrine is laid down by this court in *Dunwoodie* v. *Reed*, 3 S. & R. 451; *Waddell* v. *Rattew*, 5 Rawle, 231; *Stump* v. *Findlay*, 2 Id. 168, in reference to similar limitations. If then the remainder is to be regarded as contingent, in whom did it vest? In those who were heirs of the testator at the time of his death, or in those who were heirs at the death of his son William? The remainder, if contingent, did not vest till William's death. But it does not follow that it vested in those who were the heirs at his death. If it did, then it was doubly contingent. The event upon which it was to take effect, and the persons to whom the estate was limited, were both dubious and uncertain. If there was no uncertainty as to the class, the persons composing the class, could only be known and ascertained upon the death of the tenant for life. If the remainder had been expressly limited to the heirs living at the death of the testator, it would have been contingent, in view of the doctrine of the cases last cited; and the question recurs, who are the testator's right heirs?

As a general rule of construction, it is well settled that a devise, or bequest to heirs, or heirs-at-law of a testator, or to his next of kin, will be construed as referring to those who are such at the time of the testator's decease, unless a different intent is plainly manifested by the will; *Halloway* v. *Halloway*, 5 Vesey, 399; *Elmsley* v. *Young*, 2 M. & K. 82; *Jenkins* v. *Gower*, 2 Coll. 537; *Sciffirth* v. *Badham*, 9 Bear. 370; *Grundy* v. *Primager*, 1 De Gex, McHoughten & Gordon, 502; *Urquehart* v. *Urquehart* 36 Eng. Ch. 613; *Abbott* v. *Bradstreet*, Allen, 589.

Where, however, it clearly appears that the testator intended his heirs or next of kin at the death of the tenant, or legatee for life, such intent will prevail. *Horne* v. *Coleman*, 19 Eng. Law & Eq. 19; *Birden* v. *Hewlett*, 2 Mylne & Keen, 90; *Jones* v. *Colbeck*, 8 Vesey, 272; *Say* v. *Creed*, 5 Hare, 580; *Sears* v. *Russell*, 8 Gray, 86; *Minter* v. *Wraith*, 36 Eng. Ch. (13 Lim.) 52. But where a testator gives property to a tenant for life, and after the death of the tenant for life, to his next of kin, and there is nothing in the context to qualify, or in the circumstances of the case to exclude the natural meaning of the testator's words, the next of kin living at his death will take; and if the tenant for life be such next of kin, either solely, or jointly with other persons, he will not on that account only be excluded. *Say* v. *Creed*, 26 Eng. Ch. 580; *Elmsley* v. *Young*, 2 M. & K. 82; *Jenkins* v. *Gower*, 2 Coll. 537. Nor will the use of the word *then*, as introductory to the bequest or devise over after the death of the tenant or legatee for life, prevent the general rule from applying unless it is so used as to clearly indicate that the next of kin or heirs living at the death of the tenant for life are intended by the testator. *Holloway* v. *Holloway*; *Ware* v. *Rowland*, 2 Phillips, 630; *Wharton* v. *Barker*, 4 K. & Johnson, 483. We see nothing in this will, or in the circumstances of the case, which qualifies the natural meaning of the words, and which clearly shows that the testator intended to limit the estate to those who should be his right heirs at the death of his son William. Certainly the use of the word *then*, as introductory to the limitation, does not indicate any such intention. The limitation is in these words: And for want of such child or children, or lawful issue, then in trust for the use and behoof of my right heirs forever. Obviously the word *then* is not used in this clause as an adverb of time, but as a conjunction signifying, in that case, in that event, or contingency. If this be the meaning, there is nothing to prevent the general rule from applying, and the words must be construed as referring to the heirs of the testator at the time of his death. But the appellants rely upon the rule laid down by Redfield in his treatise on Wills, page 393. He says: The devise or bequest of property to the testator's heirs at law means those who were such at the time of his decease, unless a contrary intent is obvious. But where there are intervening estates, and the remainder is contingent, it will be construed as having reference to those who shall sustain the relation of heirs at the time the estate vests in possession. And in support of this doctrine he cites *Rich* v. *Waters*, 22 Pick. 563; *Sears* v. *Russell*, 8 Gray, 85; *Abbott* v. *Bond*, 4 Allen, 466; and *Abbott* v. *Bradstreet*, 3 Id. 587. Two of these cases, *Rich* v. *Waters*, and *Abbott* v. *Bond*, have no direct bearing on the subject. And the first is virtually overruled in *Abbott* v. *Bradstreet*. But the general rule is recognised in *Sears* v *Russell*, and strictly followed in *Abbott* v. *Bradstreet*, and neither of them suggest any such modification of the rule as that stated by Mr. Redfield.

In the latter case it was decided that a bequest of the remainder, after a life estate to the heirs at law of the testator, will be construed as referring to those who were such at the time of his decease, unless a different intent is plainly manifested; and such intent is not to be inferred from the fact that those to whom this life estate is given are among his heirs at law, or that a bequest is given to another heir at law "in full of any share she may be entitled to out of my estate." This conclusion is reached after an elaborate examination of the authorities, and there is nothing in the facts of the case, or in the opinion of the court, which lends any countenance or sanction to the dictum of the able and learned author. If then, as we have endeavored to show, the general rule of construction must prevail in this case, it follows that the testator's heirs at his death, and not his heirs at the death of the tenant for life, are entitled to the remainder.

This conclusion, though reached by a different process, is in substantial harmony with the decisions of this court, in Etter's Estate, 11 Harris, 381, and Reible's Appeal, 4 P. F. Smith, 97; in both of which there was a limitation over to the testator's heirs on the death of the tenant for life without leaving children, or issue surviving. In the former, it was held that the remainder vested in the heirs immediately on the death of the testator, and that the tenant for life was excluded by the express words of the will —"my surviving heirs hereinafter named;" in the latter, that the testator's heirs, who were living at his death, including the tenant for life, took the remainder under the limitation as an executory devisee. But whether the limitation over to the testator's heirs, in the event of the death of the tenant for life without children living, is regarded as an executory devise, or a contingent remainder, will not affect or vary the rule of construction, as it respects the heirs entitled to take. The limitation to the heirs must be construed to mean those who are such ta the testator's death, unless a different intent clearly appears. Whether, therefore, the remainder be regarded as contingent or vested, the heirs of the testator, who were living at his death, are entitled to it under the limitation.

The appeal is dismissed, and the decree of the Orphans' Court is affirmed, at the cost of the appellant.

SUPREME COURT OF PHILADELPHIA.

Hall v. Rulon.

(*From the Legal Gazette.*)

1. A contract not to carry on a particular business in a particular place is in restraint of trade, and although valid if made, its existence must be proven by clear and satisfactory evidence, and will not be inferred from the fact of the sale of the *good will* of a business.
2. After making such a sale, however, good faith requires that the vendor shall not hold himself out as *continuing* his former business, and he will be restrained from so doing.

Appeal from the decree of the Court of Common Pleas of Philadelphia County.

Opinion by Williams, J., July 6th, 1869.

We have no doubt of the validity of such a contract as is alleged in the bill, if founded on a sufficient consideration; or of the power of the court to restrain its breach by injunction. Our doubt in this case arises from the insufficiency

of the proof to establish the existence of the alleged agreement. It cannot be inferred from the sale of the good will of the business, and it is expressly denied in the answer. The sealed agreement between the parties, given in evidence by the plaintiff, contains no stipulation or covenant on the part of the defendant, either to retire from the business, or not to resume it again in the city of Philadelphia; and in this respect it fully corroborates and sustains the answer. Nor is there any sufficient evidence that such a stipulation was omitted through the fraud of the defendant, or the mistake of the parties. The only evidence from which such an inference could possibly arise is the testimony of Joseph R. and Alexander Black, but neither of these witnesses proves that it was one of the express terms and conditions of the sale that the defendant was to retire from the business, and not to resume it again in the city of Philadelphia. On the contrary, their testimony amounts to no more than a declaration of the defendant's intention not to go into the business again in Philadelphia, on account of the state of his health, which had compelled him to give it up. The fair inference from their testimony, in connection with the blank left in the agreement, is that while the defendant declared it to be his intention and purpose not to resume the business, he was unwilling and refused to bind himself by a positive stipulation not to resume it at any time thereafter. This inference is greatly strengthened by the plaintiff's admissions to Balderston and Fogg after the defendant had resumed the business, and by the fact that he furnished him, without remonstrance or objection, goods to carry on the business for two or three months after he had resumed it. As the alleged agreement is in restraint of trade, its existence should be established by clear and satisfactory evidence, in order to justify the court in restraining its breach by injunction. There should be no doubt or uncertainty in regard to its terms, or the consideration upon which it was founded. Here the parties have put their contract in writing, and it must be allowed to speak for itself, unless it is clearly shown that the stipulation in question was omitted through fraud or mistake. Under the proofs in this case a court of equity would not reform the agreement as written and sealed by the parties; and if they had not reduced their contract to writing, the evidence would be wholly insufficient to establish it as alleged by the plaintiff.

But there is more of substance in the complaint as to the manner in which the defendant is carrying on the business of an undertaker. He sold the good-will of his business to the plaintiff for a valuable consideration, and good faith requires that he should do nothing which directly tends to deprive him of its benefits and advantages. The bill charges and the evidence shows that he is holding himself out to the public by advertisements, as having removed from his former place of business—No. 1313 Vine Street to his present place of business No. 1539 Vine Street—where he will continue his former business. It is clear that he has no right to hold himself out as *continuing* the business which he sold to the plaintiff, or as carrying on his former business at another place to which he has removed. *Hogg* v. *Kirby*, 8 Ves. Ch. Rep. 214; *Churton* v. *Douglas*, 1 Johns. Eng. Ch. Rep. 174. While, therefore, the appellant is entitled to have the decree of the court below, restraining him from conducting or carryng on his business of undertaking, &c., within the limits of the city of Philadelphia, reversed, it must be so modified as to restrain him from holding himself out to the public by advertisements or otherwise, as continuing his former business, or as carrying it on at another place.

Let the decree be drawn up under the rule.

Collins v. Collins

(From the Legal Intelligencer.)

1. Duress may avoid a marriage.
2. Arrest under void process or under a warrant issued upon a false charge, will avoid a marriage which is constrained by the duress of the imprisonment.

Opinion by Brewster, J.

The record in this case was handed to us some weeks since upon the usual rule to show cause why a divorce should not be decreed. We then ordered it upon the argument list, and after hearing from the libellant's counsel we suggested the propriety of taking further proof. The libellant has, accordingly, subpœnæd and examined the respondent, and her deposition along with the other proofs have been carefully considered.

The libel prays for a divorce upon the ground that the marriage was procured by fraud, force and coercion. It alleges this fact, and that the marriage has not been confirmed by the acts of the petitioner. Jurisdiction in such cases was conferred by the Act of May, 8, 1854 (P. L. 644; Br. Dig. 346. s. 7.)

The facts as developed by the record appear to be, that on the fifth day of December, 1868, the libellant was arrested and taken before Alderman Pancoast, of this city, upon a charge (preferred against him by the mother of the respondent) of fornication with the respondent, and begetting her with a child with which she then alleged herself to be pregnant. The libellant declared his innocence, but was unable to give the required bail, and to save himself from imprisonment he married the respondent. They then separated and have never lived together as man and wife. It would seem that the prosecution was set on foot to secure this marriage, and the libellant argues that the evidence shows that the charge made against him was false.

A number of witnesses testify to these different matters.

Mr. Bartlemas, who made the arrest, says that they told libellant at the alderman's office, "he must either marry respondent or go to prison, and to avoid imprisonment he married her. I know he was compelled to marry her or go to prison. He was *intimidated and in fear at the time of the marriage, and it was done to save himself from imprisonment.* * * * He told me he was not guilty"

The libellant's father testifies to the same facts. He says the respondent threatened imprisonment if libellant did not comply with their demand. "They told him he would be sent to prison forthwith if he refused to marry her. I was not able to go his bail, and *he was compelled to marry her* to save himself from imprisonment."

The respondent's account of the transaction is to the same effect. She says in her answer to the third interrogatory: "The libellant was arrested on the oath of my mother charging him with fornication and bastardy with myself. When he was brought to the alderman's office he was told that if he did not marry me he would be sent to prison. *He at first refused to marry me*, but finally consented, rather than go to prison. *He was threatened, of course, and put in fear. He had no bail and would have gone to prison.*" As to the falsity of the accusation upon which the libellant was arrested, he has submitted several depositions.

Mr. Bartlemas says, that since the marriage he has been informed by a member of the family that the respondent "was mistaken as to her pregnancy."

The libellant's father says: "I have seen respondent repeatedly since the marriage, and she is not in the family way, and was not to the best of my knowledge at the time of the marriage. Respondent told me she was sorry she had been so hasty in having libellant arrested, that she had made a mistake in reference to her pregnancy. I have frequently seen her on the streets with different men, and one in particular. * * At the time of the marriage my son was a minor.

Officer Spear says: "I have seen the respondent two or three times since the marriage. I believe to my knowledge she is not pregnant. I am her first cousin.

The respondent, in answer to the third interrogatory, says: "I have discovered that these proceedings were rather hasty, and I have been sorry that they were ever instituted. It was a mistake as to my condition, and I was not in the family way. I was advised by others to have him arrested, and if I had had my own way I would never have had him arrested."

Our first duty is to ascertain from these proofs what are the facts of this unfortunate case, and secondly, to apply the law to the facts thus found.

This is in conformity to the practice of the ecclesiastical courts in England. There, if the parties to a matrimonial contract are *infra annos nubiles*, the Judge passes upon the assent—his certificate is the proof required, and where he has cognizance, courts of law give the same credit to his sentence, as he is bound to yield to their judgment upon matters within their jurisdiction. 2 Lilly's Dbr., 244 c. Here then we have a libel regularly sworn to by the libellant, and wholly unanswered by the respondent. The fact of the arrest, the threat, the consequent fear, the refusal at first to marry, and the subsequent assent as the only means of escape from imprisonment, would seem to be clearly established.

Our principal difficulty has been, on the question of truth or falsity of the charge preferred against the libellant. Had he married the respondent simply of his own motion, or upon her request, the presumption would have been that he was guilty. It is possible, too, that the law would have drawn the same presumption from his act even though it had been preceded by a threat of imprisonment, but here there is no place for presumption. We have direct evidence upon this point. Passing by the statement of Mr. Bartlemas, as to the remark made by a member of the family, we have two witnessess who have seen the respondent since, and who say that she is not pregnant. One of them adds, that she admitted "she made a mistake." And the respondent confirms all this. She, too, calls it a "mistake," and emphatically says she "*was not in the family way.*"

It must, therefore be conceded that the libellant was arrested upon a false charge, and while operated upon by the terror of that duress and the threat of imprisonment, he married the party who had assisted in setting on foot those proceedings.

Having thus found the facts, let us endeavor to apply the law to them.

If this question were *res nova* it would appear to be of easy solution.

The familiar maxims of the law applicable to such a case would lead the mind to a speedy conclusion.

That no party shall profit by his or her wrong is a principle of universal acceptance. It would be conclusive against his respondent. To come nearer to the point, we find the elementary maxim of the civil law upon this subject, "*Consensus non concubitas faciat nuptias,*" or, as it has been transposed, "*Nuptias non concubitas sed consensus faciat.* Dig. L. 50; tit. 17, s. 30.

This has been adopted by the common law. Co. Litt. 33; 1 Black Com. 434.

Applying this principle the libellant would be entitled to a decree of dissolution—for the law will not tolerate for a moment the enforcement of a contract obtained by the duress of personal arrest; putting in fear and the threat of future imprisonment. A party so operated upon cannot in any true sense of the expression be said to be a free agent. He is *in vinculis*. The Roman law avoided contracts, not onlyfor incapacity, but for the use of force or the want of liberty. *Ait Prœcor quod metus causa gestum erit, ratum non habebo. Dig. Lib. 4, tit. 2.* It is true, that it was added, that the force must be such as would overcome a firm man; *in hominem constantissimum cadat;* but Pothier deems the civil law too rigid herein, and states, that regard should be had to age, sex and condition. (Pothier on Obligations, n. 25.)

And Mr. Evans thinks, that any contract produced by actual intimidation of another ought to be held void. (1 Evans; Pothier on Oblig., n. 25, note [a] p. 18)

The same principle has been recognized in the chancery of England. "Courts of Equity watch with extreme jealousy all contracts made by a party while under imprisonment, and if there is the slightest ground to suspect oppression or imposition they will set the contracts aside." (See the cases cited in note 5 to 1 Story's Eq, sec. 239.)

In *Robinson* v. *Gould*, 11 Cush. 57, the Supreme Court of Massachusetts says, that duress by menaces which is deemed sufficient to avoid contracts includes a threat of imprisonment inducing a reasonable fear of loss of liberty.

In Louisiana, any threats will invalidate a contract if they are "such as would naturally operate on a person of ordinary firmness, and inspire a just fear of great injury to person, reputation or fortune."

(Civil Code Louisiana, Art. 1845.)

The contract is equally invalidated "by a false report of threats, *if it were made under a belief of their truth.*" (Id., Art. 1846, 1847.)

The same principle has been recognized in *Hawes* v. *Marchant*, 1 Curt. 136; *Kelsey* v. *Hobby*, 16 Pet. 269; and in the Pennsylvania case of *Gillett* v. *Ball*, 9 Barr, 13, where the fact that a note was given under duress in settlement of a charge like that preferred against this libellant was held to be a full defence. Indeed, the authorities upon this point might be almost indefinitely multiplied, for wherever the voice of the law has been heard, no man has been held to a contract extorted from him by force.

So, too, fraud has always been deemed the equivalent of force and as equally operative in annulling a compact obtained through its agency. So sternly has this principle been applied, that it has been wisely extended to fraud arising from facts and circumstances of imposition. In *Neville* v. *Wilkinson* (1 Bro. Ch. R. 546), Lord Chancellor Thurlow remarked; "It has been said, here is no evidence of actual fraud on R. but only a combination to defraud him. *A court of justice would make itself ridiculous if it permitted such a distinction.* If a man upon a treaty for any contract, will make a false representation, by means of which he puts the party bargaining under a mistake upon the terms of the bargain, it is a fraud. It misleads the parties contracting on the subject of the contract."

The rule has been applied in all its rigor even where the misrepresentation was innocently made by pure mistake. (1 Story's Eq., s. 193, cases cited, note 2.) And a contract of partnership was recently set aside in England upon this principle, although the defendant was free from fault, and the plaintiff had been guilty of laches. in not examining the books for four years (*Rawlins* v. *Wickham*, 28 Law J. Rep. Chan. 188; 3 De Gex and Jones, 304; 1 Giffard, 355).

In a still more recent case, a wife having been guilty of adultery, in order the more easily to carry on the illicit intercourse, induced the husband (who was ignorant of her crime) to execute a deed of separation, whereby he covenanted to pay her an annuity and to allow her to live separate. The adulterous intercourse was continued, discovered by the husband, and a divorce was obtained. The husband then filed a bill to set aside the deed of separation. It had not been obtained by any misrepresentation, and the Vice-Chancellor dismissed the bill. But the Lord Chancellor reversed the decree below, and held, that the deed must be set aside, on the principle that none shall be permitted to take advantage of a deed which they have fraudulently induced another to execute. *Evans* v. *Carrington*, 30 Law J. Rep. Chan. 364; 2 *De Gex, Fisher and Jones*, 489; 1 Johnson and Hemming, 598.

It must be plain, therefore, that if this proceeding were a bill in equity to set aside a note or bond obtained from this libellant under the circumstances presented by this record, we should be compelled to order its cancellation. It remains only to be seen whether the contract of marriage is an exception to the general principle. Mr. Bishop informs us that there is no difference in this respect between marriages and other contracts. He says, "Where a consent in form is brought about by force, menace or duress, a yielding of the lips but not of the mind, it is of no legal effect. This rule, applicable to all contracts, finds no exception in marriage." Bishop on Marriage and Divorce, s. 210. He cites in support of this a number of decisions, and amongst others the leading case of *Harford* v. *Morris*, 2 Hag. 423, where the guardian of a young school girl, having great influence and authority over her, took her to the continent, hurried her there from place to place, and married her substantially against her will. The marriage was held to be void.

So, too, in the Wakefield case, the marriage of Miss Turner was set aside by Act of Parliament. The fraud there employed was the representation of her father's bankruptcy, and that the only escape for her parent was her marriage with one of the conspirators.

The law has not always been so favorably applied where the man was the injured party.

In *Jackson* v. *Winns*, 7 Wendell, 47, Enoch Copley had been arrested under the Bastardy Act. He was taken to the house of the father of the prosecutrix, and from thence he went in company with her, her parents and the constable, to the office of the Justice, who performed the marriage ceremony, although the *groom refused to take the hand of the bride and said nothing*. It was insisted that there was no consent, and that there was duress, but the Supreme Court of New York sustained the legality of the marriage, declaring, that they could "not say that the mere circumstances that Copley had involved himself in difficulty with the Overseers of the Poor, and that he took the step he did with some reluctance, were enough to show that he did not yield his full and free assent to the marriage solemnized before the Justice."

Mr. Bishop, commenting on this and other cases, says (s. 212), "Perhaps the result would be otherwise if the arrest were under a void process; and a doubt may be entertained, whether it would not be, if shown to be both malicious and without probable cause."

This doctrine is fully sustained by the case of *James* v. *Smith*, where Judge Dewey, of the Supreme Court of Massachusetts, declared a marriage null and void which had been solemnized whilst the libellant was in custody upon a charge similar to that preferred in this case. Bishop, s. 213, note. It is true, the arrest of James was without warrant, and that there can be no duress in lawful imprisonment. *Stauffer* v. *Latshaw*, 2 W. 167; and *Winder* v. *Smith*, 6 W. & S. 429; but no court could pronounce the duress lawful which was the result of a warrant obtained by a false information.

In *Scott* v. *Shufeldt*, 5 Paige, 43, Chancellor Walworth said, that the statute authorizing the court to annul a marriage when the consent was obtained by force, was never intended to apply to a case where the putative father of a bastard elects to marry the mother instead of contesting the fact. But he yet decreed that the marriage was null, because, the parties being both white, and the child being a mulatto, it was evident that the complainant had been made the subject of a gross fraud.

It will be seen, that in *Jackson* v. *Winns*, and *Scott* v. *Shufeldt*, there was no solicitation of

marriage on the part of the prosecutrix, nor was there any threat of imprisonment. In the first case, there was no proof of the falsity of the charge. The same remarks apply to *Hoffman* v. *Hoffman*, 6 Casey, 417, where there was not even an arrest. Mr. Justice Thompson, in his able and learned opinion, says: "Nor was there even a threatened prosecution by the respondent for the alleged wrong. The case was clear of actual or constructive force." Nor has there been, in this case, "a child born during wedlock, of which the mother was visibly pregnant at the time of marriage," as in *Page* v. *Dennison*, 5 Casey, 420, 1 Grant, 377.

Here we find:—

1. An arrest upon a false charge.
2. The assertion of innocence by the libellant.
3. The threat to imprison him upon "process sued out maliciously and without probable cause." 2 Greenleaf on Evi., s. 302.
4. The assent of the lips but not of the mind or heart to the performance of a ceremony whilst under this illegal duress.
5. The repudiation of the alleged contract by both parties from that time forth.
6. The refusal of the respondent to deny any of these matters by filing an answer, and, on the contrary, her admission under oath, as already noted.

No case can be found, in which any contract thus extorted was enforced, and every instinct of humanity clamors for its abrogation.

The language of Mr. Justice Agnew, in his clear and convincing opinion in *Cronise* v. *Cronise*, 4 P. F. Smith, 264, has peculiar application to these facts. He says: "The three procuring causes, to wit, fraud, force and coercion, are linked together in the same clause, equally qualify the same thing, to wit, an alleged marriage, and have a like operation as causes of dissolution. Force and coercion procure not a lawful marriage, but one only alleged, where the mental assent of the injured party is wanting. Fraud has a like effect; it procures, not a marriage fully assented to by both of the parties and duly solemnized, but one where the unqualified assent of the injured party is wanting, and where the very act of marriage itself is tainted by the fraud."

Decree for libellant.

GENERAL CORRESPONDENCE.

Remarks on the new Division Court Rules.

To the Editors of the Law Journal.

Gentlemen,—Allow me to offer, through your columns, a few remarks on the "new rules" just come in force from the "Board of County Judges." I find upon examining them many valuable and much needed amendments and additions to the old rules, and doubts as to the construction and meaning of many of the sections of the Division Court Act heretofore left in uncertainty, or decided in different ways by different judges in Division Courts, are cleared up. The new forms by these rules are, although altered from the old ones (thus, of course, giving clerks considerable extra trouble), much better, more *court like*, and simpler than the old ones. The Division Courts, by the rules and forms (although these are so voluminous) as to practice and efficiency are more respectable and responsible to the public. It is evident that much thought, skill and learning have been brought to bear in the compilation of the new rules. The rules from 93 to 100 inclusive, were loudly called for by the public, and "the Board of Judges" deserve the thanks of suitors everywhere for them.

The rules allowing the renewal of *warrants of commitment* are very judicious, but it is a pity that they had not allowed (as indeed is the case in England in County Courts) warrants to be countersigned by judges, or even by clerks of other counties, when the debtor may have moved from his own county into another during the currency of the warrant. It is a pity too that the judges had not allowed *clerks fees* for filing papers on Chamber applications and new trials. The business would have been done more orderly and carefully then. And the applicant for a new trial should have been made to pay for all affidavits used to oppose his application if unsuccessful, or if new trial should be granted for his benefit.

I cannot see the necessity in these rules of increasing witness fees to 75 cents a day, leaving *poor jurors* with only 10 cents a day. The garnishee rules are also very good, and I observe that clerks are now given forms, as to procedure, when under the Common Law Procedure Act, they are obliged to carry out the orders of County Court or Superior Court Judges.

The contested point as to the validity of a Division Court judgment over six years old, is set at rest, and the manner of its revival is fixed by rules 156 and 157. The rule 160, as to framing transcripts to the County Courts, is well timed. So is the rule 125 as to parties leaving their place of residence or address with the clerk. The rules as to infants (126) and as to the statute of limitations (127) are admirable, and meet the wants felt in thousands of cases, and assimilate the practice of these courts somewhat with the Superior Courts. Sub-section "F." of rule 142 is very good. If it was within the power of the judges, it is a pity they had not made it clear that a judge

granting a new trial might impose on the party applying and obtaining his desire a condition that he should pay the successful litigant all his costs, such as affidavits and attorney's fees on opposing new trials. Rule 144 was very necessary. Judges (in many cases) have been prone to interfere at the solicitation of friends of suitors with their own orders *ex parte!* For instance, a man obtains at great trouble an order to commit against a dishonest debtor, and the debtor when arrested is taken to the judge, his story and wrongs heard—*ex parte*—and the creditor next sees him in the street at large laughing in his face. The judge has taken upon himself to nullify his own order, and to say that the creditor shall not collect his debt! A pretty power surely for any judge to assume! Rules 90, 91, 92 and 93, as to the duties of Bailiffs, and giving them an attendance fee at Court in default suits, are very necessary.

Rule 95, which has reference to clerks of foreign counties principally, is very admirable.

Rules from 41 to 50 inclusive, on *Replevin process*, are just what were required.

In interpleader matters the rules might have been more explicit and enlarged. For instance, one original interpleader summons should have been made to answer, where many claimants arise as to goods seized under one execution, each claimant being served only with a copy. Bailiffs, as the law and practice now are, can make a dozen original suits out of as many claims, all arising from one seizure. It is a pity that more had not been said in the rules as to the conduct of Bailiffs in executing writs of execution.

Might not something have been said as to Bailiff's returns of "*Nulla bona?*" as to whether executions bind the goods as soon as the bailiffs receive them? Perhaps not this last. I think it would have been better had a rule been made requiring clerks in outer counties to forward monies or returns on all transcripts sent them, charging the costs of transmission to the defendant who caused it.

I will not further extend these remarks in this letter.

C. M. D.

Toronto, 25th August, 1869.

REVIEWS.

Parliamentary Government in England, its Origin, Development and Practical Operation. By Alpheus Todd. Vol. II. London: Longmans, Green & Co., 1869.

It is with regret that we have again to announce the postponement of our review of the second volume of this work. Nothing but a profound sense of its value and importance, and our present inability to do it justice, compels us to defer noticing it in this number. The reading of the volume demands more time than we have had at our disposal for the purpose since the receipt of the volume. And we cannot in fairness to the learned author, or in justice to ourselves, review the volume until we have carefully looked over it, which we fully expect to do before the next issue of the *Law Journal*.

APPOINTMENTS TO OFFICE.

ASSISTANT COMMISSIONER OF CROWN LANDS.

THOMAS HALL JOHNSON, Esq., to be Assistant Commissioner of Crown Lands, in the room and stead of Andrew Russell, Esq., resigned. (Gazetted Aug. 21, 1869.)

CROWN LANDS' AGENT.

ANDREW RUSSELL, Esq., to be Resident Agent for the sale of Public Lands in the County of Wellington, in the place of James Ross, Esq., resigned. (Gazetted August 21, 1869.)

STIPENDIARY MAGISTRATE AND REGISTRAR.

JOHN DORAN, of the Town of Perth, Esq., to be Stipendiary Magistrate and Registrar for the District of Nipissing, in the room and stead of Thomas H. Johnson, Esq., resigned. (Gazetted August 21, 1869.)

NOTARIES PUBLIC.

PETER McCARTHY, of the Town of St. Catharines, Esq., Barrister-at-Law. (Gazetted July 3, 1869.)

CORONERS.

JAMES WALLACE, of the Village of Alma, and JAMES McCULLOUGH, of the Village of Everton, Esquires, M.D., to be Associate Coroners, within and for the County of Wellington. (Gazetted June 19, 1869.)

WESLEY F. ORR, of the Village of Lynden, Esq., to be Associate Coroner, within and for the County of Wentworth. (Gazetted July 31, 1869.)

JOSEPH DIX, of Garden Island, Esq., to be an Associate Corner, within and for the County of Frontenac. (Gazetted August 28, 1869.)

In an English case of Hopkins it was lately decided in the Court of Exchequer, that a creditor who takes from his debtors agent on account of the debt the cheque of the agent, is bound to present it for payment within a reasonable time, and if he fails to do so and by this delay alters for the worse the position of the debtor, the debtor is discharged, although he was not a party to the cheque.