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DIARY FOR JUNE.

2. Saturday..... EASTER TERM ends.
3. SUNDAY..... *Trinity Sunday.*
4 Monday..... Last day for notice of Trial for County Court.
10. SUNDAY..... *1st Sunday after Trinity.*
12. Tuesday ..... Quarter Sessions and County Court Sittings in each County.
14. Thursday ..... Sittings of Court of Error and Appeal begin.
17. SUNDAY..... *2nd Sunday after Trinity.*
24. SUNDAY..... *3rd Sunday after Trinity.*
30. Saturday..... Last day for Co. Councils finally to revise Ass'mt Rolls, and for apportionment of School Moneys by Chief Superintendent of Schools. Chief Sup'dnt to report state of Grammar Schools.

IMPORTANT BUSINESS NOTICE.

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

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

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

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

JUNE, 1860.

NOTICE TO SUBSCRIBERS.

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

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

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

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

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

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

THE EFFECT OF FOREIGN JUDGMENTS.

Our attention has been directed to a bill introduced during the recent session of the Legislature, by the Attorney-General for Upper Canada, intitled "An Act respecting foreign judgments."

Eminent judges, both of early and late years, have differed and differed widely as to the effect of a judgment when sought to be enforced in a country other than where recovered.

The question is one of international law, and the difficulties which surround it arise in great part from the different rules observed by different nations in respect to it. All men are amenable to the laws of nature, but no subject of one power not domiciled or resident within the dominions of another is in general bound by its local or municipal laws.

It is, according to Vattel, the province of every sovereignty to administer justice in all places within its own territory and under its own jurisdiction, to take cognizance of crimes committed there and of controversies that arise within it. Other nations, owing to courtesy, or as it is termed comity, respect this right, and hence in certain cases an effect may be given to a judgment beyond the confines of the sovereignty or power within which it is pronounced.

The question in this view becomes narrowed to one of degree. Is that judgment, as between the parties to it, in all places and at all times to be deemed conclusive or only *prima facie?*

Before proceeding further, let us inquire—1. What is a judgment? 2. How many kinds of judgment there are?

A judgment is the sentence of the law pronounced by a proper tribunal upon a case within its jurisdiction. Therefore the operation of every judgment must depend on the power of the Court to render that judgment, or, in other words, on its jurisdiction over the subject matter of adjudication. Judgments are of two kinds—*in rem* and *in personam.*

Where the judgment is *in rem* little difficulty is experienced. If the subject matter of the judgment be land or other immoveable property, the judgment pronounced in the *forum rei sitæ* is of universal obligation. So it would appear if the subject matter, though moveable property, be within the jurisdiction of the Court when judgment is pronounced.

Where the judgment is *in personam* it may be considered in the following aspects: whether between subjects or between foreigners, or between subjects and foreigners—whether set up by way of defence in a foreign tribunal, or sought to be enforced in that tribunal.

The person against whom a judgment is pronounced, in order to render it effectual, must be subject to the jurisdiction of the tribunal that pronounces it. This jurisdiction may be founded either in respect of the domicile of that person in the territory of the tribunal or in respect of his being possessed of some estate within it. (Burge Col. L. 3, 1016.)

No Sovereign is bound to execute any foreign judgment within his dominions, and if he do so out of comity he is at liberty to examine into its merits, and refuse to give effect to it if opposed to natural justice or otherwise unjust

or unfounded. *It is otherwise however where the defendant* sets up a foreign judgment as a bar to proceedings. The party dissatisfied with a foreign judgment, if in all respects legal and binding, has no right simply because of dissatisfaction to bring the matter into controversy elsewhere.

These doctrines are subject to the following limitations: 1. That the judgment has not been obtained by fraud. 2. That the proceedings to obtain it have been regular. 3. That the parties interested have had notice, or an opportunity to appear and defend their interests. (*McPherson et al* v. *McMillan*, 8 U. C. Q. B. 30; *Reynolds et al* v. *Fenton*, 3 C. B. 187; *Warrener et al* v. *Kingsmill et al*, 8 U. C. Q. B. 428, Burns, J.; *Meuus* v. *Thellusson*, 8 Ex. 638.)

Supposing the judgment to be correct on these several heads, the next question, and the one as to which so much difficulty exists, is as to its effect when produced in a country other than where recovered. Is it to be deemed conclusive? If not, is defendant at liberty to go into its original merits? If yea, what manner and to what extent *are the original merits to be inquired into?*

Here we find ourselves plunged into the troubled waters of judicial strife. On one side we hear yes, on another no; and on all sides the uncertain sounds of hesitation and doubt.

It is said that the common law recognizes no distinction whatever as to the effect of a foreign judgment, whether it is betwee citizens or between foreigners, or between citizens and foreigners. (Story's Conflict. s. 610.) The following distinctions drawn by Boullenois, an eminent foreign writer, are however deserving of much attention. He says, if the foreign judgment is in a suit between natives of the same country in which pronounced and rendered by a competent tribunal, it ought to be executed in every other country without any new inquiry into merits. His reasoning is to the effect that the judgment, having emanated from a lawful authority and been rendered between persons subject to that authority, ought not to be submitted to discussion in any other tribunal, which for such a purpose must necessarily be incompetent. He also argues that if the judgment be rendered in a suit between mere strangers found within the territorial authority of the Court rendering it, and the jurisdiction be in all respects rightfully exercised over the parties, that it should be equally conclusive; but that the jurisdiction cannot be rightfully exercised merely because the foreigners are there, unless domiciled there.

The inclination of the English Courts is to sustain the conclusiveness of foreign judgments (*Reimer* v. *O'Niel*, 23 Beav. 145, 3 Jur. N. S. 147, 26 L. J. Ch. 196); while *that of the American Courts is to make them prima facie* evidence only, and so impeachable. (Story's Conflict. s. 608.)

It is for us to examine the question from an Upper Canada point of view, by the light of our own adjudged cases.

As early as 1835, we find the late Chief Justice of the Common Pleas (Sir J. B. Macaulay) reported as using the following language:

"It may fairly be inferred from all the cases, that a foreign judgment had in a court of competent jurisdiction is conclusive upon the parties *inter se prima facie*, subject to be drawn in question by the party sought to be charged or estopped by such judgment. They seem to possess a validity equivalent at least to a promissory note, or a receipt in full. They afford sufficient foundation for an action of debt or assumpsit in favour of creditors obtaining them, and ought to be equally available in favour of a defendant. In the plaintiff's case, they are regarded as more than mere evidence of a debt, for they are declared on as upon awards, promissory notes, &c. They import or *constitute in themselves sufficient consideration or evidence* thereof to raise an implied promise. In other words, they clothe the plaintiff with a *prima facie* right of action thereon, and are so far *per se* conclusive upon the defendant. The latter may shew a want of jurisdiction, fraud, injustice, or irregularity in the recovery; but until assailed by him, they are conclusive and sufficient ground of action. Being more than evidence in favour of the plaintiff, namely, the substratum of an action of debt or assumpsit, conclusive upon the defendant until impeached, they would by analogy seem more than evidence in favour of a defendant when sued a second time, and pleaded in bar, though requiring perhaps more technical precision than when declared upon; and conclusive upon the plaintiff until avoided by him, upon grounds *dehors* the record, or apparent upon the face thereof. Yet they do not merge or change the nature of the original demand; a remark equally applicable, however to negotiable securities, awards under parol submissions, and other proceedings that might be named." (*McPhedran* v. *Lusher*, 3 U. C. O. S. 603.)

The Chief Justice of Upper Canada (Sir J. B. Robinson, Bart.), in *Warren et al* v. *Kingsmill et al*, 8 U.C.Q.B. 414, speaking of the foreign judgment sued upon in that case, says, "The judgment of the foreign court cannot be conclusive except as to *persons* and *things* within its jurisdiction."

In the same case in appeal, 13 U. C. Q. B. 60, Mr. Justice McLean is reported as follows:

"A foreign judgment is *prima facie* evidence only, and liable to be impeached, if the foreign law or any part of

the proceedings of the foreign court are repugnant to natural justice; or if, for a cause of action arising out of the jurisdiction of such court, the decision is made according to the law of the country in which the suit is tried, instead of, and contrary to the law of, that country in which the cause of action arose."

So Mr. Vice Chancellor Esten:

"The law regarding the obligation of our Courts to enforce foreign judgments seems tolerably clear. It is admitted that where an attempt is made to enforce a foreign judgment in our Courts, it is examinable, but *prima facie* valid and binding, and furnishes a good cause of action. In truth, every presumption is to be made in its favor; and if it can possibly be right under the circumstances which appear, it is the duty of the Courts to allow it to be enforced." (13 U. C. Q. B. 65.)

Mr. Justice Burns, in the same case, 8 U. C. Q. B. 424, is reported as follows:

"With respect to the question whether a foreign judgment is to be treated as conclusive evidence on the merits of the original action, or only *prima facie* evidence on behalf of the plaintiff, there has been a great conflict of opinion among English judges from time to time. Some of the most eminent have held with great confidence that the evidence should be conclusive, while others have so held with less confidence; and on the other hand, judges equally eminent have strenuously contended that foreign judgments are merely *prima facie* evidence. The latter view seems to prevail in America, though the extent to which it should be carried is certainly not definitely settled there. It can scarcely be expected upon such a question, seeing such difference of opinion, that I can do more than give my adherence to one side or the other, and in doing so, I adopt the language of Mr. Justice Story, who says, "Indeed, the rule that the judgment is to be *prima facie* evidence for the plaintiff would be a mere delusion, if the defendant might still question it, by opening all or any of the original merits on his side; for, under such circumstances, it would be equivalent to granting a new trial. It is easy to understand that the defendant may be at liberty to impeach the original justice of the judgment, by shewing that the court had no jurisdiction, or that he never had any notice of the suit, or that it was procurred by fraud, or that upon its face it is founded in mistake, or that it is irregular and bad by the local law *fori rei judicatæ*. To such an extent, this doctrine is intelligible and practicable. Beyond this, the right to impugn the judgment is in legal effect the right to re-try the merits of the original causes at large, and to put the defendant upon proving their merits." (Story Con. of Laws, s. 507.)

And at p. 430, as follows:

"The presumption is in favor of the judgment, and that presumption must prevail until displaced, and it must be displaced by shewing every thing to negative it. We find this principle applied strongly in cases where it is alleged the judgment has been obtained without the person having had an opportunity of defending himself; and there certainly is no reason why it should be less applicable when the person admits he did defend himself. Not to uphold the principle in the latter case, would be in effect to re-try the original cause."

Again, at p. 68 of 13 U. C. Q. B., as follows:

"I was and am of opinion that the judgment is not conclusive, but that it is open to the person against whom the judgment operates to shew that by our laws and by the laws of the country where the judgment was obtained, it was obtained contrary to the course of natural justice; and the question now is, whether this plea is sufficient to displace the legal obligation arising upon the judgment, or does it allege circumstances and facts from which we must say the original merits must again be tried; or, in other words, that we cannot allow an action on the judgment itself to be sustained because that judgment was obtained against the course of natural justice. Whether the judgment is to be opened or not is a question of law upon the facts admitted, or if disputed to be ascertained upon trial."

And at p. 75 of same volume, as follows:

"I take it to be the result of the cases—that a foreign judgment sought to be enforced here is to be presumed correct, and that a legal obligation arises thereon which should be enforced; that it may however be impeached either by intrinsic or extrinsic evidence; and if it is impeached by extrinsic evidence then two things are requisite; first, that the party impeaching it must show that he was altogether ignorant of the proceedings to obtain the judgment, and therefore not bound by it, in which case he must negative all and every possible circumstance on which the judgment might be sustained; and secondly, if the party has appeared and defended himself, then his extrinsic attack should be accompanied by the intrinsic evidence of what the pleadings were, if any, or the points raised, and which came on for trial, by whatever means and process the same came on, and the points disposed of, and how, by the court."

Mr. Vice-Chancellor Spragge, at p. 78 of same volume, is thus reported:

"The tendency of modern decisions appears to be to hold foreign judgments *conclusive upon the merits*, and only impeachable where the foreign court had not jurisdiction, or the defendant was not duly summoned to answer, or the judgment was obtained by fraud. The notes to the Duchess of Kingston's case in Smith's Leading Cases, con-

taining a summary of the decisions upon the subject; the case of *The Bank of Australasia* v. *Harding*, (14 Jur. 1094), and the more recent case of *The Bank of Australasia* v. *Nias* (15 Jur. 967), all bear in favor of the conclusiveness of foreign judgments.

It is observable, however, that in all the cases where the foreign judgment has been held conclusive, the cause of action has arisen within the country of the court which has rendered the judgment; and great weight has justly been given to the consideration, that if the court, in which an action upon a foreign court has been brought, were to inquire into the merits of that judgment, it would do so under great disadvantages, and with inferior means of arriving at the truth and justice of the case than were possessed by the court by which the judgment was rendered; and so it has been said with great force, that 'invariably experience shews that facts can never be inquired into so well as on the spot where they arose; laws never administered so satisfactorily as in the tribunals of the country governed by them."

Precisely as this language is forcible for the conclusiveness of judgments in the cases to which it refers, it is forcible against the conclusiveness of judgments rendered in the courts of countries where the cause of action did not arise, and when sought to be enforced in the country where the cause of action did arise."

Where judges so eminent differ so widely, it would be presumptuous in us to think of laying down the law. The differences will we hope have at least one good effect, which will be ere long a legislative declaration of the law. The Attorney General deserves much credit for the attempt, which we hope will be renewed during next session of the Legislature in time to become law with some modifications. His bill contains four sections, as follows:

1. A Foreign Judgment, rendered without this Province against a party domiciled in this Province, shall not be conclusive, either when the matter comes incidentally in controversy before any Court in this Province, or where a direct suit is brought in this Province to enforce such Judgment.

2. A Foreign Judgment, rendered without this Province, against a party not domiciled in this Province when the Judgment was rendered, and then subject to the jurisdiction of the Court rendering such Judgment, shall be conclusive in bar of a new action brought in this Province on the same case and between the same parties; but the party who seeks to enforce such Judgment in this Province, must bring a new suit upon it, in which the Judgment shall be *primâ facie* evidence only.

3. A Foreign Judgment, rendered in either Upper or Lower Canada, against a party domiciled in the other section of the Province, shall be conclusive in bar of a new action brought in such other section of the Province on the same case and between the same parties, but the party who seeks to enforce such judgment in such other section must bring a new suit upon it in which the judgment shall be *primâ facie* evidence only.

4. In either of the cases mentioned in the two next preceding sections, the defendant may contest the merits, and shew not only that the judgment was irregularly obtained, but that it is unjust and illegal.

DORMANT EQUITIES.

Opinions have hitherto been much divided as to the true construction of the Dormant Equities Act, 18 Vic. c. 124. Many members of the profession construed the act so as to include cases of mortgages, and as many gave it a different construction. The case of *Caldwell* v. *Hall*, reported in other columns, decides the latter to be the true construction. We are informed that the case is to be appealed, with a view to the final determination of the question.

ACTS OF LAST SESSION.

We subjoin a few of the most important Acts of last Session that are now in force, and the provisions of which are necessary to be known and acted upon at once by the profession:

CHAPTER 42.

An Act to repeal certain provisions of "the Common Law Procedure Act."

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I. The two hundred and fourth, two hundred and fifth, three hundred and twenty-sixth, and three hundred and twenty-seventh sections of "the Common Law Procedure Act," and the third section of "An Act respecting Absconding Debtors," are hereby repealed, save only so far as may be necessary for upholding and continuing writs issued or proceedings had thereunder before the passing of this Act, and any further proceedings necessary to be taken for the completion of the same.

II. The following section shall be substituted for the repealed *two hundred and fourth section of the first mentioned* Act, and shall, in lieu thereof be read as the two hundred and fourth section of the said Act:—"The party entering any such Record shall endorse thereon whether it be an assessment, an undefended issue or a defended issue: and the Deputy Clerk of the Crown shall make two Lists, and enter each Record in one of the said Lists, in the order in which the Records are received by him; and in the first List he shall enter all the assessments and undefended issues, and in the second List all defended issues, and the Judge at *Nisi Prius* may call on the causes in the first List, at such time and times as he finds most convenient for disposing of the business."

III. The following section shall be substituted for the repealed two hundred and fifth section of the said Act, and shall, in lieu thereof be read as the two hundred and fifth section of the said Act:—"In Town causes the Records shall be entered with the Clerk of Assize, who shall, for the purpose of receiving and entering the same, attend at the Court House on the Commission or opening day, from nine in the morning until noon, after which he shall not receive any record without the order of the presiding Judge, who shall have the same power, in this respect, as set forth in the two hundred and third section, and the Clerk of Assize shall make two Lists, as aforesaid, *which shall be regulated and the business disposed of as* in Country causes."

IV. "In any action depending in any of Her Majesty's Superior Courts of Common Law in Upper Canada, in which the amount of the demand is ascertained by the signature of the defendant, and in any action for any debt in which a Judge of either of the said Superior Courts shall be satisfied that the case may safely be tried in the County Court, any Judge of

either of the said Superior Courts may order that such case shall be tried in the County Court of the County where such action was commenced, and such action shall be tried there accordingly and the record shall be made up as in other cases; and the order directing the case to be tried in the County Court shall be annexed to the record; and the trial shall take place in such County Court in the same way as ordinary cases are tried therein: and judgment may be entered in any such action on the fifth day after verdict rendered, unless the Judge who tries the case shall endorse on the record under his hand a certificate that the case is one, which, in his opinion, should stand for motion in the Court in which it was brought, in which case no judgment shall be entered until the fifth day of the term of the Superior Courts next following the date of the Certificate."

23 VIC. CHAP. 25.

An Act to exempt certain articles from seizure in satisfaction of Debts.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I. Chapter twenty-eight of the Ordnances of the Legislature of the late Province of Lower Canada, passed in the second year of Her Majesty's reign, is hereby repealed.

II. So much of Section one hundred and fifty-one of Chapter nineteen of the Consolidated Statutes for Upper Canada as exempts certain chattels from seizure under writs of execution issued under the provisions of that Act, is hereby repealed, and in lieu thereof the following words are substituted, and shall be read immediately after the word "excepting" in the said section, namely, "Those which are by law exempt from "seizure."

III. Section two hundred and fifty-four of chapter twenty-two of the Consolidated Statutes for Upper Canada is hereby repealed, and the following substituted therefor, namely:

"254. The goods and chattels exempt by law from seizure, "shall not be taken in execution under any writ from either "of the said Superior Courts, or from any County Court."

IV. The following chattels, are hereby declared exempt from seizure under any Writ issued out of any Court whatever in this Province, namely:

1. The bed, bedding and bedsteads in ordinary use by the debtor and his family;

2. The necessary and ordinary wearing apparel of the debtor and his family;

3. One stove and pipes, and one crane and its appendages, and one pair of andirons, one set of cooking utensils, one pair of tongs and shovel, one table, six chairs, six knives, six forks, six plates, six teacups, six saucers, one sugar basin, one milk jug, one teapot, six spoons, all spinning wheels and weaving looms in domestic use, and ten volumes of books, one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use;

4. All necessary fuel, meat, fish, flour and vegetables, actually provided for family use and not more than sufficient for the ordinary consumption of the debtor and his family for thirty days;

5. One cow, four sheep, two hogs, and food therefor, for thirty days:

6. Tools and implements of or chattels ordinarily used in the debtor's occupation to the value of sixty dollars.

V. Nothing in this Act contained shall exempt from seizure in satisfaction of a debt contracted for such identical chattel, of any article enumerated in Sub-sections three, four, five or six of Section four of this Act.

VI. The debtor may select out of any larger number the several chattels exempt from seizure under this Act.

23 VIC. CHAP. 50.

An Act to amend An Act respecting the Municipal Institutions of Upper Canada.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I. The three hundred and seventy-seventh section of the fifty-fourth chapter of the Consolidated Statutes for Upper Canada, intituled: *An Act respecting the Municipal Institutions of Upper Canada*, is hereby repealed.

II. The following section shall be substituted for the repealed three hundred and seventy-seventh section of the said Act, and shall, in lieu thereof, be read as the three hundred and seventy-seventh section of the said Act:

"The Recorder's Court shall hold four Sessions in every year, and such Sessions shall commence on the second Monday in January, and on the first Monday in the months of April and July, and on the third Monday in the month of November."

LAW AND EQUITY BILL.

HOUSE OF LORDS.—*April* 24.

The Lord Chancellor in moving the second reading of this bill, said that we had arrived at a crisis in law reform, and the question now was, whether there should be a further fusion of law and equity. That subject had been commended to the careful attention of Parliament in the speech delivered from the Throne at the commencement of the session, with a view to enable the courts of common law finally to determine, in a satisfactory manner, any case which might be duly brought before them. There prevailed in this country what he believed was unknown in any other civilised State—a distinction between the law administered in one tribunal and the law administered in another. That had arisen from what he must call the narrow-minded and technical decisions of the common-law judges in former times. Justice having been denied to the subject in the courts of common law, it became necessary to apply to another tribunal. Another tribunal was constituted, from which the most important advantages were derived by the country—he meant the Court of Chancery. The great men who had presided in that court had constructed a most beautiful system of jurisprudence, the admiration of the whole world. For many generations a conflict went on between the courts on one side of Westminster Hall and the courts on the other, and Lord Mansfield made an attempt to bring about some reconciliation. That jurist incurred great obloquy for his endeavours, because it had unhappily been the practice of the law courts for centuries before to regard their respective rules as absolute perfection. He remembered, indeed, that when he himself entered the profession the equitable doctrines of Lord Mansfield were sneered at and contemned. Thus things continued, until fortunately a commission was appointed by her Majesty, to consider what improvements could be made in the courts of equity. The commission consisted of eminent men—viz. Sir J. Romilly, Lord Justice Turner, Sir W. P. Wood, Mr. Justice Crompton, Sir R. Bethell, Sir J. Graham, Mr. Henley, Mr. J. Parker, and Mr. W. M. James. Their recommendations, as far as the courts of equity were concerned, had been almost entirely carried into effect, but he was sorry to say that in the common-law courts much yet remained to be done. The commission took the most enlightened view of the subject, and offered most valuable suggestions. In the report which they presented to her Majesty in 1852 they stated:—

"The mischiefs which arise from the system of several distinct courts proceeding on distinct, and in some cases antag-

onistic, principles, are extensive and deep-rooted. These mischiefs, we believe, have arisen in part from the different principles by which the different courts are governed, and the different systems of law from which those principles are derived, and in part from inherent defects in the powers of the several courts. * * It happens that in many cases parties, in the course of the same litigation, are driven backwards and forwards from courts of law to courts of equity, and from courts of equity to courts of law. A defendant in an action at law, who has a just ground of defence, is often obliged to resort to equity to control the decision of a court of law, or to restrain the plaintiff at law from proceeding to obtain a judgment which cannot in equity be permitted to be available. * * Again courts of law have no powers for the preservation of property pending litigation. A court of equity has such powers; and parties suing in courts of law are thus frequently driven into equity for the preservation of the property pending the suit at law."

The commissioners laid down principles he wished to see adopted. They said—

"It is obviously most desirable, that in every case the court which has the cognisance of the matter in dispute should be able to give complete relief."

Having then discussed the various remedies which had been suggested, they continued—

"We have arrived at the conclusion, that without abolishing the distinction between law and equity, or blending the courts into one court of universal jurisdiction, a practical and effectual remedy for many of the evils in question may be found in such a transfer or blending of jurisdiction, coupled with such other practical amendments, as will render each court competent to administer complete justice in the cases which fall under its cognisance. We think that the jurisdiction now exercised by the courts of equity may be conferred upon courts of law, and that the jurisdiction now exercised by courts of law may be conferred upon courts of equity, to such an extent as to render both courts competent to administer entire justice, without the parties in the one court being obliged to resort to the aid of the other."

There the ground was laid down on which this bill was founded—one cause and one court. It was not proposed that a suit should be brought in the Court of Queen's Bench against a trustee for breach of trust, or that an action for assault and battery should be brought in the Court of Chancery; but that legal rights should be enforced in the courts of common law, and, if equitable questions arose incidentally, that those courts should have power to dispose of them without entailing on the parties the necessity of going to another tribunal, employing another set of counsel, and thus incurring infinite delay and expense. His hon. and learned friend Sir R. Bethell, who is not only a great advocate, but a profound jurist, in an address which he delivered at the inauguration of the Juridical Society in 1855, said—

"For above a century this country has exhibited the anomalous spectacle of distinct tribunals acting upon antagonistic principles, and dispensing different qualities of justice. It is the rule and duty of the one set of courts frequently to refuse to recognise the real right of ownership—to ignore defences and claims founded on the best established rules of justice; and the prevention of gross injury committed in the name of the law is made to depend upon the other court being quick enough to overtake and arrest the first in its career of acknowledged injustice, and prevent it from deliberately committing wrong."

The commissioners who were appointed to inquire into the common-law procedure had reported on the same subject, and the country was deeply indebted to them for their labours. Whatever might be thought of their suggestions respecting the equitable jurisdiction, their recommendations for amending the pleadings and process of the common-law courts would be generally admitted to have been most valuable. During the first nine months after the Procedure Bill of 1852 came into operation, the rules granted by those courts were reduced from 38,009 to 3,081, although a greater number of actions were brought and depending. The Common-law Commissioners were Chief Justice Jervis, Chief Justice Cockburn, Mr. Justice Willes, and Baron Bramwell. In their second report in 1852, the commissioners stated—

"We think we shall not outstep the limits of our commission by so far expressing our opinion, upon what is commonly called the fusion of law and equity, as to say, that, whether or not it may be thought conducive to the despatch of business and satisfaction to the administration of justice to do away altogether with the present division of labour between the courts of law and equity, so far as that division arises out of the diversity of the subject-matters over which either class of courts exercises an exclusive and complete jurisdiction, it appears to us that the courts of common law, to be able satisfactorily to administer justice, ought to possess, in all matters within their jurisdiction, the power to give all the redress necessary to protect and vindicate common-law rights, and to prevent wrongs, whether existing, or likely to happen unless prevented."

They then went on to recommend specific improvements, on which the present bill was partly founded. On the recommendation of the commissioners, jurisdiction was given to the courts of common law in all cases where there was an equitable defence; but the courts of equity held that suitors were not bound by the judgment where there was power to set up an equitable defence; so that, if judgment were given against them, they might go into a court of equity, file a bill, and have the whole case tried over again. Sir H. Cairns, a great ornament of the profession, had brought in a bill which did give to the courts of equity the powers that were required to do full justice to suitors who came before them; whereas formerly it was necessary, when a legal question arose, to go into a common law court, having an issue directed to try the point. Sir H. Cairns' Act enabled the court of equity to decide legal questions arising in an equitable suit; but he was sorry to say that the equity judges were very reluctant to avail themselves of the power, and it was often necessary in an equitable suit to resort to an action in the common-law courts to enforce a legal right, and to incur great additional expense by employing two distinct sets of counsel. In their third report, the Common-law Commissioners—Cockburn, Martin, Willes, Bramwell, and Walton—pointing out the evils and remedies, said:—

"It is our intention and wish that the result of what is proposed should be ingrafted upon, and become part of, the common law, and that the distinction between Common law and Chancery law should be so far abolished. If, in addition to this, the Court of Chancery is prohibited from interfering in cases where common-law rights are thus rendered capable of complete vindication in the courts of common law, and in which, therefore, its interference will have become useless, the greater part, if not the whole, of the field of conflict will be done away with, by confining the operation of the courts respectively to subject-matters peculiar to each. Thoroughly to effect this it is necessary to confer upon common-law courts power to give, in respect of rights there recognised, all the protection and redress which at present can be obtained in any jurisdiction, and it is upon this principle that we have acted in our suggestions. If they be carried into effect there will no longer be the spectacle of jurisdictions imperfect in themselves, and clashing with one another, but each court will be armed in itself with exclusive jurisdiction over the subject-matter within its cognisance, and with full power to give all the protection and redress which the law at present affords by means of a plurality of suits. The conflict of jurisdiction will be done away with, because the occasion for it will no longer exist. We have only to add, that we have given our best attention

to the question, whether it is necessary to adopt the procedure of the Court of Chancery in cases where it is proposed to borrow from its remedies; and we have arrived at the conclusion, strengthened by an experience of the working of the Common-law Procedure Act of 1854, that the desired object can be attained as effectually, and with less expense, by means of the ordinary proceedings of the common-law courts."

This report having been presented to her Majesty, no time was lost to carry it into execution. The bill, of which he now moved the second reading, had been framed entirely and exclusively on the suggestions of those eminent lawyers, the commissioners. The bill for which he took no merit, was drawn by Mr. Justice Willes. He had introduced it without altering a single line. It was approved by all the common-law judges; but the equity judges, including the Master of the Rolls and Lords Justices Knight Bruce and Turner, signed a memorial against any further fusion of law and equity. He should not ask their Lordships to pass this bill unless the objections of the equity judges could be obviated; and therefore he proposed, if the bill were read a second time, to have it immediately referred to a select committee. Lord Chief Justice Cockburn had assured him, that, after having carefully considered the question, he did not believe those objections to be tenable; and Mr. Justice Willes was of a similar opinion. He should not enter in detail into the provisions of the bill, but he might observe, that in those cases in which a court of equity possessed the right on fixed principles, to grant relief against the forfeiture of leases, and an ejectment was brought by the landlord against the tenant, relief was sought to be afforded by dispensing with the present dilatory proceedings. The noble and learned lord concluded by moving the second reading of the bill.

Lord St. Leonards observed, that in so far as the bill tended to alter the present system of legal proceedings, it might be characterised as a measure calculated rather to promote the confusion than the fusion of law and equity. He should in the first place, draw the attention of the House to the fact that the commissioners had not been authorised to make the report which they had done, in reference to equity jurisdiction, inasmuch as their inquiry had been directed to the principles of pleading in the courts of common law, the manner of conducting suits before those tribunals, and other circumstances connected with their proceedings. The commissioners had, therefore, gone beyond the scope of their powers in reporting that it was expedient to give to the courts of common law all the material functions which were now discharged by courts of equity; and this without the slightest necessity. By this process it was supposed that the two different systems would be amalgamated; but all they would do was to take equity from the courts that understood it, and persons competent to administer it, and give it to the courts that did not understand it, and persons who were not competent to administer it. If there must be a fusion of the two systems, they must have a code of laws drawn up for the purpose. As the law at present existed, no man had ability enough to execute both common law and equity. Let them consider a moment how the courts, the machinery of both systems, stood. There were seven judges in the courts of equity—the Lord Chancellor, the Master of the Rolls, two Judges of Appeal, and three Vice-Chancellors. How they had answered the purpose intended was proved by the fact that in no country was a system of equity law ever so well or so cheaply administered as in England at present. The Lord Chancellor sat separately, the Master of the Rolls and Vice-Chancellors were always sitting. What did the bill propose to substitute for this machinery? The fifteen judges of the common law, whose time was already fully occupied by the business of their own courts. Only a few evenings since the noble and learned lord on the woolsack asked their lordships to agree to the bill for increasing the powers of the judge of the Divorce Court, on the ground that the common-law judges were too much occupied to be able to sit as assistant judges in the Court of Divorce. Then, how was it possible to ask their lordships, without necessity, to transfer the duties of the courts of equity, which they were perfectly competent to execute, to the courts of common law, that could hardly do all their own work? They were quite inadequate to discharge the new duties required of them or undertake the amount of business that now occupied the six equity courts and the seven judges. The consequence of the change would be, the equity courts would not be fully occupied, and the courts of common law would be encumbered with too much work. The machinery of the two systems, as at present constituted, enabled each division to discharge its own duties. But he thought, with all respect to the common-law judges, that they were rather too fond of making cases brought before them the subject of reference to arbitration which was not the case in the Courts of Chancery. It would be found impossible to transfer the business of one set of courts to the other. It was inevitable that the common law judges should not be learned in the law of equity; yet it was proposed to transfer to them a system of procedure they had never studied, and in which they had not had the practice indispensable to form an equity lawyer. The consequence of referring equity cases to the courts combined must be confusion, and a mass of conflicting opinions. He had the greatest respect for the learning of the common-law judges in their own line, but common law lawyers themselves would be ready to admit that they were not equity lawyers. If there existed a want of capacity in the judge, insufficient time for dealing with these questions, and a want of adequate machinery for executing the decisions which might be made, with what prospect of success, he asked, could it be proposed to confer equitable jurisdiction on the courts of law? By taking on themselves to act under the provisions of this bill, these courts would frequently be forced to take charge of the money belonging to suitors. In Chancery this portion of the duties of the court had been reduced to a perfect system. All monies were paid in to the Accountant-General, whose office was one of long standing, and who had under him a large staff of clerks, while in the Bank of England there was a large department appropriated to the Court of Chancery, with a view to insure the security of the funds and their due application. Was it intended that there should be a similar large establishment for the courts of common law, or were they to have a repetition of what had already happened, where a suitor, coming to claim his money, found that it had been dealt with by the person to whom it was intrusted? In the case of a fraudulent or improvident trustee the person entitled to the equitable estate would have little difficulty, and would incur comparatively trifling expense, in causing the property to be conveyed into proper hands; but before the common-law judges a fraudulent trustees would be able to make out a much better case; and under the provisions of this bill, the owner he contended, would be compelled to make good his equitable right, as against the trustee, before it would be competent for the judges to decide on the evidence. The result of the measure, if passed, would be, that the equity courts would sit inactive, while the law courts, with insufficient machinery, time, and information, would be engaged in the attempt to execute imperfectly and ineffectually the business which it was sought to withdraw from the proper channel. As for amending the bill in committee, there was but one thing which could be done with it, and that was to run a pen through all the clauses relating to the equitable jurisdiction. The third report of the common law commissioners proposed that certain equitable powers should be given to the law courts, which they refuse to assume on the ground that they had not sufficient jurisdiction. It was not, however, a want of power on the part of the judges, but a want of determination to execute that power which prevented them from doing so. The judges found—and nobody was better acquainted with the fact than the noble lord on the woolsack—that they were unable to deal with the subject, and they refused to assume the authority which the act of Parliament had conferred on them, Now, it was proposed, in so many words, that they should have the power which they had before

declared they were unable to execute. The bill directed that in cases where the judges found they were not able to do justice they should let the party go to equity. Was ever such a provision heard of? It was proposed, as an improvement on the existing system, that powers should be transferred from the court of equity to a court of law, and if the latter found itself unable to deal with the cases brought before it, the remedy provided was, that they should be sent back to the very court to which at the present moment they belonged! He maintained, as he had often done, that the tendency of modern legislation was to drive suitors from the uncertainty and conflict of jurisdictions into an arrangement of their suits by way of arbitration. The bill proposed to give to courts of law power to enjoin courts of equity not to give relief; and a more monstrous proposition he had never heard. The noble and learned lord had referred to the example of America, where the equity jurisdiction was at one time in a most unsatisfactory state. The remedy applied was to enable judges of the courts of law to sit also as judges of equity; but that was not a fusion of law or equity—it was a mere confusion of judges. The judges of the Court of Exchequer here had at one time an equity jurisdiction; but the result of their being both law and equity judges was, that the equity jurisdiction was administered so unsatisfactorily that an end was put to it by the unanimous assent of all men, at a vast expense in the way of compensations and retiring allowances. And yet Parliament was now asked to sanction the re-establishment of a system with regard to all the courts of law which had already been tried and failed signally! When this bill was produced it had thoroughly astounded him, and he had no hesitation in saying that his surprise was shared by every lawyer in and out of Parliament. He had suggested to his noble and learned friend on the woolsack to refer it to the working judges of the courts of equity—since the report of which it was the echo was drawn up entirely by common-law judges. That was done, and the report of the Master of the Rolls and the three Vice-Chancellors was now on the table, condemning the bill on every ground. To every word of that report he thoroughly subscribed. The Lords Justices had not been included in the reference, but they had also expressed their opinion in strong condemnation of the bill. Therefore the noble and learned lord on the woolsack—new to the court and to its practice—stood alone against the other six judges of the court, whose lives had been spent in it. A more important question had scarcely ever came before their lordships, and whether the bill were to be referred to a select committee or not, he should certainly take the opinion of the House in the present stage.

Lord Cranworth said that he was not at present prepared to say whether the bill would be dealt with better in a select committee, or in a committee of the whole House; but it was very unfair to endeavour to crush the bill at once, merely because some of the details might be objectionable. The object of his noble and learned friend on the woolsack was to enable every court to complete the suit, and to decide finally on every matter brought before it. No one could doubt that it was better that each case should be decided quickly, cheaply, and before one tribunal, rather than before many; and therefore in the object of the bill he entirely concurred. He thought, for instance, that it was manifestly useful that, when an action of ejectment was brought, the court of common law should be able to restrain parties from committing waste, without the necessity of an injunction from the Court of Chancery; and that if upon an action being brought for forfeiture for non-payment of rent, and the money were paid within a certain time, a court of common law should be able to stop the action, in the same way as the Court of Chancery could now do. But with regard to the great bulk of the clauses, he should feel great reluctance in giving his assent. The real practical reason why they could not make a fusion of law and equity was, that one class of subject-matter in litigation required one sort of machinery, and another class required another. If law and equity were fused, all the courts must have the same machinery in order to do justice. As an illustration—if a person died in debt, the creditor might sue the executor at law, and obtain judgment; but then the court of equity would step in, and require all the assets to be collected, and distributed ratably among all the creditors. The courts of common law could not possibly deal with such a case, because they had not the machinery whereby full justice could be done. The question was not whether the judges were equally competent, but whether the courts had equally competent machinery. All the learning and intelligence in the world would not do unless there were the means to collect the assets, and distribute them ratably. On the other hand, there were cases in which it was unjust for the plaintiff to sue at all, yet the defendant could not stop the action without going to the Court of Chancery. It was to meet this state of things that provision was made in the second Common Law Procedure Act, whereby parties were allowed to plead equitable defences, if the court did not feel incompetent to deal with the matter. In the first year after the passing of that act two cases arose which completely illustrated the necessity of the alternative which enabled the courts of common law either to admit or refuse an equitable plea. In the first case an action was brought in which the equitable defence depended on the defendant executing a proper surrender, and doing other acts which the courts of common law had no means of enforcing. In that case, therefore, the plea was not allowed. In the second case an action was brought to recover the value of machinery in a mill. The equitable defence was, that 10,000*l.* had been paid for the mill and machinery, but, by a mistake, the machinery was not mentioned in the bought and sold note. The court of common law could deal with such an issue as that, and the plea was admitted. By this bill it was proposed to enact that a party should be able to obtain an *ex parte* injunction upon what was called an summons from a judge at chambers. At present such injunctions were only granted by the Court of Chancery, to prevent irreparable mischief, upon a bill and affidavit disclosing all the circumstances both for and against the party applying. No such security would, as he understood the bill, be obtained under the present measure. More than this—it was obvious that an injunction, granted with the view of preventing irreparable mischief to one person, might cause an equal injury to him against whom is was granted. Accordingly it was essential to justice that there should be an immediate and ready means of getting rid of it. Under the present system the Court of Chancery was in theory, and to a great extent, in practice, always open; but if injunctions were to be granted by judges at chambers during vacation, it might be several weeks before parties considering themselves aggrieved had an opportunity of applying to a court of common law for their dissolution. He had felt it his duty to state his views upon these subjects to their lordships, but at the same time, the bill contained a great many useful provisions, and he therefore hoped that they would give it a second reading.

Lord Kingsdown said that no bill more important in its consequences than this had ever been laid before their lordships, because, whether rightly or wrongly, it would subvert the system of law which had prevailed in England for above 200 years, and would introduce into the administration of justice a confusion and an uncertainty to which the nation had hitherto happily been a stranger. The distinction between law and equity arose from the circumstance, that any system of jurisprudence which pretended to effect justice must apply different remedies to the assertion of different rights, and to the redress of different wrongs. The evil which was proposed to be remedied by this bill, and which the report of the learned commissioners suggested needed a remedy, was not that the system administered by the Court of Chancery required to be altered, not that it was wrong, not that it failed to do justice, but that it would be more efficiently applied by courts other than those to which its administration was now intrusted.

The question was not whether some particular items of improvement might be adopted, but whether the general change, termed "a fusion of law and equity," was in itself desirable; and if so, whether this bill would satisfactorily carry it into effect. He collected from the report of the commissioners, that his noble and learned friend opposite (Lord Cranworth) objected on a former occasion to proposals which were again submitted to their lorships in this measure. In this matter he must say his noble and learned friend had added another to the many acknowledged, or but ill-acknowleged, obligations which the country owed to one who, while he held the Great Seal, unostentatiously discharged his high duties in a manner that might challenge comparison with his predecessors. The provisions of the bill with respect to granting injunctions and the hearing of appeals, instead of diminishing delay and expense would largely increase them. After describing the various costly stages through which litigants would have to pass without obtaining a settlement of the questions in dispute between them, the noble and learned lord said he had every respect for the commissioners on whose recommendations the measure was stated to be based; but it was not in the nature of things, that they should understand the equitable principles, practice, or pleading which they desired to apply to the common law courts. It was with surprise he had heard the authority of his learned friend the Attorney-General cited in favour of this bill.

Lord Chancellor.—I quoted, in support of the principle of the bill, his address to the Juridical Society.

Lord Kingsdown continued.—They all knew the precision and accuracy of the Attorney-General; and it was impossible for him to persuade himself that his learned friend had ever given his high sanction to one single clause in this measure. Judging only from the internal evidence of that document, he must say that no man in the slightest degree conversant with the doctrines and practice of a court of equity could give his sanction to such a bill as that. It was said to be desirable that courts of law should possess the jurisdiction by way of injunction now exercised by the courts of equity. And how was it proposed to carry out that object? In the courts of equity an injunction was granted most rarely, and guarded with extreme precautions, in order to restrain the infraction of a right. It was given only in cases where, if withheld, irreparable injury would be done to property. His noble and learned friend said he was responsible for this bill. One could hardly believe that he had ever read its provisions. While professing to confer this jurisdiction on courts of law, instead of confining it as it had been confined by courts of equity, the bill actually extended it to every possible case in which actions for breach of contract or other injury might be brought. All actions at common law were founded either on contract or on tort; and in what cases were courts of law to be empowered to issue writs of injunction? Why, before any proceedings had been taken, "in all cases of threatened breach of contract or other injury of such a nature that an action at law for damages might be maintained for the same if committed." Was there ever anything so monstrous? Any action for a threatened breach of the peace—the most important or the most trivial—might be the subject of these injunctions, because a court of equity might issue them. Looking through this report, as he was bound to do when told it was the foundation of this bill, he had met with a passage which had rather surprised him, and which he was utterly unable to comprehend. It spoke of the jurisdiction of the Court of Chancery "to entertain bills technically called bills for new trial." He must say he had never heard of such bills. He should apologise to their lordships for entering into these details, but it was important that the matter should be fully discussed. A good deal had been talked of the fusion of law and equity, but he could not help thinking that there ought to have been a fusion of equity and common-law judges on the commission. He had no apprehension that this bill, or anything like it, could ever by possibility pass into law. He had not much apprehension that this bill would go to the other House of Parliament in its present shape. He confessed he distrusted all these attempts to tamper with the existing legal institutions of the country. Our judicial system was like our legislative system; they were both the native growth of England; they had grown with the growth of the people, and accommodated themselves gradually to their wants. There might be irregularities or a want of symmetry in some parts of the system, but they had combined to give the country a greater share of order, freedom, and security of property than had ever been enjoyed by any other country under the sun; and he did trust their lordships would pause long before they adopted speculative alterations either to impair the efficiency of the courts or endanger the security of property.

Lord Wensleydale entirely agreed in the panegyric pronounced by his noble and learned friend on the woolsack on the various commissioners who had considered this subject, but he objected to this bill going so much beyond the original cases in which the equity and common-law courts came in contact with each other. He therefore entirely agreed with the noble lord who first addressed their lordships in opposition to this measure, as to the extreme impropriety of extending the jurisdiction of common-law courts to cases of injunction. The noble and learned lord concluded by observing that he could not concur with his noble and learned friend (Lord St. Leonards) in objecting to the motion for the second reading of the bill.

Lord Chelmsford said he entirely concurred with his noble and learned friends by whom he had been preceded in their opposition to the bill, and added, that when the question which it involved came on for discussion again, it would be desirable that the House should consider whether a measure of such a character ought to be introduced, proposing to effect, as the greater portion of it did, important alterations in the jurisprudence of the country, and adopted, so far as its reference to a select committee was concerned, because it contained certain clauses which were in themselves unobjectionable.

The Lord Chancellor, in reply, said that as the bill was about to be read a second time without oppostion, he should not enter into a discussion of the various objections which had been urged against its adoption. He could not, however, help expressing the great surprise which he felt at the statement which had been made by his noble and learned friend who had left the House, (Lord St. Leonards), to the effect that he regarded it as an act of great presumption on the part of the Common-law Commissioners that they should have dared to meddle with the subject. His noble and learned friend, indeed seemed to look upon the conduct of the commissioners in that respect as the right reverend bench might be supposed to view a proposal for the rejection of the ten commendments; but he should remind the noble lord that the commissioners had been authorised to examine how far the courts of common law might be improved, and that they had come to the conclusion that a great obstacle to that improvement was the want of equitable jurisdiction. Their having made a report in accordance with the authority with which they were invested, constituted the head and front of their offending; and he could not help adding, that the objections to the bill, which were founded on that report, seemed to him to be based on an entire misapprehension of its meaning; for it did not propose that suits, of whatever character they might be, might be brought indiscriminately before either equitable or common-law tribunals, but that if, incidentally, a question of law arose in a suit in equity, the equity courts might be empowered to deal with it, and *vice versa*. Any amendments in the bill which might be suggested would, he need hardly say, receive his most careful consideration,

In reply to *Lord Chelmsford*,

The *Lord Chancellor* said, when the memorial from the

equity judges should be addressed to him he would lay it before the House; and when their lordships had had an opportunity of reading the objections on one side and the other, he should be ready to refer the bill to a select committee.—*Jurist.*

LECTURES

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

BY JOHN MORRIS, ESQ.

(*Conclusion.*)

I now come to the jurisdiction and practice of the Prize Court. My remarks under this head must be extremely general. Time prevents my entering upon it at all in detail. I need scarcely say, that I shall not profess to enter upon the principles of prize law; to discuss such a subject would require more time than I have allotted to me for both my lectures. I shall merely refer to the jurisdiction and practice of the Prize Court (for the present happily of minor importance), with the view of giving you a general notion thereof, that being necessary in order to complete the subject which I have undertaken.

The rule of locality, to which our attention has been so much directed in reference to the Instance Court, never prevailed in the Prize Court. In the language of Dr. Browne, "In matters of prize, the rule which the civilians so much, so justly, but so unsuccessfully laboured to establish in the Instance Court, is universally confessed and admitted."

The Prize Court exercises its functions by virtue of a special commission from the Crown, issued at the commencement of each war.

The Crown is, as it has been termed, the "fountain of prize." "No man has or can have any interest in it," said Lord Stowell, "but what he takes as the mere gift of the Crown; beyond the extent of that gift he has nothing." To whom, then, does the Crown grant prize? It is not everyone who can seize enemies property. In our wars prior to the last, licenses were granted to privateers to seize prizes. The officers of the navy have always had direct power from the Crown to seize, without any express license. In the last war no licenses were granted to privateers,* the power to seize was, therefore, limited to the officers of the navy.

Captors, even when Crown officers, have only a right to seize subject to the duty of bringing to adjudication; "a duty," as Lord Stowell remarked, "enjoined that they may not make seizure, without bringing the ship and goods seized to the notice of the proper tribunal, in order to prevent the right of seizure from degenerating into piratical rapine."†

It is a principle of prize law, both in this and other civilised countries, that the sovereign power can direct the release of ships taken as prize, before final adjudication. An exercise of this power occurred in the late treaty between France and Austria—one of the articles of which was, that France should give up all Austrian ships not condemned.

In matters of prize the Admiralty has exclusive jurisdiction. The Courts of Common Law cannot interfere. This point was expressly decided in the great case of *Lindo* v. *Rodney.*‡ Lord Mansfield, in that case, gave a luminous exposition of the jurisdiction of the Prize Court. He said, "The Prize Court is peculiar to itself—it is no more like to the Admiralty (viz. the Instance Court) than to any court in Westminster Hall. The Instance Court is governed by the Civil Law, the laws of Oleron, and the customs of the Admiralty, modified by statute law. The Prize Court is to hear and determine according to the course of the Admiralty, and the law of nations. The end of a Prize Court is to suspend the property till condemnation; to punish every sort of misbehaviour in the captors; to restore instantly, *velis levatis*, if, upon the most summary examination, there does not appear a sufficient ground; to condemn finally, if the goods really are prize, against everybody, giving everybody a fair opportunity of being heard. A captor may and must force every person interested to defend; and every person interested may force him to proceed to condemn without delay."

The Prize Court tries all captures in ports, havens, &c., as well as on the high seas; and so, even, as to prize taken on land, if it be the result of a fight begun on the water. But, as remarked by Lord Mansfield, in the case* which I have just referred to, "as to plunder or booty in a mere continental land war, without the presence or intervention of any ships or their crews, it never has been important enough to give rise to any question about it. It is often given to the soldiers upon the spot, or wrongfully taken by them contrary to military discipline. If there is any dispute, it is regulated by the Commander-in-Chief. There is no instance in history or law, ancient or modern, of any question before any legal judicature ever having existed about it in this kingdom. To contend that such plunder was within the rule and jurisdiction of the Prize Court, might be opposed by the subject matter, the nature of the jurisdiction, the person to whom it is given, and the rules by which he is to judge."

By the Statute of Victoria,† it is enacted, s. 22, as follows—viz. "That the said High Court of Admiralty shall have jurisdiction to decide all matters and questions concerning booty of war, or the distribution thereof which it shall please her Majesty, her heirs and successors, by the advice of her and their Privy Council, to refer to the judgment of the said Court; and in all matters so referred, the Court shall proceed as in case of prize of war; and the judgment of the Court therein shall be binding upon all parties concerned."‡

The Prize Court proceeds according to the law of nations; as Lord Stowell remarked,‖ "what foreigners have a right to demand from it, is the administration of the *law of nations*, simply, and exclusively of the introduction of principles borrowed from our own municipal jurisprudence, to which it is well known they have at all times expressed no inconsiderable repugnance."

One of the principles of the law of nations is, that the question of prize must be decided by the Courts of the country of the captor. Thus, supposing in the late war between France and Austria one of our ships had been seized, either for carrying contraband of war, or for any other reason for which the property of neutrals is liable to seizure, the Courts of France or Austria, as the case may be, would have had to decide on the important and delicate questions which might have arisen out of such a seizure; hence the great importance of maintaining in this country, in time of war, the high character which our Prize Court has attained, through the eminence and ability of its judges, seeing the great influence the decisions of the Court might have on our relations with other countries, especially neutrals.

On one occasion Lord Stowell is reported to have said—"The seat of judicial authority is locally here in the belligerent country, according to known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm: to assert no

* One of the articles of the late Treaty of Paris was, that privateering should be abolished: but this, of course, only applies as between the contracting parties The United States of America have refused to be bound by it.

† *The Elsie*, 4 Rob. 185. ‡ 2 Douglas, Rep. 613.

* *Lindo* v. *Rodney*, 2 Doug. Rep. 613. † 3 & 4 Vict c. 65.

‡ The registrar stated to me after the lecture, that no orders in Council have as yet been made under this section. He also mentioned to me the case of a seizure during the Russian war of a vessel in course of building in this country for Russia; it was condemned as prize—not by the Admiralty, it being seized *on land*—but by an inquisition from the Crown.

‖ *The Peacock*, 4 Rob. Rep. 311

pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character.

The Prize Court, in administering what has been termed the law of nations, is frequently controlled or guided by the Orders in Council, proclamations, &c., of the sovereign. Lord Stowell remarked *—"It is strictly true that, by the constitution of this country, the king in council possesses legislative rights over the Prize Court of Admiralty, and has power to issue orders and instructions, which it is bound to obey and enforce; and they constitute the written law of this Court. These two propositions—that such Court is bound to administer the law of nations, and that it is bound to enforce the king's Orders in Council—are not at all inconsistent with each other, because these orders and constitutions are presumed to conform themselves, under the given circumstances, to the principles of its unwritten law. They are either directory applications of those principles to the cases indicated in them—cases which, with all the facts and circumstances belonging to them, and which constitute their legal character, could be but imperfectly known to the Court itself—or they are positive regulations, consistent with those principles, applying to matters which require more exact and definite rules than those general principles are capable of furnishing. The constitution of the Prize Court, relatively to the legislative power of the king in council, is analogous to that of the Courts of Common Law relatively to that of the Parliament of this kingdom. These Courts have their unwritten law, the approved principles of natural reason and justice; they have likewise the written or statute law in Acts of Parliament, which are directory applications of the same principles to particular subjects, or positive regulations consistent with them, upon matters which would remain too much at large, if they were left to the imperfect information which the Court could extract from mere general speculations."

Such are the leading outlines of the jurisdiction of the Prize Court.

The following is a short outline of its mode of procedure, as set forth in a letter from Lord Stowell and Sir John Nicholl to Mr. Jay, the American ambassador, in 1794, and it is believed that the practice is still substantially the same as there described. [The lecturer, instead of reading this extract, referred his hearers to "Story on the Practice of Prize Courts," by Dr. Pratt (a book easily to be procured at a low price), which contains not only the letter referred to, but also a great deal more of valuable and instructive information. This book was recommended to the attentive consideration of the student.]

I ought here to mention, what no doubt most of you are familiar with—viz. that the appeal from the Admiralty Court, both the Instance and Prize Court, is to the Privy Council; the same applies to the Vice-Admiralty Courts in our colonies, from which there used to be an appeal to the Court of Admiralty here.

Before concluding, I wish to make a few general observations and suggestions.

Mr. Pritchard, in his introduction to the Admiralty digest, described the branch of law which we have been considering "as highly interesting, from its great importance to the commercial interests of Great Britain, and from the simplicity and purity of its principles, as contradistinguished from the intricate ramifications of the municipal law, consequent upon an artificial and highly refined state of society.

A comparison of the procedure of the Court with that of our superior courts of law and equity, will, I think, suggest the reflection whether this Court might not usefully have extended to it concurrent jurisdiction, with our courts of law and equity, in all maritime matters. The prejudice against the civil law, which first occasioned the passing of the restraining statutes, has no longer any place with us. The probate and divorce jurisdiction is now administered by our municipal judges, and the procedure of those Courts, as well as that of the Admiralty Court, is now assimilated, as near as may be, to the practice of our other Courts; but the expedition with which the ship can be arrested, the completeness with which justice may be done upon the whole case without the expense of Chancery, and a *relative* superiority in the mode of taking evidence, are advantages which would, I think, bring suitors to the Admiralty Court, if they were allowed a free choice of courts.

On this point I will read to you the language in which Sir Leoline Jenkins summed up his celebrated argument before the House of Lords on the Admiralty jurisdiction, in the reign of Charles II.:—"I hope, my Lords, to conclude with something that will give all parties content, and must be understood to be a *conveniency*: it is, that we of the Admiralty are content that suitors may have *their option* of the court they would sue in. If mariners will go for their wages, owners for their freight, merchants for their damages, material men for their money, to the common law, we shall not in the least regret it; but if they choose rather to come to the Admiralty (as certainly they will not, unless they find the dispatch quicker, the proceedings less chargeable, and the method of judgment and execution more suitable to their business), we desire leave to receive them, and do them justice without the danger of a penal statute, and without the interuption of prohibitions when once we are possessed of the cause. And this is all we desire."

I can only echo the quaint language of the old Admiralty judge, as clearly expressing what, it seems to me, will alone meet the necessity of the case at the present time.

In America, where Admiralty law is administered by the same judge, and in the same courts, as common law and equity, the judges have struggled, and successfully, to maintain and uphold the Admiralty jurisdiction, and the consequence is that, in that country, the Admiralty has concurrent jurisdiction with the other courts in all or most civil maritime matters. In America the Admiralty process *in rem* is only applied where there is a lien, either by the maritime or statute law or by contract: where there is no such lien the only remedy available is *in personam*, and this seems to me the true principle, and one which should be borne clearly in mind in any extension of the Admiralty jurisdiction with us. Hitherto it has not, I think, been properly attended to. Thus by the statute of Victoria, a foreign ship is made subject to proceedings in Admiralty for necessaries, and thereupon it has been held that the proceeding *in rem* applies, that being one (although, as we have seen, not the only) mode of Admiralty procedure. No doubt this was what the Act of Parliament intended, but it would have been far better, I submit, to have created an express lien by the statute. One of the inconveniences of not having done this is, that if a question should arise as to necessaries to a foreign ship in any other court but the Admiralty, it would be there held that there is no lien, and thus the two tribunals would be administering what is practically different law. Another inconvenience of there being no lien created is pointed out by Dr. Lushington, in the case I referred to when upon the subject of "necessaries." But so it is in most of our legislation, we don't like to go straight at the point; now, although I advocate the extension of the Admiralty jurisdiction, I do not enter upon the question of the extension of the lien on the ship, or the proceeding *in rem*, which is the necessary and proper accompaniment of the lien. Put the extension of the jurisdiction on its proper ground—viz. the free choice of the suitor—and it will, I think, be carried; but if we mix up with it the question of lien, we at once open up different considerations, on which there is a good deal to be said on both sides. Time will not permit me, and if it would, this is hardly the place, to enter upon that question. All that I now contend for is, that the Admiralty jurisdiction should be extended in the way I have suggested, providing, at the same time, as is

* Edwards's Ad. Jurisdic. p 240.

the law in America, that the remedy *in rem* should, as to any cases not now cognisable by the Admiralty, only apply where there is a legal lien; in other cases letting there be a remedy *in personam* only.

In the Admiralty Courts in our North American colonies, the Admiralty jurisdiction remains on its ancient footing. The reason given by Dr Lushington is,* "that after the revolution of 1640 broke out; there was a great jealousy against the Ecclesiastical Courts, and this was extended to the Court of Admiralty; and so in Lord Holt's time its jurisdiction was curtailed, whereas in our North American colonies there were no Ecclesiastical Courts to excite any such jealousy."

The Scotch Courts are enabled to act *in rem*,† by virtue of their ordinary powers of arrest, without the aid of the maritime law. Until within modern times there was, however, a special Admiralty jurisdiction in Scotland (as there is still in Ireland and also in the colonies—in the latter, under the title of Vice-Admiralty Courts), but now it is vested in the Court of Session, which, as you no doubt know, is a Court administering both law and equity, as is usually, if not universally, the case with the Courts of all countries, whose jurisprudence, as in Scotland, is founded on the Roman civil law.

In this country, the public mind is quite disposed to give a fair trial to any mode of procedure, which aims at greater simplicity than that which prevails in our courts of law and equity.

It is scarcely necessary for me to refer you to what I have already said, as to the advantages of proceeding in the Admiralty, instead of at common law, in collision causes. Over charter-parties there seems no valid reason why the Admiralty Court should not have cognisance; and there is the reason in favour of it, that the Admiralty clearly had jurisdiction in such cases long before the passing of the Restraining Statutes. At the time when efforts were made at an arrangement between the Common Law and Admiralty Courts in the reigns of James I. and Charles I., it was conceded that the Admiralty should have jurisdiction in cases of charter-parties. So, in suits for wages, why not abolish the distinction, which precludes suits in this court where there are special contracts? Such abolition was, *I believe*, recommended in the report of the select committee, to which I shall presently advert. Why has the Court of Chancery had conferred on it by the Merchant Shipping Act, s. 504, sole jurisdiction, where there are several claims on the ship for damage and the value of the ship is insufficient to pay them all, to apportion the value amongst the several claimants, when it might, I submit, have been as well if not better exercised by the Court of Admiralty, which has generally to adjudicate on the very claims which necessitate the interference of the Court of Chancery? ‡ Why in such case could not the Court of Admiralty have power to complete justice, without going to a second, and that a very expensive court?

Then, again, in marine insurance cases, where there are several underwriters, a separate action at common law can be brought against each. It is true that these actions may be consolidated, but not until the expenses of the initiatory steps in each action have been incurred; whereas, in the Admiralty one suit would determine the whole matter.‖

In this court the proceedings are not cramped, by limiting the matter to be tried to certain defined issues between plaintiff and defendant; but the Court can not only try disputed questions, whether of law or fact, but can also, in the same suit, administer equity, as between the parties to it, without sending them to another court. This is what it does in salvage cases, where in the first instance, the Court determines how much salvage is to be paid, and then, in the same suit, apportions the amount amongst the salvors, if more than one, according to their respective degrees of merit.

There is a case reported in the 14th *Jurist*, where bottomry creditors seized the cargo under the Admiralty process; and, there not being enough, otherwise, to satisfy the bonds, the cargo was applied to that purpose, and the owners of the cargo, in order to recover the value of it from the owners of the ship had to bring actions at law; whereas, if the Admiralty had the enlarged jurisdiction I have suggested, it could, in one suit, have adjudicated on the rights of all parties arising out of the bottomry transaction.

At present the Admiralty Court has no power of enforcing its decrees, where the ship or its proceeds are not arrested, except by attachment. If the jurisdiction is extended, the Court ought, I submit, to have the same powers of issuing execution directly, against goods and lands, as are now possessed by the courts of law and equity; it is only within the last few years that such powers have been conferred on the Court of Chancery.

In the report of the select committee of the House of Commons on the Admiralty Courts, in 1833, and the evidence taken thereunder, great fears were expressed as to the effect of throwing open the Ecclesiastical and Admiralty Courts, as tending to discourage the special study of the civil law in this country. The great importance of having a judge, and a body of practitioners, skilled in civil and international jurisprudence, was urged, and properly so. What would ve been the position of this country during the early part of the present century, if it had not had a judge like Lord Stowell to administer the numerous, important, intricate, and delicate questions of international law which then arose—questions which, between us and neutrals especially, might have influenced decisions of war or peace? So, again, as was properly urged in the report it is of great importance that we should have some judges skilled in the civil law to sit in the Privy Council, on the decision of appeals from our colonies, in some of which the civil law, or some modification thereof, prevails.

We must, if possible, keep a sufficient amount of Admiralty business together, to occupy a competent judge, and to attract a proper class of practitioners, both as advocates and proctors. In this way the danger referred to in the report may be best avoided, and it affords another, and a strong argument for extending the Admiralty jurisdiction.

I have taken notes of some cases in the reports, bearing upon the duties of proctors in this court, which I thought might not be without use on an occasion like the present.

The first I have is of a case as to the preparation of affidavits; the note of it is as follows:—"It is contrary to the duty of persons preparing affidavits in salvage cases, &c., to make out the statements to which the witnesses are to swear, in language contrary to the natural tone in which the parties would unassisted, express themselves. They should consist of a plain statement of the facts and circumstances, as the witnesses themselves state them, and as they would state them if examined in court. The Court wishes always to have the statements of such witnesses in their own language."—*The Towne*, 8 Jur. 222.

The note of another case is as follows:—"Proctors are to take all practicable care to be assured, as far as circumstances will permit, that they are duly authorised to appear for the individuals on whose behalf they profess to act."—*The Haidee*, 1 Notes of cases, 597.

In another case (one as to mariner's wages, where the

* *The Royal Arch*, 30 Law T. 199.

† See an interesting case, *Harmer* v. *Bell*, 7 E. P. Moo. 268, in which the distinction between the Admiralty process *in rem*, and the power of the Scotch Courts to arrest, and of the Mayor's Court in London to attach, was fully considered.

‡ See the case of *Cope* v. *Doherty* (27 L. J., Ch., p. 699). It is a striking illustration of the mischief I have pointed out in transferring to Chancery the jurisdiction in such cases. It was held in that case that an American ship could not avail itself, either against another American ship or a British one (for it was not clear what the character of the other ship was), of the limitation of the owner's liability for damage, and that notwithstanding a suggestion that the law of America was the same as ours on this point. I do not think the Court of Admiralty (which is an international court) would have decided so illiberally. *S. C.*, 4 K. & J. 367; 2 De G. & J. 614.

‖ See 3 Black. 74, as to the "Court of Policies of Assurance," created by st. 43 Eliz. c. 12. The remarks there made seem to be confirmatory of the views I have here urged. See the case of *De Lovio* v. *Boit*, before referred to, in which Judge Story held, that a policy of marine insurance was cognisable in the Admiralty of America.

claimants were illiterate), Lord Stowell remarked that, "the proctor has in these cases something of a public, as well as a private duty thrown upon him something that in such cases he owes to a fair administration of justice, as well as to the private interest of his employers. The interests propounded for them ought, in the proctor's own apprehension, to be just, or at least fairly disputable; and when such interests are propounded, they are not to be pursued *per fas et nefas.*" In the same case he said, "I adhere to the opinion that I have expressed, that where an intercourse for such a purpose as the definite settlement of a claim is to take place, it is most effectually conducted by the proctors themselves, and not by their clerks; they have both a personal and legal weight, and an authority that can better support them against overweening pretensions, and there is a direct responsibility belonging to them, highly proper to intervene in any point so extremely important as the proposed final adjustment of a cause." Further on he remarked, "That not only is a practitioner bound not to stifle evidence, or to instruct witnesses, when examined, not to commit themselves, or in other words, not to tell the whole truth; but, moreover, that where a meeting is held for amicable arrangement, and the parties are personally produced for the purpose of fair agreement, and to prevent litigation, it is contrary to the purpose of such a meeting, to resist fair disclosures of all facts leading to a just conclusion, or to suppress facts without a knowledge of which real justice is unattainable; for men ought not to come to such a meeting as to a catching bargain, but in the full spirit of equitable adjustment." *The Frederick*, 1 Hagg. 211, 220, &c., in which case Lord Stowell ordered the proctor to pay all the costs.

There are other cases, but I forbear to trouble you with them.

I take the liberty of suggesting to the Incorporated Law Society that they should watch over, and endeavour to promote all proper amendments in our Admiralty Law; and the same Committee, if there be one, which attends to probate and divorce law, might take this also under its cognisance. I would also suggest the extension of the examination of articled clerks to include both Probate, Divorce, and Admiralty law and practice; an extension which might be easily carried out now that the examination is extended to two days; although, of course, it would require some notice to enable articled clerks to prepare for examination on these subjects.

For the student who desires to pursue this subject further, I would mention that the most useful works which I have found are Mr. Pritchard's "Admiralty Digest;" Mr. Edwards's work on the "Admiralty Jurisdiction;" Dr. Browne's "Treatise on the Civil and Admiralty Law," (2nd edit. 1802). I particularly recommend Dr. Browne's work for perusal. Then there is "Abbott on Shipping," and the series of "Reports of Admiralty Decisions," commencing with those of Christopher Robinson, in which Lord Stowell's decisions commence. I might also mention the Admiralty cases in the *Jurist*, which appear to me particularly well reported. There are also several American works on Admiralty Law which claim attention. A list of them will be found in a catalogue of American law books, which may be obtained on application at Trübner's, in Paternoster-row. Judge Story's Judgments on Admiralty Law are well worthy of attentive perusal.

Here, gentlemen, we part company. I trust I have not wearied you. The subject was an interesting one. Compression was difficult. The result you have before you. If I have given you a taste for a science, with which are interwoven such names as Stowell, Tenderten, Story, Lushington, and others almost equally eminent, I shall not regret my attempt to bring this subject before you. It can be hardly necessary for me to remind you that the masterly judgments of Lord Stowell are among the classics of the language, and, as has been well remarked by an American writer, will command and receive universal admiration and respect, "so long as the nations judging and recording in the English tongue shall maintain any supremacy in the maritime relations of the globe."

DIVISION COURTS.

OFFICERS AND SUITORS.

CORRESPONDENCE.

To the Editors of the Law Journal.

GENTLEMAN,—Approving of your frequent recommendations to the Clerks of Division Courts, to form themselves into County conventions for mutual aid, I have joined with one or two others, in an effort to accomplish that object in this County; but I am sorry to say, we have failed.

The following statement, showing the operations of the 91st clause, in this Court, was prepared with the view of having it embodied with similar statements from the Clerks of the other Divisions; but as no such general statement for the County is likely to appear, you may, perhaps, think an isolated instance, which corroborates the evidence hitherto furnished by your journal in favor of that part of the law which has been so fiercely assailed (I really think without due consideration), worthy of a place in your columns. If so it is at your service.

I beg, however, to make one remark, which I believe has been made by others before me, it is this:—The amount set down in the statement as having been "realized," from judgment summonses, is not to be taken as representing the entire efficiency of that mode of procedure. Many debtors have undoubtedly paid in anticipation of a summons; and besides most,—perhaps, nearly all, of the cases "withdrawn, or not presented," and those in which "orders for commitment" were made, some not carried into effect, were, in all probability arranged to the satisfaction of the plaintiffs. Were the facts in connection with all these cases in my possession, it is very probable I should be able to report 60 or 70 per cent. as realized or secured, instead of 24.

The following is the statement to which I allude. It covers twelve months ending the 31st December, 1858.

SECOND DIVISION COURT, COUNTY OF OXFORD.

Total number of suits entered		815
Of these, judgment summonses		68
Proportion of the latter to the former		8·34
No. of actions withdrawn or not presented		21
No. dismissed		23
No. of orders for commitment		9
No. actually committed to prison		0
Total amount sued for	$23,763	31
Of this, sought to be recovered by judg't. sum's.	1,877	00
Proportion of the latter to the former	7	90
Amount realized	448	86
Per centage realized	23	91

W. H. LANDON,
Clerk 2nd D. C.,
C. of Oxford.

Drumbo, May 2nd, 1860.

[We regret the apparent apathy of Division Court Clerks towards their own interests, manifested in a neglect to form County Conventions, but shall nevertheless be at all times glad to hear from such of the Clerks as are alive to their interests as members of a large body of intelligent and (in their several localities) influential men. Among the latter we are glad to record the name of our worthy correspondent, W. H. Landon.—EDS. L. J.]

DIVISION COURT CURIOSITIES.

The Judge of a County Court more than one hundred miles from Toronto, when on his circuit in an outer division, was called upon one morning previous to going into court by a very tidy looking daughter of the Emerald Isle. Her salutation on entering "the presence," was, "And sure you don't know me.—*Judge.* Your face seems familiar, but I cannotsay that I recollec' you.—Sure, do you not know Biddy?—Oh! yes I recollect now: you once lived in my family as cook. Well Biddy how are getting on?—Oh! bad luck—a drunken husband and five childer.—I am sorry to hear it; what can I do for you."

"I have a cause in Court to day, and I wanst to give ye an insight in'til it. Stop Biddy I cannot listen to you here, but when your cause comes to trial you may depend upon it I will do you all the justice in my power.

In due course the cause No. 92, *Bridget S.*——— v. *Patrick O*——— was called on, and the parties walked up to the bar. Pat gives the Judge a knowing wink and turning to the plaintiff asks, Where's the *ould-one*; has he given ye a *poor* of *attorney* to *plade* for him.—*Paddy.* Troth and its my own cause, and its able I am to be my own attorney forenenst you. *Defendant.* I axes for a nonshute your Reverence; the ould one is alive yet, if he is not *dead drunk.* Here was a poser, but the judge desirous of hearing what Biddy's chances for a judgmeut were desired her to call her witness.

Ah! sure whats the use of a witness? the ould sinner knows that I taiched his childer for a year at my school and never saw the colour of his money. Will yee's deny *that*?—*Pat.* I would scorn to do the likes; but here's my *off-skurt.* Did I not furnish *seed* with seed *praties* last spring and help *yees* to plant them when the *ould* man was off on the spree.—*Biddy.* did I ever deny it? but yees mind when I balanced that same by tinding your Misses in child-bed and nursing the babe when she had'int a drop of suck for it. By the same token the child is a dacenter boy than his father, and by my teaching, more of a gintleman.—*Pat.* It is true for you Biddy, but did I not take *yees* in my own sleigh to have *yees* inspected for *yees character* for taiching? and, did I not go afterwards *wid yees* to get the government money on a *false certificate*?—No you old *decaver* the certificate was signed by honester men nor you. But did you not stop at every tavern on the road to give your horse *water*, and yourself *whiskey*, and did *yees* not *leave* me to pay the *expenses* of the journey? Did ye not stop both nights at my Uncles where *yees* drank more hot punch than water by the ould horse? Oh! it was a mighty bad cauld you had that night, and much troubled yees was with the *wind in your stomach*: and sure the poor ould horse never saw the sight of oats before, and did not know the use of them till my uncle showed him how to ate them.—Pat admitted the whiskey and hospitable treatment, but denied the *oats*, it was only *shorts* and *short* allowance of that same. The laughter became so loud in the Court that the judge was compelled to bring the pleadings to an end. Pat you will have to pay this demand.—*Biddy.* Thank your Honor's self. There ye ould sinner! did I not say that he would put in till ye? Pat left the room a sadder if not a wiser man, and Biddy retired in triumph.

It is necessary to add that the Judge paid the debt and costs to the Clerk with injunctions not to tell Biddy out of whose pocket the money came, as he was quite certain she would not receive it. Pat without knowing it, got the benefit of his motion for a *nonshute*, and Biddy got more *justice* than perhaps an *execution* would have produced her.

U. C. REPORTS.

QUEEN'S BENCH.

HILARY TERM, 1860.

Reported by C. ROBINSON, ESQ., *Barrister-at-Law.*

FRASER v. PAGE AND ROBINS.

Taxes—Seizure of goods not owned by party assessed—Refusal to take other property offered by him—Evidence of possession—Liability of collector for acts of his bailiff—Evidence of distress made.

A bailiff having a warrant from the collector to distrain for taxes due by A on his lands, went to the premises, where A. pointed out to him property of his own amply sufficient to cover the amount due. The bailiff, however, insisted on seizing a pair of horses then in the stable, and which A. was at the time putting to a waggon in order to use them, but A. refused to let him take these, saying that they belonged to his son-in-law, who lived in the house, but was then away from home. The bailiff declared that he seized the horses for the taxes, though he did not touch them, but A. drove them away, and three days after the bailiff returned and took them from the stable, no one being present. The owner replevied, and it appeared on the trial that the horses belonged to the son in-law, who kept them in a part of the stable reserved for his exclusive use. There was no evidence that the collector interfered in any way in the execution of the warrant—*the jury having found for the plaintiff against both defendants.*

Held, (McLean, J., dissenting) that the horses were in the possesssion of A., and liable to seizure under the 16 Vic., ch. 182, sec. 42; that the facts proved amounted to a distress; and that the defendants, therefore, were entitled to succeed, though the bailiff might perhaps be liable in another form of action for his unreasonable conduct.

Quære, per Robinson, C J., whether the collector in this case could be held liable for the acts of his bailiff? Per McLean, J.—He was liable.

REPLEVIN.—*The declaration charged that the defendants took* and detained a pair of horses belonging to the plaintiff.

Pleas—1. Not guilty.

2. That the defendant Page was at the time when, &c., a collector of taxes for the Township of Thorold, in the County of Welland: that on the collector's roll one Joseph Upper, a resident inhabitant of the said township, was assessed for £14 4s. for taxes on certain lands in the said township: that Page demanded payment from him at his place of residence: that he did not pay, and after fourteen days had elapsed from the time of such demand, the said taxes remaining unpaid, the said defendant Page, authorised the other defendant as his bailiff to levy the same with costs, by distress and sale of Upper's goods, wherever they might be found in the County of Welland: that Robins did seize and levy upon the horses in the declaration mentioned for the said taxes, the said horses being then upon the land and premises for which the said taxes were in arrear, and in the possession of the said Upper, and the said Robins, as such bailiff, then detained the said horses to satisfy the said taxes, as he lawfully might, &c.

The plaintiff replied that at the said time when, &c., the said Joseph Upper was possessed in his own right of goods and chattels then being upon the premises and in the possession of the said Joseph Upper, sufficient to pay the said claim for taxes, and all costs and expenses in and about the seizure and sale, &c., and which said goods and chattels the said Upper voluntary offered to the said bailiff, to be taken and sold to satisfy the claim for taxes, and all costs, &c., yet that the said Robins, acting under the authority of the said defendant Page, refused to take such goods, but forcibly, and against the will of the plaintiff, seized and took the said horses of the plaintiff in the avowry mentioned, they casually being upon the premises of the said Joseph Upper, *but not in his possession*, the said defendants well knowing the said horses to be the property of the plaintiff, and that a sufficient distress of the property of the said Joseph Upper was then found and being upon the premises of the said Upper, and offered to the said defendant Robins, contrary to the form of the statute, &c.

The defendants took issue upon this replication, and also demurred to it.

At the trial, at Merrittsville, before McLean, J., evidence was given on the part of the plaintiff, which proved that when Robins went to Upper's farm to levy for the taxes, Upper pointed out to him property of his upon the place more than sufficient to cover four times the sum which he was directed to make, and told him that he might take enough of it away to satisfy the taxes, or if he would leave it till the sale, he would give him security for its being forthcoming for the sale: that Robins saw in the stable a pair of horses, which he said he would seize, and although Upper

told him they were not his property, but belonged to the plaintiff, his son-in-law, who lived in the same house with Upper but was not then present, Robins insisted upon taking them: that Upper, who was then putting them in a waggon, intending to use them, refused to let him take them and drove away with them, though Robins expressly declared that he seized them for the taxes which he was directed to levy. It was not sworn that he touched them. Three days after the bailiff came to the premises again, and took the horses out of the stable, no one being present, and the plaintiff replevied.

This evidence was uncontradicted, and no attempt was made to prove that the horses which Robins took away, and which the plaintiff afterwards replevied, were not in fact the property of the plaintiff

The conduct of Robins, unexplained as it was, seemed most unreasonable, for the property of Upper which he pointed out to Robins as his, consisted of horses, a valuable bull, a waggon and a mowing machine, all articles saleable, and easy to be removed.

There was no evidence that the defendant Page, who issued the warrant as collector, interfered in any way in the execution of it, or that he had any knowledge of what the bailiff did or intended to do in time to give him any direction.

It was contended, on the part of Page, that there was nothing to connect him with the wrongful act complained of, and nothing to show that Robins was authorised to seize any goods but those of Upper, or such as he should find in his possession.

It was admitted that Page was duly appointed collector for the year 1858: that Upper had been assessed in that year for £14 4s.: that Page issued his warrant to Robins, directing him to levy the tax from the goods and chattels of Joseph Upper, or from any goods and chattels in his possession, as directed by the statute 16 Vic.. ch. 182, sec. 42.

The replication was allowed to be amended at the trial by inserting an allegation that the horses were not in Upper's possession.

The jury found a verdict for the plaintiff. The learned judge reserved leave to defendant Page to move to have a verdict entered for him, in case the court should determine that he was not liable on the evidence.

R. A. Harrison moved for a new trial on the law and evidence, and for misdirection, contending that under the statute 16 Vic., ch. 182, a collector is authorised after demand to distrain *any* goods in the possession of the party liable for the taxes, and that no claim of property or lien, nor any privilege of the owner, can avail against that authority: and further that Page, the collector, was in no manner liable for the plaintiff's horses being seized, even if that act were wrongful, but only the bailiff. He cited *Clark* v, *Orr*, 11 U. C. Q. B. 486.

Ball shewed cause.

ROBINSON, C. J.—First, was there any wrong done here in seizing and selling the property that belonged, not to Upper, by whom the taxes were due, but to Fraser, who was living in Upper's house on the land in respect of which the taxes were charged, and who, it was sworn, attended to his horses himself in a part of the stable reserved for his exclusive use?

As a general principle, and independently of our Assessment Act, 16 Vic., ch. 182, I find no authority for holding that the goods of a stranger may be siezed on a distress for a land tax due by another, though the stranger's goods may be upon the land assessed. The British statute 43 Geo. III., ch. 99, sec. 33, does not appear to authorise it in England, and from what is said in Burns' Justice, and in Williams' Justice in this respect, and from the form of warrant given to the collector, I infer that the goods of the defaulter only are treated as being liable. In an elaborate work on Tax Titles by Blackwell, an American author, pages 184 to 213, there is nothing to lead to the supposition that the goods of a stranger are there authorised to be seized for taxes, unless perhaps in case of goods found upon unoccupied land, for which no person has been assessed by name. I mention this as only affording ground for argument that may assist us in coming to a conclusion upon what was probably intended by our legislature when they passed the statute 16 Vic., Ch. 182. If that statute is in itself clear upon the point raised in this case, it must of course govern us, whether it be or be not in that respect in accordance with what is directed or permitted in other countries. As a general rule, the authority to distrain on the goods of a stranger seems, I think, to be confined to cases of distress for rent, and is a privilage given to landlords. It has been held not to extend even to cases of distress for a rent charge, though that seems doubtful.

It has been determined that the goods of a stranger are not liable to distress for an amerciament: that is, goods of a stranger upon the premises of the person amerced.

Then what is the provision of our statute upon the subject? It is to be found in the 42nd section of the act 16 Vic,, ch. 182, which provides that when the taxes are not paid in fourteen days after they have been demanded, "the collector shall levy the same, with costs, by distress and sale of the goods and chattels of the party who ought to pay the same, or of any goods and chattels in his possession, wherever the same may be found within the township, village, town, or city, in which he is the collector; and at any time after one month from the date of the delivery of the roll to him, the collector may make distress of any goods and chattels which he may find upon any of the land of non-residents, on which the taxes inserted against the same on his roll have not been paid; and no claim of property, lien or privelege thereupon or thereto, shall be available to prevent the sale, or the payment of the taxes and costs out of the proceeds thereof."

This clause is not so framed as to exclude all room for doubt upon the question we are considering, but I think the construction to be given to it is that the goods in possession of the party taxed, whether they are found on or off of the land rated, are liable to be seized, provided they are within the local jurisdiction of the collector.

The reason of the distinction made in the case of the land of non-residents is obvious, for in respect to them I apprehend no one is rated by name in the collector's roll, but the land itself is assessed, unless the absent owner has desired to be assessed by name. The collector therefore in such cases does not know from the roll who is the party that ought to pay the tax, and cannot tell whether any goods he finds on the land are the goods of such party or not. He is consequently authorised to take any goods he may find upon the lands of non-residents.

And further, I think that the last few lines in the clause, which provide that no claim of property, lien, &c., shall prevent the sale, &c., is applicable to all the cases of seizure of goods authorised by the clause, and is not to be confined to the case of goods seized on the lands of non-residents.

Then giving the clause this effect, we are to consider whether the horses seized in this case were in the possession of Upper? They were kept in his stable upon the land assessed, and he certainly acted as if he were at liberty to use them, as the evidence shews, although it appears that Fraser, their owner, was living in the same house with Upper. I have had a good deal of doubt upon the point, but that is the conclusion I have come to,

This being so, the plaintiff had a legal right to seize, and could not be a trespasser in taking the horses, though he might or might not be liable to an action of another kind for seizing the plaintiff's horses, when there was abundance of property of Upper's own out of which the money could have been levied.

My opinion is that the Assessment Act 16 Vic., ch. 182 sec. 42, clearly authorises a levy under the warrant upon any goods or chattels in possession of the party who ought to have paid the taxes; that is upon any goods or chattels in possession of Upper.

That indeed is not denied, but the question upon the evidence is whether the horses were distrained while in Upper's possession.

I think they were. They were taken on his premises while no other person was in possession of them, the owner not being at home. The bailiff, when he went there the first time, found the horses in Upper's stable and Upper with them. He acquainted Upper with the fact that he had come to distrain for taxes, and though Upper pointed out property of his own to the bailiff which he might seize, and told him that those horses were not his, but belonged to Fraser, the bailiff, notwithstanding that, distinctly announced his resolution to distrain upon them. It cannot be said that Upper was not in possession of the horses, for he was putting the harness upon them at the time, and persisted in doing so though forbidden; and in presence of the bailiff, and in defiance of him, he drove them away so as the bailiff should not take them. What was said and done upon that occasion I think a-

mounted to a distress, though it was not proved that the bailiff actually took hold of the horses or touched them. When the bailiff distinctly announced that he seized the horses then in view, and Upper forbade him to take them, it was not necessary for the bailiff to bring on a breach of the peace.

Not being able to take the horses away, which he had sufficiently distrained upon, as I think, the bailiff retired and went to a magistrate, and complained that Upper had rescued the horses after he had distrained upon them, but he did not succeed in obtaining a warrant from the view the justice took of the case. This accounts for the delay of two or three days, at the end of which time the bailiff went and got the horses. There is nothing in his conduct that could be construed into an abandonment of the seizure made on the first occasion, if what passed then amounted to a distress, as I think it did. If a person had come with a *fi. fa.* in the interval, and seized the goods, he would have had colour for insisting that the distress of the horses was abandoned by the bailiff going away and leaving no one in possession, but it is very different when the question of abandonment is discussed between the owner of the goods and the officer. The distinction is laid down in *Swann* v. *Earl of Falmouth*, (8 B. & C. 459). It is of no consequence whether we look upon what was done by the bailiff on the first occasion or on the second as the act of distraining, further than that on the first day the horses were at the very time undeniably in the possession of Upper, who was harnessing them and using them at the very moment when the bailiff told him that he seized them for the taxes.

Then if the bailiff had authority to distrain these horses and did distrain them, the plaintiff must fail in this action, which is founded on an allegation of an unlawful taking and detention, and not merely for reckless or negligent conduct in the manner of making the distress. I find no precedent or authority for an action for distraining the goods of a stranger *without necessity*, upon the allegation of there being goods enough of the defendant in the warrant out of which the money could have been made, and if an action lies for such an injury the declaration should be framed to suit the complaint, as it should have been if what the plaintiff complained of in the case, was the taking the two horses when one would have been sufficient.

As I think the plaintiff's action failed against both the defendants, it is immaterial to consider the question whether, when a bailiff in executing a warrant from a collector to distrain for taxes, seizes goods which do not belong to the party assessed, and which are not even in his possession, it can be held that the collector, who merely issued the warrant in proper legal form, can be held responsible for the trespass, though he neither directed the bailiff to do what he did nor was in any manner privy to it.

That is an interesting and important general question, on which at present I give no opinion. Undoubtedly where a bailiff under a warrant from a sheriff under a *fi. fa.* against the goods of A., seizes the goods of B., the sheriff is liable. There the writ is directed to the sheriff, whose proper and immediate duty it is to execute the process or see that it is executed. He is paid for doing it, and whoever is employed to execute the writ which he is himself commanded to execute, and is paid for executing, is looked upon as acting in his place, and as one person with the sheriff.

The collector, on the other hand, though he is authorised to demand the taxes and levy them by distress when they are not paid, stands perhaps in a somewhat different position. He is not commanded by any process to make the levy himself, and can scarcely be expected to do so. He is not therefore delegating to another the particular duty of seizing and selling which by any process of law has been imposed upon himself, and he has no claim to fees for what the bailiff does, any more than a magistrate has who grants a warant in a criminal matter. Neither is the levy made for his benefit, as in the case of a distress which a landlord authorises a bailiff to make for rent. He cannot be truly said to be ratifying and adopting an act done for his interest.

At present I do not say that I am clear he is not liable for what the bailiff does, though contrary to the command contained in his warrant, but it will require to be carefully considered whether he is liable or not. I have not found any decided case upon the point, though I should infer that the Court of Common Pleas in England, which gave judgment in the case of *Hall* v. *Smith* (2 Bing. 160, 161), would in a case like the present have held the collector not liable. In that case the Chief Justice says, "The maxim of *respondeat superior* is bottomed on this principle, that he who expects to derive an advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it. This maxim was first applied to *public officers* by the statute of Westminster 2, ch. 11, from the words of which statute it is taken.—'*Si custos gaolæ non habeat per quodjusticietur vel unde solvat, respondeat superior suus qui custodiam hujusmodi gaolæ sibi commisit.*' The terms of the statute of Westminster the second, embrace only those who delegate the keeping of gaols to deputies, and were intended only, as Lord Coke tells us, to apply 'to those who having the custody of gaols of freehold or inheritance, commit the same to another that is not sufficient.' The principle of the statute has, however, since been extended to sheriffs, who are responsible for their under-sheriff and bailiffs, but has not been applied to any other public officer. Although the office of sheriffs be now a burdensome one, yet they are entitled to poundage and other fees for acts done by their officers, which in old times might be a just equivalent for their responsibility."

This language is very applicable to the position of Page, in the the case now before us.

If the collectors of taxes appointed by the municipalities to serve for the year are to be regarded as "public officers," as I think they must be, and if the principle of "*respondeat superior*" is correctly laid down in this judgment, it would seem to decide that the defendant Page is not liable in the present case under the circumstances, though the case of *Hall* v. *Smith*, in which the judgment was given, is one very distinguishable from the present in its facts.

The collectors of taxes here are officers annually appointed to collect the taxes generally, which in far the greater number of instances it may be expected they will be able to do by merely calling upon those against whom they are charged. In those cases in which they may have to resort to compulsory measures, although the Legislature has enabled them to levy in person, and without the authority of any process, yet I do not imagine that it was contemplated that the collectors would themselves, as a matter of course, act the part of bailiffs and auctioneers in seizing and selling, for these are duties with which they can hardly be supposed to be familiar, being persons chosen from among the inhabitants to serve for the year.

Of course the collector would be liable for anything being done which he had authorised the bailiff to do, if that were alleged; but whether he is liable, like the sheriff, for anything done by the bailiff without the authority of or contrary to the direction given in the warrant, will be in this case the question, if it is eventually found that the horses distrained upon were neither the property of Upper nor at the time in his possession. It is a question of interest to the public. On the one hand, when a constable, having a warrant from a collector to seize goods of A, seizes the goods of B, it would be very desirable for the party whose goods are illegally taken by the mistake or wilful conduct of the bailiff, to have the collector to look to for indemnity, and not merely the bailiff only, who may be a man of no property. Yet where, as in this case, the person wronged, hearing of the matter in time, pursues his remedy by replevin, he is sure of getting back the property if he succeeds in the action, and the advantage he would have in being able to recover against the collector concerns only the costs of the suit.

On the other hand, if, when the authority given to the bailiff by the warrant is exceeded, the action should be found to be against the bailiff alone, and not against the collector, the party whose goods have been illegally taken would be in no other situation after all than parties clearly are in all the cases where a constable exceeds his authority in levying fines or penalties under a warrant from a justice of the peace.

The question is, whether a collector of taxes giving a warrant to a constable comes more clearly under that class of cases, or under that where a writ is given by a sheriff.

The point is a nice one; for though undoubtedly in such cases the collector is not, like the sheriff, employing a constable to do a duty which he himself has been commanded by writ to do, yet he employs him to do what he is in general terms authorised and directed by act of Parliament to do, whenever it may become

necessary for collecting any portion of the taxes. It may therefore be reasonably argued that there is no substantial difference between the two cases, though there is a substantial difference in another respect. If I am right in assuming that while the sheriff is the officer legally entitled to the poundage and other fees for executing writs, remunerating his bailiff as may be agreed between them, the collector does not interfere with the fees given by law to the bailiff whom he employs to distrain.

I have met with no decision in a case of the same kind. If Page, the collector, had directed Fraser's horse to be seized, or had in any manner authorised it, or if, after the difficulty arose, he had been informed of the facts, and had interfered to prevent the horses being given up, he would then stand in the same situation as the bailiff, otherwise, as I have already said, I doubt whether he is liable; and as in my view of the case upon the evidence I think neither the one nor the other was liable, for that the plea of justification was proved, it is not necessary at present to determine the point.

In my opinion there should be a new trial, and without costs, as I think nothing illegal was done, though the bailiff acted unreasonably and vexatiously, which might give rise to an action against him of another kind.

McLean, J.—This is an action of replevin tried before me at the last spring assizes at Welland, and verdict rendered for the plaintiff.

The verdict was certainly in accordance with my views at the time, and I am still inclined to think it was correct, though in that respect my learned brothers take a different view of it. Page was collector of taxes for the Township of Thorold, and Robins acted as his bailiff under a warrant to distrain the goods of Joseph Upper on the property of Upper, or any goods in his possession, for the purpose of levying the amount of taxes due by Upper. When the bailiff expressed his intention to seize the horses which were replevied by the plaintiff as his property, and which had been in his possession, though kept in a stable on Upper's farm, Upper proved that he had offered abundance of property which belonged to him, and urged the bailiff to seize it, at the same time informing him that the horses belonged to the plaintiff, and that, though he was permitted to use them occasionally, they were in fact in the plaintiff's possession and subject to his control, he being at the time living in a separate part of the house of his father-in-law, Upper, and occupying a separate stable for the use of his horses.

There was no doubt of the fact that the horses belonged to the plaintiff at the time they were taken away as a distress for taxes by Robins, and the only question for the jury was, whether they were in possession of the plaintiff or of Upper. If in the possession of Upper, then they were liable to be seized under the 42nd section of 16 Vic., ch. 182, and the verdict should be for the defendants; but if in the exclusive possession of the plaintiff and subject to his entire control, then the verdict should be for the plaintiff. There is no objection to my charge at the trial, and upon the whole case as left to the jury they rendered a verdict for the plaintiff.

An objection is urged that the defendant Page was not liable, the bailiff having acted upon his own judgment, without any special directions in seizing and taking away the horses under the warrant, which only authorised him to take Upper's goods, or goods in *his* possession. Leave was reserved to move the court to have a verdict entered for Page, in case the court should consider him entitled to it.

It appears to me that Page, who by his warrant set Robins in motion, is responsible, and cannot relieve himself from the responsibility of what was done by Robins as his officer, precisely to the same extent as a sheriff is responsible for a trespass committed by his bailiff in executing a writ. The collector's roll was in the hands of Page, the same as a writ in the sheriff's hands. A collector or sheriff may act upon any authority in their hands to levy money, but if they choose to employ an officer under them, they each have by law the power of doing so, and if that officer, instead seizing the goods of the proper person, seize the goods of a stranger which are not liable, I cannot see any distinction in the two cases which should leave the sheriff liable, and at the same relieve a collector from such liability for the act of his officer. In putting power into the hands of a bailiff any collector must, I think, be considered responsible for the exercise of it.

He stands in a different situation from a justice of the peace, and is not entitled to the same measure of protection. If a warrant be issued by a justice of the peace, and a wrong person be arrested by a constable, or if a warrant be issued to levy a fine from the goods of one person, and the goods of another be seized by the constable, the constable alone would be responsible. The justice of the peace would not in such case be putting power into the hands of a stranger to be executed, but into the hands of an officer whose *duty* would require him to execute it, and for whose acts in executing a legal warrant the justice of the peace would not consider himself, and could not be held, responsible or answerable in damages. I think, therefore, that Page is properly joined and liable in this action, and as I concur in the view taken by the jury as to the possession of the horses by the plaintiff at the time they were seiz[illegible] think the verdict for the plaintiff should not be disturbed.

Burns, J.—The conclusion I have arrived at is, that the plaintiff had no legal right to replevy the horses from the hands of the defendant Robins without first tendering the amount of taxes for which the bailiff had seized the horses. The question turns upon the point, whether Upper had these horses in his possession. The 42nd section of 16 Vic., ch. 182, enacts that not only shall the goods and chattels of the person owing the taxes be liable to be seized, but any goods or chattels in his possession wherever the same may be found within the township, village, town or city in which the person taking them is the collector. It is evident the legislature intended the taxes should be paid in some way, and we must suppose they thought it better to make the goods in possession of a person liable, without doubt, for the taxes, than that the collector should be at the risk and expense of contesting title with every one who had the possession of goods who might set up title in some one else. Of course there may be cases where the rule will work hardly upon individuals, but we must take it the legislature thought it better for the interest of the public that the enquiry whether one to whom another lends his goods, or otherwise allows to have the possession, has or no not paid his taxes, should be cast upon the person so lending or allowing him to have possession, than that the trouble, inconvenience and expense should be cast upon the collector, or be a charge upon the collector, or be a charge upon the funds collected.

The question in this case is, whether the evidence established that Upper had the possession. The plaintiff is his son-in-law and lived with him. No doubt he owned the horses, but they were kept in Upper's stable, and Upper used them for ploughing occasionally upon the farm, and in other ways when he wanted them. At the very time when the bailiff went to seize, though Upper told him the horses were the plaintiff's, yet he then used them himself as if they were his own, and drove them away. If the bailiff had followed him, and found him driving the horses along the highway, it would have been difficult, I think, to say they were not then in his possession. If so, then why are they not equally in his possession when in his stable, and more particularly so when Upper told the bailiff he should not have them. If they were not in his possession, how could he say to the bailiff, you shall not take them from me? He could not have taken from him what he had not; and upon the whole evidence it appears to me plainly, that although the horses were the plaintiff's property, yet they were as much in possession of Upper's property as they were in that of the plaintiff.

It is true that the bailiff did not lay his hands upon the horses, but I am of opinion that what the bailiff did on the occasion when he went to Upper's house and the barn, did in truth amounts to a seizure at that time. Upper would not allow the bailiff to take away the horses, but drove them away himself, and the bailiff forbid him to do so. It is not necessary that an officer should in fact lay his hand upon the property seized in order to constitute a seizure. In this case what was proved, I think, amounted to a seizure.

The property being then seized in fact, and, as I view the evidence, being in Upper's possession, who was the person who owed the taxes, the plaintiff could not legally replevy without tendering the amount of the taxes.

Rule absolute.—McLean, J., dissenting.

CHAMBERS.

THE QUEEN ON THE RELATION OF WM. WALKER V. WM. HALL.

Election—Misconduct of Returning Officer—Costs.

The Courts will presume that a Returning Officer acts properly and honestly until the contrary is shown, and where it is intended to charge that officer with unfairness and impartiality the case should be plainly stated and clearly made out.

In this case it was held that the charges made, which were general, were met as broadly as they were made.

The Master on taxing costs to the successful party on a *quo warranto* summons should consider whether the successful party produced an unnecessary number of affidavits, or affidavits unnecessarily diffuse, and act accordingly.

(Chambers, May 16, 1860.)

This was an application to set aside the election of Defendant as Councillor for Ward No 5 in the Township of Brant (election held on 10th and 11th February, 1860), on the following grounds:

1. That Relator's voters were not allowed by the Returning Officer, George D. Lamont, or the Constables in his employ, freedom of voting.

2. That votes were recorded for the Defendant by Returning Officer, although polled for Relator.

3. That the Returning Officer conducted himself about the election in an arbitrary and illegal manner, and with the full determination of returning none other than the said Defendant.

4. That several of Relator's voters, seeing the partiality of the Returning Officer and his determination to have Defendant returned, deemed it useless to vote for Relator at the risk of exposing themselves to insult from said Returning Officer.

5. That before the close of the election, the friends and supporters of Relator protested against the legality of the said proceedings, and desisted voting.

6. That there were many votes in the ward, in consequence of the premises, unpolled at the said election.

Relator stated in his affidavit, that from motives of spite, malice, or some other motives to him unknown, the Returning Officer unlawfully exerted himself to defeat his election by securing the election of his opponent, and that the Constables under his control acted in like manner: That persons supposed to be friendly to him, though having undoubted votes, were insultingly questioned by the Returning Officer: That others, whom it was well known were his supporters, voted for him, but their votes against their will were recorded by the Returning Officer in favor of Defendant: That votes were refused, if friendly to him, on the most whimsical and groundless reasons, such as the temporary absence of a householder from his dwelling house on any night or nights during the month next preceding the election, although the family of the said householder always continued in his said dwelling during his temporary absence: That every thing was done by the Returning Officer and his employees to intimidate, insult and otherwise baffle persons who either voted or intended to vote for him or were supposed to be friendly to him: That 33 votes were polled for him, and 39 for defendant: That on the second day of the election, before the close of the poll, his supporters finding it almost useless to bear up against the many obstructions thrown in their way by the said Returning Officer and employees, after having entered a solemn protest against the illegality of his and their conduct, desisted further exertions on his behalf, under the full conviction that the election could not stand, but would be declared illegal by the courts: That at the close of the election he had good reason to believe there were as many as nine votes unpolled, the whole of whom were his supporters.

Nicholas Willoughby swore that he saw David Long, a duly qualified voter, take the oath of qualification: That the Returning Officer asked him if he understood the nature of an oath, when he replied he did; and the Returning Officer refused to record his vote, as he came up as he believes to vote for Relator.

David Long swore that he is a duly qualified voter in said ward and came to record his vote: That when he took the oath of qualification, the Returning Officer turned away his head and refused to record his vote: That he told the Returning Officer, if he was going to vote for defendant his vote would not be refused: That it was his belief the Returning Officer kept back all the votes he could for Relator, as did one of the Constables, Geo. Simpson.

Thomas Armstrong swore that when asked who he voted for, he said "Bill," meaning Relator: That his vote, as he believes, was recorded for Defendant: That after hearing of this and before he left the polling booth he declared that Relator was the man he intended to vote for, and that he never mentioned Defendant's name on the occasion, except to say that he would *not* vote for him (Hall): That he offered to make affidavit before he left the polling place that he had voted for Relator: That the Returning Officer positively refused to accept such affidavit or to enter his vote for Relator.

Thomas Riley swore that when he came up to record his vote, the Returning Officer refused to take his vote until he would take the oath of qualification, which he considered was done through spite or some other improper motive, as he well knew his vote was good: That he told him he never had taken an oath and did not think it was necessary to do so in that case, and he was thereby prevented from voting for Relator; and he told the Returning Officer, when he asked him who he was going to vote for, that he would vote for Relator, and it was then he (the Returning Officer) demanded he should be sworn.

William Burgess swore that in his opinion the conduct of the Returning Officer was such as to prevent Relator's votes being polled, and if he had acted impartially Relator would have been in the majority: That Thomas Armstrong voted for Relator, and his vote was recorded for Defendant, which Armstrong disclaimed on the spot, and offered to make affidavit that he voted for Walker: That before the close of the election, Relator's friends, including himself (Deponent), seeing there was no fair play, protested against the proceedings of the Returning Officer, and refused to take any further part in the election.

Thomas Cosgrove swore that the conduct of the Returning Officer was so partial that he, with others, protested in consequence of the Returning Officer's misconduct and that of the Constables: That he is a voter in the ward, and is aware that there were several voters of Relator who could not get voting at the said election.

Thomas Nelson swore that he observed a designed and determined partiality on the part of the Returning Officer in favor of Defendant, in preference to Relator.

Thomas Couch swore that he saw several voters similarly situated in regard to residence and qualification refused by the Returning Officer when they were supposed to be Relator's friends, but admitted when supposed to be Defendant's friends: That had the Returning Officer and his Constables acted fairly and impartially, Relator would have been elected and not Hall.

George Cosgrove swore that when the Returning Officer put the question, who do you vote for, to a voter present and about to vote, added the word "Hall;" this was in the case of Thomas Armstrong: That he told Relator he would vote for him if it came to a tie, but in consequence of the majority and the absence of votes which were not polled, he did not vote.

There were in all ten affidavits filed on behalf of the Relator.

For Defendant the following affidavits were filed. The Returning Officer was also made a party.

George D. Lamot, the Returning Officer, swore that the election was conducted by him according to law, the utmost freedom of voting being given to voters and the strictest impartiality shown to both the candidates, as well as their supporters: That as Returning Officer he took no part to secure the election of either of the candidates in preference to the other: That Thomas Wilson voted for Relator, and was afterwards sworn in and acted as special constable during part of the election, and shewed a partial feeling towards Relator: That two other county constables were present and acted as constables in the most impartial manner: That no votes polled for Relator were put down for Defendant: That the friends and supporters of Relator, as well as Relator himself, after the protest on the second day, did solicit support for Relator, and polled one vote (Archibald Muir) for him, and presented in two instances other parties to vote for him, urging them to take the oath, and others of Relator's followers urged them to take the oath, but they, Thomas Riley and William Muir, refused to take the oath; Thomas Wilson and William Burges, supporters of Relator, urged them to take the oath after the protest was given: That he offered no insulting language to any one

at the election, nor did he act in any unbecoming manner: That relator was guil of improper conduct and feuds and violence: That Thomas Armstrong answered, when asked for whom he voted, "Hall," and then went away, and after Robert Armstrong (his brother) had voted for Defendant, came back with a number of Relator's supporters and said he had voted for Relator, and wanted his vote changed, which the Returning Officer refused: That David Long offered to vote, but his name not appearing on the copy of the assessment roll as a householder or freeholder, he refused to allow him to vote; and Long did not say for whom he intended to vote: That there were 112 names on the copy of the assessment roll furnished him by the Clerk for the Ward, of whom 22 were not mentioned as householders or freeholders, 1 was a minor, 13 were absent from the township during the election, 2 refused to take the necessary oath as desired by Hall, and 7 never presented themselves; and 72 voted, 39 for Hall and 33 for Relator; 5 persons voted for Walker who had no votes, of whom 3 were not on the roll, and the other two were neither freeholders nor householders: That Hall was duly elected: That as long as Walker was in the majority peace and quietness prevailed, but when Hall obtained the majority, Relator and his supporters caused much trouble and were most quarrelsome; whilst with Hall and his supporters there was no trouble.

William Hall, the defendant, by his affidavit, swore that the election was conducted according to law, the utmost fairness of voting being given: That before the commencement of the election he told the Returning Officer, in the presence of Relator, he wished the election to be conducted strictly according to law, as he thought Relator would take advantage of any defect: That he received no favor or partiality from the Returning Officer at any stage of the proceedings: That three Germans, not being able to speak the English language fluently, voted for Relator, and when they discovered their mistake wished to change their votes to Defendant, but the Returning Officer refused to permit it: That Thomas Armstrong voted for him (Hall), and when Relator became aware of it he wanted the Returning Officer to change his vote, remarking that he would give Hall any that had been given to Relator in mistake, and though he would have been gainer by the change he advised the Returning Officer not to consent to the change: That as long as Relator was in the majority the election proceeded quietly, but when Defendant began to go ahead Relator and his party became very quarrelsome and troublesome.

Joseph J. Lamont, the Poll Clerk, swore that Returning Officer asked Thomas Armstrong "what is your name?" "who do you vote for?" to which he answered to the first question "Thomas Armstrong," and to the second "William Hall:" That Returning Officer did not prompt any vote at the election: That after Relator handed in the protest there was a vote recorded for him, and he continued to solicit votes to the close.

George B. Lamont, Acting Constable during the election, swore that one David Long presented himself as a voter, but refused to take the oath, and left the poll: That Thomas Armstrong voted for William Hall: That Returning Officer instructed him to call forward voters.

John Malcolm swore that David Long came to the poll to vote as he thought; he refused to take the oath, saying he did not reside on his own place, but was hired with one Nelson.

William Leggitt swore that he saw Walker and others trying to induce one David Long to take the oath.

Benjamin Leggitt swore that David Long was urged by a number of persons to take the oath, but he did not see him do so; when he (Long) first came to the poll he appeared to decline taking the oath, and turned away from the poll and commenced talking with some of Walker's supporters.

James Leggett swore that one David Long came forward to vote, but went off without doing so. Relator's party strongly urged Long to take the oath, the not taking of which appeared to be the reason why he had not voted when he first came to the poll.

George E. Simpson swore that he acted as constable during the election: That Thomas Armstrong voted for William Hall: That David Long, William Muir and Thomas Riley, presented themselves to vote at the said election, but refused to take the necessary oath: That the Returning Officer threw no obstacles in the way of qualified voters voting as they pleased, but throughout the election acted in the most impartial manner: That Relator, on the second day, after protesting against the election, brought forward three persons to vote for him; one of them did so, the two others refused to take the necessary oath, whereupon Relator used abusive language to the Returning Officer to coerce him into taking the two votes: That George Cosgrove was not in the room at the time Thomas Armstrong voted: That the Returning Officer did not prompt the said Thomas Armstrong, when he voted for Wm. Hall.

Henry McNally swore that he was at the poll during both days' polling, and heard the Returning Officer call for voters to come forward. He saw no person refused the privilege of voting who was entitled to vote. The Returning Officer shewed during his stay at the poll the greatest fairness and the strictest impartiality: That when David Long came forward as he supposed to vote, William Hall, one of the candidates, requested the Returning Officer to administer the oath to him; Long refused to take it and turned away from the poll, after which he heard several parties urge him to take it.

David Keeth swore that he saw David Long come forward to the poll to vote, but refused to take the oath. The Returning Officer asked him if he had been a householder for a month preceding the election. He answered, he had not. After which he declined taking the oath.

Robert Carmon swore that he saw David Long refuse to take the oath, and consequently he did not vote during his stay at the poll.

Benjamin Carmon swore that he saw David Long refuse to take the oath, leave the poll, and go and converse with Relator; and heard Returning Officer call for voters, and did not notice any partiality.

James Brocklebank swore that he was at the poll the greater part of both days' polling, and saw Relator and his father, on the second day, browbeating the Returning Officer: That he saw no obstacle thrown in any voter's way to hinder him from recording his vote for either candidate; the Returning Officer shewed the strictest impartiality and fairness towards the voters of both candidates during his stay at the place of polling: That since the last election he met Thomas Armstrong, who told him he had voted for Hall at the election, but said he intended to vote for Walker, but did not; he admitted having been, at the time he voted, under the influence of whiskey.

James Benson, constable, swore that Returning Officer shewed the strictest impartiality: That Relator and his father, on the second day of the election, acted in the most uproarious and disorderly manner, so much so that the Returning Officer ordered him (the Constable) to preserve the peace; he resided in Canada over 17 years, and has been three times elected councillor for Brant, and never saw a candidate and his supporters conduct themselves in a manner so disorderly as the said Walker and his friends did.

John Leggett swore that he was at the polling place nearly the whole of the first day and so long of the second day as the poll was kept open: That for many years he was a Returning Officer in the Township of South Crosby: That Lamont, the Returning Officer, conducted the election in the most impartial and fair manner: That he paid great attention to his conduct during both days' polling, more so than he would have done had he not been a returning officer himself for so many years.

The affidavits of three persons who voted for Walker were put in, stating that they were not obstructed and that everything was fair.

Other three affidavits were filed to shew that four persons, whose votes were unpolled, would have voted for Defendant, there being as stated by the Returning Officer only nine unpolled votes in the ward.

There were seven more affidavits to shew that, in the opinion of the Deponents, the Returning Officer acted in a most fair and impartial manner.

There were in all twenty-nine affidavits filed on behalf of the defendant.

R. A. Harrison for Relator.

C. J. Carroll for Defendant and the Returning Officer.

RICHARDS, J.—I have read all the affidavits, considered them carefully, and have arrived at the following conclusions.

1. As to the first ground stated in the Relator's statement. It is not pretended that the Relator's supporters were prevented by physical force from coming forward to vote for him, or if it is so pretended there is no evidence brought forward to sustain that position. No voter is named who was hindered in going forward to vote; so that if the voters themselves were unwilling to come forward to offer their votes in consequence of the conduct of the Returning Officer, that would more properly come under the ground of complaint. As to the first ground, then, I think the Relator fails to make out a case.

2. That votes were recorded for Defendant, though polled for Relator.

This charge relates only to the case of Thomas Armstrong. He says, when asked who he voted for, he said "Bill," meaning Relator: that after hearing his vote had been recorded for Defendant, and before he left the polling booth, he declared Relator was the man he intended to vote for, and that he never mentioned Defendant's name on the occasion, except to say he would not vote for him: that he offered to make an affidavit before he left the polling place that he had voted for Relator; but the Returning Officer refused to accept such affidavit, and would not enter his vote for Relator. William Burgess also states that Thomas Armstrong voted for Relator, but his vote was entered for Defendant, which Armstrong disclaimed on the spot, and offered to make affidavit that he voted for Walker; and George Cosgrove states that when the Returning Officer put the question, "who do you vote for," to Thomas Armstrong, he (the Returning Officer) added the name "Hall."

In relation to this vote, the Returning Officer states that when Thomas Armstrong was asked "for whom do you vote," he answered "Hall," and then went away; and after Robert Armstrong, his brother, had voted for Defendant, came back with a number of Relator's supporters, and said he had voted for Relator and wanted his vote changed, which he (the Returning Officer) refused to do. The Defendant (Hall) states that Thomas Armstrong voted for him; that when Relator became aware of it he wanted the Returning Officer to change his vote, and offered to allow any votes that had been recorded for Relator by mistake to be given to Defendant. That three Germans voted for Relator, who intended voting for Defendant, but he (Defendant) advised the Returning Officer not to consent to any change after the votes were recorded. Joseph J. Lamont, the Poll Clerk, states that Thomas Armstrong, on being asked "who do you vote for," answered "William Hall," and that the Returning Officer did not prompt any voter during the time of the election. George B. Lamont, Acting Constable, states that Thomas Armstrong voted for William Hall. George Simpson, who acted as constable, states that Thomas Armstrong voted for William Hall: that George Cosgrove was not in the room when Armstrong voted, and the Returning Officer did not prompt him when he voted for Hall. James Brocklebank states that, since the last election, Thomas Armstrong told him he had voted for Hall, but intended to vote for Walker and did not, and admitted having been at the time he voted under the influence of whiskey.

Mr. Armstrong himself states that, when asked for whom he voted, he replied "Bill," meaning Relator. Now, if he used this as meaning William, it would apply equally well to Relator and Defendant, for they are both called William. If it be true that Armstrong was under the influence of liquor when he voted, that might account for the confusion. At all events, the Returning Officer, the Poll Clerk, the Defendant, and the Constables, understood he at first voted for Defendant. I am not therefore prepared to support the Relator's case on this ground.

3. The third ground is too vague, the charge too general, and the affidavits filed to support and repel the charge are equally vague and general. It is met quite conclusively as a general charge.

4. There is no affidavit from any elector that he omitted to vote for Relator on the ground suggested, nor is any elector named who declined voting for Relator for the cause suggested.

5. It is true that Relator protested, but it seems equally beyond all doubt that he solicited parties to vote for him after the protest, and that one voter voted for him thereafter at his request.

6. The Relator's own affidavit mentions that there were nine votes remaining in the ward unpolled. The Returning Officer thinks there were only seven votes that did not come forward. Relator does not give the name of a single voter that would have supported him who did not come forward from any of the causes assigned; whilst Defendant endeavours to shew that four out of the seven or nine, as it may be, of unpolled votes, would have been cast for him. I do not think the facts stated in the affidavits would at all warrant setting aside the election on this ground.

The names of David Long and Thomas Riley are mentioned in the affidavits, and I will see what is said about them. First, as to David Long. He states in his affidavit that he is a duly qualified voter in the ward, and came to record his vote. That when he took the oath of qualification, the Returning Officer turned away his head and refused to record his vote; that he told the Returning Officer, if he was going to vote for Defendant his vote would not be refused. Nicholas Willoughby states that he saw David Long, a duly qualified voter, take the oath of qualification; that the Returning Officer asked him if he understood the nature of an oath. He replied, he did. The Returning Officer refused to record his vote. He came up as he believes to vote for Relator. The Returning Officer states that David Long offered to vote, but his name not appearing on the copy of the assessment roll furnished him, as a freeholder or householder, he refused to allow him to vote, and Long did not say for whom he intended to vote. George B. Lamont states that Long presented himself as a voter, but refused to take the oath, and left the poll. John Malcolm states that Long came to the poll to vote, as he thought. He refused to take the oath, saying he did not reside on his own place, but was hired with one Nelson. William Leggett states he saw Walker and others trying to induce David Long to take the oath. Benjamin Leggett states that Long was urged by a number of persons to take the oath, but he did not see him do so. When Long first came to the poll he appeared to decline taking the oath, and turned away from the poll and commenced talking with some of Walker's supporters. James Leggett says that Long came forward to vote, but went off without doing so. Relator's party strongly urged him to take the oath, the not taking of which appeared to be the reason why he had not voted when he first came to the poll. George Simpson states that David Long, Wm. Muir, and Thomas Riley, refused to take the necessary oaths. William McNally states that when David Long came forward to vote, as he supposed, William Hall (the Defendant) requested the Returning Officer to administer the oath to Long, which he refused to take, and turned away from the poll. David Keeth states that he saw Long come forward to vote, but he refused to take the oath. The Returning Officer asked him if he had been a householder for a month preceding the election, he answered he had not. After which he declined taking the oath. Robert Carmon saw Long refuse to take the oath. David Carmon saw David Long refuse to take the oath and leave the poll and go and converse with Relator.

The Returning Officer himself does not say that Long refused to take the oath, but mentions that he was not returned on the list as rated on the assessment roll as a freeholder or householder, which of course would be such an objection as would justify the rejection of his vote. One of the Deponents states that the Defendant required Long to take the oath of qualification. It would indeed be singular if the Returning Officer had administered the oath to him when his name is omitted from the list handed to him, if he considered that a fatal objection to his vote, and still more singular that after administering the oath to him he should refuse to take the vote.

It is not stated by Relator, as a ground of complaint against the Returning Officer, that after having administered the oath to Long he refused to allow him to vote, and in that way shewing partiality and calling for an explicit answer. It is sworn in the affidavits, (and there are many affidavits,) that Long refused to take the oath. It is possible he may have refused at one time, and afterwards did take it. There is nothing to

shew such to be the case, and if it was not so there is a plain denial by many witnesses of the fact of his taking the oath. The ground stated by the Returning Officer would be sufficient to reject this vote, and if it were allowed it would not effect the result.

As to Thomas Riley, he refused to take the oath, as he admits himself, but says the Returning Officer refused to record his vote unless he was sworn, as he believes out of spite or some other improper motive, as he well knew his vote was good. If this had been stated as a specific charge against the Returning Officer, as shewing him to have been partial and a partizan of Defendant, and that he had of his own mere motion, without being required so to do by the Defendant, insisted on the voter taking the oath to annoy and vex him and perhaps prevent his voting for Relator, when he knew he had a good vote, I might have required an explicit answer from the Returning Officer on this point. But the charge has not been so made; and in reference to the voters unpolled who have good votes, the Returning Officer states that two refused to take the necessary oath as required by Hall, which may include this voter. Now if the candidate required the Returning Officer to administer the oath to a voter, and he refused to take it, the refusal to record such a vote could never be properly urged as indicating partiality on the part of the Returning Officer. If the charge had been in express terms that the Returning Officer, without being required so to do by either of the candidates, or their agents, and with a view of favoring the return of Defendant, and for purposes of annoyance, had required a person (naming him) whom he knew to be a qualified voter to take the qualification oath, then he ought to answer explicitly. It would be the duty of the officer to refuse to record the vote if a candidate insisted on the voter taking the oath, and he declined doing so, and he might then well insist, even if he knew he had a good vote, on his taking the oath, before he would record the vote.

The Relator fails to make out a case to warrant me in coming to the conclusion that the election should be set aside. He fails to shew that the result of which he complains was caused by the conduct of the officer, and therefore it is only of importance to consider the other grounds as to the Returning Officer, so far as the costs are concerned.

The general rule is to assume that the officer acts properly and honestly until the contrary is shewn, and when it is intended to charge the officer with unfairness and partiality the case should be plainly stated and clearly made out. In this case the charges made are general, are met as broadly as they are made, and as to the specific grounds, considering all the affidavits filed, I think the Relator fails to make out his case.

In conclusion, I may say I have arrived at the following results. 1. That Relator fails to shew that any named duly qualified voter was induced to refrain from voting for him by the conduct of the Returning Officer or the Constables. 2. That even if it be admitted that the votes of Long, Armstrong and Riley, should have been recorded for Relator, he would still be in a minority. The votes at the close being for Relator 33, and for Defendant 39; deducting one vote from the latter and adding three to the former, the result would be 38 for Defendant and 36 for Relator, leaving the Relator in a minority of two; and so his case fails.

As to the costs, I think I cannot under the circumstances vary the general rule that the unsuccessful party must pay the costs, and therefore decide as to costs against Relator; but must not refrain from drawing the attention of the taxing officer to the great number of affidavits filed on behalf of the Defendant and the Returning Officer, and the extraordinary manner in which they are framed, the larger part of them being filled with a statement of the time and place of holding the election, the names of the Candidates and the Returning Officer.

It will be well for the Master to consider, in taxing the costs, whether it was necessary to have so many affidavits and so diffuse, and whether a great many of the Deponents could not have joined in one affidavit, particularly those who swear generally as to the fairness of the conduct of the Returning Officer.

Judgment for defendant with costs.

STEPHEN CLOSSON v. JORDAN POST ALEXANDER THOMPSON AND THOMAS ADAMS.

Administration Bond—Costs of assignment.

The costs of an application under sec. 82 of the Surrogate Courts Act (Con. Stat. U. C. p. 112), for an assignment of a probate bond in order to an action thereon at Common Law, cannot be taxed as costs in the action but should be recovered as damages consequent on default.

(Chambers, May 15, 1860.)

It is provided by sec. 82 of the Surrogate Courts Act (Con. Stat. U. C., p. 112) that the Court of Chancery may order all bonds taken in the Court of Probate on the grant of administration, and inforce on 1st September, 1858, to be assigned and that the same may be enforced in the name of the assignee under the authority of the Court of Chancery, in the same way as provided for in the case of assignment of bonds in the Surrogate Court.

As to the latter, it is by sec. 65 of the same Act (p. 108) provided that the judge of every Surrogate Court on application made or on a petition in a summary way, and on being satisfied that the condition of any such bond has been broken, may order the Registrar of the Court to assign the same, to some person to be named in such order, and that such person, his executors or administrators, shall thereupon be entitled to sue on the said bond in his own name, both at Law and in Equity, as if the same had been originally given to him instead of to the Judge of the Court, and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of the condition of the said bond.

Letters of administration were granted by the Court of Probate for Upper Canada as to the estate of Calvin Carnell, deceased, during the minority of his son, who was then a minor, to the defendant Jordan Post. The usual bond was given by defendant Post and the remaining defendants Thompson and Adams. It having afterwards been shewn by the plaintiff to the satisfaction of the Court of Chancery, that defendant Post had committed a breach of the condition of the bond, that Court ordered the bond to be assigned to the plaintiff.

Plaintiff then commenced an action upon the bond in the Court of Queen's Bench, and recovered a verdict for the penalty with damages assessed at £61.

At the taxation of costs, plaintiff included in his bill against the defendants, the costs of the application to the Court of Chancery for the assignment of the bond, and the master disallowed them.

R. A. Harrison, appealed against the master's decision.

W. H. Burns, contra.

DRAPER, C. J.—In my opinion, the costs of the application to the Court of Chancery, cannot be taxed as costs in this cause. I think they might have been recovered as damages consequent on the default of the defendant.

CHANCERY.

(Reported by THOMAS HODGINS, Esq., LL. B, Barrister-at-Law.)

JAMES CALDWELL v. HEZEKIAH J. HALL AND JOHN MAXWELL.

Mortgagor and Mortgagee—Dormant Equities Act 18 Vic., ch. 124.

Held, 1. That the Dormant Equities Act, 18 Vic., ch. 124, (Con. Stat. U. C., p. 58, ch. 12 secs. 59 & 60) does not apply to cases of an express trust. 2 That clearly it does not extend to cases of mortgage; these cases being amply provided for by the Chancery Act, (*Wragg v. Jarvis* in appeal, 7 Grant. 220,) commented upon.

(May 16, 1860.)

In 1855, Robert Caldwell, the father of the plaintiff, was the owner of Lot No. 104 in the town of Guelph, containing by admeasurement one quarter of an acre, with a house and other buildings thereon erected.

On 10th March, in the same year, he mortgaged the lot and premises to the defendant John Maxwell, as security for the payment of £45, and interest on or before 4th February, 1837.

Robert Caldwell continued in possession up to the time of his death, which happened during the month of May, 1838. He died intestate, leaving a widow and the plaintiff, his only son and heir at law, his survivors.

The plaintiff, at the time of his father's death, was an infant under the age of 2 years.

The defendant John Maxwell, having in 1839, about a year after the death of plaintiff's father, threatened proceedings at law

to recover possession of the mortgaged premises, which up to that time had continued in possession of the widow of the deceased and of plaintiff, was allowed to take quiet possession and continued in receipt of the rents and profits until 1842.

In the last mentioned year defendant Maxwell by writing transferred all his interest in the lot to the defendant Hezekiah J. Hall, which was in express terms made subject to the equity of redemption of Robert Caldwell, and those claiming under him.

Defendant Hall having entered into possession, has hitherto continued in possession, and it was alleged that the defendants Maxwell and Hall, received from the rents and profits of the lot, more than sufficient to discharge the mortgage money and interest.

It was also alleged that at the time defendant Hall entered into possession there was a good and valuable house on the lot, which was destroyed by fire during his possession, and not re-built.

Plaintiff attained the age of 21 years on 21th November, 1857, and filed his bill to redeem, praying for an account of the rent and profits; and that defendant Hall, might be ordered to account for the insurance upon the house destroyed by fire, if insured, and if not insured, that he should be made to account for the value of it.

The defendants demurred for want of equity, and relied upon the statute of limitations and the Dormant Equities Act, 18 Vic., ch. 124, as disentitling the plaintiff to the prayer of his bill.

Adam Crooks for the demurrer.

R. A. Harrison contra.

Silcox v. *Sells*, 6 Grant 237, and *Wragg* v. *Becket*, 7 Grant 220, were referred to in the course of the judgment.

The judgment of the court was delivered by ESTEN, V. C.

ESTEN, V. C.—I have come to the conclusion that this demurrer should be overruled.

Much diversity of opinion has arisen with respect to the true construction of the 18 Vic., ch. 124. I gave my opinion as to its construction in the case of *Silcox* v. *Sells*, in a very few words. I confess that it did not appear to me that its meaning admitted of any doubt. It appeared to me that the preamble indicated very clearly the two-fold object of restricting the strict application of the rules of law to cases of actual fraud, and of conferring a discretionary jurisdiction in all other cases; and it appeared to me also very clear that the enacting clauses although not expressed so clearly as they might have been, were according to the proper construction calculated to carry out this two-fold object. The first clause restricting the application of the strict rules of law to cases of express fraud—the second clause conferring discretionary jurisdiction to all other cases. I thought the words according to the strict rules of law were necessarily to be understood in the first clause were so intended by the framer of the Act and naturally occurred to the reader of it.

So far as the case of *Wragg* v. *Becket*, is a decision, I am bound to follow it: the extra judicial opinions expressed in it are entitled to full respect, but they are of course not binding. I consider the only point decided by that case to be that relief cannot be given so as to disturb the legal title in any cases within the act except cases of actual fraud. It was not perhaps strictly necessary to decide this point, for it is manifest that if the Court had considered that in other cases than cases of actual fraud, they possessed a discretionary jurisdiction to disturb the legal title they would not have exercised it in that particular case. However they did not consider the question, and intended to decide, I think, that relief against the legal title was to be confined to cases of actual fraud. It was unnecessary to decide, and it was not decided that express trusts were within the Act: because it was considered that the case under adjudication was a case of constructive, not of express trust. The only members of the Court who expressed opinions on the point were the two learned Chief Justices and my brother Spragge. The learned Chief Justice of the Queen's Bench did not express a decided opinion on it. I am not sure that he did not incline against express trusts being introduced in the Act: it is well known that the Chancellor and my brother Spragge, hold that opinion strongly: the learned Chief Justice of the Common Pleas considered that express trusts were within the Act. Under these circumstances, I am at liberty to adhere to the opinion that I have always entertained, that the Act does not extend to cases of express trust. In any event, however, I should not consider that it extended to cases of mortgage. These cases were already amply provided for by the well known clause of the Chancery Act, which has been so commended for its wisdom.

The object of the 18 Vic., was to extend this provision to *other* cases. The only respect in which these provisions differ, is, that the 18 Vic., limits the exercise of the discretionary jurisdiction conferred by it to within a period of 20 years. But under the 11th clause of the Chancery Act, the Court has power to deny redemption even within 20 years, and also to extend it beyond that period; and it could not have been the intention of the legislature to deprive the court of these powers which may be so usefully and justly exercised according to the circumstances of each individual case. Moreover the 18 Vic. would operate only against the mortgagor and would not affect the mortgagee at all, whereas under the 11th clause of the Chancery Act, these rights and remedies are reciprocal. To hold that the 18th Vic., applied to mortgages, would be to repeal the 11th clause of the Chancery Act altogether. The cases contemplated by the two provisions are the same supposing the 18 Vic., to comprise cases of mortgages—that is to say, cases where the estate has become absolute before the 4th March, 1837. According to the construction which has been put upon the 18 Vic., no relief could, under that Act, supposing it to comprise cases of mortgage, be given to a mortgagor in any such case, whatever its circumstances might be, however just it might be to decree redemption; whereas under the 11th clause of the Chancery Act, the amplest discretion is given to the Court to deal with every case according to its circumstances and upon principles of perfect justice, holding therefore that this Act of Parliament does not affect cases of mortgage which continue to be governed by the provision introduced into the Chancery Act expressly for them.

I must overrule this demurrer, for the statute of limitations *obviously interposes no bar to the present case*, possession not having been taken until 1839, less than 20 years before the commencement of the suit, and as to the demurrer for want of equity, it being of course clear that a mortgagee is entitled to redeem the estate at any time within the period allowed by law for that purpose.

Demurrer overruled.

GRIMSHAWE v. PARKS.

Practice—Evidence—Parties—Accounts—Appeal from Master's Report.

On an appeal from the Master's Report, setting out certain grounds of appeal, it was

Held, 1st. That where one defendant obtains an order and examines one of his co-defendants, and the other parties to the suit cross-examine such co-defendant, he is thereby made a good witness in the cause.

2nd. That the heirs of a deceased mortgagee of an equity of redemption, are not necessary parties to a suit of foreclosure by the prior mortgagee—the proper party being the personal representative of such mortgagee.

3rd. That where evidence affecting the amount represented as due by the second mortgage, is taken in the absence of such personal representative, it cannot be read against the equitable holder of such mortgage, although such equitable holder was a party to the suit when the evidence was taken, and cross-examined the co-defendant whose evidence affected the mortgage.

4th. That it is sufficient in appealing from the Master's Report, that notice of such appeal be served within fourteen days from the signing of such report.

This was a motion by way of appeal from the Master's Report. A decree had been made referring to the Master to enquire as to incumberances and to take the account. During the inquiry, the mortgagor contended that a second mortgage given by him to the late E. F. Whittemore, and now held by Messrs. Gladstone was without consideration, and that it was given for the accommodation of the said Whittemore. The Master made the Gladstones and the heirs of Whittemore parties—no administration having at that time been taken out for Whittemore's estate. The morgagor, Parks, had been examined by a co-defendant, a judgment creditor under an order obtained for that purpose, and had given evidence as to the accommodation mortgage, and of there being nothing due on it, also evidence affecting the amount due on the first mortgage held by the plaintiff, and had been cross-examined by the plaintiff and other parties. After the evidence had been taken, administration of the estate of Whittemore was taken out, and the Master made the administrator a party, and then rejected the evidence as against all parties to the suit, and took the account giving the full amount of each mortgage due. From this the mortgagor and a judgment creditor appealed.

Hodgins for the appeal cited, as to evidence, *Triston* v. *Hardy*, (14 Beav. 21) and *Rice* v. *Wilson*, (in this court)—as to parties,

Whitla v. *Halliday* (1 D. & W. 207), as to account that the assignee of the mortgage took subject to the state of the account between the mortgagor and mortgagee, *Mathews* v. *Wallwyn* (4 Ves. 119), and *Moffatt* v. *Bank of Upper Canada* (5 Grant 377)

Roaf, for Messrs. Gladstone, contended that the mortgage having been given to assist Whittemore in raising money, must be held good against the mortgagor, and that, at all events, the evidence could not be read as against them, owing to the absence of the personal representative at the examination.

Taylor, for the plaintiff, contended that the evidence was insufficient to affect his claim, and that it ought not to be read in the absence of the personal representative, because the plaintiff would have the right to fall back upon the estate of Whittemore for any deficency, as the mortgage he held had been also assigned by Whittemore.

S. H. Blake, for the personal representative, objected to the notice of appeal, the appeal should have been within the fourteen days. As he was no party to the suit when the evidence was taken, it could not be read against him or the Gladstones.

P. Cameron, for the infants, submitted to the judgment of the Court.

ESTEN, V. C., considered the evidence insufficient to reduce the plaintiff's claim, but held that the Master should have received the evidence as against the parties who had cross-examined the defendant, as they had thereby made him a good witness as against themselves. He also held, that the infant defendants, the heirs of the second mortgagee, were not necessary parties to the suit; that the proper party was the personal representative of his estate. That in regard to the amount due upon the second mortgage, as the evidence seeking to reduce it had been taken in the absence of the personal representative of the late Mr. Whittemore, the Master was right in reporting the whole amount as due, and in rejecting the evidence as taken. The appeal he considered was in time, notice having been served within the fourteen days, but as it had failed on the main points, viz., reducing the amounts due on the mortgages, he dismissed it with costs.

MARTIN V. REID.

Practice—Demurrer—Amending Bill—Costs.

When a bill is demurred to, the usual order to amend without costs is irregular. If the demurrer is set down immediately after filing, the defendant waives his right to taxed costs, But otherwise a plaintiff may submit to a demurrer on payment of 20s. costs.

In this case, the plaintiff's bill had been answered and demurred to, and immediately after, the usual order to amend had been taken out and the bill amended in one particular, not affecting the principal ground of demurrer; a motion was made to discharge the order for irregularity.

ESTEN, V. C., granted the motion, discharging the order. When a bill is demurred to, it cannot be amended without the plaintiff submitting to the demurrer. If the defendant sets down the demurrer for argument, he waives his right to taxed costs, but if not set down the plaintiff may submit to the demurrer on payment of 20s. costs.

CRANDELL V. MOON.

Practice—Evidence—Master's Office.

The Master is bound equally with the court, to allow a witness to be cross-examined on the whole case, without regard to his examination in chief. But in some cases the Master may exercise a discretion as to who should pay the fees of the examination.

On a motion made against a decision of the Master, that the cross-examination of a witness, should be confined to matters arising out of the examination in chief,

ESTEN, V. C., held, that the Master was equally bound with the court, to allow cross-examination of each witness on the whole case, without regard to the limits of the examination in chief. He also remarked that an extraordinary case might occur, as where a witness is called to prove a single point, and the cross-examination extends over the whole case, which might justify the Master in exercising a discretion as to the party to whom to charge his own fees.

RUSSEL V. ROBERTSON.

Foreclosure—Accounts—Insurance moneys.

Held, that in the absence of an agreement between the parties, the receipt of insurance moneys by the mortgagee during the currency of the six months allowed for redemption, does not necessitate the taking of a subsequent account: that the mortgagee is not in all cases bound to apply such moneys in reduction of the mortgage debt; and conversely, that the mortgagee is not entitled, in all cases, to charge the Mortgagor with the amounts of the premiums.

In moving for a final order, in was admitted on the part of the plaintiff, that she had received a sum of £500 for the loss occasioned by fire to the mortgaged premises and *W. Davis*, for the defendant Robertson (the mortgagor), contended that a subsequent account should be ordered, and that the £500 should be deducted from the amount payable under the decree.

Cattanach, for the plaintiff, showed that the insurance had been effected by her as mortgagee, without any privity or arrangement with the mortgagor; that she had not attempted to charge him with the amount of the premiums, and that, in fact, she had insured merely for her own protection and by way of further security.

SPRAGGE, V. C., after consideration, sustained the motion and held, that in the absence of any agreement between the parties, where a mortgagee for his own benefit and security insured the mortgaged premises, and received the amount of the policy, that amount should not be taken into the account and allowed to the mortgagor; agreeing with *White* v. *Brown* (2 Cush. Mass. Rep. 412). The English cases referred to were, *Dobson* v. *Land* (8 Hare 216), *Ex parte Lancaster* (4 Deg. & S. 524), *Gottlieb* v. *Cranch* (4 Deg. M. & G. 440), *Lea* v. *Hinton* (19 Beav. 324), and *Henson* v. *Blackwell* (4 Hare 434).

GENERAL CORRESPONDENCE.

Assessments—Non Residents—Statute Labor—Commutation.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—I would respectfully submit the following questions for your consideration trusting that you will be kind enough to give your opinion in the next number of the *Law Journal*.

1st. Has any Non-Resident, or only such as are admitted under the 87th section of the Assessment Act to perform statute labor, the privilege of paying commutation statute labor upon the aggregate valuation of his lands, (if paid before the first of May), under the 88th clause of the said act?

2nd. Whether do the words "returned as such" in the 88 clause, refer to "defaulter" or "non-resident."

3rd. If all non-residents have the privilege of paying commutation statute labor upon the aggregate valuation (if paid before the first of May), how is the proper amount to be ascertained if not entered on the roll by the Clerk against the non-resident; the Treasurer who is the collector of non-resident rates, being required to furnish the owner of non-resident lands with a statement of the amount of arrears only against each lot, (see 114 section.)

I remain, Gentlemen,

yours very respectfully, A.

1st. As at present advised we think the privilege is restricted to such non-residents as are admitted to perform statute labor in respect of lands owned by them.

2nd. "Defaulters" in our opinion.

3rd. The answer No. 1 renders our answer to this, unnecessary.

MONTHLY REPERTORY.

CHANCERY.

V. C. W. JACKSON v. OGG. *Aug.* 1.

Statute of Limitations—Accumulation of interest—Trustees—Cestui trust.

Money was advanced by A., in 1845, to a partnership firm, with an agreement that interest was to be allowed at 10 per cent., and left to accumulate at compound interest. Interest at this amount was created from time to time in the partnership books, and accumulated, according to the arrangement, until the dissolution of the firm in 1852, but no payment was ever made to A., nor any acknowledgment signed by any of the partners after the original advance.

Held, that no trust had been created in favor of A., and that the defendant was, under the circumstances, barred by the Statute of Limitations.

L.J. RE THE M. & S. A. COMPANY *ex parte* GRESEWOOD ET AL.

Contributory transfer.

In a company, the shares of which passed by delivery, a shareholder, desiring to get rid of his responsibility, sold his shares at a nominal price to his clerk a few days before an order was made for winding up the company;

Held, that as the sale was absolute and unconditional, the transfer was valid, and the vendor's name was removed from the list of contributions.

V. C. K. LORD v. COLVIN. *Suly* 18.

Scotch law—Necessary parties—Possibility of issue.

Where the decision of the question in a cause depends upon foreign law, that is a question of fact, and must be determined by the preponderance of opinion of juris-consults of the country, the law of which is involved in the question.

The court will not take upon itself to determine the effect of decisions upon the law of a foreign country.

Where a claim is made to property, the court requires all persons or classes of persons to be before it, interested in opposing such claim, and will not part with the property unless the claimant, if successful, would be entitled to immediate possession; and the rights of parties or classes of persons interested in resisting the claim are protected.

Where the claim to a property depends upon a female having a child who is in her fifty-second year, who has been married for thirty years, the court cannot assume that all possibility of her having a child is at an end.

S. J. HODGKINSON v. NATIONAL LIVE STOCK INS. CO. *June* 14.

Joint Stock Company—Purchase and cancellation of shares by directors—Parties—Demurrer—Allegations in bill.

A bill filed by some shareholders, on behalf of themselves and all others, except the defendants, who were the directors, alleged that the directors had subscribed for a large number of shares, but only paid the deposit on a small number; and had by a resolution of the board cancelled the shares on which no deposit had been paid; and had also misapplied the funds in purchasing the shares of one of their co-directors, who wished to retire; and also that they had made an improper call; and that these transactions had been confirmed at a general meeting by those shareholders who had paid the call, all others being excluded. The bill alleged that those transactions were fraudulent, and contrary to the deed of settlement, and also that the plaintiffs were ignorant of the names of the shareholders who had paid the call, but that they were known to the directors.

Held, on a demurrer by the directors, that the allegations of illegality in these transactions were sufficient, and the demurrer was overruled. *Held* also, that the allegation of ignorance of the names of the shareholders who had paid the call, was sufficient to excuse the defendants from making them parties.

V. C. W. RE HORNBY. *July* 29.

Will—Construction—Contingent gift.

Testators gave £300 to A., if living; and if dead, the £300 to become part of the residue. The will contained a gift of the residue to B. C. D., and A. if living. A. was dead at the date of the will.

Held, that the gift to A. had not lapsed, but was contingent upon his being alive; so that the other residuary legatees, and not the next of kin, took the share to which he would have been entitled

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M. R. BROOKE v. PEARSON. *July* 5.

Settlement—Gift over an alienation or bankruptcy.

By the settlement on A's. marriage, he, in consideration of £1,000 paid to him, and of the future property of the wife, assigned to him, settled his real property on himself till mortgage, alienation, or bankruptcy, and then upon trust as to £300 a year for the wife's separate use. A. first mortgaged his interest, and afterwards became bankrupt.

Held, that the wife of was entitled to the £300 a year, from the date of the mortage.

V. C. S. GARDNER v. GARDNER.

Married woman—Separate estate in husband's hands—Gift to husband.

In 1838 a legacy of £1000, bequeathed to a married woman for her separate use, was paid to her; and shortly afterwards, with her assent, came into her husband's hands; was paid by him to his bankers, mixed with his own money, and employed partly in business and partly in family expenditure. There was no evidence to show whether the wife intended that it should be a gift to her husband or not. The husband died in 1858, intestate, leaving his wife surviving.

Held, that she could not claim the sum out of her husband's estate.

M. R. NOBLE v. STOW. *July* 19.

Practice—Separate account—Erroneous order—Bill of review—Joint tenancy.

An order to carry a fund to the separate account of A. is not equivalent to a decree that A. is absolutely entitled, and if erroneous may be corrected without bill of review.

Where a person complains of orders of the court, who has not been an original party to the suit by a permanent right, he ought to bring an original bill, and not a bill of review.

When property is left to a class of children *simpliciter*, they take as joint tenants, and not as tenants in common.

M. R. COLLINS v. STUTELEY. *July* 21.

Specific performance—Sub-leases.

A plaintiff will not be entitled to damages in equity for the non-performance of an act for which *prima facie* he might have obtained specific performance, after he himself has done some act which disentitles him to specific performance.

A person who agrees to take a sub-lease, impliedly stipulates to take subject to the same covenants as the lessee.

APPOINTMENTS TO OFFICE, &c.

CORONERS.

JOHN H. RIDDEL, Esquire, M.D., Associate Coroner, United Counties of York and Peel.—(Gazetted May 5, 1860.)

JOHN H. RIDDEL, Esquire, M.D., and JOHN H. ROSS, Esquire, Associate Coroners, County of Simcoe.—(Gazetted May 5th, 1860.)

TO CORRESPONDENTS.

W. H. LANDON—Under "Division Courts."

A.—Under "General Correspondence."

JAMES STANTON—LAW STUDENT—J. C.—Too late for this number.